



MEDIA LAW LETTER

Reporting Developments Through August 16, 2002

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Editor's Note: The Guidelines discussed below were developed by the Conference of Chief Justices and the Conference of States Court Administrators. They are intended for adoption by all 50 states. You should be alert for the introduction of these guidelines in your jurisdiction.

Guidelines on Access to Court Records Go to States for Approval

By Kelli Sager

Proposed guidelines on public access to court records are going to be considered by each of the fifty states, as a result of a resolution adopted at a joint meeting of the Conference of Chief Justices (CCJ) and Conference of States Court Administrators (COSCA) at the end of July. The guidelines were derived from the work of an Advisory Committee set up more than a year ago under the auspices of the National Center for State Courts. As of now, the draft is being updated to reflect changes resulting from discussions at the July sessions. When complete, the guidelines will be posted to the project web site and notice of that will be sent to LDRC members.

Electronic Access Issues Broader

The sixteen-member Committee included two representatives from the media, two individuals representing privacy interests, one person from the data industry, and a law enforcement representative. The remaining committee members were members of the judiciary and court administrators.

The Committee initially was delegated the task of proposing guidelines for courts to use in developing policies about *electronic* access to court records.

The combination of new technologies and the increased computerization of court records meant that courts increasingly have been faced with the issue of

how, and whether, to make records available to the public electronically, rather than in paper form. Included in this debate has been the question of whether members of the public should be able to access court records "remotely," through the internet or some more limited type of computer service, rather than requiring a trip to the courthouse.

Because the issues surrounding "electronic" access to

This notion of "practical obscurity" was a surprisingly significant factor for some Committee members, who expressed discomfort at what one person described as "people sitting at home in their pajamas reading court records" over the internet.

such records inevitably involve the issue of public access in general, the Committee's work quickly changed to encompass the broader discussion of how and whether such records should be available to the public. Indeed, from the outset, the majority of the Committee seemed to agree

that as a general matter, the public's right of access should not change depending on the form (paper or electronic) of court records.

Many Committee members, however, felt that the nature of information in some court records was such that "remote" public access might be inappropriate, even if the very same records were available to individuals who took the time to travel to the courthouse to review them.

This notion of "practical obscurity" was a surprisingly significant factor for some Committee members, who expressed discomfort at what one person described as "people sitting at home in their pajamas reading court records" over the internet.

Agreed on Principles

What was not surprising was that the members of the Committee had diverse views on the types of records that

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Guidelines on Access to Court Records

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should be available to the public, as well as the means by which any records should be made accessible. At bottom, however, the Committee agreed on several basic principles, including the following:

1. there should be a presumptive public right of access to court records, which derives from the federal constitution, as well as statutory and common law;
2. any exceptions to this presumptive right of access should require a compelling interest, and must be narrowly drawn; and
3. there are interests in individual privacy, public safety, and security that may, in certain limited instances, constitute a compelling interest warranting restrictions on the public's presumptive rights of access.

For the most part, however, the Committee agreed that its job was not to anticipate every conceivable instance where these interests might arise, nor were the guidelines intended to change substantive federal or state law.

The Committee also agreed that the guidelines it was preparing was intended as a starting place for individual state or local courts, and were not written in a form that would be appropriate for adoption without local modifications.

Constitutional Access Language Removed

After months of debate, public hearings, and numerous drafts, the Committee finalized a working draft of its proposed guidelines. The draft guidelines consisted of "black letter" proposed rules, and lengthy commentary that explained the rationale behind (and occasionally divergent views concerning) these "black letter" proposals.

The guidelines were presented to the joint CCJ/COSCA meeting in Maine at the end of July. Several members of the Committee, including this author, were asked to participate in a panel discussion during one day of the joint CCJ/COSCOA session, to describe the process through which the working draft had evolved and to discuss significant issues that had arisen during the

Committee's fourteen-month process.

Unfortunately, before the panel presentation, a committee of CCJ met and significantly revised the Committee's guidelines, including removing references to the constitution-based rights of public access. Consequently, much of the carefully-drafted language that the Committee had debated and agreed was appropriate for circulation is not contained in the version that apparently was adopted by the CCJ/COSCA members as the starting point for each state's rulemaking body.

Members of the Advisory Committee, including this author, who are concerned about the version of the guidelines that will be circulated to the states are exploring the best method of voicing their dissent with the changes made last month.

In addition, anyone interested in the ultimate resolution of these issues should actively pursue this issue in their own individual states, since it is anticipated that each state will now consider (or reconsider) its own processes and rules on public access.

Kelli Sager is with Davis Wright Tremaine LLP, Los Angeles, California

Information on the Advisory Committee's work and the status of the state projects is available at: www.courtaccess.org/modelpolicy/

LDRC would like to thank summer interns — Kimberly Rose, Fordham University School of Law, Class of 2004; and Adam Schwartz, Stanford Law School, Class of 2004 — for their contributions to this month's LDRC MediaLawLetter.

Monthly Paper, Publisher and Editor Convicted of Criminal Defamation ***Kansas Case Is Only Media Prosecution In Recent Memory***

Journalism groups across the country decried the conviction by a Wyandotte County, Kansas, jury of the editor, publisher and corporate owner of a monthly political newspaper on seven of nine misdemeanor counts of criminal defamation. The jury acquitted on one count, and deadlocked on another. *Kansas v. Carson*, No. 01-CR-301 (Kansas Dist. Ct., Wyandotte County jury verdict July 17, 2002).

While criminal libel proceedings against media defendants have been rare in the past two decades, there have been several prosecutions of non-media defendants. For a more information and a compilation of recent criminal defamation cases, see Jeffrey Hunt and David Reymann, *Criminal Libel Law in the U.S.*, in 2002 LDRC Bulletin 2 (March 2002), at 79, and Russell Hickey, *A Compendium of U.S. Criminal Libel Prosecutions: 1990 - 2002*, 2002 LDRC Bulletin 2 (March 2002), at 95.

The newspaper, *The New Observer* (www.thenewobserver.com), is published in print and online, and is sent to Wyandotte County voters unsolicited. The defendants in the case were the corporate owner of the newspaper, Observer Publications, Inc., publisher David Carson, and editor Edward H. Powers, Jr. Both Carson and Powers are disbarred attorneys.

Paper Challenger Residency

The eight counts on which the defendants were convicted all stemmed from articles in 2000 and 2001 that questioned whether Kansas City, Kansas, Mayor Carol Marinovich — who was running for reelection at the time — and her husband, Wyandotte County District Judge Ernest Johnson, actually lived in the county as required by law.

In November 2000, the newspaper alleged that they lived in a specific home in Johnson County. Although the paper ran a correction in January 2001 apologizing to the actual owner of the home, it reiterated the charge that Marinovich and Johnson lived outside of Wyandotte County. “There have been too many ‘Marinovich sittings’ (sic) by too many reliable people under too interesting social circumstances for it not to be so,” the paper said.

Carson and Powers apparently have a long history of criticizing local government in Kansas City, Kansas, and their newspaper has frequently criticized both Marinovich and Wyandotte County District Attorney Nick Tomasic, who filed the charges in March 2001 — two days after Marinovich won the Democratic primary in an eventually successful reelection campaign. See

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***The six-member jury
reached its verdict after
four hours of deliberation.***

LDRC ANNUAL DINNER

November 13, 2002

In the Trenches: War Reporting & the First Amendment

Ted Koppel Moderating

Look for your invitation to arrive after Labor Day

Criminal Defamation Convictions

(Continued from page 5)

LDRC LibelLetter, March 2001, at 5.

The prosecution's case included testimony from Marinovich, and from neighbors who said that they see her and her husband at their Kansas City, Kansas home almost daily. The local elections commissioner testified that the couple vote from that address.

The two remaining charges involved alleged defamation of two people — one a former *Kansas City Star* reporter — who the *Observer* said had been hired to “lie for Marinovich.” The former reporter, Steve Nicely, testified for the prosecution during trial. He said that the statements in *The New Observer* damaged his reputation, but was unable to give a specific example on cross examination.

The defense called two witness: a colleague of Judge Johnson, who testified that the judge's reputation had not been damaged by the allegations over his and his wife's residence, and a former insurance company employee who said that he saw a policy issued to Marinovich at an address outside of Wyandotte County.

The six-member jury reached its verdict after four hours of deliberation.

Appeal Forthcoming

Post-trial motions in the case are pending, although a hearing date has not been set. Although each of the convictions can carry a fine and a jail sentence of up to one year, the prosecutor has not yet asked for a specific sentence. The defendants said that they plan to appeal if their post-trial motions are not successful.

Jackson County District Judge Tracy Klingensmith was brought in to hear the case after all the Wyandotte County judges recused themselves. The case was prosecuted by J. David Farris of Atchison, Kansas, who served as a special prosecutor after Klingensmith ruled that District Attorney Tomasic and his staff could not prosecute the case and the Kansas attorney general's office declined to prosecute the case. See *LDRC LibelLetter*, Dec. 2001, at 27.

Carson is represented by Mark Birmingham of Kansas City. Douglas J. Patterson of Leawood — who is a Kansas state representative — represents Powers and Observer Publications.

A previous version of Kan. Stat. § 21-4004, the statute under which the defendants were convicted, was upheld as facially valid in *Phelps v. Hamilton*, 59 F.3d 1058, 23 Media L. Rep. 2121 (10th Cir. 1995), even though at the time it did not include an actual malice element. The law was amended to add the actual malice element after the court ruling. 1995 Kan. Sess. Laws ch. 251, § 14.

There are 24 states which have criminal libel statutes, although six have been invalidated by the courts. Alabama's Supreme Court recently held its law unconstitutional. See *Ivey v. Alabama*, 29 Media L. Rep. 2089 (Ala. 2001); see also *LDRC MediaLawLetter* July 2001, at 20. In Florida, part of the law was recently struck down. See *Florida v. Shank*, 795 So.2d 1067, 29 Media L. Rep. 2532 (Fla. Ct. App. 2001); see also *LDRC MediaLawLetter*, Dec. 2001, at 28. In Utah, where the Supreme Court is considering a case challenging the statute's constitutionality. See *In re I.M.L.*, No. 20010159-SC (Utah argued March 13, 2002).

A recent attempt to strike down Puerto Rico's criminal libel statute was dismissed for lack of standing. See *Mangual v. Agostini*, 30 Media L. Rep. 1909 (D.P.R. 2002). A full report on the Puerto Rico case will appear in a future edition of the *MediaLawLetter*.

Seven other states recognize criminal libel at common law, but there have been no prosecutions in these states in the last 35 years.

No Charges in Johnson County

Also in Kansas, a prosecutor in Johnson County announced in mid-August that he would not refile criminal libel charges that were dropped to allow an investigation by the local sheriff.

The charges had been filed in 2001 against the organizers of an effort to recall members of the Merriam, Kansas city council. The organizers alleged that the council members had misused public funds to pay for a political web site. One of the council members was actually removed from office.

The interim Merriam city prosecutor, Brian Leininger, said that there was insufficient evidence to justify refileing the charges.

Ninth Circuit Reaffirms First Amendment Restraints on Trademark Claims

By Stephen G. Contopoulos and Bradley H. Ellis

In an opinion authored by Judge Alex Kozinski, the Ninth Circuit reaffirmed the importance of balancing the expressive interests of the public against the interests of trademark owners, and affirmed summary judgment in favor of the defendants in a trademark infringement/dilution action brought by Mattel, Inc. against the producers of the song "Barbie Girl." *Mattel, Inc. v. MCA Records, Inc.*, 2002 U.S. App. LEXIS 14821 (9th Cir. 2002).

In 1997, the Danish rock band *Aqua* wrote and produced the song "Barbie Girl" which was marketed and sold by MCA Records, Inc. and affiliated entities ("MCA"). Mattel, evidently offended by the less-than-reverential tone and lyrics ("I'm a blonde bimbo girl, in a fantasy world / Dress me up, make it tight, I'm your dolly / You're my doll, rock and roll, feel the glamour in pink / Kiss me here, touch me there, hanky-panky"), sued MCA alleging that the title of the song infringed and diluted its famous Barbie trademark.

The District Court granted summary judgment in favor of the defendants on several grounds, including that the song was a parody of Barbie and a nominative fair use, and that the song was not likely to create confusion over Mattel's affiliation with the song.

The Ninth Circuit, adopting the Second Circuit's analysis in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1999) affirmed on the grounds that the title of the song was clearly related to its content and did not explicitly or otherwise mislead as to the source of the work. In addition, MCA could not be held liable under the Federal Trademark Dilution Act, 15 U.S.C. § 1125 (c), because "Barbie Girl" fell within the FTDA's exception as a "noncommercial use."

Trademark Infringement

As to the infringement claim, the court noted the tension between trademark and speech rights, and observed that if it were to ignore the expressive value of marks beyond their source identifying function, "trademark rights would grow to encroach upon the zone protected by the First Amendment." *Mattel*, at *5.

Simply put, the trademark owner does not have the right to control public discourse whenever the public imbues his mark with a meaning beyond its source-identifying function. *Id.*

As the Ninth Circuit saw it, while the First Amendment afforded little protection to competitors who label goods with misleading marks, titles of expressive works were not the same as a label on a consumer product.

"A title is designed to catch the eye and to promote the value of the underlying work. Consumers expect a title to communicate a message about the book or

movie, but they do not expect it to identify the publisher or producer." *Mattel*, at *11.

Thus, titles of expressive works do not carry with them the same risk of source confusion as do monikers attached to products. "[M]ost consumers are well aware that they cannot judge a book solely by its title any more than by its cover." *Id.* at *12, citing *Rogers*, 875 F.2d at 1000. Where, then, to strike the balance between the legitimate rights of the trademark owner and First Amendment rights? The Ninth Circuit found the answer in *Rogers*.

Adopting Rogers v. Grimaldi

There, Ginger Rogers brought suit complaining about the movie "Fred and Ginger," the story of cabaret performers who made a living imitating Ginger Rogers and Fred Astaire. The Second Circuit, by Judge Newman, concluded that literary titles do not violate the Lanham Act (1)

If this were a sci-fi melodrama, it might be called Speech-Zilla meets Trademark Kong.

-Kozinski, J

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Ninth Circuit Reaffirms First Amendment Restraints on Trademark Claims

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unless the title has no artistic relevance to the underlying work whatsoever, or, (2) if it has some artistic relevance, unless the title explicitly misleads as to the source or the content of the work. *Id.* at 999.

The Ninth Circuit adopted the *Rogers* “standard as [its] own.” Clearly, the title “Barbie Girl” related to the content of the song. Further, the title did not “explicitly or otherwise” suggest that Mattel produced the song. Therefore, summary judgment in favor of the defendants was appropriate.

At first blush, the court’s decision in *Mattel* seems at odds with its decision in *Dr. Seuss Ent., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1400 (9th Cir. 1997) in which the court held that the defendant’s liberal borrowing from Dr. Seuss’s famous story *The Cat in the Hat* had no critical bearing on the substance or style of the original, and, therefore, could not be justified under the copyright fair use test.

The court also held that under the Lanham Act, a preliminary injunction could stand because serious questions on the merits existed and the balance of hardships tipped in favor of the plaintiff.

But, had the Ninth Circuit applied the *Rogers* standard in that case, the result would have been the same because the infringing use had no artistic relevance to the substance of the work. That is, the defendant was simply borrowing from Dr. Seuss in order to get attention. Those facts were distinguishable from the facts before the court in *Mattel* in which the MCA used the Barbie mark to “poke fun” at the original.

Trademark Dilution

Mattel’s claim under the Federal Trademark Dilution Act (“FTDA”) raised additional — perhaps more compelling — First Amendment concerns. Judge Kozinski

noted that in contrast to infringement claims, dilution actions were not meant to prevent consumer confusion, but rather, the whittling away of the value of the trademark when it is used to identify different products, a less weighty concern than avoiding harm to consumers. In other words, because infringement injunctions are intended to prevent a fraud on the consuming public — misidentification of source — they are consistent with the First Amendment which does not protect fraud.

In addition, the court reasoned, injunctions against infringing uses likely to cause consumer confusion are generally limited to a few related industries. In contrast,

dilution injunctions seek to prevent association of the trademark with wholly unrelated goods, and are, therefore, generally broader in their reach. Because a dilution claim does not require a showing of consumer confusion, injunctions to prevent dilution “lack the built in First Amendment compass of

trademark injunctions.” Thus, the court sought to construe the FTDA narrowly to avoid conflict with the First Amendment.

The court found that MCA’s use of Mattel’s mark was dilutive. It was a use of a famous mark to sell goods other than those Mattel produced. That is, “while a reference to Barbie would previously have brought to mind only Mattel’s doll, after the song’s popular success, some consumers hearing Barbie’s name will think of both the doll and the song. . . .” *Id.* at *17.

Exempt As Non-Commercial Speech

Therefore, for MCA to avoid liability, its song had to fall within one of the three exceptions to the FTDA: comparative advertising, news reporting and commentary, or noncommercial use. The first two exceptions obviously did not apply. But could the song, which was

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[Barbie] remains a symbol of American girlhood, a public figure who graces the aisles of toy stores throughout the country and beyond. With Barbie, Mattel created not just a toy but a cultural icon. With fame often comes unwanted attention.

-Kozinski, J

Ninth Circuit Reaffirms First Amendment Restraints on Trademark Claims

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clearly sold for profit, be classified a “noncommercial” use?

Cognizant of the weighty First Amendment concerns it had articulated, and consistent with statements of the drafters that the FTDA would “not prohibit or threaten noncommercial expression, such as parody, satire, editorial and other forms of expression that are not a part of a commercial transaction,” the court found that because the song was not “purely commercial speech” it fell within the “noncommercial use” exception of the FTDA.

To make this determination, Judge Kozinski looked to the Ninth Circuit’s definition of “commercial speech” announced just last year in *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001):

“[T]he core notion of commercial speech is that it does no more than propose a commercial transaction. . . . If speech is not “purely commercial” – that is, if it does more than propose a commercial transaction – then it is entitled to full First Amendment protection.”

Thus, although MCA used Barbie’s name to sell records, the song included protected expression, and was thus not “purely commercial speech.” Therefore, “Barbie Girl” fell within the noncommercial use exception of the FTDA, and Mattel could not prevent use of its mark in connection with the song.

The Ninth Circuit’s *Mattel* opinion, especially in combination with *Hoffman*, should provide strong ammunition against trademark owners (and celebrities) who would seek to control what is said about their products (or themselves). So long as the use of a trademark (or celebrity name) is not “purely commercial,” in the Ninth Circuit at least, it should receive full First Amendment protection.

MCA was represented by Russell J. Frackman, of Mitchell Silberberg & Knupp in Los Angeles. Mattel was represented by Adrian Mary Pruetz, of Quinn Emanuel Urquhart Oliver & Hedges in Los Angeles.

Steve Contopulos and Brad Ellis are partners in Sidley Austin Brown & Wood, LLP, resident in its Los Angeles office.

Suit Over Ads in “Spider-Man” Movie Dismissed

With a deft, one-page opinion, a federal district judge dismissed a suit against Sony Corp., ruling that digitally superimposing ads into Times Square in this year’s “Spider-Man” movie was protected expression under the First Amendment. *Sherwood 48 Assoc. v. Sony Corp.*, 2002 WL 177146 (July 31, 2002 S.D.N.Y.).

The suit involved a scene in which Spidey battles the Green Goblin high above crowds gathered in Times Square. In the fleeting background, however, viewers see digital ads for *USA Today* and Cingular Wireless instead of the real-life Samsung ad that they should see.

(Continued on page 10)

UPDATE

Nike Plans to Seek Supreme Court Review of California Commercial Speech Decision

At the end of July, the California Supreme Court denied Nike’s petition for rehearing its May 2, 2002 decision in *Kasky v. Nike, Inc.*, reported in the May 2002 LDRC *LibelLetter* at p. 3. Nike immediately announced that it would seek review by the Supreme Court of the United States, and had retained Laurence Tribe and Walter Dellinger on the matter.

In its initial 4-3 decision, the California Supreme Court ruled that Nike’s responses to charges in the press about its labor practices — made in letters to the editor, editorial advertising, and press releases — were to be treated as “commercial speech” and subject to suit under California’s false advertising and unfair competition laws.

The media, among other interested groups, will be asked to participate in amicus efforts. Clearly both as journalistic entities that want to be able to report fully on corporate matters and want corporations to be able to respond fully to press inquiries, and as corporate entities that wish to speak subject to the same restrictions and potential legal standards as their critics, this case should be high on LDRC member agendas.

Suit Over Ads in "Spider-Man" Movie Dismissed

(Continued from page 9)

Sherwood -- along with other Times Square building owners and their licensors -- claimed that Sony's solicitation and placement of the digital ads was unfair competition and trade dress infringement that would dilute its business, and cause confusion as to who its business partners were. Sherwood also claimed that the digital alteration of their building facade was electronic trespass.

District Judge Owen of the Southern District for New York dismissed all claims. Noting that the movie-makers also imported New York City's municipal building from downtown, Judge Owen explained that "what exists here is for artistic purposes a mixture of a fictionally and actually depicted Times Square, which is central to a major scene in the movie." The judge found that the ads serve the "theatrically relevant purpose of orienting the viewer to the location," and are afforded First Amendment protection. (*New York Racing Assoc. v. Perlmutter Publ'g Inc.*, 959 F.Supp. 578 (N.D.N.Y. 1997).)

In addition to granting First Amendment protection, Judge Owen rejected the confusion and business dilution arguments because Sherwood failed to claim that the alleged confusion affected any ad-purchasing decisions. He also rejected the trade dress claim, as no secondary meaning could be attributed to the building because ads change all the time. He also dismissed the digital trespass claim as lacking merit:

... and trespass? — bouncing a laser beam off a building to create a digital photograph? Light beams bounce off plaintiffs' buildings day and night in the city that never sleeps.

Daniel J. Warren and Carrie A. Hanlon, of Sutherland, Asbill & Brennan of Atlanta, and Anthony J. Constantini and Gregory P. Gulia, of Duane Morris in New York, represented the plaintiffs.

Bruce P. Keller and Michael R. Potenza, of Debevoise & Plimpton in New York, represented Sony.

Just Published

LDRC 50 State Survey 2002-2003:

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Missouri Appeals Court Rejects Misappropriation Claim for Naming Comic Book Character for Pro Hockey Player

Affirms Trial Court JNOV Reversing A \$24.5 Million Jury Verdict for Tony Twist

By Joseph E. Martineau

Previous issues of the LDRC *LibelLetter* (July and November 2000) reported on the case of *Doe (Tony Twist) vs. TCI of Missouri, Inc. et al.*, No. 972-9415, Div. 3 (Circuit Court for the Twenty Second Judicial Circuit, St. Louis City, Missouri). In the case, a former professional hockey player sued a comic book creator and various entities alleging misappropriation of name because a character in the comic book was named after the hockey player. In July 2000, after a two week trial, a jury awarded \$24.5 million, representing roughly 20 percent of the revenues the defendants had derived from the comic book *Spawn* and related products. That verdict was later reversed by the trial court on a motion for judgment notwithstanding the verdict.

On July 23, 2002, the Appellate Court for the Eastern District of Missouri affirmed the trial court's JNOV, holding that the use of the plaintiff's name in the comic book and a derivative television series was protected under the First Amendment. See *Doe (Tony Twist) v. TCI Cablevision of Missouri, Inc.*, No. ED 78785 (Mo.App.E.D. July 23, 2002) (available at www.osca.state.mo.us/courts/pubopinions).

Spawn and the Two "Tony Twists"

In 1992, Todd McFarlane left a successful career illustrating *Spider-Man* and other comic books for Marvel Comics and started his own comic book called *Spawn*. *Spawn* is about a CIA assassin named Al Simmons, who was killed as part of a plot by his corrupt boss. Simmons went to hell, but made a deal with the devil to return to earth so he could see his wife Wanda. Instead of returning to earth in human form, however, the devil resurrected Simmons as a Hellspawn, a ghostly being, unrecognizable from his former living self. As a Hellspawn, or Spawn for short, he has superhuman powers, but struggles with how to use them.

The first issue of *Spawn* was the largest selling comic book ever. Beginning with the sixth issue, a vi-

cious, foul-mouthed mafia don appeared. Though unnamed in that issue, in later issues, the mob boss was referred to as "Antonio Twistelli" and eventually "Tony Twist." *Spawn's* extraordinary success spawned other *Spawn*-related materials, including a line of toys, a movie and an adult animated series — some of which included the Twist character.

Who is Tony Twist?

Around the time McFarlane was starting *Spawn*, a hockey player named Tony Twist, whose main skill lay in his ability to pummel opposing players, entered the National Hockey League ("NHL"). He eventually came to play as an "enforcer" for the St. Louis Blues. During the mid-90s, Twist acquired local prominence as a sports celebrity and promoter of charitable causes, as well as some national recognition as the best fighter on the ice, including prominent mention in a *Sports Illustrated* article "Fighting for a Living" and an appearance on an episode of HBO's *Real Sports*. Twist's hockey career ended in August 1999 when on the same day the Blues decided not to renew his contract, he sustained serious injuries in a motorcycle accident.

Though the subject of some dispute at trial, the jury, the trial judge and the appellate court all concurred that McFarlane, an avid hockey fan, had intentionally used the name of the hockey player for the fictional mobster and that "the plaintiff did serve as an inspiration for the comic book character." McFarlane had virtually admitted as much in an interview in his own comic books and in an interview with a comic book trade magazine. (At trial, McFarlane had testified that the character was not named after the hockey player, and that he decided to note the identity of names at a later time. This version seemed so unbelievable that it may have ruined McFarlane's credibility with the jury, and lead to the assumption by the jury that if there was nothing wrong with doing it, why deny doing it.)

Beyond the similarity of name, the real and the *faux*

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Court Rejects Misappropriation Claim

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Twist lacked any resemblance. They did not look alike; their professions were not the same; and they hailed from different parts of the world. In discovery, and to some extent at trial, the plaintiff tried to contend that both had similar personas as “enforcers” in their respective trades. As noted by the appellate court, that purported parallel between the hockey player and mobster was tenuous at best.

The Trial Court’s Holdings

From the inception of the case, the defendants asserted a defense under the First Amendment and a defense that the fictional Twist was not the hockey player. Based on the argument that no person could possibly believe that the comic character actually portrayed the plaintiff, the trial court dismissed a defamation claim on “of and concerning” grounds, but allowed the misappropriation claims to proceed.

The defendants eventually raised the same defenses in a motion for summary judgment.

However, the trial court rejected the First Amendment defense, characterizing it as a “knee-jerk First Amendment rationale.” Instead, the trial court ruled that, notwithstanding the First Amendment, a misappropriation claim would exist against the author of a fictional work using a celebrity’s name (i) if the name was intentionally used for the purpose of advancing the author’s economic interest *and* (ii) if an economic advantage was in fact derived *or* the celebrity suffered harm as a consequence.

As to the issue of whether readers of the comic books purchased them because of the perceived relationship between the fictional character and the real life celebrity, the trial court ruled that although it was dubious, this was a fact issue for jury resolution.

In later granting the JNOV, the trial court continued to apply the same analysis. In rejecting the jury’s verdict, it held that the plaintiff had failed to make a submissible case because he failed to prove that the comic

book creator used the name intending to derive a commercial advantage from such use or that he had derived economic advantage as a specific result of using the name of the hockey player.

While the trial court’s holding afforded relief to these particular defendants, it left a significant possibility that a celebrity, in a future case, might be able to present a submissible case for misappropriation if his name was used in a work of fiction and perhaps non-fiction. It stands to reason that in many cases where an author uses the name of a celebrity in an expressive work, he is doing so, at least partially, for the purpose of attracting attention to the work and inducing people to purchase it. If that happens and if it can be proven, then under the trial court’s holding, the celebrity might be able to successfully sue the author.

Likewise, some authors may intentionally make a buffoon of a celebrity, hoping to cause some harm to the celebrity and at the same time making a profit for themselves. If that harm follows, the author

could find himself liable.

Yet, such liability, absent constitutionally-required proof that the celebrity was libeled, would seem to be at odds with the United States Supreme Court’s holding in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). Fortunately, the appellate court’s opinion eliminates most of these problems. But, as pointed out below, it might create others.

The Appellate Court’s Opinion

Although the appellate court agreed with the result reached by the trial court in entering its JNOV, it rejected the trial court’s reasoning. Unlike the trial court, the appellate court recognized the First Amendment as a formidable barrier to the plaintiff’s claims, and one that should have ended the plaintiff’s case early -- well before the \$24.5 million verdict. However, in crafting its

“The Tenth Circuit has more accurately, we think, described Zacchini as a ‘red herring,’ reading it not as a right of publicity case at all, but rather a ‘right of performance’ case.”

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Court Rejects Misappropriation Claim

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opinion, the appellate court seemed to confuse two distinct lines of defense -- the First Amendment and the requirement of identification -- by merging them into one.

The Significance of the First Amendment

From the start, the appellate court expressed criticism of the trial court's trivialization of the asserted First Amendment defense. In setting forth the applicable standard of review, the appellate court stated that "cases raising First Amendment issues require an independent examination of the whole record to insure that the judgment does not constitute a forbidden intrusion upon the field of free expression."

In its concluding remarks, the appellate court expressed even greater criticism, saying "[b]ecause all of the legally operative facts necessary to a decision on [the First Amendment] question were present and uncontested when the motion for summary judgment was heard, we conclude that this case should never have been tried on the merits." It then said:

"While a proud hallmark of our system of justice requires that we err on the side of trial on the merits, some trials that never should have taken place, while capable of serving a role in the orderly development of the law, can in fact do more damage to our system of values than others. This is especially true where First Amendment rights are at stake."

The appellate court noted the significant "chilling effect" which the jury's \$24.5 million verdict created. It characterized the verdicts as the product of the jury following the verdict directing instructions of the trial judge, and the trial court's disregard for the fact that *Spawn* was a "presumptively protected work of fiction." It concluded by saying: "While rights of publicity and misappropriation of name are important protection for real and significant property rights, they cannot, in the order of things, prevail over principles of free expression that are at the center of our system of laws."

Some trials that never should have taken place can in fact do more damage to our system of values than others. This is especially true where First Amendment rights are at stake.

The Appellate Court's Analysis

In specifically analyzing the elements of the plaintiff's claim, the appellate court characterized the claim as most properly labeled an infringement on the "right of publicity" because "he seeks to recover the damage to his endorsement value and a proportionate share of the revenue generated by the use of his identity."

Citing Missouri case law and case law from other jurisdictions, the court held that use of name *alone* cannot create a right of publicity or misappropriation claim. However, where the plaintiff's name is used "to pirate the plaintiff's identity" for a commercial purpose, then a claim could exist. *Quoting Nemani v. St. Louis University*, 33 S.W.3d 184, 185 (Mo. banc. 2000).

Similarly, the court held that "subtle appropriations of aspects of a celebrity's identity," which the court characterized as "identity markers" (e.g., catchy slogan, *citing Carson v. Here's Johnny Portable Toilets, Inc.* 698 F.2d 831, 837 (6th Cir. 1983); imitation of distinctive voice, *citing Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988)) in a commercial setting "to falsely suggest a relationship between a person and a product may constitute a violation of the right of publicity."

The court then said:

"Twist understandably seeks to bring his claim within this stream of cases. But the factual distinctions between Twist's case and these cases are glaring [because] [i]n both the misappropriation of name and the right of publicity cases, the defendants used the plaintiff's identities to aid in a purely commercial transaction."

Because these cases involved nothing more than a message to "buy," the court then went on to hold that they did not invoke First Amendment considerations. On the other hand, the court said that expressive works of entertainment and fiction, including comic books, even when produced for profit, are not commercial speech and warrant the full panoply of First Amendment protection.

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Court Rejects Misappropriation Claim

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According to the court:

“To extend the right of publicity to allow a celebrity to control the use of his or her identity in a work of fiction would grant them power to suppress ideas associated with that identity, placing off-limits a useful and expressive tool. This, in turn, would effectively revoke the poetic license of those engaged in the creative process. To proscribe their right to use certain names, works, thoughts and ideas would ultimately apply to the rest of us, impeding our ability to express ourselves.”

The appellate court distinguished *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), on which the plaintiff placed great reliance in arguing that “the First Amendment does not apply to a property-based tort such as the right of publicity.”

In *Zacchini*, the United States Supreme Court had allowed a performer to sue over a television news broadcast of his entire human cannonball performance and rejected First Amendment challenges to the claim.

The *Twist* court held that the *Zacchini* holding was limited and “written with the express purpose of allowing a performer to derive a benefit from his own performance without interference from the First Amendment.” As such, *Zacchini* was not a “‘right of publicity’ case at all, but rather a ‘right of performance’ case.”

Creating Rules for Fiction

At this point, it seems that the court could have stopped. Having recognized that the comic book was protected expression and not commercial speech, the court could have relied on the many cases holding that the use of human identity in expressive works is not actionable as either invasion of privacy by appropriation or infringement of the right of publicity. See, e.g.,

Ruffin-Steinback v. Depasse, 82 F.Supp.2d 723 (E.D.Mich 2000)(use of name and likenesses of singing group in a television docudrama); *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal.Rptr. 2d 305, 307-08 (Cal.App. 1997)(use of name in a fact-based fictional movie). The court even cited these cases -- and others of similar import -- approvingly in footnote 17 to its opinion.

Instead of stopping there, however, the appellate court engrafted a rule applicable to expressive works of fiction which are alleged to use a person’s identity without consent. That rule, according to the court, is similar to the “of and concerning” rule in defamation cases. According to the court, “it is not enough that the publi-

cation invokes the plaintiff’s identity or is in some sense ‘about the plaintiff.’” Instead, a right or publicity claim over a fictional work will fail unless the celebrity shows that readers “will reasonably believe that the depiction is meant to por-

A right or publicity claim over a fictional work will fail unless the celebrity shows that readers “will reasonably believe that the depiction is meant to portray, ‘in actual fact, the plaintiff acting as described.’”

tray, ‘in actual fact, the plaintiff acting as described.’” citing *Bindrim v. Mitchell*, 92 Cal.App.3d 61, 78, cert. denied 444 U.S. 984 (1979)(emphasis by the appellate court).

In other words, unlike a biographical work or a news item, where the celebrity could sue only where he could prove the requisite elements of a defamation or public disclosure of private facts claim (Missouri does not recognize the tort of false light invasion of privacy), in the case of a fictional work, where readers might understand the fictional portrayal as a factual portrayal, then an infringement of the right of publicity claim might still exist. The court did note, relying on *Hustler v. Falwell*, that additionally, the plaintiff would have to prove that the defendant acted with actual malice in expressing the false portrayal.

As such, the appellate court’s holding might be argued to permit a misappropriation or right of publicity claim for fictional works which portray something false

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about a celebrity where the portrayal could be viewed by the audience as portraying actual facts, even though the falsity may not be defamatory. This seems to be in derogation of the Missouri Supreme Court's repeated rejection of the false light tort and repeated holdings that recovery for false publication should be the province of libel law. See, e.g., *Sullivan v. Pulitzer Broadcasting Co.*, 709 S.W.2d 475, 480 (Mo. banc 1986). While the holding therefore clearly protects works such as *Spawn*, where no-one would ever assume the fictional character as a real life portrayal of the plaintiff, it seems to afford less protection to works which are fictional, but may appear factual — works such as the movie, *The Sandlot*, which was at issue in *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal.Rptr. 2d 305, 307-08 (Cal.App. 1997). Whether that is the case, however, remains to be seen.

What is clear from the opinion is that fictional portrayals which use the names of famous persons, or which are about famous persons, but which are reasonably understood not to be truthfully portraying the person, are not actionable under a misappropriation of name or right of publicity theory in the State of Missouri.

Edwin D. Akers, Jr., of Gallop, Johnson & Neuman in St. Louis, Mark Sableman of Thompson Coburn in St. Louis, and Robert P. Schmidt, of Williams, Venker & Sanders in St. Louis, represented the defendant/respondents.

Robert D. Blitz, of Blitz, Bardgett & Deutsch in St. Louis, represented the plaintiff.

Joseph E. Martineau is a partner at Lewis, Rice & Fingersh, in St. Louis, Missouri.

California Federal Court Denies Anna Kournikova's Motion for a Preliminary Injunction Against *Penthouse*

By Stephen G. Contopoulos and Bradley H. Ellis

In its June 2002 edition of *Penthouse* magazine, General Media Communications, Inc. ("General Media") published photographs of a woman sunbathing topless on a Miami beach, claiming they were of tennis star Anna Kournikova, along with other photographs of Kournikova and an article discussing her tennis and endorsement career. General Media was mistaken — the nude photographs were of Judith Soltesz-Benetton. Both women sued, Soltesz-Benetton in New York and Kournikova in Los Angeles.

The Soltesz-Benetton case has settled. In Kournikova's action, however, based upon her Lanham Act claims, she moved for a preliminary injunction seeking, among other things, an order freezing \$15 million of General Media's assets, ostensibly to preserve the status quo and protect her ability to recover a "reasonable roy-

alty" for the use of her name and likeness in the magazine.

In an order filed August 9, 2002, the United States District Court for the Central District of California, Judge Gary A. Feess presiding, denied Kournikova's motion. *Kournikova v. General Media Communications, Inc.*, USDC, Central District of California, Case No. CV 02-3747 GAF (AJWx). In so doing, the Court applied standards dictated by the First Amendment.

Distinguishing Advertising From Endorsement

Kournikova pled two claims under Section 43(a) of the Lanham Act, false advertising and false endorsement. As to the former, the Court held that Kournikova did not have standing to advance a false advertising claim because she has not suffered "competitive injury" as required in the Ninth Circuit. See, *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1109 (9th Cir. 1992) and *Halicki v.*

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California Federal Court Denies Kournikova's Motion for a Preliminary Injunction

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United Artists Communications, Inc., 812 F.2d 1213, 1214 (9th Cir. 1987).

In *Waits*, the Ninth Circuit was careful to distinguish false advertising claims under section 43(a)(1)(B) from false endorsement claims under 43(a)(1)(A). In the Ninth Circuit, false advertising requires a showing of "competitive injury" to establish standing. False endorsement claims, on the other hand, are not so limited. Thus, typically, celebrities do not have standing to bring false advertising claims in the Ninth Circuit, but are able to advance false endorsement claims in appropriate circumstances.

In false advertising claims, to demonstrate competitive injury, a plaintiff must show conduct "harmful to the plaintiff's ability to compete with the defendant." *Barrus v. Sylvania*, 55 F.3d 468, 470 (9th Cir. 1995). Because Kournikova could not claim to be a competitor with General Media "in any meaningful sense" she did not have standing to bring a false advertising claim under Section 43(a).

Nor was Kournikova able to demonstrate a likelihood of success on her false endorsement claim. The Court concluded that in addition to demonstrating likelihood of consumer confusion over whether Kournikova endorsed General Media's use of her name and likeness, the First Amendment would bar recovery unless she also produced "clear and convincing evidence that the defendant acted with actual malice in creating the false impression of endorsement." *Hoffman v. Capital Cities/ABC Inc.*, 255 F.3d 1180, 1186 and 1189 n.3 (9th Cir. 2001).

No Consumer Confusion

The court found that the publication did not create consumer confusion. According to the court, the headline on the magazine – "Anna Kournikova – Caught Up Close On Nude Beach" – by itself "explain[ed] to the average browser that [she] did not voluntarily pose for *Penthouse*."

The court went on to find that even had there been substantial questions on the issue of consumer confusion, Kournikova had

not produced any evidence from which [the] court could infer that [General Media] knowingly or recklessly designed the June 2002 edition of *Penthouse* in a way that was likely to confuse the average reader into believing that Kournikova endorsed the magazine.

Once again, the headline on the magazine cover completely undermined her theory, according to the court. The court observed that had General Media intended to create confusion over whether

The First Amendment would bar recovery unless she also produced "clear and convincing evidence that the defendant acted with actual malice in creating the false impression of endorsement."

Kournikova voluntarily appeared in its magazine, any number of headlines would have been available to it to accomplish that goal.

Kournikova had, then, fallen "far short" of demonstrating by clear and convincing evidence that General Media acted with actual malice to create a false impression that Kournikova endorsed *Penthouse*.

Thus, because the magazine itself did not create confusion regarding Kournikova's endorsement, and, in any event, there was no evidence that General Media intended to create such confusion, the Court denied Kournikova's motion for a preliminary injunction.

Stephen G. Contopoulos and Bradley H. Ellis are partners at Sidley Austin Brown & Wood in Los Angeles, California and are representing General Media in this matter.

William E. Wegner and Ethan D. Dettmer, of Gibson Dunn & Crutcher in Los Angeles, and Randy M. Mastro, of Gibson Dunn & Crutcher in New York are representing Kournikova.

Undercover Surveillance in Church is Not an Invasion of Privacy

In a non-media case, the Indiana Court of Appeals affirmed summary judgment in favor of a detective agency, holding that its covert videotaping during public church services was not an invasion of privacy or intentional infliction of emotional distress under Indiana law. *Creel v. I.C.E. & Assoc.*, No. 41A04-0112-CV-521, 2002 WL 1752810 (Ind. App. July 30, 2002).

As part of an investigation into plaintiff's disability claim, the defendant sent an agent to secretly videotape plaintiff at church services. Pretending to be a worshiper the agent secretly videotaped plaintiff and her husband, the church pastor, on four occasions. The church services were open to the public and there were no signs barring taping. Plaintiffs learned of the secret taping after the disability claim was denied and they thereafter sued for intrusion and infliction of emotional distress.

As to the first claim, the Court of Appeals of Indiana noted that Indiana narrowly construes the tort of invasion of privacy by intrusion – requiring an intrusion into plaintiff's private physical space. Here the defendant could not

have intruded upon the plaintiffs physical seclusion because the taping merely captured events at a open church services where, as a matter of law, plaintiffs had no reasonable expectation of privacy. The court also rejected the claim that the taping intruded on plaintiffs' emotional seclusion, finding that since plaintiffs were unaware they were being taped they could not have suffered any emotional disturbance.

Pretending to be a worshiper the agent secretly videotaped plaintiff and her husband, the church pastor, on four occasions.

As to the intentional infliction of emotional distress claim, the court found that defendant's conduct was not sufficiently outrageous to support the claim. While the taping may have been "distasteful" it was conducted

as part of a legitimate insurance investigation and only captured the plaintiffs in a public space. Thus it did not rise to the level of outrage necessary to sustain the claim.

Plaintiffs were represented by Peter Campbell of King, Cline, King & King in Columbus, Indiana, and Stan Hirsch in Indianapolis. Defendant was represented by Andrew Wirick of Hume Smith Geddes Green & Simmons, in Indianapolis.

Morgue Photographer To Appeal Jail Sentence

By John Greiner

On Monday July 29, Hamilton County, Ohio Common Pleas Court Judge Norbert Nadel denied Photographer Thomas Condon's request to be freed from serving the remainder of his 2 ½ year prison term. Earlier this year, Judge Nadel had imposed the sentence following a jury trial in which Condon was convicted on 8 counts of gross abuse of a corpse.

Condon had taken photographs of the corpses posed with several small objects as props at the Hamilton County Morgue. In denying Condon's request, Judge Nadel noted that

[n]othing has been presented which can override the devastation caused by the illegal and intrusive acts of defendant Thomas Condon.

According to the prosecution, the case focused on whether Condon has permission to take the photographs. Condon, who had originally been engaged to film an autopsy for training purposes, claims that he'd received permission to take the posed still photos. The prosecution argued successfully that Condon exceeded the limited permission he had received. Although Condon has not identified the individual who gave him permission, he did strike a friendship with Jonathan Tobias, formerly a deputy coroner who provided Condon with access to the corpses. Tobias was convicted on two counts of gross abuse of a corpse. He is free pending his appeal.

While the case may have been about the extent of Condon's authority, it is clear that the content of the photographs played a major role in the sentencing and the denial of Condon's request to modify his sentence. One of the photos shows a corpse with a snail shell on

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Morgue Photographer To Appeal Jail Sentence

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her inner thigh. Another shows sheet music over the corpse's face. In a third, a copy of "Alice in Wonderland" appears on the corpse's abdomen.

Although Condon argued that the photographs were an artistic series intended to portray the cycle of life and death, Judge Nadel was unmoved. In pronouncing the sentence, Judge Nadel commented, "[t]hey're not art. They're sick. They're disgusting. They're disrespectful, and really the worst invasion of privacy." In closing argument, a prosecutor told the jury that the contention that the photographs were art was "bullshit."

As expected the incident has spawned other litiga-

Although Condon argued that the photographs were an artistic series intended to portray the cycle of life and death, Judge Nadel was unmoved.

tion. Families of the dead have filed a class action lawsuit against Condon, Tobias and the Hamilton County Coroner's office. In addition, the lawyer for Tobias, Marc Mezibov, has filed a defamation suit against the Hamilton County prosecutor for the prosecutor's out of court comment that Tobias should request his money back from Mezibov.

Although this case is fundamentally about corpses, it appears that it won't die anytime soon.

John Greiner is with Graydon, Head & Ritchey, Cincinnati, Ohio.

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Idaho Supreme Court to Reconsider *Uranga v. The Idaho Statesman*

Privacy Claim Allowed for Publication of Document in Old Court Record

While the initial decision was a unanimous one, the Idaho Supreme Court has still agreed to reconsider its ruling last year that *The Idaho Statesman* could be sued for invasion of privacy for publishing a document from a 40-year old court file of a notorious case. *Uranga v. Federated Publications*, 2001 WL 693891, 29 Media L. Rep. 1961 (Idaho 2001). The document, handwritten notes of one of two defendants in a criminal prosecution for homosexual activities implicated the plaintiff in such activities. The notes were never introduced into evidence, but remained in the court files. *The Idaho Statesman* did an article recounting the "Boys of Boise" homosexuality scandal. The appellate court had held that as long as the document was in the court files, the newspaper was privileged to publish it. The Supreme Court reversed, finding that the document was not subject to privilege, having never been used in the prosecution.

The Supreme Court also allowed the Idaho Association of Commerce and Industry, the Boise Metro Chamber of Commerce, and a number of media organizations to file amicus on behalf of *The Idaho Statesman*.

Debora K. Kristensen of Givens, Pursley, LLC, in Boise, Idaho, argued for the defendant. The plaintiff was represented by John L. Runft, also of Boise.

LDRC ANNUAL DINNER

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Minnesota Supreme Court Limits Jurisdiction in Internet Libel Case

By John Borger

A Minnesota resident who posted allegedly defamatory Internet messages about an Alabama resident could not be sued in Alabama courts, the Minnesota Supreme Court held on July 11, 2002. Chief Justice Kathleen Blatz wrote the opinion for a unanimous court in *Griffis v. Luban*, 646 N.W.2d527 (Minn. 2002). Merely making critical statements while knowing that the plaintiff lived in Alabama did not create jurisdiction in Alabama over a non-resident.

Chatroom Dispute

The case arose from disputes in a discussion group devoted to Egyptology. Alabama resident Katherine Griffis objected to criticisms and questions concerning her credentials made by Minnesota resident Marianne Luban, and sued Luban in Alabama circuit court. When Luban did not appear, Griffis obtained a default judgment awarding \$25,000 and entering an injunction that prohibited Luban from calling her a "liar" or various other things. Griffis then sought to enforce the judgment in Minnesota. Lower courts affirmed personal jurisdiction in Alabama, but the Minnesota Supreme Court reversed and vacated the lower court judgments.

Although the Minnesota Supreme Court decision involved private individuals, the issue of personal jurisdiction based on allegedly defamatory statements on the Internet is before several other courts in media contexts. The United States District Court for the Western District of Virginia allowed a Virginia prison official to sue two Connecticut newspaper for statements posted on their website even though they had *de minimis* hard copy circulation in that state; that case is pending before the Fourth Circuit. *Young v. New Haven Advocate*, 184 F. Supp.2d 498, 29 Media L. Rep. 2609 (W.D.Va. 2001), argued in *Fourth Circuit June 3, 2002* (discussed in July 2002 Media-LawLetter). The High Court of Australia heard arguments on May 28, 2002, on whether an Australian businessman can sue Dow Jones for allegedly defamatory statements appearing in *Barrons Online*. *Gutnick v. Dow Jones &*

Co., (August 28, 2001) V.S.C. 305 (Victoria (Austl.) Sup. Ct.).

Rejects Expansive Read of *Calder v. Jones*

Griffis asserted that jurisdiction existed in Alabama under the "intentional tort effects test" of *Calder v. Jones*, 465 U.S. 783 (1984), because Luban had made allegedly defamatory statements about someone she knew lived and worked in Alabama and her statements referred to Griffis' Alabama status.

The Minnesota Supreme Court, however, rejected this expansive interpretation of *Calder*. Noting that courts "have come to varying conclusions about how broadly the 'effects test' approved in *Calder* can be applied to find jurisdiction," the Minnesota Supreme Court held that

Merely making critical statements while knowing that the plaintiff lived in Alabama did not create jurisdiction in Alabama over a non-resident.

"something more than defendant's knowledge that the plaintiff is a resident of the forum and will feel the effects of the tortious conduct there must be necessary to satisfy the effects test." Broad applications, it held, "cast too wide a net

and incorrectly disregard the factual underpinnings of the Court's holding in *Calder*."

Minnesota follows 3rd Circuit's *Imo* Analysis

The court therefore adopted the three-prong analysis articulated in *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254 (3d Cir. 1998): the plaintiff must show that

- (1) the defendant committed an intentional tort;
- (2) the plaintiff felt the brunt of the harm caused by that tort in the forum such that the forum state was the focal point of the plaintiff's injury; and
- (3) the defendant expressly aimed the tortious conduct at the forum such that the forum state was the focal point of the tortious activity (meaning that the plaintiff must point to specific activity indicating that the defendant expressly aimed its tortious conduct at the forum).

The court did not address the first and second factors, because Griffis failed to establish the third. Although the internet newsgroup was accessible to any member of the public, the court found that

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Minnesota Supreme Court Limits Jurisdiction in Internet Libel Case

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nothing in the record indicates that the statements were targeted at the state of Alabama or at an Alabama audience beyond Griffis herself. ... The fact that the messages posted to the newsgroup *could* have been read in Alabama, just as they *could* have been read anywhere in the world, cannot suffice to establish Alabama as the focal point of the defendant's conduct. ... Unlike the facts in *Calder*, where the defamatory article was focused on California activities of a California plaintiff whose professional industry was centralized in California and was carried by a national newspaper with its highest circulation in California, Griffis [*sic*] did not "expressly aim" her statements at the state of Alabama such that Alabama was the focal point of the tortious activity. ...

... The mere fact that Luban knew that Griffis resided and worked in Alabama is not sufficient to extend personal jurisdiction over Luban in Alabama, because that knowledge does not demonstrate targeting of Alabama as the focal point of the allegedly defamatory statements.

On July 19, 2002, Griffis filed a petition for rehearing, asserting that the court's decision "misconceives the reasoning" of *Calder* and "will put this Court directly at odds with the United States Supreme Court's established due process analysis, in the event that a petition for a writ of *certiorari* is filed in this matter." The Minnesota Supreme Court denied that request on August 13.

The Minnesota Supreme Court decision is similar to the March 15, 2002, decision in *English Sports Betting, Inc. v. Tostigan*, 2002 WL 461592 (E.D. Pa. 2002) (discussed in April 2002 MediaLawLetter).

Injunction Decision of Minnesota Court of Appeals Also May be Vacated

In addition to reversing the decision of the Minnesota Court of Appeals on personal jurisdiction reported at 633 N.W.2d 548 (Minn. App. 2001), the decision of the Minnesota Supreme Court vacating the lower court judgments likely means that the court eventually will vacate a separate

unpublished decision of the Minnesota Court of Appeals that addressed the validity of the injunction that Griffis obtained against Luban. See *Griffis v. Luban*, 2002 WL 338139 (Minn. App., March 5, 2002) (discussed in the March 2002 MediaLawLetter).

C. Peter Erlinder of St. Paul, Minnesota, and Ralph Overholt of Minneapolis, Minnesota, represented Griffis. John Borger, Eric Jorstad, David Flower, and Patricia Stenbridge of Minneapolis, Minnesota, represented Luban after Griffis obtained a December 21, 2000, judgment against Luban in Minnesota district court. Because the costs of litigation and the spectre of the \$25,000 Alabama judgment led Luban to declare bankruptcy in March 2000, the Faegre & Benson lawyers represented her on a pro bono basis.

John Borger is a partner at DCS member firm Faegre & Benson LLP in Minneapolis.

Illinois Man Arrested for Website Criticizing Local Police, Mayor

A DeKalb, Illinois man who was involved with a web site that harshly criticized local police and government officials was arrested for violating Illinois's Harassing and Obscene Communications Act (720 ILCS 135) -- a law that criminalizes the transmission of lewd, obscene or immoral messages over the phone, telegraph or the Internet and is most widely cited as an anti-stalking law.

Darin Boone was arrested in June in connection with a site that parodies the official DeKalb, Illinois site, despite his contentions that he no longer owned the site nor was responsible for its content. Largely copying the content of the official site, the parody site detailed alleged corruption of local police officers, and included doctored pictures of the mayor, and racist, white supremacist and pornographic links.

Boone appeared in court in July, at which time his case was continued until August 12. DeKalb police and the state's attorney would not discuss details of the case, and Boone's public defender did not return phone calls

Single Publication Rule Held Applicable to Internet Publications

New York's highest court finds traditional rule still applicable to new medium

The single publication rule, a long-accepted rule for traditional mass media, will apply to publications made via the Internet, according to the New York Court of Appeals. In July, New York's highest court held the single publication rule applied to a government report posted on the Internet in December 1996, thus requiring the dismissal of a lawsuit filed in March 1998 for falling outside New York's one-year statute of limitations for defamation claims. *See Firth v. New York*, 2002 WL 1418699 (N.Y. July 2, 2002).

The March 1998 claim was brought by George Firth, based on a report issued by the Office of the State Inspector General that was critical of Firth's managerial style and his procurement of weapons for the New York Department of Environmental Conservation. The state moved to dismiss on the grounds that the claim was time-barred under the statute of limitations.

After Firth failed to address the statute of limitations argument, the Court of Claims directed the state to submit an affidavit of anyone with knowledge of the date the report was first placed on the Internet, along with dates of any modifications to the text of the report.

In an affidavit from an associate programmer analyst, the state noted that its website had been modified by posting another report, but it made clear that the state had not subsequently modified the text of the report that gave rise to Firth's claim. Firth, nonetheless, argued that the modification of the web page constituted a "continuing wrong or new publication."

The Court of Claims rejected Firth's argument and granted summary judgment to the state. The appellate division affirmed. The Court of Appeals affirmed the lower court's ruling by a vote of 7-0.

Unanimous Opinion By Court of Appeals

In an opinion by Judge Levine, the court first considered the history and policy of the single publication rule.

When the New York Court of Appeals adopted the single publication rule in 1948, the court held that if a multiple publication rule were applied to continuing sales of books containing libelous language, the statute of limitations would "never expire so long as a copy of such book remained in stock and is made the publisher the subject of a sale or

inspection by the public." That court concluded that such a rule would "thwart the purpose of the Legislature ... to bar completely and forever all actions which, as to the time of their commencement, overpass the limitation there prescribed upon litigation."

tion."

The *Firth* court also noted that, in addition to increasing "the exposure of publishers to stale claims," a multiple publication rule would permit a "multiplicity of actions, leading to potential harassment and excessive liability, and draining of judicial resources."

Moreover, the court claimed the single publication rule "actually reduces the possibility of hardship to plaintiffs by allowing the collection of all damages in one case commenced in a single jurisdiction."

After considering these policies, the court concluded that the policies "impelling the original adoption of the single publication rule support its application to the posting of the Inspector General's report regarding claimant on the State's Web site."

(Continued on page 22)

The court concluded that the policies "impelling the original adoption of the single publication rule support its application to the posting of the Inspector General's report regarding claimant on the State's Web site."

Single Publication Rule Held Applicable to Internet Publications

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Policies Perhaps More Important In Internet Context

Of some significance to the court was the heightened possibility for a multiplicity of suits and harassment of defendants, given the pervasiveness of the Internet – making the single publication rule perhaps more important for defamation claims based upon publication via the Internet. The court stated that there would be a “serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet” if the single publication rule did not apply to the web.

Thus, the affirmed the lower court and rejected Firth’s claim that each viewing of the report via the Internet should be considered a new publication that would retrigger the statute of limitations.

Finding no subsequent modification of the report, and only a subsequent modification to the webpage itself, the court held as a matter of law that there was no republication to retrigger the statute of limitations. The court said that the “mere addition of unrelated information to a Web site cannot be equated with the repetition of defamatory matter in a separately published edition of a book or newspaper. Thus, Firth’s claim was time-barred.

Alan J. Pierce, of New York, represented George Firth. Frank K. Walsh, an Assistant Attorney General in New York, represented the State of New York.

Any developments you think other LDRC members should know about?

Call us, send us an email or a note.

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Ramseys Settle Another Lawsuit

Family claimed they were defamed by former detective’s book

John and Patsy Ramsey have reached a settlement in their lawsuit against St. Martin’s Press and the co-authors of *JonBenet: Inside the Ramsey Murder Investigation*. The terms of the settlement agreement are confidential. However, St. Martin’s Press is permitted by the terms of the confidentiality provision to disclose that the Ramseys have agreed not to assert any claims as a result of the future publication, distribution, advertising or marketing of the book in issue.

The Ramseys were suing co-authors Steve Thomas, a former Boulder Police Detective, and Don Davis, as well as St. Martin’s Press, for \$80 million. The defamation complaint was based on the book’s claims that Patsy Ramsey had killed her 6-year-old daughter, and that John Ramsey had tried to coverup the murder.

This settlement brings to end one of many civil cases involving the Ramseys.

The Ramseys have previously settled three lawsuits brought against *TIME Magazine*, the *Globe* newspaper and *Star* magazine. See *LDRC LibelLetter*, July 2001 at 24; *LDRC LibelLetter*, March 2001 at 4; and *LDRC LibelLetter*, April 2000 at 8.

Most recently, in April, the Northern District of Georgia dismissed a defamation suit brought against the Ramseys by their former housekeeper, Linda Hoffman-Pugh. See *LDRC MediaLawLetter*, April 2002 at 14.

There are at least three lawsuits involving the Ramseys that are still pending, including two claims brought by the Ramseys for the defamation of their son, Burke. See *Ramsey v. NYP Holdings, Inc.*, No. 00-CV-3478 (S.D.N.Y. filed May 8, 2000) and *Ramsey v. AOL Time Warner*, No. 01-CV-1561 (N.D. Ga. filed June 15, 2001).

The Ramseys are defendants in another lawsuit brought by Boulder, Colo., resident Chris Wolf. See *Wolf v. Ramsey*, No. 00-CV-1187 (N.D. Ga. filed May 11, 2000). See *LDRC LibelLetter*, March 2001 at 15.

L. Lin Wood, of Atlanta, represents the Ramseys. Sean R. Smith and Thomas MacIver Clyde, of Dow Lohnes & Albertson in Atlanta, and Daniel M. Petrocelli and Charles P. Diamond, of O’Melveny & Myers in Los Angeles, represented Thomas, Davis, and St. Martin’s Press.

Court Orders Production of Documents in Ramsey/NYP Holdings Libel Case

By R. Bruce Rich and Natalia Porcelli

Magistrate Judge Michael H. Dolinger of the Southern District of New York, in a libel action on behalf of Burke Ramsey, has substantially granted NYP Holdings Inc.'s motion to compel production by the Ramseys of documents relating to the family's investigation into the murder. *Ramsey v. NYP Holdings, Inc.*, No. 00 Civ. 3478, 2002 WL 1402055, at *1 (S.D.N.Y. June 27, 2002). The libel action, brought by John and Patsy Ramsey on behalf of their son Burke against NYP Holdings, Inc., arises out of a *New York Post* article reporting that Burke had been identified as the prime suspect in the murder of his sister JonBenét. Judge Dolinger largely rejected the Ramseys' attempt to withhold the investigative documents based on asserted lack of relevance and attorney work-product protection.

Burke Reported "Prime Suspect"

This suit alleges that Burke was libeled by a story published in the *New York Post* and on its web site on May 13, 1999 that reported on a story that appeared in *Star Magazine* that law enforcement officials had identified Burke as "the prime suspect" in the death of his sister, JonBenét. The *Star Magazine* story, as reported by the *New York Post*, also suggested that John and Patsy Ramsey were involved "in secret plea bargain negotiations" on behalf of their son with the Boulder County District Attorney and that Boulder prosecutors sought to charge Patsy Ramsey with "faking a ransom note and trying to cover up the murder." The complaint alleges that the article is false because Burke was never a "prime suspect," did not kill his sister, and no plea bargain negotiations took place on that premise.

In response to NYP Holdings' discovery requests seeking documents in the Ramseys' possession relating to the death of JonBenét Ramsey, the Ramseys mounted relevance challenges as well as assertions of work-

product protection, attorney-client privilege, and doctor-patient privilege. On those basis, the Ramseys withheld more than 2,000 documents from production.

The Ramseys sought to bolster their resistance by submitting an affidavit executed by then Boulder County District Attorney Alexander M. Hunter, asserting that Burke was not a suspect in JonBenét's murder and that Hunter's office had not engaged in plea bargain negotiations with anyone based on that premise. NYP Holdings and then co-defendant Time-Warner, which had been sued in a similar action and whose case was consolidated for pre-trial purposes, filed a motion to compel. (Between the filing of the motion to compel and the court's decision, Time-Warner settled its action.)

The Relevance Claim

Insofar as the libel action placed centrally at issue the question of whether Burke may have been (or was believed to have been) involved in his sister's death, NYP Holdings' discovery requests sought documents relating to the circumstances of Jon-

Benét's murder and the surrounding investigation. The Ramseys interposed a variety of relevance objections to such basic discovery. The court rejected those arguments, concluding that since the truth or falsity of the assertion that Burke Ramsey was responsible for the death of his sister was a central element of his claim,

"information that would shed light on whether Burke Ramsey was so involved comes within the purview of Rule 26(b)(1) It also follows that any information suggesting the involvement of someone other than Burke is pertinent, since such evidence would necessarily point away from Burke."

Ramsey, 2002 WL 1402055, at *4. The court thus ruled that

"any material that offers, or may lead to, evidence

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The Ramseys mounted relevance challenges as well as assertions of work-product protection, attorney-client privilege, and doctor-patient privilege. On those basis, the Ramseys withheld more than 2,000 documents from production.

Documents in Ramsey Libel Case

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tending to inculpate or exculpate anyone in connection with the murder of JonBenet Ramsey comes within the scope of relevance as defined by amended Rule 26(b)(1).”

Ramsey, 2002 WL 1402055, at *4.

One of plaintiff’s relevance arguments was that NYP Holdings was required to demonstrate a good-faith basis for maintaining that the challenged statements were true prior to being afforded discovery to them. The court responded that

“neither Rule 26(b)(1) nor any of the other federal discovery rules imposes such an obligation on the discovering party. If a factual question must be answered in order for a plaintiff to prevail on a claim or for a defendant to prevail on a defense, then information that may be helpful in answering that question is relevant for discovery purposes. . . . [T]here is no reason to require, as a prerequisite to discovery, that the discovering party demonstrate that he is likely to prevail on the factual dispute. This is particularly true when the information that is most likely to answer the central question – in this case truth – is not in that party’s control.”

Ramsey, 2002 WL 1402055, at *5 (citations omitted).

The Work-Product Claims

The vast majority of the documents that plaintiff sought to withhold were investigative documents purportedly created at the Ramseys’ behest to assist in John or Patsy’s defense should they be charged with the death of their daughter. The Ramseys contended that such documents, whether created by attorneys for the Ramseys, by private investigators, or their agents constituted attorney work-product.

In opposition, it was initially argued that John and Patsy Ramsey could not assert work-product protection for documents that were created for them in their personal capacities, *i.e.*, in anticipation of possible litigation adverse to them, as opposed to documents created on behalf of Burke in their representative capacities. The court agreed:

“[A] non-party witness may not invoke work-product protection under [Rule 26(b)(3)] to preclude production of materials prepared by or for that witness, even if created in contemplation of the witness’s own pending or anticipated litigation In sum, the fact that Mr. and Mrs. Ramsey are appearing here as the representatives

of their son does not entitle them to invoke Rule 26(b)(3) to protect those documents that were created to assist them in their own contemplated litigation, that is, in a possible criminal prosecution of one or the other of them.”

The vast majority of the documents that plaintiff sought to withhold were investigative documents purportedly created at the Ramseys’ behest to assist in John or Patsy’s defense should they be charged with the death of their daughter.

Ramsey, 2002 WL 1402055, at *6, *8.

Documents for Dual Purpose

The court proceeded to rule that, even had the work-product privilege been technically available as to the foregoing category of documents, other factors would have disqualified such documents from the protections of that privilege. The first was the court’s finding, in reliance on *United States v. Adlman*, 68 F.3d 1495 (2d Cir. 1995), that the Ramseys had a “dual purpose” for creating the investigative documents, since, in numerous public statements cited by the defendants, the Ramseys had asserted that they had launched their own investigation into the murder of their daughter in order to find the killer.

Since, in the face of such assertions, the Ramseys had failed to demonstrate that the documents would not

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Documents in Ramsey Libel Case

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have been created absent any potential criminal prosecutions of them, the court concluded that “the documents were created for two separate, if related, purposes, one of which is inconsistent with work-product immunity.” *Ramsey*, 2002 WL 1402055, at *10.

In addition, as to a number of the documents, the court found that the Ramseys had waived any work-product protection by virtue of their disclosure of the documents or the conclusions of the documents either to the public or to the Boulder County District Attorney’s Office.

Although the court found that the Ramseys could not assert work-product protection under Rule 26(b)(3) for the above-described category of investigative documents, without opposition from NYP Holdings, the court carved out an exception for “core attorney work-product” pursuant to the protective-order provisions of Rule 26(c), “which directs us to grant relief that would avoid *inter alia* oppression.” *Ramsey*, 2002 WL 1402055, at * 13. The court ordered that documents “that contain segregable analytical material authored by an attorney” need not be disclosed except to the extent that such documents were disclosed to the Boulder County District Attorney or to the public. *Id.*

The Attorney-Client Privilege and Doctor-Patient Privilege Claims

While respecting the sanctity of the attorney-client and doctor-patient privileges in principle, the court agreed with NYP Holdings that such privileges were waived as to those documents whose contents had not been kept confidential, *e.g.*, through public disclosure or disclosure to the Boulder County District Attorney.

NYP Holdings is represented by R. Bruce Rich, Richard J. Davis, Jonathan Bloom, Sondra Roberto and Natalia Porcelli of Weil, Gotshal & Manges LLP. Burke Ramsey is represented by L. Lin Wood, a sole practitioner, and Mark E. Goidell of Galasso, Langione & Goidell, LLP.

Pennsylvania Appeals Court to Decide Whether to Unseal Public Official’s Defamation Case Files

A Pennsylvania appeals court is currently deliberating whether to reverse a trial court’s broad sealing order in a defamation case brought by a public official against Sinclair Radio, its radio station WILK, and talk show host Frederick Williams. *Olszewski v. Sinclair Broadcasting Group, et al.*, No. 2087 MDA 2000 (Pa. Superior Ct.) Williams, whose real last name is Vopper, was the lead defendant in last year’s landmark privacy case *Bartnicki v. Vopper*, 532 U.S. 514, 520 (2001).

Judge Suing Over Radio Show Host’s Commentary

In 1998, then District Attorney Olszewski (now Luzerne County Judge Olszewski) sued defendants over William’s on-air commentary that Olszewski was guilty of “misfeasance and malfeasance in office,” as well as other critical comments about his handling of high profile criminal cases. In June 1999, after engaging in significant document discovery, and in the midst of his campaign for a judgeship, Olszewski moved for a protective order to seal upcoming depositions. Moreover, at the hearing on the motion, plaintiff requested that the courtroom be closed to the media and public – a request that was granted over the objection of the defendants and media who argued that the parties were public figures and the case a matter of significant public concern.

Court Seals All Case Files

In January 2000, trial court Judge Barry Feudale granted a broad order sealing all submissions, all orders, and the docket – including the sealing order itself, which contained no findings of fact for the court’s decision. The sealing order covered 68 documents that were previously available to the public.

In July 2000, the *Times-Leader*, a Knight-Ridder owned newspaper in Wilkes-Barre, petitioned to intervene in the case to move to unseal the case files. On October 13, 2000, Judge Feudale issued a new order “vacating” the prior sealing order. The new order stated that going forward all documents would be open, but he

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Pennsylvania Appeals Court to Decide Whether to Unseal Public Official's Defamation Case Files

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left under seal most of the previously sealed material. *Olszewski v. Sinclair Broadcast Group, Inc. et al.*, No. 259-C-1998 (Pa. Comm. Ct. Oct. 13, 2000) (order partially vacating protective order on discovery, unsealing the complaint and answer, but refusing to unseal any other documents or transcripts on the case docket).

Notably, even though plaintiff had not objected to unsealing most of the material, the judge in a footnote observed that "it is both unrealistic and a waste of valuable court time and resources to engage in an ongoing battle" to determine which of the other 152 docket entries should be unsealed. *Id.* at n.1. The judge in another footnote also commented that defendants' discovery into evidence of plaintiff's misfeasance or malfeasance while a district attorney "resulted in almost a one year... 'wild goose chase'... or a quest for misfeasance or malfeasance in search of itself." *Id.* at n. 2.

In March 2001, the judge issued an opinion on the *Times-Leader* appeal of the October order, but directed that this opinion be filed under seal.

Appealing the Order

To challenge the October Order, the defendants and the *Times-Leader* claimed a right of appeal under Pennsylvania's Collateral Order Rule, Pa. R.A.P. 313, which allows an appeal from an order that is separate from the main cause of action. The *Times-Leader* argued that the "practical consequence of the [October 13, 2000] order was to put them 'out of court' since the only 'claim' or issue involving them had been finally adjudicated." *Reply Brief for Defendants-Appellee* at 8, *Olszewski v. Sinclair Broadcast Group, Inc., et al.* (No. 2078) (Pa. Super. Ct. 2000).

On the merits of the appeal, defendants argue that the lower court abused its discretion by leaving under seal most of the case file, particularly in a case of significant public concern – thereby ignoring the presumption of openness for judicial proceedings and records. Moreover the court's "waste of time and resources" argument for leaving court files under seal does not support sealing under the First Amendment or Pennsylvania common law.

The Pennsylvania Superior Court in Harrisburg canceled oral argument for the appeal and the case is sub judice.

Plaintiff is represented by James E. Beasley and Barbara R. Axelrod of Beasley, Casey, and Erbstein in Philadelphia. Defendants are represented by Bruce W. Sanford, David S. Wachen and Lee T. Ellis, Jr. of Baker & Hostetler in Washington, D.C., and Lawrence M. Ludwig of Kreder, Brooks, Hailstone and Ludwig in Scranton, Pennsylvania. The *Times-Leader* is represented by Jonathan Blum from Wilkes-Barre.

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Federal Judge Denies *National Enquirer's* Anti-SLAPP Motion in Carolyn Condit's Lawsuit

National Enquirer is Not a "Newspaper" Under Retraction Statute Statements are Capable of Defamatory Meaning

By Steven D. Zansberg

In a 52-page ruling issued July 10, 2002, United States District Judge Oliver W. Wanger of the Eastern District of California (Fresno) denied the anti-SLAPP motion filed by *The National Enquirer* seeking dismissal of the libel action brought by Carolyn Condit, the wife of Congressman Gary Condit.

The National Enquirer argued that Condit's suit came within the provisions of the anti-SLAPP statute, and dismissal was warranted because her failure to demand a correction or plead special damages prevented her from recovering under California's retraction statute, and the statements in question do not have a defamatory meaning. Judge Wanger rejected all of these contentions finding that the material in question did not involve an issue of public concern under the anti-SLAPP statute, that *The National Enquirer* was not a "newspaper" or otherwise covered by the requirements of the retraction statute, and that the offending statements may reasonably be construed as defamatory.

Did Condit's Wife "Attack" Levy

The lawsuit was filed February 21, 2002, on the basis of two articles in *The National Enquirer* in late July and August 2001. The August 7, 2001 edition of *The Enquirer* reported in a cover headline "Cops: Condit's Wife Attacked Chandra" followed by subheads "The Furious Phone Call," and "What Wife is Hiding."

The article, which appeared on page 32 of the newspaper, reported that law enforcement officials who were then engaged in the investigation into the disappearance of Chandra Levy had obtained phone records indicating that Mrs. Condit had placed a phone call from her home in California to Gary Condit's apartment in Washington in the days before Levy's disappearance, and that the phone call lasted over five minutes. The article reported that investigators determined that Gary Condit had not answered that phone call, and that Chandra Levy was living in Gary Condit's apartment at the time of the call.

The article reported that as a result of extensive interviews, investigators had concluded that Mrs. Condit had engaged in a "blow-up phone call" with Chandra Levy in the course of which the 24-year-old intern told an enraged Carolyn that Gary was dumping her to start a new life and family with Chandra.

Mrs. Condit Wants Damages and Retraction

In her three-count complaint filed in federal court for the Eastern District of California, Mrs. Condit claims she suffered \$10 million in general damages as a result of the defendant's publications. She denies that there was any phone call between herself and Chandra Levy.

Mrs. Condit also seeks punitive damages and a court order requiring *The Enquirer* to apologize and to publish a retraction. Her complaint alleges that she did not demand a written retraction from *The Enquirer* because California's correction statute, Civ. Code § 48a, does not apply to *The National Enquirer* (citing *Burnett v. National Enquirer*, 144 Cal. App. 3d 991 (1983)).

Anti-SLAPP Motion

The National Enquirer filed a motion to dismiss the complaint pursuant to California's anti-SLAPP statute or, in the alternative, for summary judgment on two alternative grounds:

- (1) that Mrs. Condit did not claim to have suffered any special damages and admittedly did not comply with California's correction statute by demanding a written correction, and therefore, her claims are barred;
- (2) none of the published statements of which Mrs. Condit complains are reasonably capable of a defamatory meaning, because the headlines and article text indicating that Mrs. Condit "attacked" Chandra Levy are not reasonably understood (in the context of the article as a whole) as conveying the allegation (as alleged by Mrs. Condit) that she had physically assaulted Chandra Levy. Moreover, it would not lower a reasonable reader's opinion or estimation of Mrs. Condit

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Federal Judge Denies *National Enquirer's* Anti-SLAPP Motion in Carolyn Condit's Lawsuit

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to learn that she became "enraged" or angry when she was confronted by her husband's 24-year-old mistress and upon being told that Gary Condit was leaving her to begin a new life with Ms. Levy.

Court's Rules Anti-SLAPP Act Inapplicable

Judge Wanger ruled that California's anti-SLAPP statute did not apply to the facts of this case, because, according to the court, "it does not appear defendant is being sued for making statements related to a 'public issue' or 'issue of public interest' within the meaning and intent of California's anti-SLAPP statute." In a portion of the analysis for which the Court cited no caselaw, the court stated that

"[t]he disappearance of Ms. Levy does not concern the performance of duties by Mr. Condit in his capacity as a public official. The criminal investigation of the disappearance of Ms. Levy is not necessarily a political or community issue in which public opinion and input is inherent or desirable, although it is arguable that there is a law enforcement purpose that underlies efforts to keep the case in the media and before the public to assist in efforts to locate a missing person. This lawsuit concerns disputed claims over defamation, not the type of meritless case brought to obtain a financial or political advantage over or to silence opposition from a defendant, which California's anti-SLAPP statute was designed to discourage."

In essence, the court concluded that this case was not the archetypal SLAPP litigation, designed to wrongfully intimidate political or public speech, and as such, refused to find that it came within the law's defining terms.

Finally, the court found that even if the statute applied, accepting as true all the well-pleaded allegations in Mrs. Condit's complaint, she overcomes the defendant's motion because it appears she could succeed on the merits of her claims.

Not a Newspaper Under Retraction Statute

The court ruled that *The National Enquirer* did not constitute a "newspaper" for purposes of California Civil Code § 48a, which requires that plaintiffs provide a written demand for a correction to any "newspaper," within twenty days after knowledge of the publication claimed to be libelous. Failure to make such a request limits plaintiff's claims to special damages.

In her complaint, Mrs. Condit acknowledged that she has suffered no special damages and has claimed only general damages. *The National Enquirer* moved to have the complaint dismissed on grounds that *The National Enquirer*, as it existed in the summer of 2001, constituted a "newspaper" for purposes of the retraction statute, distinguishing the decision of the California Court of Appeals in

Burnett v. National Enquirer, Inc., 144 Cal. App. 3d 991 (1983), which held that the issue of *The Enquirer* containing the article concerning Carol Burnett's alleged drunken behavior in a Washington, D.C.-area restaurant (originally published on March 2, 1976) did not constitute a newspaper.

To avoid extensive discovery, including deposition testimony, in this anti-SLAPP motion, *The National Enquirer* supported its motion with an affidavit of its editor, David Perel, attesting to significant changes in the editorial content of *The National Enquirer* from the 1976 edition at issue in *Burnett* to the summer 2001 issues that serve as the basis for Mrs. Condit's complaint. Significantly, the 1976 editions of *The National Enquirer* contained no reporting of crime stories, which became a mainstay of *The National Enquirer* in the mid-1990s, beginning with the O.J. Simpson murder trial.

The court compared the content of two editions of *The National Enquirer* from 1976 with seven issues of the paper from 2001 and concluded that there was no significant difference for purposes of applying California's retraction statute. The court evaluated the six factors that the California Court of Appeals had applied in *Burnett*:

(1) whether the publication subscribed to wire services;

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According to the court, "it does not appear defendant is being sued for making statements related to a 'public issue' or 'issue of public interest' within the meaning and intent of California's anti-SLAPP statute."

Federal Judge Denies *National Enquirer's* Anti-SLAPP Motion in Carolyn Condit's Lawsuit

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- (2) whether the paper attributed content to wire services;
- (3) whether there was significant current coverage of politics, sports, crime;
- (4) whether the articles routinely published in the paper made reference to time;
- (5) whether the paper engaged in day-to-day generation of stories (as only daily newspapers do); and
- (6) the "lead time," or the amount of time between completion of the editing of stories and publication.

The court concluded that "the evidence adduced does not establish the news dissemination function of *The Enquirer* of 2001 is so 'markedly different' from *The Enquirer* of 1976 as to justify departure from *Burnett* to find *The Enquirer* is now a § 48a 'newspaper.'" Accordingly, the court ruled that on the records before it, Mrs. Condit was not required by the statute to demand a correction from *The Enquirer* to recover general damages.

Challenged Statements Are Susceptible of Defamatory Meaning

The court also found that the statements published in the two editions of *The National Enquirer* (dated August 7, 2001 and September 4, 2001) were reasonably susceptible to bearing a defamatory meaning. Mrs. Condit's counsel had pleaded that the combination of the word "attack" in the headlines and certain select statements in the articles gave rise to the insinuation that she had physically assaulted Chandra Levy.

The court found that not only was that one reasonable interpretation, but that other subheadlines, including "What Wife is Hiding," were reasonably susceptible of the alleging that the plaintiff was obstructing justice or hiding information about her own involvement in, or first-hand knowledge of, Ms. Levy's disappearance.

The court also found that Mrs. Condit's second and third claims for relief - based upon statements in the article that portrayed her as having engaged in a "furious, enraged, [or] bitter" exchange with Ms. Levy attributes to plaintiff "a bitter and angry disposition, intemperance, and loss of control, which are traits that could subject plaintiff to contempt, opprobrium, ridicule, and humiliation . . ." Accordingly, these statements, too, are reasonably suscep-

Collateral Estoppel May Not Preclude Substantial Truth Defense

By Samuel M. Leaf

A New York State Supreme Court Justice has ruled that a plaintiff in a defamation action may not use findings of fact made by an administrative law judge in an unrelated proceeding to collaterally estop defendants from arguing that the allegedly defamatory statements at issue are substantially true. In her June 6 opinion in *Cerullo v. William Morrow & Co., Inc., et al.*, No. 99/117910, Justice Barbara Kapnick held that it would be unfair to estop all defendants from relitigating certain factual issues which were decided in 1998 by an Securities and Exchange Commission administrative law judge in a proceeding involving only one of the defendants in the present defamation case.

The defamation action is the latest (and perhaps last) proceeding stemming from the highly publicized 1994 Kidder Peabody & Co. bond trading scandal, in which Joseph Jett, a bond trader and head of the government trading desk at Kidder, was accused by the SEC and Kidder of booking approximately \$350 million in "phantom" profits.

At the time, the scandal drew the attention of the FBI, the Manhattan United States Attorney's office, the enforcement division of the New York Stock Exchange, the Na-

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tible of a defamatory meaning.

Therefore, the court denied *The Enquirer's* motion to dismiss the complaint or, in the alternative, for summary judgment in its entirety.

Subsequent to the district court's ruling on *The Enquirer's* anti-SLAPP motion, *The Enquirer* filed an answer to Mrs. Condit's complaint, and discovery is now getting underway. A trial date has not yet been set, but is anticipated for the late summer/early fall 2003.

Steven Zansberg is with Faegre & Benson's Denver office, and with Thomas B. Kelley, is representing The National Enquirer, Inc. Mrs. Condit is represented by Neville Johnson and Brian Rishwain of Johnson & Rishwain, and by Prof. Rodney Smolla of the University of Richmond's School of Law.

Collateral Estoppel

(Continued from page 29)

tional Association of Securities Dealers and the SEC. Despite the urgings of Kidder and its lead attorney, Gary Lynch (formerly the head of the SEC's enforcement division), the U.S. Attorney declined to bring any charges against Mr. Jett. The SEC, however, brought an administrative proceeding, charging Mr. Jett with securities fraud and books and records violations.

The Administrative Trial

After an administrative trial in 1996, the SEC judge hearing the action, Carol Fox Foelak, issued an opinion in 1998 in which she held that Mr. Jett had aided and abetted in committing books and records violations and banned him from the industry. Although she found that Mr. Jett had not committed securities fraud, Judge Foelak determined that Mr. Jett had intended to defraud Kidder and that he knowingly booked trades that were "economic nullities" but appeared on Kidder's books as profitable. In addition, Judge Foelak found that Mr. Jett's supervisors at Kidder, including his immediate boss, Edward Cerullo, were not aware of his trading strategy, which, according to the judge, caused the "phantom" profits. Mr. Jett's appeal of that decision is pending before the SEC.

In 1994, Mr. Jett brought an administrative proceeding against Kidder, this one before an NASD arbitral panel, to force Kidder to release the substantial performance bonuses he had been paid in the preceding two years and had kept in a firm account, which Kidder had frozen. Kidder brought counterclaims against Mr. Jett in that action, alleging fraud, breach of fiduciary duty and unjust enrichment.

In 1997, after a lengthy administrative trial in which most of the evidence submitted in the then-undetermined SEC proceeding was presented, a majority of the NASD arbitrators summarily denied all of Kidder's counterclaims and ordered that it release the funds in Mr. Jett's account, less approximately \$1.2 million that Kidder had previously been forced to advance for Mr. Jett's legal fees.

Black & White on Wall Street

In 1999, William Morrow & Co., since acquired by HarperCollins Publishers, Inc., published the book *Black and White on Wall Street*, which told Mr. Jett's side of the Kidder story and presented his defense to the charges made against him by Kidder, its executives, the SEC and the press. The book criticized the conduct of Mr. Cerullo and Kidder in the various investigations and challenged the fairness of the SEC proceeding. Not surprisingly, the book also took issue with some of the findings reached in the SEC decision, which were reported in the book, including the findings concerning what Mr. Jett's supervisors at Kidder knew about his trading and when they knew it.

Mr. Cerullo subsequently sued Morrow, HarperCollins, Sabra Chartrand (a *New York Times* reporter who assisted in writing the book) and Mr. Jett, alleging that thirteen statements contained in the book defamed him.

In December 2001, before discovery in the defamation action had been completed (it is still ongoing), plaintiff moved for partial summary judgment on collateral estoppel grounds based on the 1998 SEC decision. Plaintiff sought to preclude all defendants from arguing the substantial truth of the allegedly defamatory statements in the book that contradict the findings made by the SEC administrative law judge, including the findings concerning what Mr. Jett's supervisors knew about the disputed trades and when they knew it and whether Mr. Jett's trades generated real profits or were entered with an intent to defraud Kidder.

Finally, plaintiff moved for a protective order to prevent the defendants from taking discovery concerning the issues decided in the SEC proceeding since, as plaintiff argued, no discovery should be permitted on issues that had already been finally determined in that proceeding. Justice Kapnick disagreed with respect to each of plaintiff's contentions and denied his motion in its entirety.

Publisher and Co-writer Not in Privity

In her opinion, Justice Kapnick noted that the doctrine of collateral estoppel is applicable to quasi-judicial determinations of administrative agencies where the administrative

(Continued on page 31)

The book criticized the conduct of Mr. Cerullo and Kidder in the various investigations and challenged the fairness of the SEC proceeding.

Collateral Estoppel

(Continued from page 30)

tribunal employs procedures substantially similar to those used in a court of law. However, the court found that in order for nonparties to the prior litigation to be collaterally estopped by a determination made in that initial action, those nonparties must have been in privity with a party to the prior litigation.

Citing the leading New York Court of Appeals precedents on the issue, Justice Kapnick stated that in order to find privity between a party and nonparty to the initial action, the nonparty must have participated in that action to the extent that there was a sharing of control of the litigation. *Id.* at 4 (quoting *Juan C. v. Cortines*, 89 N.Y.2d 659, 667 (1997)).

The court further stated that doubts as to whether a relationship giving rise to privity exists should be resolved against imposing preclusion in order to ensure that the party sought to be bound by the determinations made in the initial litigation is afforded a full and fair opportunity to litigate. *Id.* at 4-5 (quoting *Beuchel v. Bain*, 97 N.Y.2d 295, 304-05 (2001), *cert. denied*, ___ U.S. ___, 2002 WL 496747 (2002)).

Justice Kapnick found that the publishers and Ms. Chartrand (none of whom had even met Mr. Jett prior to the conclusion of the SEC administrative trial), had not participated in or exercised any control over the SEC proceeding.

The court held that since these defendants in the defamation action did not have a full and fair opportunity to litigate any issue before the SEC, they were not in privity with Mr. Jett and could not be precluded from discovering and presenting evidence regarding the truth of the allegedly defamatory statements

Prior Inconsistent Judgment Precludes Application of Offensive Estoppel

With respect to Mr. Jett (who was a party to the SEC proceeding), the court similarly denied plaintiff's motion in its entirety, but on different grounds. Justice Kapnick noted that the Supreme Court has held that the use of offensive collateral estoppel – to preclude a defendant

from relitigating issues which the defendant previously litigated and lost against a *different* party — may be unfair where the judgment relied on as the basis of the estoppel is inconsistent with a prior judgment in favor of defendant. *Id.* at 6 (citing *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 330 (1979)).

Given that the NASD arbitral panel had found in favor of Mr. Jett, dismissing Kidder's claims for fraud, breach of fiduciary duty and unjust enrichment (all of which were based on the same facts and evidence heard by the SEC) and had ordered Kidder to release funds in Mr. Jett's account, Justice Kapnick determined that the NASD decision was inconsistent with the SEC decision. In these circumstances, the court concluded, it would be unfair to

give the SEC's findings collateral estoppel effect. Accordingly, the court held that Mr. Jett, like the other defendants, was free to take discovery on and litigate the substantial truth of all the statements at issue in

the defamation action.

Justice Kapnick did not decide the interesting First Amendment issue (apparently of first impression) of whether offensive collateral estoppel – in this case offensive estoppel based on an administrative decision – may ever be used to prevent a defamation defendant from arguing substantial truth. Another issue argued but not decided by the court is whether collateral estoppel was inappropriate due to the differing standards of proof between the SEC administrative proceeding, in which the preponderance of evidence standard was applied, and the defamation action, in which the clear and convincing evidence standard will likely be applied to determine whether the statements at issue are substantially true.

Defendants Joseph Jett and Sabra Chartrand are represented by Davis Wright Tremaine LLP (Victor A. Kovner, Carolyn K. Foley, Jeffrey Blum and Samuel M. Leaf), and Defendant HarperCollins is represented by Hogan & Hartson (Slade R. Metcalf and Katherine M. Bolger). Plaintiff Edward Cerullo is represented by Boies, Schiller & Flexner LLP (Andrew W. Hayes and William D. Marsillo).

These defendants in the defamation action did not have a full and fair opportunity to litigate any issue before the SEC.

Media Libel Plaintiff Ordered to Reveal Confidential Sources

An unusual media versus media libel battle settled this month on the heels of a ruling that would have required the media plaintiff to disclose the identity of a confidential source(s). See *Inside Radio, Inc. v. Clear Channel Communications, Inc.*, 2002 WL 1446620 (S.D.N.Y. July 3, 2002). In a case described by presiding Judge Lewis A. Kaplan as a “twenty-first century blood feud,” radio trade publisher Inside Radio sued radio conglomerate Clear Channel Communications for defamation over statements accusing plaintiff of publishing fabricated stories. Clear Channel counter sued for defamation and related claims.

The case presented the rare issue of whether and to what extent a media company suing for defamation waives the protection for confidential sources. The court found that the protection is not waived merely by a reporter bringing suit – but only insofar as the source is put at issue and then only “upon a clear and specific showing that the information is:

- 1) highly material and relevant,
- 2) necessary or critical to the maintenance of the claim, and
- 3) not obtainable from other available sources.” *Id.* at *3 citing *In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 7 (2d Cir.), cert. denied, 459 U.S. 909 (1982) (vacating order that third party reporter disclose source).

Background

In 1997, negotiations for Clear Channel to buy Inside Radio fell through, and the relationship soured. Inside Radio regularly lambasted Clear Channel on its website. In response, Clear Channel launched a web site, Inside Inside Radio, run by a former shock jock, who reported, among other things, that Inside Radio fabricated harassing stories about Clear Channel’s business to “extort” a higher purchase price.

Despite the bitter exchanges, all claims settled this month with M Street Publications – which is partially owned by Clear Channel – acquiring Inside Radio’s operations on Aug. 2. The companies’s daily fax services on the

radio industry were combined Aug. 5. Inside Radio did not reveal its source(s) before the case was settled and dismissed.

Discovery of Plaintiff’s Sources

Applying the Second Circuit standard for disclosure of confidential sources, the district court found that Clear Channel was entitled to disclosure of any sources for those statements alleging that Inside Radio and its principal “deliberately printed falsehoods.” The court found that Inside Radio’s claim that these statements are false puts into issue whether it had any sources – information pivotal to Clear Channel’s defense that is unavailable from anyone else.

But Clear Channel was not entitled to disclosure of sources relating to its statements that Inside Radio published false reports about Clear Channel’s business practices since Clear Channel would itself

have the information to prove the truth of these charges.

Inside Radio was represented by Ronald Rosenberg and Edward Ross of Rosenberg Calica & Birney in Garden City, N.Y. Clear Channel was represented by Richard Mandel of Cowan, Liebowitz & Latman in New York.

To what extent a media company suing for defamation waives the protection for confidential sources

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South Carolina on Summary Judgment

By Wallace K. Lightsey

The South Carolina Supreme Court rendered a decision recently that is significant, not for making new law in South Carolina, but for reversing a highly suspect decision by the South Carolina Court of Appeals. *Fleming v. Rose*, Op. No. 25500 (S.C. July 22, 2002). The Supreme Court required that the public plaintiff bring clear and convincing proof to defeat a defendant's summary judgment motion on actual malice grounds.

An Investigative Cover-Up Alleged

The case arose from a press release concerning an internal investigation by the South Carolina Department of Public Safety into allegations of a cover-up of facts concerning an automobile accident in which several highway patrol troopers were involved. There was evidence that the vehicle in which the troopers were riding was traveling at a high rate of speed and that there were open containers of alcohol in that vehicle.

After accusations were made that this evidence had been covered up by the state agency, investigators for the Department of Public Safety looked into the matter and concluded that the plaintiff, a trooper who was not in the accident, had learned of the evidence of speeding but failed to report it to his supervisor. In the press release at issue in the case, the defendant (the director of the Department of Public Safety) stated that the plaintiff "learned key details about the accident [but] did not report this information to his superiors."

Summary Judgment on Appeal

The trial court granted summary judgment, ruling that the plaintiff was a public figure and that the publication was not made with actual malice. The Court of Appeals, relying on the usual standards for summary judgment motions, and with no mention of *Anderson v. Liberty Lobby, Inc.*, 417 U.S. 242 (1986), held that defendant's approval of the press release without any knowledge of whether it was true or false constituted sufficient evidence of "actual malice" to withstand summary judgment. 338 S.C. 524, 526 S.E.2d 732 (Ct. App. 2000).

The Supreme Court reversed, holding that a public-figure plaintiff must demonstrate actual malice with "clear and convincing proof" to defeat a motion for summary judgment. The Supreme Court reviewed the record in detail and found no proof of knowledge of falsity or reckless disregard of the truth, but to the contrary showed that the defendant "relied on the results and conclusions of an investigation conducted by two highly respected investigators." Because there was no reason for the defendant to doubt the results of the investigation, actual malice could not be predicted on the defendant's failure to conduct his own investigation.

The Supreme Court's decision was written by Chief Justice Jean Hofer Toal.

Wallace K. Lightsey is a member of the firm of Wyche, Burgess, Freeman & Parham in Greenville, South Carolina.

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Third Circuit Returns Non-Media Libel Case to State Court Citing Lack of Federal Jurisdiction

First Amendment Argument to Counter Anticipated Defense Insufficient

The Third Circuit Court of Appeals, in a non-media defamation case, addressed the rare issue of whether federal question jurisdiction can be premised on plaintiffs' inclusion in their complaint of a First Amendment argument in response to an anticipated defense argument. *Bracken v. Matgouranis*, 2002 WL 1496428 (3rd Cir. July 15, 2002). The Third Circuit said "no" based on "approximately a century of precedent,"— which, surprisingly was not cited by either side. *Id.* at *2.

Plaintiffs brought a defamation suit in Pennsylvania state court over a statement made at a deposition in another proceeding that accused plaintiffs of trying to extort money. Anticipating that defendants would cite Pennsylvania's absolute privilege for statements made in a judicial proceeding, plaintiffs alleged that the absolute privilege violated the First Amendment. Based on this alle-

gation, the defendants removed the case to a federal court on the basis of federal question jurisdiction. The federal district court thereafter dismissed the complaint.

The Third Circuit reversed and remanded to state court, finding no federal court jurisdiction. The opinion by Judge Rosenn noted that "this appeal presents an esoteric question of federal jurisdiction considered by the United States Supreme Court nearly a century ago in *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149 (1908), and rarely reviewed since." 2002 WL 1496428, at *1.

In *Mottley*, the U.S. Supreme Court held that a "a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action, and asserts that the defense is invalidated by some provision of the Constitution of the United States." *Mottley*, at 150. Applying this standard, the Third Circuit found that "the plaintiffs have anticipated a state defense (i.e., absolute privilege), and have developed a First Amend-

ment response to the defense in their Complaint (i.e., absolute privilege violates the United States Constitution). Speculation on a state defense and a constitutional answer to it cannot be the basis for federal question jurisdiction." 2002 WL 1496428, at *1.

The defendants have filed a motion for rehearing *en banc*, raising the interesting argument that since lack of privilege is an element of a defamation claim under Pennsylvania law, plaintiffs directly raised a federal constitutional question.

H. David Rothman of Pittsburgh, represented Bracken.

John W. Murtagh, of Murtagh & Cahill in Wexford, Pennsylvania, and Mary Kate Coleman, of Riley, McNulty, Hewitt & Sweitzer in Pittsburgh, represented Matgouranis.

Anticipating that defendants would cite Pennsylvania's absolute privilege for statements made in a judicial proceeding, plaintiffs alleged that the absolute privilege violated the First Amendment.

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Alleged Clinton Mistress Allowed to Prove Clinton Bullied Publishers into Rejecting Her Book

The D.C. Circuit Court of Appeals affirmed dismissal of all but two claims filed against former President Clinton, his aides, *The New Yorker*, and a reporter by an alleged mistress of Clinton who claims he prevented her from selling a book about their relationship. *Browning v. Clinton*, 292 F.3d 235 (D.C. Cir. 2002). While dismissing all claims against the media defendants and the aides, the court held that plaintiff had stated causes of action against Clinton for tortious interference and conspiracy.

Former Clinton Friend Penned Book on Relationship

The suit was filed by Dolly Browning, a childhood friend of Clinton who claims they had a long-standing sexual relationship that was active at least up to — and during — his Arkansas governorship. Browning wrote a novel based on her relationship with Clinton in which the protagonist has an affair with a Southern governor who is a long-time friend. In 1988, she submitted the work to an editor at Warner Books, who encouraged her to continue working. In 1995, she retained an agent but still had no luck selling the book, despite positive press about the book: a *Publisher's Weekly* article (1996) claimed her book could “knock *Primary Colors* out of the headlines.”

Alleged Clinton Suppressed Publication

Browning claims that Clinton, through a string of corrupt practices that spans six years, prevented her from selling her book. She alleges that in 1992 and in 1994 Clinton had people threaten her not to go public with her story. Then, in 1994, after a tense meeting between Browning and Clinton at their high-school reunion, a truce was negotiated by Browning's sister and then-White House Counsel Bruce Lindsey. According to Browning, she was allowed to say she had a relationship with Clinton that sometimes included sex, but could

not use the words “affair” or “adultery.”

In 1997, Jane Mayer wrote a profile of book publisher Alfred Regnery for *The New Yorker* in which the publisher called a novel by a “putative Presidential mistress” not newsworthy and below his standards. The article never mentioned Browning by name.

In 1998, per a discovery request from Paula Jones during her suit against him, Clinton produced a memo that he and aide Marsha Scott had written in 1994, summarizing his meeting with Browning at the high-school reunion. Both Clinton and Scott described Browning in the memo as acknowledging that her story wasn't true, but wanting to publish the book anyway because she

was angry and needed the money.

Also in 1998, Clinton attorney Robert Bennett made negative statements concerning the Paula Jones litigation, in which he claimed that Jones' witnesses had weaknesses. Browning was one of Jones' witnesses.

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According to Browning, she was allowed to say she had a relationship with Clinton that sometimes included sex, but could not use the words “affair” or “adultery.”

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Alleged Clinton Mistress Allowed to Prove Clinton Bullied Publishers into Rejecting Her Book

(Continued from page 35)

Based on the those incidents, Browning filed claims against Clinton, Lindsey, Bennett and Scott for intentional interference with business opportunity, defamation, false light invasion of privacy, intentional infliction of emotional distress, RICO violations, First Amendment violations under *Bivens*, and civil conspiracy. She filed claims against *The New Yorker* and Mayer for tortious interference with business opportunity and disparagement of property. The lower court dismissed all claims. The appellate court affirmed the dismissal of all claims against Scott, Bennett and Lindsey, as well as against Mayer and the *New Yorker*. It also affirmed dismissal of all claims against Clinton except tortious interference with business opportunity and conspiracy.

Tortious Interference with Business Relationship

The lower court dismissed all interference claims because Browning's claim of interference with an anticipated business relationship was contradicted by the fact that no publisher had accepted the book: with no willing buyer, there is no anticipated relationship with which to interfere. However, the appeals court found that the optimistic article appearing in *Publisher's Weekly* and the words of encouragement from the Warner Books editor were enough to establish the reasonable anticipation of a business relationship. Further, the court noted, it is *possible* that publishers rejected the book based on Clinton's alleged threats. This was enough, the court ruled, for the claim against Clinton to be addressed properly in a motion for summary judgment.

The court affirmed the dismissal of the interference claim against Scott because that claim arose from the same facts as a defamation claim against her, namely her contributions to the 1994 memo, and thus the expired statute of limitations for defamation applied to the interference claim as well.

Interference claims against Bennett, *The New Yorker* and Mayer were properly dismissed because their actions and statements were too attenuated to have pre-

vented her from selling the book. None of the parties ever referred to plaintiff directly in their statements, and the court found that not even a liberal pleading interpretation supported the necessary element of causation.

Disparagement of Property

The court affirmed dismissal of the disparagement claim against the *New Yorker* and Mayer, rejecting Browning's argument that the special damages element of her disparagement claim could be met by mere notice pleading.

Defamation and False Light

The court also affirmed dismissal of defamation claims based on Clinton's production of the 1994 memo pursuant to the document request made by Paula Jones and on Bennett's statements about the Paula Jones filing. The production of the memo was privileged, and the comments were either not "of and concerning" Browning or were non-actionable hyperbole. Several false light claims against the parties were based on the same facts as the defamation claims, and were dismissed along with those claims.

Bivens Claim

The *Bivens* claims failed because, according to the court, Browning "alleged no facts suggesting that Clinton or Lindsey purported to act under color of official right, or in other words, that their alleged threats reflected anything more than a private dispute."

Larry Klayman, Chairman and General Counsel of Judicial Watch, represented Dolly Browning. Floyd Abrams and Landis Best of Cahill Gordon & Reindel in New York represented Advance Magazine Publishers (*The New Yorker*) and Jane Mayer. David Kendall of Williams & Connolly in Washington D.C. represented Bill Clinton. John Aldock of Shea & Gardner in Washington D.C. represented Robert Bennett. Bruce Lindsey represented himself.

Former Chiquita Confidential Source's Contract Claim Rejected, Magistrate Judge recommends other claims proceed

Former Chiquita attorney George Ventura's claims of promissory estoppel, promissory fraud and negligent disclosure against *The Cincinnati Enquirer* can proceed to trial if Judge Herman J. Weber of the District Court for the Southern District of Ohio accepts the report and recommendation by U.S. Magistrate Jack Sherman, Jr. denying the *Enquirer's* motion for summary judgment on those claims. Magistrate Sherman, however, did recommend granting the *Enquirer's* motion for summary judgment on Ventura's claims of breach of contract, tortious breach of contract and negligent hiring or supervision. See *Ventura v. The Cincinnati Enquirer, et. al.*, No 1:99cv793 (S.D. Ohio July 25, 2002).

Both sides filed a timely objection to the magistrate's recommendations.

Source for Chiquita Voicemail Info

Ventura's claims are based on the revelation of Ventura as a confidential source for the *Enquirer*. In 1998, while the *Enquirer* was investigating Cincinnati-based Chiquita Brands International, Ventura served as a confidential source for reporters Cameron McWhirter and Michael Gallagher. Ventura gave McWhirter and Gallagher information that had been illegally procured from Chiquita's company-wide phone voicemail system.

In May 1998, after one of the articles on Chiquita had been published, it was revealed that some information had been illegally obtained from Chiquita's voicemail system and Chiquita threatened to sue the *Enquirer* and/or its parent company, the Gannett Corporation. The potential Chiquita lawsuit was settled, but Ventura's identity was ultimately revealed. The *Enquirer* and Gannett deny responsibility for the revelation of Ventura as the source.

Nevertheless, Ventura was convicted in state court on misdemeanor charges stemming from his access of the voicemail system. Ventura subsequently filed suit against the *Enquirer* and Gannett based on his exposure as the confidential source.

The Contract Claims

To prove breach of contract and tortious breach of contract, Ventura first had to prove a contract existed. Ventura claimed a contract was in place by the fact that there was a promise to keep his identity a secret in exchange for the information he had on Chiquita.

Relying on the Minnesota Supreme Court's 1990 decision in *Cohen v. Cowles Media Co.*, 457 N.W.2d 199, and the District Court for the District of Columbia's 2000 decision in *Steele v. Iskikoff*, 130 F.Supp.2d 23, the magistrate judge rejected Ventura's claims that a contract existed. The court held that a reporter's oral promise to a news source in exchange for a source's information does not constitute an enforceable contract.

As the Minnesota Supreme Court, the 8th Circuit, and the District Court for the District of Columbia have previously done, Magistrate Sherman relied on the distinction between a moral obligation and a contract.

According to the reasoning relied on by the magistrate judge, a promise of confidentiality by a reporter certainly gives rise to a moral obligation. However, the source and the reporter do not intend to make a legally binding contract. The relationship is better described as an "I'll-scratch-your-back-if-you'll-scratch-mine" accommodation, where the two parties assume a risk of broken promises and rely only on the good faith of the other party.

Quoting from the Minnesota Supreme Court, Magistrate Sherman stated:

"To impose a contract theory on [a confidential source] arrangement puts an unwarranted legal rigidity on a special ethical relationship, precluding necessary consideration of factors underlying that ethical relationship."

Moreover, the magistrate judge also voted that Ventura's illegal access of voicemail information he supplied to the

The relationship is better described as an "I'll-scratch-your-back-if-you'll-scratch-mine" accommodation, where the two parties assume a risk of broken promises and rely only on the good faith of the other party.

Chiquita Confidential Source

(Continued from page 37)

Enquirer, evidenced significant lack of good faith and fair dealing. The District Court for the District of Columbia pointed out in *Steele* that every contract has an implied covenant of good faith and fair dealing. Finding no contract, the magistrate judge recommended granting summary judgment on the breach of contract and tortious breach of contract claims.

Negligent Hiring or Supervision

The magistrate judge also recommended granting the defendant's motion for summary judgment on the negligent hiring or supervision claims.

The *Enquirer* argued that Ventura's claim should fail because Ventura had failed to satisfy an element of negligent hiring or supervision – that the employer “knew, or should have known, of the employee's propensity ‘to engage in similar criminal, tortious, or dangerous conduct.’” The *Enquirer* argued that Ventura had not shown any evidence that the *Enquirer* knew or should have known of Gallagher's “propensity to engage in the ‘history of professional and ethical lapses and misrepresentations of fact’ of which the plaintiff complains.”

Magistrate Sherman agreed with the defendants, and recommended granting their motion for summary judgment on this claim.

Promissory Estoppel, Promissory Fraud & Negligent Disclosure

Three of Ventura's claims, however, should survive summary judgment according to the recommendation.

First, the magistrate judge recommended that Ventura's claim for promissory estoppel proceed to trial, relying on Ventura's argument that the reporters had made a promise of confidentiality, he had relied upon that promise, and he had suffered injuries based on a breach of that promise.

The *Enquirer* made two arguments against enforcement of the confidentiality promise, both of which the magistrate judge rejected. The *Enquirer* argued that an “injustice” would result if the promise of confidentiality were to be

enforced, and that Ventura's “unclean hands” barred his recovery. Both arguments were based on the crime committed by Ventura in accessing the voicemail system.

As to the “injustice” argument, the magistrate judge concluded that it was a misplaced argument. Because the promise of confidentiality was in place before the issue of accessing the Chiquita voicemails arose in discussions between the parties, enforcing the promise would not be unjust.

As to the “unclean hands” argument, the magistrate judge concluded that the defense was not available to a defendant whose “less-than-proper conduct” induced the plaintiff's “questionable conduct.” The magistrate judge pointed to a secret taping of a phone conversation between Ventura and the reporters. According to Magistrate Sherman, “had such recording been revealed to plaintiff, he would neither have

served as a confidential news source nor produced the voicemail codes in question.”

Second, the magistrate judge recommended Ventura's claim for promissory fraud also proceed to trial because fraud is often a “fact-based inquiry inappropriate for summary judgment review.”

The magistrate judge agreed with Ventura that Gallagher's misrepresentation regarding tape recording phone calls could be found to suggest that Gallagher had no intention of honoring the promise of confidentiality.

Third, the magistrate judge recommended Ventura's claim for negligent disclosure proceed to trial, concluding that Ventura could potentially satisfy the three requirements for negligent disclosure/negligent publicizing of private facts under Ohio law. The magistrate judge agreed with Ventura that the “private fact” in this case was Ventura's identity, there was a genuine dispute as to whether the defendant's disclosed Ventura's identity, and a reasonable person would find this type of disclosure “highly offensive.” Thus, Magistrate Sherman concluded that Ventura presented enough evidence to survive summary judgment.

Mark Mezibov, of Sirkin Pinales Mezibov & Schwartz in Cincinnati, represents Ventura. Robert C. Bernius, of Nixon Peabody in Washington, D.C., and Jack C. Greiner, of Graydon Head & Ritchey in Cincinnati, represent the *Enquirer*.

The magistrate judge recommended Ventura's claim for promissory fraud also proceed to trial because fraud is often a “fact-based inquiry inappropriate for summary judgment review.”

UK Media To Ask ECHR To Safeguard Right To Protect Sources

By Marietta Cauchi

On July 10 the House of Lords upheld an order forcing five media organizations to hand over documents that could lead to identification of the person responsible for leaking information relating to a company takeover bid. The Lords refused the media leave to appeal the Court of Appeal judgment in *Financial Times & Ors v Interbrew SA [2002] EWCA Civ 274* (http://www.courtservice.gov.uk/judgments/judg_frame.htm?OpenDocument) The media are taking the case to the European Court of Human Rights.

Journalists for *The Independent*, *Financial Times*, *The Times*, *The Guardian* and Reuters had been sent apparently doctored documents relating to the takeover of South African Breweries by Belgian brewery company, Interbrew. Subsequent publication of inaccurate information contained in the documents created a false market in the shares of both companies.

As of July 26 Interbrew abandoned legal action against the media groups, no longer seeking access to the documents they received. At time of writing it is

unclear what further action the UK's Financial Services Authority will take to obtain the documents as part of its criminal fraud investigation.

However the media are pursuing their appeal to the ECHR and as the Court of Appeal's judgment relied heavily on ECHR jurisprudence its interpretation and application of the Convention will be in issue on the appeal in Strasbourg. The UK government will be the respondent on the appeal and will presumably argue that it has not breached Article 10 of the European Convention of Human Rights.

Article 10 of the Convention, incorporated into domestic legislation in the Human Rights Act 1998, provides everyone with a right to freedom of expression.

But exercise of the right is subject to constraints "prescribed by law and necessary in a democratic society in the interests of national security, for the prevention of disorder or crime" and for the protection of others' rights.

Section 10 of the Contempt of Court Act 1981 gives journalists statutory protection against disclosure of sources "unless it is necessary in the interests of jus-

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The decision whether to lift the shield of protection is not one of discretion, the Court of Appeal said in the Interbrew case, it is a matter of hard-edged judgment upon the established facts.

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UK Media To Ask ECHR To Safeguard Right To Protect Sources

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tice or national security or for the prevention of disorder or crime.”

In the *Interbrew* case the Court of Appeal decided the defendants were innocently involved in facilitating a civil wrong and therefore subject to an order for delivery up of the documents (*Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133) unless entitlement to production was blocked by s10 of the Contempt of Court Act, applied compatibly with Article 10 of the ECHR.

On that issue, the court relied upon the analysis of Judge Laws in *Ashworth Hospital v MGN Ltd* [2001] 1 WLR who considered the impact of the ECHR decision in *Goodwin v United Kingdom* (1996) 22 EHRR on domestic UK law. Judge Laws said the public interest in the non-disclosure of press sources is a constant, unvarying premise, whatever the merits of the particular publication, and the particular source. He went on

the court must then decide whether in a given case there was ‘an overriding public interest, amounting to a pressing social need’ to which the need for confidentiality should give way.

The decision whether to lift the shield of protection is not one of discretion, the Court of Appeal said in the *Interbrew* case, it is a matter of hard-edged judgment upon the established facts. Is there a lawful aim on the part of the claimant in seeking disclosure? Is disclosure necessary to achieve it? Will disclosure destroy the essence of the media’s protected right of free expression? And if not, does the importance of disclosure outweigh the public interest in protecting journalists’ sources? To each of these questions, once the facts are found, there can in law be only one answer.

The court said *Interbrew* could invoke one of the listed purposes for lifting the bar on disclosure under section 10. It was in the interests of justice — because delivery up of the documents (to which it was prime facie entitled under *Norwich Pharmacal*) might enable the company to identify the proper defendant to a breach of confidence action.

Then the court had to decide whether the public in-

terest in the doing of justice was sufficient in the circumstances of the case to make disclosure necessary.

In reaching its decision the court said that the basis on which production was sought did not negate the media’s right of free expression, rather it sought to limit it on prescribed grounds in a particular situation.

Further, in giving judgment Judge Sedley said the source’s evident purpose was critical.

He was careful to distinguish motive from purpose — if the purpose of a leak is to expose wrongdoing it will deserve a high degree of protection — whether the motive is conscience or spite. If the purpose is to wreck legitimate commercial activity it is less deserving of protection.

Sedley LJ found that the public interest in protection of the source in this case was not sufficient to withstand the countervailing public interest in letting *Interbrew* seek justice in the courts against the source.

In contrast, the ECHR in *Goodwin* did not consider that pursuit of a corporate mole was sufficient in itself to outweigh the public interest against disclosure of a journalist’s source.

In that case there was a threat of commercial damage to the company claimant unless publication of a stolen secret document was restrained. Although disclosure of the source would enable the company to institute proceedings for the recovery of the document, an interim injunction restraining the applicant and all national press from publication had effectively served the same purpose.

This reasoning seems to be in direct conflict with the Court of Appeal’s judgment in *Interbrew* where any damage had arguably been done by publication. The only material objective in making the order was to enable the company to pursue a source whose purpose, as in the *Goodwin* case, was to wreck legitimate commercial activity.

Marietta Cauchi is a journalist with Dow Jones Newswires and was previously media lawyer with Finers Stephens Innocent in London.

Newspaper Found Not Liable For Printing Accident Report

Court holds federal Driver Privacy Protection Act does not apply to law enforcement accident reports

By Christopher Beall

On August 2, 2002, the federal District Court for the District of Colorado granted summary judgment to a small-town newspaper, its publisher and its editor in a case involving their publication of a facsimile copy of a traffic accident report pertaining to the alcohol-related accident and arrest of the mayor of the newspaper's local community. See *Mattivi v. Russell*, Case No. 01-WM-533 (BNB), __ Media L. Rep. __ (D. Colo. Aug. 2, 2002). In granting summary judgment, the trial court held that certain provisions of the federal Driver Privacy Protection Act ("DPPA"), 18 U.S.C. § 2521 *et seq.*, may not be construed to impose civil liability for the disclosure of a traffic accident report that has been created and maintained by a law enforcement agency, as opposed to a state's Department of Motor Vehicles.

The case arose out of the bitter relationship between the *Weekly Register Call*, a small weekly newspaper in

Central City, Colorado, and the mayor of Central City, Donald V. Mattivi Jr. The newspaper has editorialized persistently against the mayor's policies and his various re-election and retention campaigns, and it had published continuing news coverage that the mayor viewed as harassing.

In the context of this history, in August 2000, the newspaper obtained via fax from the Colorado State Patrol ("CSP") a copy of an official Traffic Accident Report recounting the details of an alcohol-related, single-car accident (with no injuries) in the mountains outside Central City, where the mayor had been arrested on charges of DUI and careless driving. Rather than publishing a news story on the accident, the newspaper published an exact duplicate of both pages of the CSP's official traffic report, including the home address, telephone number and driver's license number of the mayor. Those details – "personal information" under the DPPA – had not been redacted by the CSP. The newspaper's editor later testified at her deposition that she decided to print a copy of the official

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Bloomberg Files Suit For Access to SEC Chair's Calendar

Bloomberg News filed an action on August 9, 2002 in the Federal District Court of the District of Columbia, seeking judicial review of a series of FOIA requests made by Bloomberg and denied by the Securities Exchange Commission.

The FOIA requests, filed by Bloomberg reporter Robert Schmidt, asked the SEC to provide to the press and public copies of SEC Chairman Harvey Pitt's appointment calendar and telephone message slips which relate to meetings and conferences Pitt may have attended with Wall Street executives and accounting firms. The agency denied Bloomberg's requests, claiming only that they have no responsive documents.

The request followed reporting in May by Bloomberg that Pitt, a former securities lawyer who has represented The New York Stock Exchange and convicted fraudster Ivan Boesky, met with KMPG Chairman Eugene O'Kelly after Pitt became Chairman of the

SEC. The SEC at first denied that the two discussed KPMG's client Xerox Corp., then under investigation. Bloomberg then published an internal KPMG memo where O'Kelly admitted that he and Pitt discussed Xerox.

In the wake of the market's meltdown as a result of continuing corporate scandals, Pitt and President Bush have made repeated statements that the principles of disclosure and transparency must be enforced. Bloomberg's Complaint argues that the same principles of transparency and disclosure must apply to federal agencies: "the public must be able to watch the watchdog," the suit argues.

Media entities interested in intervening to join the action may contact Jay Ward Brown of Levine, Sullivan and Koch in Washington D.C., local counsel for Bloomberg L.P. (jbrown@lsklaw.com), or Charles Glasser, Media Counsel for Bloomberg News at cglasser@bloomberg.net

Newspaper Found Not Liable For Printing Accident Report

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accident report, rather than a news story, because she believed that the facsimile copy would be indisputable and not leave open the possibility for the mayor to accuse newspaper of having made up the facts.

Seven months after the newspaper's publication of the accident report, and in the midst of a campaign to remove the mayor from office, Mattivi filed suit seeking statutory liquidated damages, punitive damages and attorney's fees under the DPPA. Mattivi alleged that the newspaper's publication of the facsimile copy of the CSP's official report was a violation of the DPPA, which prohibits the use or disclosure of "personal information" from a "motor vehicle record."

The newspaper initially filed a motion to dismiss, and later filed its motion for summary judgment, relying principally on the holdings in *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989) and *Bartnicki v. Vopper*, 532 U.S. 514 (2001). The newspaper argued that the First Amendment generally prohibits civil liability for publishing truthful information that has been lawfully obtained from, or provided by, the government. The newspaper also argued that Mattivi's suit should be dismissed on the basis that Congress did not intend for the DPPA's civil liability provisions to apply to traffic accident reports obtained from law enforcement agencies and that the plain language of the definition of "personal information" excluded information pertaining to traffic accidents.

Choosing to avoid the constitutional issues, the District Court granted summary judgment to the defendants on the basis of their statutory construction arguments. The court concluded that a traffic accident report is not a "motor vehicle record" under the statutory definition in the DPPA, because such a report is not one of the DPPA's listed records, nor does it pertain to such records. The list of DPPA "motor vehicle records" itemizes only motor vehicle licenses, registrations, titles, or identification cards. The court also concluded that the internal structure of the DPPA indicates that a "motor vehicle record" cannot be a

record that has been created and maintained by a law enforcement agency independently of a state's motor vehicles department. The court noted that its interpretation of the scope of the DPPA was supported by the sparse legislative history, which referred solely to records maintained by motor vehicle departments. The court finally held that any potentially contrary interpretation arising from how the State of Colorado might treat such records as a matter of Colorado state law was immaterial under the federal DPPA.

The court's holding on this point is in accord with the few other decisions that have addressed this aspect of the DPPA. *See, e.g., Atlas Transit, Inc. v. Korte*, 638 N.W.2d 625, 632-33 (Wis. Ct. App. 2001); *Davis v. Freedom of*

The court held that as a matter of the plain text of the statute, Congress clearly did not intend to allow the DPPA's civil liability provisions to apply to the publication of a traffic accident report.

Info. Comm'n, 790 A.2d 1188, 1191-92 (Conn. Super. Ct. 2001), *aff'd*, 787 A.2d 430 (Conn. 2002). Those cases have agreed that when motor vehicle information is obtained from some source other than a state motor vehicles department, then the DPPA's provi-

sions do not apply.

In addition to its construction of the term "motor vehicle records," the court also adopted an additional statutory construction offered by the defendants concerning the DPPA's definition of the "personal information." The court held that as a matter of the plain text of the statute, which excludes "information on vehicular accidents" from the DPPA's definition of "personal information," Congress clearly did not intend to allow the DPPA's civil liability provisions to apply to the publication of a traffic accident report. This alternative holding would appear to immunize the publication of such information even if the accident report has been obtained from a state Department of Motor Vehicles.

Christopher Beall, Steven Zansberg and Thomas Kelley, of Faegre & Benson LLP in Denver, Colorado, represented the newspaper defendants.

Jerald Devitt and Michael Shea, of Bradley Devitt & Arp, P.C., in Golden, Colorado, represented the plaintiff.

Seventh Circuit Clamps Down on Unsupported Motions to Seal Record

In a strongly worded opinion by Judge Frank Easterbrook, the Seventh Circuit Court of Appeals reaffirmed its position that documents and information that form the basis of judicial decisions should not be placed under seal, regardless of the parties' agreement to do so. *Baxter International, Inc. v. Abbott Laboratories*, 2002 WL 1543385 (7th Cir. July 16, 2002).

Generic Motion Rejected

The *Baxter* opinion arose from a judge's denial of the parties "joint motion to maintain documents under seal." The "generic" motion reflected "that the parties had agreed on secrecy, that the documents contained commercially sensitive information, and so on, but omitted details. What is more, the motion did not attempt to separate genuinely secret documents from others in the same box or folder that could be released without risk. The motion was patterned on the sort of broad secrecy agreement that often accompanies discovery in order to expedite that process by avoiding document-by-document analysis." The Seventh Circuit found this motion was "[s]o perfunctory . . . that it could have been summarily rejected."

"Agreements that were appropriate at the discovery stage are no longer appropriate for the few documents that determine the resolution of an appeal"

Discovery Agreements Different

Citing the court's previous holdings in cases such as *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir. 1994) and *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984), the Seventh Circuit drew a sharp distinction between confidentiality agreements with respect to the initial stages of discovery, and agreements attempting to place the key documents in the case under seal.

"Secrecy is fine at the discovery stage, before the material enters the judicial record. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). But those documents, usually a small subset of all discovery, that influence or underpin the judicial

decision are open to public inspection unless they meet the definition of trade secrets or other categories of bona fide long-term confidentiality."

"Agreements that were appropriate at the discovery stage are no longer appropriate for the few documents that determine the resolution of an appeal"; indeed, "[a]llowing such an agreement to hold sway would be like saying that any document deemed provisionally confidential to simplify discovery is confidential forever. That would contradict *Grove Fresh* and its predecessors, which hold that the *dispositive* documents in any litigation enter the public record notwithstanding any earlier agreement.

"[V]ery few categories of documents are kept confidential once their bearing on the merits of a suit has been revealed. In civil litigation only trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence (such as the name of a minor victim of a sexual assault), is entitled to be kept secret on appeal."

Judge Easterbrook refers to a prior opinion he authored denying the sealing of the appellate record, which emphasized that "[e]ven disputes about claims of national security are litigated in the open."¹

Many a litigant would prefer that the subject of the case . . . be kept from the curious (including its business rivals and customers), but the tradition that litigation is open to the public is of very long standing.²

Arbitrate if Secrecy Required

The *Baxter* court also noted that "businesses that fear harm from disclosure required by the rules for

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Seventh Circuit Clamps Down on Unsupported Motions to Seal Record

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the conduct of litigation often agree to arbitrate,” and that here,

Baxter and Abbott had such an agreement, and their dispute was arbitrated under terms that require secrecy. Baxter then moved the dispute to court, asking the judge to set aside the arbitrator's decision.

Whether or not Baxter's "failure to keep its promise to resolve this fight in private" exposed it to liability for breach of contract; Baxter clearly "does not have any right to keep third parties from learning what this litigation is about." And having "refus[ed] to accept the result of the arbitration [that] is the cause of the current problem," Baxter "has no claim to keep a lid on its own documents."³

No Justification for Secrecy

Judge Easterbrook criticized the parties and their counsel for making "no effort to justify the claim of secrecy," but simply relying on the parties' confidentiality agreement.

The motion did not analyze the applicable legal criteria or contend that any document contains a protectable trade secret or otherwise legitimately may be kept from public inspection despite its importance to the resolution of the litigation.

The court referred to its *Practitioner's Handbook for Appeals*, which "advises counsel to be specific in motions of this kind." The Practitioner's Handbook provides that

Any party that wants a document which was sealed by the district court to remain under seal in the court of appeals must immediately make an appropriate motion in the court of appeals. Such sealing is no longer automatic so counsel must demonstrate sufficient cause, with specificity, in their motion for sealing items.⁴

Thus, the *Baxter* opinion imposes a heavy burden on one who would propose sealing the litigation records in a

case "once their bearing on the merits of a suit has been revealed." It should prove to be a useful precedent for media intervenors seeking access to court records that have been sealed pursuant to litigants' perfunctory and overbroad requests.⁵

Circuit Judges Michael Kanne and Ann Williams were also on the Seventh Circuit panel. There was no dissent.

Constantine L. Trela, of Sidley Austin Brown & Wood in Chicago, represented the plaintiff/appellant.

R. Mark McCareins, of Winston & Strawn in Chicago, represented the defendant/appellee.

NOTES

¹ *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000), citing *New York Times Co. v. United States*, 403 U.S. 713 (1971), *United States v. Progressive, Inc.*, 467 F.Supp. 990, *reh'g denied*, 486 F.Supp. 5 (W.D. Wis.), *app. dismissed*, 610 F.2d 819 (7th Cir. 1979); *In re United States*, 872 F.2d 472 (D.C.Cir. 1989).

² *Union Oil*, at 567.

³ See also *Union Oil*, at 567 ("People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. Judicial proceedings are public rather than private property").

⁴ Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit (2002 ed.) (available on-line at <http://www.ca7.uscourts.gov/Rules/handbook.htm>); see also Seventh Circuit Operating Procedure 10(a) ("[e]xcept to the extent portions of the record are required to be sealed by statute ... or a rule of procedure ... every document filed in or by this court (whether or not the document was sealed in the district court) is in the public record unless a judge of this court orders it to be sealed")

⁵ *In re Associated Press*, 162 F.3d 503 (7th Cir. 1998); *United States v. Ladd*, 218 F.3d 701 (7th Cir. 2000) (allowing press to intervene for purposes of raising access claims).

[T]he Baxter opinion imposes a heavy burden on one who would propose sealing the litigation records in a case "once their bearing on the merits of a suit has been revealed."

Eastern District Of Virginia To Require Ashcraft Hearings Before Sealing Records

By Hill Wellford

In statements during a hearing on a Motion to Seal Documents on Friday, July 19, 2002, Magistrate Judge Barry Poretz stated that the Eastern District of Virginia is changing its procedures and will no longer allow parties to seal documents or court hearings, even by consent of all parties to the case, unless the proponent strictly follows the requirements of *Ashcraft v. Conoco, Inc.*, 218 F.3d 288 (4th Cir. 2000).

Applied in Media's Gator Suit

Magistrate Judge Poretz made his statements in the context of a ruling on a Motion for Seal brought by the defendant in *Washingtonpost.Newsweek Interactive Co., LLC et al. v. The Gator Corporation*, an intellectual property infringement case brought by sixteen major media organizations against an Internet advertising company alleged to have placed unauthorized "pop-up" advertisements on the plaintiffs' websites. See LDRC *MediaLawLetter*, July 2002 at 51.

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SEPTEMBER 22-23, 2003, LONDON 2003 LDRC International Forum

The next edition of LDRC's acclaimed international media law conferences will be held September 22-23, 2003, in London. The London conferences held in 2000 and 1998 have fostered excellent contacts between American libel defense lawyers and their colleagues in England, as well as with the English judiciary. Next year, the conference will build upon these past successes and expand the concept to Europe more broadly.

The object of the 2003 conference is to foster a practical dialogue between American and European media lawyers and press experts on current issues and trends in English, French, German and other European laws. In the age of the Internet and ever-more-aggressive jurisdictional tendencies in Europe, this focus should permit practitioners and media company representatives to gain important insights into managing the risks of publishing in a new media environment.

The conference will explore the status of European libel, privacy, newsgathering and related laws in light of the European Convention on Human Rights, data protection legislation, European Union regulation, the expansion of international jurisdiction and other developments.

The format, as always, will be entirely interactive and will rely on moderated discussions in a roundtable setting that will permit attendees to participate fully in discussions. The conference organizers will be working over the next year to find the best European practitioners to invite to the conference so that LDRC attendees can return to the United States not only with new practical insights into European law but with concrete ideas about contacts that can help their clients and companies in this challenging new environment.

-- Kurt Wimmer and Jim Borelli;
Co-Chairs of LDRC's International Law Committee

Eastern District Of Virginia To Require Ashcraft Hearings Before Sealing Records

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In the *Ashcraft* decision, the Fourth Circuit Court of Appeals stated that a trial court cannot seal “judicial records or documents” unless that court first:

- (1) provides public notice of the request to seal, and provides interested parties and the public to object;
- (2) considers less drastic alternatives; and
- (3) provides specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives to sealing.

“Judicial records and documents” include any pleadings and documents filed in court, if meant to affect the outcome of the case. Almost all court pleadings would be judicial documents or records. Ordinary discovery would not be covered by the *Ashcraft* rule, however, if that discovery is never filed in court and is not used at trial.

After further briefing by the parties, the court, by its order dated July 25, 2002, unsealed all documents filed in the case.

This development is particularly noteworthy given the particular district court involved. The Eastern District of Virginia is the court in which the prosecution of accused hijacker Zacarias Moussaoui is currently pending. Accused “American Taliban” member John Walker Lindh pleaded guilty there in July and this court has been the site of many espionage cases including the prosecutions of Aldrich Ames and Robert Hanssen.

According to Magistrate Judge Poretz, the judges of the Eastern District of Virginia have examined *Ashcraft* and have decided — although recognizing that they are two years late in doing so — that the established practice of permitting joint, agreed-to protective orders and large-scale sealing of judicial documents conflicts with the *Ashcraft* decision and related Supreme Court decisions.

Magistrate Judge Poretz informed the parties the Eastern District of Virginia, apparently in consultation

with other trial districts within the federal Fourth Circuit Court of Appeals, has made the decision to issue a formal change in its approach to Motions to Seal and to protective orders.

Henceforth, all attempts to seal or to enter protective orders must strictly follow *Ashcraft*. The court will require testimony or affidavits regarding the trade secret nature of particular information or categories of information.

Argument and citation to traditional practice will not be sufficient to support sealing of records. The formal change will be reflected in pretrial orders under Federal

Rule of Civil Procedure 16(b), as such orders are issued by the court beginning late July or August 2002.

The Gator Corporation has been the target of several lawsuits nationally, such as the one here, and has succeeded previously in keeping almost

all pleadings and documents under seal. The current litigation has received widespread media attention, due in part to the fact that the plaintiffs have secured a preliminary injunction against The Gator Corporation.

The *Washingtonpost.Newsweek Interactive Co., LLC et al. v. The Gator Corporation* case was not the original impetus for the change by the Eastern District of Virginia; however, this case will likely serve as the test case for the new process.

Hill Wellford is with Gibson, Dunn & Crutcher LLP and with Terence Ross, Claudia Osorio, and Erin Schneider represent the plaintiffs in the Washingtonpost.Newsweek Interactive Co., LLC et al. v. The Gator Corporation case that led to Magistrate Judge Poretz’s decision.

Michael Joseph Barta, of Baker & Botts in Washington, D.C., and Michael Joseph Klisch, of Cooley Godward in Reston, Virginia, represent the Gator Corp.

[T]he established practice of permitting joint, agreed-to protective orders and large-scale sealing of judicial documents conflicts with the Ashcraft decision and related Supreme Court decisions.

New Jersey High Court Finds New Sixth Amendment Basis For Blocking Juror Interviews Prior to Retrial

By Bruce S. Rosen

Amplifying its decision in a case challenging an unusual prior restraint on the news media, the New Jersey Supreme Court has ruled that a contact by reporters with members of hung juries in death penalty trials may be prohibited until the retrial is complete. The court, however, did reverse the part of the trial court's order that prohibited the media from naming the jurors.

In a separate proceeding, four *Philadelphia Inquirer* reporters have been found in contempt for violating the trial court's order, including the part of the order ruled unconstitutional by the New Jersey Supreme Court. Their convictions are on appeal to the New Jersey Appellate Division.

Strategic Advantage To DA

Explaining the order it had entered in April, the Supreme Court's 5-2 opinion in *State of New Jersey v. Fred Neulander* (A-67-01, July 18, 2002), takes an unusual tack, declaring that juror interviews of the first panel would allow prosecution a strategic advantage for the retrial, thus undermining defendants' Sixth Amendment rights. In coming to that conclusion, the court expressly rejected the usual rationales for prohibiting media contacts with jurors, such as the potential for prejudicing the new jury

panel, creating publicity that may make it difficult to find an unbiased panel, or potential harassment of jurors.

Citing a 1997 *Iowa Law Review* (82 *Iowa L. Rev.* 465) study that revealed the most frequently expressed comments by jurors that participated in post-verdict interviews focused on the evidence that influenced the jury's verdict, the court made it clear that it did not want to create new appeal issues for death penalty defendants.

Our most specific concern is that jurors submitting to media interviews might reveal some insight into the jury's deliberative process that would afford the prosecution a significant advantage at the retrial and thereby provide defendant with a colorable Sixth Amendment issue for appeal in the event of a conviction...

wrote outgoing Justice Gary Stein for the majority.

The defendant in the case, accused of arranging the murder of his wife while he was having an affair with a local radio personality, was the rabbi of one of the largest congregations in Southern New Jersey. The case and the retrial continue to receive extensive news coverage. The first trial ended in a hung jury in November 2001 before Superior Court Judge Linda G. Baxter.

[T]he court made it clear that it did not want to create new appeal issues for death penalty defendants.

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The LDRC Pre-Publication/Pre-Broadcast Review Committee is planning to survey media lawyers (inhouse and outside counsel) regarding their advice concerning document retention policies governing reporter's notes, e-mail, raw videotape and the like. If you would like to participate in this survey, please contact Mary Ellen Roy, Phelps Dunbar LLP, 504-584-9254, roym@phelps.com or Katherine Hatton, Philadelphia Newspapers, khatton@phillynews.com.

N.J. High Court Finds New Sixth Amendment Cause in Blocking Juror Interviews Prior to Retrial

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Strong Dissent

Supreme Court Justice Virginia Long, joined by Chief Justice Deborah Poritz, issued a strongly worded dissent on the juror contact issue, writing:

“The outright ban on contact with jurors is an unconstitutional prior restraint entered without regard to procedural due process of law. The minimal incremental potential impact of a former juror’s statements on the State’s retrial case, if any, is trivial in light of the extensive publicity about every other aspect of the case, from the killing of Carol Neulander and her husband’s arrest and indictment through the gavel-to-gavel coverage of the first trial and beyond. Interviews with discharged jurors do not present “the kind of threat to fair trial rights that . . . possess the requisite degree of certainty to justify restraint (*citing Nebraska Press Association v. Stuart*).”

Order on Juror Contact Expanded

The court majority went so far as to amend, *sua sponte*, the lower court’s order prohibiting media contact with jurors, adding a prohibition against jurors contacting the media. Justice Long also took issue with the new order as unnecessary and even if it were, underinclusive. She noted that the reworked order still allowed jurors to discuss their deliberations through third parties or even in chat rooms on the Internet.

Ironically, *The Inquirer’s* post-verdict news story was less about the jurors’ deliberative process than a story about the residency of the jury forewoman, who appeared to be living in Philadelphia, rather than Camden County. In writing the story, the team of reporters identified the forewoman by name in violation of the order, which had not yet been overturned.

Jurors Can Be Identified

In its April order and July opinion, the Supreme Court overturned Judge Baxter’s order prohibiting the dissemination of juror names, reasoning that the names were already publicly available in the courtroom. On this point the court unanimously ruled.

“We are reluctant to embark on course that would make public records available to the media but forbid their publication if offensive to the sensibilities of the supposedly reasonable man...

At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official court records.”

Reporters Still Penalized

On June 20, 2002, Superior Court Judge Theodore Z. Davis, who presided at the contempt hearing of the *Inquirer* reporters, accused them of “arrogance” and ordered three of them to perform five to 10 days of community service for violating Judge Baxter’s order prohibiting naming or contacting the discharged jurors. Judge Davis suspended the 180-day jail terms he imposed on George Anastasia, Emilie Lounsberry and Dwight Ott provided they perform the work, and fined them \$1,000 each. He also fined a fourth reporter, Joseph A. Gambardello, \$1,000 for naming the juror in violation of Judge Baxter’s order. An appeal of the convictions is pending.

These contempt charges were not the first brought in the Neulander matter under Judge Baxter’s order. During the trial, *Philadelphia Magazine* writer Carol Saline was found guilty of contempt by Judge Davis and fined for asking a juror whether he would agree to be interviewed after the trial.

Warren W. Faulk of Brown and Connery argued for Philadelphia Newspapers, Inc.; Thomas J. Cafferty of McGimpsey & Cafferty argued for amici curiae N.J. Press Association, the NAA, Advance Publications, The New York Times Company and the Reporter’s Committee for Freedom of the Press; and Dennis Wixted of Sufirin Zucker Steinberg Waller & Wixted, argued for respondent Neulander.

Bruce S. Rosen is a DCS member with McCusker, Anselmi, Rosen, Carvelli & Walsh in Chatham, N.J.

Ninth Circuit Becomes First Appellate Court to Find a First Amendment Right of Access to Executions

By Roger Myers and Lisa Sitkin

In the first federal appellate decision to recognize a First Amendment right of access to witness executions, the Ninth Circuit Court of Appeals this month affirmed a permanent injunction against a procedure adopted by California prison officials to dramatically limit how much of the execution the press and public witnesses could see.

In a significant victory for the media – not least because a prior Ninth Circuit panel had at one point ordered judgment entered for the state defendants in this case – the decision in *California First Amendment Coalition v. Woodford*, - F.3d --, 2002 WL 1772658 (Aug. 2, 2002) (“*CFAC IIP*”), undid much, but not all, of the damage previously inflicted by that prior ruling.

Unfortunately constrained by that prior decision, the panel was unable to apply the compelling interest test to determine if the constitutional right of access it had just recognized had been overcome, but instead found the limitation on access did not meet a somewhat heightened version of the typically deferential test that the Supreme Court has established for review of prison regulations of inmates.

New Rules, Limited Access

The case began in 1996, when California conducted its first execution by lethal injection and implemented Procedure 770, which prohibits the witnesses to an execution from observing any part of the execution until after the “execution team” exits the execution chamber, at which point a curtain is pulled back to show the condemned inmate alone, strapped to a gurney with intravenous lines inserted.

In prior executions in San Quentin, those press and public representatives allowed to witness the execution had seen the entire event – from the time prison staff escorted the prisoner into the execution chamber and strapped him into the chair until the time he was declared dead.

The new procedures were implemented with the first lethal injection execution, that of William Bonin. Later,

prison officials admitted the execution team had difficulty inserting the IV needle, causing bleeding, delay and, probably, pain, but the media and press witnesses were unable to see any of that or evaluate the extent of suffering it may have caused.

Multiple Decisions Lead To Hybrid Standard

Following Bonin’s execution, the California First Amendment Coalition and the Society of Professional Journalists, Northern California Chapter, filed suit and obtained a preliminary injunction from the federal district court in San Francisco prohibiting prison officials from preventing the witnesses from viewing the execution at least from the time the intravenous tubes are inserted.

The Ninth Circuit affirmed the preliminary injunction in an unpublished decision, *California First Amendment Coalition v. Calderon*, 1996 WL 442471 (9th Cir. 1996) (“*CFAC P*”), but a different panel later reversed the district court’s grant of

summary judgment for plaintiffs and its entry of a permanent injunction.

In that second decision, the Ninth Circuit ordered the district court to enter judgment for the state on the ground that, under the Supreme Court’s prison access analysis in *Pell v. Procunier*, 417 U.S. 817 (1974), whatever right of access the press and public might have to witness executions was trumped by prison officials’ determination that the safety of prison staff warranted implementation of Procedure 770. *California First Amendment Coalition v. Calderon*, 138 F.3d 1298 (9th Cir. 1998). Given the long odds against the panel reconsidering its unanimous decision, or against the Ninth Circuit voting to take the case en banc, it appeared that Procedure 770 would remain in place.

But in an unusual turn, the Ninth Circuit panel withdrew its opinion after plaintiffs, now supported by eight media amici whose reporters generally witness and report on executions in California, filed a petition for rehearing. In its

The Ninth Circuit began its analysis by tackling the threshold issue that the prior panel had avoided – whether the public and press had a constitutional right of access to witness executions.

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Ninth Circuit Finds Right of Access to Executions

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place, the panel issued a new opinion that retained all the prior troublesome analysis but slightly modified the result. The case was remanded to the district court to apply the deferential standard for reviewing prison regulations of inmates and to determine whether plaintiffs had “presented ‘substantial evidence’ that Procedure 770 represents an exaggerated response to [defendants’] security and safety concerns.” *California First Amendment Coalition v. Calderon*, 150 F.3d 976, 983 (9th Cir. 1998) (“*CFAC II*”).

On remand, the district court found after a bench trial that plaintiffs had carried their burden. Among other things, the district court cited a memo written in 1996 by Warden Calderon that suggests Procedure 770 was implemented to prevent the press from informing the public about the “reality” of lethal injection executions, which is that extensive force may be necessary to carry out some executions:

In the event of a hostile and combative inmate, it will be necessary to use

additional force and staff to subdue, escort and secure the inmate to the gurney. It is important that we are perceived as using only the minimal amount of force necessary to accomplish the task. In reality, it may take a great deal of force. This would most certainly be misinterpreted by the media and inmate invited witnesses who don’t appreciate the situation we are faced with.

After concluding that Procedure 770 was not necessary to address threat to prison staff safety, the district court entered a permanent injunction prohibiting the state from preventing “uninterrupted viewing of executions from the moment the condemned enters the execution chamber through to, and including, the time the condemned is declared dead.” *California First Amendment Coalition v. Woodford*, 2000 WL 33173913 at *11 (N.D. Cal. 2000).

Both the district court and Ninth Circuit denied the state’s requests for a stay pending appeal, and two more executions were carried out without incident pursuant to the district court’s permanent injunction while a different panel of the Ninth Circuit heard the appeal. Ultimately, the Ninth Circuit would affirm the permanent injunction under a hybrid, some-

what invigorated version of the “exaggerated response” test.

Constitutional Access Analysis

The Ninth Circuit began its analysis by tackling the threshold issue that the prior panel had avoided – whether the public and press had a constitutional right of access to witness executions. In some ways, it was curious that the new panel addressed this issue since it was already compelled to apply the deferential prison regulation test imposed by the prior decision and the parties’ briefs on appeal had focused on that issue. But the appellate panel’s conclusion that a full First Amendment right was at stake appeared to influence the rest of its decision in *CFAC III* as much as the prior panel’s contrary assumption influenced its decision in *CFAC II*.

The *CFAC III* panel decided that the traditional two-part test for determining whether a right of access attaches to criminal court proceedings also applied to the culmination of those proceedings in capital cases –

the execution – even if it is carried out behind prison walls. That test looks at historical accessibility and the function played by access.

To reach this result, the panel noted that, in the prison access cases, the Supreme Court had found that the press had the same qualified First Amendment right of access to prisons as the public. *CFAC III*, 2002 WL 17726658, *3-4 & n.2 (discussing *Pell v. Procunio*, 417 U.S. 817 (1974), *Saxby v. Washington Post Co.*, 417 U.S. 843 (1974) and *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978)).

Because this same rule underlies the right of access to criminal court cases – where the right of the press and public also is co-extensive – it made sense to apply the test for access for trying, convicting and sentencing criminal defendants to the process for executing a condemned capital defendant.

Historical Access

On the first prong of the test, the panel had no difficulty finding a history of access to executions, dating

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back to executions in England at common law, in the United States through the early 20th Century, and in California through 1858. *Id.* at *5-6.

Even after executions were moved behind prison walls, some members of the public and the press were allowed to attend and watch the entire execution (from the condemned's ascent up the gallows or entry into the gas chamber); in California, 17 news media witnesses are allowed to view the execution along with 12 official witnesses selected by the state. The fact that the public relies on a limited number of press witnesses for reports of an execution did not undercut the history of access because, as the Supreme Court has noted in the court access context, most members of the public now rely on their surrogates in the media for information about trials. *Id.* at *5.

Function of Access

The more interesting part of the access analysis was the panel's application of the functional prong in light of the Supreme Court's Eighth Amendment jurisprudence — exemplified recently by *Atkins v. Virginia*, — U.S. —, 122 S. Ct. 2242 (2002) (Eighth Amendment prohibits executing the retarded because public attitudes has changed since the practice was upheld by the Court 13 years ago) — that a particular punishment may become “cruel and unusual” over time as society's standards of decency evolve.

An “informed public debate” is crucial to this Eighth Amendment process, the panel held, because “[t]o determine whether lethal injection executions are fairly and humanely administered, or whether they ever can be, citizens must have reliable information” about the entire procedure, including “the ‘initial procedures,’ which are invasive, possibly painful and may give rise to serious complications.” *CFAC III*, 2002 WL 1772658 at *6.

The panel also found that public and press observation of executions fosters the same sense of catharsis that is allowed by observation of criminal trials, and therefore found the same functional concerns supporting a right of access to the latter also compelled a right of access to the

former, including the initial procedures that “are inextricably intertwined with the process of putting the condemned inmate to death.” *Id.*

A “Closer Fit” Required For Restrictions on Press Than on Prisoners

Having found a First Amendment right of access, the *CFAC III* panel then faced a conflict between traditional access law, under which the right of access can be overcome only where essential to protect a compelling governmental interest, and *CFAC II*, which found that, under *Pell* and its progeny, any right of access to witness executions could be limited as long as it was not an “exaggerated response” to prison safety concerns.

Had it been writing on a blank slate, the panel made fairly clear it would not have applied the *Pell* standard. Picking up on an argument advanced by the media amici, the panel noted that the part of *Pell* establishing the “exaggerated response” test had addressed a challenge by *prisoners*, not the press, to prison regulations limiting the prisoners' rights. *Id.* at *7-8.

As amici argued, *Pell* had actually involved two separate challenges to a prison regulation restricting press interviews with prisoners — one by the press, to whom the Court applied the equal-but-effective access test (*i.e.*, the press is entitled to access equal to that of the public and that provides adequate opportunity to observe prison conditions), and one by the prisoners, to whom the Court applied the exaggerated response test.

The *CFAC III* panel agreed that the Supreme Court has never applied the “prisoners' rights” part of *Pell*, (as modified by *Turner v. Safley*, 482 U.S. 78 (1987)), “in a case such as this one, where the regulation promulgated by prison officials is centrally concerned with restricting the rights of outsiders rather than prisoners.” *Id.* at *8.

Based on this conclusion, the panel appeared to agree that, to the extent the prison setting might alter the standard of review, the effect here should be to require application of the intermediate scrutiny test established by the Supreme Court to review regulations censoring outgoing prisoner mail. Under that standard, the regulation must be shown to

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The more interesting part of the access analysis was the panel's application of the functional prong in light of the Supreme Court's Eighth Amendment jurisprudence.

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further an important or substantial governmental interest unrelated to the suppression of expression and must be no greater than necessary or essential to protect that interest. *Id.* at *8 (citing *Procunier v. Martinez*, 416 U.S. 396 (1974), as modified by *Thornburgh v. Abbot*, 490 U.S. 401 (1989)).

Bound by the prior panel's decision, however, the *CFAC III* panel determined it had to apply the "exaggerated response" test – but it did so with a kicker. *Id.* Observing that *Thornburgh v. Abbott* had said that *Martinez*-type cases – *i.e.*, cases involving prison regulations that are "broad in nature and do not require substantial case-by-case discretion" by prison officials – would require "a closer fit" between the regulations and the purported purpose underlying them, the *CFAC III* court determined that, in applying the exaggerated response test, the state defendants had to show a closer fit between Procedure 770 and their security interest than would be required in a case involving a regulation restricting prisoners' rights. *Id.*

Evidence Showed Intent To Censor Coverage

Applying this hybrid test, the Ninth Circuit affirmed the district court's findings that the state had presented no evidence supporting its asserted concern that, because lethal injection executions take longer, they are more likely to result in identification of, and thus attacks on, execution team members.

There was no evidence that such identification and attacks had or would occur, nor evidence that the execution team actually harbored this fear. Indeed, during executions carried out while Procedure 770 was enjoined, team members took no steps to hide their identities except to remove their name tags.

Nor was there evidence that Procedure 770 would even rationally advance the state's purported security concerns. Witnesses were as likely to identify the execution team members during lethal gas executions, which were conducted from 1937 to 1995 without incident. And the condemned inmate himself had ample opportunities during his final day to call family and friends and relay the names of the execution team members, who are with the condemned

prisoner continuously for the last 30 hours of his life.

The Ninth Circuit also found that the evidence in the record supported the district court's conclusion that there were alternatives to Procedure 770 — such as execution team members wearing surgical garb to conceal their identities — that would accommodate both the state's concerns and the First Amendment right of access.

Finally, the Ninth Circuit found no clear error in the district court's factual finding, based on Warden Calderon's memo, that Procedure 770 "was motivated at least in part by a desire to conceal the harsh reality of executions from the public." *Id.* at *9-10.

This was significant, the panel found, because Procedure 770 would require the public and the press to rely entirely on prison staff to describe any problems in inserting the IV lines or otherwise carrying out the execution prior to when Procedure 770 allowed the curtain to be drawn back.

As the Warden's memo indicated, the prison staff's perceptions about this process would likely be vastly different from that of the press and public witnesses, and the prison staff simply

did not have the same incentives to describe fully any problems that arose during an execution.

Consequently, unless Procedure 770 was enjoined it would prevent "informed public debate" about how lethal injections are carried out, thus undermining "the main purpose for granting a right of access." *Id.* at *12-13.

State Seeking Rehearing

Given the history of this case, it is too early to say that this latest chapter was the last chapter. The state has already filed a petition for rehearing or rehearing en banc and, if that fails, may petition for certiorari to the Supreme Court, which is often unkind to Ninth Circuit decisions. For now, however, there is a clear federal appellate precedent establishing that the public, and its representatives in the press, cannot be compelled to rely exclusively on the officially sanctioned government version of an execution, including that part of the execution that the state wants to conduct in private behind closed doors – or curtains – but in the public's name.

Roger Myers and Lisa Sitkin of Steinhart & Falconer LLP in San Francisco represented the media amici in this

Unless Procedure 770 was enjoined it would prevent "informed public debate" about how lethal injections are carried out, thus undermining "the main purpose for granting a right of access."

Miami Federal Judge Prohibits Content-Based Discrimination Against Reporter's Use of Press Room

By Robert Rivas

A federal judge enjoined the Miami-Dade County School Board from banishing a newspaper reporter employed by a teachers union publication from its press room. 15 Fla. Law Weekly Federal D435, 2002 WL 1791467 (S.D. Fla. July 10, 2002)

U.S. District Judge Ursula Ungaro-Benages entered the preliminary injunction on July 10, holding that the School Board violated the First Amendment in discriminating against *UTD Today*, a 19,000-circulation monthly tabloid newspaper published by the United Teachers of Dade.

Miami-Dade County Schools Superintendent Merrett R. Stierheim enacted a rule on May 14, 2002 in which he authorized use of the press room by those defined by the Office of Public Relations "as individuals employed by a newspaper or broadcast organization intended for general circulation," and prohibited from the School Board press room reporters for newspapers "intended primarily for members of a particular profession or occupation" and those "who work for union publications". Until this policy was enacted, *UTD Today's* editor-reporter Annette Katz had used the School Board press room to cover School Board meetings for two decades.

The regulations were adopted, according to defendants, because of complaints by members of the general

press that UTD officials, including Katz, had caused disruptions and overcrowding in the press room, and were using their access to the press room to lobby their viewpoint with other reporters.

Reporter Was Arrested

School Board security officers arrested Katz and charged her with trespassing for refusing to leave the press room on May 15. Through the end of June she and the UTD tried to persuade the School Board that its policy was impermissible, but to no avail. The State Attorney declined to prosecute the trespassing charge.

Katz and UTD finally brought suit in federal court on July 1, alleging that the School Board's policy of banning "union publications" from using the press room was a facially unconstitutional form of content based discrimination. They also alleged that the policy was enacted to retaliate against *UTD Today's* critical coverage of the School Board. The policy did not affect any reporter but Katz.

The plaintiffs sought expedited consideration of their motion for a temporary injunction in time to repatriate Katz to the press room for a scheduled July 10 School Board meeting. Judge Ungaro-Benages required the School Board to submit a brief by July 8 and scheduled a hearing on July 9. She announced her decision at the end of the hearing and signed an 11-page preliminary injunction order the next day.

[Plaintiffs] alleged that the policy was enacted to retaliate against UTD Today's critical coverage of the School Board.

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LDRC ANNUAL DINNER

November 13, 2002

In the Trenches: War Reporting & the First Amendment

Ted Koppel Moderating

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Miami Federal Judge Prohibits Content-Based Discrimination Against Reporter's Use of Press Room

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Judge Followed Consumers Union Case

Judge Ungaro-Benages's analysis followed *Consumers Union of United States, Inc. v. Periodical Correspondents' Assoc.*, 365 F. Supp. 18, 22-23 (D.D.C. 1973), *rev'd on other grounds*, 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976). There, Judge Gerhart Gesell held it was unconstitutional for Congress, after electing to provide press room facilities to magazines, to discriminate against *Consumer Reports* on grounds that it was "owned and operated" by a "self-proclaimed advocate of consumer interests."

Judge Gesell's decision in *Consumers Union* was vacated based on the political question doctrine. However, as Judge Ungaro-Benages' injunction noted, his holding on the merits in *Consumers Union* has been uniformly approved in cases where the political question doctrine was not a bar. See *Borreca v. Fasi*, 369 F. Supp. 906, 909 (D. Haw. 1974); *Lewis v. Baxley*, 368 F. Supp. 768, 776-777 (M.D. Ala. 1973). Even the U.S. Circuit Court for the District of Columbia, the court that vacated Judge Gesell's decision as a non-justiciable political question, subsequently endorsed and applied its holding on the merits. *Sherrill v. Knight*, 569 F.2d 124, 129 n.17 (D.C. Cir. 1977).

Generally, these cases hold that a government agency need not provide the press with any special facilities or access not granted to the rest of the public, but that, if an agency does provide a press room, access to press conferences, or other assistance in covering the agency, the agency may not discriminate against any news medium based on its content unless the discrimination is in furtherance of a compelling governmental interest, and the rule is narrowly tailored to meet the goal. In addition, they hold that if a particular reporter or publication is being prohibited from press facilities as a sanction based on past conduct that is incompatible with the use of the facility, the reporter must be given notice and an opportunity to be heard on the exclusion.

There are only eight or ten reported cases addressing these issues. Curiously, they are all from the '70s.

School Board's arguments rejected

The School Board of Miami-Dade County argued that its policy was permissible under a rational basis test because it did not inhibit the *UTD Today* reporter from attending the School Board's meetings as a member of the general public, and because the policy did not otherwise restrict the *UTD Today's* access to public records.

Judge Ungaro-Benages's order rejected the School Board's argument, applying strict scrutiny because the School Board's prohibition of *UTD Today* was content-based and restricted *UTD Today* from gathering news along with other media. Her preliminary injunction stated that

Judge Ungaro-Benages found that the School Board's explicit policy of prohibiting reporters "who work for union publications" from using the press room was facially unconstitutional

under the School Board's new policy, the *UTD Today* was "deprived of the same news gathering environment and opportunities afforded to the 'general-circulation media'." In addition, at the hearing, she said she felt the School Board's argument was based on isolated facts

from the *Consumers Union* line of cases in an attempt to interpret them more narrowly than they were intended.

Judge Ungaro-Benages did not reach the issue of whether the School Board's policy was retaliatory. Instead, she found that the School Board's explicit policy of prohibiting reporters "who work for union publications" from using the press room was facially unconstitutional, holding that the School Board could not discriminate against *UTD* or *Katz* "because of *UTD Today's* viewpoint or because the publication's primary constituency consists of members of a teacher's union."

On August 9, the Stierheim and the School Board filed a notice of appeal to the Eleventh U.S. Circuit Court of Appeals.

Robert Rivas, who represented the plaintiffs United Teachers of Dade and Annette Katz, is a partner in The Rivas Law Firm, based in Tallahassee, Florida. The defendants, the School Board of Miami-Dade County and Superintendent Merrett R. Stierheim, were represented by H. James Montalvo of the School Board Attorney's Office.

More Skirmishes in the Information War

As we approach the first anniversary of the terrorist attacks, the courts continue to deal with the aftermath and its effects on freedom of speech, freedom of information, and other First Amendment issues. The latest developments in these battles:

Court Stays Order Requiring INS Disclosure

On Aug. 15, District Court Judge Gladys Kessler of the District of Columbia District Court stayed an order that she had issued two weeks previously, ordering the government to reveal the names of immigrants that it detained after the Sept. 11 attacks and the identity of their attorneys. *See Center for Nat'l Security Studies v. Department of Justice*, Civil No. 01-2500 (D.D.C. order Aug. 15, 2002) (staying 2002 WL 1773067 (D.D.C. order Aug. 2, 2002)).

The stay was issued in a lawsuit brought under the federal Freedom of Information Act by a number of civil rights and civil liberties groups. *See LDRC MediaLawLetter*, Dec. 2001, at 51.

Kessler issued the stay two days before the deadline she had imposed in her earlier order, after the Justice Department asked the D.C. Circuit for an expedited appeal of her Aug. 2 ruling requiring disclosure. The stay remains in effect until the appeal is completed.

In the original ruling, Kessler ordered the release of the identity information, but refused to order the release of details regarding their arrests and detainments. She also allowed for some names to be withheld: those being held as material witnesses and those who did not want their names disclosed.

Kessler's ruling came a month after the New Jersey Supreme Court refused to hear an appeal of a decision by an appellate court holding that that state's freedom of information did not require local jails holding detainees for the federal government to reveal their identities. *See ACLU v. County of Hudson*, No. _____ (N.J. July 9, 2002) (denying appeal of 352 N.J. Super. 44, 799 A.2d

629 (N.J. Super. Ct., App. Div. 2002), available at www.judiciary.state.nj.us/opinions/a4100-01.pdf); *see also LDRC MediaLawLetter*, July 2002, at 37.

In the D.C. district court, both the plaintiffs and the government moved for summary judgment, which Kessler granted in part and denied in part for both parties. She granted partial summary judgment to the plaintiffs based on their argument that the Freedom of Information Act required disclosure of the detainee's names and the identities of their attorneys, which she ordered released within 15 days. She also granted partial summary judgment for the government, agreeing that the Act did not require the government to disclose details about the when and where the detainees were arrested, held and, in many cases, released.

Finally, Kessler held that the government's efforts to find information in response to the plaintiff's request for information on policy directives regarding public statements and disclo-

tures were inadequate, and ordered a new search within 30 days.

In making her rulings, Kessler rejected the government's arguments that the identities of the detainees and their attorneys were exempt from disclosure under FOIA exemptions 3 (information protected by federal statute, which the government cited federal grand jury secrecy laws to argue against disclosing information regarding "material witnesses"), 7A (information "compiled for law enforcement purposes"), 7C (protecting the privacy of detainees and their lawyers), and 7F (protecting detainees' and lawyers' physical safety).

Kessler wrote that she sympathized with the government's goals in the face of terrorism, but that the government must respect the rights and freedoms that it is protecting.

"Difficult times such as these have always tested our fidelity to the core democratic values of openness, government accountability, and the rule of law. The Court fully understands and

In making her rulings, Kessler rejected the government's arguments that the identities of the detainees and their attorneys were exempt from disclosure under FOIA.

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appreciates that the first priority of the executive branch in a time of crisis is to ensure the physical security of its citizens. By the same token, the first priority of the judicial branch must be to ensure that our Government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship.”

Slip op., at 3-4.

The government has stated that up to 1,200 people have been or are being detained by federal, state and local authorities after Sept. 11. This includes 751 detained for immigration violations, 129 detained on federal criminal charges, and an unknown number of people detained as “material witnesses” to terrorism investigations. (For a discussion of the statutes allowing for detaining of material witnesses, see *LDRC LibelLetter*, Oct. 2001, at 56.) In a July letter to Sen. Carl Levin (D-Mich.), the Justice Department reported that 611 of those held have been subject to closed hearings.

The plaintiffs were represented by Arthur Barry Spitzer, Steven R. Shapiro and Lucas Guttentag of the American Civil Liberties Union Foundation in New York and David Lane Sobel and Kate Abbott Martin of the Center for National Security Studies. Lisa Ann Olson represented the government.

Judge Kessler’s original decision appeared to be in conflict with a March decision by a federal judge in Texas, who held that FOIA did not require the INS to disclose the identities and birth dates of immigrants detained as part of a program to deport aliens with criminal records. The records were sought by the *San Antonio Express-News*. See *Schiller v. INS*, 205 F. Supp. 2d 648 (W.D. Tex. 2002).

Other Papers Fight Alone

While the civil rights groups fought for access to information in cases nationwide, other newspapers fought

their own battles over information on individual detainees.

Reporter Chris Dumond of the *Bristol (Virginia) Herald Courier* was held in contempt of court and was scheduled to be sentenced after he refused a federal magistrate’s order to reveal his source for a sealed warrant which served as the basis for the detention of Pakistani-born psychiatrist who was held for six days under the material witness provision.

On the day of the sentencing hearing, the source voluntarily identified herself to the magistrate, Pamela M. Sargent of the Western District of Virginia. Relieved of his confidentiality agreement, Dumond then confirmed that the woman was indeed the source.

Dumond was represented by Craig Merritt and David Harless of Christian & Barton LLP in Richmond, Va.

In New York, *The New York Times* successfully argued for the unsealing of

documents in two cases.

In the case of a man who has been detained for more than nine months as a “material witness,” the reporter covering the case submitted a letter to U.S. District Judge Michael B. Makasey asking for the information. In response, the newspaper obtained redacted versions of the briefs submitted to Makasey on this point from the attorney for the detainee — referred to only as “John Doe” in the documents — and the government. The briefs formed the basis of an article published on July 29.

The second case stemmed from the arrest and detaining of Abdallah Higazy. *In re Application of the United States for Material Witness Warrant, Pursuant to 18 U.S.C. § 3144, for Material Witness No. 38*, Misc. No. 01-1750 (S.D.N.Y. opinion and order Aug. 5, 2002).

Higazy, who was staying in a hotel adjacent to the World Trade Center on Sept. 11, was arrested and held after a hotel guard told government officials that a radio which could be used to communicate with a similar radio aboard an aircraft was found after the attacks in the safe

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More Skirmishes in the Information War

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of Higazy's room. Although Higazy at one point told investigators that the radio was his, the hotel guard was eventually found to have lied, and pled guilty to making false statements.

After Higazy was released once the truth was discovered, his lawyer moved that the court investigate the circumstances under which the "confession" was made. The court agreed to await the results of the government's own investigation into the matter.

The lawyer also asked that records in the case, and the report of the government investigation, be made available to the public. The *Times* joined in this request via a letter to the court on July 12.

In a Aug. 5 ruling, U.S. District Court Judge Jed S. Rakoff ruled that the government should make the papers from the case available, although he allowed four days for the government to submit proposed redactions of any particularly sensitive information. The papers were released on Aug. 15.

The court also ruled that it would allow the government until Oct. 31 to complete its investigation into the circumstances of Higazy's false confession, at which time the court will decide on whether the report should be released to the public.

In Denver, the *Rocky Mountain News* and *The Denver Post* first sought to cover a July 26 hearing in the case of anti-war activist James Ujaama, who is being held as a material witness because of his alleged association with a London man whose web site promotes security training courses. The man was arrested by British authorities, but later released.

Magistrate Craig B. Shaffer denied the newspapers access to the hearing. While held in Denver, Ujaama was the subject of a grand jury investigation in the Eastern District of Virginia and the hearing was closed under an order issued by that court. Shaffer added that the closure order itself was sealed.

The newspapers then asked for a redacted transcript of the hearing, with material related to grand jury proceedings deleted. Shaffer transferred this request to the Virginia federal court, where the documents and apparently Ujaama himself had by then been moved. At press time, the motions were due to be heard on Aug. 23.

In Denver, the *Post* was represented by Steven D. Zansberg of Faegre & Benson LLP. The *Rocky Mountain News* was represented by Marc Flink of Baker & Hostetler LLP.

Congress Bristles At Leak Investigation

In June, the chairs of the Congressional intelligence committees requested that the Justice Department investigate public disclosures of committee material. But they and members of the committees grew upset when the FBI asked several

members of Congress to submit to lie detector tests as part of the investigation.

A spokesman for Senate Majority Leader Tom Daschle (D-S.D.) told reporters that the requests to administer polygraph tests raised "grave concerns about the constitutional separation of power issues raised by having one branch of government asking to polygraph employees of another branch."

According to the *Washington Post*, which first reported on the dispute, besides the 37 members of the Congressional committees, the FBI has questioned about 60 employees of Congress, the Defense Department, and intelligence agencies.

The investigation was sparked by the disclosure of Arabic messages intercepted by the National Security Agency that, in retrospect, may have warned of the Sept. 11 attacks. Although the messages were intercepted before the attacks, they were not translated until the day afterwards. See *LDRC MediaLawLetter*, July 2002, at 38.

In another investigation of leaks, the Defense Department sought the source of military plans to attack Iraq, which were reported by the Los Angeles Times, The New York Times and the Washington Post.

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In another investigation of leaks, the Defense Department sought the source of military plans to attack Iraq, which were reported by the *Los Angeles Times*, *The New York Times* and the *Washington Post*. In a television interview, Defense Secretary Donald Rumsfeld later blamed a low-level Pentagon planner.

The *Los Angeles Times* also reported that a debate between the Justice Department and the CIA has delayed the release of a report commissioned by Congress on the issue of leaks of classified information. Congress requested that the Justice Department complete the report after a provision which would have made current and former federal employees who disclose or attempt to disclose "properly classified" information subject to a fine and/or imprisonment for up to three years. See *LDRC Libel-Letter*, Jan. 2002, at 35; see also *LDRC Libel-Letter*, Oct. 2001, at 57.

According to the newspaper, release of the report is being held up by CIA Director George Tenet, who objects that it does not call for stricter enforcement of existing anti-leak laws.

Accused Spy Seeks Reporter Testimony

Besides the leak investigation, the Iraq disclosures led a retired Air Force master sergeant to seek to discover the *New York Times*' sources for the information.

Attorneys for Brian Regan, who is on trial for allegedly trying to sell classified information to China, Iraq and Libya, sought to discover whether government officials were among *Times* reporter Eric Schmitt's sources for the Iraq plans. They hoped to argue that government could not prosecute Regan for releasing classified information while other officials who gave such information to the *Times* were not punished.

U.S. District Judge Gerald Bruce Lee of the Eastern District of Virginia rejected the request on Aug. 8.

Floyd Abrams of Cahill, Gordon & Reindel in New York represented the *Times*

Administration Seeks FOIA Change, Tightens Info

The Bush Administration has proposed making information regarding network weaknesses and hacker attacks that private owners of critical computer systems share with the government exempt from the federal Freedom of Information Act. See H.R. 5005, 107th Cong. (2002), § 724(a)(1)(A).

Meanwhile, administration officials have also sought to prevent disclosure of basic biographical information about public officials. Government officials asked the *Fort Worth Star-Telegram* to not pursue a profile of FAA Chief Financial Officer and Budget Director Ruth Leverenz, and the EPA asked the National Resources News Service, a public interest group, not post the full resumes of EPA political appointees on its web site. According to the group, the EPA's general

counsel explained that "in the wake of Sept. 11, they didn't want information about government officials made public." Neither the newspaper or the web site complied with the requests.

Opening the hearings "would assist terrorists in getting a blueprint of the government's strategy to fight the war on terrorism," government lawyer Gregory Katsas argued before the court.

Closed Circuit TV for Moussaoui Trial

A law signed by President Bush on Aug. 2 provides that the trial of accused terrorist conspirator Zacarias Moussaoui be shown on closed circuit television, for viewing by family members of victims of the terrorist attacks. P.L. 107-206, § 203 (signed Aug. 2, 2002).

Under the provision, the trial is to be shown at "convenient locations" determined by the trial judge, U.S. District Judge Leonie Brinkema of the Eastern District of Virginia.

Previously, Brinkema rejected a request from Court TV to broadcast the trial. See *U.S. v. Moussaoui*, 205 F.R.D. 183, 30 Media L. Rep. 1251 (E.D. Va. order Jan. 18, 2002) (denying motion to record and telecast trial); see also *LDRC Libel-Letter*, Feb. 2002, 1t 40.

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Argument in Secret Hearings Case

The 6th Circuit Court of Appeals heard oral argument in the government's appeal of a decision by a Michigan federal court holding that an INS policy, instituted after Sept. 11, of closing immigration hearings in designated cases was unconstitutional. See *Detroit Free Press v. Ashcroft*, Civil No. 02-1437 (6th Cir. argued Aug. 7, 2002) (appeal of 195 F. Supp. 2d 937, 30 Media L. Rep. 1598 (E.D. Mich. 2002)).

Opening the hearings "would assist terrorists in getting a blueprint of the government's strategy to fight the war on terrorism," government lawyer Gregory Katsas argued before the court. But Herschel Fink of Honigman, Miller, Schwartz and Cohn, LLP in Detroit, representing the plaintiff newspapers, argued that "government incompetence flourishes in secrecy." Staff attorney Lee Gelernt of represented the ACLU.

The case involves access to hearings in the case of Rabih Haddad, co-founder of the Global Relief Foundation. The government alleges that foundation funneled money to terrorist groups.

In June, the U.S. Supreme Court issued a stay of a decision by another federal judge overturning a government policy of holding closed immigration hearing in cases of "special interest" while the 3rd Circuit considers an appeal. See *Ashcroft v. North Jersey Media Group*, No. 01-A-991 (U.S. June 28, 2002); see also *LDRC MediaLawLetter*, July 2002, at 36. A coalition of media companies submitted an amicus brief for the 3rd Circuit, an effort coordinated by David Schultz of Clifford Chance Rogers & Wells in New York.

DCS BREAKFAST MEETING

Friday, November 15, 2002

7A.M-9A.M.

ETHICS CORNER: Suing Government Clients for Fun and Profit?

Media lawyers tend to have pretty much the same ethics problems as other lawyers, but there are some that we see a little more frequently. Conflicts as a result of government clients is one.

Lawyers representing the media in access matters outside the courtroom – open records matters, open meetings issues, and access to crime scenes, as a few examples – are constantly adverse to government entities of all kinds. But many of us practice in firms large enough so that we seem to run into conflicts everywhere we turn. Your partner has an employment case for a local public utility; an associate serves as a part-time county attorney to get referrals on condemnation cases. And, of course, you don't find this out til the public utility stiffes your newspaper client on access to some obviously public records, or the county throws your TV station client's reporter out of a clearly open meeting.

Who is the Client

One of the trickier angles of these conflict problems is sometimes the question, "Who is the client?"

Most of us are aware of the issues that confront us as we try to determine whether we can be adverse to a private company or other business where the entity we want to sue is a parent, or subsidiary, or sister corporation to a client. Or where we want to sue a limited partnership whose general partner is a client. Tricky issues abound, and the guidance in some jurisdictions is limited.

The traditional view (shared by most in-house counsel) was that representing even one small, remote member of even the most sprawling, complicated corporate family meant that you represented each and every one of their far-flung, confusingly-named corporate family members. But the courts and other authorities are today starting to take a much more nuanced, realistic view.

Start With ABA Opinion

On these issues, the best place to start (absent local authority) is often the seminal ABA opinion on the sub-

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ject, ABA Formal Opinion 95-390 (1995) (helpful, but also the subject of an unusual dissent within the ABA Committee), and the *Restatement of the Law Governing Lawyers* § 131, cmt. d. The ABA this year revised the Comments to Model Rule 1.7 (no state has yet adopted them) to accurately state the law in many jurisdictions and (essentially) the position of the majority in ABA Opinion 95-390. This new Comment says:

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

What if your firm decided, as a matter of law firm policy, to obtain advance waivers of conflicts of interest from governmental entities it agreed to represent before you had to sue them?

- ABA Formal Op. 97-405 (1997) follows generally the approach of the ABA's earlier opinion, focusing on two different hypotheticals, one where the Committee sees no client identity and thus no conflict, and one where it sees a closer question.
- *Brown & Williamson Tobacco Corp. v. Pataki*, 152 F. Supp. 2d 276 (S.D.N.Y. 2001), permitting a law firm to sue a state for a tobacco company while also representing state agencies on unrelated matters.
- Ill. Op. 01-07 (April 2002), a recent opinion permitting a lawyer to represent a small city's park district while the lawyer's partner serves as city attorney on a part-time basis.

Obtain Advance Waiver

But is there a possible solution? Well, maybe so. What if your firm decided, as a matter of law firm policy, to obtain advance waivers of conflicts of interest from governmental entities

it agreed to represent *before* you had to sue them?

For example, let's say that, before your partner took that employment case for that local public utility, or before your associate signed up as a part-time county attorney to handle occasional condemnation matters, the local public utility or the head county attorney had approved an engagement letter for your firm that included the following paragraph:

As you know, our firm regularly represents media entities in connection with various matters (including, for example, access to government records and meetings) and, largely due to our practice representing media entities, we sometimes represent others on matters relating to access to government records and meetings. From time to time, these clients of our firm may be adverse to [Public Utility/County] on such matters. As a part of our undertaking to represent [Public Utility/County] in this and other matters in the future, [Public Utility/County] agrees to waive in advance any conflict that might

Applied to Government

But what about those governmental entities? Sure, there are some with clear organizational authority, corporate-style existence, and crisp boundaries, but there are lots more whose actual legal status is shrouded in historical (or political) mystery. The questions of client identity are always intensely fact-based and frequently unique.

There are a few opinions out there that have struggled with these questions, each on quite different fact situations. A small sampling follows:

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result from our representing another client adverse to [Public Utility/County] where the other client is seeking access to government records or meetings or has some related claim and where the other client's matter is unrelated to our work for [Public Utility/County].

Assuming your partners would go for this, would it enable you to sue the firm's clients when you need to? Though the law is still emerging, in most states, the answer is probably, "Yes."

Will It Stand Up?

The emerging rule is that a sophisticated client, properly informed of the meaning of such a waiver, may effectively give one, though a court later considering whether to enforce it will focus on whether the later, unrelated matter has been adequately foreseen and described in the waiver. Perhaps the leading authority on this subject is ABA Formal Opinion 93-372 (1993), but there are now numerous other helpful opinions and court decisions, including D.C. Bar Opinion No. 309 (Sept. 2001), which is helpful and comprehensive, despite some unique provisions in its ethics rules.

Again, the newly-revised Comments to ABA Model Rule 1.7 accurately restate the current prevailing view:

Consent to Future Conflict

[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the

consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

Note also the importance of the consenting client having other counsel involved in the waiver, if possible. And for the best recent summary of the law in this area, see Richard W. Painter, *Advance Waiver of Conflicts*, 13 Geo. J. Legal Ethics 289 (2000).

Under this view of the law, in many states, there would be a better than even chance that having this type of advance waiver would permit you to take on your firm's government client for media client.

(But New Jersey lawyers *Beware!* There, Rule 1.7 (a)(2) and 1.7(b) don't permit governments to waive such conflicts. A few other states may agree with this rule.)

Yes, it's true that the world is getting to be a more and more dangerous place for lawyers, but, with a little advance planning, and with a little reliance on some of the newer tools at our disposal, we can all be a little freer to represent our regular clients.

Lucian T. Pera is a member of Armstrong Allen, PLLC, resident in its Memphis office. He is also the co-author of a free, monthly email newsletter, "Ethics and Lawyering Today," hosted on the web at <www.EthicsandLawyering.com>.

LDRC Bulletin Reviews Certiorari Petitions in Libel and Media Privacy Cases

LDRC's forthcoming annual **SUPREME COURT REPORT**, 2002 Bulletin No. 3, examines the fate of petitions for certiorari to the U.S. Supreme Court in libel, privacy and other media and First Amendment cases of interest. LDRC has cataloged libel and privacy petitions for 17 Terms, reviewing the cases appealed and questions presented in text and tables. Over the Terms studied by LDRC, the Court has granted certiorari in only 16 of the 359 petitions filed – 4.5 percent.

This past term the Court considered 19 libel and privacy petitions, involving both media and non-media parties, accepting none for review. Notable among the cases left standing: the Fifth Circuit's decision in *Procter & Gamble Co. v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001), which held that speech about a public figure on a matter of public concern would be commercial speech if defendants' motive for the speech was "substantially economic." Also left standing was the California Supreme Court's decision in *Saderup v. Comedy III Productions*, 21 P.3d 797, 29 Media L. Rep. 1897 (Cal. 2001), which held that a non-commercial work containing a celebrity image would not be protected by the First Amendment unless the work "adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation."

The Supreme Court Study also reviews the Supreme Court's decisions in a number of other First Amendment areas, including *Republican Party of Minn. v. White*, striking down restrictions on judicial candidates' speech; and *Ashcroft v. Free Speech Coalition*, holding that restrictions on "virtual" child pornography are unconstitutional.

Among the most important cases for the media accepted for review by the Supreme Court for next term is *Eldred v. Ashcroft*, in which the Court will decide whether the Sonny Bono Copyright Term Extension Act of 1998 – which extends the period of copyright protection for an additional 20 years – violates the First Amendment and Copyright Clause of the Constitution.

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