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LDRC LIBELLETTER

Reporting Developments Through August 20, 1999

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WCCO-TV Wins Libel Trial

Divided Jury Finds Statements Defamatory But Unanimously Rules No Actual Malice

After 10 days of deliberations and several notes to the judge expressing doubt about whether they could reach a unanimous verdict, a federal jury in Minneapolis ultimately ruled for the defendants, finding that WCCO-TV did not act with malice when it broadcast a report about a stalled murder investigation. *Stokes v. WCCO-TV, et al.*, Civ. No. 4-96-178 (D. Minn. August 17, 1999). They were able to reach a verdict only after the parties agreed to accept a less than unanimous verdict (8-3 would suffice).

An Unsolved Murder

The case arose out of 1994 WCCO-TV news segment which reported on the stalled investigation into the murder of Dennis Stokes, a 3M Company executive. While no one was ever charged with killing Dennis Stokes in 1993, his widow, Terri Stokes, aroused suspicion. The 1994 broadcast contained the

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WCCO Wins Trial

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following exchange with Anoka County sheriff's detective Tom Johnson:

> *Detective Johnson*: Somebody walked directly to the house, up the stairway, into the bedroom and, it appears, shot him while he was sleeping. The gun was pressed to his head and pulled the trigger. This was a personal thing. I think this was a well planned out methodical execution of Dennis Stokes.
>
> *Reporter Tom Gasparoli*: By his wife?
>
> *Detective Johnson*: I believe so.
>
> *Reporter Tom Gasparoli*: Do you have any doubts about the direction you are going?
>
> *Detective Johnson*: No.

Stokes subsequently filed suit against CBS-owned WCCO-TV, King-World Production's "American Journal," which also broadcast a report on the murder, Detective Tom Johnson, and Anoka County, contending that the reports falsely accused her of being the killer. At trial, Stokes' attorney, Joe Friedberg accused former WCCO reporter Tom Gasparoli of doing a sloppy job and ignoring evidence favorable to Stokes when putting the piece together. In closing arguments Friedberg told the jury, "The First Amendment does not give the media the right to falsely accuse people of crimes. It does not give them the freedom to destroy lives."

WCCO countered Stokes' attack by arguing that WCCO accurately reported on Detective Johnson's suspicions regarding Stokes' alleged involvement in the murder — suspicions which Johnson testified at trial still have him convinced that Stokes was involved. WCCO also pointed out that the report specifically stated that there was no proof of Stokes' guilt.

Additionally, according to the Associated Press, WCCO noted that testimony from several witnesses lent support to Detective Johnson's views, including evidence that the marriage was in trouble, that Terri Stokes' had two affairs, that the couple had money problems, that Stokes stood to gain financially from her husband's death, that she gave false or evasive statements to the police, and that even her own relatives suspected her.

Difficult Deliberations and a Split Verdict

Following the five-week trial, the jury began its difficult deliberations on July 29. On August 5, the jury wrote to U.S. District Court Judge David Doty, "After a week of intense deliberations we cannot get past question 1. We are deadlocked. We are not making any progress at all." Following a conference with the judge, the jury returned to deliberate only to complain less than an hour later, "Is it possible that this jury has been placed in a no win situation? . . . . We are of varied opinions and have strong feelings. I doubt we will ever reach a verdict."

Attorneys for both sides agreed to accept an 8-3 verdict on the morning of August 17, and the jury returned its verdict later that day. In answer to question 1, which asked whether Stokes had been defamed, the jury voted 9-2 that she had. The jury also voted 8-3 that the defamatory statement was false. The jury voted unanimously, however, that neither WCCO, Detective Johnson, nor the county acted with actual malice in publishing the statements.

According to the *Star-Tribune*, Stokes' attorney, Joe Friedberg, was quoted following the verdict as saying, "The jury found that she did not have anything to do with the crime, but neither the reporter nor Mr. Johnson knew that when they broadcast. If this was for vindication, we won. But we lost if it was for money." An appeal is reportedly not expected.

King World Productions settled with Stokes before trial. Terms were not disclosed.

WCCO was represented by Michael Sullivan and Cameron Stracher of Levine, Sullivan & Koch LLP, John Borger of Faegre & Benson LLP, and Susanna Lowy and Anthony Bongiorno of CBS Corporation.

California Supreme Court On Access To Civil Trials and Grand Jury Materials

Constitutional Right to Civil Trials, Limited Access on Grand Jury

By Kelli L. Sager and Randall Boese

In a unanimous, sweeping opinion, the California Supreme Court has held that the public and press have a constitutional and statutory right of access to civil proceedings. *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 86 Cal. Rptr. 2d 778, 980 P. 2d 337 (Cal. 1999).

Directly addressing the issue for the first time, California's high court held that a trial judge in the well-publicized dispute between Clint Eastwood and Sondra Locke wrongly excluded the press and public from proceedings conducted outside of the jury's presence. In addition to its finding that the constitutional right of access applied to civil proceedings, the court meticulously analyzed and rejected the many arguments typically raised against media access to legal proceedings.

[P]ublic access plays an important and specific structural role in the conduct of [civil] proceedings.

A Landmark Ruling

The ruling makes clear that civil trials are presumptively open, and closure is permitted only in "the rarest of circumstances" where a trial court expressly finds, after adequate notice and an open hearing, that there exists an overriding interest supporting closure, there is a substantial probability that the interest will be prejudiced absent closure, the proposed closure is narrowly tailored to serve the overriding interest, and there is no less restrictive means of achieving the overriding interest.

Days earlier, the California Supreme Court came down on the other side of access. In a case involving a questionable settlement of a criminal grand jury investigation into alleged misconduct by Merrill Lynch that some believed contributed to a $1.7 billion loss from the pooled investment fund for Orange County, California, the court unanimously held that California's statutory scheme did not give trial judges discretion to make public grand jury materials from criminal investigations that do not result in indictments. *Daily Journal Corporation v. Superior Court*, 86 Cal. Rptr. 2d 623, 979 P. 2d 982 (Cal. 1999). All eyes are now on California's Legislature to enact a law that would provide trial judges the discretion to make such materials public under the appropriate circumstances. One state legislator already has voiced his intent to introduce such a bill.

The Constitutional Right Of Access To Civil Proceedings

Locke v. Eastwood involved a contentious dispute in which Locke claimed that Eastwood, her former lover, tried to sabotage her directorial career. Shortly after the jury was sworn, the trial judge on his own motion issued a blanket order that "all proceedings in the case that are held outside the presence of the jury will be closed to the public and the press." *NBC Subsidiary*, 86 Cal. Rptr. 2d at 782. Explaining that the order was designed to "ensure a fair and impartial jury," the trial court also sealed the transcripts of the closed proceedings until after trial. The court then proceeded to deal with important substantive and procedural issues in closed session, including a motion for nonsuit, argument on the scope of witness testimony, and a motion for mistrial.

In response to the closure order, KNBC, a Los

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Angeles television station, applied to vacate the order. Again noting its concern in the aftermath of the O.J. Simpson criminal trial that the jury might be exposed to inadmissible information through the media, the court denied the application — in a hearing closed to the public and press — and continued excluding the public and press while it dealt with various substantive and procedural trial issues.

KNBC, joined by the *Los Angeles Times* and *California Community News*, successfully petitioned the California Court of Appeal, which issued a twenty-eight page decision directing the trial court to vacate its closure order because it violated the First Amendment. *Id.* at 787. Shortly thereafter, the trial concluded, and the lawsuit ultimately settled during jury deliberations.

The California Supreme Court granted review to resolve two issues: first, whether there is a constitutional right of access to civil trials; and, second, whether the trial court's closure order violated an obscure 1872 California statute which provided in part that "the sittings of every court shall be public." *Id.* at 788. After a thorough historical analysis of the many cases invalidating orders closing proceedings in criminal cases, Chief Justice Ronald George, writing for a unanimous court, concluded that:

> [P]ublic access plays an important and specific structural role in the conduct of such proceedings. Public access to civil proceedings serves to (i) demonstrate that justice is meted out fairly, thereby promoting public confidence in such governmental proceedings; (ii) provide a means by which citizens scrutinize and check the use and possible abuse of judicial power; and (iii) enhance the truth finding function of the proceeding.

Id. at 810.

Accordingly, the Court concluded that "the First Amendment provides a right of access to ordinary civil trials and proceedings . . . ." *Id.* at 804.

[A]ny proceeding that would be subject to the right of access in open court does not lose that character simply because the trial court chooses to hold the proceedings in chambers.

Court Clarifies Right of Access

California's high court did not stop with its conclusion that the First Amendment and California law mandated open access to civil proceedings. It proceeded to thoroughly debunk many arguments typically raised against media access to trials. For example, the court expressly rejected the argument that possible juror exposure to inadmissible information through the media was grounds for closing civil proceedings. Although it recognized that the trial court reasonably was concerned that the jury might learn of inadmissible information through the media, the court explained that "frequent and specific cautionary admonitions to the jury and clear and direct instructions, rather than closure of the courtroom to the public, constitute the accepted, presumptively adequate, and typically less restrictive means of dealing with this potential problem." *Id.* at 782.

The Court also rejected the notion that a trial court may exclude the public and press from proceedings by dubbing closed proceedings as "chambers conferences." Rather, "any proceeding that would be subject to the right of access in open

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court does not lose that character simply because the trial court chooses to hold the proceedings in chambers." *Id.* at 807.

The court similarly refuted arguments that criminal and civil cases are different because the public purportedly has a greater interest in criminal cases, that private litigants have a greater right of privacy for purely private disputes, and that the public and press have the right to see only what the jury sees.

The decision has been hailed as a landmark ruling — the first in the nation to proclaim a Constitutional right of access to civil proceedings. It affirms the principle that government has to be open and accessible to the public, and the decision should serve as an important precedent in other states.

Access To Grand Jury Transcripts Limited

In another case involving the public's access to the legal system, the California Supreme Court held that California law does not allow trial judges to release grand jury testimony and documents in criminal investigations that do not result in indictments. *Daily Journal Corporation v. Superior Court* arose from questionable circumstances surrounding the "settlement" of a grand jury investigation. In 1994, Orange County, California, filed for bankruptcy protection after its pooled investment fund lost $1.7 billion.

Among other targets, a grand jury began investigating Merrill Lynch, one of the investment banking firms from which Orange County purchased high-risk securities. The criminal investigation came to an abrupt halt when the Orange County District Attorney "settled" the eighteen month grand jury investigation into alleged wrongdoing on the part of Merrill Lynch and several of its officers. In exchange for dropping all criminal charges against Merrill Lynch and its officers before any indictment was returned, and in settlement of any potential civil actions against the corporation by the District Attorney, Merrill Lynch paid the county $30 million, which included a $3 million set-aside payment to the District Attorney's office. *Daily Journal*, 86 Cal. Rptr. 2d at 625.

Trial Court Sees Public Interst . . .

Recognizing that the receipt of $3 million by the district attorney's office "seemed self-serving" and "may create a conflict of interest," and given "the magnitude of the public's loss of funds and loss of confidence in government and financial markets," the trial judge overseeing the grand jury concluded that transcripts and documents from the grand jury's investigation should be released to the public. *Id.* Because there was no statutory provision expressly prohibiting it, a three-judge panel of the California Court of Appeal unanimously held that a trial judge "has inherent power to release otherwise secret grand jury materials whenever the advantages gained by secrecy are outweighed by a public interest in disclosure." *Id.* at 626.

. . . But California Supreme Court Disagrees

The California Supreme Court, however, interpreted the statutory silence differently. The Court pointed out that with regard to grand jury proceedings, secrecy was the rule, and disclosure of information was permitted only in certain circumstances provided by statute. Examining the extensive statutory scheme and the previous decisions limiting the discretion of judges to release grand jury information, the court concluded that "the Legislature has, in effect, occupied the field," and absent express legislative

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authorization, a trial court may not require disclosure. *Id.* at 628.

Legislative Action?

Although the Court concluded that California law did not provide for the release of grand jury materials where no indictment is obtained, it noted that a request for such a change in the law was "more appropriately addressed to the Legislature." *Id.* at 635. Since the decision was published, one California legislator, Assemblyman Scott Baugh , has stated that he intends to introduce such legislation. Only time will tell whether this aspect of government is opened as well.

Kelli L. Sager is a partner and Randall Boese is an associate with the Los Angeles office of Davis Wright Tremaine LLP. Ms. Sager argued both cases before the California Supreme Court on behalf of The Los Angeles Times and California Community News in NBC Subsidiary (KNBC-TV), Inc. v. Superior Court and The Daily Journal in Daily Journal Corporation v. Superior Court.

Jack Kevorkian "Virtually Libel-Proof"

In a perhaps not surprising decision, a Michigan appellate court has dismissed claims brought by assisted suicide doctor, Jack Kevorkian, against various members of the AMA, for statements in which they expressed their rather negative views about his activities. Among the statements at issue were: plaintiff "perverts the idea of caring and committed physician," "serves merely as a reckless instrument of death," "poses a great threat to the public," and engages in "criminal practices." *Kevorkian v. American Medical Assn., et al.*, No. 203985 (Mich. Ct. App. Aug. 6, 1999)

Analyzing issues of opinion — and clearly finding that the AMA statements could not be taken as stating actual facts about the plaintiff — and finding that Kevorkian was a public figure and that the issues were clearly ones of public concern — speech about which requires "special solicitude" — the court was equally clear that the statements did not so harm his reputation as to meet the basic definition of defamatory meaning. This plaintiff, at least with respect to the issue of assisted suicide, was "virtually libel-proof." Plaintiff could not sue for defamation over statements, made on issues that are so clearly controversial and as to which Kevorkian has intentionally, as the court notes, "exercised his leadership on one side of the debate."

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Oregon Supreme Court Strikes Down Rules For Witnessing Executions

On July 22, 1999, the Oregon Supreme Court reversed a Court of Appeals decision upholding Oregon rules that prohibit witnesses from viewing the executions of condemned murderers by lethal injection from beginning to end and impose conditions of nondisclosure on those witnesses. *Oregon Newspaper Publishers v. Dept. of Corrections*, 329 Or. 115, 1999 WL 517170 (Or. July 22, 1999) (No. CA A97110, SC S45795). The case arose when several news media organizations challenged the statutory and constitutional validity of these Oregon Department of Corrections (DOC) rules. Although the Court of Appeals upheld the constitutionality of the rules, the Oregon Supreme Court invalidated them on statutory grounds, and therefore did not address whether they violated the state or federal constitution.

Nondisclosure Rules

First, the media petitioners argued that the nondisclosure rules exceeded the statutory authority of the DOC because the Oregon statute sanctioning the death penalty did not authorize the limits the rules placed on all witnesses *ORS 137.473*. The DOC rules require that witnesses sign and abide by an agreement not to disclose the appearance, characteristics, or identity of any person involved in the execution of an inmate, subject to injunctive and damage actions for violations of the agreement. *OAR 291-024-0020, 291-024-0017.*

In striking down the nondisclosure rules, the court noted that the Oregon death penalty statute creates two classes of witnesses to an execution — those who must be invited by the DOC superintendent and who may attend at their discretion (such as physicians and clergy), and friends and relatives of the prisoner who may attend with the permission of the superintendent. The court held that "to the extent that OAR 291-024-0020 and 291-024-0017 purport to place nondisclosure requirements on members of the class of witnesses who may, at their own discretion, be present at the execution, those rules exceed the rulemaking authority granted to DOC by the legislature and, therefore, are invalid."

Although the court recognized that the DOC's duties to ensure the safety and security of its institutions allowed it to limit the activities of those on its premises, the court did not read the statute "so broadly as to permit DOC to condition a right to be present on a witness' willingness to waive that witness' free expression rights — not only while still inside the institution, but afterward." However, the court declined to resolve whether the DOC may enforce the rule against the second class of witnesses present at the execution only with the permission of the superintendent, awaiting a revision of the DOC rules.

Interestingly, in making its decision the court relied strongly on the presumption that the DOC did not have "the right to interfere with the free expression rights of persons whom the voters have declared to be entitled to be present to witness an execution." The Oregon death penalty statute does not specifically authorize the media to attend executions. A DOC rule, however, does mandate that the media be invited. Presumably, the DOC could change its adminstrative rules and circumvent the court's holding. Such a decision would undoubtedly invite constitutional challenges by the media.

Limited Access Rules

Second, the media petitioners argued that permitting the witnesses to view only the actual administration of the lethal injection and the subsequent death of the inmate violated the Oregon death penalty statute. The statute authorizes certain witnesses to be present at "the execution." The DOC rules, however, limit the witnesses' access *OAR 291-024-0065, 291-024-0070, 291-024-0080.*

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Oregon Supreme Court

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The petitioners claimed that "the statute requires that the execution, not just the dying, be observed by the witnesses," and therefore the witnesses must be permitted to view the preparations prior to administering the injection, not simply the act alone.

The Oregon Supreme Court interpreted "execution" to mean "the process of putting the prisoner to death." The court found that "those actions that are linked inextricably with the administration of the fatal drugs are part of the execution. Those acts include connecting special monitoring equipment to the prisoner, placing the prisoner in restraints, and inserting a catheter that later will be used to administer the fatal drug." The court then held that the DOC's limited access rules that prevent witnesses from viewing these activities exceeded the statutory authority of the agency and were therefore invalid.

California First Amendment Coalition v. Calderon

The Oregon Supreme Court's holding on the access rules differs significantly from a Ninth Circuit appellate decision last year about a similar California prison procedure, where the court reversed a district court decision invalidating the rule. *California First Amendment Coalition v. Calderon*, 150 F.3d 976 (9th Cir. 1998). In *Calderon*, the petitioners had challenged a California procedure that excluded witnesses from viewing some portions of executions by lethal injection, restricting witnesses' view of the condemned until all the intravenous tubes had been inserted and the execution team left the execution chamber.

Unlike the Oregon Supreme Court, however, both the district and appellate courts in *Calderon* based their analysis of the validity of the California procedure on First Amendment grounds. The district court looked to cases involving access to the judicial process, and determined that under strict scrutiny the regulation was not narrowly tailored to serve the state's interest in ensuring the safety of the prison staff. The Ninth Circuit reversed, focusing instead on cases involving media access to prisons and prison inmates and holding that under a rational basis test the procedure does not violate the First Amendment rights of either the press or the public.

Execution Access in Other States

While no other state or federal court appears to have addressed either the nondisclosure or limited access issues directly, most state death penalty statutes do contain provisions regulating witnesses to executions. The majority of these statutes, however, do not specifically authorize the media to attend executions. Instead, the statutes generally permit a state corrections official to select a specific number of "citizens" to attend the execution, or allow the condemned prisoner to invite friends or family members. In contrast, thirteen state death penalty statutes currently do authorize at least one member of the media to attend executions: Alabama, Connecticut, Florida, Kentucky, Mississippi, New Jersey, Oklahoma, Ohio, South Carolina, South Dakota, Tennessee, Utah, and Washington. However, no state statute permits the use of audiovisual equipment during executions. In addition, three state statutes, New Jersey, Illinois, and Montana, specifically provide that the identities of the executioners not be disclosed.

LDRC would like to thank our summer interns — Lara Schnieder, Cardozo Law School, Class of 2000; Ashley Clymer Bashore, Columbia Law School, Class of 2001; Patricia Stewart, Columbia Law School, Class of 2001 and Gregory Milne, University of Michigan, Class of 1999 — for their contributions to this month's *LibelLetter*.

Opinion in the Context of a Heated Debate on the Internet

By Roger Myers and Joshua Koltun

In the first ruling of its kind, a federal court in San Francisco threw out a defamation suit against a Seattle writer, based on statements she had made on her personal web page, in emails, and in internet usegroups, after finding that, in the context of a heated debate conducted on the internet, 11 of 13 statements at issue were expressions of opinion protected by the First Amendment. *Nicosia v. DeRooy*, No. C98-3029 MMC (N.D. Cal. 1999).

In addition, the court found that articles referred to on the website and connected by hyperlink for "immediate access," constituted a publication or disclosure of the underlying facts upon which plaintiff based her opinions.

The court rejected plaintiff's claim based on two statements found to be factual on the ground that plaintiff had not alleged or adduced any facts showing actual malice. The court therefore granted defendant's motions to dismiss and to strike the complaint under California's anti-SLAPP statute, which emtitles plaintiff to recover her attorney's fees.

Also of note was the court's finding of jurisdiction. As a threshold matter defendant Diane DeRooy argued that the complaint should be dismissed for lack of personal jurisdiction, since DeRooy's postings on her "passive" personal website in Seattle and on internet Usegroups hosted outside California were insufficient to provide jurisdiction in California. Although the court did not disagree with that proposition, it found that De Rooy had subjected herself to California jurisdiction by taking the additional step of sending emails to a number of individuals in California inviting them to view her website. The court concludes that such invitations were the same as sending the defamatory material directly into California.

A Beat Dispute

The case arose out of a bitter public dispute regarding the disposition of the literary estate of the Beat author Jack Kerouac and that of his daughter, Jan. That dispute involved a byzantine series of lawsuits in which plaintiff Gerald Nicosia — a biographer of Jack Kerouac and "literary executor" of Jan Kerouac's estate — was intimately invloved. Defendant Diane De Rooy wrote a series of commentaries on the Internet critical of plaintiff's role in the controversy. Nicosia, a Bay area resident, filed suit in federal court in San Francisco. According to the complaint, De Rooy had called Nicosia a killer, an embezzler, a criminal, a fraud, a perjurer and a liar.

Opinion Asserted

De Rooy argued that the statements at issue were expressions of protected opinion. De Rooy argued that the general context in which the statements were made — a bitter ongoing debate waged over the internet by De Rooy, Nicosia, and others over the Kerouac estates — showed that the relevant audience of internet usegroup participants and others interested in the issue would understand that her criticisms were merely strongly worded expressions of her subjective opinions, not objective assertions of fact. De Rooy also argued that the specific context in which many of the statements were made showed that they were intended to be understood in a hyperbolic or figurative fashion.

In addition, De Rooy argued that the statements were "pure opinion," in that De Rooy had fully disclosed the basis of her negative characterizations of Nicosia. Based on her own investigation, exhaustively discussed in her articles, De Rooy had come to the conclusion that Nicosia's public crusade to "rescue" the Jack Kerouac Archives from the supposed depredations of Kerouac's heirs had no

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Opinion on the Internet

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factual foundation, but was rather, in her opinion, a vehicle for Nicosia's self-aggrandizement. She came to a similar conclusion with regard to Nicosia's role as "literary executor" of Jan Kerouac's estate, which De Rooy came to believe was nothing more than an attempt by Nicosia to take control of Kerouac's literary estate and the commercial value of his reputation, for Nicosia's own purposes.

Finally, De Rooy also explained that Nicosia, a conceded public figure, had neither pleaded actual malice with sufficient particularity nor made a sufficient showing of actual malice to defeat a motion to strike under California's anti-SLAPP statute.

Hyperlinks Provide Context

For all but two of the statements, federal Judge Maxine M. Chesney of the Northern District of California agreed that the statements were protected expressions of opinion. In the context of such an ongoing debate on the internet, in which Nicosia had "full engaged De Rooy . . . [¶] . . . readers are less likely to view statements as assertions of fact," the court ruled. The court also concluded that De Rooy's articles had sufficiently disclosed the factual basis of her conclusions, rendering those conclusions protected opinion. The court ruled that De Rooy's statements each had to be considered in the total context of all her articles and postings on the internet, which were connected to each other by hyperlinks, reasoning that "[t]hese articles were at least connected to the newsgroup posting as the back page of a newspaper is connected to the front."

For example, the court found that De Rooy's characterization of Nicosia as having "embezzled" money was, considered in the context of her linked internet writings, a protected expression of De Rooy's disapproving opinion of the propriety of Nicosia's conduct with regard to Jan Kerouac's estate, because she had disclosed the factual basis of her disapproval. De Rooy's internet readers also would understand her accusations that Nicosia had "lied" to be figurative, hyperbolic expressions; moreover, she had disclosed the basis of her conclusion that Nicosia had made untrue statements. Similarly, the recipient of an email stating that Nicosia "killed" Jan Kerouac would have understood it, in the context of ongoing controversy, to indicate De Rooy's disapproval of Nicosia's having involved Jan in extensive litigation while she was in failing health.

Lack of Actual Malice

The court concluded that only two of De Rooy's statements could be characterized as statements of fact. As to those, however, the court concluded that Nicosia had neither pled actual malice with sufficient particularity to survive a motion to dismiss, nor made a sufficient showing of actual malice to survive an anti-SLAPP motion to strike. The court denied Nicosia's request for further discovery on the grounds that Nicosia had not identified any basis for determining that further discovery might change the outcome.

Plaintiff has filed a notice of appeal.

Mr. Myers and Mr. Koltun, who are with Steinhart and Falconer LLP in San Francisco, CA, represented defendant Diane De Rooy in this matter.

Any developments you think other LDRC members should know about?

Call us, or send us an email or a note.

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New Republic Article on "Robespierre of the Right" Is Not Actionable

By Alexandre de Gramont

At a hearing held on August 13, 1999, in the U.S. District Court for the District of Columbia, Judge Thomas Penfield Jackson granted the defendants' Rule 12(b)(6) motion to dismiss all of the Plaintiff's claims with prejudice in *Weyrich v. The New Republic, Inc., et al.*, CA 99-1213 (D.D.C.). Ruling from the bench following oral argument on the defendants' motion, Judge Jackson held that none of plaintiff's claims was actionable. Defendants' had argued all were either opinion or not defamatory. Judge Jackson's dismissal of the case comes less than three months after the defendants prevailed on their motion to transfer the action to the District of Columbia from the Middle District of Florida. *See LDRC LibelLetter*, June 1999 at 13 ("Plaintiff Loses Forum Battle in Libel Case Against The New Republic").

"Robespierre of the Right"

Plaintiff Paul Weyrich is a prominent political conservative activist who, among other things, founded the Heritage Foundation and National Empowerment Television. His lawsuit followed a cover article by David Grann in the October 27, 1997 edition of *The New Republic* entitled "Robespierre of the Right: Paul Weyrich and the Conservative Quest for Purity." The article chronicles Mr. Weyrich's rise in conservative politics inside Washington, and discusses his relationship with a variety of other prominent Washington figures, such as Newt Gingrich, Orrin Hatch, Trent Lott, John McCain, and the late John Tower.

The theme of the article is that Mr. Weyrich "has become, in many respects, a case study of the conservative mind — a metaphor for the right's deep-seated inability to accept the compromising nature of power." The image used throughout the article is of Mr. Weyrich as "a kind of K Street Robespierre" — a reference to the famed French revolutionary who, in his quest for purity, unleashed a reign of terror. The magazine's cover features an illustration of Mr. Weyrich operating a guillotine and surrounded by the heads of Jack Kemp, Trent Lott, Newt Gingrich, John Tower, and others. Accompanying the article is another illustration depicting Mr. Weyrich gleefully eating conservatives off a skewer. The article is supertitled: "What I ate at the revolution."

The Lawsuit

Mr. Weyrich brought the lawsuit in state court in Orlando, Florida in September 1998. In addition to The New Republic, Inc. and Mr. Grann, the lawsuit named as defendants *The New Republic*'s editor-in-chief, Martin Peretz, and the cartoonists who drew the guillotine and skewer illustrations, respectively, Taylor Jones and Vint Lawrence. The complaint included counts for libel, invasion of privacy/false light, and civil conspiracy. Mr. Weyrich alleged that the article and cartoons falsely portrayed him as "mentally unsound and paranoid." The complaint set forth approximately 15 specific passages from the article alleged to be defamatory. Mr. Weyrich also alleged that the defendants' conduct was part of a "conspiracy" against "notable conservative persons and organizations," including Justice Antonin Scalia, and also Larry Klayman — the Chairman of the conservative group Judicial Watch who served as Mr. Weyrich's lead counsel in this lawsuit.

Shortly after the complaint was filed, the defendants removed the case from Florida state court to the U.S. District Court for the Middle District of Florida, based on diversity grounds under 28 U.S.C. § 1332. The defendants then filed a motion to transfer the action to the U.S. District Court for the District of Columbia pursuant to 28

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New Republic Article Not Actionable

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U.S.C §§ 1404 (transfer for the convenience of the parties and witnesses) and 1406 (transfer based on improper venue), or, in the alternative, to dismiss the individual defendants for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). The defendants also moved to dismiss the case in its entirety under Federal Rule of Civil Procedure 12(b)(6) (failure to state a claim on which relief can be granted). On May 17, 1999, the federal court in Florida granted the defendants' motion to transfer the case to the District of Columbia on section 1404 grounds, without reaching any of the other issues raised in defendants' motions. Once transferred to the District of Columbia, the case was assigned to Judge Jackson (who is also presiding over the Microsoft trial), who promptly scheduled argument on the defendants' Rule 12(b)(6) motion to dismiss.

The Hearing on the Defendants' Motion To Dismiss

The defendants' Rule 12(b)(6) motion to dismiss argued that the First Amendment protected all of the expression in the article and accompanying illustrations. The motion argued further that Mr. Weyrich — who did not dispute that he was a "public figure" for purposes of libel law — could not show that any of the expression at issue was defamatory, let alone that it rose to the level of "actual malice" required by a public figure in a libel action against the media.

At the outset of the hearing, Judge Jackson stated that having read the parties' briefs as well as the article, he was leaning toward granting the defendants' motion. Judge Jackson said that he was inclined to agree with the defendants that there was nothing in the article or illustrations that was capable of rising to the level of defamation. He nonetheless invited Mr. Weyrich's counsel, Mr. Klayman to try to persuade him otherwise.

Mr. Klayman compared the case to *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), which concerned two articles in which the defendants admittedly attempted to provide a "psychobiography" of then-Presidential candidate Barry Goldwater. Among other things, the defendants in *Goldwater* asserted that the plaintiff was literally "paranoid" and "sick" and that numerous psychiatrists believed him "psychologically unfit" to be president. The Second Circuit affirmed the jury's verdict in favor of Mr. Goldwater. Mr. Klayman argued that *The New Republic*'s article similarly portrayed Mr. Klayman as "paranoid" and "mentally ill." Mr. Klayman also asserted that Mr. Weyrich had lost his position at National Empowerment Television as a result of the article and suffered "substantial damages."

In response, counsel for defendants, Stuart H. Newberger, argued that when viewed in context, all of the expression at issue was political speech that fell into one or both of two protected categories: rhetorical hyperbole and/or statements that could not be taken as asserting "objectively verifiable facts" about the plaintiff; or statements which — even if they could be taken as asserting objectively verifiable facts — did not rise to the level of defamation.

Mr. Newberger observed that the article explicitly stated that it was profiling the plaintiff as a "metaphor for the right's inability to accept the compromising nature of power." Terms such as "pessimism and paranoia," as used in the article, had to be read in context. Thus, according to the article, "Weyrich began to experience sudden bouts of pessimism and paranoia — early symptoms of the nervous breakdown that afflicts conservatives today." Mr. Newberger argued that no reasonable person would take these words as offering a medical or psychological assessment of the plaintiff. Rather, they are plainly metaphor and hyperbole used to express a political opinion.

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New Republic Article Not Actionable

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Mr. Newberger further argued that the few statements at issue that might be taken as stating actual facts about the plaintiff (i.e., that Senator McCain refused to talk to the plaintiff) were simply not, as a matter of law, defamatory.

At the conclusion of the hearing, Judge Jackson stated that he remained unpersuaded by the plaintiff's arguments, and granted the defendants' motion to dismiss in its entirety, thus disposing of all of Mr. Weyrich's claims with prejudice. He also rejected Mr. Klayman's request for additional discovery and to submit a supplemental brief opposing the motion to dismiss. In entering the order of dismissal, Judge Jackson did not indicate whether he would issue a written opinion.

Mr. Klayman suggested that Mr. Weyrich will likely file an appeal of Judge Jackson's ruling.

Alexandre de Gramont was an LDRC intern in 1988. He is now a partner at Crowell & Moring LLP in Washington, D.C., where he practices media law and litigation. Along with his partners Andrew H. Marks and Stuart H. Newberger, Mr. de Gramont represent the defendants in the Weyrich case.

New Jersey Supreme Court Allows Wide Latitude on Campaign Rhetoric

A Strong Opinion on Libel Law

By Bruce S. Rosen

The New Jersey Supreme Court has delivered another in a long series of decisions upholding the right of free expression, this time in the context of a nasty political campaign. In what may be his final opinion as a member of that state's highest tribunal, Justice Stewart Pollock, speaking for a unanimous court, reiterated the state's tough standard for actual malice in dismissing a politician's claims concerning a political ad terming him a "Boss of Bosses" linked to mob-related chemical dumping.

In *Lynch v. New Jersey Education Association, et al*, (A219/220-1997 July 27, 1999), state Sen. John A. Lynch, a lawyer, sued the state teachers' union and his 1991 opponents' campaign and consultants over an advertisement, flier and mailer which described him as "The Boss of Bosses" and claimed he was a partner or officer of "mob-owned" companies fined for illegal toxic dumping, and said that he has "mobsters as business partners and mobsters as clients." While the defendants produced a book describing a John Lynch connected to mob-related dumping, the plaintiff John Lynch established that it was a different person. The

Wide Latitude on Campaign Rhetoric

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question then, was whether the defendants entertained serious doubts about whether the Lynches were the same person.

Who Knew It Was the Wrong Man?

Lynch maintained that the defendants could have ascertained from the Secretary of State the true identities of the officers of the named companies. One of the campaign workers stated, however, that she not only read the book, but also verified its content with the author. Reinforcing the court's previous rulings that mere failure to investigate all sources does not prove actual malice, Pollock cited federal trial court decisions from Missouri and Michigan which held that reliance on previously published material was not evidence of actual malice. The court allowed the case to proceed to a jury, however, against a former Lynch campaign consultant who switched sides and may have known about the book's inaccuracies.

Hyperbole Protected But Not Approved

The court also declared a number of campaign statements to be mere "hyperbole and name calling emanating from a rough and tumble political campaign." (For example, "Boss of Bosses" and "John Lynch knows nothing but bad people.") The court said there was no evidence a number of inaccurate statements were published with actual knowledge of serious doubts about their truthfulness (for example, "Mobsters as business partners, mobsters as clients"). However, Pollock warned:

> The publication of false statements about a public official, including those published during an election campaign, disserves both the vilified official and the public. Freedom of speech tolerates the publication of such statements to avoid stifling open debate on matters of public concern. Even so tolerant a view recognizes some limits on that freedom. Through the heedless publication of misleading statements, defendants have trenched those limits. Our holding should not be construed as an endorsement of either the statements or the process that produced them.

The decision was in marked contrast to the 1994 bench trial decision in *Newman v. Delahunty*, 293 N.J. Super. 491, which awarded $200,000 in punitive damages to a former mayor for his opponents' use of campaign materials which painted the mayor as corrupt. The court in that case found that the defendant, who was pro se, knew that some of his allegations were false and that he had expressed ill will toward the plaintiff.

The trial court decision was the first in New Jersey, however, to allow wide latitude for opinion in political cartoons, and was ironically cited in *Lynch* for that reason, although the *Newman* court found one cartoon to be actionable and the appellate division later upheld the $200,000 punitive damage award.

Justice Pollock Retiring

Pollock was a stalwart of the liberal activist New Jersey Supreme Court led by the late Robert Wilentz, where he authored several eloquent decisions using the state constitution to enhance First Amendment rights not recognized by the federal courts. He announced his resignation last spring and is due to step down in September 1999, to be replaced by the state's 40-year-old attorney general, Peter Veniero. Without Pollock and Justice Alan Handler, who is due to step down later this year, the court may tilt measurably toward the center, as current Republican Governor Christie Whitman appointed most of its members, including Chief Justice Amy Poritz.

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New Jersey Cyberspace Defamation Suit Dismissed for Lack of Personal Jurisdiction

Cyber-Libel Alleged on Employee Bulletin Board

A New Jersey appellate court affirmed the dismissal for lack of personal jurisdiction of defamation, sexual harassment, business libel, and emotional distress claims brought by a Continental Airlines pilot against several co-workers based upon statements made on a Continental employees only bulletin board offered by CompuServe . *Blakey v. Continental Airlines, Inc.*, No. A-5462-97T3 (N.J. Super. Ct. App. Div. June 9, 1999). Plaintiff's claims against Continental Airlines in the same lawsuit were also dismissed on other grounds.

Flight Crew Cyber-Messages

The case stems from events surrounding a 1993 sexual harassment complaint brought by the plaintiff, a female captain, against Continental for maintaining a hostile work environment. Plaintiff was not a New Jersey resident, but had been based at Continental's Newark hub from 1990 to 1993. That case was tried in New Jersey federal court, and Continental was eventually found liable for sexual harassment in 1998. *Blakey v. Continental Airlines, Inc.*, 992 F. Supp. 731 (D.N.J. 1998).

Beginning in 1995, while Blakey's federal lawsuit was pending in New Jersey, several Continental co-workers made statements about Blakey's job performance and motivation for bringing her sexual harassment claim on an electronic bulletin board (the Forum) maintained by CompuServe but accessible only by Continental employees. CompuServe, which charged employees a membership fee and could only be accessed through a personal computer. Pursuant to a contract with Continental, CompuServe linked its Forum to Continental's computerized Crew Management System ("CMS") that provided employees with information on flights, crewmember schedules, compensation, and crew pairings. While Continental employees were required to access CMS, they were not required to join CompuServe or to access the Forum.

Continental management could not post messages on the Forum which was intended for crew, and no one department at Continental was responsible for its content. Continental did allow CompuServe to solicit staff for the CompuServe service.

A Federal Lawsuit

Based on the allegedly defamatory statements, Blakely subsequently attempted to amend her federal complaint to include charges of defamation against her co-workers and Continental. This request was denied, and the plaintiff filed a complaint in a New Jersey Superior Court alleging defamation and intentional infliction of emotional distress against her co-employees for the statements on the bulletin board. She also claimed that Continental was liable for creating a hostile work environment, by its operation of the CMS, participating in business libel, and intentionally inflicting emotional distress.

The trial court had concluded that the court lacked personal jurisdiction over the individual defendants who were not New Jersey residents because they did not purposefully avail themselves of the benefits and protection of New Jersey laws or direct the allegedly defamatory statements at New Jersey. The plaintiff contested this ruling and argued that the defendants had maintained sufficient minimum contacts with New Jersey to subject them to personal jurisdiction, because the allegedly defamatory statements were published in New Jersey. The New Jersey appellate court disagreed, however, and affirmed the lower court ruling.

No Jurisdiction

The court began its jurisdictional analysis by reviewing print media defamation cases, specifically

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NJ Cyberspace Defamation Suit Dismissed

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Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) and *Calder v. Jones*, 465 U.S. 783 (1984), but ended up focusing on Internet cases in deciding this issue.

> Both the *Keeton* and *Calder* cases concerned allegedly defamatory statements published in print magazines and, to some extent, the outcome in each at least implicitly relied on the deliberate physical distribution within the forum state of the magazine itself. The case before this court, however, involves electronically transmitted communications. While Internet communications share some of the same features as print and television communications, some features such as the virtually limitless accessibility of many Internet connections renders this communication medium unique." *Blakey*, slip op. at 5.

Citing several Internet cases involving "on-line" injuries, the court concluded that "[t]he common thread that runs through each of the reported decisions is that non-resident defendants may be subject to personal jurisdiction solely on the basis of their electronic contacts only when they specifically direct their activities at the forum, the plaintiff is a resident of the forum, and the brunt of the injury is felt in the forum state. . . . [I]n each case in which jurisdiction has been asserted over non-resident defendants the defamatory communication was specifically targeted at the state in which the plaintiff resided or conducted business activities." *Id.* at (slip op. at 6).

Although the court found that most Internet defamation cases did in fact find personal jurisdiction, the court declined to do so in *Blakey*. In addition to the fact that neither the plaintiff nor the defendants (except for one) had ever resided in New Jersey, the defendants had never been based in New Jersey, and the plaintiff was not based in the state at the time the allegedly defamatory statements were made. The court concluded that:

> we have no evidence that the non-resident defendants continuously and deliberately directed their comments to this state or caused any identifiable harm in this state. The act of posting a message on the Forum's electronic bulletin board to which access is restricted to a defined and relatively small group and is further restricted by personal choice, purchase of equipment and payment of a fee is not an act purposefully or foreseeably aimed at this state. There is no nationwide jurisdiction for defamation actions." *Id.* at (slip op. at 8).

No Vicarious Liability For Employer

In addition, the court held that Continental was not vicariously liable for the defamatory statements made by the one individual defendant who resided in New Jersey at the time the statements were made because the Forum, which the court determined was a separate system from Continental's Crew Management System, was not used within the scope of the individual's employment.

The court also found that the Forum was not a workplace for the purposes of a hostile work environment and therefore affirmed the trial court's dismissal of the plaintiff's sexual harassment claim. Finally, the court held that the business libel and intentional infliction of emotional distress claims were premised on Continental's vicarious liability for the allegedly defamatory statements, and consequently were properly dismissed by the trial court judge.

Pre-Filing Press Release on Lawsuit Not Fair Report
Hewlett-Packard Not a Public Figure

Holding that Hewlett-Packard was not a public figure, a Pennsylvania Judge refused to dismiss defamation counter-claims brought by Hewlett-Packard against Computer Aid and its law firm, Anderson Kill & Olick, based upon a press release issued by the law firm. The district court found that a press release issued at the same time a complaint is filed may not be privileged as a fair report if the press release goes further than the complaint and is issued to some members of the press before the actual complaint is filed. *Computer Aid, Inc. v. Hewlett-Packard Company*, Nos. 96-CV-4150 and 97-CV-0284, 1999 U.S. Dist. LEXIS 9243 (E.D. Pa. June 15, 1999). A subsequent motion for reconsideration of the court's ruling that Hewlett-Packard was not a public figure was denied on July 14, 1999.

A Failed Business Relationship

The case arose out of a failed business relationship between Computer Aid and Hewlett-Packard, a relationship Hewlett-Packard inherited when it acquired CaLan corporation.

In 1996, Anderson Kill & Olick, a New York law firm representing Computer Aid, filed a complaint against Hewlett-Packard, Sydney Fluck (president, CEO and Chairman of the Board of CaLan, who became a Hewlett-Packard manager after the merger) and a third party which was ultimately dropped from the complaint. At approximately the same time, Anderson Kill issued a press release that discussed Computer Aid's claims against Hewlett-Packard. Several copies of the press release were distributed to members of the press the night before the complaint was filed.

Hewlett-Packard and Sydney Fluck filed answers to Computer Aid's complaint, alleging in their counterclaims that Computer Aid and Anderson Kill had defamed Hewlett-Packard and Fluck in the press release. Computer Aid and Anderson Kill countered that the press release was protected under the fair report privilege and alleged that Hewlett-Packard had failed to show actual malice or special damages (on the injurious falsehood claim) and that the unfair competition claims were unsubstantiated.

Defamation and the Fair Report Privilege

At the outset, the court addressed the issue of which state's law should govern the defamation claims. Because the parties agreed that New York and Pennsylvania law should apply to Hewlett-Packard and Sydney Fluck repectively, the court saw no reason to proceed further in its analysis on that point althought the court briefly considered California law because Hewlett-Packard's claim was initially filed in California (although it was subsequently transferred to the Pennsylvania court.

Applying New York and Pennsylvania law (but reserving for itself a review of California law for substantive differences in result) the court next turned to Computer Aid and Anderson Kill's contention that the press release was protected under the fair report privilege. Hewlett-Packard and Sydney Fluck argued that the press release could not be privileged as a fair report under New York Civil Rights Law § 74 for three reasons: (1) because the press release was issued before the complaint was filed, (2) because a jury could conclude that Anderson Kill abused the privilege by "maliciously instituting a judicial proceeding alleging false and defamatory charges and then issuing the press releases in connection," and (3) because the press release was not a report of a judicial proceeding. 1999 U.S. Dist. LEXIS 9243, at 19. (On the third point, the court noted that the nonmoving parties (Hewlett-Packard and Sydney Fluck) claimed that the press release "added numerous statements in addition to detailing the suit." *Id.*)). The court found these three factors sufficient to defeat Computer Aid and Anderson Kill's motion for summary judgment, indicating that each presented

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Hewlett-Packard Not a Public Figure

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a question of material fact for a jury to resolve.

> Read as a whole, we believe based on our reading of the Press Release itself, that a jury could reasonably find that it grossly overstates both the . . . nature and severity of the lawsuit. For example, a jury could find that the lawsuit arose from a mere misunderstanding between a giant, Hewlett-Packard, and an uncooperative Computer Aid whose product was not particularly strategic in amount of revenue or positioning. Thus, we conclude that an outstanding issue of material fact exists with respect to whether the Press Release is a "fair and true" report, applying New York law. *Id.* at 18.

The court noted that the result would be the same under Pennsylvania and California law, that is, there would be the same outstanding issues of material fact.

Hewlett-Packard Not a Public Figure

Computer Aid and Anderson Kill also argued that Hewlett-Packard and Sydney Fluck had to show actual malice to prevail on their counterclaims of defamation and injurious falsehood because Hewlett-Packard and Fluck were public figures.

The court refused to accept this argument. As to general public figure status, the court concluded:

> [W]e do not believe that Hewlett-Packard has such pervasive fame or notoriety to be deemed a general purpose public figure." *Id.* at 23.

Computer Aid and Anderson Kill relied on *Reliance Insurance Co. v. Barron's*, 442 F.Supp. 1341 (S.D.N.Y. 1977) for the proposition that Hewlett-Packard should be considered a general purpose public figure "because it is one of the largest and most influential corporations in the world with one of the most actively traded stocks on the New York Stock Exchange." *Id.*

The Pennsylvania court's disagreement with this argument sprang from its arguably incorrect reading that the *Reliance* court found that corporation to be a *limited purpose* public figure rather than a general purpose public figure. But under a limited purpose public figure analysis, the court "fail[ed] to see the public question or controversy into which Hewlett-Packard has injected itself or been drawn." *Id.*

Nor did the court find Sydney Fluck to be either a general or limited purpose public figure. Computer Aid and Anderson Kill & Olick argued that Fluck became a limited purpose public figure by virtue of his participation in the acquisition of CaLan by Hewlett-Packard. The court ruled however that "Computer Aid and Anderson Kill's proposition that a principal in a publicity effort is necessarily a limited purpose public figure with respect to the subject matter of the publicity is legally unsupported." *Id.* at 28. The publicity surrounding this business acquisition, the court found, was not sufficient to justify a public figure finding.

Vicarious Liability, Injurious Falsehood and Unfair Competition

Hewlett-Packard and Fluck argued that Computer Aid should be held vicariously liable for statements made by Anderson Kill in the press release by virtue of an agency relationship between Anderson Kill and Computer Aid. This claim did not appear, however, in Hewlett-Packard's or Fluck's pleadings and was not raised until after Computer Aid and Anderson Kill's motion for summary judgment was filed. The court therefore granted summary judgment on this issue for Computer Aid.

Hewlett-Packard and Fluck had also argued that vicarious liability should be permitted because Computer Aid allegedly actively approved the press release. However, the court held that neither Hewlett-Packard nor Fluck had offered evidence "upon which a jury could reasonably find that

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Hewlett-Packard Not a Public Figure

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Computer Aid . . . authorized the material in the Press Release or ratified such material." *Id.* at 34.

No Special Damages Condemns Non-Libel Claims

Because Hewlett-Packard and Fluck were unable to produce any evidence of requisite special damages caused by the press release, summary judgment was granted on their injurious falsehood claims." Hewlett-Packard also alleged common law and statutory unfair competition. In New York and Pennsylvania, common law unfair competition consists of "the misappropriation of the skill, expenditures, and labor of another." *Id.* at 41. And in both states, the claims require "proof of direct financial loss, lost dealings, or an accounting of the profits of such unfair competition." *Id.* (quoting *Cubby v. Compuserve, Inc.*, 776 F.Supp. 135, (S.D.N.Y. 1998), *Waste Distillation Technology, Inc. v. Blasland & Bouck Engineers, P.C.*, 136 A.D.2d 633, 523 N.Y.S.2d 875 (N.Y.App.Div. 1988) and *Pennsylvania State University v. University Orthopedics, Ltd.*, 706 A.2d 863 (Pa. Super. 1998)). Because Hewlett-Packard presented insufficient evidence on this issue, summary judgment was granted in favor of Computer Aid. A California state law unfair competition claim was also dismissed because there was no private right of action for damages under the statute.

Mississippi Federal District Court Enforces Mandatory Forum Selection Clause in Television Release

By John C. Henegan

On March 29, 1999, a federal district court in Mississippi dismissed a libel action for improper venue arising from the plaintiff's appearance on the *Leeza* program, a daily talk show broadcast on television stations across the United States and the United Kingdom, which had been filed in Mississippi against Paramount Pictures Television Group, the producers, and several other corporations and individuals associated with the show. The court dismissed the action for improper venue based on the mandatory forum selection clause included in a release which the plaintiff, a resident of Mississippi, had signed before appearing on the show which was taped and produced in California. The release required that any claims arising under the release, including claims for libel, be brought in the courts of California. *Tolbert v. National Broadcasting Co. Inc., et al.*, No. 1:97cv638GR, __ F. Supp. 2d __ , (S.D. Miss., Mar. 29, 1999).

Based upon the mandatory forum selection clause, the defendants had moved to dismiss the action under Rule 12(b) for lack of subject matter jurisdiction, improper venue, and failure to state a claim. Although the plaintiff admitted reading and signing the release before going on the show, the plaintiff alleged that he did so under duress; that he was not allowed to question the contents of the release before signing the document; that he had been fraudulently induced to appear on the program and therefore, the release should be unenforceable; that the forum selection clause was unconscionable; and that between the parties, the defendants were in a better position to litigate the action in Mississippi rather than have the plaintiff go to California where "it would be impossible for the plaintiff to litigate . . . ."

When granting the defendants' motion to dismiss, the district court noted that forum selection clauses, which are governed by federal law, are *prima facie* valid, favored under the law, and are to be enforced unless they are unreasonable under the circumstances of the particular case. The party objecting to the

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Mississippi Federal Ct. Enforces Mandatory Forum Selection Clause

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forum named in the clause has the "heavy" burden of proving unreasonableness which is carried only by a showing that the clause results from fraud or overreaching; that it violates a strong public policy; or that enforcement deprives the party of his day in court.

The district court found that the choice of California was reasonable since guests for the show come from all areas of the country, and it was where the show was taped. The district court also concluded that Tolbert had presented no facts to support his claim that his signature was procured by fraud or overreaching, and that Tolbert's conclusory arguments of inconvenience and additional expense in having to go to California to file suit was insufficient to vitiate the forum selection clause. The district court concluded that Tolbert had failed to demonstrate that the clause should not be enforced, and it dismissed Tolbert's action.

John C. Henegan of Butler, Snow, O'Mara, Stevens & Cannada, PLLC represented the defendants in these proceedings.

U P D A T E

Defense Verdict in Quarterback Biography Case Affirmed

The U.S. Court of Appeals for the First Circuit has affirmed a defense verdict in favor of former Buffalo Bills quarterback Jim Kelly in a suit brought by Kelly's former agent A.J. Faigin. *Faigin v. Kelly*, 1999 WL 498565 (1st Cir. June 11, 1999), *see LDRC LibelLetter*, April 1998 at 7. Faigin had alleged that statements in Kelly's 1992 biography, *Armed and Dangerous*, in which Kelly described how he lost trust in and eventually fired his agents, implied that he was dismissed for unlawful conduct.

Following the 1998 defense verdict, Faigin pursued an appeal pro se, assigning error to a "plethora of rulings." *Id.* at *3.

The court found that Faigin's failure to make a motion for judgment as a matter of law at the close of all the evidence and his subsequent failure to make a motion for judgment notwithstanding the verdict largely foreclosed his ability to challenge the sufficiency of the evidence. While the court recognized that even in the absence of a motion, the court of appeals "retains a modicum of residual discretion to inquire whether the record reflects an absolute dearth of evidentiary support," it held that in the instant case "the evidence is not so lopsided as to bring this seldom-invoked discretion into play." *Id.* at *5.

The First Circuit then rejected all of Faigin's remaining issues, including various discovery and evidentiary issues.

Tennessee Rejects Compelled Self-Publication Doctrine

Holding that "compelled self-publication" does not satisfy the publication element of a defamation claim, the Supreme Court of Tennessee reversed an appellate court's dismissal of a grant of summary judgment in favor of a hospital that was being sued for defamation by a former employee. *Sullivan v. Baptist Memorial Hospital*, No. 02-S-01-9804-CV-00032 (Tenn. July 12, 1999). The case arose when Sullivan, a neonatal nurse, was fired for allegedly taking property from the defendant hospital. Sullivan sued the hospital for defamation claiming she was compelled to reveal the defamatory reason she was fired in subsequent job applications, and consequently was unable to obtain employment.

The Tennessee Court of Appeals had reasoned that the publication element required for a defamation claim was satisfied if the publication was reasonably foreseeable to the defendant, and if the plaintiff was compelled to republish the defamatory statement. The Court of Appeals limited its holding to apply only "to those cases in an employment setting in which the plaintiff is forced to republish false and defamatory reasons for his or her termination on subsequent job applications."

Potential Chill in Workplace Communications

The Tennessee Supreme Court disagreed, however, concluding that Tennessee precedent, the majority view on the issue, and important policy reasons compelled them to reject the self-publication doctrine. The court based their decision in part on "the public's interest in open communication about employment information and limiting the scope of defamation liability," and found that "the potential for defamation liability every time an employee is terminated would chill communications in the work place, preventing employers from disclosing reasons for their business decisions, and would negatively affect grievance procedures intended to benefit the discharged employee."

In addition, the court held that the self-publication doctrine would give plaintiffs less of an incentive to mitigate damages, and would conflict with Tennessee's employee-at-will rules and legislative standards regarding employer liability in disclosing employee information.

How Other States See the Issue

In rejecting the compelled self-publication doctrine, Tennessee has joined the majority of states that have considered the issue. Currently, seventeen states, including Tennessee, do not accept compelled self-publication as proof of publication when a defamed person is allegedly compelled to republish defamatory statements to a third party. Arizona courts have not addressed the issue directly, but a federal district court has predicted that Arizona courts will not accept the doctrine. *Spratt v. Northern Automotive Corp.*, 958 F. Supp. 456, 465 (D. Ariz. 1996).

In rejecting the compelled self-publication doctrine, Tennessee has joined the majority of states that have considered the issue.

Eleven states have recognized compelled self-publication in some form, although most limit its application. In California, Colorado and Iowa, self-publication may satisfy the publication element only if the plaintiff is operating under a "strong compulsion" to republish the defamatory statements. In Iowa, the fact finder determines what constitutes "strong compulsion," while in California and Colorado it may mean no more than a subsequent job interview. *McKinney v. County of Santa Clara,* 110 Cal. App. 3d 787, 797-798, 168 Cal. Rptr. 89, 94 (1980); *Churchey v. Adolph Coors Co.*, 759 P.2d 1336 (Colo. 1988); *Suntken v. Den Ouden,* 548 N.W.2d 164, 167 (Iowa App. 1996).

California, Colorado, Minnesota and Missouri all require that the compelled self-publication be foreseeable to the defendant, which may include subsequent job

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Tennessee Rejects Self-Publication Doctrine

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seeking. *Live Oak Publ'g Co. v. Cohagan*, 234 Cal. App. 3d 1277, 1287, 286 Cal. Rptr. 198, 203 (1991); *Lewis v. Equitable Life Assurance Society*, 389 N.W.2d 876, 62 A.L.R. 4th 581, 105 Lab. Cas. ¶55,625, 1 IER Cases 1269 (Minn. 1986); *Neighbors v. Kirksville College of Osteopathic Med.*, 694 S.W.2d 822 (Mo. Ct. App. W.D. 1985).

Connecticut Superior Courts have held that the defamatory statements must *actually* be republished before the doctrine can apply, rejecting claims that merely allege the statement may be compelled at some point in the future. The Georgia Court of Appeals has recognized a claim for compelled self-publication only where there is a legal requirement to publish information. *Anderson v. Gamma One Inc.*, 1 Conn. Ops. 1316, 1317 (Conn. Super. Ct. New Haven Oct. 6, 1995); *Colonial Stores v. Barrett*, 73 Ga. App. 839, 38 S.E.2d 306 (1946).

Although the Arkansas, Maine and Vermont state courts have not considered the issue, federal district courts have predicted that all three states would accept the self-publication doctrine. *Coatney v. Enterprise Rent-A-Car Co.*, 897 F. Supp. 1205 (W.D. Ark. 1995); *Carey v. Mt. Desert Island Hosp.*, 910 F. Supp. 7 (D. Me. 1995); *Raymond v. International Business Machines Corp.*, 954 F. Supp. 744, 755-56 (D. Vt. 1977).

In the remaining states, the law on compelled self-publication is either unclear, or the courts have not specifically addressed the issue. For example, New York courts are split on the issue, although several federal courts have forecast recognition of compelled self-publication in New York. See, e.g. *Keeney v. Kemper Nat'l Ins. Cos.*, 960 F. Supp. 617 (E.D.N.Y. 1997).

The status of self-publication in Texas is also unclear, although some Texas courts recognize a very narrow acceptance of a self-compelled defamation claim if it is foreseeable, actually republished, and conforms to a strict two-part test. The test requires that the allegedly defamed person be unaware of the defamatory nature of the matter when it is communicated to a third party, and that the circumstances indicated that the communication to the third party was likely to occur. *Chasewood Constr. Co. v. Rico*, 696 S.W.2d 439 (Tex. App. – San Antonio 1985, writ ref'd n.r.e.); *Reeves v. Western Co. of N. Am.*, 867 S.W.2d 385, 387 (Tex. App. – San Antonio 1993, no writ); *Doe v. SmithKline Beecham Corp.*, 855 S.W.2d 248, 259; *AccuBanc Mortg. Corp. v. Drummonds*, 938 S.W.2d 135 (Tex. App. – Fort Worth 1996, writ denied).

Compelled Self-Publication Doctrine Status

Recognized		
Arkansas	Georgia	Minnesota
California	Kansas	Missouri
Colorado	Iowa	Vermont
Connecticut	Maine	
Not Recognized		
Alabama	Maryland	Puerto Rico
Arizona	Michigan	Tennessee
Delaware	New Jersey	Virginia
D.C.	Ohio	Washington
Illinois	Oregon	West Virginia
Indiana	Pennsylvania	
Not Addressed		
Alaska	Nebraska	South Carolina
Florida	Nevada	South Dakota
Hawaii	New Hampshire	Utah
Idaho	New Mexico	Wisconsin
Kentucky	North Carolina	Wyoming
Mississippi	North Dakota	
Montana	Rhode Island	
Undecided		
Louisiana	New York	Texas
Massachusetts	Oklahoma	

For more information on status of the compelled self-publication doctrine in each state, see the *LDRC 50-State Survey 1999: Employment Libel and Privacy Law*

The Road to a Shield Law in North Carolina

By Amanda Martin

The road to a statuatory reporter's privilege in North Carolina has been a long and tortuous one, making stops in North Carolina's state and federal trial courts, a Wake County jail cell, North Carolina's Court of Appeals and Supreme Court, the chambers of the North Carolina General Assembly and finally reaching Governor Hunt's desk. After 16 years of litigating and three months of lobbying, North Carolina's reporters now rest assured that as of October 1, 1999, they have broad statutory protection in their work and work product.

The Judicial Path

The first reported North Carolina case of a news reporter invoking a reporter's privilege came 11 years after the United States Supreme Court decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972). Citing *Branzburg*, a Wake County trial court recognized the now-familiar three-part test to overcome the assertion of a reporter's privilege. *North Carolina v. Rogers*, 9 Media L. Rep. (BNA) 1254 (Wake County Sup. Ct., N.C. 1983).

Rogers, a criminal defendant, contended that Raleigh *News & Observer* reporter Liz Leland had evidence that would support his assertion that he had been singled out and "selectively" prosecuted by the Wake County District Attorney. Rogers sought Ms. Leland's testimony and all her notes. Leland argued that Rogers had not made a sufficient showing of materiality, relevancy and necessity and that by responding to the subpoena, she would be "rendered incapable of effectively carrying out her news-gathering responsibilities for her employer," thus burdening the free flow of information to the public.

Although the court recognized that the State has a compelling interest in allowing a defendant a full and fair opportunity to make out his legal and factual defenses, the defense made no showing that there was no alternate source for the information sought. In fact, the defendant had under subpoena at the time a number of witnesses, including the Wake County District Attorney, to address the issue of selective prosecution.

In the years following *Rogers*, trial courts heard dozens of motions to quash subpoenas, most of which were granted. In cases ranging from allegations of child abuse to murder, state and federal trial courts repeatedly recognized a reporter's privilege based on *Branzburg* and, in some cases, based on North Carolina's constitutional provision that "Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse." N.C. Const. art. 1, § 14.

The most publicized interpretations of the privilege came in *Food Lion v. Capital Cities/ABC Inc.*, 951 F. Supp. 1211 (M.D.N.C. 1996), and *State v. Demery*, 23 Media L. Rep. 1958 (Robeson County N.C. Super. Ct. 1995). In *Food Lion*, the court quashed subpoenas served by Food Lion to nonparties such as hotels, telecommunications companies and letter carriers in an attempt to document ABC's newsgathering activities. The court granted ABC's motion for a protective order.

In *Demery*, defense counsel sought reporters' testimony in connection with a motion to suppress a tape recording one of the reporters made of a jailhouse telephone conversation with Larry Demery, the man accused of killing James Jordan, Michael Jordan's father. Recognizing a privilege for both confidential and nonconfidential information, Judge Weeks quashed the subpoenas, finding the defense counsel had not made a showing sufficient to overcome the public policy favoring the free flow of information to the public.

14 Years of Success Halted

Because news media had success for 14 years asserting a privilege based on federal and state constitutional free press provisions, no one seriously

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discussed seeking a statutory privilege. That all changed on February 7, 1997, when state trial court Judge Robert Farmer sent an NBC reporter to jail for refusing to answer questions in a capital murder pretrial proceeding.

On New Year's Day in 1996 Karen Boychuk, a Cary lawyer, was killed after reportedly being struck and knocked from a highway overpass by a hit-and-run driver. A few days later the woman's husband, William Boychuk, was charged with her murder. Upon becoming aware that he was a suspect, Boychuk hired an attorney, Bryan Collins. Although Boychuk declined to talk to the press, Collins granted interviews to local newspaper and television reporters. Boychuk later told a story that was inconsistent with Collins' story, and an assistant district attorney attempted to force Collins to testify as a witness against Boychuk. The ADA subpoenaed three reporters to testify at a pre-trial hearing. Citing the numerous state and federal court rulings recognizing the privilege, all three filed motions to quash.

In a surprising ruling, Judge Farmer found there is no reporter's privilege whatsoever and ordered the reporters to testify. Two print reporters confirmed direct quotations in their articles but refused to answer other questions; the ADA backed off and did not force their testimony. WCN reporter Sarah Owens was not so lucky. Even though her station had given the district attorney a videotape of the Bryan Collins interview the station had broadcast, the prosecutor all-but-ignored it and launched into various lines of inquiry with Ms. Owens.

When she refused to answer, even after being admonished by Judge Farmer, the judge angrily held her in contempt and ordered her to serve 30 days in jail. When he refused a request to stay his order, counsel sought a stay from the state supreme court, which was meeting for its monthly conference that same day. The request for a stay was denied. Meanwhile, the superior court hearing ended, whereupon Judge Farmer reduced Ms. Owen's sentence to two hours and she was released.

Ms. Owens appealed her contempt conviction, and almost exactly a year after she was jailed, the Court of Appeals affirmed her conviction. The court found that in the context of a criminal case, reporters enjoy no privilege for non-confidential information obtained from non-confidential sources. *In re Owens*, 128 N.C. App. 577, 496 S.E.2d 592 (1998).

In a surprising ruling, Judge Farmer found there is no reporter's privilege whatsoever and ordered the reporters to testify.

A few days after the Court of Appeals ruled in *Owens*, Raleigh *News & Observer* reporter Andy Curliss faced a subpoena in another capital murder case. This time the prosecution sought Mr. Curliss' notes from a jailhouse interview with Derrick Allen. Arguing that the confidential nature of his notes took his case outside the purview of the *Owens* Court of Appeals ruling, *The News & Observer* moved to quash the subpoena.

Trial court judge Orlando Hudson undertook an *in camera* review of the notes. Without clearly ruling whether he recognized a privilege but found it overcome or refused to recognize a privilege, Judge Hudson ruled that Mr. Curliss had to turn over his notes. The court granted the paper's motion for a stay of his ruling and, proceeding under a provision allowing matters ancillary to a capital murder case to go directly to the North Carolina Supreme Court, *The News & Observer* petitioned the supreme court for certiorari.

The North Carolina Supreme Court granted certiorari and put the case on a fast track. On March

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11, the court ordered the record on appeal to be filed by March 20; the petitioner's brief to be filed by April 15; and the State's brief to be filed by May 5. The court heard oral argument at the end of May. Meanwhile, Sarah Owens petitioned the state supreme court to review her contempt conviction, and the court granted her petition.

The Legislative Path

Opinion day after opinion day passed without any word from the Supreme Court on the reporter's privilege cases. At the end of 1998 two judges retired from the bench, and the court still did not decide the cases. The more time that went by the more anxious North Carolina reporters became about the fate of the reporter's privilege in North Carolina state courts. As the deadline drew near for the filing of bills in the North Carolina General Assembly, momentum grew in support of seeking a legislative answer to the question.

Days before the filing deadline, the North Carolina Press Association and North Carolina Association of Broadcasters jointly approached Senator David Hoyle and Representative George Miller about sponsorship of a reporter's privilege bill. Both legislators — highly respected and longtime members of the General Assembly — enthusiastically endorsed the idea and introduced parallel, though not identical bills, in the Senate and House.

NCPA lobbyist John Bussian, together with legislative committee chairman Bill Hawkins, coordinated a formidable plan, including repeated visits to key members of the General Assembly, testimony before the judiciary committees of both houses, dozens of publishers and editors from across the state visiting and emailing their elected officials, and a campaign of news reports and editorials advocating the need for a privilege.

Both bills initially sailed through, passing 48-0 in the Senate and 94-12 in the House. However, once the bills crossed out of their respective houses, opposition began to surface. Two city council members and the mayor of Raleigh — all of whom had been sued by a coalition of media for a violation of the state's Open Meetings Law — appeared at a committee meeting to testify against the bill. A woman who has sued *The News & Observer* for libel testified against the bill. A representative of the state association of district attorneys testified against the bill. Withstanding the wave of opposition, a slightly modified version of the Senate bill passed a House vote 87-25; the Senate concurred; and on July 21, 1999, Governor Hunt signed the bill into law.

The Statute

North Carolina's statutory reporter's privilege is codified at N.C. Gen. Stat. § 8-53.9. Its strength lies in its breadth. The privilege applies to any "person, company, or entity, or the employees, independent contractors, or agents of that person, company, or entity, engaged in the business of gathering, compiling, writing, editing, photographing, recording, or processing information for dissemination via any news medium" in any "grand jury proceeding or grand jury investigation; any criminal prosecution, civil suit, or related proceeding in any court; and any judicial or quasi-judicial proceeding before any administrative, legislative, or regulatory board, agency, or tribunal."

Thus, the law applies to essentially anyone connected with the publication of information via any news medium in essentially any context. The law protects confidential as well as nonconfidential information or materials gathered.

In order to overcome the privilege, the subpoenaing party must prove that the information sought:

> (1) Is relevant and material to the proper administration of the legal proceeding for which the testimony or production is sought;

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> (2) Cannot be obtained from alternate sources; and
>
> (3) Is essential to the maintenance of a claim or defense of the person on whose behalf the testimony or production is sought. Any order to compel any testimony or production as to which the qualified privilege has been asserted shall be issued only after notice to the journalist and a hearing and shall include clear and specific findings as to the showing made by the person seeking the testimony or production.

On the first opinion day following the governor's signature, the North Carolina Supreme Court — in a one sentence opinion — affirmed the court of appeals' decision in *Owens* but added, "*But see* Act of July 9, 1999, ch. 267, 1999 N.C. Sess. Laws __ codifying 'journalists' testimonial privilege.' " *In re Sarah Lynn Owens*, Supreme Court of North Carolina, No. 122PA98, July 23, 1999. That same day, in the *Curliss* matter, the court entered an order that the writ of certiorari was improvidently allowed, thus sending the matter back to the trial court. *In re Andrew Curliss*, Supreme Court of North Carolina, No. 88PA98, July 23, 1999.

The Path Ahead

The only real weakness of the statutory privilege is its effective date. Members of the General Assembly were adamant that judges across the state needed time to be educated about the privilege and its application and therefore insisted that the privilege apply only to information and materials gathered after October 1, 1999. Therefore the information that resides in reporters' heads, notepads and computers on September 30 remains vulnerable.

There remain, however, arguments to protect reporters even before October 1. *Owens* should not apply in civil cases at all and, arguably, should not apply to confidential information or confidential sources in criminal cases. The week after the N.C. Supreme Court decided *Owens*, a trial court in Charlotte quashed a subpoena in a civil case. *Shinn v. Price*, 98 CVS 2061, Superior Court for Mecklenburg County, July 26, 1999 Order. Distinguishing the case from *Owens*, the court recognized a United States constitutional privilege and quashed the subpoena issued to Charlotte *Observer* reporter Elizabeth Chandler. We will, therefore, continue to file motions to quash, cross our fingers and wait for October 1, 1999.

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United States on Broadcast of Truthful Ads for Gambling
Not Unlawful When Broadcast From Any Jurisdiction

The Department of Justice and the Federal Communications Commission have concluded that, as a result of the recent Supreme Court decision in *Greater New Orleans Broadcasting Association v. United States*, 119 S.Ct. 1923 (1999), see *LDRC LibelLetter* June 1999 at 21, it would be unconstitutional to bar the broadcast of truthful advertising by any broadcaster, whether located in a state that permits gambling or one that does not do so.

The Government position is stated in a Supplemental Brief filed by the Government in *Players International, Inc. v. United States of America*, No.98-5127 (3rd Cir.), a matter on appeal from the district court in New Jersey, in which the National Association of Broadcasters, nine state broadcaster associations, two New Jersey radio stations, and a casino operator challenged the constitutionality of the law that barred such advertising and the FCC regulations that paralleled the law. The district court had held that the bar on such advertisements was unconstitutional. *Players International, Inc. v. United States*, 988 F.Supp. 497 (D.N.J. 1997).

In *Greater New Orleans*, the Supreme Court held that the statutory ban on lawful casino gambling, 18 U.S.C. s. 1304, as currently written and replete with exceptions and inconsistencies, could not be constitutionally applied to broadcasters operating in Louisiana, state in which gambling was legal.

A question that remained after *Greater New Orleans*, according to the Government, was whether the law/FCC regulations could be applied, consistent with the Constitution, to truthful broadcast advertisements for lawful private casino gambling that originates in states that do *not* permit such gambling — such as advertisments on Pennsylvania stations for legal gambling in New Jersey casinos. The Government concludes that the reasoning of the Court in *Greater New Orleans* would apply as well in this situation.

The Government disclaimed any change or impact on the rules governing the advertising of state lotteries. In doing so, it relied on the Supreme Court's decision in *United States v. Edge Broadcsting Co.*, 509 U.S. 418 (1993) which upheld the constitutionality of the law to the extent it bars advertising of state lotteries from broadcast operations in states in which lotteries were unlawful, and on the fact that the Supreme Court cited *Edge* in *Greater New Orleans* without questioning its precidential effect.

FCC Given One More Chance on Personal Attack and Political Editorial Rules

A three judge panel of the Court of Appeals for the District of Columbia has decided to remand to the Federal Communications Commission for further consideration a challenge to the FCC's decision not to repeal the personal attack and political editorial rules. The challenge to the Commission's decision to allow the rules to remain in effect was brought by the National Association of Broadcasters ("NAB") and Radio-Television News Directors Association ("RTNDA").

The Court of Appeals, finding that the FCC had not offered an adequate set of rationales for the rules gave it another (albeit one might argue, undeserved) opportunity to try to justify their continued existence. *Radio-Television News Directors Association and National Association of Broadcasters v. F.C.C.*, No. 98-1305 (D.C.Cir. Aug. 3, 1999).

The rules govern instances in which broadcasters must afford opportunities to respond on-air. The personal attack rules govern "an attack []made upon the honesty, character, integrity, or like personal qualities of an identified person or group." There are exceptions, including "bona fide newscasts." The editorial rules

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afford response time to station editorials.

The NAB and RTNDA contended that the rules should have disappeared when the FCC in 1987 annulled the fairness doctrine, under which the personal attack and editorial rules were originally adopted. They argued that the preservation of the rules was "arbitrary and capricious and a violation of the First Amendment." *Slip op.* at 2.

The FCC issued a notice of proposed rulemaking in 1983, in which it questioned the continued "public interest" basis of these rules, stating that an "especially searching" re-examination was required. The FCC did not act following the NPRM. The NAB and other parties continued both before the Commission and the court to seek a ruling on the continued validity of the rules. In recent years the FCC has been deadlocked 2-2, with Chairman William Kennard recusing himself, on the decision as to whether or not to repeal the rules.

According to the Court, the Joint Statement issued by the two Commissioners who advocated upholding the rules did not adequately specify the affirmative justification for the rules.

> "[T]he FCC's failure to address relevant factors, distinguish applicable precedents, and explain the scope of its rules despite acknowledging that the rules might be too broad renders meaningful judicial review impossible because the court lacks a coherent rationale against which to weigh petitioners factual, policy, and constitutional claims." *Id.* at 17.

Because of the obvious suggestion that the rationale for the repeal of the fairness doctrine would and should apply equally to rules that arose initially to effect the policies of the fairness doctrine, and because of First Amendment implications of requiring broadcasters to provide air time, the court agreed that the FCC faced a serious burden to justify why these rules should remain in force.

After a decade of challenges by the media as to the constitutionality of the rules, the Court has given an opportunity yet again to the FCC to communicate its views about the personal attack and political editorial rules — even after years of wavering on the issue and despite the Court admittedly asserting that the burden is on the FCC to justify their reasoning. Perhaps the Court, however, has decided that another decade delay will not do, as it stated, "[G]iven its prior delay in this proceeding, the FCC need act expeditiously." *Slip op.* at 19.

Registration Requirement Violates First Amendment

Commodity Exchange Act Registration Requirement Regulates Speech, Not Profession

The United States District Court for the District of Columbia held that the Commodity Futures Trading Commission's requirement that plaintiff-publishers register under the Commodity Exchange Act violates the First Amendment as an attempt to regulate speech. *Taucher v. Born*, No. 97-1711 (D.C.D.C. June 21, 1999).

The plaintiffs in this case were publishers of books, newsletters, websites, trading systems and computer software on the subject of futures trading. The plaintiffs challenged the application of a section of the Commodity Exchange Act ("CEA") that requires the registration of commodity trading advisors. Under the CEA, a commodity trading advisor is defined as

> any person who (i) for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in — (I) any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of a contract market; (II) any commodity option authorized under section 6c of this title; or (III) any leverage transaction authorized under section 23 of this title; or (ii) for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the activities referred to in clause (i).

Slip op. at 11.

The district court found that each of the plaintiffs fell within the parameters of this definition and that they were therefore subject to the registration requirement. The plaintiffs challenged the application of the registration requirement as violative of their First Amendment rights. The defendants countered that the registration was a permissible regulation of a profession.

Regulates Speech, Not a Profession

Siding with plaintiffs, the court relied on *Lowe v. Securities and Exchange Commission*, 472 U.S. 181 (1985) — where plaintiffs similarly argued that a registration requirement under the Investment Advisers Act placed an impermissible burden on speech. The court looked at several factors, the chief factor being that the plaintiffs did not "'exercise judgment' on behalf of those who purchase their products." *Id.* The court also cited the fact that the plaintiffs never had personal contact with their customers, nor did they "supplement their general recommendations with specific recommendations directed at individual customers." *Id.* While the court agreed that the plaintiffs obtained money for the sale of their products, thereby pursuing a calling, "[t]heir calling . . . is the selling of ideas, not the trading of commodity futures." *Slip op.* at 14.

Fully Protected Speech or Commercial Speech?

Acknowledging that not all kinds of speech "are protected to the same extent," the court subjected the validity of the application of the registration requirement to a commercial speech analysis. The primary authority here was *Commodity Trend Service, Inc. v. Commodity Futures Trading Commission*, 19 F.3d 679 (7th Cir. 1998). In that case, the Seventh Circuit addressed the issue of whether the publications of a financial publishing corporation constituted commercial speech. Concluding that the CTS publications were "not commercial speech because they do not propose a commercial transaction between CTS and a specific

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customer," the *Commodity Trend Service* court reasoned that the publications provided only "information on commodity trading in general and le[ft] any actual trading to other parties." *Slip op.* at 15 (citing *Commodity Trend Service, Inc.*, 19 F.3d at 685-86).

The *Taucher* court considered briefly the notion that the publications constituted commercial speech by virtue of advertising within the same publications. The notion was rejected, however, again under *Commodity Trend Service, Inc.*:

> [a] speaker's publication does not lose its status as protected speech simply because the speaker advertises the publication. An advertisement is a separate publication and does not strip the promoted publication of its First Amendment protection." *Slip op.* at 16 (citing *Commodity Trend Service, Inc.*, 19 F.3d at 685).

The *Taucher* court found the relevant analysis to be "whether the substance of the plaintiffs' publication is commercial speech" and concluded that it was not. *Slip op. at 16.*

Prior Restraint

Having determined that the publications constituted fully protected speech, the district court's next step was to ascertain whether the restriction imposed by the registration requirement constituted an impermissible prior restraint on plaintiffs' speech. Acknowledging that licensing schemes that require registration before engaging in publishing activities have generally been determined to be prior restraints, the court once again turned to *Lowe, holding* that the CEA's registration requirement constituted an unconstitutional prior restraint on speech.

> As in *Lowe*, the defendants in this case have imposed a drastic prohibition on speech based on the mere possibility that the prohibited speech will be fraudulent. As applied by the CFTC, the CEA imposes a ban on the plaintiffs' publishing of impersonal commodity futures trading advice unless they register with the CFTC. . . . This is no different than the regulation in *Lowe* in that is seeks to prevent individuals from publishing information based solely on a fear that someone may publish advice that is fraudulent or misleading, regardless or [sic] whether or not the information published actually is fraudulent or misleading. Such a prior restraint on fully protected speech cannot withstand the searching scrutiny of the First Amendment. Accordingly, the court concludes that the registration requirement of the CEA as applied to restrict the plaintiffs from engaging in their publishing activities constitutes an impermissible restraint upon the exercise of free speech and runs afoul of the First Amendment of the United States Constitution.

New York State Police Post, Remove Press Photos From Police Website

Copyrighted news photos of the disturbances that occurred at the end of the Woodstock '99 concert in Rome, New York have led to a highly public dispute over the use of news photos for law enforcement purposes. The Associated Press and Syracuse Online challenged the unauthorized posting of news photos on an Internet website by the New York State police.

In seeking to identify participants in the vandalism and unrest, the State Police posted on their website fourteen copyrighted news photos, most of which were owned by AP or Syracuse Online. Although police officers with cameras had been on scene, those officers were busy photographing other officers posing with topless female concert goers at the time of the disturbance.

The actions of the New York State Police in publishing news photos on their website continues a disturbing recent trend of police organizations using news photos as a tool in investigating crimes. Earlier this year, police investigating student riots that broke out in East Lansing, Michigan following an NCAA basketball tournament game likewise posted news photos on a police website.

At stake, according to AP President Lou Baccardi, is not only the protection of the news organizations' intellectual property, but the preservation of the historic separation between the functions of an independent press and the investigatory functions of the State. In the Woodstock matter, attorneys for both AP and Syracuse Online sent letters to the State Police demanding the that the police stop their infringement of the copyrighted photos by removing the photos from the police website. In addition, various news organizations, including The New York Press Club, The New York Daily News, The New York Times and the Buffalo News wrote letters to Governor Pataki or the Sate Police protesting the misuse of news material and blurring of the line between police journalism functions posed by the police activities.

The State Police argues that their use of the photos constituted a noninfringing fair use. Nevertheless, within a few days of receiving the news organizations' letters, the photos were removed from the State Police website.

Proposed Amendments to Federal Rules of Civil Procedure Approved by Standing Committee

Could Severely Limit Depositions

Federal civil discovery practice moved a step closer to being changed once again as the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States approved proposed amendments to the Federal Rules of Civil Procedure. The proposed amendments to the Federal Rules, which will be submitted to the Judicial Conference for consideration at its September 15, 1999 meeting, would affect Rules 4, 5, 12, 14, 26, 30, 34 and 37, and Admiralty Rules B, C, and E.

Rule 26

Of particular interest to LDRC members, the proposed changes to Rule 26 would eliminate the authorization for local rules that opt out of the initial disclosure requirement. At the same time, however, the proposed amendments would substantially reduce the scope of the initial disclosure obligation to require disclosure of only the identity of witnesses and documents that support the disclosing party's position.

Additionally, while the scope of discovery defined by Rule 26 (b) (1) is retained, the proposed amendments distinguish between attorney-managed and court-managed discovery. Attorney-managed discovery is limited to matters relevant to the "claims or defenses"

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Proposed Amendments to FRCP Approved

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of the parties. Discovery that reaches beyond the claims or defenses of the parties, embracing the "subject matter involved in the action," remains available, but only on court order for good cause.

Rule 30

Further, in its August 1998 draft the Committee had proposed to amend Rule 30 by limiting the amount of time to conduct a deposition and requiring the consent of the deponent should additional time be required to complete the deposition. Specifically, the August 1998 proposed amendment to Rule 30 (d) (2) provided that:

> Unless otherwise authorized by the court or stipulated by the parties and the deponent, a deposition is limited to one day of seven hours. The court shall allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.

In response to the proposed amendments, LDRC, through the efforts of the LDRC Pretrial Committee, filed comments in January 1999, objecting to the changes to Rule 30. In its statement, LDRC argued that the "one day of seven hours" time limit was arbitrary and ill-equipped to solve the perceived problems of deposition abuse and could undermine the constitutional protections designed by the U.S. Supreme Court to preserve First Amendment rights. Additionally, LDRC pointed out that by requiring the consent of the deponent to an examination longer than the "one day of seven hours" limit, the revisions to Rule 30 would "give the deponent veto power over any agreement reached by counsel."

Following its April 1999 meeting to discuss the proposed amendments and the comments received, the Advisory Committee voted to recommend approval of all proposed rule changes with some changes in the text of the rules and the committee notes accompanying them. With regard to the two issues raised by LDRC in its comments, the Advisory Committee chose not to change the "one day of seven hours" language, but did vote unanimously to eliminate the "deponent veto" provision. The proposed Rule 30 (d) (2) now reads:

> Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.

The Standing Committee met on June 14-15, 1999 and approved the proposed amendments as revised by the Advisory Committee. The proposed amendments will be submitted to the Judicial Conference for consideration at its September 15, 1999 meeting.

Rule 26(c) Changes Abandoned

In 1996, LDRC opposed proposed amendments to the Federal Rules of Civil Procedure, Rule 26 (c). At that time, LDRC, joined by The Associated Press, Dow Jones & Company, Inc., Magazine Publishers of America, National Association of Broadcasters, Newspaper Association of America, Radio-Television News Directors Association, and Society of Professional Journalists, filed comments with the Standing Committee on Rules of Practice and Procedure in opposition to proposed changes. The proposed amendments would have allowed courts to issue protective orders in discovery on the parties' stipulation and would have eliminated the requirement of a judicial determination of "good" cause. Following the comment period, the Advisory Committee on Civil Rules decided not to adopt the proposed amendments.

THE ROAD TO TRIAL IN THE *HIT MAN* CASE

By Seth Berlin, Tom Kelley, Lee Levine and Steve Zansberg

Last month's *LibelLetter* reported that the suit against a book publisher brought by kin of victims of a contract murder — the so-called "*Hit Man*" case — was settled on the eve of trial. Because litigation against media companies for violent acts modeled after those depicted or taught in books, movies, video games, and other media are being filed with increasing frequency, this article is offered to show how one publisher prepared itself to defend such allegations before a jury.

Background

In December 1995, the surviving relatives of three persons who were murdered in a suburban Maryland home by James Perry in March 1993 sued Paladin Enterprises, Inc. in federal court in the District of Maryland. The plaintiffs claimed that Paladin "aided and abetted" the murders and "conspired" with James Perry, the man who shot and killed two of the three victims and caused the death by suffocation of the other, when it published and sold a copy of the book *Hit Man: A Technical Manual for Independent Contractors* to him in January 1992. Specifically, plaintiffs claimed that Perry had followed more than 20 "instructions" contained in the *Hit Man* book in perpetrating his crimes.

Perry had been hired by Lawrence Horn to kill his ex-wife, his son and the son's full-time nurse. Horn hoped to inherit a $1.7 million trust fund that had been established to provide for his son's medical care (from the settlement of a medical malpractice action prosecuted on the child's behalf). Both James Perry and Lawrence Horn were convicted of murder and conspiracy to commit murder in 1996. Perry was sentenced to death and Horn to four consecutive life sentences. No criminal charges were brought against Paladin.

Judge Luttig was undeniably right about one thing: the case was unique in the law"; there was simply no precedent with remotely similar fact.

Paladin's Motion for Summary Judgment on First Amendment Grounds

At the time the lawsuit was filed, Paladin had only limited funds for the defense — its insurance carrier having denied coverage — and hoped to avoid full-scale discovery. Accordingly, Paladin filed a preliminary motion for summary judgment. That motion was based upon factual stipulations, made only for purposes of that motion which conditionally admitted many of the plaintiffs' allegations, asserting that its publication and sale of *Hit Man* was protected by the First Amendment. In September 1996, Judge Alexander Williams, Jr. granted that motion, finding that the book did not constitute "incitement of imminent lawless conduct" and therefore was protected speech.

In November 1997, however, the Fourth Circuit reversed that ruling. In a lengthy opinion by Judge J. Michael Luttig, the panel held that *Hit Man* was not "advocacy" of unlawful conduct entitled to application of the incitement test under *Brandenburg v. Ohio*, 395 U.S. 444 (1969). The Appeals Court, however, ruled that if a jury found that Paladin had the specific intent to assist the crime of murder for hire and that it provided substantial assistance to James Perry in committing his crimes, the First Amendment would pose no bar to the imposition of liability on Paladin. Paladin sought Supreme Court review of the Fourth Circuit's opinion, but certiorari was denied. The case was remanded for discovery and trial.

In his opinion for the Fourth Circuit, Judge Luttig sought to prevent the defendants from seeking additional legal escape hatches. Several times, the opinion strongly suggests that there should be no further impediments to a jury trial on the plaintiffs' aiding and abetting claim. The judge went so far as to declare that even without the defendants'

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conditional stipulations, there was sufficient evidence, based solely upon the content of the book and the manner in which it was marketed, to overcome any First Amendment concerns about the claim. The last line of the opinion orders, "The case is remanded for trial."

On the other hand, the summary judgment stipulation submitted only the question of First Amendment bar, and no party raised or argued any issue as to the state law elements of civil aiding and abetting. Thus, the definition of the state law elements and determination of the sufficiency of the evidence to support them were de novo questions for the trial court, and any suggestion to the contrary by the Fourth Circuit was, at least technically, dictum. Ultimately, Judge Williams agreed.

By the time the Fourth Circuit's opinion had been issued, a Colorado district court judge had ruled that Paladin's insurance carrier owed it a defense, and Paladin's insurer had agreed to provide a full defense through the conclusion of the proceedings. Now, the trick was to build a defense out of the rubble of the Fourth Circuit's opinion.

Elements of The Civil Aiding and Abetting Murder

Of course, the key to any defense is to identify the elements of the claim that the jury might not be willing to buy. But for Paladin, that begged the question, "what are the elements of a civil claim for aiding and abetting murder?" Judge Luttig was undeniably right about one thing: the case was "unique in the law"; there was simply no precedent with remotely similar facts.

(1) INTENT. The Fourth Circuit said that to overcome First Amendment limitations on the tort of aiding and abetting, the plaintiffs would have to prove criminal intent, i.e., that Paladin desired that killers succeed in their crimes, as opposed to mere civil intent, i.e., that Paladin knew that a criminal use of the book was substantially certain. *See Restatement (Second) of Torts* § 8A.

Seemingly powerful arguments could be made that Paladin lacked the former kind of intent. The book was marketed primarily through retail channels, including major bookstore chains, and was available through lending libraries throughout the country. These were not the marketing channels of a nihilist who desires to train real killers. The book was also sold through a catalogue, but this required a purchaser to create a record of the purchase, and Paladin's policy of cooperating with investigating law enforcement authorities had become well known.

Thirteen thousand copies were sold over ten years prior to the murders, and there was no evidence that any had been used to plan a murder. Paladin witnesses would testify that the book, an olio of themes from popular literature, was aimed at crime buffs and armchair adventurers, and to their beliefs that it was most unlikely to cause or help someone commit murder.

The defense quickly discovered, however, that few lay persons would have trouble finding that Paladin harbored criminal intent in publishing a book that informs readers how to commit contract murder. And the defense discovered that efforts to convince lay persons that the book was not to be taken seriously — that it was a pastiche of material from other literature combined with some facts about murder and some pure fantasy — was not effective.

In fact, our experience would suggest that even "mainstream" publishers who are sued over books that depict or describe criminal means should not be sanguine about the intent issue. To many lay persons, a media company that profits over publication of material that will be instructive to wrongdoers is no different than the firearm retailer who sells a weapon even knowing some buyer might well intend to commit a violent crime, not necessarily because of a desire to see the criminal succeed, but merely for the sake of making a profit.

A potential lifeline on the intent issue came from

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cases explicating the common law requirement of specific knowledge in civil aiding and abetting cases. Cases from Maryland, *Duke v. Feldman*, 226 A.2d 345 (Md. 1967), the Fourth Circuit applying South Carolina law, *Flowers v. Tandy Corp.*, 773 F.2d 585 (4th Cir. 1985), and elsewhere, including a well-reasoned opinion by the Massachusetts Supreme Judicial Court in *Kite v. Philip Morris, Inc.*, 556 N.E.2d 1025 (Mass. 1998), hold that the element of intent in a civil aiding and abetting case requires knowledge of criminal intent on the part of a particular perpetrator.

That view seemed particularly marketable to a court applying Maryland law where the criminal decisions as well appeared to enhance the strict view of the intent required in aiding and abetting cases pronounced in *United States v. Superior Growers Supply, Inc.*, 982 F.2d 173, 178 (6th Cir. 1992), holding the element of intent requires proof of the defendant-publisher's knowledge that a particular customer was planning to use the published information to commit a crime with the defendants' intent to assist that customer in that endeavor. Robert Dean, the chief prosecutor in the Perry and Horn criminal cases, who chose not to prosecute Paladin, testified in deposition that Paladin lacked criminal intent required under Maryland law because it was not present during the crime and had no knowledge of Perry or Horn's criminal plans.

Althought the determination that intent under Maryland law required knowledge of a particular criminal scheme would, in effect, require a directed verdict, because Judge Luttig had written at such length about the ample evidence of Paladin's criminal intent not even the most optimistic of the defense team was willing to put money on a favorable ruling on this point. And while the intent issue may be a winner on summary judgment for most media defendants, the defense team concluded it was not the hill to defend before a jury. Rather, the focus that would most likely serve to distract the jury from its natural sympathy for the plaintiffs and dislike for Paladin was to place the jurors in a investigator's trench coat to determine how and why the murders happened. Although the case was no longer a "who-done-it," it remained very much a "how-done-it," and, most importantly, why-done-it.

Rather, the focus that would most likely serve to distract the jury from its natural sympathy for the plaintiffs and dislike for Paladin was to place the jurors in a investigator's trench coat to determine how and why the murders happened.

Non-Intent Elements

The most useful guide to the non-intent elements of civil aiding and abetting is § 876 of the *Restatement (Second) of Torts*, relied upon by the Maryland Court of Appeals in recognizing the tort. Section 876 states that a defendant may be subject to civil liability for "harm resulting to a third person from the tortious conduct of another" under three separate circumstances — that is, where the defendant:

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Liability under (a) requires either a conspiracy between a defendant and the principal actor, or joint

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activity with him. Comment a to Section 876 explains that such a relationship between the defendants and the principal actor creates an implied agency that subjects the defendant to liability for damages caused by the third person, even though the defendant's conduct alone did not cause them.

In our case, there was no basis for liability against Paladin under (a), since there was no conspiracy with Perry, and no joint activity with him, but merely the fulfillment of an order placed by Perry, one of 13,000 fulfilled over the ten years since the book had been published (an average of slightly under four orders per day). The defendant had no notice of any unlawful designs by Perry, and the plaintiffs therefore ultimately abandoned any claim of conspiracy between Paladin and Perry. (Instead, plaintiffs changed their alternative "conspiracy" claim to a claim of conspiracy to aid and abet.)

Nor did liability under (c) appear to be viable, since the sale of *Hit Man*, without more, did not, "separately considered, constitute a breach of duty to" the plaintiffs.

If there was liability at all under the theories pronounced by the Restatement, it would be under (b), which requires both knowledge of tortious intent by and the giving of "substantial assistance or encouragement" to the primary tortfeasor. In addition, the comments to § 876 indicate that in the case of liability under subsections (b) (or (c) for that matter), the plaintiff must prove that the substantial assistance provided by the defendant to the primary actor was a "substantial factor" in bringing about the harm. *See Restatement* § 876, cmts. d & e.

(2) SUBSTANTIAL ASSISTANCE. According to the Restatement, the question of whether assistance provided by the defendant is sufficient to create liability depends upon a weighing of the facts and circumstances, considering the nature of the act encouraged, the amount of assistance provided, defendant's presence or absence at the time of the crime, his relationship to the principal tortfeasor, and his state of mind. *Restatement*, § 876, cmt. d.

Most lay persons we asked to consider the "substantial assistance" element were reluctant to hold a book responsible for the criminal acts of another human being, because this flouted the generally accepted notion that one should be accountable for his or her own conduct. Surprisingly, some found the imposition of liability on a book publisher contrary to their notions of how the First Amendment should work.

Some, however, were disgusted at Paladin's unwillingness to assume responsibility, comparing Paladin to product purveyors such as tobacco companies who most believe should be held responsible for injuries caused by products they put on the market. (For that reason, the words, "this is a case about responsibility," were not to be uttered by anyone speaking for Paladin.)

Thus, the element of "substantial assistance" did not give the defense team a high comfort level. There was substantial evidence that the book provided some ideas to Perry (after all, the firearm he selected, an AR-7 rifle, is mentioned in the book and, although it has turned up in the hands of numerous inner-city gangs, is not considered a weapon of choice for career criminals), and the criteria for determining whether the defendant's assistance was "substantial" seemed too malleable to overcome the emotion and animus that would weigh in the plaintiffs' favor.

(3) CAUSATION. The biggest problem with the plaintiffs' case was the lack of any evidence that the book *Hit Man* had caused James Perry or Lawrence Horn to do anything either would not have done in any event. It is generally established that to recover for any tort — even intentional ones — the defendant's conduct is not a substantial factor in bringing about harm unless it is demonstrated that the harm would not have occurred "but for" the

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defendant's conduct. The only exception to this rule is when the defendant's conduct is alone sufficient to cause the plaintiff's loss, and combines with other causes. *Restatement (Second) of Torts* §§ 431 & 432. *See also id.* § 9, 870, cmt. l; W. Prosser & W. Keeton, *Prosser & Keeton on Torts* § 41 (5th ed. 1984).

Although there has been little jurisprudence over what is required to show that defendant's conduct is "itself sufficient," it seems obvious that the publication of a book is not "itself sufficient" to kill three people. Ultimately, the plaintiffs did not argue otherwise. Thus, the defense team decided that the best defense case could be leveraged from a jury instruction that required "but for" causation. The key focus would be on evidence tending to show that the murders were caused by forces that eclipsed any possible role of the book *Hit Man*. In other words, the three victims would have been murdered even if Paladin had never published *Hit Man*.

(4) Plaintiff's Standard of Proof. Under settled Maryland law, in civil cases where plaintiffs' claims are premised on allegations that the defendant engaged in fraud or criminal misconduct, plaintiffs are required to produce clear and convincing evidence of each element of their claim. *Everett v. Baltimore Gas & Elec. Co.*, 513 A.2d 882, 890-91 (Md. 1986); *Rent-a-Car Co. v. Globe & Rutgers Fire Ins. Co.*, 156 A.2d 847, 855 (Md. 1931); *First Nat'l Bank v. U.S. Fidelity & Guar. Co.*, 340 A.2d 275, 283 (Md. 1975). Accordingly, the defense requested that the jury be so instructed and planned to rely heavily upon that standard in framing the case, especially with respect to causation, for the jury.

(5) First Amendment. Finally, the defense team concluded that Judge Luttig's opinion left virtually no opportunity for raising First Amendment defenses at trial, but that these defenses would be preserved for a second appeal, after which the U.S. Supreme Court might again be asked to review those issues. However, Paladin did argue that the First Amendment considerations applicable to "acts" in the form of pure speech should cause the Court to construe the common law narrowly. The defense team hoped that these considerations would cause the Court to resolve in Paladin's favor any doubts about what form of intent was required, or whether the defendant's conduct was "alone sufficient" to cause the plaintiffs' harm.

Developing the "How-Done-It" Case

To prove that the murders were caused by forces that dwarfed the role, if any, of *Hit Man*, the defense had to reinvestigate the crimes. This was a daunting task, since the case against Perry and Horn had required coast-to-coast sleuthing in which the Montgomery County Police were supported by the F.B.I., the L.A.P.D., and the A.T.F.

The plaintiffs clearly had no stomach for this. They announced at the outset of discovery that they would rely upon Prosecutor Dean and the lead investigator from Montgomery County, Craig Wittenberger, to provide expert testimony that the *Hit Man* book provided James Perry with substantial assistance in committing the crimes. Dean's testimony would be based not upon personal knowledge, but upon the testimony provided by the various forensic and fact witnesses that testified during the Horn and Perry trials.

Dean and Wittenberger had become committed to the theory that *Hit Man* had provided Perry with a "blueprint for murder" that he followed in great detail, because without this means of connecting Perry to the crime, the case was highly circumstantial and hard for a jury to follow. The plaintiffs hoped to be able to bull their way through on the credibility of these witnesses. However, the defendants soon learned that other investigators that were just as close to the case, including the lead F.B.I. investigator who played a significant role at the criminal trial were of the opinion that the book might have given Perry some ideas, but

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did not provide "substantial assistance." This was encouraging.

The defense team began by studying the transcripts of the two trials, each of which lasted several weeks. The Perry transcript was not of much help, since it put the best face on Dean's evidence that Perry committed the murders according to the book. Cross-examination by Perry's defense counsel was perfunctory.

The Horn transcript was much more useful. The prosecution tried hard for the death penalty against Horn, and stressed throughout the case the theme that Horn had masterminded the crimes, and manipulated Perry in committing them. There was evidence that Horn devised schemes for Horn and Perry to communicate with one another from pay phones using a credit card issued in a phony name and for transferring money to Perry under another phony name, and maintained telephone contact with Perry on an almost daily basis before and after the crimes, even while Perry was at the crime scene. This kind of contact between the hit man and his "employer" is strictly taboo under the teaching of the *Hit Man* book.

In addition, the prosecution made a convincing case that Perry was instructed by Horn on the means of disconnecting his son's respirator and causing his asphyxiation, information that appears no where in the *Hit Man*. There was obviously also a wealth of evidence that Lawrence Horn was bitter towards his ex-wife, obsessed with money, and fixated upon obtaining the nearly $2 million estate that belonged to his son as a result of a medical malpractice settlement. The prosecution even argued to the jury, in support of the death penalty, that Lawrence Horn was the "sole proximate cause" of the three murders.

Although the trial transcript would not be admissible at our trial, all of the witnesses, including the plaintiffs, gave depositions in which they stuck by their prior testimony that Lawrence Horn would have committed these murders even if there had been no James Perry, and necessarily, even if *Hit Man* had never been published.

The criminal trial testimony also negated the significance of many of the so-called similarities between Perry's acts and the information in *Hit Man*. Some of them were the only choices permitted by the circumstances, e.g., the decision to commit the crime at the victims' home, since young Trevor, the primary target, was homebound.

The criminal trial testimony also negated the significance of many of the so-called similarities between Perry's acts and the information

The transcripts also showed that Perry ignored so many of the strongly worded recommendations in *Hit Man* as to suggest that he didn't even read the book, or if he did, that he paid little attention to it. For example, *Hit Man* implores the would-be killer to register in a local motel under an alias, exhorts him to make no long distance calls from the vicinity of the crime, and particularly not to his employer. Perry checked into the motel using his own name and address, and was on the phone long distance with Lawrence Horn both immediately before and immediately after the crimes.

Moreover, many of the techniques Perry had allegedly copied from *Hit Man* could be easily shown to involve clichés in popular media, such as "shoot for the head," "aim for the eyes," "wear gloves," "disassemble and ditch the weapon," "rough up the scene to make it look like a burglary," "remove the serial number on the weapon," etc. Research also showed that most of the alleged similarities were generic to most crimes of this type, and that the alleged "techniques" learned from *Hit Man* were either intuitive or common knowledge among criminals.

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An Investigator Was Required

The more difficult tasks were dredging up and interviewing witnesses from Perry's past, and interviewing the trial witnesses to learn the "rest of the story." This would require an investigator with the means to disarm uptight people, including inner-city residents who were Perry's friends and relatives, and law enforcement investigators and forensic specialists involved in the investigation, all of whom would be reluctant to talk to strangers. There was good reason to doubt that these folks would be willing to talk to attorneys for Paladin. The problem was compounded by the fact that many of the key people were located in Detroit and Los Angeles, where the defense team's local contacts were virtually nil.

We found that the best resource for this kind of task is a recently retired F.B.I. special agent, particularly one who is affable and likely to develop good relationships with active law enforcement. There is an informal network amongst current and recently retired F.B.I. special agents through which the investigator we hired in Denver, Chuck Evans, could retain local talent in places like Detroit and L.A., and establish trust with our potential witnesses.

Of course, the defense could have proceeded with depositions, but if the testimony proved favorable to the plaintiffs, that would provide them a free deposition (the plaintiffs attended non-local depositions only by telephone in most cases) that could be read at trial. In the end, these folks were open and even loquacious with Mr. Evans. Through the same network, such an individual can put you in touch with excellent forensic experts recently retired from the F.B.I. and other agencies.

Mr. Evans' interviews with forensic experts that testified on behalf of the State dissolved many more of the alleged similarities. For example, a ballistics expert testified at both the Perry and Horn trials that a small satellite wound appearing on the forehead of one of the victims was "consistent with" the use of a homemade silencer, which can fragment a bullet.

This expert told Mr. Evans, however, that a fragment that would produce such a satellite wound was just as likely caused by the stripping of the brittle alloy lubricant that coated the bullets Perry used. The witness told Mr. Evans, and confirmed in his deposition, that he could not say, more probably than not, that the fragmenting was caused by a silencer. Thus, since a .22 could easily be fired inside a home without being heard by neighbors, there was no evidence, more probably than not, that Perry used a silencer. . . one of the plaintiffs' key alleged similarities between the book and the murders.

The Killer Didn't Need a Manual

The investigation into Perry's background was even more fruitful in defusing the plaintiffs' claim that *Hit Man* had taught Perry how to commit the contract killing. Perry demonstrated that he had the willingness and ability to kill more than twenty years before he ordered the book *Hit Man*. Before Perry fought in Vietnam, the Army subjected him to the behavioral conditioning discussed by David Grossman in his book, *Killing*, in which soldiers are subjected to stimuli which reduce their resistance to killing other human beings.

When Perry returned from Vietnam, he left his wife and job, and committed a series of armed robberies. Two of them resulted in arrests and convictions. The evidence in these cases showed that, in committing hold-ups, ten years before *Hit Man* was published, Perry would use gloves, a .22 caliber firearm fitted with a silencer (all the same as were recommended by *Hit Man*). During his flight from one of these armed robberies, Perry emptied his pistol firing at a pursuing Michigan State Patrol officer, and hit the officer on the shoulder near the neck, indicating he was likely aiming for the head (as recommended by *Hit Man*).

More than from *Hit Man*, Perry could well have learned what to do or not do from the evidence

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presented against him at his preliminary hearing on the latter robbery. The firearm used in the gunfight with the patrol officer was found in Perry's possession, linked to him by a trace of a fingerprint on the grip, and to the crime by matching the spent shells with the weapon (*Hit Man* advises to collect ejected shells).

Because of this and a later conviction for a similar offense, Perry spent approximately seven years at the Southern Michigan Penitentiary in Jackson, ample time to contemplate these errors that led to his convictions. Mr. Evans found a recently retired warden from the Michigan prison system who worked as a prison guard in the cellblock to which Perry was assigned, who would testify that inmates where Perry was confined spent most of their time discussing the mistakes that led to their incarceration and how to avoid such mistakes in the future. The retired warden was prepared to testify that he heard virtually all of the techniques described in *Hit Man* frequently discussed among prison inmates in Perry's cellblock while he was there.

Perry's long-time friend, Thomas Turner, who served time with Perry in prison, and who later referred him to Lawrence Horn to deal with his "problems" in Maryland, related that Perry was a "lieutenant" in a prison gang called the Brotherhood of Islam, which orchestrated drug trafficking, prostitution, and even murder, within the prison walls.

Mr. Evans also located the state patrol officer and another victim of the armed robberies, who were prepared to provide vivid testimony concerning Perry's apparent comfort with killing and violent crime.

The defense also developed testimony from Perry's network of friends in Detroit and law enforcement officials from that venue that Perry lived and hung out in a neighborhood in which violence was a way of life and firearms of all sorts, including silencers, were readily available and regularly exchanged, with serial numbers removed (as advised in "*Hit Man*").

Most lay persons who were treated to the foregoing evidence were convinced that the book *Hit Man* had no causative role in the murders. A few, however, came up with an argument that went roughly as follows: "If I want to build a patio, before I do it, I will buy a 'how-to' manual. Although I may end up deviating significantly from all or most of the instructions given, I would not begin building of the patio without first buying the book to give me the confidence to undertake the project." Would the story of Perry's willingness to kill and his Ph.D. in violent crime be enough to convince the jury that Perry had the confidence to commit these crimes without reading *Hit Man*?

There were two additional pieces that the defense team believed would drive this point home. The first was the gall demonstrated by Perry in his statements to a Michigan judge prior to his sentencing on the second of his armed robberies, in which he protested his innocence and declared that attributing the perpetrator's M.O. to him, an "experienced criminal" who knew enough not to leave "live witnesses," was an "insult to my intelligence."

Second, the prosecution in both the Horn and Perry cases offered as evidence one of Perry's business cards, which announced that he was a "case buster." Prosecutor Dean was convinced that these were code words in Perry's culture for expressing his willingness to commit contract murder. A recently retired police officer from Detroit, who was prepared to testify for the defendants, agreed. Perry's friend, Thomas Turner, testified that Perry had been using these cards (Turner in fact gave one to Lawrence Horn) for at least a year prior to the time he purchased *Hit Man*.

Expert Witnesses

Plaintiffs endorsed, in addition to Dean and Wittenberger, Neil Livingstone, a well known pundit on the subject of international terrorism, to testify that

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Paladin is reputed among law enforcement officers to be a correspondence school for criminals, and as to Paladin's alleged intent to be such.

Paladin endorsed experts on popular media to testify concerning the commonality of the alleged 22 similarities between *Hit Man* and Perry's crime in popular film, TV, and literature; the retired prison warden to testify concerning Perry's likely education while in prison; former F.B.I. behaviorist Gregg McCrary, to testify to the nature and causes of Perry's willingness to kill, the ubiquitousness of the so-called "blueprint" in the criminal world, and the absence of any significant role played by the book *Hit Man* in the murders; and law enforcement officers from Detroit to testify concerning the prevalence of the methods allegedly instructed by *Hit Man* as a way of life in Perry's neighborhood.

The plaintiffs filed a motion in limine seeking to bar all of the defense experts except for McCrary, on the grounds of relevance. Defendants similarly moved to bar all of plaintiffs' expert testimony, based on *Daubert* issues, relevance, and the impropriety of expert testimony on the element of intent. The defendants also sought to bar Dean and Wittenberger from repeating hearsay from fact witnesses not present at trial. These motions were all under advisement at the time the case settled.

Motions for Trial Structure, Exclusion of Evidence, and Continuance

Paladin also filed a trial procedure motion requesting (a) that the jury be asked to read the book before opening statements, (b) that it be pre-instructed on the core legal issues in the case, and (c) that the liability and damages phases of the trial be bifurcated. In addition to the motions concerning expert testimony, Paladin filed a motion to exclude evidence and testimony concerning other books sold by Paladin and other crimes alleged to have been committed using Paladin books that did not involve *Hit Man*. While Judge Williams denied the motion on pretrial structure and procedure, he took most of the other motions in limine under advisement and had not ruled by the time of the settlement.

After the Columbine High School massacre on April 20, 1999, Paladin filed a motion for a continuance arguing prejudice was likely to result from news reports that the Columbine shooters had relied upon "how to" information they had obtained from the Internet. That week before trial there was a series of "copycat" school bomb and shooting incidents and threats across the nation making headline news. At the pretrial hearing held five days before the *Hit Man* trial was to begin, the judge denied the continuance motion.

Conclusion

With the abrupt and unexpected conclusion of the *Hit Man* case, several important questions of significance to book publishers and information providers remain unanswered. Specifically, what are the elements of a plaintiff's "aiding and abetting" claim under a state's tort law when those claims are premised exclusively on the defendant's mass-distributed speech? Must plaintiffs bringing such a claim prove each element of their case by clear and convincing evidence? Must plaintiffs prove that the defendant had actual knowledge of the book purchaser's criminal plans at the time the defendant sold the book to the purchaser? Must plaintiffs prove that the defendant's acts were a "but for" cause of the plaintiffs' injuries?

Perhaps the most disappointing aspect of the settlement is that the Fourth Circuit's decision remains on the books as binding precedent within that circuit and persuasive authority outside that circuit, without an opportunity in the *Hit Man* case for the Supreme Court to review that decision. That opinion suggested that "mainstream" media companies had nothing to fear from its holding, limited as it was to the context of "how-to" instructional manuals; declaring the case "unique in

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the law," the panel stated, "in virtually every 'copycat' case, there will be lacking in the speech itself any basis for a permissible inference that the 'speaker' intended to assist and facilitate the criminal conduct described or depicted," thus making summary judgment readily available.

Despite this explicit reassurance, the speech-chilling implications of the Fourth Circuit's decision have already been demonstrated: relying upon that decision, a state court of appeals in Louisiana reversed a dismissal for the defendants in another wrongful death case alleging that the film "Natural Born Killers" caused two individuals to engage in a shooting spree leaving one dead and another victim paralyzed.

It will remain to be seen whether the *Hit Man* precedent is followed in other cases currently pending and to be filed in the future including the lawsuit against the makers and distributors of the film "The Basketball Diaries" that is alleged to have inspired Michael Carneal to shoot eight of his classmates in Padukah, Kentucky. Unless and until a different Court of Appeals creates a circuit split with the Fourth Circuit's ruling on the *Hit Man* case or the Supreme Court grants certiorari in the "Natural Born Killers" case after additional proceedings, the corrosive effects of the *Hit Man* precedent may continue to be felt nationwide.

There is little question that, if Paladin had had the resources at the outset, it would have been better served by building the record on the factual issues of the case and then seeking summary judgment on all issues, as would any media defendant embroiled in such a case when a *Brandenburg* defense may be unavailable and its defense on the intent issue is tenuous. Many have suggested that Paladin's decision to seek judgment on a record in which bad intent was admitted for purposes of the motion was ill advised. Although Judge Williams was willing to see it as an intellectually honest attempt to ripen an important constitutional question, the far less sympathetic Judge Luttig was prepared to make the defendant eat its stipulations for breakfast, lunch, and dinner.

However such a case is handled on summary judgment, the intent issue is not likely to be the defendant's best issue before a jury. The issue under no circumstances should be abandoned, but in most cases, a defendant who makes it appear to jurors that intent is the most important issue before them faces a significant challenge.

Indeed, it is precisely because a defendant's intent is always such an unpredictable jury question that the *Brandenburg* test should be applied to all cases of mass distributed speech – only if the speech is found to be likely to incite imminent lawless conduct, does a defendant's intent become relevant. In cases where, following the Fourth Circuit's opinion in the *Hit Man* case, courts choose not to apply the *Brandenburg* test, defense counsel are well-advised to focus their defense efforts on the elements of substantial assistance, causation and the argument that there is a common law requirement that the defendant had actual knowledge of the principal tortfeasor's improper intent.

Lee Levine and Seth Berline, both partners and Ashley Kissinger, an associate, of Levine Sullivan & Koch LLP, Washington, D.C. along with Tom Kelly and Steve Zanzberg, partner and associate, respectively, represented Paladin Enterprises, Inc. throughout the litigation.

LDRC BULLETIN Examines Texas Interlocutory Appeal Statute *Also*: Annual Supreme Court Review

LDRC's recently released BULLETIN 1999 No. 2 contains 1) an in-depth report on the Texas interlocutory appeal statute; and 2) LDRC's annual report on the certiorari petitions filed in the Supreme Court in libel, privacy and other First Amendment cases.

Texas Interlocutory Appeal Statute

As Tom Leatherbury so generously states in his Introduction, through this BULLETIN about the Texas interlocutory appeal statute, LDRC continues in its roles as clearinghouse, trendspotter, and trendsetter. As a clearinghouse, LDRC has brought together accomplished Texas libel defense lawyers to share their collective experience under §51.014 of the Texas Civil Practice & Remedies Code which permits media defendants and sources faced with libel and other free speech or free press claims to appeal as of right from a denial of summary judgment.

This deceptively simple statute has been on the books only since September 1993. The positive trends spotted by the authors are unmistakable:

- unmeritorious claims disposed of efficiently;
- trial costs avoided;
- public and private resources conserved; constitutional values protected and reserved.

We hope this BULLETIN provides you with the information you may need to be a trendsetter, to try and replicate the Texas statute in your state. Perhaps, if we work together, this resource may even provide the basis for procedural reform in the federal system. That would truly be a trend worth setting that would benefit us all.

The BULLETIN reports that the Texas statute works: cases that should be dismissed before trial now ***are*** being dismissed without unnecessary, wasteful and constitutionally suspect litigation. A remarkable number of cases have been disposed of at the appellate level. Of fifteen (15) cases in which the courts decided the merits of the claims (as distinct from procedural issues), claims in thirteen (13) cases were dismissed on the appeal.

The issue was organized and edited by Tom Leatherbury (Vinson & Elkins L.L.P.), Chair of LDRC's Defense Counsel Section, Lee Levine (Levine, Sullivan & Koch, L.L.P.), Chair of LDRC's Legislative Affairs Committee, in addition to LDRC staff and LDRC BULLETIN editor Gayle Sproul. The report covers the background, legislative and legal history and practical application of the Texas law and contains articles by:

- Michael J. McCarthy, Executive Vice President and General Counsel of A.H. Belo Corporation, on the genesis of the legislative initiative;
- Paul C. Watler and John T. Gerhart, Jenkens & Gilchrist, on the "Nuts & Bolts" of the statute;
- Alan Greenspan, Jackson & Walker L.L.P., on summary judgment law prior to the interlocutory appeal statute;
- Ron Kessler and Kirte Kinser, Locke Lidell & Sapp, on the legislative history;
- Julie Ford, Haynes & Boone, and Bill Ogden, Ogden, Gibson, White & Broocks, L.L.P., on the case law that has developed under the statute;
- David Donaldson, George & Donaldson, L.L.P., and Tom Williams, Haynes & Boone,

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LDRC Bulletin

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L.L.P., survey Texas libel lawyers on the impact of the statute.

Texas joins two other states — New York and Arkansas — that offer this efficient and First Amendment-friendly avenue of relief. LDRC's report, it is hoped, will be an invaluable guide to media entities and their counsel across the country interested in broaching a similar legislative initiative in their states to provide a much-needed alternative to costly, time-consuming litigation of unmeritorious claims.

U.S. Supreme Court 1998 Term: Petitions for Certiorari

LDRC annual Supreme Court Report reviews the resolution of this Term's petitions for certiorari to the U.S. Supreme Court in libel, privacy and other First Amendment cases of interest and the overall history of the Supreme Court's disposition of certiorari petitions since 1985. For the first time since 1989, the Court decided a media-related privacy case, issuing two decisions regarding the controversial newsgathering technique know as the "ride-along."

In *Wilson v. Layne* and *Hanlon v. Berger*, both decided on May 24, 1999, *see LibelLetter* June 1999 at 1, the Court ruled that law enforcement officials can be held liable for Fourth Amendment violations when they invite the media into a private home to witness the execution of a warrant. While the Court noted "the need for accurate reporting on police issues," it found that that need "in general bears no relation to the constitutional justification for the police intrusion into a home in order to execute a felony arrest warrant." These decisions may effectively end the possibility of media ride-alongs into private homes.

The last media privacy case decided before this Term was *Florida Star v. B.J.F.*, 491 U.S. 524 (1989). The Supreme Court has not reviewed a libel case since its 1991 decision in *Masson v. New Yorker Magazine*, 111 S. Ct. 2419 (1991).

This past term, the Court considered and denied 16 other petitions in libel and privacy cases. Over the 14 Terms studied by LDRC, the Court has granted certiorari in only 14 of the 303 privacy and libel petitions filed (4.6%).

LDRC's Supreme Court report contains summary descriptions of this past Term's libel and privacy petitions and decisions by the Court. As in the past, the report also charts these petitions and decisions in several different categories: media v. nonmedia; by court system (federal v. state); by party filing petition (plaintiff or defendant); final or nonfinal judgment; and by issues raised.

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