

MULRC Media Law Resource Center
MEDIA LAW LETTER

Reporting Developments Through August 27, 2004

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District Court Rules in Favor of Congressman Boehner in Wiretap Dispute

Potentially Critical Decision for Media

The District Court for the District of Columbia granted summary judgment in favor of Representative John Boehner (R-Ohio) on his federal wiretap claims in his protracted legal battle against Representative James McDermott (D-Wash) over the release of an illegally intercepted 1996 conference call involving Boehner, then-House Speaker Newt Gingrich and other Republican Congressmen discussing how to deal with an ethics committee ruling against Gingrich. *Boehner v. McDermott*, Civ. No. 98-0594 (TFH), (D.D.C. August 20, 2004)(Hogan, C.J.).

Background

McDermott received a tape recording of the call from a Florida couple, Alice and John Martin, who electronically intercepted the conversation using a radio scanner. The Martins delivered a copy to McDermott, the ranking Democratic member of the House Ethics Committee, along with a cover letter explaining the tape's contents, how it came into being, and asking for immunity. McDermott, in turn, released tapes to *The New York Times* and the *Atlanta Journal-Constitution* before giving copies to the Committee.

Boehner subsequently filed a complaint alleging McDermott violated federal wiretapping statute, U.S.C. §2511(1)(c), and Florida wiretapping statute, Fla. Stat. §943.03(1)(c), and seeking damages under 18 U.S.C. §2520 and Fla. Stat. §934.10. In a pyrrhic victory for the defendant, the court granted summary judgment dismissing the claims under Florida law for lack of sufficient contacts and because the Florida statutes do not apply extraterritorially.

McDermott defended the case on the ground that the First Amendment barred punishing the *disclosure* of truthful information of undisputed public importance, because to do so would constitute barring speech. The District Court initially agreed and dismissed the case in July, 1998. The U.S. Court of Appeals for the D.C. Circuit reversed in September, 1999.

The Supreme Court then granted certiorari, taking the appeal of the *McDermott* case and another case, *Bartnicki v. Vopper*, in which the Third Circuit had held that the conduct of a person who, like McDermott, had disclosed the tape recording of an illegally intercepted conversation was protected by the First Amendment.

The Supreme Court affirmed the Third Circuit's ruling in *Bartnicki*, reiterating that where truthful information of pub-

lic importance is illegally intercepted, 18 U.S.C. § 2511 is unconstitutional as applied to a third person who receives the intercepted information and discloses it to the media. 532 U.S. 514, 535 (2001) (stating that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern").

The Supreme Court then reversed the Court of Appeals' ruling against McDermott and remanded the case for further proceedings in light of its *Bartnicki* ruling. The Court of Appeals in turn sent the case back to Judge Hogan and allowed the plaintiff, Congressman John Boehner of Ohio, to file an amended complaint. Following discovery, both sides moved for summary judgment.

Unlawfully Obtained Information

Judge Hogan ruled that McDermott entered into an "illegal transaction" when he voluntarily accepted the tape with knowledge that it was produced unlawfully and thus fell outside of *Florida Star v. B.J.F.*, 491 U.S. 523 (1988) and the line of cases that protects lawfully obtained information. The court distinguished *Bartnicki* because in that case the defendant received illegally intercepted information "without present knowledge of its illegality" whereas here, the evidence, most notably the existence of the Martins' cover letter, established that McDermott was aware of the Martins' illegal activity in producing the tape.

[Editor's note: The distinctions drawn here by the court are factually erroneous in certain respects, and analytically, are hair splitting at best and disingenuous at worst.]

The person who disclosed the tape in *Bartnicki* received it from strangers who left it anonymously in his mailbox. He listened to it and understood that it likely had been taped illegally. The Supreme Court expressly assumed in its opinion that the person thus *knew* a conversation had been taped illegally before he disclosed it. The Supreme Court nonetheless held that he "lawfully acquired" the tape because he was not complicit in its taping.

Here, it was similarly undisputed that McDermott did not participate in the taping of the tape and did not know the people who recorded the conversation until they walked up to him weeks later and handed him an envelope that had the

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District Court Rules in Favor of Congressman Boehner

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tape inside. The District Court inferred from the discovery record that at the time McDermott took the envelope from the Martins (but before he opened it or listened to the tape inside), he either knew from a cover letter or was told by the Martins that he was receiving a tape recording made some weeks before of “a conference call heard over a scanner.”

The District Court concluded that because McDermott had a face to face encounter with the tapers, rather than receiving the tape in an anonymous drop, and because, in the Court’s view, he knew it was an illegally recorded tape as he received it and before he listened to it, McDermott had “participated in an illegal transaction” and was stripped of his First Amendment rights.

In addressing plaintiff’s argument that McDermott had assumed a duty of confidentiality under *U.S. v. Aguilar*, 515

U.S. 593(1995), the court refused to recognize a general Congressional duty of non-disclosure. The court ruled that even though McDermott received the tapes in his “official ethical capacity” as House Ethics Committee chair, he was not under a pre-existing duty not to disclose the information.

Having found that Boehner was entitled to summary judgment for violation of the federal wiretap law, the remaining question for the court was one of damages. The court sought further briefing on the issue of whether or not Boehner should be awarded any attorney’s fees and costs, and whether an award of punitive damages was appropriate.

Michael Carvin and Louis Fisher of Jones Day represented plaintiff Boehner. Frank Cicero, Christopher Landau, and Daryl Joseffer of Kirkland & Ellis represented defendant James McDermott.

9th Circuit Holds Yahoo! French Judgment Bar Premature

On August 23, the Ninth Circuit ruled that Yahoo! must wait until French litigants try to enforce a French court order on American soil before it can properly seek a declaration that the foreign judgment violates the First Amendment. *Yahoo! Inc. v. LICRA and UEJF*, No. 01-17424, (9th Cir. 2004) (Ferguson, J.). A split three-judge panel ruled that California lacks personal jurisdiction over two French groups that sought to prevent the Internet service provider from hosting Nazi propaganda discussion groups and Nazi paraphernalia auctions on its American website, www.yahoo.com.

In April 2000, the French groups, “LICRA” and “UEJF”, filed suit in France alleging that Yahoo! violated French law, Section R645-2 of the Criminal Code, which prohibits the sale of Nazi propaganda. Although a Yahoo! subsidiary, Yahoo! France, operates www.yahoo.fr in France and removes all Nazi material from its site, French users can still access the American Yahoo! website that carries the Nazi-related discussions and paraphernalia.

In May 2000, the French court ordered Yahoo! to destroy “all Nazi-related messages, images and text stored on its server” under penalty of a daily fine of 100,000 Francs for noncompliance. Yahoo! chose not to appeal in France opting instead to seek — and receive — a declaration from the Northern District of California district court that the French order was not recognizable or enforceable in the United States.

The Court of Appeals decision reverses the 2001 district court decision in which Judge Jeremy Fogel held California had specific jurisdiction over the French groups and granted summary judgment in favor of the Yahoo! on First Amendment grounds.

In reversing, the Ninth Circuit held that California law under *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082 (9th Cir. 2000) requires that a defendant engage in *wrongful conduct* targeted at a plaintiff whom the defendant knows is a resident of the forum state in order to justify haling that party into the forum jurisdiction. Distinguishing the case at bar from *Bancroft & Masters* (where defendant engaged in subterfuge in an attempt to wrongfully convert intellectual property), the 9th Circuit concluded that LICRA and UEJF acted within their legitimate rights by pursuing a claim under valid French law.

In a lengthy dissent, Judge Brunetti argued that (1) wrongful conduct by defendants was sufficient, but not necessary, to satisfy jurisdiction requirements and (2) LICRA and UEJF targeted Yahoo! in California by moving a French court to issue an order requiring Yahoo!’s American website to comply with French law and serving Yahoo! with the order in the United States.

Richard Jones, Coudert Brothers, San Jose, CA represented LICRA. Neil Jahss and Robert C. Vanderet, O’Melveny & Myers, Los Angeles, CA represented Yahoo!.

**The LDRC Institute Publishes
MEDIA LAW RESOURCE CENTER WHITE PAPER ON REPORTER'S PRIVILEGE**

At a time when there is great pressure on the reporter's privilege, the LDRC Institute is publishing the MEDIA LAW RESOURCE CENTER WHITE PAPER ON REPORTER'S PRIVILEGE, a series of articles designed to assess the history of the reporter's privilege, put it in context with other privileges recognized by the courts in the United States, and offer the arguments and empirical rationales in support of a strong privilege.

The MLRC WHITE PAPER is designed as a resource for media counsel, to be sure, but also for anyone interested in the reporter's privilege and its important role in American journalism.

MLRC members who have paid their dues will be receiving a copy of the MEDIA LAW RESOURCE CENTER WHITE PAPER ON REPORTER'S PRIVILEGE. The articles and authors are:

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Sandra S. Baron

**THE ROAD LESS TAKEN: THE PATH TO RECOGNITION OF A QUALIFIED
REPORTER'S PRIVILEGE THROUGH THE LAW OF EVIDENTIARY PRIVILEGES**

*Kelli L. Sager, Carolyn Killeen Foley, Andrew M. Mar,
John D. Kostrey, and Trinh C. Tran*

**FROM JOHN PETER ZENGER TO PAUL BRANZBURG:
THE EARLY DEVELOPMENT OF JOURNALIST'S PRIVILEGE**

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**THE CONSTITUTIONAL PRIVILEGE AFTER BRANZBURG:
AN HISTORICAL OVERVIEW**

Len Neihoff

REPORTER'S PRIVILEGE: LEGISLATIVE AND REGULATORY

Robert Lystad and Malena F. Barzilai

THE EMPIRICAL CASE: PROVING THE NEED FOR THE PRIVILEGE

Steve Zansburg

PROTECTION OF JOURNALISTS SOURCES UNDER FOREIGN AND INTERNATIONAL LAW

Floyd Abrams

RETHINKING THE REPORTER'S PRIVILEGE FOR THE 21ST CENTURY

Paul Smith and Lee Levine

The LDRC Institute's development and distribution of the MLRC WHITE PAPER ON REPORTER'S PRIVILEGE was made possible with support from a grant from the McCormick Tribune Foundation. On behalf of the LDRC Institute, and from all who will benefit from this MEDIA LAW RESOURCE CENTER WHITE PAPER ON REPORTER'S PRIVILEGE, we want to thank the McCormick Tribune Foundation.

If any MLRC member knows of a journalist, academic or jurist who they believe would benefit from the MEDIA LAW RESOURCE CENTER WHITE PAPER ON REPORTER'S PRIVILEGE, please let us know. We look forward to widespread distribution of this WHITE PAPER.

Five Reporters Held in Contempt in Wen Ho Lee Lawsuit

By Nathan Siegel

Washington, D.C. federal judge Thomas Penfield Jackson held five journalists from major news organizations in civil contempt for refusing to identify confidential sources they used to report about the investigation of Dr. Wen Ho Lee, an Asian-American scientist once suspected of espionage. *Lee v. United States Dep't of Justice*, 2004 WL 1854138 (D.D.C., August 18, 2004). Judge Jackson fined each journalist \$500 a day until they comply with his disclosure orders, but stayed the fine pending an appeal.

The journalists involved are James Risen and Jeff Gerth of *The New York Times*, Bob Drogin of the *Los Angeles Times*, Josef Hebert from the *Associated Press* and Pierre Thomas, who reported for *CNN* and is now with ABC News. A sixth journalist, Walter Pincus of *The Washington Post*, also refused to identify his sources, but his case has proceeded more slowly than the others and contempt proceedings against him have not yet been initiated.

Lawyers for all the journalists have stated they plan to appeal. The case is unprecedented in the sheer number of prominent journalists involved and will likely prove to be a major test of the continued viability of the federal constitutional and common law reporter's privilege in civil proceedings.

Motions to Quash Subpoenas to Journalists

The subpoena battle that led to the contempt orders began almost two years ago. The dispute arises out of a lawsuit brought by Wen Ho Lee against several federal government agencies for allegedly leaking information about him to the media in violation of the Privacy Act, 5 U.S.C. § 552a. After taking roughly 20 depositions of government witnesses, Lee's attorneys subpoenaed the journalists to sit for depositions and identify the confidential sources of leaks they reported.

All of the journalists moved to quash the subpoenas, relying heavily on the journalist's privilege articulated in

Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981). *Zerilli* was also a Privacy Act case in which the D.C. Circuit rejected a plaintiff's effort to depose a reporter to learn the sources of alleged leaks. The D.C. Circuit articulated a relatively rigorous definition of the First Amendment reporter's privilege that has effectively shielded reporters from civil discovery of their confidential sources in Washington, D.C. federal court for the past quarter century.

However, last year Judge Jackson found that Dr. Lee made a showing sufficient to overcome the qualified First Amendment privilege and denied the motions to quash. *Lee v. Department of Justice*, 287 F.Supp. 2d 15 (D.D.C. 2003). He found that the journalists' sources were crucial to the maintenance of Dr. Lee's case because proof that the defendant agencies were the source of leaks about him was

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an essential element of his *prima facie* case under the Privacy Act. *Id.* at 19-20. Though most of the journalists argued that Dr. Lee's counsel had asked virtually no questions about their news reports during discovery, Judge Jackson also

found that Dr. Lee had made "reasonable efforts" to exhaust alternative sources of the information he sought from the journalists. *Id.* at 20-23.

Moreover, in *dicta* Judge Jackson expressed doubt that recognition of any First Amendment privilege in civil proceedings is consistent with *Branzburg v. Hayes*, 408 U.S. 665 (1972), at least where a source may have violated the law by passing information to the press. As a result, he ordered the each journalist to appear for a deposition and to "truthfully answer questions as to the identity of any officer or agent of defendants, or any of them, who provided information to them directly about Wen Ho Lee, and as to the nature of the information provided." *Id.* at 25.

The Journalists' Depositions

All of the journalists subsequently sat for depositions. Most answered the vast majority of questions put to them, but all asserted the reporter's privilege to questions that ei-

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ther directly or indirectly asked them to identify confidential sources. The extent to which each journalist found it necessary to invoke the privilege varied considerably. For example, Jeff Gerth from *The New York Times* only declined to answer one question, while his colleague James Risen – whose reporting helped break the Lee story – asserted the privilege on more than 100 occasions. Upon Plaintiff's Application, the court then initiated civil contempt proceedings.

The Contempt Proceedings

The journalists raised varying defenses to civil contempt. One theme emphasized was that up to his point the court had lumped all the journalists together and treated them as one, rather than making findings about the merits of the privilege asserted in each individual case. Most of the reporters argued that when the relatively small number of questions to which they asserted a privilege were specifically examined, the reporter's privilege should apply and therefore no finding of contempt would be warranted.

Two of the reporters – Jeff Gerth and Bob Drogin – argued that they could not be held in contempt because they had not violated the specific terms of the court's order at all. Though they invoked a privilege on a few occasions, both argued that the specific questions put to them potentially asked them to identify sources beyond agents of the government defendants who provided information about Dr. Lee. Indeed, Gerth maintained that his contributions to the relevant *New York Times* articles did not involve Wen Ho Lee at all and therefore he never had any sources that would be responsive to the order.

For different reasons, all of the reporters also argued that the specific information they learned from the sources at issue was not the kind of information protected by the Privacy Act. As a result, they maintained the identities of their sources could not be crucial to the Plaintiff's case.

For example, Drogin argued that the principal confidential source at issue in his reporting merely voiced an opinion about the Lee investigation and opinions are not protected by the Privacy Act. Josef Hebert maintained that his use of confidential sources was limited to confirming information that was already in the public domain and confirmed on the record by several of the government defendants themselves. Pierre Thomas demonstrated that his reporting focused solely on the conduct for which Dr. Lee ultimately accepted criminal responsibility (i.e., unauthorized downloading of classified national security information).

In his Application, the Plaintiff also asked that contempt sanctions include compensatory damages and attorneys' fees payable to Dr. Lee, in addition to any fines the court might impose. All of the reporters vigorously contested the propriety of any sanctions payable to the Plaintiff.

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Big Month for the Reporter's Privilege

In addition to the decisions reported in this MediaLawLetter in the Wen Ho Lee matter, the Valerie Plame investigation, and the criminal trial of Lynne Stewart, subpoenas have been issued in the following highly publicized matters –

- The U.S. Attorney's office in San Francisco subpoenaed the San Francisco Chronicle in connection with its receipt of grand jury testimony in the BALCO steroid investigation from a confidential source;
- The Valerie Plame investigating prosecutors subpoenaed New York Times reporter, Judith Miller, and the Times itself, both seeking documents. Ms. Miller was previously subpoenaed to testify before the Plame grand jury;

And Editor & Publisher reports that the newsroom of the jointly owned Tribune and Scranton Times in Pennsylvania learned that since April a state judge appointed a special prosecutor in April to investigate an alleged leak of grand jury information to the newspapers. In that investigation, none of the reporters were subpoenaed.

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tiff and also urged the Court to impose a nominal fine.

The Contempt Order

Following a hearing, Judge Jackson held all of the journalists in civil contempt and issued a 12-page Memorandum & Order laying out his findings. Most of those findings addressed the issue of whether each journalist had violated the literal terms of his order. He appeared to take an expansive view of what his order required and he found that all the journalists were in violation of it.

Otherwise, Judge Jackson rejected the contention that the scope of the Privacy Act was relevant to the issue of contempt, noting that

“The Order did not allow the journalists to make *ad hoc* determinations about whether information responsive to questions about identity would or would not implicate the Privacy Act.” *Lee*, 2004 WL 1854138, *3.

On appeal, however, the merits of the privilege the reporters asserted in their depositions will again be a central focus, since they may not be held in contempt for asserting a privilege if they were legally entitled to invoke it.

As to the penalty for contempt, Judge Jackson explained that he settled upon a fine of \$500 a day by “splitting the difference” between the nominal fines of \$1 per day occasionally issued in some past cases involving journalists and the more punitive \$1,000 assessed more recently in *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004) and Judge Thomas Hogan’s recent contempt orders arising out of the Valerie Plame investigation. *In re Special Counsel Investigation*, Nos. 04-296, 04-379 (D. D.C., August 9, 2004).

Judge Jackson also declined, for the time being, to award the plaintiff any form of compensatory sanctions. However, he denied the application for such sanctions without prejudice, thus leaving open the possibility that the Plaintiff might attempt to seek additional sanctions at some future juncture. *Lee*, 2004 WL 1854138, *5-6.

Finally, Judge Jackson found that “the journalists undoubtedly have a good faith belief in the appropriateness of their constitutional arguments,” *Id.* at *5, and remarked from the bench that the privilege issue presented a serious legal question that should be resolved by the Court of Ap-

peals. As a result, he stayed the fine pending the completion of any appeal.

Lee Levine, Nathan Siegel and Chad Bowman of Levine Sullivan Koch & Schulz LLP represented Bob Drogin and Josef Hebert in the *Lee* contempt proceedings. Floyd Abrams, Joel Kurtzberg and Karen Kaiser of Cahill Gordon & Reindel LLP represented James Risen and Jeff Gerth. Charles D. Tobin and Jennifer M. Mason of Holland & Knight LLP represented Pierre Thomas. Kevin T. Baine and Kevin Hardy of Williams & Connolly LLP represent Walter Pincus in the *Lee* case.

Nathan Siegel is of counsel to Levine Sullivan Koch & Schulz, LLP in Washington, D.C.

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TIME Inc. and Reporter Held in Contempt in Plame Leak Investigation

Contempt Cleared When Reporter Agrees to Interview by Prosecutors

On August 9, Federal District Court Judge Thomas F. Hogan, of the District of Columbia, issued an Order holding TIME Inc. and its reporter, Matthew Cooper, in contempt for refusing to comply with grand jury subpoenas for testimony and documents in the federal investigation into the leak of the identity of CIA operative, Valerie Plame. *In Re: Special Counsel Investigation*, Misc. No. 04-296 and 04-297 (TFH)(DCDC 2004)

On August 24th, the order of contempt was lifted by Judge Hogan after Cooper agreed to and was interviewed by the prosecutors in the matter on August 23rd. TIME issued a press release stating that:

Mr. Cooper, who has been held in contempt of court for refusing to disclose his confidential sources, agreed to give a deposition because the one source specifically asked about by the Special Counsel, I. Lewis Libby, the vice president's chief of staff, gave a personal waiver of confidentiality for Mr. Cooper to testify. Mr. Libby also gave TIME permission to release this information to the public.

According to the TIME release, the deposition of Cooper took place in the Washington, D.C. office of Floyd Abrams, Cooper's counsel on the matter, and

"focused entirely on conversations Mr. Cooper had with Mr. Libby, one of Mr. Cooper's sources for the articles he helped author about the leak in July 2003."

Following Up on Report by Robert Novak

Ms. Plame's employment with the CIA was first reported by Robert Novak in a column on July 14, 2003. [Neither Mr. Novak nor his counsel have indicated whether Mr. Novak has been subpoenaed by the prosecutors in this investigation and if he has, the status of such subpoena.]

The leak to Novak was reported in Cooper's article, which appeared in TIME on July 17, 2003, as well as in other news reports in and around the time period. There was discussion at the time about whether the Administration was leaking Ms. Plame's name and CIA connection in order to discredit her husband, Administration critic, Am-

bassador Joseph C. Wilson. True or not, the disclosure may have put Ms. Plame at risk, and those with whom she had dealt as a CIA operative.

A criminal investigation was ordered into the leak with the Department of Justice appointing United States Attorney Patrick Fitzgerald as Special Counsel to investigate allegations that one or more Executive Branch officials unlawfully disclosed the name of a CIA undercover operative, Ms. Plame.

No Reporter's Privilege in Grand Jury

In a Memorandum Opinion written and issued to the parties on July 20, 2004, but not released publicly until August, the District Court denied motions to quash by Matthew Cooper and NBC's Tim Russert. Tim Russert, it was later reported, had no confidential information to impart, and sat down for an interview with the investigators. It has been reported that Russert also told prosecutors about conversations he had with Scooter Libby.

TIME Inc. and Matthew Cooper initially filed an appeal.

In his Memorandum Opinion, Judge Hogan categorically rejected the idea that there is a reporter's privilege rooted in the First Amendment or otherwise with respect to a grand jury acting in good faith. Relying upon *Branzburg v. Hayes*, 408 U.S. 665 (1972), the court refused to adopt the balancing test that the newsmen argued was the drawn from Justice Powell's concurring opinion in *Branzburg*.

Instead, he accepted the Government's position that Justice Powell's concurrence in *Branzburg* is consistent with the opinion that Justice White wrote for himself and three other justices and that constitute the majority. Although Justice Powell refers to the necessity of "proper balance of the society interests involved," Judge Hogan states that Powell is referring to a test that would screen out bad faith on the part of prosecutors and improper interrogations of the press.

While acknowledging that courts around the country "have chipped away at the holding of *Branzburg* by ruling that a court shall apply a qualified privilege in certain limited contexts[,] [t]hese courts have

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TIME Inc. and Reporter Held in Contempt in Plame Leak Investigation

(Continued from page 11)

done so by carving out various factual scenarios different than those presented in *Branzburg*.”

Branzburg's factual context was grand jury subpoenas and as to those, the court found that there is a consistent approach in the federal courts in finding no qualified reporter's privilege. Judge Hogan also rejected the argument that *Branzburg* dealt not with confidential sources, but with eyewitness testimony of criminal conduct, and thus testi-

mony on confidential sources, as was at issue here, was not directly at issue.

The court found inapplicable the District of Columbia shield law and DOJ guidelines – the latter of which if they did apply, he concluded, relying upon *ex parte* affidavits by the prosecutor, were met by the conduct of the prosecutor in this inquiry.

TIME Inc. and Matthew Cooper were represented by Floyd Abrams and Joel Kurtzberg, Cahill Gordon & Reindel, New York.

Judge Requires Reporter to Testify at Lynne Stewart Trial

On August 19, 2004 United States District Court Judge John Koeltl denied a motion to quash a trial subpoena directed to Esmat Salaheddin, and ordered the Reuters reporter to testify during the Government's case against New York attorney Lynne Stewart. Stewart and two others are accused of assisting imprisoned Sheikh Omar Abdel Rahman communicate from jail with a terrorist group in Egypt. *United States v. Lynne Stewart*, S1 02 Cr. 395, (S.D.N.Y. August 19, 2004).

The Government wants Salaheddin, an 18-year employee of Reuters stationed in Cairo, Egypt, to authenticate four news articles he wrote between June 2000 and April 2001 relating to Sheik Abdel Rahman. The government declared that it would not seek any testimony beyond the facts contained in the published news reports. It is specifically interested in establishing the accuracy of statements contained in Salaheddin's articles that are attributed to Stewart and other supporters of the Sheikh who are alleged to be in a conspiracy with Stewart.

Stewart supported the motion to quash the Government's subpoena, but indicated that she would broadly seek to cross-examine on issues beyond the published facts if Salaheddin is required to testify. In moving to quash, Salaheddin urged the court to consider the potential scope of cross examination, and argued that the possibility of confidential source issues on cross-examination should increase the Government's burden to demonstrate the necessity of Salaeddin's testimony.

In denying the motion to quash, Judge Koeltl applied only the standard governing requests for non-confidential information, and concluded that the Government had met its burden. Relying on *Gonzales v. National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999), the court reaffirmed the

existence of a reporter's privilege for nonconfidential information, but acknowledged that “the showing needed to overcome the privilege is less demanding than the showing required where confidential materials are sought.” The court concluded that the qualified privilege was overcome because the statements sought to be introduced through the reporter were highly relevant to proving a key charge in the case, that Stewart had passed information from the Sheikh to the press in violation of her agreement with the Government, and evidence of her statements made to the Reuters reporter were not reasonably obtainable from other available sources.

The district court found unpersuasive concerns advanced by Salaheddin that would be perceived as cooperating with the Government, and opening himself and his family to the possibility of retaliation in Egypt. Judge Koeltl considered this to be “important” but “particularly attenuated” concern, given that Salaheddin had resisted the subpoena and would testify only under court order. The court also rejected the suggestion that compelled authentication testimony could “be viewed as posing a threat to Salaheddin's journalistic credibility.”

The court also set aside Salaheddin's assertions that the scope of cross-examination should also be weighed in assessing the Government's subpoena. Judge Koeltl found “no reason to believe that defense counsel would exceed the reasonable bounds of cross examination” and noted that the scope of the examination would be no broader than allowed under the Federal Rule of Evidence.

David A. Schulz of Levine Sullivan Koch & Schulz, L.L.P. represented Salaheddin. Assistant U.S. Attorneys Anthony Barkow and Christopher Morvillo represented the government. Michael D. Tigar represented Lynne Stewart

Federal District Court Quashed Subpoena for Reporter's Testimony in its Entirety Under Federal Reporter's Privilege and Under Rule 45

A Positive Legacy for a Defunct Magazine: Reporter Does Not Have to Confirm Published Quotations from Witness

By Devereux Chatillon Joshua Akbar

Neatly filling a gap in the current law on federal reporter's privilege in the Second Circuit, Judge Alan Nevas of the United States District Court for the District of Connecticut granted a non-party journalist's motion to quash a subpoena in its entirety. Holding that the plaintiffs had not met the test under *Gonzalez v. NBC*, 194 F.3d 29 (2d Cir. 1999), for divesting the reporter's privilege where non confidential sources are at stake, and that to the extent that the defendants were insisting on intrusive cross-examination should the reporter testify at all, satisfaction of the subpoena would be an undue burden under Rule 45 of the Federal Rules of Civil Procedure, the Judge declined even to require the reporter to testify concerning published statements. *Concerned Citizens of Belle Haven v. Belle Haven Club, Inc.*, No. 399CV1467 (D. Ct. June 21, 2004).

The Underlying Lawsuit and the Reporter's Article

The reporter, Leah Nathans Spiro was not a party to the underlying lawsuit, which is based on claims that the Belle Haven Club in Belle Haven, a residential community in the Town of Greenwich, Connecticut, engaged in anti-Semitic membership practices and thus violated federal and state law.

From November 1999 to November 2001 Ms. Spiro was a journalist employed by *Talk Magazine* as its Business Affairs Writer. *Talk* was a general interest magazine circulated throughout the United States. *Talk* suspended publication in January 2002.

While working for *Talk*, Ms. Spiro prepared an article entitled *The Thin Blue-Blood Line*, which appeared in the March 2001 issue. The article addressed the issue of continuing discrimination against Jews by country clubs in the United States and focused particularly on a country club in Florida that has had an ongoing controversy over its admissions policies and possible discrimination against Jews. Included in the March 2001 Article was a sidebar entitled "Other Hot Spots," in which Ms. Spiro devoted approximately one and a half paragraphs to a discussion of the Belle Haven Club and the law-

suit. In this sidebar, Ms. Spiro referred to a conversation she had with an individual named John Lyddane, who was the Treasurer for the Belle Haven Club at the time they spoke. The sidebar stated that "Lyddane told Talk that his litigating Jewish neighbors should just 'sell their homes and move out.' He says the three Jewish couples were rejected by the Belle Haven Club because they were litigious, . . . not because they were Jewish."

In January of 2004, the plaintiffs served a subpoena duces tecum on Ms. Spiro with an extensive list of docu-

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Jury Verdict for GQ Magazine in Oklahoma Libel Suit

After two hours of deliberation, a federal jury in Oklahoma City decided that an 1997 article in Gentleman's Quarterly ("GQ") magazine did not libel former FBI agent Jeff Jenkins when it criticized his investigation of the 1995 death of an inmate at the Federal Transfer Center in Oklahoma City. *Jenkins v. Advance Magazine Publishers, Inc.*, Civil No. 03-243 (W.D. Ok. jury verdict Aug. 25, 2004).

The plaintiff sought \$3 million, which he alleged was the net revenue from the issue of the magazine containing the article. Besides the magazine publisher, the suit also named writer Mary Fischer.

The eight-day trial was presided over by U.S. District Court Judge Stephen P. Friot, who held that Jenkins was a public figure who had to prove actual malice.

Jenkins was represented by Roland Combs and Cynthia D'Antonio of Roland Combs & Associates in Oklahoma City, and Aletia Timmons of Timmons & Associates in Oklahoma City. GQ and article author Mary A. Fischer were represented by Bob Nelson and Jon Epstein of Hall Estill in Oklahoma City.

A full report on the verdict will be included in the September edition of the *MediaLawLetter*.

Federal District Court Quashed Subpoena for Reporter's Testimony in its Entirety

(Continued from page 13)

ments requested. The documents demanded from Ms. Spiro and the testimony sought related only to the article in *Talk* and Ms. Spiro's newsgathering in preparation for that article. The parties did not dispute that the material sought to be discovered was not obtained under a promise of confidentiality.

The District Court Quashes the Subpoena

On June 21, 2004, Judge Nevas found that, under *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999), the plaintiffs had not made a clear and specific showing requiring divestiture of the qualified reporters' privilege for non-confidential information. Specifically, Judge Nevas found the plaintiff's explanation for how the requested information was relevant to be "weak and unconvincing." (Order at 3). Furthermore, the evidence would "be of little or no substantive probative value" because the plaintiffs had failed to prove that Mr. Lyddane's statements could be attributed to the Belle Haven Club since they had not shown that Mr. Lyddane "was authorized to speak to Spiro either on behalf of the Club regarding membership issues or on the specifics of the plaintiffs' claims, or that the matters he spoke about were within the scope of his authority as treasurer of the Club." (Order at 4). Because the statements were therefore inadmissible hearsay, the only possible purpose they could serve was to impeach Mr. Lyddane at trial, and Judge Nevas, citing *Holland v. Centennial Homes, Inc.*, No. 3:92cv1533T, 1993 WL 755590 (N.D. Tex. Dec. 21, 1993), held that impeachment of a witness is "an insufficient reason to vitiate the privilege." (Order at 4).

Judge Nevas also found that the requested information, confirmation by Ms. Spiro that statements attributed in the *Talk* article to a witness were accurate, was available from the article itself. (Order at 4).

The defendants in the case had supported quashing of the subpoena in its entirety, but as a backup position stated that if Ms. Spiro were to answer any questions, even ones limited to confirming the accuracy of what had been published, they would require full discovery and cross-examination. Addressing this under Rule 45, Judge Nevas further held that, "given the extensive cross-examination of Spiro anticipated by the defendants, the burden of com-

pliance with the subpoena would exceed the marginal benefit the plaintiffs would gain from such information." (Order at 4). Judge Nevas cited the Seventh Circuit's recent decision in *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004), in support of this holding.

The plaintiffs are represented by David N. Rosen of Rosen & Dolan in New Haven, CT. The Belle Haven Club, Inc. is represented by Carolyn R. Linsey of Owens, Schine & Nicola, P.C. in Trumbull, CT. The other defendants are represented by Charles W. Pieterse of Whitman Breed Abbott & Morgan LLC in Greenwich, CT.

Ms. Spiro was represented by Devereux Chatillon and Joshua Akbar of Sonnenschein Nath & Rosenthal LLP in New York. Ms. Chatillon and Mr. Akbar can be reached at (212) 768- 6700.

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Toledo Radio Slander Case Settled

Contempt Appeal Dropped; Reporter's Privilege Appeal Continues

The slander suit brought by Toledo Blade newspaper reporter, Sandra Svoboda, against a local radio host, Denny Schaffer, who alleged that the reporter was having an affair with her editor was settled in late July, and an appeal of the contempt finding against Schaffer for failure to identify his sources was dropped. But, a separate appeal on reporter's privilege issues arising from discovery in the case of the news director of the radio station will be heard by the Ohio Supreme Court. *Svoboda v. Clear Channel Communications, Inc.*, No. 2004-0612 (Ohio rev. granted July 30, 2004)

The Defamation Suit

The underlying suit was brought by Svoboda against Schaffer, who co-hosted the "Breakfast Club" program on WVKS-FM. In October 1999, Schaffer criticized Svoboda's articles about the University of Toledo on the air. According to Svoboda's suit, in his comments Schaffer stated that reporter Svoboda had unfairly slanted her articles at the direction of Blade publisher and editor-in-chief John Robinson Block. The lawsuit further alleges that Schaffer said that Svoboda and Block had a sexual relationship. *Svoboda v. Clear Channel Communications*, No. G-4801-CI-200001224 (Ohio Ct. C.P., Lucas County filed Oct. 2000).

In the course of depositions in the case, Schaffer was asked to reveal the sources of the allegations made on the air by Schaffer. First, he invoked Ohio's reporter's privilege statute and refused to name the sources. Then Schaffer said that he could not recall the source. Schaffer finally named his source four months later, after Judge William Skow held him in contempt and ordered him to pay \$5,955 to cover Svoboda's legal costs related to the contempt motion.

Schaffer's appeal of the contempt order and fine was due to be argued July 15, but the appeal was withdrawn when the underlying slander case was settled. *Svoboda v. Clear Channel Communications, appeal dismissed*, No. _____ (Ohio Ct. App., 6th Dist. appeal dismissed July 23, 2004).

While the terms of the settlement were not disclosed, on July 20 Schaffer apologized to Svoboda on the air during his program on WSPD-AM. Both Schaffer's current and former stations are owned by Clear Channel Communications.

News Director Invokes Reporters Privilege

During discovery in the suit, "Breakfast Club" co-host Tricia Tischler, whose title at the station was news director, said that she had second-hand information that Svoboda and Block were dating. She invoked Ohio's reporters' privilege statute and refused to name the original source. But in September 2002 Judge William Skow held that although "her function in part on the radio show ... is that of a news person, it's mainly by default and all she does is rip and read wire service stories ... and that doesn't include gossip, and this is gossip at best." Based on this reasoning, Skow ruled that the reporters' shield statute did not apply to Tischler.

A divided panel of the Sixth District Court of Appeals affirmed this ruling. *Svoboda v. Clear Channel Communications, Inc.*, Court of Appeals No. L-02-1302, 2004 WL 368120 (Sixth Appellate District, Lucas County, Feb. 27, 2004); see *MLRC MediaLawLetter, March 2004*, at 27. In its 2-1 ruling, the appellate panel found that the Ohio shield law, Ohio Rev. Code § 2739.04, did not protect the news director because she was not acting as a newswoman when she spoke with her contact; the information she received was a rumor and did not qualify as "information" under the statute; and, she did not establish that her contact was a "source of any information" under the shield law.

On July 30, the Ohio Supreme Court agreed to hear Tischler's appeal.

Schaffer and the other defendants are represented by Thomas G. Pletz and Neema Bell of Shumaker, Loop & Kendrick in Toledo. Sandra Svoboda was represented by C. Thomas McCarter of Toledo, Ohio, and Frederick Gittes and Kathaleen Schulte of Columbus, Ohio.

Arizona Court Upholds Criminal Trespass Conviction for Reporter

On appeal from a municipal court, the Superior Court of Arizona, Maricopa County ruled that a local reporter for the *East Valley Tribune* could be found guilty of criminal trespass for entering posted private property in search of details on a story. *Arizona v. Bryon Wells*, Cit. No. 03-P-861784 (Az. Super. Ct., July 2, 2004)(Jones, J.). The court held that the Arizona Constitution and the First Amendment to the U.S. Constitution neither immunized nor created any special exemption for reporters against Arizona Revised Statute § 13-1504(A)(2), the state criminal trespass law.

Wells, a beat reporter following both the Chandler and Tempe Police Departments, had been covering the investigation of former Chandler police officer Daniel Lovelace, who faced second degree murder, manslaughter and endangerment charges for the October 2002 shooting death of Dawn Rae Nelson – Lovelace was recently found not-guilty on all counts. After repeated phone messages were not returned, Wells visited the officer's home on November 6, 2003, ignoring the "No Trespass" sign that had been posted to deter media intrusion. Wells had a brief conversation with Lovelace's wife, where, according to her, she asked him to leave the premises, and he left. A subsequent police investigation led to a criminal trespass charge against the reporter.

In affirming the lower court decision, the Superior Court rejected the reporter's arguments that he believed he was "licensed, authorized or otherwise privileged" to enter the property despite the sign; that a "no trespassing" sign was insufficient to render his actions criminal. The court further rejected his arguments that his actions as a newsgatherer, covering a story on a matter of public concern, was protected by the First Amendment in this case.

Instead, the court found that anyone entering property protected by such a sign was guilty of trespass under the statute, and that the press had no greater rights of access under the law than did ordinary citizens. Mere entry onto the property – and not, as the reporter said he understood the law, remaining after being asked to leave – was a crime under the statute. The appellate court found that the trial court appropriately found that no one had consented to the reporter's entry on to the property and that the sign and fence gave the reporter sufficient notice that

he lacked permission and that entering the property was a breach of the complainants' privacy.

A general trespass statute, the court held, could be applied constitutionally to a reporter provided that it is done without discrimination and not used to intentionally suppress First Amendment rights.

The case was remanded for sentencing and at the sentencing hearing on July 28, the municipal court changed its original sentence – against the prosecutor's wishes – and lifted the one year probation, thereby allowing Wells and his wife to join the Peace Corps. Wells paid the \$300 fine (which the *East Valley Tribune* then reimbursed) and the case is now over. But for the desire of Bryon and his wife to join the Peace Corps, Bryon and the *East Valley Tribune* would have appealed to the Arizona Court of Appeals.

Daniel Barr, a partner at Perkins Coie, Brown & Bain, Phoenix, Arizona, represented reporter in this case. James Neugebauer represented the State.

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Ninth Circuit Affirms Preliminary Injunction Restraining Distribution of Anti-Tax Book

Finds Book Is Fraudulent Commercial Speech

A unanimous Ninth Circuit panel affirmed a preliminary injunction against Irwin Schiff, author of the anti-tax book *The Federal Mafia: How the Government Illegally Imposes and Unlawfully Collects Income Taxes*. *U.S. v. Schiff*, No. 03-16319, 2004 WL 1770140 (9th Cir. Aug. 9, 2004) (Hug, Alarcón, and W. Fletcher, JJ)

The injunction prevents Schiff, or any of his associates or businesses, from distributing or promoting the book which, in the course of recounting Schiff's policy criticisms of the IRS, purports to reveal how individuals can legally not pay any federal income tax.

The court affirmed the injunction on the ground that the book – although mixed with Schiff's policy comments – is fraudulent commercial speech. Notably, the court found it unnecessary to address two of the more controversial grounds invoked by the lower court to issue the injunction – that the book incited others to lawless acts and abetted criminal tax evasion.

Background

Irwin Schiff has a long history with the IRS and has been charged and convicted with numerous criminal violations of the tax code over the years. Schiff contends that federal income tax is voluntary and his book instructs individuals on how to avoid paying taxes. Schiff also offers other books, seminars and audio tapes relating to the tax scheme (some of which are advertised and promoted in *The Federal Mafia*).

In February 2003, the IRS raided Schiff's publishing business, Freedom Books, and charged him and several of his associates with promoting illegal tax evasion schemes. The government also brought an action under 26 U.S.C. § 7408, which authorizes district courts to enjoin tax evasion schemes.

Last year Nevada federal district court Judge Lloyd George entered a preliminary injunction against Schiff and his associates. *U.S. v. Schiff*, 269 F.Supp.2d 1262 (D. Nev. 2003); see also *MLRC MediaLawLetter* April 2003 at 9 and July 2003 at 43.

Judge Lloyd found that *The Federal Mafia* promotes an illegal tax evasion scheme and preliminarily enjoined Schiff and his associates from further distributing or advertising it. He concluded that an injunction would not violate the First Amendment because the book was essentially a false advertisement for his various tax evasion schemes, and moreover incited lawless action and abetted criminal tax evasion.

As to these last two grounds for the injunction, the district court relied on, among other cases, *Rice v. Paladin Enters., Inc.* 128 F.3d 233, 246 (4th Cir. 1997).

The Ninth Circuit stayed the injunction pending appeal.

The court concluded that the book was a commercial linchpin for Schiff's "entire line of tax avoidance products and services."

Ninth Circuit Analysis

The Ninth Circuit, in a decision by Judge Procter Hug, joined by Judges Alarcon and William Fletcher, affirmed solely on the ground that the book was false commercial speech.

The court noted that the constitutionality of the injunction turned on whether the book could properly be characterized as commercial speech. Schiff argued that commercial speech is limited to "advertising pure and simple" – a definition he conceded would cover only the book's back cover and several inserts that advertised other products.

The government argued that commercial speech was broader and extended to "expression related solely to the economic interests of the speaker and its audience." Quoting *Central Hudson v. Public Service Comm'n*, 477 U.S. 557, 561 (1980). Several chapters of the book would meet this definition, according to the court.

Although the court acknowledged that the line between commercial and expressive speech is blurred "the case before us is not so close." Distinguishing the court's recent decisions in *Mattel, Inc. v. MCA Records, Inc.* 296 F.3d 894(9th Cir. 2002); *Hoffman v. Capital Cities/ABC*,

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Ninth Circuit Affirms Preliminary Injunction Restraining Distribution of Anti-Tax Book

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Inc., 255 F.3d 1180 (9th Cir.2001), Judge Hug reasoned that this is not a case where expressive and commercial speech are “inextricably intertwined” and cannot be enjoined.

Instead the court concluded that the book was a commercial linchpin for Schiff’s “entire line of tax avoidance products and services.”

Unlike *Hoffman* and *Mattel*, the expressive and political portions of *The Federal Mafia* are not “inextricably entwined” with its commercial elements. Schiff can relate his long history with the IRS and explain his unorthodox tax theories without simultaneously urging his readers to buy his products. Because the protected and unprotected parts of the book are not inextricably intertwined, Schiff cannot use the protected portions of *The Federal Mafia* to piggy-back his fraudu-

lent commercial speech into full First Amendment protection.

Finally, the Ninth Circuit also affirmed portions of the injunction requiring Schiff to turn over his customer lists (the issue was not properly appealed); and to post a notice of the injunction on his website, concluding that “in a commercial setting, such as a website that sells products, the government must be able to regulate content to prevent the deception of customers.”

Schiff was represented by Michael D. Stein, of Las Vegas. The government was represented by Judith A. Hagley, U.S. Department of Justice, Washington, D.C. The Association of American Publishers, Inc, the American Bookseller Foundation for Free Expression, the Freedom to Read Foundation of the American Library Association, and the PEN American Center as amici curie were represented by Allen Lichtenstein, ACLU Nevada.

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Prior Restraint Orders in the Kobe Bryant Case

By Steven D. Zansberg

Judge Terry Ruckriegle, the presiding judge in the Kobe *Bryant* case, has gotten into the habit of issuing unconstitutional gag orders – first against the press and then against trial participants. The first order, issued June 24th, prohibited the seven news media companies who had received transcripts of closed proceedings (directly from a court reporter) from publishing any portion of those transcripts under penalty of contempt. As reported in the July *MediaLawLetter*, the seven media companies (Associated Press, CBS Broadcasting, Inc., Denver Post Corp., ESPN, Inc., FOX News Network, L.L.P., *Los Angeles Times*, Warner Brothers Domestic Television) petitioned the Colorado Supreme Court to lift the prior restraint.

On July 19th, the Colorado Supreme Court, in a 4-3 ruling, affirmed the temporary prior restraint, but remanded for Judge Ruckriegle to make evidentiary rulings on the rape shield motion and to release from the prior restraint portions of the transcript containing evidence deemed admissible at trial.

Media Seek a Stay From Justice Breyer

Two days after the Colorado Supreme Court's ruling, the seven media companies filed an application for a stay of Judge Ruckriegle's order with Justice Stephen J. Breyer, as Circuit Justice for the Tenth Circuit states. The petitioners argued that the Colorado Supreme Court's majority opinion completely misconstrued the holding of *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), and was premised upon faulty reasoning that while post-publication sanctions on truthful information lawfully obtained may lead to *self-censorship* by the press, it was nevertheless permissible to impose *direct* censorship prior to publication.

The petitioners invoked the body of case law in which single justices of the Supreme Court had stayed lower courts' prior restraint orders. And, as they did before the Colorado Supreme Court, the petitioners argued that the privacy rights of the alleged victim were not a sufficiently urgent interest to merit the continuation of the prior restraint order, particularly in light of all of the information about the alleged victim's sexual history and forensic tests that are already in the public domain.

The next day (July 22), an amicus brief in support of the seven petitioners was filed by seventeen major media entities and associations.

Both the Colorado District Court and the Eagle County District Attorney filed responses to the application for the stay on Friday, July 23rd. In those responses, they argued that the stay should be denied primarily on procedural grounds. According to respondents, the application was premature because the mandate of the Colorado Supreme Court had not yet issued, and the stay was foreclosed because the petitioners had not formally sought a stay from the Colorado Supreme Court.

The news media petitioners filed a reply on Sunday, July 25th, addressing the weaknesses of the respondents' procedural challenges. In their reply, the petitioners pointed out that the real procedural shortcomings in this case were committed by the trial court and undermined the facial validity of the trial court's prior restraint order: it was entered *suave sponte*, with no opportunity for the restrained parties to be heard, and with no means of speedy judicial review. In addition, the petitioners argued, the trial court's order, as modified by Colorado's Supreme Court was unconstitutionally vague and unenforceable.

Also on Friday, July 23rd, the trial court issued its ruling on the defense motion to admit certain evidence concerning the alleged victim's sexual conduct under the exception to Colorado's rape shield statute. In that ruling, Judge Ruckriegle determined that all evidence concerning the sexual conduct of the alleged victim within the 72 hours of her encounter with Mr. Bryant would be admitted at trial. Nevertheless, that order was silent about whether any portion of the leaked transcripts would be removed from under the prior restraint.

Breyer's Ruling

On Monday night, July 26th, Justice Breyer issued a ruling, denying without prejudice the news media petitioners' application for a stay. Justice Breyer stated that because the trial court had not yet determined which portions of the transcript, if any, should be lifted from under the prior restraint (in light of its ruling on the rape shield motion) and was expected to do so imminently, the case would be remanded to

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Prior Restraint Orders in the Kobe Bryant Case

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the trial court to make such findings and the news media could renew or re-file its application within 48 hours. If the trial court took no action in that time or did not lift the prior restraint, the application could then be re-filed, Justice Breyer said, and the trial court would then have 24 hours thereafter to explain why no action had been taken or why portions that remained subject to the prior restraint must stay so restrained.

On remand, Judge Ruckriegle issued a series of rulings that incrementally released portions of the sealed transcripts from under the prior restraint, starting with an order entered on Wednesday, July 28th. On July 29th, the petitioners filed their second application to Justice Breyer, describing the trial court as “lethargic” in its response to Justice Breyer’s remand order. On Thursday, July 29th, the District Attorney moved for an extension of time to respond to the second application, and pointed to the trial court’s having calendared a hearing on Friday, July 30th, to hear from the parties (but not the press) about which portions of the transcripts should remain under the prior restraint order. On Friday, July 30th, the trial court filed a similar motion, which was granted upon receipt. Justice Breyer gave Judge Ruckriegle until end of day on Tuesday, August 3rd, to reply to the second application for a stay.

Trial Judge Releases Most Transcripts

On Monday evening, August 2nd, Judge Ruckriegle issued his fourth order regarding the transcripts, and released practically all of the contents of the transcripts from under the prior restraint. In his ruling, Judge Ruckriegle made clear that he was extremely reluctant in releasing this rape shield testimony. He described the release of this testimony as one-sided and an invasion of the alleged victim’s privacy rights. Nevertheless, Judge Ruckriegle stated, he was responding to the clear directives of the Colorado Supreme Court and of Justice Breyer in balancing competing constitutional rights when, under the doctrine of prior restraints, the rights of the press were paramount.

On Tuesday, August 3rd, the news media petitioners filed a letter with Justice Breyer withdrawing their second application in light of Judge Ruckriegle’s having lifted the prior restraint with respect to all but an extremely small portion of the leaked transcripts.

Judge Ruckriegle Imposes an Overbroad Gag Order on Trial Participants

No sooner had the dust settled on the first major legal challenge to Judge Ruckriegle’s prior restraint order, that a second facially unconstitutional order was entered. On Wednesday evening, August 4th, at approximately 6:00 p. m., Judge Ruckriegle e-mailed an order expanding his earlier order regarding extra-judicial publicity to all attorneys of record in the *Bryant* case.

The new, expanded gag order prohibited all “trial participants” from making *any* extra-judicial comments about the case knowing or intending that it be disseminated through the mass media. The order defined “trial participants” as not only the attorneys of record in the case, but all witnesses, whether endorsed or not, their attorneys, and the alleged victim and her family. In addition, the order applied to any attorney who “office-shares” with any of the attorneys identified above.

Although this order was in response to a motion from Mr. Bryant’s counsel, filed August 3rd, and directed primarily at John Clune, counsel for the alleged victim, the court probably entered the order after Mr. Clune and his co-counsel L. Lin Wood of Atlanta, appeared on *Good Morning America* and *The Dan Abrams’ Report* on August 4th, and announced that the alleged victim was considering not proceeding with the criminal case but filing a civil lawsuit against Mr. Bryant instead, in which there would be a “level playing field,” on which Mr. Bryant’s own sexual history could be explored at length.

Judge Ruckriegle invited any of the affected parties to object within 24 hours, and ordered Mr. Bryant to reply within 24 hours of any objections being filed. On Thursday evening, August 5th, John Clune and Lin Wood objected to the court’s “blatantly unconstitutional prior restraint order.” That objection was joined in by the prosecutor. Both of these objections quite directly attacked Judge Ruckriegle and accused the court of trying to silence the parties from criticizing its mishandling of the case and re-victimization of the alleged victim. CBS commentator David Lugert, who shares an office with John Clune, filed his own objection, claiming that he was not a proper subject of the gag order and that it precluded him from engaging in his profession as a legal commentator.

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Prior Restraint Orders in the Kobe Bryant Case

(Continued from page 20)

Twelve news media entities (ABC, Inc., Associated Press, CBS Broadcasting, Inc., CNN, *Denver Post*, FOX News Network, *Los Angeles Times*, NBC, *New York Times*, *Orange County Register*, *USA Today*, and *Vail Daily*) also filed an objection to the judge's gag order, asserting that it was facially overbroad and an unconstitutional restriction on their ability to gather information from willing speakers. On Friday, August 6th, Mr. Bryant filed his reply in support of his motion seeking the gag order. On Monday, August 9th, Judge Ruckriegle issued an order removing CBS commentator David Lugert from the scope of the gag order, and indicating that he would strive to expeditiously resolve the remaining objections to the gag order.

On August 17, 2004 (a full 13 days after entering the initial overbroad gag order), Judge Ruckriegle issued an Amended Order re: Pretrial Publicity, see <http://www.courts.state.co.us/exec/media/eagle/08-04/amendedorderrepretrialpublicity.pdf>. In this Order, the judge noted that there had been a spate of recent press statements and media appearances by counsel for the alleged victim which included

- (1) comment on the character and reputation of the alleged victim and Defendant;
- (2) comment on the credibility of the alleged victim and Defendant;
- (3) comment on the merits of the evidence of the case;
- (4) comment on the ultimate issue of fact to be determined by a jury and opinion on the guilt or innocence of Defendant;
- (5) comment on the motives of the participants;
- (6) comment on anticipated testimony;

- (7) comment suggesting that a fair trial may not be obtained in Eagle County;
- (8) comment directed to opposing counsel that utilizes inflammatory and denigrating language; and
- (9) inflammatory comment directed toward this Court regarding the effectiveness of the judicial system.

The court also found that "it is axiomatic that statements made by counsel present a significantly greater threat of prejudice to the fairness of the proceedings." Acknowledging the objections to his earlier gag order that had been filed by the prosecutor, alleged victim's counsel, and the news media, the Court narrowed the scope of the order, essentially tracking the language of Rule 3.6 of Colorado's Rule of Professional Conduct, but extending its reach to the alleged victim and witnesses.

Kelli Sager, Alonzo Wickers IV, Sonja West, Laura Handman and Jeffrey Fisher of Davis Wright & Tremaine prepared the amicus brief in support of the petitioners.

Tom Kelley, Steve Zansberg, Chris Beall & Eileen Kiernan-Johnson of Faegre & Benson's Denver office, along with Lee Levine, Nathan Siegel and Adam Rappaport of Levine, Sullivan, Koch & Schulz represented the seven media companies that appealed Judge Ruckriegle's prior restraint order to Justice Breyer. Colorado Solicitor General Allen Gilbert and Assistant Attorneys General Matt Holman and Matt Grove represented the trial court and the District Attorney.

Steve Zansberg is a Partner at Faegre & Benson LLP in Denver, CO.

State Sides With Jacksonville Stations' Appeal of Prior Restraint

By George D. Gabel, Jr., Charles D. Tobin and Jennifer A. Mansfield

Two Gannett television stations in Jacksonville, FL, have been joined by the state of Florida in an emergency appeal of a judge's order threatening criminal prosecution for any re-broadcast of a grand jury transcript.

In an unusual move, the Florida Attorney General's office, which usually defends trial court orders on appeal, de-

clined to appear in the case and deferred to the local prosecutor to speak for the state. The prosecutor's counsel, in spirited opposition to the order, has asked an appellate court to grant the reversal requested by the newspaper.

Most of the country's largest news media organizations also have jumped into the fray, signing onto an *amici* brief written by the Reporters' Committee for Freedom of the Press. As of press time, the appeals court has not yet ruled.

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State Sides With Jacksonville Stations' Appeal of Prior Restraint

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Broadcast of Murder Defendant's Grand Jury Testimony

The issue arose when the Florida Seventh Circuit State Attorney's Office in St. Augustine responded to a discovery request by a murder defendant, Justin Mertis Barber. Barber stands accused of murdering his wife, and he also is the defendant in a wrongful death action brought by his wife's estate.

Barber testified in a civil deposition that an unknown assailant shot him and his wife while they took an evening walk on the beach. Barber also testified before the grand jury, which returned an indictment the same day. Grand jury documents usually are secret under Florida law. However, Florida law also broadly provides that, with limited exceptions not relevant here, "documents given or required by law or agency rule to be given to the person arrested" are public record. Florida Statutes § 119.011(3)(c)(5). Florida courts have broadly interpreted the provision and require compelling justification, backed up with detailed finding of facts and rejection of alternatives, before a trial court may order criminal discovery records sealed.

Following Barber's demand in the criminal case for the grand jury transcript, a reporter for Jacksonville television stations WTLV and WJXX, Gannett properties that jointly broadcast news programming under the name "First Coast News," asked the prosecutor's office for a copy. An assistant state attorney complied. The station broadcast a story on the transcripts on July 28.

Judge Issues Prior Restraint, Requests Criminal Probe of Everyone, Takes a Holiday

Late afternoon on Friday July 30, First Coast News received by fax an order rendered that day by Circuit Judge Robert K. Mathis, who presides over the criminal case in St. Augustine. The order was issued *ex parte* on the court's own motion, with no notice to the stations, the prosecutor, or defense counsel. It recites that Barber's grand jury transcript was released to the press and the sheriff's office in violation of the grand jury secrecy statute, "and that portions of the transcript have been broadcast and published" in violation of the statute as well.

The order also:

- Advises that the judge has requested the Florida Department of Law Enforcement "to conduct a criminal investigation to determine who disclosed, released, filed, or otherwise divulged" the transcript "in apparent violation" of the statute;
- Directs the clerk of the court to remove the transcript from the court file and put it in the evidence locker;
- Orders that "[n]o party shall further disclose the contents of the transcript" to anyone not authorized by the grand jury statute to see it;
- Places "[a]ll persons who have obtained a copy of the transcript . . . on notice" that "any broadcast, publication, disclosure or communications" of the contents is "punishable as a misdemeanor in addition to constituting grounds for Criminal Contempt of Court."
- Warns anyone who obtained a copy that "destruction of the transcript might constitute destruction of evidence or obstruction of justice."

The same day as he issued the order, Judge Mathis wrote a letter to the state attorney advising that the judge had asked the state for a criminal probe and that the local sheriff's office should be disqualified from conducting it. The judge at the same time wrote to the Florida Department of Law Enforcement asking it to launch the investigation.

Judge Mathis left for a week's vacation at the same time or soon after he signed the letters and issued the order.

Chief Judge Refuses to Hear Matter, First Coast News Files Emergency Appeal

The following Monday morning, August 2, First Coast News filed a Motion to Set Aside Unconstitutional Prior Restraint. The stations' lawyers throughout the day called and wrote the chief judge of the circuit asking that, with Judge Mathis on vacation, she immediately hear the motion. Late that afternoon the chief judge's assistant advised that she would make First Coast News await Judge Mathis' return.

On August 4, the stations filed an Emergency Petition for a Writ of Certiorari in the Florida Fifth District Court of Appeal. First Coast News' petition argued that: (1) the trial court order is an unconstitutional prior restraint; (2) no

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State Sides With Jacksonville Stations' Appeal of Prior Restraint

(Continued from page 22)

state interest can be asserted to justify it, as the civil deposition and grand jury transcripts contain testimony on the same subjects, and the grand jury finished its work when it indicted Barber; (3) First Coast News lawfully obtained the transcript from the state attorney and is therefore entitled to continue to publish its contents; (4) the transcript became a public record under Florida law when disclosed to the defense.

The same day the stations filed the petition, the appeals court issued an order to show cause to the parties why the petition should not be granted and set a one-week deadline for a response. The court also required First Coast News to serve the petition on the state Attorney General.

Attorney General Demurs, Prosecutor Takes on Judge

In one of many interesting turns in the case, the Attorney General's Office filed a "Notice of Non-Appearance" in the court of appeal. The notice advised that the AG would defer to the local prosecutor's office to speak for the state of Florida in a single voice.

In another unexpected and fortuitous twist, the state attorney's office hired special counsel to represent it—the lawyer who regularly represents the *Daytona Beach News-Journal*. That decision led Judge Mathis to file a "Suggestion of Disqualification" calling on the appellate panel to remove both the state attorney's office and its special counsel from the case. The judge argued that the prosecutor's office, as it is a target of the criminal probe he requested, should not be permitted to speak for the state. He also argued that the special counsel, as a regular advocate for a newspaper, also should step aside because he has a "direct conflict of interest."

The judge's filing drew a sharp rebuke from the prosecutor's special counsel in a Response to Suggestion of Disqualification:

The conflict is between Judge Mathis' view of the law and that of the State. Neither the Attorney General nor the State Attorney for the Seventh Circuit agrees with Judge Mathis' interpretation of the public records law, nor that the Order can be justified under the First Amendment. . . . It is understand-

able that Judge Mathis wants the State to "defend" his Order as if he were the client, but the State cannot do so because the higher duty is to the law. The appropriate legal officers (and this advocate) believe that the Judge erred grievously in his Order. The duty of these officers is to come to this Court and take the position that in good faith serves the law.

Judge Issues Second Order, Asks Governor to Investigate

On his first work day back from vacation, after the appeal had been lodged, Judge Mathis on August 9 issued a second order. He denied the motion to set aside that First Coast News filed in his court a week earlier. He even denied First Coast News' motion to intervene. Attempting to characterize his previous order as something other than a prior restraint, Judge Mathis' new order states at no point did he hold that First Coast News is "precluded or restrained from publishing matters which are public record" nor is it "enjoined or restrained from broadcasting matters in this case."

Instead, the new order states that the First Coast News "was placed on notice, along with all other persons who might have obtained copies . . . that publication or broadcast, or disclosure of such information, is a crime and may be punished as contempt of court." The order also held "incorrect" First Coast News' position that it lawfully obtained the transcript when a prosecutor furnished it.

The fact that the Assistant State Attorney in question disclosed these transcripts, in an apparent violation of law, does not make that disclosure lawful, does not make the transcript one of public record, and does not entitle First Coast News to publish the information.

The same day as this new order, Judge Mathis once again wrote a letter seeking an investigation. This time, he asked Florida Governor Jeb Bush to appoint an outside prosecutor, asserting the local state attorney would be conflicted from "deciding whether or not to prosecute [the assistant state attorney], First Coast News, or any other organization" that published the grand jury transcript.

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State Sides With Jacksonville Stations' Appeal of Prior Restraint

(Continued from page 23)

First Coast News Responds to New Order, Letter to Governor

First Coast News' counsel quickly wrote to Governor Bush in response, expressing "dismay[] that a sitting judge has actively sought to have it prosecuted for the routine act of conveying public information furnished by the government." The response letter furnishes the governor with a detailed history of the events and arguments and copies of Judge Mathis' orders and the appellate court filings, and asks that he decline the judge's "extraordinarily inappropriate and unprecedented requests."

The stations filed in the appeals court the judge's second order, along with a new brief attacking it. First Coast News disputed the second order's assertion that the court's "notice" of potential prosecution was not a prior restraint. It pointed to other cases where the Florida Supreme Court has characterized threats of prosecutions of journalists as "prior restraint". Regardless, the stations argued, a threat of prosecution is unconstitutional.

Here, the Orders are clear in their directions to First Coast News and others: report the information already in their possession, and the full weight of the law enforcement system will be on them. Both Orders clearly threaten First Coast News, and the trial court has lobbied the Governor to pursue prosecution of the station. Under the circumstances of this case, the Orders cannot stand as a matter of constitutional law.

Judge Mathis' letter to the governor and First Coast News' response are posted at: http://www.rcfp.org/news/documents/extra/mm_letters_to_gov_bush.pdf

Prosecutor, News Media Coalition File Supportive Briefs

Counsel for the prosecutor filed a substantive brief which began: "The State cannot defend the Order." It describes the judge's actions as "a prior restraint which cannot overcome the heavy presumption of unconstitutionality under the First Amendment." The brief argues the grand jury transcript became presumptively open,

both as a public record when furnished to the defendant and a court record when it became part of the court's file. The brief threads through the grand jury secrecy statute and Florida's public records law, arguing that when "confronted with a public records request" a prosecutor "does not violate [grand jury secrecy] by complying with the request." It urges that the appeal court quash the orders below "[t]o protect the public right of access to records of criminal prosecution and to protect the prosecutors of Florida from the chilling uncertainty" fostered by the trial judge's actions.

The Reporters Committee brought together a coalition of 17 media entities for the *amici* brief. They include: ABC, ASNE, CBS, CNN, Diversified Communications, Freedom Communications, Hearst, NBC Universal, The New York Times Co., Post-Newsweek Stations, RTNDA, SPJ, Tribune Co., The Washington Post. Co., Media General, and Scripps. Their brief cites a number of examples where journalists in Florida and elsewhere have exposed significant issues in the criminal justice system, including grand juries, through access to court records. The brief also underscores the unconstitutionality of threats of prosecutions of journalists and other prior restraints.

The state of Florida is represented by Jonathan D. Kaney, Jr., specially retained by the Seventh Judicial Circuit State Attorney's Office. The *amici curiae* brief was prepared by Lucy A. Dalglish, Gregg P. Leslie, and James A. McLaughlin of the Reporters' Committee for Freedom of the Press in Arlington, VA, and filed by Robert Rivas, Sachs, Sax & Klein, P.A., Tallahassee.

George D. Gabel, Jr., Charles D. Tobin and Jennifer A. Mansfield, with Holland & Knight LLP, represent First Coast News in this matter. Gabel and Mansfield are with the firm's Jacksonville, FL office, and Tobin is with the Washington, D.C. office.

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Inter-American Court of Human Rights Throws Out Reporter's Criminal Libel Conviction

In what could be a ground breaking decision, on August 4th the Inter-American Court of Human Rights announced that the criminal libel conviction of Costa Rican journalist violated the right to free speech under Article 13 of the American Convention on Human Rights.

The decision is currently available only in Spanish and is on the web at <www.corteidh.or.cr/seriec/seriec_107_esp.doc>. MLRC will publish a more detailed report on the decision when the Court issues an English translation.

Background

In 1999, Mauricio Herrera, a journalist for the Costa Rican daily newspaper *La Nacion*, was convicted of criminal libel for a series of reports about Felix Przedborski, a former Costa Rican diplomat implicated in an international arms scandal.

Allegations against Przedborski first appeared in several Belgian newspapers. Herrera's articles reported on these allegations and also included interviews with European diplomats.

Przedborski, a Polish national who became a Costa Rican citizen and served as an honorary diplomat to several European countries, filed a complaint under Costa Rica's criminal code which provides criminal penalties for the "dishonoring of" or "spreading [of] information liable to effect" a person's reputation.

Herrera was convicted and he and *La Nacion* were ordered to pay Przedborski approximately \$200,000 in damages, to publish the ruling and to remove all links to the articles on the newspaper's website. Herrera and *La Nacion* were also listed as convicted criminals. In 2001, the Costa Rican Supreme Court upheld the conviction.

The American Convention

Herrera and *La Nacion* then began an appeal process under the American Convention on Human Rights. (The Convention is available online at www.cidh.org/Basicos/basic3.htm).

The Convention has been adopted by 24 nations in Central and South America. Article 13 provides for the right of freedom of thought and expression as limited by

law to the extent necessary to protect reputation, national security, public order, health and morals.

Article 13 of the American Convention is similar to Article 10 of the European Convention on Human Rights. But the Convention's enforcement mechanisms differ. Under the American Convention, individuals are not entitled to bring complaints directly to the Inter-American Court. Instead, they must first file an appeal with the Inter-American Human Rights Commission, based in Washington, D.C. which can refer a case to the Inter-American Court, as well as issue a non-binding opinion on the merits of the complaint.

As required under the Convention, the defendants first filed an appeal with the Inter-American Commission on Human Rights based in Washington, D.C. The Commission issued a non-binding ruling in favor of the defendants which Costa Rica declined to follow. The Commission then allowed the defendants to appeal to the Inter-American Court.

IACHR Decision

According to news reports, the Inter-American Court of Human Rights set aside the conviction in part on the ground that public officials and others who "enter the sphere of public discourse" must tolerate a greater "margin of openness to a broad debate on matters of public interest."

Moreover, the Court reasoned that Costa Rica improperly restricted the defendants' right of free expression by requiring them to prove the truth of the newsworthy allegations first published in the European press.

The Court ordered the convictions and all their effects reversed and required Costa Rica to pay Herrera \$20,000 in moral damages and \$10,000 in legal expenses. Costa Rica has indicated that it will comply with the ruling.

Several international organizations submitted briefs in support of Herrera, including the World Press Freedom Committee, represented by Kevin Goldberg of Cohn & Marks; and the Committee to Protect Journalists, represented by James Goodale, Jeremy Feigelson, Erik Bierbauer, Pablo J. Valverde, and Ellen Hochberg of Debevoise & Plimpton.

Third Circuit Affirms Dismissal of Suit Over Use of Plaintiff's Name in Ad

By David McCraw

The Third Circuit has affirmed the dismissal of a complaint brought by a New Jersey man who objected to the use of his name "Larry Botts" in the well-known "A Mind Is A Terrible Thing To Waste" ad campaign by the United Negro College Fund. *Botts v. New York Times Co.*, 2004 WL 1616354, (3d Cir. July 20, 2004).

The ad in question, which ran in The New York Times, showed the photograph of a homeless derelict and had a high school yearbook photo imposed over his face. Under the yearbook photo, which depicted an African-American, was the name "Larry Botts."

Botts, who is white and college-educated and worked in advertising, sued for libel, false light, misappropriation of identity, and intentional infliction of emotional distress. He was joined in the suit by his father (who has the same name) and his mother. He named as defendants The New York Times Company, Young & Rubicam (the creators of the ad), and the United Negro College Fund.

In affirming the District Court's dismissal of the complaint's libel cause of action, the Third Circuit held that the ad could not reasonably be construed as concerning the plaintiffs. The Court noted that the plaintiffs, "who are Caucasian, do not claim that readers of the Times could reasonably draw the conclusion that plaintiffs were African-Americans in need of a UNCF college scholarship." Likewise, in dismissing the false light count, the Court said no reasonable person could confuse the advertisement's fictional "Larry Botts" with the plaintiffs.

In addressing the plaintiffs' misappropriation claim, the Court noted that the ad was a commercial communication but characterized the name "Larry Botts" as a "generic placeholder" like John Doe. As such, the Court said, it did not attempt to exploit the identity of any particular person for commercial gain.

The Court did not address a statute-of-limitations issue that had been a central part of the arguments in the District Court and in the appellate briefs. The ad first ran in the national edition of The New York Times in January 2002. That edition does not circulate in New Jersey, where the plaintiffs reside. The ad then ran a second time in February 2002 in The Times's edition that covers the tri-state area. Plaintiffs filed suit in February 2003.

In response to the defendants' argument that the libel claim was time-barred by New Jersey's one-year statute of limitations, the plaintiffs claimed that (a) the February edition of the newspaper in which the ad ran was a separate publication that started the limitations clock running anew and (b) publication in the national edition, which was not readily available in plaintiffs' community, should not be relevant to the limitations calculation. The District Court had dismissed the libel claim solely on limitations grounds but the Third Circuit said it did not need to reach the issue because of the plaintiffs' failure to state a claim.

The defendants were represented by Howard Rubin and Lauren Pearle of Davis & Gilbert, New York City. The plaintiffs were represented by Robert Rusignola of Short Hills, N.J.

David McCraw is Counsel at The New York Times Company.

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Kansas Court of Appeals Affirms Criminal Libel Convictions

The Kansas Court of Appeals affirmed the criminal libel convictions of a fringe newspaper and its editor – the first time in more than 30 years that members of the press have been convicted of criminal defamation in the U.S. *Kansas v. Powers*, No. 90690 (Kan. Ct. App. Aug. 20, 2004) (unpublished) (Marquardt, Malone and Rosen, JJ). See also *MediaLawLetter* Aug. 2002 at 5, Dec. 2003 at 31, May 2004 at 16.

The case is an embarrassment to all those who promote First Amendment law as a model to other countries around the world – and a particular disappointment in light of the Inter-American Court of Human Rights' groundbreaking decision reported in this issue of the *MediaLawLetter* holding that a criminal libel conviction violated international norms of free expression.

Background

At issue were several articles published in *The New Observer*, a free irregularly published newspaper in the Kansas City area. The articles reported that the mayor of Kansas City, Carol Marinovich, and her husband, a sitting Kansas state court judge, lived outside of Wyandotte County in violation of residency rules.

The newspaper had been a persistently strident critic of the Mayor and local officials and regularly leveled charges of incompetence and corruption against her and her administration, including lambasting the district attorney that initiated the criminal libel prosecution against the newspaper.

Interestingly, the articles about the Mayor's residency were among the mildest of the newspaper's attacks and prosecutors never claimed that she or her husband suffered any injury to reputation or other damage.

In March 2001, the newspaper, its publisher and editor were charged with multiple counts of criminal defamation. They were convicted following a jury trial in July 2002. The publisher and editor were both ordered to pay \$3,500 in fines, and sentenced to one year unsupervised probation. The newspaper and its editor appealed and his fine was suspended pending appeal.

Appeals Court Decision

The per curiam decision gives scant attention to the First Amendment issues involved due in part to inadequate brief-

ing by defendants' counsel and the court's apparent reluctance to give serious consideration to the constitutional issues surrounding criminal libel. Without comment the court earlier this year denied a motion by a group of media companies seeking permission to file an amicus brief challenging the statute on First Amendment grounds.

The court quickly disposed of two unfocused constitutional arguments raised by the defendants. First, defendants claimed that the statute "is unconstitutional because it reduces the required burden of proof to something less than reasonable doubt." Second, that the state submitted no proof of damages.

Defendants' first argument was based on the language of the statute which defines criminal libel as knowingly false statements about a living person "tending" to expose them to public hatred, contempt, ridicule, etc. Defendants appeared to be trying to sketch out a vagueness argument but it was unclear at best. The court simply concluded that the jury was instructed to find proof of guilt beyond a reasonable doubt and left it at that.

The defendants also claimed that their conviction was unconstitutional because the state offered no proof of damages, but they provided no argument to support this point. A fully developed argument on this point might have educated the court on some of the inherent contradictions involved in trying to protect personal reputation through criminal law. The absence of any requirement of damage to reputation, for example, shows that there are hardly any guidelines to govern enforcement of the criminal libel statute.

Absent any meaningful discussion on this point by defendants, the court simply concluded that damages are not an element of the statute. The bulk of their brief on appeal was mired in arguments on procedure, conflict of interest and prejudice, none of which succeeded with the appeals court.

Kansas Statute

The Kansas criminal defamation statute, K.S.A. 21-4004, provides in relevant part:

- (a) Criminal defamation is communicating to a person orally, in writing, or by any other means, information, knowing the information to be false and with

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KS Ct. of Appeals Affirms Criminal Libel Convictions

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actual malice, tending to expose another living person to public hatred, contempt or ridicule; tending to deprive such person of the benefits of public confidence and social acceptance; or tending to degrade and vilify the memory of one who is dead and to scandalize or provoke surviving relatives and friends.

In July 1995, following an unsuccessful civil court challenge in federal court, the statute was amended to expressly include an actual malice standard (viz. “knowing the information to be false and with actual malice”), but it otherwise substantially tracks an 1868 definition of criminal libel.

Press Would Have Challenged Statute

The Associated Press, Dow Jones & Company, Inc., the Kansas Broadcasters Association, the Kansas Press Association and Reuters America LLC has sought to challenge the constitutionality of the Kansas criminal defamation statute on three grounds.

First that the statute violates the First Amendment on its face because the language that attempts to identify what speech is subject to criminal punishment is impermissibly vague and allows for arbitrary and selective enforcement.

Second, that the statute is unconstitutional under a strict scrutiny standard because Kansas has no interest to investigate and prosecute potentially libelous statements about public officials or people of any kind. Moreover, civil defamation law provides an entirely adequate remedy for complaints about alleged harm to reputation.

Finally, amici argue the statute is simply per se unconstitutional under evolved standards of decency and freedom.

Further Appeal?

The defendants may petition for review by the Kansas Supreme Court, but appeals to the court are discretionary. Given the defendants weak constitutional arguments an appeal may draw little interest from the court.

The constitutional objections to the Kansas statute, however, may get a hearing in a separate Kansas federal court action where a § 1983 action has been filed following an attempted criminal libel prosecution.

Federal Court Challenge

On March 13, 2003, criminal defamation charges were filed against Larry Hiatt, publisher of the weekly *Baxter Springs News* in Baxter Springs, Kansas; columnist Ron Thomas, and city council candidate Charles How, Jr. stemming from a column and political advertisement criticizing the Baxter Springs City Clerk. See *MediaLawLetter* June 2004 at 15.

In June 2003, the criminal defamation charges were dismissed *without* prejudice, with the city attorney publicly announcing that he would appoint a special prosecutor to refile the charges. After no action by the prosecutor for a year, Ron Thomas and Charles How filed a § 1983 action against the City of Baxter Springs and town officials. In addition to seeking damages, they are seeking a declaration that the municipal criminal libel ordinance (identical to the state statute) is unconstitutional.

A conference is scheduled for later this month to set a discovery schedule in the case.

At press time, MLRC learned that the Clerk of the Kansas Court of Appeal erroneously designated the decision in *Kansas v. Powers* as a per curiam decision. In fact, Judge Rosen dissented and the decision will be corrected to include a written dissent which reportedly holds that the statute violates the First Amendment.

The defendants in *Kansas v. Carson* were represented by Mark Birmingham in Kansas City. The state of Kansas is represented by J. David Farris of Atchison, Kansas, a private attorney appointed as a special prosecutor in the case. The proposed media amici brief was prepared by David Heller, MLRC; Mike Merriam, Topeka, Kansas; and James Goodale, Jeremy Feigelson and Erik Bierbaur of Debevoise & Plimpton in New York. Sam Colville, of Holman Hansen & Colville, Overland Park, Kansas, represents the plaintiffs in the federal court action.

MLRC would like to thank summer interns Adam Mandel, Michigan Law School; Jessie Mishkin, Harvard Law School; Phu Nguyen, Yale Law School and Julie Zando Dennis, Cardozo Law School for their contributions to this month's MediaLawLetter

California Federal Court Rules Criminal Police Libel Statute Unconstitutional

A California federal court ruled last month that a California statute that makes it a misdemeanor to file a false charge of misconduct against a police officer is facially unconstitutional. *Hamilton v. San Bernadino*, No. CV 00-107-RT, 2004 WL 1551460 (C.D. Cal. July 7, 2004).

The court held that California Penal Code § 148.6 essentially amounts to viewpoint discrimination because it creates a special defamation rule for complaints against police officers. The court granted summary judgment in favor of plaintiff and issued a permanent injunction against its enforcement.

The decision sets up an interesting conflict with California's state courts. In 2002 the California Supreme Court upheld the constitutionality of the statute against a facial challenge, explicitly rejecting all the reasoning employed here by the district court. See *People v. Stanistreet*, 127 Cal.Rptr.2d 633, 58 P.3d 465 (2002).

Background

Cal. Penal Code 148.6(a)(1) provides that: "Every person who files any allegation of misconduct against any peace officer ... knowing the allegation to be false, is guilty of a misdemeanor."

Section 148.6(a)(2) requires complainants to read and sign an advisory that states in relevant part:

You have the right to make a complaint against a police officer for any improper police conduct. California law requires this agency to have a procedure to investigate citizens' complaints. You have a right to a written description of this procedure. This agency may find after investigation that there is not enough evidence to warrant action on your complaint; even if that is the case, you have the right to make the complaint and have it investigated if you believe an officer behaved improperly....

It is against the law to make a complaint that you know to be false. If you make a complaint against an officer knowing that it is false, you can be prosecuted on a misdemeanor charge.

The statute was enacted in 1995. The California Legislature noted that following revised complaint procedures

instituted in the aftermath of the Rodney King case, many "less ethical citizens ... maliciously file[d] false allegations of misconduct against officers in an effort to punish them for simply doing their jobs." See *San Diego Police Officers Assn. v. San Diego Police Department*, 76 Cal. App.4th 19, 22-23, 90 Cal.Rptr.2d 6.(Cal. App. 1999).

A preexisting statute, Cal. Penal Code § 148.5, makes it a misdemeanor to make a knowingly false report of a misdemeanor or felony. However, several state court decisions had held that this section did not apply to citizens' complaints of police misconduct. See, e.g., *Pena v. Municipal Court*, 157 Cal. Rptr. 584 (Cal. App. 1979); *People v. Craig*, 26 Cal.Rptr.2d 184 (Cal. App. 1993). Section 148.6 was enacted to fill this gap.

Federal Court Decision

The decision by Judge Robert J. Timlin acknowledged the conflicting California Supreme Court decision, but found that the state court erred in applying the U.S. Supreme Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

Both the federal court and the California Supreme Court agreed that *R.A.V.* controlled. In *R.A.V.*, the Supreme Court considered the constitutionality of an ordinance that prohibited the placing on public or private property a burning cross, a Nazi swastika, or other symbols "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."

The Supreme Court struck down the ordinance for violating the First Amendment. Justice Scalia writing for five members of the Court, (three other justices concurred in the result only), held that the First Amendment imposes a 'content discrimination' limitation on the government's authority to prohibit subclassess of "proscribable speech," such as fighting words, obscenity and defamation, where the discrimination creates a danger of viewpoint discrimination by the government. *Id.* at 387.

He concluded that the ordinance improperly discriminated among fighting words based on race, color, creed, religion, or gender, concluding that the "First Amendment does not permit St. Paul to impose special prohibi-

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CA Court Rules Criminal Police Libel Statute Unconstitutional*(Continued from page 29)*

tions on those speakers who express views on disfavored subjects.”

Scalia’s decision sets out three areas where subclasses of proscribable speech can be singled out for regulation without raising constitutional concern. First, “When the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.” *Id.* at 388. For example, Scalia found no constitutional issue raised by the federal statute that criminalizes only threats against the President.

Second, “where the subclass happens to be associated with particular ‘secondary effects’ of the speech, so that the regulation is ‘justified without reference to the content of the ... speech.’” *Id.* at 389. And, third, a catchall provision that permits regulation “so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot.” *Id.* at 390.

Interestingly, the concurring opinion by Justice White strongly criticized Scalia’s approach, arguing that each one of these tests could just as well support the constitutionality of the Minnesota ordinance – an argument presaging the California courts’ split in applying *R.A.V.* to defamation law.

Applying R.A.V. to § 148.6

Applying *R.A.V.*, the district court concluded that Section 148.6’s prohibition on false complaints against police officers was not based on the same reasons underlying the general prohibition on defamatory speech. Among other things, the court reasoned that “the reasons for prohibiting defamation are less pronounced when the defamatory statements are directed to public officials.”

The statute, according to the district court, could also not be justified as a regulation of the secondary effects of false complaints. The state argued that the statute was designed in part to curb the waste incurred by investigating false complaints and damage to officer’s reputation. But the district court concluded that these are the results of the content of the speech and not “secondary effects” within the meaning of the law.

Finally, the court concluded that the statute could reasonably be viewed – albeit indirectly – as government suppression of speech. The sober warning that false complaints

can be prosecuted as criminal offenses would likely cause individuals to refrain from filing complaints altogether.

The California Supreme Court in *Stanistreet* disagreed on each of these points, concluding that “Warning people of the consequences of a knowingly false complaint is no more impermissible than advising people they are signing a document or testifying under penalty of perjury. The explanation and admonition do not invalidate the statute.” *Stanistreet*, 127 Cal.Rptr.2d 633, 642.

Conclusion

California will likely appeal the decision to the Ninth Circuit. The district court ruling impacts another related California statute, Cal. Civil Code § 47.5, which allows police officers to file civil libel suits against individuals who knowingly make false misconduct complaints against them.

Last year a California appellate court upheld the statute on appeal of a jury verdict in favor of a police officer. *Loshonkohl v. Kinder*, 109 Cal. App. 4th 510 (2003) (affirming a \$350,000 judgment). Relying on the California Supreme Court’s decision in *Stanistreet*, the appeals court reasoned that the statute does not result in “the official suppression of ideas.”

The California Supreme Court declined to hear an appeal of the decision and this year the U.S. Supreme Court denied certiorari in *Loshonkohl*.

Plaintiff was represented by Benjamin E. Wizner and Mark D. Rosenbaum, ACLU Foundation of Southern California; and Joe H. Freeman, III, Robert A. of Seeman, Freeman & Associates, Burbank. The city was represented by Christopher D. Lockwood, Joseph Arias, Arias Lockwood & Gray; and the San Bernardino City Attorneys Office.

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Wyoming Supreme Court Affirms Dismissal of Defamation Suit on Jurisdiction Grounds

A Wyoming catalogue publisher cannot sue a Nebraska-based paid advertiser for defamation in Wyoming because the state lacks personal jurisdiction over the defendant. *Cheyenne Publishing v. Starostka*,⁹⁴ P.3d 463, 2004 WY 88 (Wyo. July 23, 2004). Cheyenne Publishing and its owners Larry and Nancy Lovelass filed a complaint against Ardith Starostka for defamation, intentional interference with contract, and interference with prospective contractual advantage for email, telephone, and written correspondence she had with other advertisers in Cheyenne's art buyers guide book.

According to Starostka's affidavit submitted with her motion to dismiss, Cheyenne contacted her in Nebraska via telephone and then in person to solicit her purchase of space in a proposed "Art Buyers Guide, Volume IX, featuring Nebraska artists." Although no written agreement was entered into the record, neither side disputed that Starostka agreed to buy space. Displeased with the arrangement, Starostka went on the offensive, reaching out to other advertisers from neighboring states, but none from Wyoming. Plaintiffs also contended that Starostka defamed them by contacting businesses and agencies in Wyoming, however, the court does not address these issues in its discussion.

The court relies in part on the three-part test which defines the outer limits of Wyoming's long-arm jurisdiction reach, articulated in *O'Bryan v. McDonald*, 952 P.2d 636 (Wyo. 1998):

1) the defendant must purposefully avail himself of the privilege of acting in the forum state or of causing important consequences in that state, 2) the cause of action must arise from the consequences in the forum state of the defendant's activities, and 3) the activities of the defendant or the consequences of those activities must have a substantial enough connection with the forum state to make the exercise of jurisdiction reasonable.

Cheyenne argued the court should assert jurisdiction because Starostka's action in Nebraska "came to roost in Wyoming in the form of detrimental...consequences for Cheyenne Publishing." The court, however, rejected this reasoning, noting that the plaintiff's pleading did not assert that defendant had sufficient contact with Wyoming that would justify hailing her into court there. The court relied on the fact that the contract was formed entirely in Nebraska; all contacts associated with the contract took place in Nebraska; and the alleged defamation was not directed to readers in Wyoming.

Guy Patrick Vleveland, Cheyenne, Wyoming represented plaintiff, Cheyenne Publishing. William K. Rounsborg of White and Steele, PC., Cheyenne, Wyoming represented defendant, Ardith Starostka.

Federal District Court Throws Out Defamation Suit By Carolyn Condit

By Gregory P. Williams and Jim Dines

A federal district court in New Mexico has dismissed a defamation suit brought by the wife of ex-Congressman Gary Condit against USA TODAY and its parent company, Gannett, ruling that New Mexico did not have personal jurisdiction over the defendants.

Carolyn Condit alleged in the lawsuit (captioned Carolyn Condit v. USA TODAY and Gannett Co., Inc., U.S.D. C. (N.M.) No. CIV 03-0862) that she was defamed by Defendants in a July 27, 2001, article in USA TODAY. That article included a two-sentence reference to an item previously published in the National Enquirer regarding an alleged telephone confrontation between Carolyn Condit and

Chandra Levy. At the time that the statements appeared in USA Today, Gary Condit had admitted a romantic relationship with Ms. Levy, his former intern, who had since disappeared. The case was a matter of intense national attention at the time of the article.

Plaintiff chose to file suit in New Mexico presumably because of New Mexico's three-year statute of limitations for defamation claims, one of the longest in the country. She had already sued the National Enquirer in California for defamation, and reached a settlement in that case. Plaintiff did not name USA TODAY or Gannett as Defendants in that suit, and the statute of limitations in California had expired by the time she filed suit in New Mexico.

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Federal District Court Throws Out Defamation Suit By Carolyn Condit

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Condit Argues General Jurisdiction

Defendants moved to dismiss the suit on jurisdictional grounds. Defendants presented evidence that the article in question was never circulated in New Mexico.

Gannett published at least two editions of the July 27, 2001, USA TODAY, and only the first edition was distributed in New Mexico. The allegedly defamatory statements appeared only in the second edition. Defendants argued that, under those circumstances, the court did not have personal jurisdiction over Defendants.

Plaintiff argued that Gannett's publication of up to 16,000 copies per day of USA TODAY in New Mexico, in addition to certain other business interests of Gannett in New Mexico, meant that Defendants had submitted themselves to jurisdiction in the state.

Fails Due Process Analysis

The district court granted the motion to dismiss, finding that New Mexico did not have jurisdiction over the Defendants. The court applied a constitutional analysis under the due process clause.

The court ruled that there were not sufficient "minimum contacts" between New Mexico and Defendants to allow for jurisdiction, finding that

- (1) there was no specific jurisdiction over Defendants because the article was never published in New Mexico, and
- (2) there was no general jurisdiction because Defendants' business presence in New Mexico was too small.

The Court noted that although 16,000 daily newspapers circulated in New Mexico "sounds substantial," that circulation is less than 0.6% of USA TODAY's total circulation. The court went on to note that the exercise of jurisdiction in this case would not comport with traditional notions of fair play and substantial justice, considering the burden on Defendants in litigating the case in New Mexico, the lack of any significant interest to the state of New Mexico in having the dispute adjudicated there, and the lack of any witnesses in New Mexico.

In making its decision, the court distinguished this case from *Keeton v. Hustler Magazine*, 465 U.S. 770 (1984).

In *Keeton*, a defamation case, the United States Supreme Court ruled that the New Hampshire courts had jurisdiction over defendant despite the fact that only a small percentage of the copies of the nationwide magazine were actually circulated in New Hampshire. The Condit court held that *Keeton* was not controlling because not even a single copy of the allegedly defamatory USA TODAY article had been published in New Mexico.

Johnson & Rishwain, LLP, Neville L. Johnson and James T. Ryan; Carpenter & Stout, Ltd., William H. Carpenter and David J. Stout, for Plaintiff Carolyn Condit.

Nixon Peabody, LLP, Robert C. Bernius and Leslie Paul Machado; Dines & Gross PC, Jim Dines and Gregory P. Williams, for Defendants Gannett Co., Inc., and USA TODAY.

Gregory P. Williams and Jim Dines are media attorneys with Dines & Gross, P.C. in Albuquerque, New Mexico.

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California Court of Appeal Holds eBay Not Immune Under CDA

Online Release Effective to Protect Internet Auction House eBay

By Jeffrey P. Hermes

In *Grace v. eBay, Inc.*, Docket No. B168765 (Cal. Ct. App. 2d Dist. July 22, 2004) (Croskey, Acting P.J.), the California Court of Appeal for the Second Appellate District overruled a decision of the Los Angeles Superior Court, which had held that internet auction house eBay, Inc. was immune, under the Communications Decency Act of 1996, to a cause of action for libel arising out of negative “feedback” about the plaintiff posted on eBay’s internet website by a third party.

The Court of Appeal, diverging from the majority of courts that had analyzed the protection afforded to providers and users of interactive computer services by 47 U.S.C. § 230 (part of the Communications Decency Act), held that § 230 applies only to preempt “publisher” liability for content, and not “distributor” liability, as those terms are defined by the common law.

Thus, the Court of Appeal held that providers and users of interactive computer services could be held liable as distributors of content without offending § 230 if they knew or had reason to know that the information posted was defamatory.

The Court of Appeal nevertheless affirmed the dismissal of the plaintiff’s claims against eBay, as it found that the plaintiff had waived his claims by accepting an eBay User Agreement containing a broadly-worded release.

Background

The plaintiff, Roger Grace, was the winner of six auctions for goods offered for sale on eBay’s website by Tim Neeley, a dealer in Hollywood memorabilia. eBay encourages buyers and sellers using its service to post “feedback” about the people they have dealt with on eBay’s website; this feedback takes the form of a brief online comment, with a tag identifying the comment as positive, negative or neutral. Any user of eBay’s service can view the collected feedback of any other user.

With respect to three of the auctions that Grace won, he left negative feedback about his experiences with Neeley. In response, Neeley left negative feedback for Grace with respect to all six of the auctions, posting for each auction a comment stating: “Complaint: SHOULD BE BANNED FROM EBAY!!!! DISHONEST ALL THE WAY!!!!”

Grace notified eBay that Neeley’s comments were defamatory, but, according to the opinion, eBay refused to remove them.

Grace filed suit against Neeley and eBay, including claims for libel and unfair trade practices against eBay. The libel claim rested on eBay’s publication of Neeley’s negative comments. eBay demurred to the plaintiff’s complaint, seeking dismissal of all claims against it.

In *Grace v. Neeley*, No. BC288836 (Cal. Super. L.A. County Apr. 28, 2003) (Willhite, J.), the Los Angeles Superior Court ruled that Grace’s libel claim was precluded by 47 U.S.C. § 230. The court found, however, that

the immunity provisions did not necessarily preclude a cause of action for unfair business practices under Section 17200 of the California Business and Professions Code (except inasmuch as the alleged libel was the basis for that claim), but nevertheless held that the plaintiff’s claims under Section 17200 failed for other reasons.

On appeal, Grace challenged the Superior Court’s ruling under 47 U.S.C. § 230 on his libel claim against eBay (including his claim under Section 17200, to the extent that claim was premised on the libel claim), but did not challenge the dismissal of his other Section 17200 claims. Grace also challenged a ruling of the Superior Court denying him leave to amend his complaint to add a challenge to the constitutionality of 47 U.S.C. § 230.

47 U.S.C. § 230 Does Not Preclude “Distributor” Liability

The Court of Appeal ruled that the Superior Court erred in sustaining eBay’s demurrer to the plaintiff’s libel claim on the basis of 47 U.S.C. § 230(c)(1), which provides that

The Court of Appeal held that § 230 applies only to preempt “publisher” liability for content, and not “distributor” liability, as those terms are defined by the common law.

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CA Court of Appeal Holds eBay Not Immune Under CDA*(Continued from page 33)*

“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

The Court of Appeal agreed with the Superior Court that eBay was within the class of entities protected by this provision, as eBay’s use of an interactive website for its business made it, at the very least, a “user of an interactive computer service.” However, the Court of Appeal disagreed with the Superior Court’s interpretation of § 230(c)(1) as a complete bar to libel claims based upon the publication of “any information provided by another information content provider.”

In its interpretation of § 230, the Court of Appeal focused primarily upon principles of federal preemption. In that regard, the Court found that Congress’ use of the phrase “publisher or speaker” in § 230(c)(1) was significant, because, the Court stated, the common law of libel recognizes a distinction between “publisher[s] or speaker [s]” of defamatory material, and mere “distributors” or “transmitters” of such material.

Specifically, the Court stated, distributors may only be held liable upon proof that they knew or should have known that they have disseminated defamatory content, while publishers are presumed to know of the content that they publish. Relying on the presumption that Congress is aware of common law principles when it enacts statutes, the Court of Appeal held that because Congress focused only on “publishers or speakers” in § 230(c)(1), it did not evince a clear intent to preempt liability for distributors under common law principles.

Court held, § 230(c)(1) operates solely to eliminate a presumption that the provider or user of an interactive computer service knows of the content of statements published on that service. Under the Court’s ruling, a provider or user of an interactive computer service may be found liable as a distributor, if the plaintiff provides proof that the defendant knew or should have known of the defamatory content at issue.

Thus, because Grace could attempt to prove that eBay was liable as a distributor because it knew or should have known of the allegedly defamatory statements, the Court did not sustain a demurrer to the libel claim at the pleading stage on the basis of § 230.

Reliance Upon Legislative History

In support of its ruling, the Court of Appeal relied upon the legislative history of § 230(c)(1). Specifically, the Court considered the conference committee report on the Communications Decency Act of 1996, which stated that § 230 was, in part, intended to overrule cases such as *Stratton-Oakmont, Inc. v. Prodigy Services Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). See H.R.Rep. No. 104-458, 2d Sess., p. 194 (1996).

In *Stratton-Oakmont*, the New York Supreme Court held that a computer bulletin board operator who took steps to remove offensive postings and otherwise to screen content was a publisher of content rather than a distributor, and could therefore be found liable for defamation without proof that the operator knew or should have known of allegedly defamatory content. 1995 WL 323710, at p. 3.

Based on the committee’s citation of *Stratton-Oakmont*, the California Court of Appeal found that Congress’ intent in enacting § 230 was to ensure that providers of interactive computer services are not treated as publishers or speakers of information provided by others because of the

operator’s efforts to control offensive content. But, the court found, there is no indication that Congress intended to preclude liability where the provider “knew or had reason to know” that the matter was defamatory – “that is, common law distributor liability.”

The Court of Appeal chose to disregard another committee report regarding the enactment of 47 U.S.C. § 941, which relates to the creation of an internet domain limited to child-appropriate material. In that report, the House committee stated that court decisions which had interpreted § 230(c) as providing complete immunity to defamation claims, including *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), had correctly interpreted that statute, and that the same protection would inure to the benefit of websites in the new domain created by § 941. See H.R.Rep. No. 107-449, 2d Sess., p. 13 (2002), reprinted in 2002 U.S. Code Cong. & Admin. News, p. 1749. The Court of Appeal held that the legislative history of § 941 was inapplicable to the interpretation of § 230, finding that the legislative history of a later Congress was unpersuasive as to the intent of the Congress that enacted § 230.

Because Grace could attempt to prove that eBay was liable as a distributor because it knew or should have known of the allegedly defamatory statements, the Court did not sustain a demurrer to the libel claim at the pleading stage on the basis of § 230.

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CA Court of Appeal Holds eBay Not Immune Under CDA

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Disagreement with Prior Case Law

In reaching its conclusions, the Court of Appeal expressly disagreed with a developing line of cases holding that 47 U.S.C. § 230 precludes liability for internet “providers and users” of interactive computer services, including the rulings of the U.S. Court of Appeals for the Fourth Circuit in *Zeran v. America Online, Inc.*, and the California Court of Appeal for the Fourth District in *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816 (Cal. Ct. App. 4th Dist. 2002).

Notably, the Fourth Circuit in *Zeran* held that, if internet service providers could be held liable as distributors, it would inevitably chill protected free speech. The sheer volume of material that is processed by many internet websites would make it impractical to investigate every complaint from any source that particular content is defamatory. The federal court then posited that, in the absence of immunity, internet service providers would be compelled to delete content without investigation in order to avoid liability. *Zeran*, 129 F.3d at 333.

Moreover, allowing for distributor liability would deter internet service providers from self-regulation of offensive material, because the fact of such regulation would give potential plaintiffs a basis to argue that the provider knew or should have known of allegedly defamatory content; thus, the federal court held, distributor liability for internet publishers of third-party content would defeat Congressional intent. *Id.*

The California Court of Appeal criticized the reasoning of *Zeran*, arguing that the purpose of § 230 was to promote efforts to control objectionable content and remove disincentives to the development of technologies to accomplish that purpose. The *Grace* court opined that complete immunity under § 230, rather than providing adequate safety for technical development, would encourage internet service providers to do nothing; in contrast, a threat of distributor liability would be an incentive to the development of screening technologies.

Flawed Reasoning

The reasoning of the California Court of Appeal in *Grace v. eBay* appears, on balance, to be flawed. As discussed above, the California court effectively reads § 230 to grant limited protection to publishers by eliminating a presumption that publishers know or should know of any allegedly de-

famatory statements that they publish. However, the court has placed no restrictions on how a plaintiff can prove knowledge as a factual issue.

The precise reason that publishers are presumed at common law to know of the content they publish, while distributors are not, is because publishers exercise traditional editorial functions that bring them into contact with the material published. Even if there is no legal presumption of knowledge, under the California court’s ruling plaintiffs can simply argue that the exercise of editorial functions by website providers creates a factual basis for distributor liability under a ‘should have known’ standard.

This hurdle is even further lowered if the plaintiff notifies the defendant of alleged libel, as with the notice issued by Grace to eBay in this case. The elimination of a technical legal presumption is thus a meaningless gesture, that would not give internet providers any greater security in attempting to restrict potentially offensive material (as the Fourth Circuit correctly noted in *Zeran*).

Waiver of Claims in the eBay User Agreement

Notwithstanding its analysis of 47 U.S.C. § 230, the California Court of Appeal affirmed the Superior Court’s decision to sustain eBay’s demurrer, finding that the plaintiff had waived his claims against eBay by accepting eBay’s “User Agreement.” The User Agreement stated that each user released eBay from claims and demands “of every kind and nature, known and unknown, ... arising out of or in any way connected with ... disputes [with one or more users],” and contained an express waiver of California Civil Code § 1542, which would otherwise limit the scope of a general waiver of liability.

The Court of Appeal found that the User Agreement was specific enough to waive the plaintiff’s libel claim against eBay, as that claim arose out of his dispute with another user (Neeley, the seller in the auctions at issue). As the Court of Appeal had affirmed on the basis of the User Agreement, while rejecting the Superior Court’s interpretation of 47 U.S.C. § 230, it found that the plaintiff’s attempt to raise the issue of the constitutionality of § 230 was moot.

Grace v. eBay, Inc., Docket No. B168765 (Cal. Ct. App. 2d Dist. July 22, 2004) (Croskey, Acting P.J.). Roger

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CA Court of Appeal Holds eBay Not Immune Under CDA*(Continued from page 35)*

M. Grace, in pro. per., and Lisa Grace-Kellogg for Plaintiff/Appellant. Michael Rhodes and Andrea Bitar of Cooley Godward LLP for Defendant/Respondent. Samir Jain of Wilmer Cutler Pickering LLP for Amazon.com, Inc., America Online, Inc., Google Inc. and Yahoo! Inc. as Amici Curiae

on behalf of Respondent. The slip opinion for this decision is available on-line at <http://www.courtinfo.ca.gov/opinions/documents/B168765A.DOC>.

Jeffrey P. Hermes is an associate with the Boston office of Brown Rudnick Berlack Israels LLP.

Libel Suit Over Aviation Ratings Dismissed**By John Borger**

Aviation Charter, Inc., owner of the plane that crashed and killed U.S. Senator Paul Wellstone days before the 2002 elections, saw its libel claims grounded by a federal judge in July 2004. The Court held that the public-figure plaintiff could not show malice on the part of Aviation Research Group/US (ARGUS), which had given the charter company a poor safety rating. (*Aviation Charter, Inc. v. Aviation Research Group/US and Joseph Moeggenberg*, Civ. No. 03-2439, United States District Court for the District of Minnesota, filed July 23, 2004).

In the months after the fatal crash, the *Star Tribune* published numerous articles about the charter company, its pilots, and its owners. Its January 16, 2003, article entitled "Wellstone charter firm got poor safety evaluation," described the pre-crash conclusions of ARGUS, an aviation consultant that sells information regarding safety ratings of air charter service providers to businesses, government agencies, and other consumers.

ARGUS compiles historical incident information from public files at the Federal Aviation Agency and the National Transportation Safety Board, sorts it by carrier, and "scores" the data for about 850 operators. For about a year before the crash, Aviation Charter received the lowest rating, "does not qualify" ("DNQ"), with a safety record in the lowest 8 percent of all carriers. The article reported the safety rating and comments by ARGUS' founder, Joseph Moeggenberg.

Aviation Charter contended that the rating and accompanying statements damaged its reputation, and sued ARGUS and Moeggenberg but did not sue the *Star Tribune*. This may have reflected a strategic assessment by plaintiff

that ARGUS and Moeggenberg would be more vulnerable and less-experienced defendants than the newspaper. If so, the strategy failed.

United States District Judge Paul Magnuson rejected the defendants' position that the ratings were mere opinion, but did not have to reach the issue of truth. The parties agreed that Aviation Charter was a public figure (a nearly inevitable conclusion in light of the intense public interest and controversy surrounding the Wellstone crash), and the court held as a matter of law that there was "no evidence that supports the argument that ARGUS acted with actual malice or reckless disregard in formulating its safety ratings." The FAA and NTSB data had been just the starting point for extensive research and investigation that produced a mathematical formula underlying a comparative analysis of aircraft charter safety.

Because Moeggenberg's comments to the *Star Tribune* were based upon the ARGUS ratings and research, those comments likewise had not been uttered with actual malice. The court also noted that Aviation Charter's complaint had "completely mischaracterize[d] the content of the *Star Tribune* article" and "blatantly misquotes the language of the article." The decision will be a major obstacle to any claim that Aviation Charter might try to bring against the newspaper.

The court also rejected Aviation Charter's claims based upon the Lanham Act and Minnesota's Deceptive Trade Practices Act, because the rating and the statements to the newspaper "do not constitute commercial advertising or promotion."

John P. Borger is a partner at MLRC member Faegre & Benson LLP in Minneapolis, MN.

The court held as a matter of law that there was "no evidence that supports the argument that ARGUS acted with actual malice or reckless disregard in formulating its safety ratings."

Appeals Court Reinstates Officer's Libel Award

Holds that Judge Improperly Granted JNOV in Retrial, Since Jury's Decision was Reasonable

The Minnesota Court of Appeals has reinstated a \$110,000 jury verdict to a police officer who sued KARE-TV over broadcast that questioned whether the officer, Tom Schlieman, was justified in killing a man who came toward him with a knife. *Schlieman v. Gannett Minnesota Broadcasting*, No. A03-177, 2004 WL 1728514 (Minn. Ct. App. Aug. 3, 2004) (unpublished). The decision is also available at <http://www.courts.state.mn.us/opinions/coa/current/opa031777-0803.htm>. KARE-TV will be filing a Petition for Review by the Minnesota Supreme Court on or before September 2.

The appellate decision reversed a ruling by Judge Gary Larson of the Hennepin County (Minn.) District Court that had granted KARE's motion for judgment notwithstanding the verdict and dismissed the case. See *MLRC MediaLawLetter*, Aug. 2003, at 7. This was the second time that the case has reached the Court of Appeals: in late 2001, the court reversed a jury trial verdict for the defendants based on an erroneous jury instruction, and remanded for retrial. See *Schlieman v. Gannett Minnesota Broadcasting, Inc.*, 637 N.W.2d 297, 30 Media L. Rep. 1235 (Minn. App. Dec. 26, 2001), *review denied* (Minn. Mar 19, 2002); see also *MLRC MediaLawLetter*, Feb. 2002, at 19.

This time, the appeals court, in a decision written by Judge James C. Harten, held that the trial court's grant of judgment notwithstanding the verdict (JNOV) was erroneous because "[a]bsence of malice was not established as a matter of law." The appellate court also rejected the trial court's determination that its failure to provide a preliminary jury instruction on actual malice, and its failure to provide a more comprehensive instruction at the close of trial, were prejudicial errors.

The appellate court remanded the case with instructions to restore the jury verdict.

Absence of Malice Not Established as a Matter of Law

The case arose from KARE reports which repeated the official account that the shooting was justified, but also said that two unidentified neighbors had said that the man shot by Schlieman was "not being aggressive." In August 1999, the official report found that Officer Schlieman was justified in killing Hartwig. KARE reported Officer Schlieman's exoneration.

Schlieman's lawsuit against KARE first came to trial in 2001. After a five-day trial during which Judge Tanya M. Bransford ruled that Schlieman was a public figure who had to prove actual malice, the jury found that the three statements at issue were not defamatory, and thus did not reach the issues of whether the statements were false, broadcast with actual malice, or caused any injury.

Schlieman appealed, which resulted in the Minnesota Court of Appeals reversing and remanding the case for a new trial, holding that the jury instruction on defamatory meaning was a prejudicial misstatement of the law. But the appeals court also found that, as a matter of law, two of the three statements at issue were incapable of defamatory meaning and should have been dismissed on summary judgment. One member of the three-judge panel dissented on the grounds that none of the statements were capable of a defamatory meaning. See *Schlieman v. Gannett Minnesota Broadcasting, Inc.*, 637 N.W.2d 297, 30 Media L. Rep. 1235 (Minn. App. Dec. 26, 2001), *review denied* (Minn. Mar 19, 2002).

The retrial, held in July 2003, focused on the sole remaining statement: "...two people say they witnessed the shooting and that Hartwig was not being aggressive." As they had in the first trial, the neighbors denied telling KARE that Hartwig was "not being aggressive" at the time he was shot, saying that they told KARE that Hartwig was not aggressive generally, not specifically at the time he was shot. The jury found that sentence was false, defamatory, broadcast with "actual malice," and caused Officer Schlieman \$110,000 in compensatory damages.

After the re-trial, Judge Larson ordered that judgment of dismissal with prejudice be entered, notwithstanding the verdict, holding that he had erred in submitting the question of actual malice to the jury at all and by giving only the form Minnesota jury instruction on "actual malice." This was the ruling reversed by the Minnesota Court of Appeals on Aug. 3.

Relying upon the "reckless disregard of the truth" definition of actual malice – "which may be found where there are obvious reasons for a reporter to doubt the veracity of an informant" – the appellate court found that the versions

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that the reporter allegedly relied upon were themselves disputed, and that evidence presented at trial – including statements given by witnesses to the police – supported a theory that the reporter had obvious reasons to doubt the truth of the conflicting accounts of the incident.

In post-trial interviews with KARE's lead counsel and senior producer, several of the jurors said that they had concluded that because there were two plausible but conflicting versions of what happened, the statements must be

in "substantial doubt." Minnesota's form jury instruction on actual malice reads: "A statement is published with 'actual malice' if the person who published it knew it was false or had substantial doubts about its truth."

Paul Klaas and Emily Fitzgerald of Dorsey & Whitney in Minneapolis represented KARE; Officer Schlieman was represented by Patrick T. Tierney of Collins, Buckley, Sauntry & Haugh, PLLP in St. Paul, Minn.

Defense Verdict in Libel By Implication Case Stands

Judge Denies New Trial Motion in Franklin Prescriptions v. NY Times

A unanimous jury verdict from March that a Philadelphia pharmacy had not suffered any harm when an image of its website was used to illustrate a *New York Times* article on illicit online drug sales will stand, after a federal court judge denied the pharmacy's motion for a partial new trial. *Franklin Prescriptions, Inc. v. The New York Times*, No. Civ. A. 01-145 (E.D. Pa. Aug. 5, 2004) (denying plaintiff's motion for new trial). The decision is available at 2004 U.S. Dist. LEXIS 15342, and <http://www.paed.uscourts.gov/documents/opinions/04D0236P.pdf>.

In its motion, Franklin had argued that the jury instructions given by U.S. District Judge Cynthia M. Rufe failed to explain "presumed damages" and "defamation per se," which Franklin argued were essential to its case. In its March verdict, the jury found that while the juxtaposition of article and illustration did have a defamatory implication and the *Times* was at fault in the placement, the jury also found that Franklin Prescriptions has not suffered any actual harm for which it should be compensated. See *MLRC MediaLawLetter*, March 2004, at 4.

In her ruling on the new trial motion, Judge Rufe said that the ultimate victory for the *Times* at trial was due to the fact that "plaintiff simply did not present any evidence that would allow a jury to conclude that it was harmed." In fact, she noted, the *Times* had shown that Franklin's sales had actually increased after the article was published, at the same rate as prior to the publication.

"This Court fails to see how any reasonable jury could find that an article that was not read by any

potential customers caused any harm, reputational or otherwise, to a company whose revenues increased in the months and years following the publication of the article."

At trial, the plaintiff had argued that several doctors stopped using the pharmacy after the article was published. But the *Times* showed that these doctors had switched pharmacies for other reasons, and that none of them had actually seen the *Times* article.

Rufe dismissed the argument regarding a presumed damages instruction, noting that plaintiff had not made the argument when the jury instructions were being drafted and approved by both parties. While holding that the argument had thus been waived, she nevertheless addressed the argument, concluding that the Pennsylvania Supreme Court was not likely to rule that such an instruction is required, despite its presence in the Pennsylvania Suggested Standard Civil Jury Instructions.

She also concluded that the instruction was unnecessary because the plaintiff had not shown actual malice, which is required for recovery of presumed damages in defamation actions. (The plaintiff was held to be a private figure.)

Franklin Prescriptions was represented by George Bochetto and David Heim of Bochetto & Lentz in Philadelphia. The *Times* was represented by in-house counsel George Freeman and Carl Solano, Elizabeth Ainslie, Jennifer DuFault James, and Harris Feldman of Schnader Harrison Segal & Lewis in Philadelphia.

Update: 60 Minutes Report on “Jackpot Justice” Held Not “Of and Concerning” Mississippi Juror Plaintiffs

By Tom Curley

In two related cases brought against 60 MINUTES concerning a news report on large damage awards in tort suits in Mississippi state courts, a federal trial court has held that the broadcast as a whole is not “of and concerning” the plaintiffs, former jurors in state tort suits.

The July decisions by Judge David Bramlette of the Southern District of Mississippi in *Berry v. Safer*, No. 5:03CV3BrS, and in *Gales v. CBS Broadcasting Inc.*, No. 5:03CV35BrS, effectively dismiss both defamation actions, although a lone defendant asserting a personal jurisdiction defense remains in the *Berry* case.

The district court opinions are notable for their emphasis that the “of and concerning” element is strictly applied under Mississippi law, which requires that an allegedly defamatory statement must be both “of and concerning” the plaintiff and “clearly directed toward” the plaintiff. Accordingly, the district court held that the defamatory meaning of the challenged statements with respect to the plaintiffs must be “clear and unmistakable from the words themselves and not the product of innuendo, speculation or conjecture.”

Jackpot Justice Leads Jurors to Sue

The cases arose out of a November 24, 2002 broadcast by 60 MINUTES concerning multi-million dollar jury awards in and comparable settlements of personal injury cases in rural Mississippi. The broadcast, entitled “Jackpot Justice,” observed that “[t]here are more lawsuits filed [in Jefferson County] than there are inhabitants of Jefferson County” and that the southern Mississippi jurisdiction is one in which “plaintiffs’ lawyers have found that juries . . . can be mighty sympathetic when one of their own goes up against a big, rich multinational corporation.”

Following the broadcast, two lawsuits were filed on behalf of some 35 Mississippi citizens who alleged that they served on Jefferson County juries and were defamed by the broadcast because it allegedly suggested that they had awarded large sums to plaintiffs suing big corporations without a proper evidentiary basis for doing so.

The lawsuits named a variety of defendants, including CBS Broadcasting Inc., 60 MINUTES correspondent Morley Safer and the two producers of the “Jackpot Justice” broadcast. Also named as defendants were two Mississippi citizens interviewed in the broadcast, Wyatt Emmerich, a newspaper publisher and columnist, and

Beau Strittman, a florist who was a plaintiff in a tort suit against a diet drug maker.

The lawsuits were initially filed in Jefferson County Circuit Court, the very jurisdiction that had been the focus of the 60 MINUTES report. The defendants removed both

cases to the Southern District of Mississippi, arguing that the two non-diverse defendants in the cases, Mississippians Emmerich and Strittman, had been “fraudulently joined” so as to defeat federal jurisdiction.

In June 2003, Judge Bramlette held that the Mississippi defendants had indeed been fraudulently joined, and thus the case should remain in federal court, because plaintiffs could not state claims for defamation (or any other cause of action) against the non-diverse defendants, since their own, specific statements on the broadcast were not “of and concerning” any particular Jefferson County juror. See July 2003 MediaLawLetter, at 23. The court emphasized that the “of and concerning” inquiry in this fraudulent joinder context was properly focused on the particular statements of Emmerich and Strittman in the broadcast as distinct from other portions of the news report.

The district court opinions are notable for their emphasis that the “of and concerning” element is strictly applied under Mississippi law, which requires that an allegedly defamatory statement must be both “of and concerning” the plaintiff and “clearly directed toward” the plaintiff.

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Update: 60 Minutes Report on “Jackpot Justice” Held Not “Of and Concerning” Mississippi Juror Plaintiffs

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Summary Judgment Sought

Following Judge Bramlette’s denial of plaintiffs’ motions to remand the cases to state court, the media defendants in both cases moved for judgment on the pleadings on a variety of grounds, including that Mississippi Code § 95-1-3 expressly precludes an action against a broadcaster or its employees that is based on allegedly defamatory statements made by third parties.

In addition, the media defendants argued that the broadcast – which raised important questions about multi-million dollar jury awards and settlements in rural Mississippi tort cases and offered competing explanations for a phenomenon of acknowledged public concern – was not reasonably capable of being understood to convey the defamatory meaning alleged by plaintiffs.

Judge Bramlette, in two opinions that are largely identical, did not reach any of these arguments, concluding instead that the broadcast simply was not “of and concerning” any individual juror or jury in particular. In its analysis, the court focused on the broadcast as a whole, *i.e.*, “the context of the entire broadcasted news report.”

At bottom, the court held that the “information contained in the broadcast as a whole does not logically support the inference that the plaintiffs were guilty” of any misconduct. On the contrary, the court observed that the

“only statement conceivably referring to the plaintiffs is sufficiently separate from the portions of the broadcast about juror misconduct to dispel any inference that the allegedly defamatory comments are of and concerning the plaintiffs.”

The plaintiffs in the *Gales* case have filed a notice of appeal to the Fifth Circuit. Plaintiffs in the *Berry* case are represented by solo practitioner Kevin D. Muhammad in Fayette, Miss. Plaintiffs in the *Gales* case are represented by Christopher W. Cofer of Cofer & Associates, P.A., in Jackson.

In both cases, the CBS defendants are represented by in-house counsel Susanna M. Lowy and Anthony M. Bongiorno and by Lee Levine, Jay Ward Brown, Audrey Critchley and Thomas Curley of Levine Sullivan Koch & Schulz, LLP in Washington, D.C. Mississippi counsel for the CBS defendants and Wyatt Emmerich are Luther T. Munford, John P. Sneed and Christopher R. Shaw of Phelps Dunbar, LLP in Jackson, and Robert O. Allen of Allen, Allen, Boerner & Breeland in Brookhaven. Defendant Beau Strittman is represented by W. Wayne Drinkwater, Jr. and Billy Berryhill of Bradley Arant Rose & White, LLP in Jackson.

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HIPAA Does Not Provide Private Right of Action, Court Rules

Court Also Denies Hospital's Request for Return of Confidential Medical Report from Newspaper

By Marc D. Flink

In what apparently is the first federal court decision addressing the issue, the U.S. District Court for the District of Colorado has held that the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C. § 1320d-6, does not create a private right of action against a media outlet for publication of confidential medical records. *University of Colorado Hospital Authority v. The Denver Publishing Company [dba Rocky Mountain News]*, Case No. 03-WM-1977 (D. Colo. Aug. 2, 2004).

This decision follows in the wake of a previous ruling (reported in the October 2003 MediaLawLetter) by the same court that denied, on First Amendment grounds, the University of Colorado Hospital's attempt to prevent the *Rocky Mountain News* from publishing the contents of a confidential peer review report of one of the hospital's top neurosurgeons. The peer review report was sent anonymously to the *News*, which had been reporting on a long-running controversy between the doctor and the hospital. Following denial of the hospital's motion seeking a prior restraint, the *News* published the peer review report on its website and moved to dismiss the hospital's complaint.

While the *News*' motion to dismiss the hospital's complaint was pending, the hospital amended its complaint to seek damages allegedly resulting from publication of the report and seeking an order requiring the *News* to return the original report to the hospital. The hospital's amended complaint asserted that the *News* violated 42 U.S.C. § 1320d-6, the privacy provisions of HIPAA. The hospital alleged that

"HIPAA prohibits any person from disclosing individually identifiable health information . . . without authorization, and calls for the imposition of fines up to \$250,000 and imprisonment of up to ten years for an unlawful disclosure of such health information for commercial advantage, personal gain or malicious harm."

The hospital also alleged that the *News*' receipt, retention and publication of the report violated Colorado statutes providing that peer review materials are confidential (C.R.S. § 12-36.5-104(13) and C.R.S. § 25-1-1201). As a result of these alleged violations of federal and state "confidentiality and privacy" statutes, the hospital sought damages.

The hospital also sought to impose liability on the *News* under Colorado's civil theft (C.R.S. § 18-4-405) and theft of medical records (C.R.S. § 18-4-412) statutes, and further asserted a claim based on the common law theory of trespass to chattels. The hospital alleged that the *News*

"interfered with the right of University Hospital to recover possession of the Report in the [*News*'] possession [and] refused to allow University Hospital to examine the Report in [the *News*'] possession for the purpose of investigating the identity of the person who unlawfully sent that copy to [the *News*]."

In addition to damages, the hospital requested that the Court enter "an order requiring [the *News*] to return to University Hospital the Report that was wrongfully sent to Defendant."

Motion to Dismiss HIPAA Claim Granted

The *News* moved to dismiss the hospital's amended complaint on the several grounds, including:

- (1) the hospital had no privacy rights to protect;
- (2) there is no implied private right of action to enforce the privacy provisions of HIPAA;
- (3) there is no civil liability under the state statutes;
- (4) the hospital's effort to compel the *News* to return the report or make it available for forensic inspection is barred by the qualified privilege first recognized in *Branzburg v. Hayes*, 92 S. Ct. 2646 (1972) and the Colorado Newsmen's Privilege set forth in C.R.S. § 13-90-119; and

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HIPAA Does Not Provide Private Right of Action, Court Rules*(Continued from page 41)*

- (5) the hospital's effort to obtain the report for purposes of forensic testing to identify the source would chill the right to anonymous speech.

In dismissing the HIPAA claim, Judge Walker Miller held:

Neither § 1320d-6, nor any other section of HIPAA, contains any language conferring privacy rights upon, or identifying as the intended beneficiary of § 1320d-6, any specific class of persons (particularly one which would include healthcare providers such as University Hospital). § 1320d-6 does not focus on individuals whose privacy may be at risk, but instead on regulating persons who might have access to individuals' health information. Additionally, the language in § 1320d-6 mirrors that customarily appearing in criminal statutes, and thus creates little reason to infer a private remedy. As a result, the statutory text displays no intent to create a private right of action under § 1320d-6.

The statutory structure of HIPAA likewise precludes implication of a private right of action. § 1320d-6 expressly provides a method for enforcing its prohibition upon use or disclosure of individual's health information—the punitive imposition of fines and imprisonment for violations. Consequently, I find “no evidence that Congress intended to create the right of action asserted by [University Hospital], and...conclude that such a right does not exist.”

Order at 5-6 (citations omitted). Judge Miller decided not to address the state law claims and remanded those claims to state court. (The action originally had been filed in state court and removed to federal court).

Court Also Denies Hospital's Request to Obtain Original Report From Newspaper

While the motion to dismiss was pending, the hospital served discovery requests on the *News*, including a request that the *News* produce to the hospital the “original” of the report sent to the *News* or alternatively that the *News* make the “original” report available for inspection and forensic testing.

After the *News* objected to those requests, the hospital filed a motion to compel. In opposing the motion, the *News* argued that the hospital's motion to compel should be denied because:

- (1) the motion to compel sought unconstitutional relief;
- (2) the federal and state newsmen's privileges bar the discovery of newsgathering materials sought by the hospital; and
- (3) the hospital's discovery was propounded for an improper purpose not related to the purported liability of the *News* – i.e. the purpose of identifying and prosecuting the source of the report.

On June 21, 2004 Magistrate Judge Patricia A. Coan denied the hospital's motion to compel on the grounds that they were barred by both the First Amendment and state law privileges. While acknowledging that the information sought was material to the hospital's request that the report be returned, she found that the hospital had not sought to independently obtain the information elsewhere, and further that the hospital's real interest in obtaining the report was not to support its tort claims against the *News*, but rather to identify who sent the report to the newspaper. This latter motive, she found, “has no relevance to this case whatsoever” and amounted to a “fishing expedition.”

The Rocky Mountain News was represented by Marc D. Flink and D. Rico Munn of the Denver office of Baker & Hostetler LLP. The University Hospital was represented by Joseph Bronesky, Fred Yu and Writer Mott of Sherman & Howard, Denver.

Any developments you think other MLRC members should know about?

Call us, send us an email or a note.

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D.C. Appeals Court Admonishes Judges to Keep Criminal Hearings, Records Open

By John O'Keefe

Taking on the issue of access to criminal proceedings for the first time in more than two decades, the District of Columbia's highest court sent a message to judges: Don't be too hasty in closing the courtroom doors.

On July 22, the D.C. Court of Appeals issued an order in *Nellson v. Bayly*, No. 04-SS-512, 2004 D.C. App. Lexis 396, that served as a "reiteration of the governing standards" for sealing records of—or barring the public from—criminal proceedings. In a five-paragraph per curiam opinion, a three-judge panel of the appeals court reminded their colleagues on the trial bench that they are obligated to keep such proceedings open unless they find that (1) closure serves a compelling interest, (2) the interest most likely would be harmed if the proceedings were not closed, and (3) there is no less drastic alternative that would protect the interest.

The admonishment was prompted by a request from the D.C. Public Defender Service for "an opinion explaining the relevant legal principles" after Superior Court Judge John H. Bayly Jr. admitted he "did not satisfy First Amendment standards" when he granted a prosecution request to exclude a PDS attorney from a hearing in a murder case. (The attorney represented a co-defendant in the case who was not involved in the hearing.)

Lawyers for the PDS argued that D.C. courts lacked procedures implementing the public's qualified First Amendment right of access to criminal proceedings and records. The appeals court panel rejected that characterization, saying that its 1981 decision in *United States v. Edwards*, 430 A.2d 1321, "gave critical guidance" to judges on the standards governing public access to criminal proceedings and records. *Edwards* held that, before closing a pretrial hearing to the press or public, a judge must conduct an inquiry concerning "(1) the likelihood of and nature of pretrial publicity; (2) its potential to jeopardize a fair trial for all parties; and (3) the available means by which a fair trial can be assured without resorting to closure."

Since then, however, the Court of Appeals has not "revisited those standards—in particular their application to the issue of closure of a courtroom in a criminal case," the *Nellson* panel acknowledged. The PDS charged that the court's silence on the matter had led to routine and flagrant

disregard by D.C. judges for the public's right of access. As evidence of this, the PDS identified nearly 200 cases on the D.C. Superior Court docket that were under seal.

Apparently persuaded of the need for clarification, the panel reiterated the "explicit and authoritative guidance" provided by the U.S. Supreme Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14-15 (1986): "To justify closure of a protected judicial proceeding, the trial court must find that closure serves a compelling interest; that in the absence of closure there is a 'substantial probability' that this compelling interest would be harmed; and that there are no alternatives that would adequately protect that compelling interest."

Because Judge Bayly, "although originally misled in [the] application [of the *Press-Enterprise* standards], ha[d] changed his mind and ordered the unsealing of the record" of the hearing in the murder case, the appeals panel concluded there was no need to issue an order compelling the judge to open the records.

John O'Keefe, a summer associate at Levine Sullivan Koch & Schulz in Washington, D.C., is a third-year law student at the University of Virginia.

Judge Partially Dismisses FOIA Suit Seeking Records Relating to SEC Contacts with Accounting, Securities Firms

By Tom Curley

On July 28, the U.S. District Court for the District of Columbia partially dismissed a FOIA lawsuit against the SEC, in which the plaintiffs included Bloomberg L.P., The Baltimore Sun Company, CBS Broadcasting Inc., Chicago Tribune Company, The Copley Press, Inc., Forbes Inc., Gruner + Jahr USA Publishing, Los Angeles Times Communications LLC, Newsday, Inc., and Reuters America, Inc. *Bloomberg L.P. v. SEC*, No. 1:02CV01582 (D.D.C.). The plaintiffs sought records relating to communications that former SEC Chairman Harvey L. Pitt had with accounting and securities firms while those firms and their clients were under scrutiny by the SEC.

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Judge Partially Dismisses FOIA Suit

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Bloomberg, L.P. v. United States Securities and Exchange Commission, No. 02-1582. Although dismissing most of the media's complaint, the Court ordered the SEC to produce certain email messages between SEC staff and certain regulated companies.

Questioning SEC Chairman's Potential Conflict of Interest

In a series of FOIA requests made during Pitt's brief tenure as SEC chief, reporters sought records relating to meetings, appointments or communications that Chairman Pitt had with KPMG officials and other regulated entities.

Among other records, the media sought Chairman Pitt's appointment calendar and his telephone messages related to those meetings and conversations. Prior to heading the SEC, Pitt had represented KPMG while in private practice.

The requests came in the context of public controversies related to Pitt's chairmanship,

including questions about the propriety of Pitt meeting with executives of accounting companies whose clients were at the same time under scrutiny by the SEC. These controversies eventually raised enough public questions to result in Pitt's resignation after 15 months on the job.

After repeated delays in responding, the SEC acknowledged that it possessed records responsive to the FOIA requests, but declined to release any records on a variety of grounds. With particular respect to Chairman Pitt's telephone messages and appointment calendar, the SEC asserted that they were not agency records within the meaning of FOIA, but were instead Chairman Pitt's "personal" property, despite being created by government employees and being kept on government computers.

Defining "Agency Record"

While FOIA generally requires the disclosure of agency records, as distinct from the "personal" records of an agency employee, FOIA does not define the term agency record. In the absence of statutory guidance, the U.S. Court of Appeals

for the District of Columbia Circuit has focused on the totality of the circumstances surrounding the creation, maintenance, and use of the document at issue to determine whether the document is in fact an agency record. See, e.g., *Bureau of Nat'l Affairs, Inc. v. United States Dep't of Justice*, 742 F.2d 1484, 1492-93 (D.C. Cir. 1984).

Judge Leon held that, although the calendar and telephone messages were maintained in electronic form on the SEC's computer system and were accessed by some SEC employees other than Chairman Pitt, the totality of the circumstances weighed in favor of finding that the records were created and maintained only for Mr. Pitt's personal convenience. Judge Leon applied similar reasoning to Pitt's telephone messages and related documents.

In the absence of statutory guidance, the U.S. Court of Appeals for the District of Columbia Circuit has focused on the totality of the circumstances surrounding the creation, maintenance, and use of the document at issue to determine whether the document is in fact an agency record.

SEC Must Disclose Staff Emails

With respect to email messages between Pitt and his top staff and regulated entities, however, Judge Leon ordered the SEC to produce responsive records within 90 days, giving

the SEC another opportunity to assert exemptions the agency believes may apply to these records. The SEC had urged the Court to dismiss the lawsuit insofar as related to the FOIA request for email messages, on the ground that the Court lacked subject matter jurisdiction because the agency had not yet rendered a decision on the original FOIA request and Bloomberg (the first FOIA requester) had not taken an administrative appeal. As a consequence, the SEC argued, plaintiffs had not exhausted their administrative remedies. Judge Leon rejected that contention, observing that the SEC's failure to respond to Bloomberg's request within the statutory deadline amounted to a constructive denial entitling the press to commence litigation.

Bloomberg L.P. was represented by its Media Counsel Charles J. Glasser, Jr. and the plaintiffs as a group were represented by Jay Ward Brown and Tom Curley of Levine Sullivan Koch & Schulz, L.L.P. of Washington, D.C. The SEC was represented by agency counsel Melinda Hardy and Thomas J. Karr.

NJ Supreme Court Avoids Tackling Pretrial Discovery Access – For Now

By David E. McCraw, Jennifer A. Borg and
Bruce S. Rosen

The New Jersey Supreme Court last month rejected an effort by trial lawyers – supported by media amici – to obtain access to unfiled civil discovery where public health or safety issues are involved, but the Court directed a committee of lawyers and judges to study the issue and make recommendations on an expedited basis. *Estate of Frankl v. Goodyear Tire and Rubber Co.*, (A-52-03, July 28, 2004). The decision is available online at: <http://lawlibrary.rutgers.edu/decisions/supreme/a-52-03.opn.html>.

Background

The New Jersey Supreme Court upheld an Appellate Division ruling that said that there was no public right to pretrial access of unfiled civil discovery, declaring that the state's "good cause" determination for protective orders was not an independent source of entitlement to public access to discovery documents.

Consumers for Auto Reliability and Safety and Trial Lawyers for Public Justice sought to obtain documents exchanged during a litigation, which since settled, involving the safety of Goodyear tires involved with SUV rollovers. Similar litigations are still ongoing in other states.

NJ Supreme Court

"The universal understanding in the legal community is that unfiled documents in discovery are not subject to public access," the Court said in a per curiam decision. While citing numerous concerns weighing against disclosure, the Court also cited Professor Arthur Miller's article Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L. Rev. 427 (1991), which argues for a presumption of public access to all discovery materials, as a reason to have the Court's Civil Practice Committee reexamine the issue.

That committee, which is made up of judges and civil practitioners, had previously studied and split on the issue. The Court noted that only two states, Florida and Texas, provide statutory access to unfiled discovery upon showings that public health, safety or public administration was implicated.

Trial Court's Decision

Although Goodyear produced the documents under a protective order and also had an additional stipulation of confidentiality with the original plaintiffs, the trial court ruled that the private agreement was not enforceable against an application for public access and that there was no good cause for a continued protective order for some of the documents.

Superior Court Judge Jack Sabatino went through a detailed analysis based upon a previous N.J. Supreme Court case, *Hammock by Hammock v. Hoffman-LaRouche, Inc.*, 142 N.J. 356 (1995) in which he continued the protective order only for some documents containing trade secrets and self-critical analysis. Goodyear appealed.

The Appellate Division panel differed from the trial court on its key point: it concluded neither the "good cause" requirement for protective orders nor Hammock created a right of public access to unfiled documents exchanged during discovery in civil litigation. The intervenors appealed.

Media Intervenors

A number of amicus briefs were filed, including one from The New York Times and Bergen Record (joined by the N.J. Chapter of the Society of Professional Journalists, the N.J. Foundation for Open Government and the newly-formed N.J. Media Lawyers Association), from the N.J. Press Association and Reporters Committee for Freedom of the Press, and from Public Citizen, Inc.

The media amici argued that the presumption of public access should be extended in cases involving public hazards or misconduct by public officials, that stipulated protective orders should not be afforded the same level of protection as protective orders based upon a "good cause" finding, and that in any case, when challenged, good cause must be reestablished under court rules.

The Times' brief specifically cited several instances where federal courts, particularly in the Third Circuit, found no good cause to permit continued protective orders in cases involving health, safety or government actions.

Aware of the dichotomy, the Supreme Court said that much of the case law concerning access in federal cases

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NJ Court Avoids Tackling Pretrial Discovery Access

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relied on the language of Federal Rule of Civil Procedure 5(d) which had blurred the distinction between filed and unfiled discovery because all discovery was subject to filing.

The Court implied those cases were subject to re-review because the Rule was amended in 2000 to say that discovery must not be filed unless it is “used in the proceeding,” thus “bolstering the differentiation between filed and unfiled documents and supports the conclusion that unfiled discovery is not meant to be accessible to non-parties.”

In a separate memo instructing the Civil Practice Committee to review the issue, the Clerk of the Court asked that the Committee also make recommendations to assure that procedures for granting protective orders conform to the procedures under Federal Rule 26(e).

The Clerk said the Court is aware that it had previously been split on the issue of third party access to un-

filed discovery but wanted an expedited recommendation for its consideration.

The case was argued by Rebecca E. Epstein of Washington D.C. for Trial Lawyers for Public Justice, George Rooney of Kelly, McLaughlin & Forster of Ohio argued for Goodyear Tire & Rubber Co.

Bruce S. Rosen of McCusker, Anselmi, Rosen, Carvelli & Walsh, P.C. of Chatham, N.J., David McCraw of The New York Times and Jennifer Borg of North Jersey Media Group represented the New York Times, North Jersey Media Group Inc. (the Bergen Record and North Jersey Herald News), N.J. Chapter of the Society for Professional Journalists, N.J. Foundation for Open Gov't and the N.J. Media Lawyers Association. Thomas J. Cafferty and Arlene Turinchak of McGimpsey & Cafferty in Franklin, N.J. filed a brief on behalf of the N.J. Press Association and the Reporter's Committee.

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Privacy Concerns Cited in Rejecting Access to 911 Calls

Mixed Results on Rhode Island Nightclub Fire Document Requests

By Joseph V. Cavanagh, Jr. and Staci L. Kolb

The Providence Journal made a series of public records requests pursuant to the Rhode Island Access to Public Records Act (APRA), R.I.G.L. § 38-2-1, all relating to the tragic fire at a local night club, The Station, on February 20, 2003. The Kent County Superior Court of Rhode Island found that privacy concerns trumped the requests for 911 call tapes from fire victims or their families, and that potential interference with the criminal investigation barred access to others. However, the court did afford the newspaper access to a mixed bag of other relevant documents. *The Providence Journal v. Town of West Warwick*, 2004 R.I. Super. LEXIS 136.

At the onset, the government made a blanket denial of all the Providence Journal's requests forcing the newspaper to file an action in state court based on APRA against the State of Rhode Island, the Town of West Warwick, and certain named government officials. Thereafter, certain categories of records were released either voluntarily or by Consent Order. Subsequently, the newspaper moved for summary judgment seeking the remaining records, which the court reviewed in camera.

Evaluate Requests on Circumstances At Hearing

In its analysis, the court recognized that the government has the burden of proof in demonstrating that the records in dispute were properly withheld. Moreover, because there had been a segmented release of records over time following the government's initial blanket denial of all the newspaper's requests, the court specifically rejected the government's argument that the requests made by the newspaper must be evaluated based on the circumstances existing at the time each request was initiated and not at the time of the summary judgment motion.

The court reasoned that judicial economy and practicality mandated against requiring the newspaper to initiate new requests over time. The court also held that it would have been burdensome and unnecessary to conduct an item by item review of each individual record sought and therefore divided its analysis of the records into discrete categories: police communications, fire communications, department of human services lists, victim location documents, and police reports.

Protects Privacy of Victim/Family Calls

With respect to the police and fire communications, the court held that release of the 911 and other telephone calls from victims and/or family members of victims would be a "highly intrusive interference with the legitimate privacy entitlement" and significantly outweighed any legitimate public interest. Because of the graphic nature of the calls, the court noted that it could not "conceive of a greater affront to such dignity than permitting others to listen to the anguish that [wa]s embodied in such communications."

However, the court required the government to release the remaining subcategories of police and fire communications including: private citizen telephone calls, first responder calls and off-duty officer calls because the government failed to demonstrate that they fall within any exemption to APRA. Specifically, the court held that these calls did not present privacy considerations in the manner that victim/family member calls do. The court also required that these communications be redacted to remove references by name, phone number or other identifying characteristics of the person placing the call.

With respect to the Department of Human Services List compiled by the executive branch, the court held that because the document included information that was identifiable to individual applicants for benefits, it was specifically exempted from public disclosure under the APRA.

Mixed Results on Other Documents

The court found that the third category of records, victim location document (a document created by the State Fire Marshall's Office, that depicts the "groupings" of where bodies were found at the Station) should be released as it did not fall within any of the enumerated exemptions to the APRA.

With respect to the final category of records, police reports which include incident reports, police officer narratives, evidence logs, search warrant inventory and numerous witness statements, the court held that disclosure would necessarily interfere with the now pending criminal prosecutions, and therefore, access was denied.

Joseph V. Cavanagh, Jr., the managing partner of Blish & Cavanagh, LLP and Staci L. Kolb of that firm represented The Providence Journal in this matter.

Access to Info on State University Presidential Candidates

By John Borger

The University of Minnesota will have to disclose the identities of five unsuccessful finalists that its Regents secretly interviewed for the position of president, thanks to the July 15, 2004, decision of the Minnesota Supreme Court. (*Star Tribune Co. v. University of Minnesota Board of Regents*, Nos. A03-125, A03-155.)

The Supreme Court affirmed earlier decisions of the Hennepin County District Court and the Minnesota Court of Appeals. Those lower courts had held that the Regents violated the state Open Meeting Law and Minnesota Government Data Practices Act when they abruptly closed meetings and withheld finalist data during the November 2002 presidential selection process. The Regents argued that some well-qualified candidates refused to be interviewed in public. A few days later, they offered the presidency to Robert Bruininks, who already was serving as interim president and who was not an announced candidate for the permanent position. (See report in the November 2003 MediaLawLetter at 47-48.)

Test for State University Autonomy

In a 4-2 majority decision written by Justice Russell Anderson, the Court strongly endorsed the principle that the OML and MGDPA were enacted for the public benefit and therefore must be construed in favor of public access. Those statutes apply to all Minnesota public bodies and require disclosure of names and other background information on finalists for public employment, and require open meetings of governing bodies as they interview those finalists. The Regents argued that the statutes did not apply clearly to the University, but the Court rejected that interpretation.

The Court equally strongly rejected the University's contention that its "special [state] constitutional autonomy should insulate it from the requirements of the Data Practices Act and Open Meeting Law." Minnesota is one of at

least 20 states that accord their major universities some degree of independence from legislative control. (Others include Alabama, Alaska, Arizona, Arkansas, California, Georgia, Hawaii, Idaho, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, and Oklahoma.)

Since 1928, the Minnesota Supreme Court had addressed university autonomy on a case-by-case basis, more frequently finding that a particular state law intruded too far onto the authority of the Board of Regents. In *Star Tribune*, the Court articulated a concise and general test, upholding the Legislature's power to apply statutes to the University if the statutes

The Court refused to "essentially elevate the University to the status of a coordinate state entity, not answerable to state government except as it chooses or as limitations are tied to appropriations."

- (1) are intended to promote the general welfare,
- (2) apply not just to the University, but broadly to government bodies, and
- (3) do not intrude into the internal management of the University.

Public Access Laws Pass That Test

Public access laws pass that test, the Court held. In the context of presidential searches, the laws do not

"dictate who must be selected, criteria for consideration, or the nature of the vote needed for selection. ... They affect the presidential search process only in its interface with the outside world, that is, the extent to which this public institution, which is funded substantially by public tax dollars, must make the final part of that process accessible to the public."

Rejects Michigan Decision

The Minnesota Supreme Court expressly rejected the reasoning of *Federated Publications, Inc. v. Board of Trustees*, 594 N.W.2d 491 (Mich. 1999) (application of Michigan Open Meeting Law violated constitutional autonomy of Michigan State University's governing board), calling that opinion "not ... persuasive" and its rationale "contradictory."

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Access to Info on State University Presidential Candidates

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The Minnesota Supreme Court noted that the prevalence of open search processes in most other states “does rebut any generalization that presidential searches cannot effectively be performed under such requirements.” Although it acknowledged pros and cons on both sides of the openness/privacy issue in presidential searches, it

“concluded that determination of the proper approach is a policy issue that balances the pros and cons and is not an issue of such dimension that opting for openness interferes with the effective management of the university.”

In a sharp rebuke to the Regents, the Court refused to “essentially elevate the University to the status of a coordinate state entity, not answerable to state government except as it chooses or as limitations are tied to appropriations.”

Dissent

Chief Justice Kathleen Blatz and Justices Paul Anderson and Helen Meyer joined the majority opinion. In dissent, Justices James Gilbert and Sam Hanson conceded the “generally good policy” of the Open Meeting Law and Data Practices Act, but contended that their application to the presidential search process “interferes with and obstructs the power given to the Board of Regents to select a president, which may be the most fundamental internal management decision of the Board of Regents.” Justice Alan Page, a former Regent, did not participate in the decision.

John P. Borger is a partner at MLRC member Faegre & Benson LLP in Minneapolis, MN. With with Eric Jorstad and Patricia Sprain, he represented lead plaintiff Star Tribune in this access proceeding.

Eighth Circuit Affirms Media Policy Banning Cameras in Execution Chamber Court Holds There is No First Amendment Right to Film Proceedings Open to the Public

By Russell Hickey

In July, the Eighth Circuit Court of Appeals ended a religious organization’s attempt to film executions in Missouri, holding that a “banning the use of video cameras and other cameras in the execution chamber does not burden any ... First Amendment rights.” *Rice v. Kempker*, 2004 WL 1532547 (8th Cir. July 9, 2004).

The New Life Evangelistic Center had argued that the Missouri Department of Correction’s Media Policy banning cameras in the state’s execution chambers violated the public’s First Amendment right of access. The court of appeals, however, held that “neither the public nor the media has a First Amendment right to videotape, photograph, or make audio recordings of government proceedings that are by law open to the public.”

District Court Finds First Amendment Infringed, But Sides with State

In 1989, Missouri reintroduced the death penalty, in part, to deter serious crimes. Like most executions in

Missouri, Daniel Basile’s August 14, 2002 execution was late at night in the remote town of Potosi.

By state law, Missouri requires at least eight members of the public to attend each execution. The viewing room of the execution chamber in the Missouri State Penitentiary at Potosi can accommodate approximately 31 witnesses. According to the state’s Media Policy, no cameras or tape recording devices of any type are to be allowed in the witness area or surrounding area. Each media witness representative, however, is allowed to take paper, pencil and sketch pad to the witness area.

New Life, an interdenominational church that operates television and radio stations in Missouri, Kansas, Illinois and Arkansas, opposes the death penalty. In 2002, it requested access to film Daniel Basile’s execution, believing the public opinion on the death penalty would be swayed after seeing an execution.

Following the Media Policy, the Missouri Department of Corrections permitted New Life to witness Basile’s execution. New Life’s request to film the execution, however, was denied.

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8th Circuit Affirms Media Policy Banning Cameras in Execution Chamber

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New Life filed suit in the Eastern District of Missouri seeking a declaratory judgment and injunction to prevent the enforcement of the Media Policy. The District Court did hold that the ban on filming executions burdened New Life's First Amendment rights. The District Court, however, granted summary judgment for the state, concluding that the infringement was reasonable in light of "legitimate penological concerns." New Life appealed.

Circuit Court Finds No First Amendment Right to Film Executions

Citing a line of cases including *Westmoreland v. CBS*, the Eighth Circuit Court of Appeals affirmed the District Court's grant of summary judgment. The court of appeals, however, held that there was no infringement of First Amendment guarantees.

New Life had cited *Richmond Newspapers, Inc. v. Virginia*, arguing executions are required to be open to the public, and thus prohibitions on filming executions is an impermissible infringement of First Amendment rights. The court, however, stated that while *Richmond Newspapers* requires criminal trials to be open to the public, "no court has ruled that videotaping or cameras are required to satisfy this right of access. Instead, courts have universally found that restrictions on videotaping and cameras do not implicate the First Amendment guarantee of public access." The court also cited the Second Circuit's decision in *United States v. Yonkers Bd. of Educ.*, in which the Second Circuit stated that "the First Amendment right of access is limited to physical presence at trials."

Even if the court had agreed with New Life and the District Court, and found that First Amendment rights were infringed by the ban on filming executions, the court stated it would have found the state's Media Policy was a "content-neutral time, place, and manner" restriction on speech. The court noted that the ban on filming the execution did not prevent New Life from "disseminating to the public any information gained from attending the execution."

Tactical Error?

New Life may have missed an opportunity to argue for greater access when it claimed status as a member of the

public rather than a member of the press. New Life claimed status as a member of the public in an attempt to distinguish its case from *Garrett v. Estelle*, a Fifth Circuit case upholding the prohibition of filming executions, and *Houchins v. KQED*, the Supreme Court decision vacating a district court decision that would have required prison officials to give press access to certain areas of a prison, including permitting the use of cameras. New Life argued the press in *Garrett* and *Houchins* attempted to claim additional privileges not enjoyed by the public.

The court rejected this argument, noting that "New Life attempts to turn this principle on its head and argue that as a member of the public, they enjoy a special right of access not available to the reporters in *Garrett* and *Houchins*." Worse yet, the court stated in a footnote that Justice Stewart's concurring opinion in *Houchins* "indicated the possibility that cameras or pictures may be required for the press to fulfill its First Amendment function in certain situations. (Citation omitted.) But New Life has eschewed any status as a member of the press, as discussed *infra*, so we need not consider the force or validity of Justice Stewart's suggestion."

New Life was represented by Robert Schutlz, of Schutlz & Little in Chesterfield, Mo. The State of Missouri and its individual defendants were represented by Assistant Attorney General Michael Eugene Cook Pritchett.

Russell Hickey is a claims counsel for Media/Professional Insurance in Kansas City, Mo.

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The European Union's "Rome II" Approach to Choice of Law Moves Forward *MLRC/Others Urging "Country of Origin" Approach*

By Kurt Wimmer

The battle for international jurisdiction and choice of law in content liability cases proceeds on a country-by-country basis, from Australia to Zimbabwe. One organization that could have a positive impact is the European Union, which now counts 25 countries among its member states. The EU has provided a document that might be the only bright spot on the choice-of-law horizon in its E-Commerce Directive, which generally provides that the law applicable to the activities of an online business should be the law of the country in which it is organized — the "country of origin" principle. However, a newer document, the so-called "Rome II" approach to choice of law in European libel and privacy disputes, continues in its newest iteration to be a disappointment.

In June 2002, the Justice and Home Affairs Council of the European Commission commenced a consultation proposing to apply the law of the country in which the plaintiff resides to any defamation or privacy action. This approach, if adopted, could have broad repercussions for publishers not only in Europe but throughout the world. The MLRC filed comments before the European Commission urging the application of a "country of origin" approach, an approach that was echoed by European publishing organizations.

The Current Draft

The Commission then published a new draft of its "Rome II" regulation, which provides as follows:

Article 3 — General Rule

1. The law applicable to a non-contractual obligation shall be the law of the country in which the damage arises or is likely to arise, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event arise.
2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country when the damage

occurs, the non-contractual obligation shall be governed by the law of that country.

3. Notwithstanding paragraphs 1 and 2, where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply. A manifestly closer connection with another country may be based in particular on a pre-existing relationship between the parties, such as a contract that is closely connected with the non-contractual obligation in question.

In addition, the Commission added a separate section which was meant to address the comments of the publishing industry, which had uniformly opposed a rule favoring the application of the law of the plaintiff's country. That section provides as follows:

Article 6 — Violations of Privacy and Rights Relating to the Personality

1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality shall be the law of the forum where the application of the law designated by Article 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information.
2. The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.

Draft Article 6(1), although not clear, apparently intends to provide that the forum need not apply the law of another country if the application of that country's law would violate the fundamental law of the forum state. In that case, the law of the forum would apply. But this would lead to the result that the publishers were seeking only if the claimant happens to sue in the publisher's forum and the forum has a fundamental law that would be offended by application of the law of the claimant's country. This article would be very little assistance in the clearly dominant type of case in which the claimant files in his or her own country.

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The European Union's "Rome II" Approach to Choice of Law Moves Forward

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UK Lords Support Country of Origin Rule

Support for a "country of origin" approach for Rome II is not solely the province of the publishing industry. The United Kingdom House of Lords issued a report in April 2004 stating its preference for a 'country of origin' rule to govern choice of tort law for defamation and privacy actions:

A country of origin rule would have certain advantages, notably simplicity and certainty. It would point to one law . . . To adopt a country of origin rule would also accord with, though not necessarily in all cases replicate, the host country/place of establishment regimes found in the E-Commerce and other Single Market measures. A country of origin rule would encourage enterprise, education and the widest dissemination of knowledge, information and opinion.

House of Lords European Union Committee, *The Rome II Regulation, Report with Evidence* [2004] 8th Report of Session 2003-04 at ¶¶ 117-130.

Next Steps

The Rome II regulation falls under the procedures of the relatively recent Treaty of Nice, which requires the EU's

"co-decision" procedure to be used. This means that the European Commission's final proposal, quoted above, is its last word on the topic, and the process now will move to the European Parliament. The Parliament will be required to propose amendments to the rule drafted by the Commission.

After that, the process moves to the Council of Ministers, which will prepare a revised version of the proposal (called a "common position") that is satisfactory to the Member States. The common position may or may not take on board Parliamentary amendments. If there is a disagreement between the Council and Parliament, the proposal will then move back to Parliament for a second reading.

The publishing industry currently is attempting to persuade the European Parliament to change the approach adopted by the European Commission. A final decision is unlikely to be entered until 2005. The MLRC will continue to be active in opposing the Commission's proposed rule.

Kurt Wimmer is a partner with Covington & Burling in Washington, D.C.

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More than 50 Media Organizations Urge the Ontario Court of Appeal To Reverse The Finding of Jurisdiction in *Bangoura v. Washington Post*

By Kurt Wimmer

In *Bangoura v. The Washington Post*, 235 D.L.R. (4th) 564 (Jan. 27, 2004), the Ontario Superior Court of Justice exercised jurisdiction over the Washington Post for an article that reached only seven subscribers in Ontario when it was published and was accessed only once over the Internet — by the plaintiff's lawyer. In sweeping language, the Canadian court found that the Washington Post should anticipate being sued in any court in the world.

Superior Court Decision

The plaintiff, Cheikh Bangoura, was the head of a United Nations program in Kenya when the Washington Post published three articles in 1997 alleging mismanagement of the program. Bangoura moved to Canada in 2001 and sued the Washington Post in Toronto, some four years after the article was published, alleging that the article damaged his reputation in his new country. The Washington Post moved to dismiss the case.

Although the court conceded that the Post had “no connection to Ontario,” it noted that

“the Washington Post is a major newspaper in the capital of the most powerful country in the world now made figuratively smaller by, *inter alia*, the Internet. . . . Frankly, the defendants should have reasonably foreseen that the story would follow the plaintiff wherever he resided.”

The court further reasoned that it would be fair for the case to be tried in Canada because “the Post is a newspaper with an international profile.” The court noted that it “would be surprised if [the Post] were not insured for damages for libel or defamation anywhere in the world, and if it is not, then it should be.”

The court cited the decision of the Australian High Court in *Gutnick* with approval, and specifically noted that “those who publish via the Internet are aware of the global reach of their publications.” Under Canadian law, a “real and substantial connection” between the forum and the action must be found to support jurisdiction, and the court concluded that such a connection existed.

Intervening Brief

The Washington Post appealed to the Ontario Court of Appeal. On July 30, 2004, more than 50 newspaper, magazine and Internet publishers, trade associations, and non-governmental organizations promoting free expression intervened to file a brief in support of the appeal. The brief pointed out the dangers of the trial court's decision, noting that Internet publishers faced with the prospect of universal worldwide jurisdiction will either restrict the availability of content online or be forced to write for the lowest common denominator of national protection for speech; in either case, the result will be greatly diminished freedom of speech on the Internet.

The brief argued that traditional principles of Canadian law favor a Washington, D.C. venue for the case. It also argued in favor of the application of one of three alternative approaches, all of which would reject jurisdiction in Canada —

- (1) the “targeting” approach exemplified by *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), *cert. denied*, 538 U.S. 1035 (2003);
- (2) the “active/passive” approach exemplified by the *Zippo* case and its Canadian progeny, *Braintech, Inc. v. Kostiuik*, [1998] B.C.J. No. 3201 (C.A.), or
- (3) the “country of origin” approach applied by the European Union's E-Commerce Directive and favored by a recent report in the U.K. House of Lords.

Cheikh Bangoura is represented by Charles C. Roach, Roach, Schwartz & Associates, Toronto.

The intervenors are represented by Brian MacLeod Rogers in Toronto and Kurt Wimmer of Covington & Burling in Washington. The Washington Post is represented by Paul Schabas and Ryder Gilliland of Blake, Cassels & Graydon, LLP in Toronto. Lee Levine, Levine, Sullivan, Koch & Schulz, LLP, filed an affidavit on American law on behalf of the Washington Post.

Truth and Public Interest Insufficient to Protect Against Defamation Claim Says Canada's Supreme Court

By Marc-André Blanchard

In a case arising out of the civil law province of Quebec in *Gilles E. Néron Communication Marketing Inc. v. Chambre des notaires du Québec*, 2004 C.S.C 53, and decided on July 29, 2004, the Supreme Court of Canada, in a 6 to 1 judgment, rendered what many believe is a chilling judgment for freedom of expression. This final judgment from the highest court in Canada states that truth and public interest are not elements that will, in themselves, enable a defendant in a libel action to win.

It is important to note that this judgment was rendered under Quebec law, which is a civil jurisdiction, contrary to the rest of Canada where common law, of British influence, is enforced.

As we all know, at common law, and consequently for the whole of Canada except Quebec, the defense of truth is an absolute defense against a claim in defamation.

The troubling consequence of this decision of the Supreme Court of Canada is that the citizens of Quebec are now left with a freedom of expression and a freedom of the press, which are enshrined in the Canadian Constitution, that have a lesser value in Quebec.

The following text is taken from the summary provided by the Supreme Court of Canada.

The facts, as resumed by the court, are:

“The French network of the Canadian Broadcasting Corporation (“CBC”) aired on the show *Le Point* a report on delays by the Chambre des notaires du Québec (“CNQ”) in dealing with disciplinary complaints against notaries and compensation claims made to its indemnity fund. The CNQ set out to counter the negative effects of the broadcast and the respondent N, who acted as a communications consultant for the CNQ, drafted a handwritten letter to request a meeting with the director of the show. In the letter, he lamented the prejudicial effect that the broadcast had had on the CNQ and pointed out certain errors. When contacted by a journalist of the CSC, N explained that the letter was nothing more than a request for a right of reply and that it was not meant for publication. The journalist pointed out to N two errors in the letter concerning

two disgruntled complainants seen in the broadcast. N said that he was going to verify the information, which he had received from the CNQ, and respond within three days. A day before N’s requested time was to expire, *Le Point* broadcast a report crafted as a response to N’s letter, but quoted only the erroneous portions of the letter. Following this broadcast, a rash of letters were received from notaries who expressed indignation and dismay about the CNQ’s communication policies. In a communique sent to all notaries and all professional corporations, the Interprofessional Council, the media, the Office des professions and the Minister of Justice, the CNQ asserted that N had sent his letter on his own, without its authorization. Soon thereafter, the CNQ terminated contractual relations with N and his corporation. N lodged a complaint with the CBC’s ombudsman who acknowledged that one of the grievances was well-founded in that the second broadcast seriously compromised the principle of fairness by failing to mention the five grievances that were central to N’s letter and only reporting on the two errors. N and his corporation initiated a claim for damages against the CBC and the CNQ. The Superior Court found the CBC liable in defamation, solidarily with the CNQ. The majority of the Court of Appeal dismissed the CBC’s appeal, concluding that the trial judge had correctly found fault in this case.”

Justice LeBel, for the majority, stated in its summarized opinion:

“Freedom of expression, and its corollary, freedom of the press, play an essential and invaluable role in our society. These fundamental freedoms are protected by s.3 of the Quebec Charter of Human Rights and Freedoms and s. 2(b) of the Canadian Charter of Rights and Freedoms. However, freedom of expression is not absolute and can be limited by the requirements imposed by other people’s right to the protection of their reputation. This right also receives protection under s. 4 of the Quebec Charter and under art. 3 C.C.Q. In an action in defamation, the two fundamental values of

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Truth and Public Interest Insufficient to Protect Against Defamation Claim Says Canada's Supreme Court

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freedom of expression and the right to reputation must be weighed against each other to find the necessary equilibrium.

An action in defamation in Quebec is grounded in art. 1457 C.C.Q. Like any other action in civil, delictual and quasi-delictual liability, the plaintiff must establish, on a balance of probabilities, the existence of injury, a wrongful act and a causal connection between the two. Furthermore, in order to prove injury, the plaintiff must demonstrate that the impugned remarks were defamatory. Here, the thrust of the CBC's argument is the absence of fault. The other elements are not seriously at issue. The determination of fault in an action in defamation involves a contextual analysis of the facts and circumstances. Truth and public interest are factors to consider but they are not necessarily the determinative factors. It is insufficient in this case to focus merely on the veracity of the content of the second broadcast report. One must look globally at the tenor of the broadcast, the way it was conducted and the context surrounding it. The guiding principle of liability for defamation is that there will not be fault until it has been shown that the journalist or media outlet in question has fallen below professional standards. The conduct of the reasonable journalist becomes the all-important guidepost.

In holding the CBC liable for defamation, the Superior Court and the Court of Appeal achieved the correct balance between freedom of expression and N's right to respect for his reputation. Even though N's handwritten letter cannot be considered private, in focusing only on the two errors in that letter, the second broadcast was misleading, giving the impression that the substance of N's letter was limited to these two erroneous statements. The letter discussed other concerns relating to the image of notaries created by the broadcast. A person viewing the report in question, would not be aware of these other concerns. Nor

would the viewer be aware, from the structure of the report, that the letter was really just a request for a meeting and a right of reply. By leaving out vital pieces of information the CBC misrepresented N's letter as a disingenuous attempt to mislead the CBC, and thereby the public. Moreover, the CBC intentionally and deliberately broadcast the errors in the letter before N could attempt to set things straight. The tone and tilt of the second broadcast pointed to its being more of a response to N's criticism than an exercise in protecting the public interest. Lastly, the CBC's own ombudsman found one of N's complaints to be quite serious and considered the second broadcast to have the appearance of a settling of accounts.

This is highly detrimental to the CBC's case. The Ombudsman also openly implied that the journalists did not live up to proper journalistic standards, given the selective use of certain portions of the letter. These factors lead to

the conclusion that the CBC intentionally defamed N and did so in a manner that fell below the professional standards of a reasonable journalist. By not respecting professional standards in this case, and given all the other surrounding circumstances, the CBC was at fault."

Justice Binnie, the sole dissenter, stated, as summarized:

"A legal rule that awards \$673,153 in damages to N and his corporation on the basis of a broadcast which stated true facts, the publication of which was undoubtedly in the public interest, just because other lesser matters might also have been mentioned but were not, or further context might have been provided but was not, is inconsistent with s. 3 of the Quebec Charter of Human Rights and Freedoms including the public's right to have access to true and accurate information about matters of legitimate interest and concern. In this case, despite the journalists' boorish refusal to meet promptly with N and the poor quality of presentation evident in the second

Truth and public interest are factors to consider but they are not necessarily the determinative factors.

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Truth and Public Interest Insufficient to Protect Against Defamation Claim Says Canada's Supreme Court

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broadcast, civil fault should not be attributed to the appellant when all the relevant public interest issues are taken into account.

The first broadcast relied in part on two complainants, T and L, who agreed to be interviewed on the air. On learning about the broadcast, the CNQ (without checking its facts) leapt to the attack, alleging (erroneously) that L had lied about his complaint because the CNQ had in fact reimbursed him for a loss suffered at the hands of one of its members, and that T's brother was the leader of a bizarre and violent cult. It was appropriate to bring these allegations to the attention of viewers, together with the journalists' response.

First, while the second broadcast ought to have presented N's letter in a more complete and balanced fashion, the lack of balance did not subvert the truth of the real matter of interest to the public, namely the truth of the CNQ's allegations pertaining to the complainants. Second, although N ought to have been given time to verify the errors in the letter, the allegations against the complainants were demonstrably false whether or not N took the opportunity to verify them. Had N publicly acknowledged the falsity of the allega-

tions, it would simply have added to the impression that the CNQ had responded impetuously to the original broadcast with a misinformed attack on the complainants, for which it should justly be called to account. Furthermore, it would not have improved N's reputation for the CBC to report that he wanted time to find out about the truth of the CNQ's allegations only after they were made. Third, the CBC was entitled to consider the information it had received to be public. There was no indication in N's letter to the contrary. Fourth, the criticism of some aspects of the second broadcast by the CBC's ombudsman cannot be equated with a finding of civil fault. He was not concerned with balancing the values of a free press and the respect for reputation. Had the other points made in N's letter been broadcast they would not have pulled the sting, or served the public interest in any substantial way, or for that matter, have helped to save N's reputation."

The full text of the decision can be accessed at: www.lexum.umontreal.ca/csc-scc/en/index.html.

Marc-André Blanchard is a partner with Gowling Lafleur Henderson LLP in Montréal.

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Canadian Radio Station Loses License for Offensive Broadcasts

By Florence Lucas

Quebec's French-language commercial radio station "CHOI-FM" is set to cease broadcasting August 31, 2004 – though the station owner Genex Communications, Inc. plans to petition the Federal Court of Appeal to stay the August 31 deadline pending an appeal.

On July 13, 2004, the Canadian Radio-Television and Telecommunications Commission (CRTC) denied the station's license renewal application for what it deemed the licensee's numerous failures to comply with the *Radio Regulations, 1986* and CHOI-FM's Code of Ethics. During the license term, the radio station had received several complaints about offensive comments and contests, personal attacks and harassment.

The CRTC's decision and public notices are available through at <www.crtc.gc.ca>.

CRTC Regulations

The CRTC is an independent public authority that regulates and supervises Canadian broadcasting and telecommunications. It has the authority to suspend or revoke broadcast licenses.

According to the *Canadian Broadcasting Act*, the Canadian broadcasting system should serve to safeguard, enrich and strengthen the cultural, political, social and economic fabric of Canada, encourage the development of Canadian expression and serve the needs and interests, and reflect the circumstances and aspirations of Canadian men, women and children, and the CRTC has the role of ensuring that programming by broadcasting enterprises be of a high standard.

The *Act* is also to be construed and applied consistent with the right of free expression set out in the *Canadian Charter of Rights and Freedoms*.

In 1986, the CRTC adopted the *Radio Regulations Act, 1986* which states in relevant part:

3. A licensee shall not broadcast ... (b) any abusive comment that, when taken in context, tends to or is likely to expose an individual or a group or class of individuals to hatred or contempt on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, age or mental or physical disability;

The CRTC denied CHOI-FM's license renewal application for violating this provision.

Background

Since the station began operating in 1997, the CRTC had received several complaints about it. In 2002, at the time of the station's first license renewal, the CRTC called Genex Communications to a public hearing because of its apparent failure to comply with the *Radio Regulations, 1986*.

On July 16, 2002, the CRTC renewed CHOI-FM's license for a short term of 24 months, from 1 September 2002 to 31 August 2004, subject to the following:

At the same time if, in the future, it considers that Genex has again failed to comply with the Radio Regulations or any of the conditions attached to CHOI-FM's license, including the code of ethics in Appendix II to this decision, the Commission may call Genex to a public hearing to show cause why the Commission should not issue such a mandatory order or apply any of its enforcement measures including revocation or suspension of the license of CHOI-FM.

This decision renewed CHOI-FM's license for a period of only 24 months due to

the licensee's repeated failure to comply with the Regulations regarding, among other things, abusive comment, contrary to section 3(b), the submission of logger tapes, insufficient French-language vocal music content and the condition of its license related to sex-role portrayal.

The CRTC also noted the licensee's failure to meet the objective set out in section 3 of the Act regarding high programming standards.

In 2004, while considering Genex Communications' subsequent renewal application, the CRTC conducted an analysis of CHOI-FM's programming, examined the new complaints brought during the short-term license and concluded that the licensee had again failed to comply with section 3 of the *Regulation* and the requirements of the Decision in 2002.

Freedom of Expression and the Radio Act

In its decision, the CRTC reiterated that the right to freedom of expression on broadcasting stations is not absolute and that it is expressly limited by various laws aimed at pro-

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Canadian Radio Station Loses License

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pecting other values, a statement it had made on a number of occasions in the past.

The CRTC placed all of the complaints against the licensee on the licensee's public examination file and in its decision, focused on 10 of the 92 complaints received between 1997 to 2002. It found that several on-air comments were in violation of the *Regulations* and CHOI-FM's Code of Ethics, including but not limited to:

- Comments that compared children with disabilities to animals, in reference to the Latimer case (a case brought before the Supreme Court of Canada, in which a father was charged with murdering his disabled daughter);
- Comments that tended or were likely to expose black or Muslim students at Laval University in Quebec city to hatred or contempt on the basis of race, ethnic origin, religion or color, regardless of their country of origin;
- Comments that ridiculed and insulted a complainant by broadcasting numerous abusive remarks about her physical and sexual attributes and claiming that she otherwise has no talent or intelligence (the CRTC reiterates that equality between men and women is one of the values referred to in section 15 of the Charter);
- Gratuitous, repeated and relentless personal attacks on individuals or groups, that the CRTC considered unresearched or inaccurate reporting and unprofessional on-air behavior as examples of failure to meet the high programming standards required of each licensee.

The CRTC observed that these sort of comments appeared to be part of a pattern of behavior by the station that continued, and even grew worse, despite clear, unequivocal warnings from the CRTC.

Genex Communications' Response

The CRTC noted that the station adopted an inflexible and unresponsive position in its responses to the written complaints and to questions at the public hearing pertaining to them. The CRTC considered that Genex Commu-

nications' behavior called into question its credibility and that of its controlling shareholder, sole director and chief executive officer, Mr. Patrice Demers, regarding Genex Communications' ability to understand and exercise its responsibilities under the Act as the holder of a broadcasting license.

Citing the seriousness and frequency of the violations, the fact that they were not first violations, the licensee's general attitude of denial, and the stalling tactics that the licensee used in dealing with complaints throughout the current license term, the CRTC concluded that the station did not accept its regulatory obligations and was not committed to meeting them.

Measures

Citing the licensee's inflexible behavior, its lack of acceptance of its responsibilities and the lack of any demonstrated commitment to rectify the situation, the CRTC concluded that Genex Communications would almost certainly not comply with the Act, the Regulations and its Code of Ethics if its license were renewed or temporarily suspended.

Even though the CRTC recognized that nonrenewal is rarely used, in view of the gravity of Genex Communications' repeated violations and the fact that none of the other available measures would appear to be effective, it decided to deny the renewal application.

In a Broadcasting Public Notice released the same day, the CRTC invited interested persons to submit an application to operate a new French-language radio station in Québec City, underlining that it would serve to maintain the diversity of radio service in the Québec region.

At press time, the Federal Court of Appeal ruled CHOI-FM can continue broadcasting until March 2005 pending appeal.

Florence Lucas is an associate at Gowling Lafleur Henderson LLP in Montreal, Canada.

New York Federal Judge Dismisses Former Reporter's § 1983 Action Against Newspaper

By Kevin M. Colmey

Does a newspaper reporter have a federally protected right to have her stories printed in the newspaper for whom she works, where the stories involve the alleged mishandling of felony cases by the local District Attorney? That question was recently answered by Judge David G. Larimer of the United States District Court for the Western District of New York in *Rivoli v. Gannett Co., Inc.*, No. 03-CV-6429L (W.D. N.Y. 2004), wherein the Court dismissed the reporter's complaint for failing to state a claim against the newspaper.

Reporter Investigates The District Attorney's Handling of Felony Cases

In November 1996, Gannett Co., Inc. hired Michelle Locastro Rivoli as a reporter for the Rochester Democrat and Chronicle, Rochester, New York. In late 1999, Rivoli told her editors that she had discovered a potential problem in the way the Monroe County District Attorney's office handled certain felony cases. She asked permission to investigate further, which her editors granted.

In early 2001, the editors felt Rivoli's investigation had uncovered sufficient credible information to merit a story regarding the District Attorney's failure to present certain felony cases to the grand jury. Based on information she uncovered, the Democrat & Chronicle criticized the District Attorney's Office and its handling of felonies in a lengthy series of news stories and editorials.

In the Spring of 2001, the Democrat & Chronicle's coverage triggered an investigation by the New York State Commission of Investigation. The editors decided to allow the investigation to run its course, and to "cool" reporting on the heavily-covered story. Having exposed the issue and taken a strong editorial stance, the newspaper decided to await the results of the investigation before publishing additional stories or editorials.

Reporter Alleges A "Deal" Between the Newspaper And The District Attorney, And Gets Removed From The Story

Rivoli disagreed with the newspaper's decision to "cool" the stories about the District Attorney, and requested that she be permitted to continue with her investigation. When the newspaper refused, she accused her editors of involvement in a "deal" with the District Attorney to silence her speech. Rivoli also began tape-recording conversations with her co-workers, and even criticized the newspaper in the Washington Post. This caused Rivoli's editors to question her objectivity, and led to an editorial decision to remove her from the story completely.

Reporter Resigns And Files Lawsuit Against Newspaper in Federal Court

The Democrat and Chronicle refused to publish any more of Rivoli's stories concerning the District Attorney's office. In September 2002, after being removed from the story completely, Rivoli resigned from the newspaper.

A year later, Rivoli filed a 50-page complaint against the newspaper's parent company, Gannett, in the United States District Court for the Western District of New York. Rivoli sought compensatory and punitive damages in the amount of \$5 million, as well as attorneys' fees, pursuant to 28 U.S.C. § 1983. Her complaint alleged that the Democrat and Chronicle and the District Attorney, acting in concert, deprived her of her constitutional right to free speech under the First Amendment. She did not name the District Attorney as a defendant in the lawsuit.

Newspaper Moves To Dismiss The Reporter's Lawsuit

Gannett moved to dismiss Rivoli's complaint, arguing that the newspaper's actions in removing Rivoli from the story and refusing to publish any more of her stories about the District Attorney's office are themselves constitutionally protected. Gannett also argued that the complaint failed to allege the requisite "state action" for a § 1983 claim, and that Gannett, as a private entity, could not have deprived Rivoli of her constitutional rights.

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New York Federal Judge Dismisses Former Reporter's § 1983 Action Against Newspaper

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Rivoli opposed the motion and argued that Gannett's right to editorial discretion does not shield Gannett from liability for conspiring with public officials to cover up malfeasance in public office. Rivoli further argued that, although Gannett is a private entity, it can still be liable under § 1983 for willfully collaborating with the District Attorney.

Case Dismissed – Newspaper Cannot Be Compelled To Publish Stories Written By Its Reporters

On July 29, 2004, Judge David G. Larimer of the United States District Court for the Western District of New York issued a Decision and Order granting Gannett's motion to dismiss Rivoli's complaint in its entirety.

Section 1983 Claim

The Court first discussed the "state action" requirements under § 1983. After acknowledging that there are circumstances under which a private entity *can* satisfy the state action requirement, the Court concluded that Rivoli's complaint had not demonstrated a sufficient nexus between Gannett and the District Attorney.

Rivoli had argued, in part, that the reason Gannett allegedly entered into the "deal" was out of fear that the District Attorney would stop providing the newspaper with newsworthy information. The Court rejected this argument as insufficient, pointing out that a government official has no general obligation to speak with the news media, and that even if the District Attorney had threatened to withhold such information, there was nothing unconstitutional about that. The Court concluded that the District

Attorney's "ability to give or deny the [newspaper] newsworthy information ... does not amount to the kind of governmental action that would give rise to a First Amendment violation."

Publisher v. Reporter: Whose First Amendment Right to Speak?

The Court then discussed the tension between Rivoli's First Amendment right to free speech and Gannett's First Amendment right not to speak and to control the contents of its own newspaper. The Court held that a newspaper reporter has no free standing First Amendment right to have her articles published by a privately owned newspaper for which she works, and a privately-owned newspaper cannot be compelled to publish stories written by its reporters. The Court concluded:

"Gannett has a First Amendment right to determine the contents of its own publications. That right necessarily includes the right to decide not only what to include, but what to exclude from the [newspaper]."

Gannett also requested an award of attorneys' fees pursuant to § 1988 of the Civil Rights Attorney's Fees Awards Act of 1976. The Court denied the request, finding that while the complaint was "meritless," it was not so frivolous as to warrant attorneys' fees.

Michelle Locastro Rivoli is represented by David Rothenberg of Geiger and Rothenberg, LLP in Rochester, New York. Gannett Co., Inc. is represented by Robert C. Bernius, Christopher D. Thomas, and Kevin M. Colmey of Nixon Peabody LLP in Rochester, New York and Washington, D.C.

DID YOU GO TO TRIAL RECENTLY? If you know of a libel, privacy, or case with related claims that went to trial recently, please let us know. It will be included in our annual report on trials, which is published each year. E-mail your information to erobinson@ldrc.com.

California Supreme Court Reverses Minor's Criminal Conviction for Penning "Dark Poetry"

By Jean-Paul Jassy

On March 5, 2001, a student at Santana High School in Santee, California shot and killed two students and wounded 13 others. Eleven days later, George T., a fifteen-year-old honors English student at Santa Teresa High School in Santa Clara County, California, approached a fellow student, Mary S., and handed her a "dark" poem, warning that George could be "the next kid to bring guns to kill students at school." George was later ordered to juvenile hall for sharing this poem with Mary and another student, Erin. On July 22, 2004, Justice Carlos R. Moreno, writing for a unanimous California Supreme Court, reversed George's conviction, finding that George's poem was protected under the First Amendment. *In re George T.*, - Cal. 4th --, 93 P.3d 1007, 16 Cal. Rptr. 3d 61 (2004). The Court's decision has an important and wide-ranging discussion of the standard of review in First Amendment cases, and particularly in cases that involve alleged criminal threats.

The Poem

When George (aka Julius and Angel) delivered his poem to Mary, he did so with a "straight face," explaining that the verse described his "feelings." The poem was labeled "Dark Poetry," was entitled "Faces" and reads (with misspellings) as follows:

Who are these faces around me?
Where did they come from?
They would probably become the
next doctors or loirs or something. All
really intelligent and ahead in their
game. I wish I had a choice on
what I want to be like they do.
All so happy and vagrant. Each
original in their own way. They

make me want to pike. For I am
Dark, Destructive, & Dangerous. I
slap on my face of happiness but
inside I am evil!! For I can be
the next kid to bring guns to
kill students at school. So parents
watch your children cuz I'm BACK!!

by: Julius AKA Angel

The poem scared Mary, who contacted school officials, who, in turn, called the police. When the police arrived at George's uncle's home (where George and his father were staying), the police asked George if there were any guns in the house. George "nodded." The guns belonged to George's uncle. The police discovered another undistributed "dark" poem, with similar sentiments, and took George into custody.

The police later learned that George gave another student, Erin, the original copy of "Faces," but Erin had not yet read it. When Erin discovered the poem and read it, with police and school officials present, she became "terrified" and considered the poem to be a personal threat.

Although George frequently joked with his friends that he would be "the next Columbine kid," he insisted that "Faces" was not intended to be a threat. Instead he considered poetry art, and a medium to describe emotions, rather than acting them out. Nevertheless, a juvenile court determined, and an intermediate appellate court agreed, that "Faces" constituted a criminal threat under California Penal Code § 422.

Clarifies The Standard Of Review For First Amendment Cases

The most significant aspect of the California Supreme Court's decision, from a wide-ranging First Amendment perspective, is its recognition that the United States Supreme Court mandates an independent review of the re-

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The Court concluded that "independent review is particularly important in the threats context because it is a type of speech that is subject to categorical exclusion from First Amendment protection."

Minor's Criminal Conviction for Penning "Dark Poetry" Reversed*(Continued from page 61)*

cord in a wide variety of First Amendment contexts, including cases involving alleged defamation, fighting words, obscenity, incitement to imminent lawless action, peaceful assembly, clear and present danger, failure to issue licenses for meetings and parades, and expressive association.

The California Supreme Court noted, however, that "independent review is not the equivalent of de novo review." The main difference, the Court explained, is that a reviewing court will not make credibility determinations on independent review.

The Attorney General of California contended that independent review was unnecessary in the case of George T. because true threats comprise a category of speech that is unprotected by the First Amendment. The Court rejected that contention noting that it "misses the point – independent review is utilized by a reviewing court precisely to make certain that what the government characterizes as speech falling within an unprotected class actually does so."

The Court concluded that "[i]ndependent review is particularly important in the threats context because it is a type of speech that is subject to categorical exclusion from First Amendment protection, similar to obscenity, fighting words, and incitement of imminent lawless action."

Not A Criminal Threat

The Court unanimously determined that "Faces" was not, on its face and under the circumstances in which it was disseminated, so unequivocal, unconditional, immediate and specific as to convey a grave and serious threat to Mary and Erin. The Court held that it was "readily apparent" that most of the poem does not constitute a threat, and only the final two lines come close. But even in those final two lines, George does not actually threaten to take action, he only writes of his "potential or capacity" to do so. Thus, the poem is "ambiguous and plainly equivocal," and was not a criminal threat.

The Court went on to explain that

"the surrounding circumstances may clarify facial ambiguity ... but care must be taken not to

diminish the requirements that the communicator have the specific intent to convey a threat and that the threat be of such a nature to convey a gravity of purpose and immediate prospect of the threat's execution."

The circumstances did not "clarify" the ambiguity in this case because "there was no history of animosity of conflict between the students," "no threatening gestures or mannerisms accompanied the poem," and "no conduct suggested to Mary and Erin that there was an immediate prospect of execution of a threat to kill."

In concluding that "Faces" is constitutionally protected, the Court took note of the poetry of Sylvia Plath, John Berryman, Robert Lowell and other "confessional poets who depict 'extraordinarily mean, ugly, violent, or harrowing experiences.'" However, the Court refused to create a "very strong presumption" – as urged by *amici* – that poems are not threats, citing the potential for such, presumably unprotected, prose: "Roses are red. Violets are blue. I'm going to kill you, and your family too."

The Court observed that a safe school environment can be harmonized with freedom of expression. By allowing expression that does not rise to the level of a criminal threat, students can vent their frustrations, while alerting the authorities to other problems that warrant attention. The Court underscored this point by noting that school officials were "amply justified in taking action," even though the poem "did not constitute a criminal threat."

George T. was represented by Michael A. Kressner of Santa Clara, California.

The People of the State of California were represented by Bill Lockyer, Attorney General, Manuel Medeiros, State Solicitor General, Robert R. Anderson, Chief Assistant Attorney General, Ronald A. Bass and Gerald A. Engler, Assistant Attorneys General, Stan M. Helfman, Violet M. Lee and Jeffrey M. Laurence, Deputy Attorneys General.

Jean-Paul Jassy is an associate with Sheppard, Mullin, Richter & Hampton LLP in Los Angeles, California.

Fox's Scrat Prevails in a Scrap With Silberstein's Sqrat

Movie's Scrat Character Did Not Infringe Plaintiff's Sqrat Logo

By Melissa A. Kern

The fur was flying in a recent dispute involving a squirrel, a rat, a fox, a beaver, and a prehistoric rodent.

In the motion picture *Ice Age*, produced by Twentieth Century Fox Film Corporation, the film's creators attempted to portray with some accuracy the historical period in which the film's events took place—the onset of the Ice Age. Although three main characters in the film were based upon animals that had actually existed during the Ice Age, one character prominently featured in the film was based upon a prehistoric creature, the *leptictidium*, that predated the Ice Age by several million years. This character was known as “Skrat”, a rodent-like being with bulging eyes, a long snout, saber teeth, a raccoon-like striped tail, and an anxious mien.”

Whose Sqrat is This?

Plaintiff, Ivy Silberstein was inspired to develop her “Sqrat” character after seeing an animal in a park that appeared to be a cross between a squirrel and a rat. Silberstein believed that such a creature had significant commercial potential and subsequently commissioned an artist to develop a character based upon a squirrel-rat hybrid which she named “Sqrat.” Silberstein later placed the Sqrat logo on various promotional items including T-shirts, stickers, and a banner that hung at the back of the stage at various outdoor rock concerts.

Silberstein, filed the suit upon learning of the film *Ice Age* and the Scrat character which she alleged was a knock-off of her own “Sqrat” logo. Silberstein's complaint asserted claims for, among other things, for copyright infringement.

Although Silberstein had initially moved for preliminary injunction seeking to enjoin Fox from distributing portions of *Ice Age* which featured a role referred to as “Skrat”, Silberstein had withdrawn her preliminary injunction motion after learning that the artist she had hired to create the Sqrat logo created it by adapting a piece of copyrighted clip art. The artist had apparently taken a short-cut when it created the Sqrat logo by cre-

ating it by adapting a copyrighted clip-art image entitled “Beaver Cartoon No. 2” (the “Beaver”) available on a CD Rom created by Smart Designs. The artist made minimal alterations to the Beaver clip-art: (1) the Beaver's tail was replaced with a tail that the artist intended to be a squirrel's tail; (2) the ears were made rounder; (3) whiskers were added; (4) the artist allegedly “played with the teeth a little,” and (5) the creature held a sign reading “SQRAT.”

Quick Round of New Licenses

The revelation that the Silberstein's Sqrat character was a derivative work engendered a flurry of activity on both sides of the dispute. Around March, 2002, Fox entered into a written agreement with the successor in interest to Smart Designs, Digital Art Solutions, Inc. (“DAS”), which warranted that it was the sole owner of the copyright in and to the Beaver and transferred and assigned its rights, title, and interest in and to the Beaver to Fox, retroactive to the date of the Beaver's creation.

However, DAS might have transferred more than it had, because Beaver, once thought to have been created as a work-for-hire by an employee of Smart Designs was actually drawn by an artist named Ron F. Szafarczyk, an independent contractor. A dispute ensued between DAS and Szafarczyk regarding ownership of the copyright in the Beaver. The dispute went to arbitration, and the arbitrator awarded an undivided one-half ownership of the Beaver copyright to each DAS and Szafarczyk.

Subsequently, Fox and DAS voided their earlier agreement and entered into a new agreement under which Fox gained a non-exclusive license, retroactive to the creation date and continuing in perpetuity to use and exploit the Beaver in connection with Fox's Scrat. Silberstein, not to be outdone, purchased Szafarczyk's rights in and to the Beaver, retroactive to the date of the Beaver's creation.

Summary Judgment Granted

Fox brought a motion for summary judgment arguing, among other things, that its license to use the Beaver cartoon operated to preclude copyright infringement as to any

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Fox's Scrat Prevails in a Scrap With Silberstein's Sqrat

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of the features of Silberstein's Sqrat that were in the original Beaver cartoon. In addition, Fox contended its Scrat character was not substantially similar to the protectible elements of Silberstein's Sqrat logo.

On July 15, 2004, the Court granted Fox's motion for summary judgment in its entirety and dismissed all of Silberstein's claims. *Silberstein v. Fox Entertainment Group Inc.*, 2004 U.S. Dist. LEXIS 13554 (S.D.N.Y., July 19, 2004). Both Silberstein and Fox have the right to use the Beaver as the result of (1) the subsequent retroactive license granted to Fox by DAS; and (2) the subsequent retroactive transfer of Szafarczyk's copyright interest to Silberstein.

The Court noted that since there can be no copyright infringement by a holder of a copyright against a licensee of another holder of the same copyright, the retroactive license agreement between DAS and Fox immunized Fox against claims of infringement of the Beaver copyright. The Court further noted that the retroactive nature of the license agreement does not invalidate its ability to immunize Fox.

Similarly, since an owner of a copyright is free to create derivative works based upon the underlying copyrighted work, the retroactive conveyance of Szafarczyk's Beaver copyright to Silberstein gave Silberstein the right to create Sqrat as a derivative work based upon the Beaver. Therefore, since both Fox and Silberstein had rights in the Beaver, Silberstein only had a copyright interest in which she could claim Fox had infringed with regard to the derivative elements that had been contributed to the Beaver to create the Sqrat logo.

The Court found that Silberstein had only contributed four derivative elements to the Beaver: (1) a round ear, (2) bushy tail, (3) whiskers, and (4) a sign reading "SQRAT". Of those elements, at least the sign was not protectible because copyright law does not lend protection to the names of cartoon characters.

No Substantial Similarity

As for the other elements, to succeed on her copyright infringement claim, Silberstein would have to prove substantial similarities existed between the Scrat character and

the protectible elements of her Sqrat logo. To determine whether the protectible elements were copied by Fox, the Court conducted a "total concept and feel" comparison and found that such fundamental differences existed between the Scrat character and Sqrat logo that no reasonable fact finder would be able to find in favor of Silberstein on the issue of substantial similarity.

The only original element of Sqrat that resembled the Scrat in any meaningful way were its character's round ears. However, the Court noted that a round ear on a rodent was "hardly a novel feature." Moreover, under the doctrine of "scenes a faire," which excludes from copyright protection features of a work that are indispensable, or at least standard, in the treatment of a given topic, the Court noted that there were limited possibilities in the placement of an ear on a rodent's head. The Court concluded that substantial similarity could not be established by this common feature as no reasonable jury could conclude that Sqrat and Scrat were substantially similar with regard to the protectible (and even non-protectible) elements. Therefore the Court granted summary judgment in favor of Fox as to Ivy Silberstein's copyright infringement claim.

For Ivy Silberstein dba Ivy Supersonic, Plaintiff: Peter S. Cane, LEAD ATTORNEY, New York, NY.

For Fox Entertainment Group, Inc., Twentieth Century Fox Film Corporation, Blue Sky Studios, Inc., Jakks Pacific, Inc., UBI Soft Entertainment, Inc., HarperCollins Publishers, Inc., Defendants: Eulas G. Boyd, Jr., Jacques M. Rimokh, Jonathan Zavin, LEAD ATTORNEYS, Loeb & Loeb, L.L.P., New York, NY.

For Fox Entertainment Group, Inc., Twentieth Century Fox Film Corporation, Jakks Pacific, Inc., UBI Soft Entertainment, Inc., Blue Sky Studios, Inc., Counter Claimants: Jonathan Zavin, Jacques M. Rimokh, LEAD ATTORNEYS, Loeb & Loeb, L.L.P., New York, NY.

For Ivy Silberstein dba Ivy Supersonic, Counter Defendant: Peter S. Cane, LEAD ATTORNEY, New York, NY.

Melissa A. Kern is an Associate of Frost Brown Todd LLC in Cincinnati, OH.

Federal Communications Commission Releases Three Notices of Inquiry on Programming

In July, the FCC released three Notices of Inquiry that touch upon programming, and thus the First Amendment, interests of broadcasters. These follow on the heels of a busy Spring by the Commission in which it has undertaken to rewrite the basic ground rules on “indecentcy” on the airwaves. The NOIs are summarized briefly below. MLRC will be publishing longer articles in the MLRC BULLETIN 2004:4 on aspects of these issues in the late Fall.

In the matter of: Violent Television Programming and Its Impact on Children Notice of Inquiry FCC 04-175 (July 28, 2004)

In response to an election year letter signed by 39 members of the U.S. House of Representatives, Committee on Energy and Commerce, the FCC is soliciting materials pertaining to violence in broadcasting. Among the more disturbing statements in the NOI is the Commission’s willingness to accept that “numerous studies have demonstrated the harmful effects of media violence on children,” – a statement that is more than arguably a stretch from the various correlation studies done over the last three decades or more.

[And note that Commissioner Michael J. Copps, in a separate statement, seems to accept unequivocally the “harmful impact that exposure to graphic and excessive media violence has on the physical and mental health of our children.” He states:

“Wanton violence on the people’s airwaves has gone unaddressed for too long.”]

The FCC acknowledges that defining violence for regulatory purposes may be difficult, but largely because of its conclusion that:

“‘[N]ot all violence is created equal.’ From a public policy standpoint, is there a need to define all violence, or simply gratuitous or excessive violence?”

Citing a UCLA Violence Reports from 1997 and its attempt to define violence for research purposes as “the act of, attempt at, physical threat of or the consequences of physical force.”

“As the 1997 TV Violence Report explains, such broad definitions ‘include violence, cartoon violence, slapstick violence – anything that involves or immediately threatens physical harms of any sort, intentional or unintentional, self-inflicted or inflicted by someone or something else.’ We seek comment on whether these definitions are appropriate.”

Interestingly, after seeming to eschew context as a key variable or factor in analyzing whether the articulation of even a single “dirty word” on the air was sanctionable as indecent, the Commission seems to be willing to listen to the argument that with respect to violence, “[c]ontext is key to the determination of whether or not violence is appropriate.” Citing the UCLA 1997 TV Violence Report from UCLA.

The inquiry intends to examine the

- (1) frequency of televised violence and the trends, noting whether there are differences between media such as over-the-air television versus cable or satellite, premium or non-premium channels,
- (2) varying definitions and types of violence in programming, including the context;
- (3) nature and profundity of effect the exposure to violence may have on American youth, examining the numerous studies that have been done on media violence and children and older viewers
- (4) various means of controlling (or facilitating parental control over) the exposure of children to violent programming such as the existing V-chip and accompanying industry rating system, and
- (5) statutory and constitutional limitations on the FCC’s ability to regulate televised violence.

At the heart of the inquiry lies a discussion of proposed “Safe-Harbor” legislation that would

“declare it unlawful for any person to distribute to the public any violent video programming not blockable by electronic means specifically on the basis of its violent content when children are reasonably likely to comprise a substantial portion of the viewing audience.” FCC 04-175, 10 (citations omitted).

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Federal Communications Commission Releases Three Notices of Inquiry on Programming

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The inquiry (and the future of the legislation) appears to revolve around the answers to three interrelated questions posed by the aforementioned House committee members:

- (1) Does the FCC have “the authority to adopt a ‘safe-harbor’ for the broadcast of violent programming”? FCC 04-175, 10;
- (2) If not, could Congress convey the power to enforce a “safe-harbor” to the FCC through legislation? (Under what standard of review would a “safe-harbor” scheme be scrutinized?);
- (3) Could the FCC enforce such legislation by “defin[ing] ...violent programming in a way that is not unconstitutionally vague or overbroad”? FCC 04-175, 13.

In terms of narrow tailoring, the inquiry leaves no question of scope unexamined, including: “Does violence serve any artistic function that should be considered, or are all depictions of violence necessarily gratuitous?” FCC 04-175, 5.

In the matter of: Broadcast Localism Notice of Inquiry FCC 04-129 (July 1, 2004)

The FCC is once again examining the efficacy of its regulatory activity designed to further the public interest in the proliferation of community responsive programming.

The first and most elemental question posed by the Commission is what qualifies as ‘local’ programming, and does such programming best satisfy Title III of the Communications Act. Largely setting that issue aside, the Commission, for the purposes of this NOI, presumptively defined community responsive programming to include:

- (1) access by political candidates and community leaders at all levels of government to their (potential) constituencies;
- (2) emergency/disaster warnings; and,
- (3) community specific programming with an emphasis on traditionally under-served populations.

The primary concern of the NOI, however, is the extent to which ‘pro-localism’ regulation is demanded by the current radio, television, cable, and satellite broadcasting markets with their ever advancing technology and concomitantly demanding consumers.

The Commission intends to explore the potential effects of mandating quotas for community responsive or local programming, as well as overhauling its now impotent license renewal procedures. The FCC is also targeting the quality of broadcasting by considering how to best increase the visibility of “tainted” or purchased programming. Proposals to cleanse the informational superhighway include mandating sponsorship identification and closing the gaps in Payola prohibitions.

Network autonomy is similarly up for debate, specifically the stranglehold of “National Playlists” and the autonomy of broadcasters with respect to their Network Affiliations. Finally, the NOI addresses the potential of LPFM (Low Power FM broadcasts with a 3.5 mile signal radius) to serve as the “mouthpiece” of local communities without technologically undermining noncommercial signal translators that rebroadcast radio to areas otherwise without adequate programming reception. FCC 04-129, 2

In the matter of: Retention by Broadcaster of Program Recordings Notice of Proposed Rulemaking FCC 04-145 (July 7, 2004)

The FCC proposes “to require that broadcasters retain recordings of their programming for some limited period of time (e.g., 60 or 90 days) in order to increase the effectiveness of the Commission’s process for enforcing restrictions on obscene, indecent, and profane broadcast programming.” FCC 04-145, 1. The rule is intended to shift the burden of producing evidence of offensive broadcasts from members of the public, who initiate complaints, to the broadcasters that (1) are the immediate beneficiaries of the broadcast licenses and (2) the best able to preserve complete records of daily broadcasts.

The Commission seeks comment on the rule as a whole but specifically on

- (1) the length that broadcasters should be required to maintain programming after the date of its broadcast and
- (2) the scope of the rules applicability (specifically, should the rule apply to satellite broadcasters and/or small businesses). Additionally, the FCC is concerned as to the collateral effects of the rule—would it facilitate the Commission’s general enforcement activity and/or unduly expose broadcasters to third party actions or subpoenas?

LEGISLATIVE UPDATE

By Kevin M. Goldberg

Between the two political conventions and the traditional August recess, there has not been much action in Congress of late. In fact, it is unlikely to get any more active upon legislators' return after Labor Day, as there will only be one month left in the Congressional session before the planned adjournment on October 1 to allow for candidates to return home for election races. However, this may also mean we see another "lame duck" session in November, much along the lines of the passage of the Critical Infrastructure Information Act of 2002.

The impending end of the 108th Congress may just allow us to escape passage of a bill that would greatly reduce access to aggregated medical records.

Patient Safety and Quality Improvement Act (S 720)

Some believe that S 720 would trump existing state laws, such as a recently-passed Illinois law which requires the reporting of hospital-acquired infections. This concern stems from the very broad definition of "patient safety data." Any advocacy against this bill must contain opposition to this definition.

- This bill was introduced by Sen. Jim Jeffords (I-VT), Bill Frist (R-TN) and John Breaux (D-LA) on March 26, 2003.
- The bill notes that "research on patient safety unequivocally calls for a learning environment, rather than a punitive environment, in order to improve patient safety." Increased voluntary data gathering, but not increased mandatory data gathering, from within the health care field is apparently necessary to achieve this goal of a learning environment. Organizations supporting this increased voluntary data gathering also support legal rules that will allow them to review this protected information in order to "collaborate in the development and implementation of patient safety improvement strategies."
 - It contemplates the creation of "patient safety organizations" who will receive "patient safety data" that is voluntarily provided by health care providers.
 - These "patient safety organizations" are public or private entities that:
 - Conduct efforts to improve patient safety and quality of health care delivery;
 - Collect and analyze patient safety data voluntarily submitted by a provider;
 - Develop and disseminate information to providers regarding patient safety,
 - Including recommendations, protocols or information on best practices; or
 - Utilize patient safety data to encourage safety and minimize patient risk.
- "Patient safety data" is defined as any data, reports, records, memoranda, analyses, deliberative work, statements, or quality improvement process. This does not specifically include individual medical records, nor is it information that contains personally identifiable information. Rather, patient safety data will most likely consist of aggregated statistics reflecting trends in a given organization or office, such as the number of people who died during surgery in the past year or the number of patients who died from post-operative infection. It may also include individual reports — minus personally identifying information — of medical or administrative errors which are reported to the patient safety organization in order to receive feedback regarding the ability to avoid similar mistakes in the future.
- A health care provider submitting this information can be any person or entity furnishing medical or health care services, including, but not limited to, physicians, pharmacists, renal dialysis facilities, ambulatory surgical centers, long term care facilities, behavioral health residential treatment facilities and clinical laboratories.
- The bill's controversial provisions grant confidentiality to this patient safety data. The legislation states that all patient safety data shall remain privileged and confidential, preventing its release even in the face of a subpoena or discovery request (or its use as evidence) in any civil, criminal or administrative proceeding, or its disclosure pursuant to FOIA. Disclosure of this information can only occur if:
 - A health care provider makes the disclosure as part of a separate request for information that contains this

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LEGISLATIVE UPDATE*(Continued from page 67)*

- information (such as a proper request for a patient's file when that file contains a reference to patient safety data or the data itself); or
- A health care provider or patient safety organization releases the information as part of a disciplinary proceeding or criminal proceeding if the information is material to the proceeding, within the public interest and not available from any other source.
- A House version was introduced on February 11, 2003 by Rep. Michael Bilirakis (R-FL), with approximately twenty co-sponsors.
- Some believe that S 720 would trump existing state laws, such as a recently-passed Illinois law which requires the reporting of hospital-acquired infections. This concern stems from the very broad definition of "patient safety data." Any advocacy against this bill must contain opposition to this definition.

By including "any data, reports, records, memoranda, analyses, or statements that could result in improved patient safety or health care outcomes that are

- (1) collected or developed by a provider for reporting to a patient safety organization,
- (2) requested by a patient safety organization, or
- (3) collected from a provider", in the definition of "patient safety data", the bills would allow health care providers or patient safety organizations to bring records, information, or other evidence of improper care through the back door into the safe haven of protection from disclosure (the bills' supporters disagree, claiming that the bills would not limit the availability of any information already in the public domain, nor would they relieve physicians from maintain a proper standard of care).

In addition, the exception for information that has been collected or developed separately from patient safety data is not sufficiently precise to allow a requestor to claim access to such records — they would apparently allow medical information such as specific patient records to be grouped with patient safety data in a way that results in both being protected by the law. It almost certainly would restrict access to the self-generated "hospital report cards" that are a good indication of a hospital's health care practices.

- The differences between the two bills have been resolved and the measure has been cleared for a Senate Floor vote – the last impediment to its potential passage. Again, however, the lack of active congressional work days left in this session may mean a bullet is dodged.

HR 4823 (Journalist's Visas)

- Introduced by Rep. Zoe Lofgren (D-CA) on July 13, 2004, this bill seeks a simple solution to a devastating problem.
- Under the Visa Waiver Program, citizens from 27 friendly countries can travel to the United States for up to 90 days without getting a visa prior to entry; US citizens traveling to these nations have reciprocal rights. In either case, certain exceptions apply:
 - Persons convicted of certain serious felonies and those with highly communicable diseases are not eligible to participate in this program.
 - Nor are persons who are coming to the United States solely for the purpose of engaging in very complex, long term business transactions.
 - Finally, journalists are prohibited from entering the United States without an "I-visa", which must be obtained from a United States Consulate prior to entering the United States.
- The requirement to obtain an I-visa prior to coming to the United States to engaging in reporting has been part of US law since being enacted as part of the Immigration and Nationality Act in 1952 and is considered a relic of the Cold War.
- It was largely dormant prior to 18 months ago, when the Department of Homeland Security, without prior public notice, began enforcing it at the borders. In that time, an estimated 15 journalists have been detained and arrested at airports across the country when it was revealed that they were entering the United States to engage in reporting. These journalists were handcuffed and detained in holding cells before being summarily deported without a hearing or trial of any kind. In many cases, they were forcibly searched and denied the right to a phone call or even an attorney.

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LEGISLATIVE UPDATE

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- Upon pressure from various journalism organizations, the Department of Homeland Security has stated that it will allow reporters to enter the United States without a visa on one occasion – presuming that most reporters are ignorant of the I-visa requirement. However, any second offense will result in arrest and deportation, with the possibility of being barred from entering the United States in the future.
- Rep. Lofgren’s bill would simply specifically exclude journalists from those classes of persons ineligible to participate in the Visa Waiver program, putting them on equal footing with all other citizens of these friendly nations. It was referred to the House Judiciary Committee, but has not received any action from that committee.

For more information on any legislative or executive branch matters, please feel free to contact the MLRC Legislative Committee Chairman, Kevin M. Goldberg of Cohn and Marks LLP at (202) 452-4840 or kmg@cohnmarks.com.

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No Injunction Issues Over ESPN’s Playmakers Television Series

By Marc E. Ackerman and Jessica A. Rose

The United States Court of Appeals for the Ninth Circuit affirmed the denial of a motion for preliminary injunction brought by a Seattle sports agency against ESPN over the use of the title “Playmakers” for ESPN’s dramatic series about the on and off field lives of professional football players. *PlayMakers, LLC v. ESPN, Inc.*, No. 04-35031, 2004 WL 1575249, at *2 (9th Cir. July 15, 2004).

Agency Claims Trademark Infringement

The agency, named PlayMakers LLC, filed its lawsuit against ESPN alleging, *inter alia*, state and federal trademark infringement. Plaintiff, which owns federal trademark registrations for “PlayMakers” in connection with “agency services, namely representing and advising professional athletes in contract negotiations with professional sports teams and in endorsement appearances,” claimed that ESPN’s use of the word “playmakers” for the title of its television show was likely to cause confusion in the minds of consumers.

Plaintiff argued a theory of “reverse confusion”; that is, that potential athletes might believe that the agency was sponsored or endorsed by ESPN. Moreover, the agency argued that the show’s controversial subject matter was likely to tarnish the agency’s reputation, and that the court should consider such tarnishment in deciding whether consumer confusion was likely. ESPN’s fictional dramatic series, which received critical acclaim and strong ratings, also drew some criticism for touching on provocative subjects such as drug use and homosexuality.

Court Finds No Likelihood of Consumer Confusion

Writing for the Ninth Circuit panel, Circuit Judge Pregerson upheld the district court’s denial of an injunction. The Court found that consumer confusion was unlikely: “Like the district court, we are persuaded that, despite the marks’ similarities, the commonness of the term ‘playmaker,’ the remoteness of the parties’ lines of busi-

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No Injunction Issues Over ESPN's Playmakers TV Series

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ness, the differences in their choice of marketing channels, and the degree of care professional and aspiring athletes are likely to exercise before choosing an agent strongly suggest that the LLC's prospective clients are not likely to be confused." The Court also agreed with the District Court that that the balance of hardships did not tip in favor of granting an injunction, given ESPN's showing of substantial harm that would occur should an injunction issue.

The Ninth Circuit also upheld the district court's conclusion that "tarnishment" is not a factor in the likelihood of confusion analysis. The court stated "[t]arnishment may be a theory of liability or a type of harm, but it is not itself a factor to be considered in determining whether consumer confusion is likely." Finally, the Court did not reach Defendants' argument (presumably because it did not need to) that

the First Amendment precluded the application of the Lanham Act against ESPN, as the designation "Playmakers" was used as the title of an artistic work, and such title accurately describes the content of the show and does not explicitly mislead as to the show's source or sponsorship.

Defendants ESPN, Inc. and Orly Adelson Productions, a producer of the series, were represented by Robert L. Ras-kopf, Marc E. Ackerman, Jennifer Johnson Millones and Jessica A. Rose of White & Case LLP in New York, and Scott A. W. Johnson and Shannon M. Jost, of Stokes Lawrence, P. S. in Seattle. Plaintiff was represented by O. Yale Lewis, Katherine Hendricks and Kari L. O'Neill of Hendricks & Lewis in Seattle.

Marc E. Ackerman is a partner and Jessica A. Rose is an associate with White & Case LLP in New York.

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ETHICS CORNER

Representing Multiple Clients: No Time for Complacency

By Bradley H. Ellis and Frank J. Broccolo

Loyalty. As law students we are taught that fidelity to the interests of our client is a fundamental pillar upon which the adversary system of resolving disputes depends. The client must know that her lawyer has her and only her interests in mind as the lawyer makes the myriad of judgments and decisions required in litigation. As the California Supreme Court has said:

“When a client employs an attorney he has a right to presume, if the latter be silent on the point, that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgment, or endanger fidelity.”

Flatt v. Superior Court, 9 Cal. 4th 275, 287, 36 Cal.Rptr.2d 537, 544 (Cal. 1994) citing *Williams v. Reed* (C.C.D.Me. 1824) 29 Fed. Cas. 1386, 1390.

Can Get Complex

When the lawyer represents multiple clients, remaining loyal to both can get complicated. Yet, media lawyers routinely take on the representation of an existing, usually longstanding, corporate media client along with a reporter, author, songwriter or producer they have never met. Can the lawyer be loyal to the individual? Can the lawyer avoid the nightmare of a client claiming lack of fidelity, hurling unseemly accusations about the lawyer's ethics and competence?

The answer, of course, is “yes.” More often than not, the known facts make it clear that the interests of the publisher and the writer are aligned and there is little possibility they will diverge. But, because multiple representation is relatively routine, lawyers may ignore the steps that should be taken to protect both clients – and themselves – when, unexpectedly, the unknown intrudes, causing interests to conflict.

And Penalties Abound

This is not an area that permits complacency, however. Attorneys are generally subject to public censure for failing to identify a conflict of interest among clients. See American Bar Association's Standards for Imposing Lawyer Sanctions § 4.33 (“Reprimand is generally appropriate when a lawyer is negligent in determining whether [a] representation...will adversely affect another client”); *Case of Shillen*, 149 N.H. 132 (N.H. 2003) (Public censure appropriate sanction where attorney promptly withdrew from representation upon learning of conflict of interest between clients); *People v. Stevens*, 883 P.2d 21 (Colo. 1994).

Because multiple representation is relatively routine, lawyers may ignore the steps that should be taken to protect both clients – and themselves – when, unexpectedly, the unknown intrudes, causing interests to conflict.

Moreover, failure to identify a conflict of interest among one's clients might subject an attorney to a malpractice claim. *Lysick v. Walcom*, 258 Cal. Ct. App. 2d 136, 148, 65 Cal. Rptr. 406, 414 (Cal. Ct. App. 1968) (“[W]hen an attorney attempts dual relationship without making the full disclosure required of

him, he is civilly liable to the client who suffers loss caused by lack of disclosure.”)

In the extreme case, active concealment of conflicts can result in suspension or disbarment. See e.g. *The Florida Bar v. Sofo*, 673 So. 2d 1 (Fla. 1996) (Failure to disclose conflict of interest to clients, and use of information obtained in confidence against one client, resulted in 91-day suspension).

Apart from active wrongdoing, the routine can breed complacency which will lead to nothing good for client or lawyer should an actual conflict develop between the jointly represented clients.

NYC Bar Offers Good Guide

A recent opinion by the Bar of the City of New York Committee on Professional and Judicial Ethics (“NYC Bar”) provides useful guidance respecting the issues lawyers should consider every time they put their loyalty to

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the test, taking on representation of multiple clients with potentially conflicting interests.

In Formal Opinion 2004-02, the NYC Bar specifically addresses multiple representation of a corporation and one or more of its constituents in the context of governmental investigations, but notes that the concepts discussed in the opinion “apply to any multiple representation of a corporation and one or more of its constituents.” Formal Opinion at 2. The opinion addresses three primary issues:

- (1) when is it appropriate to take on two or more clients in the same matter;
- (2) what disclosures are necessary when doing so; and
- (3) the steps that should be considered to minimize potential harm to the clients should a conflict in fact arise.

The Disinterested Lawyer Test

As to the first, New York applies the “disinterested lawyer” test – that is, would a disinterested lawyer “believe that a single lawyer could competently represent the interests of each client.” Formal Opinion at 3; DR 5-105. A disinterested lawyer “is an objective, hypothetical lawyer ‘whose only aim would be to give the client the best advice possible about whether the client should consent to a conflict’ or potential conflict.” *Id.*, citing Simon’s New York Code of Prof’l Responsibility Ann. 554-55 (2003). Such lawyers evidently do not only exist in New York. The ABA Model Rules of Professional Conduct, Model Rule 1.7 incorporates a similar concept. Under the Model Rule a lawyer may represent clients with potentially conflicting interests only if “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.” If the proposed representation does not pass the “disinterested lawyer” test, the lawyer cannot accept the multiple representation.

Whether a particular jurisdiction contains a similar concept, thinking of the issue in terms of the “disinterested lawyer” is a good way to test whether, in fact, the lawyer reasonably believes his loyalty to either client will be compromised if he represents them both. In fact, when in doubt about whether the representation can be taken on at all, discussing the matter with a truly disinterested lawyer – even a colleague in the office – is always a good idea.

Appropriate Disclosures

Once the decision is made that the lawyer may represent more than one client, the lawyer must consider the appropriate disclosures that must be made. Consent to representation when potential conflicts exist must be informed consent in writing. ABA Model Rules, Rule 1.7; Cal. Rules of Prof. Resp. Rule 3-310 (C).

The New York rule is more detailed, requiring “full disclosure of the implications of the simultaneous representation and the advantages and risks involved.” DR 5-105 (C). The cases make clear that the concept of “full disclosure” is taken seriously by courts and regulators. *See e.g. Swift v. Ki Young Choe*, 674 N.Y.S.2d 17, 19, 242 A.D.2d 188, 192 (N.Y. Sup. Ct. 1998) (Whether a client “fully understood and appreciated the risk he was undertaking” when assenting to concurrent representation was a factual inquiry that was not resolvable on a motion for summary judgment, despite the existence of letter confirming that the client had been advised that retaining individual counsel was preferable, and the client’s execution of a release in favor of his former counsel; consequently, the trial court’s order dismissing a malpractice action was reversed).

The New York formulation highlights that full disclosure requires discussion of the implications of simultaneous representation, including the advantages and risks. Therefore,

“the attorney must give careful, fact-specific consideration to the potential risks and advantages of the representation so that there can be full disclosure to the clients. . . .”

Formal Opinion 2004-02. The disclosure, of course, runs to both clients. Depending on the potential conflicts the lawyer sees, he should disclose to his media client the potential consequences of an actual conflict developing – principally, that he may not be able to continue to represent the company in that matter.

Structuring to Limit Problems Later

The final subject the NYC Bar discusses in its Opinion is how a lawyer might structure the representation to minimize the potential adverse consequences to the clients should an actual conflict between the clients arise. Of par-

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ticular importance to the corporate client will be a prospective waiver of any conflict.

Once again, however, to be effective the waiver must have been made after full disclosure, which is difficult to make in the abstract. The attorney should nonetheless attempt to be as specific and complete as possible. If there is a dispute regarding the waiver, the issue will be, of course, whether it was made with knowledge. The more specific and detailed “the more likely the waiver is to be upheld.” In any event, once an actual conflict develops, the lawyer must obtain a further waiver to continued representation. *See e.g. Gilbert v. National Corp. for Housing Partnerships*, 71 Cal.App.4th 1240, 1255, 84 Cal.Rptr.2d 204, 213-14 (Cal. Ct. App. 1999).

The NYC Bar offers additional suggestions such as contractual limitation on the scope of representation to try and steer around potential conflicts and the hiring of co-counsel or “shadow” counsel who is available to offer inde-

pendent advice to the individual client. Whether those suggestions make sense in any particular matter depends on the facts. It is difficult to imagine that, in libel litigation, for example, a “carve out” could be made that could avoid conflict and still provide for effective and advantageous representation to both clients. And, the problem with co-counsel or “shadow” counsel is that it deprives the media client of the principal advantage of a single lawyer representing it and the author – cost savings. Nevertheless, the subject is an important one and should be considered at the outset – if the unthinkable happens and an actual conflict arises that does not permit further joint representation, what steps can and should be taken to minimize the impact to both clients.

Bradley H. Ellis is a Partner at Sidley Austin Brown & Wood LLP in Los Angeles, CA, where Frank J. Broccolo is also an Associate.

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