

LDRC Libel Defense Resource Center

LIBELLETTER

Reporting Developments Through August 21, 2000

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**LDRC LONDON CONFERENCE 2000
SEPTEMBER 25-26, 2000**

Latest LDRC Bulletin Tracks Appeals, Cert Petitions

Twenty Year Study Shows Appellate Results Fa- vorable to Media

This month, LDRC released its third BULLETIN of the year, the LDRC 2000 REPORT ON APPELLATE RESULTS. In this publication, LDRC studies the results over 20 years of appeals from media trials, an expansion in scope from LDRC's previous appeals studies which examined cases since 1984. The BULLETIN also includes the annual SUPREME COURT REPORT, reporting on the fate of certiorari petitions in libel, privacy, and other areas of interest.

The appellate study reveals that, of cases taken up on appeal, very few plaintiffs who won awards against the media at trial retained those awards through the end of the appellate process. Over the

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Latest LDRC Bulletin Tracks Appeals, Cert Petitions

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last 20 years, the likelihood that a plaintiff's trial verdict would survive an appeal intact as to both liability and damages averaged only 27.8%.

Appellate courts have refused to affirm verdicts against media defendants on the basic issue of liability more than half the time, either reversing verdicts or remanding for further proceedings in 57.2% of cases. And courts have shown even greater reluctance in upholding damage awards: they have reversed, remanded, or reduced compensatory damages 66% of the time, and punitive damages nearly 80% of the time, since 1980.

Meanwhile, defense verdicts were affirmed at a rate of 81.4%. Defense verdicts against public figure or public official plaintiffs were affirmed 87% of the time.

These trends have remained relatively consistent over the last two decades, although the total number of media trials and appeals has fallen somewhat in the 1990's. The number of appeals from plaintiffs' verdicts dropped from 126 in the 1980's to only 68 in the 1990's, correlating with a reduction in media trials: 261 in the 1980's compared to 177 in the 1990's, as reported in the LDRC BULLETIN 2000:1 — REPORT ON TRIALS AND DAMAGES.

The recent BULLETIN also examines the issues raised on appeal from 1996 through 1999 and the results on appeal with respect to those issues. Actual, or constitutional, malice is most frequently litigated, with defendants prevailing on appeal in more than half of the cases.

LDRC simultaneously issued its SUPREME COURT REPORT — 1999 TERM. LDRC has catalogued petitions for certiorari raising libel and privacy issues in media and non-media cases for 15 terms. Over the 15 Terms studied by LDRC, the Court has granted certiorari in only 15 of the 327 libel and privacy petitions filed — only 4.6%.

The Supreme Court considered 23 petitions for certiorari in libel and privacy cases this term, including cases involving both media and non-media parties. The Court took up for review only one case

Bruce J. Ennis died this month. Bruce, a partner in the Washington D.C. office of Jenner & Block, was not only one of the finest First Amendment and Supreme Court advocates in the country, he was one of the finest men. Bruce brought decency, in addition to exceptional intellect to every project he touched. He was an eager volunteer for projects at LDRC, despite his obviously heavy schedule, but his qualities of unique intelligence, down-home approach and humor made working with him a special privilege. He will be greatly missed.

of relevance, *Bartnicki v. Vopper*, a petition brought by a plaintiff from a Third Circuit decision. The case involved the publication by a broadcaster of portions of a recorded telephone conversation, which was intercepted and recorded by an anonymous individual in violation of state and federal wiretap statutes. The decision stands in contrast with *McDermott v. Boehner*, 191 F.3d 463, 27 Media L. Rep. 2345 (D.C. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3693 (U.S. Apr. 25, 2000) (No. 99-1709). The defendant in that case also filed a petition for certiorari, upon which the Court has not yet acted. And now see the Fifth Circuit decision in *Peavy v. WFAA TV*, page 11 *infra*.

If you are not already a subscriber to the LDRC BULLETIN and wish to receive a copy of the LDRC BULLETIN 2000:3, send \$35 to LDRC. For a subscription to the 2000 year quarterly LDRC BULLETIN, send \$110. In 2000, the LDRC BULLETIN has published, in its first three issues:

- TRIALS OF A GENERATION
- LDRC 2000 REPORT ON TRIALS AND DAMAGES
- MEDIA TRIALS AT THE CLOSE OF THE CENTURY: CHALLENGE AND CHANGE
- FAIR USE IN THE MEDIA: A DELICATE BALANCE
- LDRC 2000 REPORT ON APPELLATE RESULTS.

The last issue will review NEW DEVELOPMENTS, with, we believe, a particular emphasis on the right of publicity, misappropriation and related issues.

Congress Shall Make No Law . . .

Where Does the 1999 Term Leave the First Amendment?

By Paul M. Smith and Nory Miller

The bumper crop of First Amendment decisions issued during the Supreme Court's 1999 Term illustrates nothing so clearly as the wide range of doctrines jostling each other under that rubric. Of the ten cases, two addressed Establishment Clause challenges, two addressed right-of-association claims, and six addressed speech rights in contexts varying from compelled contributions to regulation of sexually oriented speech.

Making sense of the larger import of these decisions requires putting away any assumption that a given Justice is "pro-First Amendment" or "anti-First Amendment." There are too many different issues addressed through the application of different doctrines. But it is possible, we think, to draw from the recent cases some lessons about the types of First Amendment claims likely to be embraced by particular Justices – and to describe underlying patterns of thought that may help predict how a given Justice will respond to new and different constitutional controversies coming down the road.

First Amendment v. Other Rights

A hallmark of the recent cases is that they so often involve contexts where one set of First Amendment values is pitted against another, or against some other comparably fundamental value. In such cases, there are no easy answers, and the outcome likely to be supported by a given Justice cannot be divined by simply asking whether that Justice is inclined toward "activism" or "restraint" in enforcement of constitutional rights.

Instead, the approaches of individual Justices are inevitably colored by their personal perspectives on the relative legitimacy and importance of (1) the

values and interests being promoted by the government action at issue and (2) the values and interests allegedly being trampled.

As Justice Scalia has noted, there are "culture wars" being waged in this country, and these are not limited to the issues being debated but rather encompass overarching presumptions about the proper allocation of rights between minority and majority views and the relative value of specific categories of speech and conduct.

Making sense of the larger import of these decisions requires putting away any assumption that a Justice is "pro-First Amendment" or "anti-First Amendment."

In the cases before the Supreme Court, the Justices often take turns attacking and defending governmental action under the First Amendment, depending on which presumptions and values the action is perceived to favor. Where a given Justice tends to fall in these cultural divides can prove a more reliable tool in interpreting and predicting

individual positions than any attempt to discern an across-the-board view of the role of government versus individuals or institutions.

The Establishment Clause

In their two Establishment Clause decisions this Term, *Santa Fe Independent School District v. Doe*, 120 S. Ct. 2266 (2000), and *Mitchell v. Helms*, 120 S. Ct. 2530 (2000), the Justices continued to struggle with the increasingly ragged *Lemon* test. The basic positions of the Justices with respect to the separation of church and state – although not the precise formulation of the appropriate analysis – are increasingly clear and divergent. Justices Stevens, Souter, and Ginsburg remain committed to a clear separation of church and state, while Justices Scalia, Thomas and Chief Justice Rehnquist appear increasingly impatient to read the Establishment Clause as a far narrower prohibition. Thus, for example, the

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Chief Justice found the Court's concern with majoritarian imposition of religion in *Sante Fe Independent School District* – the pre-football game prayer case -- “disturbing,” complaining that “it bristles with hostility to all things religious in public life.” 120 S. Ct. at 2283 (Rehnquist, J. dissenting).

The view of the Establishment Clause that has emerged as predominant is a compromise that allows government support for church-operated schools through a “neutral” program, as in *Mitchell v. Helms*, but gives very close scrutiny to any government intervention that facilitates actual religious activity in the public schools, as in *Sante Fe Independent School District*. It remains uncertain how open a “neutral” funding program must be in order to survive Establishment Clause review.

The four Justices comprising the *Mitchell v. Helms* plurality – Justice Thomas (writing), Chief Justice Rehnquist, and Justices Scalia and Kennedy – view the First Amendment as requiring only that aid be allocated among schools on the basis of neutral, secular criteria. The aid may be direct or indirect, susceptible to diversion or not.

The Justices who provided the votes needed for a majority to uphold the aid program – Justices O'Connor and Breyer – view such facial neutrality as insufficient. They insist on an additional inquiry into the effect of government aid with respect to advancing or inhibiting religion, and would therefore find actual diversion of government aid to religious indoctrination inconsistent with the Establishment Clause. They voted to uphold the program at issue only because it provides equipment and materials, as opposed to money, and because there was little evidence of actual diversion.

The Right of Association

Two decisions last Term rejected as unconstitutional government action attempting to increase opportunities for participation in large, society-wide, but private, institutions. In these cases, the Justices who were

most tolerant of government action in the Establishment Clause cases were most hostile to government action aimed at “opening up” such associations.

In the “blanket primary” case, *California Democratic Party v. Jones*, 120 S. Ct. 2402 (2000), the Court sorted through private rights and public goals in analyzing the already highly intertwined relationship between political parties and state electoral processes. The law allowed primary voters to pick and choose which party primary they would participate in, office by office on a single ballot. It was aimed at encouraging a broader range of citizens to participate in selecting candidates for elective office, an approach that was considered likely to move nominees toward the political “center.”

The Court held that such a scheme was inconsistent with the associative rights of the private political parties under whose sponsorship the candidates would run. In an opinion by Justice Scalia, the majority reasoned that the state could, if it so chose, disengage public elections from private political organizations altogether, but that it could not simultaneously run partisan primaries while opening voting to persons who had not chosen to associate themselves with that party.

In *Boy Scouts of America v. Dale*, 120 S. Ct. 2446 (2000), the Court rejected New Jersey's attempt to enforce anti-discrimination laws to prevent a local Boy Scout council from excluding a gay Scout leader solely on the basis of his sexual orientation. The Court split, 5 to 4, with respect to whether the Boy Scouts actually had the expressive purpose of teaching that homosexuality is wrong, and Mr. Dale's continued involvement would interfere with that purpose; or whether, instead, the Scouts simply chose to discriminate against adult homosexuals.

The majority opinion, written by Chief Justice Rehnquist, promulgated a rule under which the courts must accept an organization's assertions as to its expressive purposes, here supported by only an internal memo and positions taken in similar litigation.

The dissent, written by Justice Stevens and joined by Justices Souter, Ginsburg and Breyer, objected to the Court's disinclination to undertake an independent re-

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view and would have required a showing that the position asserted in litigation represented shared goals of the organization's members. Recognizing the potentially precarious position of the Court's precedents in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and its progeny, under the majority's approach, the dissent warned that the Court had turned "the right to associate into a free pass out of antidiscrimination laws," 120 S. Ct. at 2472.

Both association cases decided this Term illustrate that the right of association – which once served to protect nascent, vulnerable associations such as the early NAACP from government and majoritarian forces intent on driving them out of existence – has become a right to exclude wielded by majoritarian groups. In both cases, those groups successfully fought off attempts by government to impose a given set of values – broader political representation in the blanket primary case and nondiscrimination based on sexual orientation in the Boy Scout case – favored by a given state. And the groups did so with the enthusiastic support of the very Justices who tend to be least concerned about government imposition of *religious* values in Establishment Clause cases.

Campaign Finance

State efforts to impose rules on campaign contributions divided the Court, in *Nixon v. Shrink Missouri Government PAC*, 120 S. Ct. 897 (2000), with many Justices responding to government efforts in this area in line with their votes on efforts to broaden majoritarian associations. Those forming the majority to uphold Missouri's contribution limit emphasized both the need to balance the First Amendment interests against the constitutionally significant interest in democratic governance underlying the government's actions and the precedent of *Buckley v. Valeo*, 424 U.S. 1 (1976).

Justice Souter wrote for the Court, with concurrences from both Justice Stevens and Justice Breyer (joined by Justice Ginsburg). Justices Thomas, Scalia and Kennedy dissented, challenging the legitimacy of *Buckley*, and setting forth, in two separate dissents, an argument for a stricter standard of review and for a tougher look at the likelihood that the measure would improve the integrity of the electoral process.

"Adult" Speech

State efforts to impose rules on campaign contributions divided the Court...with many justices responding similarly to government efforts here as to efforts to broaden majoritarian associations.

The two decisions reviewing government regulations aimed at "adult" speech – *City of Erie v. Pap's A.M.*, 120 S. Ct. 1382 (2000) (upholding a nudity ban applied to nude dancing), and *United States v. Playboy Entertainment Group, Inc.*, 120 S. Ct. 1878 (2000) (invalidating a regulation applicable to sexually oriented cable programming) – reflect, *inter alia*, the individual Justices' views of the protection properly accorded to that category of speech. Those inclined to confer less protection under the First Amendment include Chief Justice Rehnquist and Justices Scalia, O'Connor, Breyer, and Thomas. Those inclined to favor more protection include Justice Stevens – who, in his earlier years on the Court, held the opposite view – and Justices Souter and Ginsberg.

Most of the majority and dissenting opinions in the two cases purported to apply the same standard of protection, but in ways that essentially resulted in different standards. For example, the plurality in *Pap's*, in applying *O'Brien* scrutiny, accepted – as a sufficient justification for the rule requiring dancers

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to wear g-strings and pasties rather than appearing fully nude – the town’s assertion that the measure would combat negative secondary effects from establishments offering such entertainment. But the record contained no evidence that dropping “the last stitch” would increase any negative secondary effects over those produced by an all-but-nude dancing establishment. And the record also included no evidence to support the town’s choice of a nudity ban rather than a zoning change. It was on that basis that Justice Souter dissented, applying *O’Brien* but finding insufficient evidence that the ordinance would serve any substantial and legitimate governmental purpose.

In the *Playboy* case, both the majority and the primary dissent applied strict scrutiny but differed as to the availability of a less restrictive alternative: individual parents requesting cable operators to block sexually oriented channels. Justice Kennedy, writing for the majority, held that the availability of such an alternative was sufficient to invalidate a law requiring complete scrambling during daytime hours unless the subscriber expressly authorized receipt of such channels. Justice Breyer, in dissent joined by the Chief Justice and Justices O’Connor and Scalia, viewed the alternative as too ineffective because it might not protect children whose parents were not concerned about or aware of the cable programming.

Justice Scalia, a long-time advocate for less protection for adult speech, argued this Term in *both* cases that *no* First Amendment scrutiny of any kind was required. In *Playboy*, he argued *sua sponte* that, although the statute purports to reach indecent as well as obscene programming, it only affects businesses that are beyond the scope of First Amendment protection because they advertise themselves as providing erotic programming for its prurient appeal. In *Pap’s*, Justice Scalia argued that the ordinance was a general law regulating conduct and not specifically directed at expression and therefore not subject to First Amendment scrutiny at all.

He further asserted that even a law aimed specifically at nude dancing would not implicate the First Amendment unless the government’s objection was to the dancing’s *communicative* character. As he put it, the

“traditional power of government to foster good morals . . . and the acceptability of the traditional judgment . . . that nude public dancing itself is immoral, have not been repealed by the First Amendment,” 120 S. Ct. at 1402.

Justice Thomas – who has become a strong voice against government restriction of commercial speech as a method of modifying behavior – provided the key vote in both cases, in *Pap’s* for the government restriction and in *Playboy* against the government restriction. In *Pap’s*, he joined Justice Scalia’s concurring opinion arguing that no First Amendment scrutiny was required at all. In *Playboy*, although joining the majority invalidating the regulation, he wrote separately to explain his view that the programming at issue might very well be obscene and unprotected, but that he refused to proceed on that basis because the government had not argued it, and there were no findings to that effect on the record. Even more interesting than Justice Thomas’s reluctance to join Justice Scalia’s *sua sponte* finding of obscenity was his refusal to join Justice Breyer’s dissent. Having determined that strict scrutiny was the applicable standard on the record before the Court, Justice Thomas explained that he voted to invalidate the government regulation because strict scrutiny could not be applied to uphold the regulation without weakening that standard of review, and he was unwilling to corrupt the First Amendment by taking the starch out of our constitutional standards.

Two cases provide an insufficient sampling, but Justice Thomas might prove a force pushing the Court to choose between strictly applying the full First Amendment protections currently accorded speech to adult speech, and promulgating identifiably separate, and lower, standards for adult speech.

Advocacy Versus Protection From Harassment

Hill v. Colorado, 120 S. Ct. 2480 (2000), involving a First Amendment challenge to a rule restraining advocates from approaching within 8 feet of unwilling listeners in front of health facilities, may be too case-specific to

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provide clear predictive insight into the Court's current First Amendment jurisprudence. But the comparison with *Pap's* is interesting. In both, the legislatures became concerned about a specific development – a nude dancing club in *Pap's*, harassment of abortion clinic patients in *Hill* – but drafted a more general law in response. Both the majority in *Hill* and the plurality in *Pap's* reviewed the laws as written, notwithstanding the ordinance's preamble in *Pap's* and the statute's legislative history in *Hill* – both of which acknowledged the narrower context. And both laws were upheld.

But the similarities largely end there. Only two Justices – the Chief Justice and Justice O'Connor – voted to uphold both the *Pap's* ordinance and the *Hill* statute. A preamble to a statute expressly specifying the legislature's intention is not identical to legislative history indicating what brought an issue to the legislature's attention initially.

Nor are the concerns raised or restrictions at issue in the two cases the same. *Pap's* presented a conflict between majoritarian opposition and a type of expression many on the Court view as only marginally protected, if at all. But the restriction at issue was a complete ban. *Hill* presented a conflict between political speakers exercising First Amendment rights and vulnerable individuals exercising other fundamental constitutional rights. But the restrictions at issue did not prevent speech at the times and places the speakers selected.

Thus, Justices Stevens, Souter and Ginsburg, who found the law banning nude dancing in *Pap's* inconsistent with the First Amendment, in dissent, joined a majority allowing the lesser restrictions of the speech of protestors enacted as a protective measure for those seeking an abortion. Justices Scalia, Thomas and Kennedy made the opposite switch. The line-up in *Hill* clearly reflects Justices' conflicting assessments of the importance of the countervailing state interest and the nature and severity of the restrictions imposed.

New Doctrinal Territory

Two decisions raise as many questions for future doctrinal development as they answer, as the Court broached new or underexplored First Amendment territory.

In *Los Angeles Police Department v. United Reporting Publishing Corp.*, 120 S. Ct. 483 (1999), the Court ducked the substantive issues and dismissed the First Amendment challenge on procedural grounds. But the substantive issues – raised by a regulation at the intersection of government control over access to information and government regulation of speech – split the Court and remain unresolved.

The challenged statute gives the press and others access to certain police information but denies access to anyone intending to use it for commercial speech purposes.

At least four members of the Court – Justices Ginsburg, O'Connor, Souter and Breyer – thought the appropriate standard would be viewpoint neutrality, the standard applied to government subsidies, and expressed the concern that states might provide no public access if providing partial access required more stringent review. Another four were more skeptical. Justices Scalia and Thomas questioned whether the law was, in reality, a restriction upon speech and should be reviewed as such. Justices Stevens and Kennedy would have reviewed the law as a speech regulation and have found it invalid.

In *Board of Regents of the University of Wisconsin System v. Southworth*, 120 S. Ct. 1346 (2000), the student activity fees case, the Court addressed the limits on government-compelled contributions, providing an opportunity to clarify a particularly murky area of First Amendment law. Despite decades and subsequent decisions, the underlying *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), analysis that distinguishes between permissible and impermissible compelled contributions remains unclear.

Abood decided a First Amendment challenge to agency shop arrangements in which nonmember employees were required to pay the equivalent of union dues to the union. The Court drew a line. The requirement that nonmembers pay their share of collective bargaining costs was upheld, even though the Court viewed the requirement as impinging on their First Amendment interests. However, nonmembers could opt out of paying any part of the service charge that paid for the union's legis-

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lative lobbying and support for political candidates. The standard by which permissible and impermissible compelled contributions could be distinguished was not clearly demarcated. The Court relied on the legislative judgment that collective bargaining was important to our system of labor relations, and drew the line between union activities *germane* to collective bargaining and other activities.

The Court's only compelled contribution decision outside of the union context, before this Term, was a challenge to bar association dues, *Keller v. State Bar of California*, 496 U.S. 1 (1990), which the Court treated as analogous to *Abood*. In remanding, the Court suggested that a line be drawn between dues supporting bar disciplinary activities and dues supporting lobbying and other activities not germane to the bar's supervisory role over the profes-

sion. *Southworth* presented the Court with a compelled contribution requirement in a different context. The government's purpose was not collective bargaining or attorney discipline but the general stimulation of extracurricular speech and ideas by funding student organizations of all kinds. Further, because 100% of the contributions were used for the intended purpose, there was no need to determine which uses were germane to the government's purpose. Thus, *Southworth* provided an opportunity for the Court to reconsider the standard for determining when compelled contributions are permissible.

Justices Souter, Stevens and Breyer, concurring in the judgment, would have upheld the fee requirement as consistent with First Amendment values and as raising none of the concerns underlying the compelled speech doctrine. Justice Kennedy, writing for the Court, imported a standard of review from public forum cases on the ground that a university funding student organizations to stimulate ideas and expression of all kinds is similar to a university providing a public auditorium for outside lecturers for the same purpose.

That standard – viewpoint neutrality – was applied to the allocation of funds in this context and found satisfied because the record included a joint stipulation that the allocation rules were viewpoint neutral. However, the Court remanded for application of the viewpoint neutrality standard to one aspect of those rules.

What rules will apply outside of union, bar association, and public forum-like contexts in the future is less clear. It seems unlikely that the Court will now require viewpoint neutrality as the applicable standard for compelled contribution challenges when the government's purpose is unrelated to public forum-like goals. But whether it will attempt to devise separate standards of review for each type of government purpose, as it did in *Southworth*, or will instead develop a generally applicable standard of review for determining when compelled contributions are permissible, as it started to in *Abood*, remains for another Term.

...Southworth provided an opportunity for the Court to reconsider the standard for determining when compelled contributions are permissible.

Conclusion

When constitutional values collide, a balancing becomes inevitable. In First Amendment cases, that often involves spoken or unspoken weighing of the value of the speech at issue as well as of the importance of the governmental interest at stake. The analytical structures developed by the Court – the *O'Brien* test, strict scrutiny and the like – were intended to lend some structure and objectivity to this process. But as this Term's cases suggest, there remains a fair amount of “play in the joints.” It is thus hardly surprising that a diverse set of Justices will cast votes in difficult First Amendment cases that tend to reflect their general cultural attitudes and their understanding of the evils at which the First Amendment is aimed.

Paul M. Smith and Nory Miller are partners at Jenner & Block, Washington, D.C., which represented United Reporting Co. at oral argument.

Fifth Circuit Becomes Third to Rule on Use of Illegal Wiretaps

Sends Peavy Back For Trial in Defense Reversal

By Thomas Leatherbury

Late on July 31, 2000, the United States Court of Appeals for the Fifth Circuit joined the Courts of Appeals for the D.C. and Third Circuits and refused to apply strict scrutiny to the use and disclosure provisions of the Federal Wiretap Act. In *Peavy v. WFAA-TV*, a unanimous Fifth Circuit panel composed of Judges Barksdale and Jolly and Senior Judge Politz reversed the summary judgment obtained by a Dallas television station and one of its reporters and remanded most of plaintiffs' federal and state wiretap claims for trial.

Police Scanner Overhears, Leads to Lawsuits

In two related lawsuits, Dan Peavy, a former trustee of the Dallas Independent School District (DISD), his business associate Eugene Oliver, and their wives sued A.H. Belo Corporation's Dallas station, WFAA-TV, WFAA reporter Robert Riggs, and the Peavys' neighbors, Charles and Wilma Harman.

The disputes began when the Peavys' neighbors, the Harmans, intercepted some of Peavy's cordless telephone calls using a police radio scanner. The neighbors heard Peavy, who was then a DISD trustee, discussing DISD insurance contracts and other matters (including what Harman understood as threats to him arising out of ongoing disputes between the neighbors) and began taping Peavy's phone calls. The Harmans, eventually called WFAA's reporter Riggs in early December 1994 with a tip about Peavy. After talking to and meeting with the Harmans, WFAA started its investigation. Over the next several months, the neighbors gave WFAA 18 tapes containing 188 telephone conversations between Peavy and others, including his business associate Oliver. At that time, the Harmans and WFAA were unaware of the November 1994 amendment to the federal wiretap making it unlawful to intercept the radio portion of cordless telephone calls.

After learning of the recent changes in the federal law, WFAA stopped accepting tapes. WFAA contin-

ued with its intense investigation of Peavy, Oliver, and DISD insurance without using the tapes and materials relating to the tapes. After an exhaustive six-month investigation, WFAA and Riggs aired several broadcasts in 1995 reporting on Peavy, his relationship with Oliver, Oliver's criminal history, and corruption in DISD insurance programs.

WFAA later won numerous awards for the broadcasts, including the *George Foster Peabody Award* and the *Alfred I. duPont Columbia University Journalism Award* for investigative reporting. After an FBI investigation, Peavy and Oliver were indicted on more than forty counts of official bribery, conspiracy, and income tax evasion. They were eventually acquitted of all criminal charges after a trial in which the government chose not to impeach Peavy or other witnesses with the contents of the Harman Tapes.

Peavy and Oliver then began pursuing their lawsuits against WFAA, Riggs, and the Harmans, claiming that the Harmans illegally intercepted the calls and that WFAA and Riggs procured or obtained the interceptions and unlawfully used and disclosed the contents of the interceptions in violation of the federal and Texas wiretap acts. Peavy and Oliver further asserted state law claims for invasion of privacy, intentional infliction of emotional distress, conspiracy, and tortious interference with contracts. Plaintiffs claimed to be seeking more than \$1 billion in damages.

Fifth Circuits

What Dallas federal Magistrate Judge Jeff Kaplan and Chief Judge Jerry Buchmeyer described as "a classic conflict between the right of privacy and the right of a free press to publish truthful and newsworthy information" and termed responsible journalism received a far less hospitable reception in the Fifth Circuit. In recommending that defendants' motions for summary judgment be granted, Magistrate Judge Kaplan concluded that the First Amendment protects the media's use and disclosure of true, lawfully obtained informa-

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5th Circuit Becomes Third to Rule on Use of Illegal Wiretaps

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tion about matters of public significance, even though the media's source had illegally obtained the information in violation of the state and federal wiretap acts. Chief Judge Buchmeyer accepted the Magistrate's recommendation in the *Peavy* case and granted defendants' motion.

Did Station Procure or Obtain the Tapes

The Fifth Circuit affirmed in part, reversed and vacated in part, and remanded the case for trial. The court affirmed the dismissal of plaintiffs' procurement claims under the federal wiretap act but held that fact issues existed about whether defendants "obtained" the Harmans to intercept the calls in violation of the Texas wiretap act and whether defendants conspired with the Harmans to intercept the Peavys' calls.

The court agreed begrudgingly with defendants that the federal wiretap act no longer provides a civil damages cause of action for procurement. However, the court held that Peavy is entitled to a trial on his claim that defendants violated the Texas wiretap act by "obtaining" the Harmans to intercept the calls. Moreover, the court held confusingly that, although the Peavys cannot recover damages for procurement, whether WFAA and Riggs procured the interceptions might still be an issue presented at trial because it somehow may be relevant to damages.

The court held that a reasonable jury considering the evidence in this case could conclude that WFAA and Riggs "procured" or "obtained" the Harmans to intercept Peavy's telephone calls. The evidence upon which the court relied for this finding includes:

- (1) Riggs told Harman he would like copies of any tapes Harman made;
- (2) Riggs instructed Harman not to turn the recorder on and off while listening to Peavy's conversations and not to edit the tapes;
- (3) Riggs occasionally telephoned Harman to ask if additional tapes were available;
- (4) Riggs asked Harman to keep him aware of what he was hearing from the interceptions;

- (5) Riggs and/or a WFAA producer would pick up tapes from the Harmans' home; and
- (6) Riggs told Harman he would look into the contents of the tapes and assured Harman, even after learning that the interceptions were unlawful, that he would continue investigating Peavy.

The court also reversed the trial court's summary judgment for defendants on plaintiffs' conspiracy claim and sent this claim back for trial. The court held that a reasonable jury could find that Riggs and Harman agreed to investigate and to expose Peavy by unlawfully intercepting Peavy's telephone calls. The court based its holding on the same evidence cited in support of the procuring and obtaining claims.

Use and Disclosure

The court then turned to plaintiffs' "use" and "disclosure" claims. Significantly, the court reversed the trial court's ruling for plaintiffs on their claim that WFAA "disclosed" the contents of the Harman tapes in three news broadcasts in July and August of 1995, to which plaintiffs have repeatedly tied the bulk of their alleged damages. The court held that a reasonable jury could conclude from the evidence that news sources independent of the Harman Tapes supported the information in WFAA's broadcasts and therefore that the broadcasts themselves did not disclose the contents of the Harman tapes. Accordingly, the court sent this disclosure claim back to the district court for trial.

However, the court upheld the district court's finding, as a matter of law, that WFAA and Riggs violated the wiretap acts by using and disclosing the contents of the Harman tapes during their news investigation of Peavy. The court noted that defendants cannot really dispute that they used and disclosed the Harman tapes during their news investigation and then rejected each of defendants' defenses to the use and disclosure claims.

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5th Circuit Becomes Third to Rule on Use of Illegal Wiretaps

(Continued from page 10)

The court held that defendants used and disclosed the information on the Harman tapes *intentionally* and that defendants' reliance on erroneous legal advice did not excuse their conduct. The court left open for the trial court's consideration whether some of Peavy's use and disclosure allegations were made in a timely fashion.

The court declined to consider Peavy's challenge to the trial court's holding, as a matter of law, that WFAA and Riggs did *not* use the Harman tapes in violation of the wiretap acts merely by listening to them.

Constitutional Analysis

Having found fact issues on some of the plaintiffs' wiretap act claims, the court somewhat surprisingly tackled the remaining constitutional issues head-on, holding that the wiretap acts were constitutional as applied under the intermediate scrutiny test. Glaringly absent from the court's constitutional analysis is any recognition of the societal value of the speech at issue, core truthful political speech about a public official's misdeeds.

The court began its analysis of the First Amendment issues by positing that defendants "had undisputed participation concerning the interceptions." The opinion repeats several times that defendants "participated" in the interceptions. However, the court did not cite any additional evidence in support of this statement or otherwise explain what it means by "participation" or why potentially lawful "participation" dictates a less stringent constitutional analysis. Apparently, the court believed that defendants "participated" in the unlawful interceptions even if a jury fails to find that defendants "procured" or "obtained" or conspired with the Harmans to intercept Peavy's calls.

The court purported to distinguish the key First Amendment precedents cited by the parties and held that the Supreme Court's decision in *Florida Star* left open the precise question presented in this case. That footnote 8 in *Florida Star* left open this question in itself led

the court to conclude that the Supreme Court had held the *Florida Star* strict scrutiny analysis could not apply. With very little analysis, the court then decided that open question by stating that the wiretap acts must satisfy only intermediate scrutiny. The court based its decision on its determination that the wiretap acts do not single out expressive content for punishment and impose no more than an "incidental" burden on free expression.

Glaringly absent from the Court's constitutional analysis is any recognition of the societal value of the speech at issue, core truthful political speech about a public official's misdeeds.

Freely mixing First Amendment and Fourth Amendment precedents, the court parroted plaintiffs' and the government's arguments to uphold the wiretap acts: they protect important privacy rights "of constitutional dimension;" further an interest that is unrelated to suppression of free expression (and indeed encourage free expression — apparently even if that expression is about an elected public official's misconduct); and do not burden more speech than necessary to further the government's interest in protecting privacy rights, because without a prohibition on "use" and "disclosure," the wiretap acts would be less effective in deterring privacy violations.

Finally, the court held that the wiretap acts are not unconstitutionally vague or overbroad because they give

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5th Circuit Becomes Third to Rule on Use of Illegal Wiretaps

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adequate notice of the conduct they prohibit and do not sanction a substantial amount of protected expression.

As a sidebar, the court declined to address the Peavys' argument that the district court erred in allowing defendants to use the contents of the Harman tapes as summary judgment evidence. The court apparently believed that, in considering the tapes in connection with dispositive motions, the district court did not decide whether to suppress the contents of the tapes "at trial" and can reconsider the issue on remand.

District Judge Sam Lindsay has not yet issued a decision in Eugene and Anna Oliver's companion case against WFAA and Robert Riggs. The Oliver's claims against defendants are virtually identical to the Peavys' claims, although Eugene Oliver has an additional claim that defendants tortiously interfered with his business relations and contracts. Magistrate Judge Jeff Kaplan recommended that defendants' motion for summary judgment be granted in the *Oliver* case at the same time as in the *Peavy* case, and review of that recommendation is still pending in Judge Lindsay's court.

Tom Leatherbury, Bill Sims, Mike Raiff, and Stacey Doré of Vinson & Elkins in Dallas represent WFAA-TV and Robert Riggs. A brief for numerous amici curiae was filed in the Fifth Circuit by Cam DeVore and Jessica Goldman of Davis Wright Tremaine in Seattle.

UPDATE:

Cyber-suits: Discovering the Defendants

An article in the last *LDRC LibelLetter* discussed the issue of discovering the identity of those alleged to have published libelous material on the Internet, but whose identity is masked by screen names. A New Jersey court in a very recent suit came up with an innovative first step in a litigation designed initially simply to discover the identities of the anonymous posters. The court, Judge Kenneth MacKenzie sitting in Morris County, New Jersey, ordered the plaintiff, Dendrite International Inc., to post notice of its application for limited, expe-

dated discovery into the identities of four John Doe defendants on the same Yahoo! message board used by defendants. Dendrite is suing the "Does" for libel, misappropriation of trade secrets, breach of contract, breach of fiduciary duty and civil conspiracy.

According to an article in the *New Jersey Law Journal* (July 31, 2000), the court concluded that such notice was "the most effective and appropriate means of providing actual notice" to the defendants.

Indeed, one of the "Does" responded to the notice by threatening the company with disclosure of "all the dirt" if Dendrite identifies him. Two other "Does" made appearances through counsel in the suit. Only one "Doe" apparently has not responded, although that individual, the most prolific poster of the group, stopped posting any messages on the board after the Dendrite notice of its lawsuit and discovery request was posted.

The *New Jersey Law Journal* quoted Internet privacy proponents as generally favoring the judge's efforts to notify the "Does" in this manner.

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Federal Judge in Florida Shuts Down Athlete Web Sites On Right of Publicity Claims

By Steve Perry

The right of publicity continues to wreak havoc upon First Amendment values. In a decision handed down on July 11, 2000, a federal judge in Fort Lauderdale, Florida relied on the right of publicity to permanently enjoin a “dot com” company, Gridiron.com, from depicting, describing the athletic exploits of, or even *mentioning* more than five professional football players on its web site. *Gridiron*, 2000 US Dist. Lexis 9810 (S.D. Fla. July 11, 2000). As a result of the court’s ruling, Gridiron.com essentially shut its doors, pending its efforts to obtain a stay or expedited appeal of the district court’s order.

The prevailing party in the *Gridiron* case was the National Football League Players Association (“NFLPA”), a union that represents over 90% of active NFL players. The NFLPA sued after approximately 150 of its player-members agreed with Gridiron.com to launch web pages devoted to the players. The web pages contained news and information about the players and their teams, and the players also agreed to participate in “chat room” sessions and to respond to fan e-mails. The Gridiron.com website contained a page devoted to virtually every NFL player, not just the players who had entered into contracts with Gridiron.

NFLPA Owns Rights for Products

The NFLPA asserted in its suit that the Gridiron web site violated its purportedly exclusive rights to operate web sites relating to members of the NFLPA. According to the NFLPA, each NFL player agreed when he joined the union that the union would have the exclusive right to use the names, images and biographical information of six or more players “in conjunction with or on products that are sold at retail or used as promotional or premium items.” Slip op. at 5.

The district court held that the Gridiron website fit this definition because the web site contained banner advertising, because Gridiron hoped to sell football-related merchandise to web site visitors, because Grid-

iron allowed web site visitors to participate in “fantasy” football games, and “most significantly,” because the web site was itself a “product.” *Id.* at 7. The court rejected Gridiron’s argument that the web site should be considered an electronic book or magazine, rather than a product. According to the court, “Gridiron.com is not similar to a book, because it does not contain intangible thoughts, ideas and messages.” *Id.* at 8. Instead, “[t]he web sites are a product that aggregates information on football players and organizes the information for easy access.” *Id.*

The court rejected Gridiron’s argument that the web site should be considered an electronic book or magazine, rather than a product.

Websites are “Products”

After finding that the Gridiron web site was a “product,” the court found that the web site infringed upon the NFLPA’s “exclusive group licensing rights,” and issued a permanent injunction that barred Gridiron “from using the images of six or more players.” *Id.* at 13. Not surprisingly, Gridiron has interpreted the order as barring it from providing information about or mentioning more than five NFL players, regardless of whether the players had signed contracts with Gridiron or not. As a result, Gridiron shut down its entire web site, including the web pages whose content Gridiron had created entirely on its own without player input.

Under the court’s analysis, the Internet web sites of numerous media companies, such as sportsillustrated.com, ESPN.com, and NYTimes.com, would be considered “products” that would need to be licensed by the NFLPA in order to report on the activities of six or more football players. These sites contain banner advertising; they sell substantial amounts of merchandise; and during football season they regularly contain the images and names of numerous NFL players. One even suspects that these web sites try to “organize the information for easy access.” *Id.* Accordingly, under the court’s approach, each of these sites must obtain a license from the NFLPA. Indeed, even more traditional publications such as newspapers and sports-oriented magazines, which carry advertising and which often contain mer-

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chandising inserts, would face a licensing requirement under the court's analysis.¹

Players Waived Rights to Speak

How did the court reach this result? It is difficult to answer this question, in part because all of the parties' summary judgment briefs were filed under seal, apparently to protect one or more purported trade secrets. The court appears to have held that each individual player intended when he joined the union to waive his right to operate — or contribute content to — an Internet web site if that site was linked to at least five other players' web sites. The court apparently located this restriction in the contract language quoted above, which gave the union the exclusive right to use, or to license others to use, the names, images and biographical information of six or more players "in conjunction with or on products that are sold at retail. . . ." *Id.* at 5.

Precedent on Speech Waivers Ignored

It may be possible for individuals to waive their First Amendment rights or to bind themselves contractually not to speak in certain fora or about certain issues. The Jeffrey Wigand/CBS controversy, for example, raised these issues. See generally Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261 (1998). By way of analogy, it is not unheard of for entertainers and other public figures to sell their stories on an exclusive basis or to agree to contractual restrictions on their ability to speak about certain issues.

Court Disregards Contrary Law and Evidence

There is a substantial body of case law, however, supporting the proposition that contractual waivers of constitutional rights will be narrowly construed and will be upheld only if there is "clear and convincing evidence" that the waiver was "voluntary, knowing and intelligent." *Gete v. INS*, 121 F.3d 1285, 1293 (9th Cir. 1997). See also *Curtis Publishing Co. v. Betts*, 388 U.S.

130, 145 (1967) (observing that "we are unwilling to find waiver [of First Amendment rights] in circumstances which fall short of being clear and compelling"); *National Polymer Products v. Borg-Warner Corp.*, 641 F.2d 418, 423-4 (6th Cir. 1981) (holding that any purported waiver of First Amendment rights "must be narrowly construed to effectuate the policies of the First Amendment"); *Wildmon v. Berwick Universal Pictures*, 803 F.Supp. 1167, 1178 (N.D. Miss. 1992) (holding that "[u]nless the parties have clearly promised to limit the flow of information. . . an ambiguous contract should be read in a way that allows viewership and encourages debate"), *aff'd mem.*, 979 F.2d 209 (5th Cir. 1992).

The court's order does not mention these settled rules of interpretation, and the court certainly did not give the NFLPA contract a narrow construction. To extend the analogy used in the preceding paragraph, if a celebrity such as Paul Newman had licensed to someone the exclusive right to use Newman's name and likeness "in conjunction with or on products that are sold at retail," it is unlikely that a court would hold that that language meant that Newman could not continue to appear in films or could not publish an autobiography — even though he would be paid to appear in the film or write the book, even though the studio or publisher would want to make a profit, and even though the film or book would arguably be sold "at retail."

Even in the absence of special rules of contract interpretation, it seems improbable that the issue of the athletes' intent in the *Gridiron* case could have been resolved in the NFLPA's favor at the summary judgment stage. At least 150 NFLPA members had signed agreements with Gridiron, which was substantial evidence that those players did *not* believe that their union contract barred them from contributing to the Gridiron website. In addition, seven players submitted sworn declarations stating that they had not intended to sign away any Internet-related rights. Slip op. at 10.

The court disregarded this evidence of intent on the principal ground that the NFLPA was "the exclusive representative of the players, with the authority to bind them." *Id.* at 5. In other words, the court seemed to find

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that only a union can interpret its contracts with its members, and the members' views are irrelevant. *But see Wright v. Universal Maritime Serv. Corp.*, 119 S.Ct. 391, 396 (1998) (holding that any waiver by a union of an employee's substantive rights must be "clear and unmistakable" and "explicitly stated").

Limits First Amendment to "News"

Summary judgment for the NFLPA seems particularly inappropriate given the substantial First Amendment issues at stake. Although the parties' briefs are under seal, it is clear from the court's order that Gridiron raised First Amendment issues, and that it argued that its web site contained "speech [that] is similar to that of novels, movies, music, magazines and newspapers, giving rise to heightened constitutional protections, not generally accorded merchandise, due to the expression of ideas and opinions." *Id. at 10.*²

The court appeared to make two points in response to Gridiron's First Amendment arguments. First, the court observed that while the right of publicity "is limited to the extent reasonably required to convey the news to the public," the Gridiron sites "go way beyond merely conveying the news." *Id. at 11.* The court's underlying presumption seems to be that an individual player can rely upon the right of publicity to bar a web site such as Gridiron.com from using his name, image and biographical information unless it is reporting "the news." Second, the court relied upon the fact that Gridiron had paid some of the NFL players to provide content for the web site, and it noted that Gridiron hoped that the players would "help attract third party advertisements." *Id. at 10.*

It thus seems likely that the court simply overlooked, or ignored, the following: that the First Amendment goes "way beyond" merely protecting the news; that newspapers, magazines and books are published for

profit; that ratings and advertising revenue are a motivating force in television programming decisions; that writers are paid to write; and that it has been the law for at least fifty years that the fact that "books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Joseph*

Burstyn, Inc. v. Wilson, 343 U.S. 495, 501-2 (1952). In addition, while some might think it a stretch to compare speech about football to the speech at issue in *New York Times v. Sullivan*, it is sometimes forgotten that

the speech punished in the latter case was contained in what the Supreme Court referred to as "editorial adver-

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First, the court observed that while the right of publicity "is limited to the extent reasonably required to convey the news to the public," the Gridiron sites "go way beyond merely conveying the news."

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tisements.” In a passage that seems almost prescient with regard to Internet speech, the Court held that the fact

[t]hat the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. Any other conclusion would discourage newspapers from carrying ‘editorial advertisements’ of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities who wish to exercise their freedom of speech even though they are not members of the press. The effect would be to shackle the First Amendment in its attempt to secure ‘the widest possible dissemination of information from diverse and antagonistic sources.’

New York Times v. Sullivan, 376 U.S. 254, 266 (1964).

Players’ Rights Ignored

What is particularly unsettling about the *Gridiron* decision is the complete absence of any discussion of the individual players’ rights. While professional football players may not be the most sympathetic of victims, they do not forfeit their constitutional rights when they choose their line of work. In this case, 150 or more players decided on *Gridiron.com* as the forum in which they would communicate with the public in a manner that was both unfiltered by the media and uncensored by any team, league or union. Their web site pages have now been shut down, by court order, without trial and on the flimsiest of evidence.³ And while the players’ comments about their games or their personal lives may be deemed by some to be of little social value, it is settled that “[s]peech shielded by the [First] Amendment’s protective wing must remain inviolate regardless of its inherent worth.” *United States v. United States Dist. Ct.*, 858 F.2d 534, 541 (9th Cir. 1988).⁴

As major sports organizations continue to recognize the power and promise of the Internet, it is likely that

their efforts to control that medium will continue to bump up against First Amendment values. The NBA’s recent suit against the New York Times Co. over the Times’ online sales of photos taken at NBA games may be one example. The *Gridiron* case presents an opportunity for the Eleventh Circuit to issue an opinion that recognizes that the right of publicity does not bar Internet speech about athletes, athletic events or any other matter of public interest, and that reminds lower courts that claims by an organization that its members have waived their free speech rights should be strictly construed and subjected to exacting standards of proof.

¹ The NFLPA is currently attempting to shut down all or portions of two other athlete-oriented websites, www.bigpros.com and www.athletesdirect.com. The author of this article represents Athletes Direct, Inc. The views expressed in this article are the author’s alone.

² Several courts have recognized in the past few years that commentary about sports-related issues is entitled to full First Amendment protection. See *Cardtoons v. Major League Baseball Players Ass’n*, 95 F.3d 959, 970 (10th Cir. 1996) (rejecting right of publicity claims by baseball players’ union against manufacturer of parody trading cards and holding that discussions about baseball constitute “speech subject to full First Amendment protection”); *ETW Corp. v. Jireh Publishing, Inc.*, 2000 U.S. Dist. LEXIS 4816 (N.D. Ohio, April 10, 2000) (rejecting right of publicity claim by Tiger Woods’ licensing agent arising from sale of an “art print” featuring Woods); *Montana v. San Jose Mercury News, Inc.*, 34 Cal.App.4th 790, 794 (1995) (holding that discussions about professional football involve “matters in the public interest entitled to First Amendment protection.”).

³ The NFLPA has stated that it is not attempting to entirely bar online speech by the players, because each player could theoretically set up his own *individual* site without running afoul of his union contract. It is doubtful, however, that many players would have the sufficient technical wherewithal to launch or operate a similar site.

⁴ Although the *Gridiron* site is currently off-line, web surfers can take a look at some of the fairly substantive opinions and viewpoints being offered by NFL players at the athletesdirect.com web site, portions of which the NFLPA is also trying to shut down. See, e.g., Bruce Smith’s comments on the health care system or his e-mail exchange with a fan about the need for more African-American NFL coaches, or Desmond Howard’s opinions about the NFL’s ongoing “PR disaster.”

Steven Perry is a member of Munger, Tolles & Olson LLP in Los Angeles, CA

Law Professors Join in Amicus Effort Supporting Sport Art Publisher

Brief Argues First Amendment Protects More Than News

Dane Zimmerman, Professor of Law at New York University, on behalf of herself and a group of over 70 intellectual property and constitutional law professors will file an amici curiae brief in the Sixth Circuit in support of Jireh Publishing, the publisher of a poster version of a painting depicting golf champion Tiger Woods. The brief will argue that the First Amendment severely limits the application of the right of publicity where it is being used to restrict expressive work, regardless of the medium. In March, the U.S. District Court for the Northern District of Ohio awarded Jireh summary judgment after the licensee of Woods' publicity rights brought suit under trademark law and the common-law right of publicity. See *ETW Corp. v. Jireh Publishing, Inc.*, 99 F. Supp. 829 (N.D. Ohio 2000); *LDRC LibelLetter*, April 2000 at 30. The licensee, ETW Corporation, a subsidiary of International Management Group, filed an appeal.

No Trademark Claim

The poster at issue reproduces a painting by sport artist Rick Rush, which depicts Tiger Woods in three different positions, surrounded by images of past victors of the Masters of Augusta P.G.A. tournament. Woods' name is printed at the lower edge of the poster.

U.S. District Judge Patricia Gaughan found that ETW could not own a trademark in every possible image of Woods, only one which had been used consistently as the identification of a source of goods. As ETW presented no evidence that such an image existed, or that it was contained in the poster, there was no likelihood of consumer confusion as a matter of law; the plaintiff's Lanham Act and Ohio trademark law claims therefore failed. Claims based on the use of Woods' name (a registered trademark) were also summarily disposed of, as the court found the name

was used in a descriptive capacity consistent with the fair use protections in trademark law.

Amici Focus on Publicity Right

Although ETW has appealed these holdings as well, the amici's brief concerns only the right of publicity claim. Judge Gaughan in the district court held that the poster fell within the scope of full First Amendment protection, precluding liability under tort law. In so holding, she rejected the plaintiff's argu-

ment that the poster was commercial speech and not entitled to full constitutional protection.

The amici will again address this argument on appeal. The brief, still in draft form, first points out that contemporary constitutional jurisprudence recognizes works of visual expression, including the painting re-

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... the traditional immunity from right of publicity suits fashioned initially for "newsworthy" uses of individuals' likenesses should extend to expressive uses as well.

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Law Professors Join in Amicus Effort

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produced on Jireh's poster, as fully protected speech. Therefore, it follows that the traditional immunity from right of publicity suits fashioned initially for "newsworthy" uses of individuals' likenesses should extend to expressive uses as well. This argument opposes ETW's assertion that all but newsworthy uses are "commercial," a notion that the amici attribute to early twentieth century concepts of the First Amendment, rather than to modern jurisprudence.

The brief goes on to refute the plaintiff's suggestion that because Jireh is a publisher and not the painting's original artist, the First Amendment will not avert a right of publicity claim. It cites *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which noted that "the [Supreme] Court's decisions involving corporations in the business of communication or entertainment are based not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas." Furthermore, the brief argues, the fact that the poster was part of a large edition, and not a unique work, does not derogate from its protection under the First Amendment as expressive speech.

Not a Traditional Property Dispute

In a final point, the amici argue that this is not a traditional conflict between property rights and speech rights, where the defendant tries to use the plaintiff's physical property for speech activities. Rather, they assert, here the property is the publicly available subject matter of the speech itself; the right to use such information for purposes of expression is the core of the First Amendment. Hence, the tension that results should normally resolve itself in favor of expression. Furthermore, the property interest in a "likeness" is such an amorphous one that courts must observe great restraint in protecting it through limitations on speech, particularly where, as here, the asserted interest is in a secondary market (endorsements).

The New York Times Company, joined by Time Inc. and the Newspaper Association of America, will also file an amicus curiae brief, which in its draft form presses the law professors' arguments regarding the ir-

relevance of the publisher/artist distinction and the extent of reproduction of the poster. In the draft, authored by Adam Liptak, amici argue:

ETW would have this Court work from a model in which Mr. Woods is granted complete control over the use of his name, likeness and story, with a few narrow exceptions. We argue for a model in which speech concerning Mr. Woods is unregulated, with a few narrow exceptions, notably libel and commercial endorsements.

The Reporters Committee for Freedom of the Press and the Volunteer Lawyers for the Arts are expected to file briefs as amici curiae as well. The filing deadline is August 23.

The Screen Actors Guild, the Major League Baseball Players Association and the NFL Players Association and a group of organizations, including Elvis Presley Enterprises and Arnold Palmer Enterprises, have filed amicus briefs on behalf of ETW.

UPDATE

Gray v. St. Martin's Press, Inc. and Susan Trento

*First Circuit Affirms Jury Verdict for St.
Martin's Press and Author Trento
in Suit by Robert Gray*

In this long-fought libel suit brought by Robert K. Gray, leading Washington figure and high-powered lobbyist, against St. Martin's Press and author Susan Trento, the Court of Appeals for the First Circuit has upheld the partial summary judgment granted to defendants on a number of the statements at issue, the finding that Gray was a limited purpose public figure, and the jury verdict in favor of defendants on the remaining disputed statements. In so doing, the First Circuit panel reviewed issues of opinion, public figure status and actual malice and on each issue published a remarkably useful, quotable analysis. A detailed review of this opinion will appear in next month's *LDRC LibelLetter*.

Anti-Gangsta Rapper C. Delores Tucker Allowed Suit Against Press in Pa. Court

Emphasizing Consortium Claim Can Be Defamatory

By Amy B. Ginensky and Michael E. Baughman

In a remarkable ruling, the Pennsylvania Superior Court has held that newspaper articles which “emphasized” the consortium claim in a plaintiff’s lawsuit could create a defamatory suggestion that the plaintiff and her husband are “overly concerned with sexual matters.” *Tucker v. MTS Inc*, No. 99-1169 (3d Cir. July 17, 2000). Although the Superior Court recognized that the plaintiffs — anti-gangsta rap crusader C. Delores Tucker and her husband — did make a claim for loss of consortium against rapper Tupac Shakur, and that a loss of consortium claim does include damages for sexual harm, the court found the articles actionable because it thought the jury could decide it was unfair to highlight these elements of the Tuckers’ claims. The decision undermines the press’ constitutional right to exercise editorial judgment in determining what *true* elements of a news story are of public interest and concern and places that decision in the hands of a jury.

Only the Latest in Tucker v. Shakur

The Superior Court’s ruling is the latest installment in an ongoing dispute between C. Delores Tucker and the late rap star, Tupac Shakur. Mrs. Tucker is the former Secretary of the Commonwealth of Pennsylvania and a well known figure in the African American community. In 1993, she helped launch a nationwide campaign against “gangsta rap” music — music which she claimed glorified violence, sex, drugs, and criminal behavior.

Her campaign caught the attention of the gangsta rap community, and most particularly one of its biggest stars, Tupac Shakur. Apparently irked by Mrs. Tucker’s campaign, Shakur penned two songs which gave his views on Mrs. Tucker and her campaign. In one, called “How Do U Want It,” Shakur rapped: “Delores Tucker, yous a muthafucka, instead of trying to help a nigga you destroy a brotha, worse than the others, Bill Clinton, Mr. Bob Dole, you too old to understand the way the game’s told.”

Just as Shakur did not care much for Mrs. Tucker’s campaign, Mrs. Tucker did not much care for Shakur’s lyrics. And so the litigation began. First, Mrs. Tucker

sued Shakur and others in the U.S. District Court for the Eastern District of Pennsylvania, claiming Shakur’s “vile and offensive lyrics” defamed her and caused her great humiliation, mental pain and suffering. Mrs. Tucker’s husband, William, joined that lawsuit, claiming loss of consortium. The Tuckers issued a press release announcing the lawsuit. Richard Fischbein, the administrator for Shakur’s estate, made his own comments about the lawsuit, and particularly the claim for loss of consortium: “It’s hard for me to conceive how these lyrics could destroy her sex life. But we can only wait for the proof to be revealed in court.”

Lawsuit Was News

Not surprisingly, scores of newspapers and magazines picked up the story. *Time Magazine* published a short piece in its “People Section” stating that “The prize for the most bizarre suit . . . goes to anti-rap warrior C. Delores Tucker, who claims that lewd remarks made about her on Shakur’s album . . . caused her so much distress that she and her husband have not been able to have sex.” *Newsweek* stated that “Even C. Delores Tucker, the gangsta rap foe, wants a chunk [of Shakur’s estate]. She and her husband claim that a lyrical attack by Tupac iced their sex life.” Numerous other publications around the country also picked up on the story.

First, A Federal Suit — Dismissed

Believing that the media had trivialized her lawsuit by picking up on the “sexual spin” Mr. Fischbein had used to describe it, Mrs. Tucker turned her ire to the media. First, Mrs. Tucker and her husband sued Fischbein, *Time Magazine*, *Newsweek* and others in the United States District Court for the Eastern District of Pennsylvania for defamation. Judge Ronald Buckwalter eventually (after denying a motion to dismiss) granted summary judgment, finding that a statement that the Tuckers claimed Tupac’s lyrics harmed their sex life might annoy and embarrass them, but it cannot harm their reputation. Judge Buckwalter also found that the Tuckers could not establish constitutional malice. Meanwhile, Judge Buckwalter dis-

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missed the Tuckers' claim against Shakur, finding that Shakur's lyrics were non-defamatory protected opinion. The Tuckers appealed both rulings to the United States Court of Appeals for the Third Circuit, which affirmed the ruling.

Plus Two More Lawsuits

Before Judge Buckwalter granted summary judgment in the *Fischbein* case, the Tuckers filed two more lawsuits — a federal action against over 100 publications for publishing articles describing the Tuckers' suit against Shakur with the alleged "sexual spin" and a state court action against a few non-diverse defendants, including the *Daily News* and Philadelphia's local legal periodical, *The Legal Intelligencer*. The *Philadelphia Daily News* had run a cover story on the lawsuit, with the headline "C. Delores Tucker claims CD gave her — A Dirty Rap. Suit vs. Shakur estate says 'vile' lyrics ruined her rep — and her sex life." The article reported that the lawsuit claimed Shakur's lyrics allegedly "caused her mental anguish and diminished her sex life." The article also reported Fischbein's statement, as well as extensive quotations from the Tuckers' attorney, Richard Angino. *The Legal Intelligencer* also focused on the injury to sex life claim.

The federal action was stayed pending resolution of the appeal in *Tucker v. Fischbein*. The state court action proceeded.

Motions to Dismiss in State Suit

In the Philadelphia trial court, Philadelphia Newspapers, Inc. (publisher of the *Daily News*) filed a motion to dismiss (in Pennsylvania called preliminary objections), relying on Judge Buckwalter's opinion in the *Fischbein* litigation that a statement that one has filed a claim for damage to his or her sex life, while perhaps annoying or embarrassing, is not defamatory because it could not possibly harm reputation. The *Legal Intelligencer* filed a separate motion, arguing the same point, and also asking the trial court to dismiss the case on the grounds of constitutional malice and the fair report privilege. The

Philadelphia Court of Common Pleas granted the motion, agreeing that both articles are incapable of a defamatory meaning. The trial court also concluded that the Tuckers could not establish constitutional malice since the articles were true (loss of consortium includes damages to sexual relations) and that the articles were protected by Pennsylvania's fair report privilege. The Tuckers appealed both rulings to the United States Court of Appeals for the Third Circuit which, thus far, has affirmed the ruling in the Shakur suit.

A three judge panel of the Superior Court reversed. The Superior Court recognized that the Tuckers had indeed alleged a loss of consortium claim in their lawsuit against Shakur. The Superior Court also recognized that loss of consortium includes claims that sexual relations between spouses have been affected by the defendants' actions. Nevertheless, the Superior Court found that the *Daily News* and *Legal Intelligencer* articles were capable of a defamatory meaning, and that the plaintiffs had adequately pleaded constitutional malice and abuse of the fair report privilege.

What is the Defamatory Meaning?

With respect to the defamatory meaning of the articles, in their briefs the Tuckers primarily argued that the articles were defamatory because they demeaned their lawsuit against Shakur and made them and their lawsuit look ridiculous, foolish and litigious. The Superior Court agreed that the article was capable of a defamatory meaning, but for a different reason.

In the present case, the Tuckers stress that the emphasis in the articles on the one possible component of a loss of consortium claim, to the exclusion of other ingredients, creates an impression that will expose the Tuckers to public hatred and ridicule. We agree with the Tuckers assertion that, because of their advanced age and their reputation as people of strong morals, the suggestion in the newspaper articles that the Tuckers are overly concerned with sexual matters could be capable of defamatory meaning.

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Apparently in response to the defendants' argument that the articles, while perhaps annoying or embarrassing, are not defamatory, the court attempted to explain why the articles here were more than annoying or embarrassing. The court examined the *allegations* in the complaint, and found the Tuckers had alleged "personal humiliation and mental anguish and suffering" and "world wide ridicule." Relying on case law discussing what type of *damages* are available in a defamation action once liability is established, the court concluded that "personal humiliation and mental anguish" are compensable damages in a defamation action. It thus drew a distinction between statements which are alleged to cause "annoyance or embarrassment" and statements which are *alleged* to cause "personal humiliation and mental anguish and suffering" — in cases alleging the latter, the court held a jury could find the article to be defamatory.

The court misconstrued settled defamation law in several respects in reaching its conclusion. First, the question of whether an article is capable of a defamatory meaning is one of *law* for the court to decide. The Superior Court improperly looked to the allegations in the complaint rather than the text of the articles to determine whether the articles were capable of a defamatory meaning.

Further, even if it were proper to look at the allegations in the complaint, an article can cause "personal humiliation and mental anguish" and still not be defamatory because defamation law is designed to protect an individual's *reputation*, not to rectify hurt feelings. The Superior Court ignored the pronouncement of the Pennsylvania Supreme Court that "it is not enough that the victim . . . be embarrassed or annoyed, *he must have suffered the kind of harm which has grievously fractured his standing in the community of respectable society.*" *Scott-Taylor, Inc. v. Stokes*, 229 A.2d 733, 734 (Pa.

1967).

Finally, even if the articles suggested that the Tuckers are overly concerned with sexual matters and even if that suggestion were capable of harming their reputation, it is an opinion based on disclosed facts. The press and public certainly have the right to draw the conclusion that, if the Tuckers are claiming that a rap star's lyrics harmed their sex life, they are overly concerned with sexual matters. And, such a statement is not capable of being proven true or false by objectively verifiable evidence under *Milkovich* — what one person might consider an "overly" active interest in sexual matters, another might consider prudishness.

The bottom line is this: even if the articles suggest that the Tuckers are overly concerned with sexual matters, how can such a suggestion possibly harm the reputation of a married couple? Judge Buckwalter correctly concluded that it cannot. The Superior Court did not even mention Judge Buckwalter's opinion, and made no attempt to distinguish it. If the type of statements complained of here state a claim for defamation, it is not difficult to imagine scores of persons who dislike the way they are portrayed in the media seeking relief.

Constitutional Malice, Truth and Fair Report

The court also found that the plaintiffs adequately pleaded constitutional malice. While it is not unusual for a court to refuse to dismiss a complaint at the pleading stage for failure to allege actual malice, the decision is unusual in this case because the court conceded that the facts contained in the articles were *true* — the court conceded that the *Shakur* lawsuit sought damages for loss of consortium and that loss of consortium includes damages for sex life. Nevertheless, the court concluded that the Tuckers had adequately pleaded constitutional malice because they alleged:

had the appellees more thoroughly investigated

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The Superior Court improperly looked to the allegations in the complaint rather than the text of the articles to determine whether the articles were capable of a defamatory meaning.

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the complaint and its allegations, they would have known that the complaint contained more than the consortium claim and would have more fairly covered the entire complaint. The Tuckers maintain that a comparison of the complaint, the Tuckers' news release and the published stories will reveal that the newspapers acted with more than mere negligence when they published the articles which indicated that the complaint only encompassed the claim that the Tucker's sex life was ruined by the derogatory lyrics.

For essentially the same reason the Superior Court reversed the dismissal on fair report.

This reasoning is both factually and legally wrong. First, as the panel conceded earlier in the opinion, neither the *Daily News* nor the *Legal* articles indicated that the complaint "only" encompassed the Tuckers' claim that their sex life was damaged — both explained that the complaint sought damages for reputation, mental suffering, humiliation and sexual harm.

More importantly, the court appears to state that actual malice can be found if a newspaper did not "fairly" cover the Tuckers' complaint — even if the account is true. The United States Supreme Court has, of course, repeatedly rejected any such test. Of course, the key question in determining whether actual malice exists goes to *falsity* not fairness — did the defendants know the article was false or subjectively entertain serious doubts as to its truth. Here, the court concedes that the article was true — the Tuckers did seek, in part, damages for sexual harm. Malice cannot be established by simply showing that the defendants could have written the articles in a way that the Tuckers would have preferred.

In the end, that is perhaps the most frightening aspect of the Superior Court's decision. Clearly, the Superior Court did not think it was fair to highlight the fact that the Tuckers had asserted a loss of consortium claim against Shakur. But the very purpose of the First

Amendment is to take editorial decisions out of government hands. In the exercise of sound editorial judgment, a newspaper may determine that it is interesting or ironic that a woman who has spent years campaigning against gangsta rap music because she believed the lyrics glorified sex, drugs and violence herself claimed that those very lyrics had harmed her sexual relationship with her husband. The Tuckers might not like the media calling this irony to the public's attention. The courts might not like it either. But such speech is nonetheless true, and is therefore constitutionally protected.

. . . . the court appears to state that actual malice can be found if a newspaper did not "fairly" cover the Tuckers' complaint — even if the account is true.

What Next?

The defendants filed a petition for reargument *en banc* on July 12, 2000, which was joined by amici briefs from The New York Times Company and the local Fraternal Order of Police. Meanwhile, all await the Third Circuit's ruling in the *Fischbein* case.

Ironically, while the petition for reargument was pending in the Superior Court, the Third Circuit affirmed Judge Buckwalter's decision to dismiss the Tuckers' suit against Shakur. In an unpublished opinion, the Third Circuit found that "[t]he reference to Tucker as a "muthafucka" is part of an expression of opinion — Shakur's opinion that Tucker was out to hurt rather than help her fellow African-Americans. An expression of opinion, without more, is not defamatory."

So, as it now stands, it was not defamatory for Shakur to suggest that Mrs. Tucker was out to hurt her fellow African-Americans by calling her a "muthafucka," but it was defamatory to allegedly suggest that the Tuckers were overly concerned with sexual matters for bringing a loss of consortium claim based on those very lyrics.

Amy B. Ginensky is a partner, and Michael E. Baughman is an associate, in the Media Law Department at Dechert. They represent Philadelphia Newspapers, Inc. in the Tucker v. Philadelphia Daily News case.

Judge Permits Law Firm's Defamation Claims Against DaimlerChrysler

Analysis of "Opinion" is Key

In yet another set of claims based upon a litigation press release by Philadelphia-based law firm Greitzer & Locks, federal district judge William H. Yohn, Jr. ruled that defamation claims against DaimlerChrysler could proceed for remarks it and its general counsel, Lewis Goldfarb, made accusing Greitzer & Locks of engaging in "legalized blackmail" and attempting to transform the legal system into a "rigged lottery." *DaimlerChrysler v. Askinazi*, No. 99-5581, 2000 U.S. Dist. LEXIS 9664 (E.D. Pa. July 12, 2000).

The allegedly defamatory statements appeared in a company press release and in comments attributed to Goldfarb by the *Wall Street Journal* at the time the automaker was filing suit against Greitzer & Locks for pursuing an allegedly frivolous class action claim in which the lead plaintiff did not even own the car at issue.

Greitzer & Locks' complaint identifies four DaimlerChrysler statements which it alleges are defamatory and designed to prevent a representative with standing from engaging the legal services of Greitzer & Locks in future litigation against the automaker.

- The first statement avers that the firm and its lawyers abuse the legal system by filing "unwarranted and baseless cases";
- The second, that the lawyers engage in "'legalized blackmail' by launching frivolous suits to 'coerce' Chrysler and others into settling claims";
- The third, that they "seek to transform the legal system into a 'rigged lottery'"; and
- The fourth, that they "dupe their clients for their own financial benefit."

In his evaluation of the statements, Judge Yohn dismissed claims based on two of the statements, but has allowed the claims against the other two to stand. Greitzer & Locks have a valid defamation claim, he ruled, for the statement characterizing the lawyers as "lawyers who engage in 'legalized blackmail' by launching frivolous suits to 'coerce' Chrysler and others into settling claims." Yohn held that a reasonable person "would interpret this statement as an assertion

that Greitzer & Locks filed [its class action suit] not because it was attempting to adjudicate a legitimate claim but because it believed that, regardless of the merits of [the suit], it could frighten DaimlerChrysler into settling the case."

Yohn also concluded that Greitzer & Locks could proceed against the statement that its lawyers "seek to transform the legal system into a 'rigged lottery.'" Yohn expressed the view that a reasonable person "would understand this statement to imply that Greitzer & Locks expected to force DaimlerChrysler into a settlement in [its class action suit] that would be unrelated to the merits of the case. . . . Because this statement tends to damage the reputation of Greitzer and Locks in the eyes of the community, it is defamatory."

Yohn, however, threw out the complaint against DaimlerChrysler's statement that the law firm abused the legal system by filing frivolous complaints, noting that it expressed opinion. "Because the factual bases for DaimlerChrysler's opinion are clear [in the press release]," Yohn wrote, "a reader is able to evaluate them and accept or reject the opinion based on that evaluation. Thus, the opinion is not actionable despite its defamatory nature."

Similarly, Yohn concluded that DaimlerChrysler was expressing an opinion when it stated that Greitzer & Locks were lawyers "who dupe their clients for their own financial benefit." Yohn based this conclusion on his analysis that "the opinion is based on the perception that any benefit consumers received from [the class action suit] . . . is outweighed by the increase in product costs that results from the class defendants passing along to consumers the costs of defending [it]."

Yohn's ruling on the defamation complaint is the third opinion he has issued in *DaimlerChrysler v. Askinazi*. In an earlier opinion, Yohn ruled that DaimlerChrysler's general counsel, Goldfarb, must answer to the defamations claims. In the other opinion, Yohn refused to dismiss DaimlerChrysler's complaint against the lead plaintiff in the class action suit, Liscomb, and Maryland attorney Askinazi for the filing of a frivolous suit.

Application for Kennel Club Judge is Matter of Public Concern

Plaintiff “Dogged” by Failure to Show Gross Irresponsibility

On July 7, the United States District Court for the Southern District of New York granted summary judgment for all media defendants in a defamation action brought after several critical articles were published in *Dog News* concerning inconsistencies in plaintiff’s application for judging American Kennel Club (the “AKC”) dog shows. *Abbott v. Harris Pub., Inc.*, 2000 U.S. Dist. LEXIS 9384. In granting summary judgment, the court held that it’s application was a matter of legitimate public concern, at least to a particular segment of the community, warranting the application of New York’s gross irresponsibility.

Plaintiff, Vicki Abbott is an AKC-sanctioned dog show judge, who had submitted an application for extending her judging privileges to additional dog breeds. She was allegedly defamed by articles written for *Dog News* by Sari

Tietjen, Denise Kodner and Mathew Stander (which were edited by Stander) after they learned that Abbott had been granted extended judging privileges even though an AKC investigation had shown that she had allegedly made false representations in her judging application. In particular, Abbott represented in her application that she had several in-depth conversations with both Tietjen and Stander concerning dog breeds, which both reporters claimed they could not recall had ever taken place.

The court, citing *Don King Productions, Inc. v. Douglas*, 742 F.Supp. 778 (S.D.N.Y. 1990), determined that although the controversy did not affect the general population, it nevertheless was a matter of public concern because it affected a particular segment of the community; the dog show community. Consequently, because the case involved a private plaintiff and a matter of public concern, the defendants could only be held liable, under New York law, if they acted in a “grossly irresponsible manner without the due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.” *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199 (1975).

In addressing the actions of the reporters, the court

held that Abbott had failed to raise any facts showing gross irresponsibility and that both Tietjen and Stander had complied with “the standard of information gathering and dissemination ordinarily followed by responsible parties.” *Huggins v. Moore*, 94 N.Y.2d 296, 301-02 (1999). The court stated that Tietjen had confirmed her factual assertions from several reliable sources, as well as her own personal knowledge, and “that there was no reason to doubt the veracity of the information received from [the AKC Board members], and indeed good reason to believe it was accurate,” quoting *Gaeta v. New York News Inc.*, 62 N.Y.2d 340, 477.

The court further stated that Stander, as editor, did not act with gross irresponsibility, but had followed editorial policy, which required confirmation of any controversial subject matter from more than

one source. Additionally, he had followed up by contacting several sources personally concerning Tietjen’s story and discussed the content and basis of Koder’s column with her before it was published.

The court also stated that Stander was not grossly irresponsible when he wrote a letter to the AKC Chairman asserting that many people had told him that Abbott had incorrectly listed their names on her application and that such communication was privileged because it was made to another with a common interest. (*See Nyitray v. Johnson*, Nol 96 Civ. 6150 (S.D.N.Y. Feb. 19, 1998), *aff’d*, 166 F.3d 1201 (2d Cir. 1998)).

Lastly, regarding Harris Publications and *Dog News*, the court determined that the publishers had no reason to doubt the journalistic integrity of any of their reporters or the publication’s editorial practices and, therefore, were not liable for gross irresponsibility, noting that “[a] publisher will not be held liable for an article later shown to be false if it relies upon the integrity of a reputable author and has no serious reason to question the accuracy of the information provided by that author.” *Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 595 (1989).

The court...determined that although the controversy did not affect the general population, it nevertheless was a matter of public concern because it affected a particular segment of the community....

Wrath Of Khan Is Not Actual Malice

Nor are Multiple Errors as Times Prevails at Appellate Level

By Jeremy Feigelson

Multiple errors do not prove actual malice, when the basis of each error is a well-documented and honest misunderstanding of written source materials. So held New York's Appellate Division, First Department in dismissing a libel case against *The New York Times*. *Khan v. New York Times Co.*, ___ A.D.2d, ___ 710 N.Y.S.2d 41 (App. Div. 1st Dep't 2000).

In an October 1993 article, *The Times* stated that a prominent California stockbroker named Rafi Khan was being sued by the SEC. He wasn't. Khan responded by giving the reporter a telephonic tongue-lashing memorable for its force ("I may have been screaming," he admitted at his deposition) and its clarity ("but I was civil," he added). Khan told the reporter he was "totally clean," "never ever ever" tarred by sanction. The reporter (Khan said) promised to call before writing anything else about him.

Three months later, without contacting Khan, the same reporter wrote that Khan had once been fined for fraud in Canada. He hadn't been. *The Times* promptly ran a correction, as it had done following the first error.

An Honest Misreading

In both cases, the reporter had simply misread background articles that she consulted while preparing her own articles. She then wrote the statements at issue based on her honest misunderstanding of these written sources. At her deposition, the reporter identified the exact source passages that, with hindsight, she realized she had misread. Neither passage was a model of clarity, and the reporter's misunderstandings could be explained by reference to the text. The sources recited historical matters of the kind for which confirmation is not usually sought — hence the lack of contact with Khan before publishing, notwithstanding the supposed promise. Contemporaneous federal court findings that questioned Mr. Khan's integrity also contributed to the reporting context.

In response, Khan contended with gusto that light-

ning does not strike twice by accident. He also produced an expert affidavit from a retired Pulitzer winner who attacked *The Times'* methods.

The trial court denied summary judgment, erroneously equating actual malice with gross irresponsibility under *Chapadeau v. Utica Observer Dispatch*, 38 N.Y.2d 196, 199 (1975). *Chapadeau* actually supplies an objective test akin to negligence, and applies under New York law to private figure plaintiffs. The subjective actual malice test governs the claims of public figures like Mr. Khan. The trial court was unmoved by *Mahoney v. Adirondack Publishing*, 71 N.Y.2d 31 (1987), which holds that honest misunderstanding of oral sources is not actual malice.

Disentangles the Fault Standards

Ruling on *The Times'* interlocutory appeal, the panel began by stressing that the actual malice and *Chapadeau* tests should not be conflated. Next it held that *Mahoney* indeed controlled. The test, in the words of *Mahoney*, is whether the reporter "could not have misperceived" the source, be it oral or written. Khan's lightning-striking-twice theory and his expert affidavit, whatever appeal they held, did not supply the requisite clear and convincing evidence of conscious error. Instead, the reporter's sworn and well-supported explanations led to summary judgment. Nor was the appellate court troubled by the supposed breach of promise, given that the reporter thought she was extracting historical facts from reliable written sources (Dow Jones in one case, Bloomberg in the other).

Khan has not sought leave to appeal, giving the Appellate Division the final word. Recently he has been occupied with other matters. Since suing *The Times* in 1994, he has pled guilty to tax fraud, been sued civilly by the SEC for fraud (after all), and accepted a five-year bar from the securities industry to settle the SEC case.

John Kiernan and Jeremy Feigelson, of Debevoise & Plimpton, together with Adam Liptak of The Times's Legal Department, represented defendants in this case.

Illinois Circuit Court Rules That Actual Malice Cannot Defeat Fair Reporting Privilege

by Michael Conway and Miki Vucic

In the face of conflicting appellate authority, the Illinois circuit court in Chicago ruled July 28 that the fair reporting privilege cannot be defeated by actual malice and, on that basis, dismissed a libel lawsuit against CBS Broadcasting Inc.

The lawsuit arose from a CBS network broadcast on “Public Eye with Bryant Gumble” about spousal abuse by law enforcement officers. Carol Marin, the network’s correspondent, interviewed Adrienne Cherry, the divorced wife of Chicago police officer Carl Cherry. Adrienne Cherry said her ex-husband had threatened to have her killed.

The CBS broadcast explained that Adrienne and Carl Cherry were involved in a child custody dispute and that Carl Cherry, who would not speak directly to the CBS reporter, previously had categorically denied the charges against him.

CBS’ Chicago affiliate, WBBM-TV, also broadcast follow-up reports about these allegations about Carl Cherry on the local news programs.

Broadcast was Fair and Accurate

Carl Cherry sued CBS on three counts – defamation, false light invasion of privacy and public disclosure of private facts.

In a motion to dismiss, CBS asserted that the fair reporting privilege precluded liability because Adrienne Cherry’s allegations had previously been made in her sworn petition filed in the Cook County Circuit Court in a domestic relations proceeding against her husband when she successfully sought an order of protection against him.

Circuit Judge Kathy Flanagan ruled that the fair reporting privilege applied because the broadcast is an “accurate and complete or fair summary or abridgment of the proceedings.” However, the central issue before the Court was whether an allegation of actual malice defeated the fair reporting privilege under Illinois law. Specifically, Carl Cherry alleged that CBS knew that his ex-wife’s accusations were false and therefore published them with actual malice.

Conflicting Illinois Authority

In reviewing inconsistent Illinois Appellate Court

precedents, the Cook County Circuit Court held that actual malice could not, as a matter of law, defeat the privilege. Initially, the privilege in Illinois had been based upon the First Restatement of Torts, which included as an element of the privilege that the publication not be made solely for purposes of causing harm to the person defamed. The Second Restatement of Torts eliminated this element of the privilege.

While Judge Flanagan held that the Illinois Supreme Court had adopted the Second Restatement in 1980, as recently as 1998 the Illinois First District Appellate Court in *Lykowski v. Bergman*, 299 Ill. App. 3d 157 (1st Dist. 1998), had held that an allegation of actual malice defeated the fair reporting privilege. In 1999, the Illinois Second District Appellate Court held to the contrary in *Tepper v. Copley Press*, 308 Ill. App. 3d 713 (2d Dist. 1999).

Restatement Resolves Issue

Judge Flanagan said the Illinois Supreme Court’s adoption of the Second Restatement settled the question – the privilege is not lost even if actual malice is shown.

Originally, when the fair reporting privilege was recognized by the Illinois Supreme Court in *Lulay v. Peoria Journal-Star*, 34 Ill.2d 112 (1966), the definition of this privilege as taken from the *first* Restatement of Torts included the requirement that the publication was not made solely for the purposes of causing harm to the persona defamed. Thus, the privilege could be defeated by a showing of malice. In *Catalano v. Pechous*, 83 Ill.2d 146 (1980), the Illinois Supreme Court modified the privilege in accordance with Restatement (Second) of Torts and dropped the requirement of malice. Thus, a showing of malice cannot defeat the privilege once the privilege has been established.

Consistent With Privilege’s Purpose

Judge Flanagan’s ruling is consistent with the underlying rationale of the fair reporting privilege. The purpose of the privilege is to allow the press to report as the

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Illinois Circuit Court Rules That Actual Malice Cannot Defeat Fair Reporting Privilege

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representative of the public, who would have had the right to attend a trial or legislative session to observe what actually happened. Accordingly, the journalist's subjective knowledge or belief about the truthfulness of what occurred is irrelevant.

If actual malice could defeat the fair reporting privilege, the result would be perverse — the reporter would be compelled not to report what a witness at trial had said because the reporter subjectively believed the testimony to be false.

The fair reporting privilege defense resulted in Judge Flanagan's dismissal with prejudice of the defamation and false light claims. In an earlier ruling the court held that no claim for public disclosure of private facts had been pled because the allegations in the CBS broadcast were already public as part of the judicial record in the domestic relations case.

The essence of plaintiff's claims of defamation and false light involve the broadcast of allegations by his ex-wife that he threatened to kill her or have her killed and that he physically and mentally abused her. These allegations made by Mrs. Cherry on the broadcast are contained within a Petition for Order of Protection and Mrs. Cherry's affidavit filed with the Circuit Court of Cook County. These documents are part of the court file in the Cherrys' domestic relation case and are public record. On the broadcasts, videotapes and transcripts of which were provided to the court, Mrs. Cherry makes the same accusations that she did in the court records. In addition, the reporter prefaced the remarks by stating that the accusations by Mrs. Cherry were *allegations*, that she and Mr. Cherry were currently involved in a *custody battle* and that Mr. Cherry *categorically denies* the allegations. The court found that the news broadcasts fairly and accurately summarized the contents of the court record on this matter. Thus, the privilege applied.

CBS was represented by Susanna M. Lowy and Naomi B. Waltman of the CBS Law Department and Michael M. Conway and Miki Vucic of Hopkins & Sutter in Chicago.

Fair Report and Malice in Other States

Drawing from the LDRC 50-STATE SURVEY: MEDIA LIBEL LAW, the following is a list of some jurisdictions indicating whether the fair report privilege cannot be defeated by malice of any kind, whether the privilege can be defeated by actual malice, or whether the privilege can be defeated by common law malice:

CANNOT BE DEFEATED BY MALICE

1. **California:** *Green v. Cortez*, 151 Cal.App. 3d 1068 (1st Dist. 1984).
2. **Minnesota:** *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, No. C6-98.2421, 2000 Minn. LEXIS 279 (May 18, 2000).
3. **New Mexico:** *Stover v. Journal Publishing Co.*, 105 N.M. 291, 731 P.2d 1335 (Ct. App. 1985), *cert. denied*, 484 U.S. 897 (1987)
4. **New York:** Under Section 74 of the New York Civil Rights Law, a fair and substantially accurate report of an official, judicial or legislative proceeding cannot be the basis for a defamation action. *Holy Spirit Ass'n v. New York Times Co.*, 49 N.Y.2d 63, 399 N.E.2d 1185 (1979); *Branca v. Mayesh*, 101 A.D.2d 872 (2d Dep't 1984).

DEFEATED BY ACTUAL MALICE

1. **Idaho:** Idaho Code §6-713 (4) creates a "fair and true report" privilege which can be defeated by a showing of constitutional actual malice. *See Wiemer v. Rankin*, 117 Idaho 566 (1990).
2. **Louisiana:** *See Dileo v. Davis*, 23 Media L. Rep. 1756 (E.D. La. 1995).
3. **Montana:** A statutory privilege (Section 27-1-804 (4), MCA) protects nonmalicious reports. No case has clearly defined the meaning of "malice", but courts would be expected to follow *New York Times v. Sullivan*. *See Cox v. Lee Enterprises, Inc.*, 723 P.2d 238 (1986).
4. **North Carolina:** General qualified privileges can be defeated by common law malice or constitutional actual malice. *See Clark v. Brown*, 393 S.E.2d 134 (1990).
5. **South Dakota:** The statutory privilege (SDCL

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Fair Report and Malice in Other States

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20-11-5 (4)) can be defeated if the statement is made with constitutional actual malice. However, this case was decided prior to adoption of the *Restatement (Second) of Torts*, § 611. See *Hackworth v. Larson*, 165 N.W.2d 705 (S.D. 1969).

6. **Vermont:** The privilege can be defeated by proving either common law malice or constitutional actual malice. See *Lent v. Huntoon*, 470 A.2d 1162 (1983).

7. **Virginia:** The general qualified privilege can be defeated by proving either common law malice or constitutional actual malice. See, e.g., *Smalls v. Wright*, 399 S.E.2d 805 (1991).

8. **Washington:** *Mark v. Seattle Times*, 635 P.2d 1081, 7 Media L. Rep. 2209 (1981), cert. denied, 457 U.S. 1124 (1982).

9. **Wyoming:** The statutory privilege (Wyo. Stats. §§ 1-29-104 and 1-29-105) can be defeated by a showing of constitutional actual malice. See *Casteel v. The News-Record, Inc.*, 875 P.2d 21 (Wyo. 1994).

DEFEATED BY COMMON LAW MALICE

1. **District of Columbia:** The privilege can be defeated with a showing of common law malice. See *Mosrie v. Trussell*, 467 A.2d 475 (D.C. App. 1983).

2. **Kentucky:** Kentucky statute KRS 411.060 protects reports unless “maliciously made”. This form of malice is non-constitutional malice. See *Pearce v. Courier-Journal & Louisville Times Co.*, 683 S.W.2d 633 (Ky. App. 1985).

3. **Minnesota:** See *Moreno v. Crookston Times Printing Cos.*, 594 N.W.2d 555 (Minn. Ct. App. 1999)

4. **Nebraska:** The privilege can be overcome by common law malice. However, this case was decided prior to the 1977 revised *Restatement (Second) of Torts*, § 611. See *Rhodes v. Star Herald Printing Co.*, 113 N.W.2d 658 (1962).

5. **Nevada:** The fair report privilege recognized in *Thompson v. Powning*, 15 Nev. 195 (1880), could be defeated by a showing of common law malice. Additionally, general qualified privileges can be defeated by a showing of common law malice. No recent cases are reported. See *Circus Hotels, Inc. v. Witherspoon*, 657

P.2d 101 (1983).

6. **New Jersey:** The privilege can be defeated by a showing of malice. New Jersey is unsettled as to what type of malice applies. See *Fortenbaugh v. New Jersey Press, Inc.*, 722 A.2d 568 (App. Div. 1999). The Third Circuit stated that “malice in fact (ill will) defeats the fair report privilege.” *Schiavonne Construction Co., v. Time, Inc.*, 847 F.2d 1069, 1085 n.25 (3d Cir. 1988).

7. **North Dakota:** The statutory privilege (N.D. Cent. Code, §14-02-05) applies only if the statement is made without malice. The malice standard to defeat the statutory privilege is not clear. However, guidance may be found in the common law malice standard required to defeat general qualified privileges. See *Soentgen v. Q & R Clinics, et al.*, 467 N.W.2d 73 (1991).

8. **Pennsylvania:** The privilege can be defeated by non-constitutional malice. However, this case was decided prior to the adoption of the 1977 *Restatement (Second) of Torts*, § 611. See *Binder v. Triangle Pub. Inc.*, 275 A.2d 53 (1971).

9. **Rhode Island:** The privilege can be defeated if the report is motivated by non-constitutional malice. However, this case was decided prior to the adoption of the 1977 *Restatement (Second) of Torts*, § 611. See *Bray v. Providence Journal Co.*, 101 R.I. 111 (1966).

10. **South Carolina:** It appears that the privilege can be defeated by a showing of non-constitutional malice. See *Richardson v. The State-Record Co.*, 499 S.E.2d 822 (1998).

11. **Utah:** The statutory privilege (Utah Code Ann. 45-2-3 (4) (1993)) can be defeated by a showing of common law malice. See *Russell v. Thomson Newspapers, Inc.* 842 P.2d 896 (Utah 1992).

12. **Washington:** The privilege can be defeated by proving common law malice. See *Corbally v. Kennewick School Dist.*, 973 P.2d 1074 (1999).

In a number of other states, including Ohio, Georgia and Maryland, the courts are either split or have not resolved what, if any, type of malice would defeat the privilege.

Additional cites for this compendium came from a memo prepared by Consuelo Robins, a summer associate with Hopkins & Sutter, Chicago, Illinois.

California Court: San Quentin Must Let Witnesses See Full Death Penalty Process

First Amendment Requires Access

By Terry Francke

Editor's Note: Terry Francke is General Counsel of the California First Amendment Coalition ("CFAC"), a party in this proceeding. With some modification, the following article was taken from CFAC'S FLASH, the organization's e-mail newsletter, 7/28/00.)

A federal judge has ordered San Quentin prison officials henceforth to allow official witnesses, including but not limited to press observers, to view the entire process of lethal injection executions from the point the prisoner enters the death chamber until expiration. The court's rationale is that the First Amendment requires such exposure. *California First Amendment Coalition v. Woodford*, No. C-96-1291-VRW (N.D.Cal. 7/26/00)

The order is the latest phase in a protracted course of litigation brought by the California First Amendment Coalition and the Northern California Chapter of the Society of Professional Journalists.

Issued by U.S. District Court Judge Vaughn Walker on Wednesday, July 26, just a day before he ended another trial in approving the Hearst Corporation's sale of the San Francisco Examiner, the order could hardly have been a more resounding vindication of the plaintiffs' legal theory, which is that executions are not just prison events but the most drastic proceedings in the criminal justice system.

Accordingly, CFAC and SPJ attorneys have contended, the legal standard for how the government must behave derives not entirely from a line of U.S. Supreme Court cases holding that the press has no better right than the general public to enter prisons and visit inmates, but also from the high court's holdings that criminal justice proceedings must be as open to public observation as possible, consistent with fair and effective trials.

Court Rejects State Concerns

The order results from a trial before Walker earlier this year in which the decisive issue was whether the practice of preventing witnesses from viewing all but the final moments of lethal injection executions, with the condemned already strapped to the gurney and attached to the toxic fluid shunt, was an "exaggerated response" to the prison officials' expressed concern for the safety of the attending

"death team."

Officials of the prison and the Department of Corrections maintained that since lethal injection was typically a more complicated and lengthy procedure than gassing, the death team members were exposed for a longer period to the gaze of witnesses, who could more readily identify them to the public or to prisoners, resulting in retaliation.

Judge Walker's findings of fact were to the contrary in two senses. First, there was no evidence at trial that the concerns were well founded in the first place. Secondly, even if the concerns were valid, the death team members could wear surgical masks that would effectively prevent their identification — as well as serving the practical protection that is typically sought by medical professionals whenever blood may spatter from an attempt at intubation.

Court Findings

In *CFAC v. Woodford*, Case No. C-96-1291-VRW, (get pdf copy online at <http://www.cand.uscourts.gov/cand/tentrule.nsf/4f9d4c4a03b0cf70882567980073b2e4/d3cb9cb58ed1ef1588256928007bcb2?OpenDocument>), Judge Walker found that:

- * Any of some 800 San Quentin staff could be selected for the death team visible at executions, comprising five to 10 staff members.

- * The process has been known to take about 25 minutes from the time the prisoner is brought into the death chamber, but the final phase is getting shorter — once as briefly as six minutes.

- * In the one execution fully exposed to the public (under Judge Walker's first, short-lived order, overturned by the U.S. Ninth Circuit Court of Appeals in 1998), no member of the death team dropped out in fear of being seen.

- * Once the prisoner is strapped to the gurney, the fact that the prisoner is resistant does not complicate the process of intubation appreciably.

- * Witnesses to both the first lethal injection (partly concealed) and the second (more visible, under court order) "perceived a dramatic contrast" in being able to see

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San Quentin Must Let Witnesses See Full Death Penalty Process

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the attachment of the injection apparatus.

* Despite the state's concern that a "hostile or combative" prisoner might force the death team to appear brutal in the force used to subdue him, no one has so far resisted.

* Of the 35 states and two federal jurisdictions having adopted lethal injection, most use the concealment in effect in California, and only one (Oregon) allows full viewing — under court order.

* Staff safety is a legitimate concern, but no staff member's identity has ever been disclosed by the media, and there was no evidence at trial that even if identified, a death team member would be more likely to be attacked than usual.

* No attempt is made to conceal the identities of other "high-profile individuals" equally complicit in an execution, including the warden, the governor and the involved judges.

* Surgical masks are a "practical alternative" to process concealment in addressing death team members' need for anonymity.

* The challenged concealment procedure "was motivated, at least in part, by a concern that the strapping of a condemned inmate, the injection of intravenous lines or other aspects of a lethal injection execution would be perceived as brutal by the public and thus, to that extent, prompted by considerations other than legitimate concerns for prison personnel safety."

Judge Walker notes that the prison officials are not resisting observation as a simple exercise of evenhanded exclusion from prisons on security grounds, held to be sufficient in the supreme court's prison access cases. California prison authorities instead "have a history of resistance to media presence at executions, at one point trying to prevent reporters from bringing pencils and paper into the viewing chamber and even attempting to exclude the media's presence altogether."

More vitally, concealing how the process works — and thus preventing an assessment of whether it meets constitutional standards against cruel and unusual punishment — leaves just one non-governmental witness to these facts: one who will tell no tales. Judge Walker observes:

*California prison authorities...
"have a history of resistance to
media presence at executions"....*

Although lethal injection is generally regarded as the most humane and painless execution method presently available, technology and society's perceptions may evolve in the future. If there are serious difficulties in administering lethal injections, society may cease to view it as an acceptable means of execution and support a return to lethal gas or electrocution or push for development of another execution method. Or a majority of the public may decide that no execution is acceptable. Eyewitness testimony is crucial to the public's evaluation of how this extreme punishment is performed.

Judge Walker based his decision not only on First Amendment grounds tracing to the open trial holdings of the U.S. Supreme Court and Eighth Amendment humane punishment principles, but also on state law grounds. California statute requires witnesses to executions, and the Oregon Supreme Court has interpreted that state's essentially identical statute to mandate "that the execution, not just the dying, be observed by witnesses." Walker expressly adopted that rationale.

Walker enjoined prison officials from "preventing uninterrupted viewing of executions from the moment the condemned enters the execution chamber through to, and including, the time the defendant is declared dead."

COMMENT: This is Judge Walker's second order opening up the process to full witness observation. His first order, issued in 1996, was overturned by the Ninth Circuit, but with a remand to Walker to determine whether the concealment policy represented an "exaggerated response" to any plausible safety concerns. That issue was the only factual sliver that the appeals court felt would support a First Amendment-based attack on the policy.

Judge Walker's findings of fact are cumulatively devastating to the state's position in this case. If the state were to seek another reversal in the Ninth Circuit, while that court may not agree with all of Walker's rationale (insisting as it does on the relevance of the Supreme Court's open trial cases), it would find it hard to fault (or even take issue with) his conclusions.

New York Federal Court Bars State and Local Governments From Claiming Copyright in Public Records

Reverses Prior Opinion on NY FOI Law

By Andrew L. Deutsch

In a matter of first impression, Judge John F. Keenan of the United States District Court for the Southern District of New York has ruled that the New York Freedom of Information Law (FOIL), N.Y. Pub. Off. Law § 84 *et seq.*, bars state and local agencies in New York from claiming copyright in public records – in this case, official tax maps. The decision, *County of Suffolk, New York v. Experian Information Solutions, Inc., et al.*, 99 Civ. 8735 (JFK) (decision reported in the August 1, 2000 New York Law Journal), dismissed Suffolk County's copyright infringement complaint, and came on a rare grant of a motion to reconsider the Court's earlier refusal to dismiss the complaint. Judge Keenan was persuaded by a recent advisory opinion of the New York State Committee on Open Government, which concluded that copyright should not apply to public records which state law requires be created. The decision establishes a strong precedent that government may not use copyright as a device to prevent the free copying and circulation of public records.

Background

The real property tax is the largest single revenue source for local governments in New York State, raising approximately \$25 billion annually, about one-third of all state and local taxation within New York. The creation and use of tax maps are integral to the state real property tax system. While cities and towns in New York have taxing authority, the administration of the real property taxation system takes place at the county level. New York law requires counties to create and maintain a tax map approved by a state agency, the Office of Real Property Systems (ORPS). Tax maps are, by statute, explicitly declared to be public records and their creation is funded through a tax on real property.

Tax assessors must use these official tax maps in preparing the annual tax assessment roll for the county. Ac-

cess to the tax maps is essential to the public's right to challenge real property assessments, and the standard New York tax grievance form requires the petitioner to include a tax map number in counties using that system. In addition, tax maps are regularly consulted by title insurers, brokers, prospective land purchasers and others to determine the tax status of real property.

In 1974, Suffolk County completed a five-year project to remap every parcel in the county. The county filed for and received copyright registration certificates for its new tax maps. Since 1974, the county has periodically updated its maps and has obtained copyright registration certificates for the updated maps. While copies of the maps can be obtained from county at a fairly nominal cost

of reproduction, the county has insisted that its copyright prohibits unauthorized reproduction or redistribution of these maps.

First American Real Estate Solutions LLC is the country's largest collector and publisher of real estate information. It acquired real estate information businesses formerly operated by TRW and Experian (which were also named as defendants in the Suffolk County action). First American's primary clients are mortgage companies, appraisers, and title insurers. Most of these companies operate at substantial distances from the real property they are lending on, appraising, or insuring, and need up-to-date sales and tax information to make their decisions. First American provides this market with accurate copies of the official real property tax maps of most tax jurisdictions (including Suffolk County) in CD-ROM form and over the Internet.

The Litigation

In August 1999, Suffolk County sued First American for copyright infringement. The County alleged that its maps contained "original material, research, compilation and organization," and that First American's sale and distribution of copies of the Suffolk County maps infringed

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Judge Keenan was persuaded by a recent advisory opinion of the New York State Committee on Open Government. . .

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the county's copyrights.

First American immediately moved to dismiss the complaint, raising three grounds. It first argued that the maps lacked sufficient originality to be copyrightable, because ORPS regulation dictated the content and format of county tax maps. Since the maps had to depict every parcel of land in Suffolk County, the county could not make the creative selection or arrangement of facts that would provide a basis for copyright. Second, First American contended that because tax maps are essential to the operation of the state real property tax statute, they should be considered in the public domain from conception, as state statutes and judicial decisions are.

Finally, First American contended that the public right of maximum access to public records, guaranteed by FOIL, barred the county from asserting a copyright in public records. Citing two advisory opinions of the Committee on Open Government, it argued that the public's right of access included the right to disseminate and republish the contents of public records. Because these are rights encompassed within copyright, the state's enactment of FOIL effectively waived or abandoned any potential copyright that state or local government might otherwise assert in public records. Because a New York court, confronted with an unsettled question of interpretation of FOIL, would be required to follow the interpretation of the Committee on Open Government unless it was irrational or unreasonable, First American contended that a federal court must do the same.

The District Court's First Decision

In a May 15, 2000 memorandum decision, Judge Keenan denied the motion to dismiss. His reasoning was, at best, perfunctory. It found that the county's allegation that its maps contained original material, compilation, and organization was sufficient to survive a motion to dismiss, and that the county would be entitled to offer evidence on originality. The court found that the issue of tax maps being in the public domain from inception was a matter of first impression, and "declin[ed]" to find in favor of First American. Finally, as to FOIL, the court held that the "access" guaranteed by FOIL did "not give Defendant the

right to publish and sell Plaintiff's copyrighted maps." In a footnote, the court stated that the unpublished advisory opinions of the Committee on Open Government were "not binding authority."

The Motion For Reconsideration

First American promptly moved for reconsideration. It brought to the court's attention a new March 2000 opinion of the Committee on Open Government (unavailable at the time the motion to dismiss was briefed). This opinion set out, in substantially greater detail than the Committee's earlier opinions, the rationale for denying copyright to public records: in particular, that the legislature that enacted FOIL intended "that the public good is best served when records available under that statute are disclosed as widely as possible and without impediment." The opinion cited a commentator's view that "when a commercial publisher disseminates public information, it is serving a public purpose – the very purpose that is central justification for FOIAs." The Committee opined that while copyright exists to provide an incentive to authors to develop creative works, public officials are required by law to create and preserve public records, and do not need the economic incentive of copyright.

First American contended that this new opinion was new authority unavailable to the court at the time of its decision. It argued that the court had overlooked the controlling Second Circuit rule that federal courts, confronted with an undecided issue of New York law, must "carefully predict" how the New York Court of Appeals

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would rule on the issue, applying New York principles of statutory construction. It again pointed out that New York courts interpreting unsettled questions under FOIL would give substantial deference to Committee opinions addressing those questions and would follow those opinions unless they were irrational.

The District Court's Second Decision

In its second opinion, dated June 21, 2000, Judge Keenan granted reconsideration and dismissed the complaint. He agreed that the Committee's March 2000 opinion was indeed new law that the court could review on reconsideration. He also agreed that he would be bound to defer to the Committee's interpretation of FOIL unless it was irrational or unreasonable.

Judge Keenan found that while the earlier Committee opinions were conclusory and failed to provide the court with a basis for determining whether the interpretation of FOIL was irrational or unreasonable, the Committee's March 2000 opinion "provides extensive analysis and support for its interpretation of FOIL." He quoted extensively from the Committee's opinion, and found it "well reasoned" and "neither irrational nor unreasonable." The opinion was also found to be "compatible with FOIL's purpose of providing maximum access to public records." The court also accepted the Committee's "incentive" reasoning, finding that the county was required by law to prepare tax maps and needed no incentive to create them. The decision concluded that "under the FOIL, First American may freely copy and distribute Plaintiff's tax maps and . . . Plaintiff may not prevent First American from disseminating the tax maps on the basis of Plaintiff's copyrights in those maps."

The Consequences

The court's second decision has several important consequences. For one, its rationale is clearly not limited to tax maps. The decision stands for the proposition that no New York government, state or local, may assert copyright in any document that is a public record. This rule should guarantee that the press (including information publishers

like First American) will be free to publish New York public record documents without the fear of a copyright infringement lawsuit, an injunction, and possible damages. Moreover, New York is not the only state where these issues have arisen. Many states have freedom of information or public records laws. In some of those states, local governments are also asserting copyright in public record documents such as tax maps. Judge Keenan's opinion provides a persuasive basis for defeating such claims of copyright.

Andrew L. Deutsch is a partner with Piper Marbury Rudnick & Wolfe LLP in New York. He was counsel to First American Real Estate Solutions in the Suffolk County litigation.

New and Noteworthy: *Reputations Under Fire: Winners and Losers in the Libel Business*

By Kevin W. Goering

LDRC members planning to attend the London Conference, and others interested in international libel law, should note the publication of *Reputations Under Fire: Winners and Losers in the Libel Business* (Little Brown 2000) by LDRC member David Hooper. The book surveys English libel law and reviews recent libel cases of note. The introductory primer on the history and quirks of English libel law is a synopsis of the 700 year development of the tort beginning in 1275. Who would have guessed that a 1792 statute (Fox's Libel Act) required that juries hear libel cases because judges were viewed as too hostile to defendants (ironically, the 1999 "Woolf" reforms responded in part to the problems the Fox Act jury system created over two centuries)?

The review of significant libel cases includes a veritable rogues gallery of undeserving libel plaintiffs — Robert Maxwell, Jonathan Aitken, Jeffrey Archer, Mohamed Al-Fayed and McDonald's. The book concludes with a thoughtful discussion of the problems of forum shopping in the age of the Internet and gives predictions about how important recent English law developments such as the Woolf Reforms, the Human Rights Act and the Defamation Act 1996 will affect the libel business in England.

Kevin W. Goering is a member of Coudert Brothers in New York, NY

UPDATES

Arkansas Juvenile Court Judge Drops Finding of Contempt Against Paper

Overly Broad Gag Order Narrowed

Last month LDRC reported that the Arkansas Supreme Court had determined that a broad gag order issued by a juvenile court judge in Fayetteville, Arkansas constituted a prior restraint on the press. *Arkansas Democrat-Gazette v. Zimmerman*, 2000 Ark. LEXIS 348 (Ark. June 29, 2000); see *LDRC LibelLetter* July 2000, at 19. Following the Supreme Court decision, Judge Stacey Zimmerman dropped a finding of contempt against the *Arkansas Democrat-Gazette* she previously had entered, vacated the sanction and narrowed her gag order to exclude the media from taking photographs only inside the Arkansas Courts Building.

The original gag order, which was issued on May 18, arose from a case involving a 12-year-old boy who was accused of shooting a police officer, and stated in pertinent part that: (1) no information could be released by the media unless it was stated on the record at the hearings; (2) no names or pictures of the victim and the victim's family could be disseminated in the media; (3) no names or pictures of the child or his family could be disseminated in the media; and (4) no names or pictures of juveniles in the courthouse could be broadcast or released by the media.

On May 20, the judge modified her gag order to permit the dissemination of the juvenile defendant's name and photograph obtained by the media prior to her May 18 gag order; however, the remainder of her gag order was unaffected. Additionally, the judge set a hearing date to consider whether the *Arkansas Democrat-Gazette* should be held in contempt of court for publishing a photograph of the boy as he left the Courts Building after the original May 18 gag order was in place. The newspaper was later found in contempt and fined \$100 by the judge.

On May 31, a coalition of local, state and national news organizations filed a writ of *mandamus* before the Arkansas Supreme Court concerning the gag order, claiming that it was too broad and, therefore, con-

stituted a prior restraint on the press. On June 29 the Supreme Court determined that the gag order was an unconstitutional "prior restraint" and a "plain, manifest, clear and gross abuse of discretion."

"Safe Harbor"

EU Executives Endorse Data Protection Agreement

The European Commission, the European Union's executive body, recently adopted the United States' "safe harbor" arrangement that would provide "adequate protection" for personal data transferred from the European Union to the U.S. This adoption is binding on all 15 EU member states and should be fully operational by November.

The proposal, which was narrowly approved by the European Parliament in July, after setting down a number of conditions, was endorsed by the executive body who conveyed those concerns to U.S. authorities. By approving the proposal, the Commission brings to an end two years of negotiations and, according to EU Internal Market Commissioner Frits Bolkestein, the arrangement will provide "a framework within which personal data transferred to the U.S. will be better protected, while at the same time making transfers simpler for both EU and U.S. businesses."

The "safe harbor" proposal was created in response to the EU's Data Protection Directive, which took effect in 1998, and allowed the transfer of personal data to countries outside the 15-nation bloc only if the proposed recipient had "adequate protection" for the data. Although participation in the "safe harbor" is not mandatory, its rules are binding on U.S. companies which decide to join and are enforced by the Federal Trade Commission and, for airlines, the U.S. Department of Transportation. Transfers of data to companies that choose to remain outside the "safe harbor" would still be possible, but only if the transfer falls under one of the allowed exceptions to the agreement, for example where those people concerned have given their agreement, or a specific contract was drafted.

A Broad Gag Order in United States of America v. Brown

A “Close Call” or an Unconstitutional Prior Restraint?

By Mary Ellen Roy and Sheryl A. Odems

In *United States v. Brown*, 2000 WL 898058 (5th Cir. July 6, 2000), the U.S. Court of Appeals for the Fifth Circuit upheld a broad gag order that a prominent criminal defendant argued unconstitutionally restrained his First Amendment rights of free speech to comment on the prosecution against him. The Fifth Circuit held that the legal standard the U.S. Supreme Court applied to attorney speech in *Gentile v. State Bar of Nevada*, 111 S. Ct. 2720 (1991) – which requires only a showing of a substantial likelihood of material prejudice to a defendant’s trial rights – applied to all trial participants.

The decision, perhaps the first gag order upheld after being challenged by a criminal defendant, essentially determined that concerns about preventing a “circus” atmosphere outweighed a defendant’s conception of his fundamental right to a public trial, and the public’s First Amendment interest in robust and spirited debate about prosecutions of public officials.

Fear of Case Against Ex-Governor

Prosecutors in *Brown* allege that the current Louisiana Commissioner of Insurance, James Brown, together with former Louisiana governor Edwin Edwards and other public officials, conspired to concoct a sweetheart liquidation deal for an insolvent Louisiana insurance company. Brown and Edwards have pleaded not guilty to criminal counts ranging from insurance fraud to witness tampering, and the trial is scheduled to commence in September.

The district court imposed the gag order *sua sponte* the day the government filed its indictment. The order prohibited the defendants, their counsel, the government, and any potential witnesses, from making “any extrajudicial statement . . . to any person . . . associated with any public communications media . . . relating to the trial, the parties or issues . . . which could interfere with a fair trial or prejudice any defendant, the government, or the administration of justice.” The gag order allowed statements regarding the “general nature of an allegation or defense” and decisions and motions filed in the public record, as long as such explanations were “without any elaboration or any kind of characterization whatsoever.”

Brown petitioned the Fifth Circuit for a writ of mandamus and, in the alternative, appealed from the order pursuant to the collateral order doctrine. The court denied Brown’s petition for mandamus in a 2 to 1 unpublished decision. See *In re Brown*, No. 00-30134 (5th Cir. Feb. 21, 2000). Various Louisiana news media filed an amicus brief in support of Brown.

Fifth Circuit Takes the Appeal

On appeal, the Fifth Circuit addressed as a threshold matter whether it possessed subject matter jurisdiction over the appeal, given the recent decision of another Fifth Circuit panel in *United States v. Edwards*, 206 F.3d 461 (5th Cir. 2000), in which the court held *per curiam* that it did not have jurisdiction over an appeal from a nearly identical gag order. See *Brown*, 2000 WL 898058, at *3-4. The court distinguished *Edwards* from *Brown* because the defendants in *Edwards* waited over ten months to appeal the order. *Id.* at *4.

Perhaps more significantly, while Brown had argued that the gag order violated his First Amendment rights, the *Edwards* defendants’ principal challenge was that the gag order had materially damaged their fair trial rights. *Id.* Concluding that “Brown’s asserted right to contemporaneously comment on his case in public and defend his reputation would . . . be irretrievably lost if review were postponed until trial is completed,” the court held the gag order was an appealable collateral order. *Id.* at *5.

Applies Gentile

On the merits, the Fifth Circuit conceded that the “case presents a somewhat close call,” but ultimately concluded that the gag order was not a constitutionally impermissible prior restraint. *Id.* at *7. In so holding, the court relied, in part, on the U.S. Supreme Court’s decision in *Gentile*, in which the Court considered the constitutionality of a Nevada Supreme Court rule prohibiting an attorney from making extrajudicial comments to the media that the attorney knew or should have known would have a “substantial likelihood of materially preju-

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United States of America v. Brown

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ding an adjudicative proceeding.” The Court in *Gentile* held that the “substantial likelihood of material prejudice” standard was a constitutionally permissible balance between the First Amendment rights of attorneys and the state’s interest in ensuring fair trials. *Gentile*, 111 S.Ct. at 2745.

Although the Fifth Circuit recognized that the Court had premised its decision in *Gentile*, in part, on the unique role of attorneys as officers of the court, the court concluded there was no reason to distinguish between attorneys and parties.

Brown, 2000 WL 898058, at *10. Moreover, while the court acknowledged that the Sixth, Seventh and Ninth Circuits have required a showing of “clear and present danger” or a “serious and imminent threat” to a defendant’s

fair trial rights in evaluating whether a gag order directed at trial participants constituted an impermissible prior restraint on speech, the court rejected these decisions because they pre-dated *Gentile* and failed to consider what the Fifth Circuit believed to be a distinction drawn by *Gentile* between trial participants and the press. *Id.* at 9. The court reasoned that although it was appropriate to apply the more stringent “clear and present danger” standard to gag orders which restrained the press’s speech, as required by *Nebraska Press Association*, the less stringent “substantial likelihood of material prejudice” standard was sufficient as to gag orders which restrained the speech of trial participants. *Id.* at *9-10.

Moreover, although not deciding the issue, the Fifth Circuit pointedly noted that *Gentile* had merely approved, but did not require, the “substantial likelihood” standard as a constitutional minimum necessary to justify an order restricting attorney speech, and thus questioned whether the even less rigorous standard adopted by the Fourth and Tenth Circuits, the “reasonable likelihood” standard, might suffice. *Id.* at *9-10.

Citing the district court’s findings that extrajudicial

statements by trial participants would increase pre-trial publicity and taint the jury pool, and that the parties had already demonstrated “a desire to manipulate media coverage to gain favorable attention,” the court ultimately concluded that the district court had identified a “substantial likelihood” that extrajudicial statements would prejudice its ability to conduct a fair trial. *Id.* at *11. The court further concluded that the gag order was sufficiently narrow to eliminate only that speech having a “meaningful likelihood of materially impairing the court’s ability to conduct a fair trial.” *Id.* at *12.

The Fifth Circuit’s decision not only represents a broad application of *Gentile*’s watered-down “substantial likelihood” standard to trial participants other than lawyers, it also reflects the court’s expressed wariness of the

“significant and well-known dangers to a fair trial” that can result from “trial by newspaper.” *Id.* at *7. *Brown* is particularly notable in this regard as *Brown* himself challenged the gag order as not being in his best interests. The Fifth Circuit gave short shrift to this point, however, summarily stating: “It makes no difference that *Brown* is contesting the gag order as violative of his First Amendment rights instead of embracing it as protective of his Sixth Amendment right to a fair trial . . . ‘under the Sixth Amendment, a criminal defendant is entitled to a fair and impartial jury, not a jury whose views have been deliberately manipulated by outside influences to be biased in his . . . favor.’” *Id.* at *15 n.9.

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Although the Fifth Circuit recognized that the Court had premised its decision in Gentile, in part, on the unique role of attorneys as officers of the court, the court concluded there was no reason to distinguish between attorneys and parties.

LDRC would like to thank Summer interns — Brian Scott Levine, St. Johns Law School, Class of 2002 and Mark Mendoza, Columbia Law School Class of 2002 — for their contributions to this month’s *LDRC LibelLetter*.

California's News Reporter Shield: Recent Wins and Losses

By Guylyn R. Cummins

California courts, in connection with criminal cases, have recently chipped away at and reaffirmed the once absolute 1980 constitutional immunity provided to news reporters and others engaged in news reporting, failing to rigorously apply the standards. California reporters this year have faced jail time more than once — the most recent incident of which involved the subpoena of a San Diego reporter's notes of a jailhouse interview with a capital murder defendant.

Article I, Section 2(b) of the California Constitution provides that a reporter "shall not be adjudged in contempt . . . for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public." The Constitution defines "unpublished information" to include "information not disseminated to the public" regardless of "whether or not related information has been disseminated." Unpublished information includes "all notes, outtakes, photographs, tapes or other data of whatever sort not itself disseminated to the public through a medium of communication"

Balance in Criminal Cases

In 1990, the California Supreme Court in *Delaney v. Superior Court*, 50 Cal. 3d 785, held the absolute shield immunity covers both confidential and nonconfidential information, but must yield in an appropriate criminal case to the federal constitutional fair trial guarantee of a defendant. To overcome Article I, Section 2(b), a criminal defendant must demonstrate by competent evidence that there is a *reasonable possibility* the information requested will *materially assist his defense*. The court must then "balance the criminal defendant's and the newspaper's rights, considering whether the unpublished information in question is confidential or sensitive, the degree to which the information is important to the criminal defendant, whether there is an alternative source of unpublished information, and whether there are other circumstances which may render moot the need to avoid disclosure."

In a 1990 companion case, *New York Times Co. v. Superior Court*, 51 Cal. 3d 453 (1990), the Supreme Court held the shield is absolute as to civil litigants and can not be pierced. Recent decisions have continued to flesh out the shield's protections and limitations.

Prosecutor's Rights?

Miller v. Superior Court, 21 Cal. 4th 883 (1999)

In *Miller v. Superior Court*, the Supreme Court last year addressed a prosecutor's ability to force a journalist to reveal unpublished information. In reversing the appellate court, the Court declined to extend its holding in *Delaney v. Superior Court* to enable prosecutors to circumvent the reporter shield.

In affirming the trial court's decision holding a news

reporter in contempt, the appellate court held that prosecutors have a due process right to circumvent the shield. The court relied on

*California reporters this year have faced
jail time more than once*

an interpretation of *Delaney* and article I, section 29 of the California Constitution which gives "the people of the State of California . . . the right to due process of law." The court reasoned that, under *Delaney*, the People's due process rights in uncovering information contained in interview outtakes outweighed the television station's interest in protecting them.

In reversing the appellate court, the Supreme Court held that prosecutors do not have the due process right to "breach . . . established evidentiary privileges and immunities," including the shield law. As a matter of statutory interpretation, the more specific 1980 shield law could not be altered or repealed by the more general People's due process provision enacted in 1990, the Court ruled. Therefore, balancing under the *Delaney* balancing test was unnecessary as the two laws were not in conflict.

Examining a Defense Witness

Fost v. Superior Court, 80 Cal. App. 4th 724 (2000)

In *Fost*, an appellate court this year addressed a prosecutor's ability to cross-examine a defense witness. Dan Fost, a journalist for the *Marin Independent Journal*, published articles about a homicide. Fost interviewed and

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quoted a key prosecution eye-witness about her version of the events. Trial testimony presented discrepancies in the witness' story, and when confronted at trial, she denied making the statements attributed to her by reporter Fost.

At trial, the defendant questioned Fost only about the authenticity of the news story and his general journalistic practices, but elicited no unpublished information protected by the shield law. During cross-examination, however, the district attorney tried to elicit the circumstances surrounding the interview. Fost invoked the reporter shield, and the court found him in contempt imposing a \$1000 per day fine for each day he refused to answer.

Fost appealed. The First Appellate District refused to sustain the trial court's contempt order, finding the trial court did not undertake the proper *Delaney* two-stage inquiry to determine whether Fost's shield rights had to give way to the defendant's federal constitutional right to a fair trial. The court held that without analyzing the case under *Delaney*, the trial court could not properly use contempt power to compel Fost to disclose the "unpublished information" sought by the prosecution. Because Fost invoked the reporter shield and refused to answer proper cross-examination by the prosecution, the prosecution could strike Fost's direct examination testimony.

Fost thus creates a sort of Pandora's box (unless depublication efforts succeed). While a prosecutor may not compel a journalist to testify to unpublished information in the first instance, the prosecutor can strike the journalist's testimony if the shield is invoked. If a defendant then shows that excluding or striking a journalist's testimony would deprive him of his federal constitutional right to a fair trial, his rights will transcend the conflicting rights protected by the shield law.

The court did not reach the issue of whether the defendant's rights outweighed those of journalist Fost, holding instead that since the trial court never properly balanced their respective rights, the trial court could not enforce the contempt order.

Confidential Sources

News reporter Tim Crews of the Sacramento Valley Mirror

Earlier this year, Attorney Thomas R. Burke reported

on contempt proceedings for news reporter Tim Crews. After seeking relief through the entire California state court system and having his emergency request for stay denied by the emergency motions panel of the Ninth Circuit Court of Appeals on February 26, 2000, Tim Crews reported to the Tehama County jail to serve a five-day sentence for contempt rather than disclose his confidential law enforcement sources.

Crews, the publisher, editor, chief reporter and photographer for his semi-weekly newspaper in Altois, California, began his shield law odyssey last summer when *The Valley Mirror* reported that Dewey Anderson, the former Undersheriff of Glenn County, and at the time an officer with the California Highway Patrol, was under investigation in connection with a gun that turned up at a local high school. Relying on unnamed law enforcement officers who had been promised confidentiality, *The Valley Mirror* reported that Anderson had kept the gun — a .380 Cobray Mac 12 semi-automatic — ever since he was assigned to the Tehama County Interdisciplinary Task Force ("TIDE"), a local drug enforcement task force. Law enforcement sources told the newspaper that authorities were aware that the gun had been missing since 1995 and that a "missing gun" report concerning the weapon had been prepared in 1994.

When Anderson was later charged with felony grand theft of the gun, Anderson's lawyer subpoenaed Crews to testify at the preliminary hearing to disclose the identities of *The Valley Mirror's* confidential sources. Defendant's counsel hoped to show that law enforcement officials were aware the gun had been missing for several years, to support his client's statute of limitations defense. Crews appeared and testified at the January 14 preliminary hearing without counsel.

Crews authenticated certain published information but refused to identify the confidential sources who had told him about the "missing gun" report. Tehama County Superior Court Judge Noel Watkins felt strongly that Anderson needed to know the newspaper's confidential sources, explaining to Crews that Anderson was "only" asking him to reveal their identities. Judge Watkins found Crews in "open contempt" and sentenced him to five days in the county jail. Judge Watkins then gave

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Crews 72 "judicial hours" in which to obtain a stay in the Court of Appeal.

Lacking a transcript of the preliminary hearing, Crews retained counsel and secured a brief stay of the contempt order by the Third Appellate District. After the Court of Appeal issued its stay, Judge Watkins on his own issued a further stay of his contempt order and ordered that the entire transcript of the preliminary hearing be prepared and made available to counsel for Crews. Despite this order, the preliminary hearing transcript arrived less than two days before the trial court's stay order was set to expire, when Crews filed a petition for writ of mandate, habeas corpus or review in the Court of Appeal.

In his writ petition, Crews argued that Judge Watkins improperly applied the balancing test established by the California Supreme Court in *Delaney v. Superior Court*. Specifically, Crews argued that the trial court failed to require Anderson to show that the disclosure of his confidential sources would "materially assist" the defense; failed to consider the sensitivity of Crews's sources to him; ignored *Delaney's* alternative source requirement; and discounted entirely the shield law's historic purposes of protecting confidential sources and preserving press autonomy.

Crews argued that Tehama County officials needed only to look in the TIDE evidence room as early as the spring of 1994 to learn that the gun was "missing" from its inventory of seized weapons. Relying on this evidence, and emphasizing that various other knowledgeable law enforcement officers were never called to testify at the preliminary hearing, Crews argued there were a variety of alternative ways for Anderson to establish his statute of limitations defense without compelling Crews to reveal his confidential law enforcement sources.

Crews' writ petition was summarily denied, leaving Crews only a weekend in which to obtain a further stay. Crews then filed a petition for review and request for stay in the California Supreme Court. On February 23, the California Supreme Court summarily denied the peti-

tion for review and request for stay, although Justice Stanley Mosk voted for review.

When an emergency petition for habeas corpus and a request for stay in the U.S. District Court, Eastern District in Sacramento, California and request for stay at the Ninth Circuit were denied, Crews went to jail. Crews was released from jail on March 1, his subpoena was subsequently dropped and he dismissed his habeas petition.

Jailhouse Interview with Capital Plaintiff

*News Reporter J. Harry Jones of
The San Diego Union-Tribune:*

*Judge Noel Watkins felt strongly
that Anderson needed to know the
newspaper's confidential sources,
explaining to Crews that
Anderson was "only" asking him
to reveal their identities.*

On June 27, 2000, news reporter J. Harry Jones turned over to the San Diego Superior Court a declaration of his recollection of statements made by criminal defendant Jacob Issac Henderson in a jail house interview pursuant to

court order. Jones filed the declaration only after petitions for writ relief and review of his contempt finding were summarily denied by the Fourth Appellant District and the California Supreme Court.

In the underlying case, Henderson is charged with three counts of murder, each with an allegation of use of a deadly weapon, as well as a special circumstance of multiple murders exposing Henderson to death by lethal injection if convicted and the circumstance is found true. Henderson confessed to the murders when arrested by police on another charge in July 1999, and that confession forms the *sole basis* for the murder charges against him.

On August 10, 1999, Jones conducted a jailhouse interview with Henderson. Jones' news story (published by the *Union-Tribune* on November 16, 1999) contained statements by Henderson recanting his police confession, including:

I just don't want to be a victim of society's three-strikes law. . . . I'd rather be put to death. If I'm going to go out, I'm going to go out with a bang, not like a chump. Prison is like a slow death. I'm not into slow. I'm one of those die young and strong guys. I don't believe in fading away. But I

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didn't kill those people.

On April 27, 2000, Henderson subpoenaed from Jones any "memorialization of any kind" of the interview.

On May 24, 2000, Jones filed a motion to quash the subpoena. On May 25, 2000, the court ruled Jones's "work product" — or his "impression, opinions of what [was] said" by Henderson and "interpretation of what was going on" — was protected from disclosure, but that

Jones' news story contained statements by Henderson recanting his police confession....

"any notes Jones made of statements" by Henderson *not* "appear[ing] in the [published] article" would be reviewed *in camera*. The court asked Jones to first determine if his notes contained statements not in the published article.

On June 2, 2000, Jones filed supplemental pleadings with the trial court admitting his notes did contain some references to statements made by Henderson not in the published article. Jones requested the court hold a hearing as required by *Delaney v. Superior Court*. Jones further asserted that Henderson could not meet the *Delaney* test or show a reasonable possibility that his *own statements* recanting his police confession to Jones were material to his defense as Jones' notes and recollection of those statements constituted inadmissible hearsay, for which Henderson was the only non-hearsay source.

On June 12, 2000, the trial court ruled the statements must be turned over to the court and that the *Delaney* test had been met. The court stated, the "[s]tatements of the defendant to the reporter were neither confidential nor sensitive" and the "majority of the statements . . . were published in the article."

With respect to interests protected by the shield law, "when a criminal defendant seeking disclosure is himself the source of the information, it cannot be seriously argued that the source will feel his confidence has been breached" and the "reporter's news gathering ability will not be prejudiced."

With respect to the importance of the information to the defendant, the court "conclude[d] that the statements may well be admissible in the guilt phase of this trial." The court further found there was "no question that the statements would become material and relevant in the guilt [and penalty] phase determination." With respect to alternative sources, the court found that given "this defendant's mental history, the quality of the information that would be given by him and the practicality of its restatement would be highly suspect."

On June 14, 2000, the Superior Court found Jones in contempt of court for refusing to disclose his recollection of Henderson's statements. The court ordered he be jailed without bail until he either turned over the statements or the underlying criminal case concluded (which the court estimates will be in July 2001). Jones immediately petitioned the court of appeal for writ relief, which was summarily denied on June 19, 2000. Review was denied by the California Supreme Court on June 26, 2000, and Jones filed his declaration on June 27, 2000 as ordered.

The court stated, the "[s]tatements of the defendant to the reporter were neither confidential nor sensitive"

Jones said he reluctantly turned over the material because the shield law offered "no refuge in this case," and going to jail would not change the law. He also said the specter of spending as long as a year in jail away from his family weighed heavily on him. However, if this had been a case of protecting a confidential source, Jones said, he would have been willing to go to jail. "The bottom line is the notes do not contain confidential information. If they did, my decision would be different." Jones further said he feared the outcome of the case would add to the "growing tendency by lawyers in criminal cases, especially death-penalty cases, to try to drag journalists into court."

Jones was represented by Harold W. Fuson, Jr. and Scott Wahrenbrock of The Copley Press, Inc. and

Fifth Circuit Shows Deference to First Amendment Concerns in Trademark Infringement Case

By Robert Latham

In an opinion that contains a little bit of something for everyone, the Fifth Circuit reversed the award of a permanent injunction in a trademark infringement case and remanded that portion of the case to the trial court to fashion a remedy that is more sensitive to First Amendment concerns. *Westchester Media v. PRL USA Holdings, Inc.*, 2000 WL 758415 (5th Cir. Tex.). In this unique case, the analysis of the Fifth Circuit will be important both to intellectual property and First Amendment practitioners.

The Polo Match

The history of the dispute underlying this litigation is interesting and is significant to the court's ultimate holding. PRL USA Holdings, Inc. is, of course, Polo Ralph Lauren. PRL was founded in 1967 and its fashion and design products bear the famous "Polo" logo and trademark. Prior to 1997, the publisher of "POLO" magazine and PRL had peacefully co-existed. POLO magazine was founded in 1975 and in 1992 had obtained a "POLO" trademark for a "magazine on the subject of equestrian sports and lifestyles." POLO magazine was geared towards the sport of polo, and in fact most of its 7,000 subscribers were members of the United States Polo Association who received the magazine as a benefit of membership. The relationship between POLO and PRL was such that PRL even advertised in POLO.

In 1997 the landscape changed when Westchester Media purchased the assets of POLO magazine with the intent of relaunching the magazine to expand readership and broaden the magazine's appeal. Westchester denied any intent to trade on PRL's reputation and good will. However, the Fifth Circuit, though not determinative of its ultimate opinion, seemed to take issue with that denial. The Fifth Circuit noted that Westchester began publishing a separate magazine called "Polo's Player's Edition" that was geared toward the sport of polo while relaunching "POLO" magazine so that it was, in Westchester's own words, "not about the sport, but rather about an adventur-

ous approach to living life." Westchester sent a free copy of POLO to customers of Nieman Marcus, which was one of PRL's largest retailers. On the cover of the first issue of the new POLO magazine, Westchester placed Claudia Schiffer, who had been PRL's featured model.

After discussions between Westchester and PRL regarding the relaunched POLO magazine proved unproductive, Westchester filed for declaratory relief claiming that its use of the title "POLO" on its magazine did not infringe PRL's "Polo" mark. PRL counterclaimed for trademark infringement, trademark dilution, and unfair competition and also sought injunctive relief. The court below found infringement by Westchester on PRL's "Polo" mark and issued a permanent injunction that Westchester cease and desist from publishing POLO magazine under the title "POLO".

The court rejected PRL's contention that Westchester's title for the magazine was pure "commercial speech" and less deserving of First Amendment protection.

The First Amendment Issues

The Fifth Circuit recognized that the case involved "the tension between the protection afforded by the Lanham Act to trademark owners and the protection afforded by the First Amendment to expressive activity." To resolve this tension, the Fifth Circuit relied upon the test employed by the Second Circuit in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989) and *Twin Peaks Productions, Inc. v. Publications Int'l Ltd.*, 996 F.2d 1366 (2d Cir. 1993), and adopted by the Fifth Circuit last year in *Sugar Busters LLC v. Brennan*, 177 F.3d 258 (5th Cir. 1999).

The court rejected PRL's contention that Westchester's title for the magazine was pure "commercial speech" and less deserving of First Amendment protection. Rather, the Fifth Circuit found that magazine titles, like book titles, combine both artistic expression and commercial promotion and "consequently require more First Amendment protection than the labeling of ordinary commercial products."

The Fifth Circuit showed its concern for the protec-

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5th Cir. Shows Deference to First Amendment Concerns in Trademark Infringement Case

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tion of expressive speech, even if it involved commercial promotion, in several ways. In the first instance, the court held that in order to show that an artistically relevant title may still be actionable under the Lanham Act if it misleads as to the source or content of the work, courts must employ a more stringent “likelihood of confusion” test than that used in evaluating standard trademark infringement claims. The likelihood of confusion must be “particularly compelling” in order to overcome First Amendment interests. The court, however, noted that the “particularly compelling” standard applies only to the ultimate issue of likelihood of confusion and not to the evidentiary standard for each of the recognized factors that lead to a finding of likelihood of confusion.

Secondly, the strength of the First Amendment protections at issue compelled the court to overturn the issuance of a permanent injunction against Westchester from using the name “POLO,” and to remand the case to the trial court to consider the narrower remedy of a disclaimer. The Fifth Circuit held that even where trademark infringement has been found under the heightened likelihood of confusion standard in a case with First Amendment implications, those First Amendment interests should still influence the choice of remedy.

The court in this case found that the lower court’s ruling meant that a magazine which focused on the sport of polo could be published under the title “POLO,” but use of the name “POLO” in a lifestyle centered magazine was prohibited. The content based impact of the permanent injunction thus raised First Amendment concerns that could be avoided by fashioning a remedy whereby Westchester issued a disclaimer to alleviate any actual confusion and make clear that POLO magazine, regardless of its content, had no connection to PRL.

Interesting to the court’s analysis in this regard was its finding that polo aficionados — be they purchasers of PRL’s products or readers of POLO magazine — are

“sophisticated” consumers who would be able to notice, read and understand the import of a disclaimer in the POLO magazine. One wonders what the Fifth Circuit’s opinion might have been in a case involving another sport. For instance, if the sport had been figure skating rather than polo, would the alleged infringer have argued

for the less intrusive remedy of a disclaimer by citing the historical elegance and sophistication of the sport, while the trademark owner brought out Tonya Harding? Fans of other sports will have to await federal court endorsement of the sophistication level of their passion.

The Fifth Circuit held that even where trademark infringement has been found...First Amendment interests should still influence the choice of remedy.

Analysis of Trademark Issues

The Fifth Circuit’s analysis of the trademark issues is also noteworthy. First of all, the court recognized that PRL was attempting to prevent Westchester from using the name “Polo” for the title of a magazine even though PRL sold no literary products. However, the Fifth Circuit upheld the lower court’s finding that the likelihood of confusion does not depend on direct competition between the parties’ products.

In so holding, the court emphasized that consumer perception was the controlling factor. If consumers believe, even falsely, that a magazine focusing on polo lifestyles was the type of product that PRL might market, then such a magazine would be in the natural zone of expansion for PRL and confusion might be likely. Thus, the court did not disturb the finding that Westchester had infringed PRL’s marks.

The trademark analysis, however, was not entirely favorable to PRL. PRL contended that Westchester’s use of the name “Polo” for its magazine constituted dilution of its famous mark in violation of the Federal Trademark Dilution Act (FTDA). The Fifth Circuit found that there was no dispute that PRL’s marks were famous and distinctive and that Westchester had adopted the name “Polo” after PRL’s mark had become famous and distinctive. PRL attempted to argue that it was entitled to relief

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under the FTDA if it could show “likelihood of dilution,” relying upon the Second Circuit’s opinion in *Nabisco, Inc. v. PB Brands, Inc.*, 191 F.3d 208 (2d Cir. 1999).

Westchester argued that the FTDA requires proof of actual dilution and actual economic harm, citing the Fourth Circuit’s opinion in *Ringling Bros. - Barnum & Bailey Combined Shows, Inc. v. Utah Division of Travel Development*, 170 F.3d 449 (4th Cir. 1999). The court found the Fourth Circuit’s analysis better reasoned and, in this case of first impression in the Fifth Circuit, held that under the FTDA there needed to be proof of *actual* harm. The FTDA became effective in January 1996 and it will be interesting to see whether the federal circuits continue to be split on this issue or whether the Second Circuit’s opinion in *Nabisco* will be the exception.

The Last Chukker

The Fifth Circuit’s analysis of this polo contest is rich with interesting and provocative factual and legal elements. Among them is the unusual position taken by PRL. In balancing the equities, the court noted that PRL’s products had become “famous by basking in the reflected glow of an elegant sport.” It did not escape the court that PRL essentially was asserting that it had a greater claim to the name “Polo” than the official publication of the United States Polo Association that regulated the very sport that gave rise to the source of PRL’s “glow.”

Despite the unique set of facts, the Fifth Circuit’s recognition of a heightened likelihood of confusion standard, its requirement for a showing of actual harm under the FTDA, its recognition that a magazine title is partially expressive speech and is entitled to First Amendment protection, and its requirement that a remedy even when infringement is found nevertheless be fashioned around First Amendment concerns are important and should have more general application, though the court’s conclusion regarding the very broad ‘natural zone of expansion’ may be relegated to the unique facts of the case.

Robert Latham is a partner at Jackson Walker, L.L.P in Dallas, Texas.

Broadcasters’ Efforts to Eliminate Speech Restrictions Enter Third Decade

D.C. Circuit Orders FCC to Act by September 29, 2000

By Jerianne Timmerman

The National Association of Broadcasters (NAB) has recently resumed its twenty-year effort to obtain repeal of the Federal Communications Commission’s personal attack and political editorializing rules. In a petition filed July 5, 2000, NAB and the Radio-Television News Directors Association (RTNDA) asked the D.C. Circuit Court of Appeals to take decisive action to end the FCC’s delay in its reconsideration of these rules. In response to NAB’s and RTNDA’s latest motion, the Commission assured the D.C. Circuit that, by October 5, 2000, it would “make a good faith attempt” to “take action” that would provide NAB and RTNDA relief “by eliminating, or suspending operation of, the rules or by retaining the rules pursuant to an appealable order.”

After considering NAB’s and RTNDA’s motion and the FCC’s response, the D.C. Circuit has recently ordered that, if the FCC does not act by September 29, 2000, NAB and RTNDA “may supplement their requests and seek whatever action they deem appropriate from the court.”

The FCC Rules

The personal attack rule requires that “[w]hen, during the presentation of views on a controversial issue of public importance, an attack is made upon the honesty, character, integrity or like personal qualities of an identified person or group, the licensee shall” provide the person or group attacked a tape or transcript, and a reasonable opportunity to respond. 47 C.F.R. § 73.1920.

The political editorial rule mandates that “[w]here a licensee, in an editorial, [e]ndorses or, [o]pposes a legally qualified candidate or candidates, the licensee shall” provide the other qualified candidates for the same office with notice and an opportunity to respond. 47 C.F.R. § 73.1930.

Both rules are remnants of the fairness doctrine, which the FCC decided, in 1987, to no longer enforce because it was inconsistent with the public interest and the First Amendment.

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Broadcasters' Efforts to Eliminate Speech Restrictions Enter Third Decade

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First Round Challenge

NAB first petitioned the FCC to repeal the personal attack and political editorializing rules in 1980. NAB's petition argued that the rules inhibited broadcasters' presentation of controversial issues, prevented the public from receiving diverse viewpoints on important substantive issues, and discouraged licensees from editorializing.

Together with RTNDA, NAB also submitted a survey of commercial broadcast stations attempting to quantify the chilling effect of the political editorial rule. The survey found that only about 3% of responding stations endorsed candidates for public office, although well over 40% aired other types of editorials. Nearly 43% of stations said they would endorse, or would consider endorsing, candidates if the FCC's political editorializing rule were repealed.

Although the Commission proposed repealing or modifying the personal attack and political editorializing rules in 1983, no final action was taken. NAB and RTNDA consequently petitioned the FCC for an expedited rule-making with regard to these rules in 1987 and again in 1990.

Mandamus and Appeal

Following petitions for writs of mandamus by RTNDA and NAB and remands by the D.C. Circuit Court to the Commission, the FCC refused in both 1997 and in 1998, by 2-2 votes, to repeal or modify the personal attack and political editorializing rules. In reviewing the second deadlocked vote in 1999, the D.C. Circuit concluded that the Commission had failed to provide any "affirmative justification of the two rules as being in the public interest, or explanation of why the rules should survive in light of FCC precedent rejecting the fairness doctrine." The court then remanded the matter to the Commission for further explanation, and ordered that "[g]iven its prior delay in this proceeding, the FCC need act expeditiously" on remand. *RTNDA and NAB v. FCC*, 184 F.3d 872, 875, 889 (D.C. Cir. 1999) (*Remand Decision*).

Another Round at the D.C. Circuit

Because the FCC has taken no action to advance its reconsideration of the challenged rules in the nearly one year since the *Remand Decision*, NAB and RTNDA have now urged the D.C. Circuit to take decisive action. Specifically, on July 5, NAB and RTNDA filed a motion requesting that the D.C. Circuit recall its mandate and vacate the challenged rules. Under clearly established precedent, a court has "inherent power" to recall and modify a mandate "upon a showing of good cause." *Dilley v. Alexander*, 627 F.2d 407, 410 (D.C. Cir. 1980). NAB and RTNDA argued that "good cause" exists in this case for recalling

NAB first petitioned the FCC to repeal the personal attack and political editorializing rules in 1980.

the mandate and invalidating the challenged rules, given the court's previous decision that the Commission has failed to provide any "affirmative justification" for

the rules and the Commission's extensive delays and deadlocked status.

Even if the court declines to recall its mandate and invalidate the challenged rules, NAB and RTNDA contended that the Commission cannot be permitted to sit back and do nothing in the face of the court's earlier directive to "act expeditiously." Thus, in the alternative, NAB and RTNDA asserted that the court should issue either a writ of mandamus, or an order under 47 U.S.C. Section 402(h), requiring the Commission to complete its reconsideration of the rules within three months, or else the rules will automatically become invalid. In light of the FCC's failure to act as directed by the *Remand Decision*, its unconscionable delays, and the need for action on these rules prior to the November elections, NAB and RTNDA urged the court to require the Commission to act within three months.

In less time than it has taken the FCC to address NAB's original petition, the American Revolution was fought and won, the Articles of Confederation adopted and rejected, and the Constitution drafted, ratified, and amended by the Bill of Rights - including the First Amendment, which the personal attack and political editorializing rules violate. Perhaps, as this proceeding enters its third decade, broadcasters' efforts to obtain repeal of these speech-restrictive rules may be nearing fruition.

Jerianne Timmerman is Associate General Counsel for the National Association of Broadcasters in Washington, D.C.

Editor's Note: For a further discussion of FCC rules as they apply to political matters, see "A Primer on Election Coverage and Commercials" on p. 45

A Primer on Election Coverage and Commercials

By C. Amanda Martin

Editor's Note: Amanda Martin is a member of LDRC's Prepublication/Prebroadcast Committee, under whose auspices this article was commissioned.

Campaign season may bring increased revenues to advertising departments of newspapers and radio and television stations, but it also brings increased stress to the editors and publishers, news directors and station managers who find themselves in a cross-fire of contentious political rhetoric. This article will examine the issues that must be considered both in covering political campaigns and in considering political ads offered for publication or broadcast. Print and broadcast media should evaluate editorial content in essentially the same way, and therefore they will be addressed together. Considerations in accepting or refusing advertising, however, differ significantly between print and broadcast, due to federal regulation of broadcast stations. Both, therefore, will be treated in turn.

Importance of Political Speech: The Doctrine

The importance placed on political speech by the framers of our Constitution can scarcely be overstated. Our forefathers "believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth." *Whitney v. California*, 274 U.S. 357, 375-76 (Brandeis, J. concurring), overruled on other grounds by *Brandenburg v. Ohio*, 395 U.S. 444 (1969). In *Thomas v. Collins*, Justice Jackson wrote in a concurring opinion that

The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.

323 U.S. 516, 545 (1945). Political speech is "more than self-expression; it is the essence of self govern-

ment." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), overruled on other grounds *sub nom.* by *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).

Adopting John Stuart Mill's axiom that the truth of a matter emerges from "its collision with error," JOHN S. MILL, *On Liberty* 15 (Oxford, Blackwell 1947), the Court has afforded significant breathing room, not only for truthful speech but also for false. "[R]ight conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (internal quotation omitted).

The starting point for considering any political news story, letter to the editor or advertisement, therefore, is that wide latitude is afforded to political speech and that a certain number of mistaken allegations or inaccurate charges are inevitable in the rough-and-tumble of political campaigns. Figuring out where and how to draw the line between robust debate and libelous dialogue, however, is the difficult challenge to editors, publishers, news directors and station managers.

Evaluation of Editorial Political Content

Pre-publication review of a news story, letter to the editor or editorial cartoon about political issues or political participants is at heart no different from review of any other editorial content. There can be no liability absent proof of a defamatory and false statement about the plaintiff that is published with fault by the defendant and causes damage to the plaintiff. It is helpful, therefore, to answer the standard questions reviewed before publishing any dicey story: Who will look bad when the story is published or aired? Are there any doubts about the truth of the information? Who or what, and how solid, are the sources of the damaging information? How severe is the likely damage from the story? Of course, one must be mindful of whether the cover-

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A Primer on Election Coverage and Commercials

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age is likely to pull the news organization into a subpoena battle.

Political news stories, however, are unusual in two ways. First, they are likely to contain greater vitriol than other stories, and the stakes of political office often are quite high. Second, writing about public officials or candidates for public office by definition raises the standard of fault that must be proven by a plaintiff to succeed in a defamation action. This means that political stories initially may be riskier to publish and broadcast, but the media are generously protected by the plaintiffs' almost "insurmountable" burden of proving actual malice." *Jordan v. World Publ'g Co.*, 872 P.2d 946, 22 Media L. Rep. (BNA) 1796 (Okla. Ct. App. Div. 4 1994).

NEW YORK TIMES AND POLITICAL SPEECH

The Supreme Court's landmark case of *New York Times v. Sullivan* is no doubt one of the handful of First Amendment cases that every LDRC member knows intimately. *New York Times v. Sullivan*, 376 U.S. 254 (1964). *New York Times*, the grandfather of all political speech cases, articulated the principle that we have "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Id.* at 271.¹

In considering the factually inaccurate statements in the undeniably political speech in the advertisement, the Court borrowed language from *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940):

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the

long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

The Court went on to describe the thick skins with which public officials must clothe themselves and the futility and imprudence of an overly restrictive review of political speech.

The climate in which public officials operate, especially during a political campaign, has been described by one commentator in the following terms: 'Charges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually have filled the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent.'

Id. at 273 (citations omitted). The Court then gave birth, of course, to actual malice, thereby making it one of the essential elements of any defamation action by a public official.

In a series of cases following *New York Times*, the Court fairly quickly explored and expanded the contours of the actual malice requirement for defamation recovery, often in the context of political speech. In *Monitor Patriot Co. v. Roy*, the Court wrote that, in political campaigns

the constitutional guarantee has its fullest and most urgent application...publications concerning candidates must be accorded at least as much protection under the First and Fourteenth Amendments as those concerning occupants of public office.

401 U.S. 265, 271-72 (1971).

The requirement applies to political candidates, as well as public officials.

[P]ublic discussion of the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* rule.

Ocala Star-Banner Co. v. Dameron, 401 U.S. 295, 300 (1971).

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Again in 1989, the Court echoed that political candidates must arm themselves for battle when entering an election.

When a candidate enters the political arena, he must expect that the debate will sometimes be rough and personal and cannot ‘cry Foul!’ when an opponent or an industrious reporter attempts to demonstrate that he lacks the ‘sterling integrity’ trumpeted in the campaign literature and speeches. Vigorous reportage of political campaigns is necessary for the optimal functioning of democratic institutions and central to our history of individual liberty.

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 687 (1989).

Therefore, the subject matter of political campaigns cloaks reporters, editors and publishers with the protection that they will not be liable for defamation unless it is proven that they published with knowledge of the information’s falsity or with reckless disregard for its falsity.

In reviewing stories about political matters, it is worth remaining ever vigilant to spot the unintended plaintiff — the private person who is mentioned in passing in an article about a public matter. Were such a person to bring a libel action, he likely would argue that as a private person he need only prove negligence on the part of the defendant. The general milieu of a political campaign might not be enough to raise the fault standard to actual malice.

What Constitutes Actual Malice?

DOES A NEWSPAPER OR BROADCAST STATION HAVE A DUTY TO INVESTIGATE CHARGES LEVELED BY ONE CANDIDATE AGAINST ANOTHER?

The question of “What constitutes actual malice” has primarily been answered by cases deciding what *doesn’t* constitute actual malice. The year after *New York*

Times, the Court made clear that “reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

At issue in *St. Amant* were statements by St.

Amant, a political candidate, imputing “conduct of the most nefarious nature” to his opponent, though St. Amant was merely repeating statements he had heard and himself did not have knowledge of the truth or falsity of the allegations. Answering the charge that a standard requiring actual knowledge of falsity rewards ignorance, the *St. Amant* Court wrote that

...the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones.

Id. at 731-32.

Generally speaking, there is no affirmative duty to investigate facts or allegations before publishing them.² However, the Supreme Court has held that insurmountable evidence that a reporter was on notice of the likely inaccuracy of a charge could be evidence of actual malice. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989).

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In reviewing stories about political matters, it is worth remaining ever vigilant to spot the unintended plaintiff — the private person who is mentioned in passing in an article about a public matter.

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In *Harte-Hanks*, the Journal News published a story, about a candidate for municipal judge Connaughton, relying upon a single source — a witness in a pending grand jury investigation — who stated that Connaughton had used “dirty tricks” and offered her and her sister jobs and a trip to Florida “in appreciation” for their help in the investigation. *Id.* at 660.

The Court found that evidence of obvious reason to distrust the bonafides of the single source when joined with failure to interview a key witness to the events at issue, to listen to a proffered audiotape of key conversations, or to accept the denials of other relevant sources, suggested a “deliberate effort to avoid the truth.”

The Court concluded that a “deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the] charges,” in the context of the entire record before it, was sufficient to support a finding of actual malice. *Id.* at 692-93.

In *Sible v. Lee Enterprises, Inc.*, another court found evidence that a reporter was “on notice” of falsity sufficient to reach an actual malice finding. A former investigator accused the sheriff of stealing a meat smoker and covering up the investigation. 729 P.2d 1271, 13 Media L. Rep. (BNA) 1738 (Mont. 1986), *cert. denied*, 483 U.S. 1011 (1987). The reporter knew the story’s source was a political foe, and the reporter “promised to make an independent investigation.” *Id.* at 1273.

However, he didn’t interview the investigating officer, who later testified that he had been available for an interview; he would have been willing to be interviewed; and he would have confirmed the falsity of story. *Id.*

When a newspaper has facts that indicate material is highly suspect, it should, and it does, have a duty to investigate before publishing.”

Id. at 1274.

Reporter and editor “had reason to believe that Salisbury’s statement was highly suspect.” *Id.*

There is no duty to put before one candidate the spe-

cific allegations made against him by another before publication. The Oklahoma Supreme Court affirmed such a summary judgment ruling in favor of a newspaper publisher on the basis of absence of actual malice.

Regardless, and even assuming the reporter did not inform him of the accusation prior to publication, such an omission on his part, when weighed

in the total context of Washington’s deposition, was not ‘highly unreasonable conduct constituting an [e]xtreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.’

Washington v. World Publishing

Co., 506 P.2d 913, 917 (Okla. 1972) (citations omitted).

Nor do denials by the subject of a story raise the duty to investigate.

Liability under the ‘clear and convincing proof’ standard . . . cannot be predicated on mere denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error.

Edwards v. National Audubon Soc., Inc., 556 F.2d 113, 121 (2d Cir.), *cert. denied sub nom., Edwards v. New York Times, Co.*, 434 U.S. 1002 (1977).

Courts have consistently held that “[p]olitical motivation [behind a statement] does not equate with knowing or reckless falsity,” *Dolcefino v. Turner*, 987 S.W.2d 100, 119 (Tex. Ct. App. 1998), and that “[a]ctual malice cannot be proven simply because a source of information might also have provided the information to further the source’s self-interest.” *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 715 (4th Cir.), *cert. denied*, 501 U.S. 1212 (1991).

Moreover, “[a]ctual malice may not be inferred from evidence of ill will or deliberate intention to injure because the focus of the inquiry is not on the defendant’s

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Courts have consistently held that “[p]olitical motivation [behind a statement] does not equate with knowing or reckless falsity,”

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attitude toward the plaintiff but on the defendant's attitude towards the truth or falsity of the statement." *Condit v. Clermont Cty. Review*, 638 N.E.2d 96, 100 (Ohio Ct. App. 1994).

In the context of call-in radio shows and television talk shows, courts have been reluctant to find liability for the broadcast station caught in the middle of political bickering.

[A] statement called into a talk show can not be verified within the seven seconds afforded by electronic equipment.

Pacella v. Milford Radio Corp., 462 N.E.2d 355 (Mass. App. Ct. 1984), *aff'd* 476 N.E.2d 595 (Mass. 1985), *cert. denied*, 474 U.S. 844 (1985).

In *Weber v. Woods*, a candidate for sheriff made statements on a television talk show (aired on an ABC-owned station) that a police officer working in the records department had "removed" evidence related to his brother's criminal activity. 334 N.E.2d 857 (Ct. App. Ill. 1975). The court found there was a question of fact as to actual malice by Woods, the talk show guest, but found no potential liability for television station. "[I]nvestigatory failures alone are not sufficient to establish reckless disregard" under the actual malice standard.

Discussing the nature of how newspaper columnists work, the Circuit Court of Appeals for the District of Columbia also found that, absent some reason to know of its falsity, newsmen need not verify every last detail.

Pearson and his fellow columnists seek and often uncover the sensational, relying upon educated instinct, wide knowledge and confidential tips. Verification would be certain to dry up much of the stream of information that finds its way into their hands. Whether or not this would please a number of us is irrelevant. What matters is that a rule requiring verification in the absence of evidence that the publisher had good reason to suspect falsity would curtail substantially a protected form of speech.

Washington Post Co. v. Keogh, 365 F.2d 965, 972-73 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 1011 (1967).

Absent something extraordinary — such as inherently improbable information or contrary facts placed in a reporter's lap — a journalist does not have an affirmative duty to independently investigate information that is published. Such investigations may be "good reporting," but their absence does not give rise to an inference of actual malice.

DOES IMBALANCED COVERAGE RAISE AN INFERENCE OF ACTUAL MALICE?

"The exercise of editorial judgment to omit information favorable to the plaintiff is no evidence of actual malice." *Dolcefino v. Turner*, 987 S.W.2d 100, 121 (Tex. Ct. App. 1999). In *Janklow v. Newsweek, Inc.*, the Eighth Circuit wrote that:

We believe that the First Amendment cautions courts against intruding too closely into questions of editorial judgment, such as the choice of specific words. Editors' grilling of reporters on word choice is a necessary aggravation. But when courts do it, there is a chilling effect on the exercise of First Amendment rights.

788 F.2d 1300, 1304 (8th Cir.), *cert. denied*, 479 U.S. 883 (1986).

That same Circuit, in similar rulings, held that favorable information about plaintiff, reviewed by defendant but omitted from a broadcast, does "not reach the level of malice required by *New York Times*," *Brown v. Herald Co.*, 698 F.2d 949, 951 (8th Cir.1983), and that disregarding one source who claimed another source's version was a "pack of lies" is not actual malice. *Speer v. Ottaway Newspapers, Inc.*, 828 F.2d 475 (8th Cir.1987), *cert. denied*, 485 U.S. 970 (1988).

While verification of the facts remains an important reporting standard, a reporter, without a 'high degree of awareness of their probable falsity,' may rely on statements

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made by a single source even though they reflect only one side of the story without fear of libel prosecution by a public official.

New York Times Co. v. Connor, 365 F.2d 567, 576 (5th Cir. 1966). See also, *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913-14 (2d Cir.1977) (“Knowledge of an author’s ill-will does not by itself prove knowledge of probable falsity.”)

Defending The Political News Story

Even if a plaintiff has made a *prima facie* showing of the elements of defamation, including actual malice, there remain defenses that may be especially appropriate in defending a political news story. Much political banter is rhetorical hyperbole that cannot be proven true or false. Once termed the “opinion defense,” the now-clumsy “not provably false” defense will come into play in defending many political reports.

OPINION AND PROVABLE FALSITY

Recognizing that one of the intended benefits of the First Amendment was that citizens should thoroughly discuss and analyze matters of public concern, the courts created a protection for fair comment and criticism. This exception led to what many courts perceived as a more general protection for speech expressing opinions.

The Supreme Court in *Milkovich v. Lorain Journal Co.* denied that there is or was such a wholesale opinion privilege. 497 U.S. 1 (1990). Instead, the Court outlined a series of cases which, when read together, offer sufficient protection to free expression “without the creation of an artificial dichotomy between ‘opinion’ and ‘fact.’” *Id.* at 19. The Court found that “existing constitutional doctrine . . . ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.” *Id.* at 20. The Court cited the

Restatement (Second) of Torts:

“A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.”

Restatement (Second) of Torts, § 566.

Despite the Court’s holding, pre- and post-

Despite the Court’s holding, pre- and post-Milkovich cases have implicitly recognized and applied the “opinion defense” in political speech cases.

Milkovich cases have implicitly recognized and applied the “opinion defense” in political speech cases. The Georgia Court of Appeals exonerated a Cox newspaper in its statement that, “in a deeply cynical and revealing act, [a political candidate changed his name] to John

Frank Collins during the gubernatorial term of Joe Frank Harris, believing that if he couldn’t be elected on his merits, maybe he could fool voters into putting him into power.” *Collins v. Cox Enterprises, Inc.*, 452 S.E.2d 226, 227 (Ga. Ct. App. 1994).

The Court of Appeals found the statement does not imply an assertion of objective fact that might be proved false; rather, it is merely speculation as to Collins’ motive based upon his behavior. Collins’ motive is a matter about which reasonable people might differ. Cox’s conjecture regarding Collins’ motive cannot be proven as absolutely true or false and therefore is the sort of opinion that is not actionable as libel.

Id. at 227.

Similarly, in considering a series of articles and editorial cartoons accusing a U.S. Senatorial candidate of sewer politics, the Oklahoma Supreme Court found that

[w]hen viewed even in their most derogatory

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tory sense . . . while possibly unflattering or even reprehensively false in their conclusions, they are expressions of opinion, privileged under the First Amendment to the United States Constitution.”

Miskovsky v. Tulsa Tribune Co., 678 P.2d 242, 247 (Okla.), *cert. denied*, 465 U.S. 1006 (1984).

The court went on to state that while

innuendo may be explanatory of the meaning of the publication alleged to be libelous, whether pictorial or writings, and of the understanding imparted to the ordinary viewer of the publication, innuendo cannot be used to enlarge the meaning or to attribute to it a meaning which it will not bear.

Id. at 250.

Courts also have concluded that acrid words used against political leaders and candidates are not actionable as a matter of law. *Good Gov't Group v. Superior Court*, 586 P.2d 572, 576 (Cal.) (charges of “recalcitrant,” “machinations,” “infamy” and so forth used against former city council member not actionable), *cert. denied*, 441 U.S. 961 (1978).

NEUTRAL REPORTAGE

The defense of being even-handed also can come into play in political coverage. Though never directly ruled upon by the Supreme Court, the so-called neutral reportage defense has been recognized in many state and federal courts. The Second Circuit in *Edwards v. National Audubon Soc., Inc.* found that:

The public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them. The contours of the press’s right of neutral reportage are, of course, defined by the principle that gives life to it. Literal accuracy is not a prerequisite: if we are to enjoy the blessings of a robust and unintimidated

press, we must provide immunity from defamation suits where the journalist believes, reasonably and in good faith, that his report accurately conveys the charges made.

556 F.2d 113, 120 (2d Cir.), *cert. denied sub nom.*, *Edwards v. New York Times, Co.*, 434 U.S. 1002 (1977). The formulation included in American Jurisprudence is that

[A] republisher who accurately and disinterestedly reports certain defamatory statements made against public figures is shielded from liability, regardless of the republisher’s subjective awareness of the truth or falsity of the accusation . . . where there is an accurate and disinterested reporting of serious charges leveled by a responsible organization against a public figure under circumstances where a raging and newsworthy controversy exists. The substance of the privilege is that if the mere fact that a statement is made is itself newsworthy, then the reporting of that statement by the press is protected expression, regardless of whether the statement is defamatory and false, and the press is not bound to verify the truth of the statement.

50 Am Jur 2d, Libel and Slander § 313.

In *Harte-Hanks*, the Supreme Court alluded to the possibility of a neutral reportage defense but noted that the petitioner had “eschewed any reliance” on it. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 694 (1989). The Court noted that such a “strategic decision appears to have been unwise in light of the facts of this case,” because the article accurately reported newsworthy allegations that a political candidate had used “dirty tricks” to elicit information that had become important to the political campaign and also accurately reported the candidate’s response. *Id.* at 694-95. While opining that if the

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Court were “to adopt the neutral reportage theory, the facts of this case arguably might fit within it,” the Court declined to reach that question that was not raised on appeal. *Id.* at 695.

Despite the Supreme Court’s silence on the privilege, state and federal courts across the nation have recognized and applied the neutral reportage privilege. See *Coliniatis v. Dimas*, 965 F. Supp. 511, 519 (S.D.N.Y. 1997); *Krauss v. Champaign News Gazette, Inc.*, 375 N.E.2d 1362, 1363 (1978); *Price v. Viking Penguin, Inc.*, 881 F.2d 1426 (8th Cir.1989), *cert. denied*, 493 U.S. 1036,(1990); *Ryan v. Herald Ass’n*, 566 A.2d 1316 (Vt. 1989); *Burns v. Times Argus Ass’n*, 430 A.2d 773 (Vt. 1981) (citing privilege with approval in dicta); *Herron v. Tribune Publishing Co.*, 736 P.2d 249 (Wash. 1987) (en banc); *Barry v. Time, Inc.*, 584 F. Supp. 1110 (N.D. Cal.1984); *Sunshine Sportswear & Electronics, Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499 (D.S. C. 1989); *Gist v. Macon County Sheriff’s Dept.*, 671 N.E.2d 1154 (Ill. App. Ct. 1996) (neutral reportage conditional privilege protected newspaper and television station).

Political rhetoric was at issue in *Cianci v. New Times Publishing Co.*, 639 F.2d 54 (2d Cir.1980). In that case, the mayor, who was seeking reelection, brought a libel action against a magazine that stated that the mayor had once been accused of rape, had gotten the charges dropped, and had made a payment to the accuser. While recognizing the defense, the Second Circuit in *Cianci* found that the article at issue failed the neutral reportage test. The court found that a jury could find that the *New Times* did not simply report the charges but espoused or concurred in them and that the *New Times* made no mention of Cianci’s claim of innocence of the charge of rape. The court therefore reversed the judgment dismissing the complaint and remanded the case for further proceedings. *Id.* at 67-69.

SELF DEFENSE

Some courts have recognized a defamation defense termed by American Jurisprudence as “defensive declarations.” If someone is the victim

of a “character attack,” the victim may enjoy a privilege to return fire with statements “made in an honest endeavor to vindicate one’s character or to protect one’s interests Thus, as a general rule, statements made in reply to a defamatory publication enjoy a qualified privilege.” 50 Am Jur 2d, Libel and Slander § 337.

The Supreme Court of South Carolina applied this defense in the context of letters to the editor in *Cartwright v. Herald Pub. Co.*, 68 S.E.2d 415, 417 (S.C. 1951). In *Cartwright*, the plaintiff, who was a member of the South Carolina House of Representatives, claimed that he was the target of two letters published in the daily Rock Hill Evening Herald. *Id.* at 416.

The letters did not refer to appellant by name but as a church elder and there were other allusions by which plaintiff alleged he was identified. *Id.* A letter that appeared in a newspaper column called “Voice of the People” referred to previously published letters as “ugly criticisms of the delegation” and “that they were keynoted by, quoting, ‘a lunatic sage who serves as ghost writer for most of the vitriolic letters contributed to this paper as well as fulfilling his life work as superintendent of a hen house, and warming the scorners bench.’” *Id.* at 416. The “Voice of the People” column touched off a series of letters back-and-forth, of which the challenged letter was one.

Recognizing a privilege from libel and slander for utterances made in self-defense, the court quoted AmJur and affirmed the defense judgment of the court below. *Id.* at 420.

Evaluation of Political Advertising

While editorial content in print and broadcast media is evaluated in the same way, the rules of the road in print and broadcast advertising are diametrically opposed. It has been said that the freedom of the press is the freedom to *own* a press. That is to say that the publishers have un-

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fettered license to accept or reject any copy, including advertising, that is submitted for publication. As a corollary to that right, publishers assume liability for the content of advertisements. By contrast, broadcasters have a mere restricted ability to refuse political advertising, but also are afforded immunity against liability for defamatory content in certain circumstances.

THE RIGHTS AND RESPONSIBILITIES OF POLITICAL ADVERTISING IN PRINT

Part and parcel of the First Amendment guarantee of a free press is the right not to be forced to sponsor others' speech. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 243 (1974), the Supreme Court considered a state law that required a newspaper to publish a reply to a political attack. The Court held that the plaintiff had no right to require the paper to publish a reply, and that the statute requiring the publisher to provide balanced coverage was unconstitutional. *Id.* at 258.

The Court found that under the statute, "political and electoral coverage would be blunted or reduced." *Id.* at 257. The Court noted that "[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated." *Id.* at 256.

The Court reiterated that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials — whether fair or unfair — constitute the exercise of editorial control and judgment." *Id.* at 258. Under *Tornillo* and its progeny, newspapers therefore retain the right to make unilateral, editorial judgments about what advertisements to accept.

Cases uniformly hold, however, that once a newspaper accepts an advertisement or letter to the editor for publication, the newspaper is potentially liable for its contents, even though the content did not originate with the newspaper. The Eleventh Circuit wrote:

Supreme Court cases discussing the limitations the First Amendment places on state defamation law indicate that there is no constitutional infirmity in Georgia law holding publishers liable under a negligence standard with respect to the commercial advertisements they print.

Braun v. Soldier of Fortune Magazine, Inc., 968 F.2d 1110, 1118, 20 Media L. Rep. (BNA) 1777, (11th Cir. 1992).

In *Trigg v. The Elk Valley Times*, a petition was circulated, signed and taken to the *Times* to run as a paid advertisement. 720 S.W.2d 69, 71 (Tenn. Ct. App. 1986). Incidentally, a member of the news staff picked up the issue for a news story.

Even in the context of advertising, traditional First Amendment principles apply in analyzing a defamation claim, and the court in *Trigg* noted that "[n]egligent failure to check the accuracy of statements in an advertisement and to discover misstatements therein, 'is constitutionally insufficient to show the recklessness that is required for a finding of actual malice.'" *Id.* at 75 (citing *Baldine v. Sharon Herald Co.*, 391 F.2d 703, 706 (3rd Cir. 1968), *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) and *Taylor v. Nashville Banner Publishing Co.*, 573 S.W.2d 476, 482 (Tenn. Ct. App. 1978), *cert. denied*, 441 U.S. 923 (1979)).

Despite the presumption of a right to refuse political or any other advertising, the First Amendment does not exempt media from the general laws of contracts. In *Herald Telephone v. Fatouros*, the newspaper accepted copy for an advertisement, arranged for review of proof, and accepted, then tried to return payment. 431 N.E.2d 171 (Ind. Ct. App. 1982).

The Court of Appeals in Indiana found that the newspaper had created a contract to run the ad. *Id.* The newspaper did not provide the advertiser with a copy of their "Policy Considerations Covering Political Advertisements," nor did the paper reserve the right to later reject the ad.

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While a newspaper has a right to reject any ad it wishes, this right exists only until a contract is formed. . . . Once the contract is entered into, the newspaper stands in the same position as any other business entity and may reject an ad only if it reserved the right to do so or has an equitable defense to specific performance.

Id. at 175.

The trial court entered, and the appellate court affirmed, a mandatory injunction requiring publication of the advertisement.

THE BROADCASTERS RIGHTS AND RESPONSIBILITIES OF POLITICAL ADVERTISING

Unlike the realm of print publications, broadcasters are regulated under the premise that they trade certain editorial rights in exchange for the ability to broadcast over scarce, public airwaves. There is a labyrinth of statutes and regulations that govern political advertising via the public airwaves. This article will not fully explore the minute detail inherent in broadcast regulations but will give an overview of the general principles applicable and the primary obligations on broadcast stations accepting political advertising. Nor will this article address state laws and regulations that might be applicable.

EQUAL ACCESS

Broadcast stations are governed by two broad principles aimed at assuring access to candidates for political office: equal opportunity and reasonable access. Federal law provides that

if any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.

47 U.S.C. § 315(a).

This requirement applies to candidates for any office — federal, state or local.

No obligation is impossible under this subsection upon any licensee to allow the use of its station by any such candidate.

“Use” of the station includes any identifiable broadcast of a candidate’s voice or image — other than in news coverage — or any use by a candidate of the station’s facilities.

The statute further provides that the licensee “shall have no power of censorship over the material broadcast under the provisions of this section.” *Id.* Note that while news programming is exempt from these provisions, non-news programming is *not* exempt and can trigger equal access requirements.

Also in the statute are provisions for charging such candidates for “use.” The exact requirements relating to the pricing of air time are quite technical and beyond the scope of this article, but the essential premise is that, in pricing air time, broadcast stations must make air time available to candidates at the same rates made available to their “most favored” advertisers. 47 U.S.C. § 315(b).

[D]uring the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, [stations must offer] the lowest unit charge of the station for the same class and amount of time for the same period.” *Id.*

At other times, charges must be “comparable” to charges assessed other users. *Id.*

Application of the equal opportunity doctrine requires that if a station gives one candidate free air time, that station must make free time available to each opposing candidate.

REASONABLE ACCESS

The reasonable access requirements apply only to legally qualified candidates for federal — not state — office. The definition of “legally qualified candidate” is set forth in 47 C.F.R. § 73.1940:

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(a) A legally qualified candidate for public office is any person who:

- (1) Has publicly announced his or her intention to run for nomination or office;
- (2) Is qualified under the applicable local, State or Federal law to hold the office for which he or she is a candidate; and
- (3) Has met the qualifications set forth in either paragraph (b), (c), (d), or (e) of this section.

(b) A person seeking election to any public office including that of President or Vice President of the United States, or nomination for any public office except that of President or Vice President, by means of a primary, general or special election, shall be considered a legally qualified candidate if, in addition to meeting the criteria set forth in paragraph (a) of this section, that person:

- (1) Has qualified for a place on the ballot; or
- (2) Has publicly committed himself or herself to seeking election by the write-in method and is eligible under applicable law to be voted for by sticker, by writing in his or her name on the ballot or by other method, and makes a substantial showing that he or she is a bona fide candidate for nomination or office.

(c) A person seeking election to the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules in 47 CFR chapter I, be considered legally qualified candidates only in those States or territories (or the District of Columbia) in which they have met the requirements set forth in paragraphs (a) and (b) of this section: Except, that any such person who has met the requirements set forth in paragraphs (a) and (b) of this section in at least 10 States (or 9 and the District of Columbia) shall be

considered a legally qualified candidate for election in all States, territories, and the District of Columbia for the purposes of this Act.

(d) A person seeking nomination to any public office, except that of President or Vice President of the United States, by means of a convention, caucus or similar procedure, shall be considered a legally qualified candidate if, in addition to meeting the requirements set forth in paragraph (a) of this section, that person makes a substantial showing that he or she is a bona fide candidate for such nomination: Except, that no person shall be considered a legally qualified candidate for nomination by the means set forth in this paragraph prior to 90 days before the beginning of the convention, caucus or similar procedure in which he or she seeks nomination.

(e) A person seeking nomination for the office of President or Vice President of the United States shall, for the purposes of the Communications Act and the rules thereunder, be considered a legally qualified candidate only in those States or territories (or the District of Columbia) in which, in addition to meeting the requirements set forth in paragraph (a) of this section:

- (1) He or she, or proposed delegates on his or her behalf, have qualified for the primary or Presidential preference ballot in that State, territory or the District of Columbia; or
- (2) He or she has made a substantial showing of a bona fide candidacy for such nomination in that State, territory or the District of Columbia; except, that any such person meeting the requirements set forth in paragraphs (a)(1) and (2) of this section in at least 10 States (or 9 and the District of Columbia) shall be considered

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a legally qualified candidate for nomination in all States, territories and the District of Columbia for purposes of this Act.

The FCC may revoke a station's license "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." 47 U.S.C. § 312(a)(7).

In *CBS, Inc. v. F. C. C.*, the Supreme Court upheld the FCC and Circuit Court's articulation of the factors that should be considered in evaluating whether a candidate's request is reasonable. 453 U.S. 367, 375, 7 Media L. Rep. 1563 (1981). The five factors to be weighed are

(a) the individual needs of the candidate (as expressed by the candidate); (b) the amount of time previously provided to the candidate; (c) potential disruption of regular programming; (d) the number of other candidates likely to invoke equal opportunity rights if the broadcaster grants the request before him; and, (e) the timing of the request. *Id.*

The requirements of parity in charges for air time apply to all candidates, including candidates for federal office. Stations must make time available to all candidates on an equal basis. Additionally, FCC regulations require stations to make full disclosure of its rates to candidates, including "all discount privileges offered to commercial advertisers, including the lowest unit charges for each class and length of time in the same time period, and all corresponding discount privileges, available upon equal terms to all candidates." At a minimum, stations must disclose

- (1) A description and definition of each class of time available to commercial advertisers sufficiently complete to allow candidates to identify and understand what specific attributes differentiate each class;
- (2) A description of the lowest unit charge and

related privileges (such as priorities against preemption and make goods prior to specific deadlines) for each class of time offered to commercial advertisers;

(3) A description of the station's method of selling preemptible time based upon advertiser demand, commonly known as the "current selling level," with the stipulation that candidates will be able to purchase at these demand-generated rates in the same manner as commercial advertisers;

(4) An approximation of the likelihood of preemption for each kind of preemptible time; and

(5) An explanation of the station's sales practices, if any, that are based on audience delivery, with the stipulation that candidates will be able to purchase this kind of time, if available to commercial advertisers.

47 C.F.R. § 73.1942 .

The regulations provide that political advertisements must identify "(1) That such matter is sponsored, paid for, or furnished, either in whole or in part, and (2) By whom or on whose behalf such consideration was supplied . . . with letters equal to or greater than four percent of the vertical picture height that air for not less than four seconds." 47 C.F.R. § 73.1212. The broadcast must identify the actual purchaser of air time by name, not by an obscuring committee name.

INTERPRETATIONS OF THE EQUAL OPPORTUNITY AND REASONABLE ACCESS PROVISIONS

The application and meaning of Sections 312 and 315 of the U.S. Code have been challenged in federal court.

In *Becker v. FCC*, 95 F.3d 75 (D.C. Cir. 1996), the D.C. Circuit considered the refusal by WAGA, an Atlanta station, to broadcast a candidate's anti-abortion advertisement during times of the day that children were likely to be among the viewing audience. Recognizing that in passing these requirements Congress affords "a special right of access to a broadcasting station which no other groups enjoyed" the D.C. Circuit wrote that Congress' primary purpose was "to ensure 'candidates ac-

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cess to the time periods with the greatest audience potential.” *Id.* at 80. Broadcasters are not free to impose their own evaluations of the propriety of the proposed advertisements or to move them to more palatable or convenient time slots.

In exchange for being subject to this compelled speech requirement, the United States Supreme Court has recognized that broadcast stations enjoy immunity from suit for any allegedly defamatory statements contained in the advertisements.

[J]udicial interpretations reaching the issue have found an immunity implicit in this section. . . . In no case has a court even implied that the licensee would not be rendered immune were it denied the power to censor libelous material.

Farmers Educational and Cooperative Union of America v. WDAY, Inc., 360 U.S. 525 (1959).

This immunity does not attach, however, to broadcasts placed by any person or organization other than the candidate or the candidate's official committee.

PERSONAL ATTACKS AND RIGHT OF RESPONSE

FCC regulations provide that when an attack is made upon the “honesty, character, integrity or like personal qualities” of a person or group during the presentation of views on a controversial issue of public importance, a station must (1) inform the “victim” of the date, time and identification of the broadcast; (2) provide a script, tape or accurate summary (if actual record is unavailable) of the attack; and (3) offer a reasonable opportunity to respond over the licensee’s facilities. 47 C.F.R. § 73.1920. These provisions do not apply to attacks made by legally qualified candidates or their spokespersons, or to remarks made during newscasts, in news interviews or in news analysis.

RECORDKEEPING

Broadcast stations must keep a “political file” that documents “all requests for broadcast time made by or on behalf of a candidate for public office, together with an appropriate notation showing the disposition made by the licensee of such requests, and the charges made, if any, if the request is granted. The

“disposition” includes the schedule of time purchased, when spots actually aired, the rates charged, and the classes of time purchased.” 47 C.F.R. § 73.1943. A record must be kept of free time provided to candidates, and all records must be retained for two years. *Id.*

FUTURE CONSIDERATIONS — THE GORE COMMISSION

Election broadcast coverage itself is evolving in response to recent public policy debates concerning campaign finance reform. Reformers, concerned about the burgeoning costs of running political campaigns, have recognized that the most rapidly increasing component of campaign expenditures is television advertising expenditures. Indeed, from 1970 to 1996, television advertising expenditures increased 800 percent. *Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters*, 56 (Dec. 18, 1998)

To address this, reformers have proposed that broadcasters provide free air time to candidates. The FCC has currently invited comment on this topic. *Notice of Inquiry on the Public Interest Obligations of TV Broadcasters* (99-390) (FCC, December 15, 1999).

Some urge that broadcasters be mandated to provide free air time to candidates for public office. The Alliance for Better Campaigns, for example, has urged the FCC to adopt a rule requiring television broadcasters to set aside five minutes per night for the month prior to an election for candidates to appear and provide discourse on various topics. This, the Alliance and other reformers urge, is consistent with the role of broadcasters as public trustees who are “given the privilege of using scarce [frequencies] as proxies for the entire community [and] obligated to give suitable time and attention to matters of great public concern.” Comments of Alliance for Better Campaigns, et al, before the Federal Communications Commission in the Matter of Public Interest Obligations of TV Broadcast Licensees, FCC 99-390, *MM Docket No. 99-360* (March 27, 2000), citing *Red Lion Broadcasting v. FCC*, 396 U.S. 367, 394 (1969).

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The broadcast industry has resisted a mandated imposition of free air time, citing First Amendment concerns and its already rich history of contributions of air time in the public interest. The industry has, however, endorsed voluntary guidelines urging broadcasters to provide five minutes of air time each night for candidate-centered discourse in the thirty days before an election.

These recommendations were adopted by the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters (commonly known as “The Gore Commission”), which studied a wide range of public policy issues affecting the broadcast industry as it enters the digital age. The Gore Commission recommendations sought to provide maximum flexibility for broadcasters to choose the format, time slots, topics and races. *Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters*, 59 (Dec. 18, 1998).

Broadcasters taking the Gore Commission’s recommendations to heart, and considering offering free air time, should exercise some degree of caution. Perhaps proving that no good deed goes unpunished, one of the early providers of free air time, Capitol Broadcasting Company of Raleigh, North Carolina, whose CEO sat on the Gore Commission, was subjected to a citizen complaint before the N.C. State Board of Elections alleging that the free air time that it was offering to gubernatorial candidates was nothing more than an impermissible corporate political contribution. The complaint also alleged that the broadcaster had impermissibly denied minor candidates the opportunity to participate. The complaint was ultimately dismissed by the Board after determination that the format of the free air time was consistent with a broadcast exemption found in North Carolina’s campaign contribution laws.

Nonetheless, this incident suggests that broadcasters who desire to offer free air time should consult state election law and ensure that the format of the air time, as well as the choice of beneficiaries, comply with local requirements. See *In re Complaint Concerning the Administration of Election Laws Pertaining to the May 2, 2000 North Carolina Primary Elections* — Complaint

Relative to Free Air Time and Capitol Broadcasting Co. before the North Carolina Board of Elections (April 14, 2000).

The Gore Commission recommended several other changes to the broadcast regulatory scheme pertaining to election coverage. While it is difficult to predict whether some or all of these changes will be adopted, they are the subject of debate. The Commission recommended the following:

- Repeal the “lowest unit rate” requirement in return for free air time. The Commission suggested that the “lowest unit rate” requirement was cumbersome and a “bureaucratic nightmare” which could be replaced with a system which allowed broadcasters to air political ads at market rates provided they also provided some free time to candidates as well.
- Create broadcast banks, providing money or vouchers for time for candidates and parties for the purchase of radio and television time.
- Change requirements governing sale and use of discounted broadcast time to shorten the time period of its availability and expand the length of the candidate’s appearance on the air. (That is, the Commission recommends shortening the period of time in which broadcasters must sell time to candidates. If candidates were required to actually appear in the commercials they air it likely would cut down on the negativity of the commercials.)
- Grant the FCC the authority to waive the “equal opportunities” requirements of Section 315(a) of the Communications Act where it is necessary to allow the broadcasters to give free air time to major candidates in a race or to give time only to one candidate if one or more opponents decline the offer of time.

Report of the Advisory Committee on Public Interest Obligations of Digital Television Broadcasters, Dec. 18, 1998 at pp. 57-59.

Evaluation of editorial content or print advertisements about elections and political matters follows the traditional model for pre-publication review. An assessment should be made about the elements of libel and the possible defenses should a lawsuit be brought, bearing in

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mind the heightened protections for criticism of public officials. The rules for political advertisements on broadcast stations, however, are not governed by First Amendment principles at all but by a complex maze of regulations. Those rules are structured to allow full and equal access by political candidates to public airwaves in furtherance of the goal of uninhibited, robust, and wide-open debate. With thoughtful consideration, both editorial and advertising departments can promote the free flow of information while at the same time remaining free from threats of lawsuit. This is the highest calling of members of the Fourth Estate.

¹ As has been recounted numerous times, the challenge in *New York Times* was to a full-page advertisement published in the March 29, 1960 edition of the *New York Times*. The ad was captioned, "Heed Their Rising Voices," and stated that "As the whole world knows by now, thousands of Southern Negro students are engaged in widespread non-violent demonstrations in positive affirmation of the right to live in human dignity as guaranteed by the U.S. Constitution and the Bill of Rights." *Id.* at 256. The ad charged that "in their efforts to uphold these guarantees, they are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom." *Id.* The ad appealed for funds to support the student movement, "the struggle for the right-to-vote," and the legal defense of Dr. Martin Luther King, Jr. against a perjury indictment then pending in Montgomery. *Id.*

Some of the statements contained in the advertisement were indisputably inaccurate descriptions of events which occurred in Montgomery. The students at the demonstration sang the National Anthem and not "My Country, 'Tis of Thee." *Id.* at 258-59. Students had been expelled for a lunch counter demonstration, not a demonstration at the Capitol. *Id.* at 259. "The campus dining hall was not padlocked on any occasion, and the only students who may have been barred from eating there were the few who had neither signed a preregistration application nor requested temporary meal tickets." At no time did the police "ring" the campus, and they were not called to the campus in connection with the demonstration on the State Capitol steps. Dr. King had been arrested four, not seven, times. *Id.*

The plaintiff alleged that the word "police" in the third paragraph referred to him as the Montgomery Commissioner who supervised the Police Department and that the allegations against the police were therefore against him. *Id.* at 258. The trial court awarded him \$500,000 in damages, and the Alabama Supreme Court affirmed the award. *Id.* at 254.

² The overwhelming number of cases have found that a failure to fully investigate a story is not demonstrative of actual malice. See *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501, 1507 (D.C. Cir. 1996) ("[A] publisher has no duty to investigate unless he has 'obvious reasons' to doubt the

veracity of his source."); *Hotchner v. Castillo-Puche*, 551 F.2d 910 (2d Cir. 1977) (Doubleday's failure to independently investigate defamatory statements did not amount to reckless disregard); *Murray v. Bailey*, 613 F. Supp. 1276, 1280 (N.D. Cal. 1985) ("The law did not require Stein & Day to make an independent investigation of Bailey's accusations."); *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1122 (N.D. Cal. 1984) ("publisher's knowledge of a source's disreputable character is not necessarily sufficient to put him on notice of probable falsity"); *Marcone v. Penthouse Intern., Ltd.*, 577 F. Supp. 318, 325, 10 Media L. Rep. (BNA) 1193 (E.D. Pa. 1983); *Bindrim v. Mitchell*, 155 Cal. Rptr. 29, 5 Media L. Rep. (BNA) 1113 (1979) ("Where the publication comes from a known reliable source and there is nothing in the circumstances to suggest inaccuracy, there is no duty to investigate."); *Kisser v. Coalition for Religious Freedom*, 1995 WL 3996, *4 (N.D. Ill. 1995) ("A duty to investigate arises only after the publisher discovers 'an obvious reason to doubt' the accuracy of story."); *Conwell v. Beatty*, 667 N.E.2d 768 (Ind. Ct. App. 1996); *Bates v. Times-Picayune Pub. Corp.*, 527 So.2d 407, 411 (La. Ct. App. 1988) ("The test should be whether, under the facts and circumstances existing at the time the reporter receives his information, the reporter is made aware or placed on guard as to possible error").

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