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Reporting Developments Through August 29, 2008

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MEDIA LAW RESOURCE CENTER

ANNUAL DINNER

WEDNESDAY, NOVEMBER 12TH, 2008

The Presidency and the Press

Michael Beschloss
Author, *Presidential Courage: Brave Leaders and How They Changed America, 1789-1989*
Presidential Historian for NBC News

David Gergen
Professor of Public Service and Director of the Center for Public Leadership at
John F. Kennedy School of Government at Harvard University
Director of Communications for President Reagan
Advisor to Presidents Nixon, Ford and Clinton

Joe Lockhart
Founding Partner with The Glover Park Group
Chief Spokesman for President Clinton and the Clinton Administration, 1998-2000

Moderated by

Martha Raddatz
Chief White House Correspondent for ABC News

Cocktail Reception at 6:00 P.M.
Sponsored by Media/Professional Insurance

Dinner at 7:30 P.M.
Grand Hyatt New York
Empire Ballroom, 109 East 42nd Street at Grand Central Station

RSVP by Monday, October 27, 2008

Business Attire

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Fourth Circuit Rejects Defamation Suit by Military Contractor at Abu Ghraib

First Amendment Right to Criticize the Government and Government Contractors in Time of War Upheld

By Laura R. Handman and David M. Shapiro

In *CACI v. Rhodes*, 2008 WL 2971803 (4th Cir. Aug. 5, 2008), the Fourth Circuit rejected a military contractor's attempt to hold a radio host and radio station liable for live on-the-air statements about the contractor's involvement in abuse at Abu Ghraib prison in Iraq. Although the statements in issue contained words such as "rape," "murder," and "torture," the Fourth Circuit held, based on a combination of the latitude afforded by the actual malice standard and the First Amendment's robust protection of rhetorical hyperbole, that the statements could not serve as a basis for a defamation suit.

Background

During a series of seven broadcasts in August 2005 of *The Randi Rhodes Show* on Air America radio, host Randi Rhodes discussed the role of military contractors, including CACI, in the horrific abuses that occurred at Abu Ghraib prison. More broadly, Rhodes, using the hyperbolic style typical of talk radio, expressed her view that quintessential military functions – such as interrogation in a theater of war – should not be farmed out to private companies. CACI sued Rhodes for thirteen statements. This was typical:

> Unless we actually apologize for these [acts], unless we actually have a president of the United States who says-look what's been done here and I know who did it and this is who did it and it was CACI and it was Titan and it was Blackwater and it was Halliburton and it was Bechtel and it was DynCorp. and it was this one and it was Triple-whoever it was, and he actually says these people are going to be put on trial and they will be charged with murder, and they will be charged with rape, and they will be charged with molesting children. And they will be charged with crimes against humanity. Until and when and if that happens, the recruitment for Al Qaeda is going to surpass our recruitment capabilities here in the United States.

2008 WL 2971803, at * 8.

In a September 2006 opinion, the U.S. District Court for the Eastern District of Virginia granted summary judgment against CACI. The District Court found that each of the statements was not demonstrably false, consisted of rhetorical hyperbole, or did not rise to the level of actual malice, in some cases finding a statement non-actionable for more than one of these reasons. There was no dispute that CACI was a public figure.

Fourth Circuit Decision

In an opinion by Judge Michael, the Fourth Circuit affirmed the District Court's grant of summary judgment. The Fourth Circuit did not consider whether the statements were demonstrably false, but affirmed on the ground that each statement either was not made with actual malice or consisted of hyperbolic accusations rather than statements of fact.

The Court engaged in a detailed analysis of the sources that Rhodes relied on, placing particular emphasis (as did Rhodes) on two U.S. Military reports resulting from investigations of abuse at Abu Ghraib. First, a report by Major General Antonio M. Taguba documented abuse at Abu Ghraib including:

> punching, slapping, and kicking detainees; using unmuzzled military dogs to frighten, and in one case to bite, detainees; breaking chemical lights and pouring the phosphoric liquid on the detainees; positioning a naked detainee on a box with a sandbag on his head and attaching wires to his fingers, toes, and penis to simulate electrical torture; sodomizing a detainee with a chemical light and perhaps a broomstick; having sex with a female detainee and threatening male detainees with rape; stacking naked male detainees, handcuffed and shackled, in piles so that each one's penis touched the buttocks of another; videotaping and photographing naked male and female detainees; forcibly arranging detainees in sexually explicit positions for photographing; forcing groups of male detainees to masturbate while being photographed and videotaped; and taking photographs of dead Iraqi detainees.

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Fourth Circuit Rejects Defamation Suit by Military Contractor at Abu Ghraib

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Id. at *2. The Court noted that that a CACI employee, along with another civilian contractor and two military officers, "'were either directly or indirectly responsible for the abuses at Abu Ghraib.'" *Id.* (citation omitted).

The Court also analyzed a subsequent report on Abu Ghraib by Major General George R. Fay and Lieutenant General Anthony R. Jones, which stated that "the abuse, 'ranging from inhumane to sadistic,' was inflicted 'by a small group of morally corrupt soldiers and civilians,' with CACI and Titan employees making up the latter category. CACI or Titan employees were responsible in over one-third of the incidents." *Id.* at *3 (citations omitted). The report referred certain civilian contractors for possible criminal prosecution. Rhodes also relied on a *New Yorker* article and a speech at the American Civil Liberties Union conference by investigative reporter Seymour Hersh, an interview with Brigadier Janis Karpinski who had been in charge of detention facilities in Iraq, a law review article about military contractors, and several other articles.

Refusing to find liability for Rhodes' statements, the Court underscored the First Amendment's protection of the right to criticize the government when the country is at war:

> The conduct of the military and its designated civilian surrogates during wartime is a matter of the highest public concern, and speech critical of those responsible for military operations is well within "the constitutionally protected area of free discussion." … The actual malice standard thus offers broad protection for the media commentator who is critical of public officials or public figures responsible for war-related activities.

Id. at *11 (quoting *Rosenblatt v. Baer,* 383 U.S. 75, 85 (1966)); *see also id.* at *22 ("Th[e] essential privilege [to speak one's mind] minimizes the danger of self-censorship on the part of those who would criticize, thus allowing robust debate about the actions of public officials and public figures (including military contractors such as CACI) who are conducting the country's business.") (quoting *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964).

The Court also stressed that the actual malice standard affords latitude for "rational interpretation" of ambiguous sources or events. Specifically, Rhodes' sources stated that CACI employees gave instructions to soldiers, which could rationally be interpreted to mean either (1) that the soldiers knew the CACI employees were contractors or (2) that "CACI employees were misrepresenting their authority to soldiers." *Id.* at *13. Rhodes acted rationally in concluding that CACI employees misrepresented their authority – indeed, her interpretation was "equally, if not more, rational" than the alternative. *Id.*

Concurrence

Judge Duncan concurred in the judgment, stating that her concurrence was "compelled" because "prevailing First Amendment jurisprudence imposes a particularly onerous burden on public figures" and that the "appropriateness of summary judgment here is more reflective of the magnitude of CACI's burden than the defensibility of Rhodes' comments." *Id.* at *22 (Duncan, J., concurring). Judge Duncan focused in particular on statements regarding the rape of children, such as the following (which was quoted in the majority opinion as well):

> How about the defense contractors or the oil conglomerates or CACI or Titan International? What's their relationship with the President and why are they allowed to torture and rape little children using low-level clerks, who then go to jail for 10 or 15 years? And how come you don't have a responsibility to report on those trials of those low-level specialists who went to jail for 10 or 15 years, who testified that they believed they were working for their government, and really they were working for CACI and Titan, as tools.

Id. at *6. Judge Duncan asserted that Rhodes accused CACI of involvement in child rape at Abu Ghraib and that Rhodes' sources, which found an instance of rape of a minor, did not "prove CACI's liability for child rape." *Id.* at *23 (Duncan, J., concurring). Nonetheless, Judge Duncan concluded that Rhodes' statements still did not rise to the level of actual malice. *Id.*

Laura Handman, a partner with Davis Wright Tremaine LLP in Washington, DC, was lead counsel for Randi Rhodes and Piquant, LLC d/b/a Air America Radio with David Shapiro on the brief. CACI was represented by J. William Koegel, Jr. and John F. O'Connor, Steptoe & Johnson LLP, Washington, DC. Media Amici participating in the case were represented by Theodore B. Olson, Theodore J. Boutros, Jr., Jack M. Weiss, Joshua Wilkenfeld, and Laura M. Leitner, Gibson Dunn & Crucher LLP.

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Illinois Appellate Court Affirms Tribune Jury Verdict

No Actual Malice in Newspaper Articles About Prosecutor

By Charles L. "Chip" Babcock

A jury in Cook County ruled in May of 2005 that the *Chicago Tribune* and its reporter, Maurice Possley, did not defame Thomas L. Knight, a former State's Attorney, and did not publish with constitutional "actual malice" when it wrote about the plaintiff's indictment by a grand jury. Judgment was entered on the verdict by the trial court and now the Appellate Court of Illinois, First Judicial District has affirmed in a unanimous ruling. *Knight v. Tribune*, No. 1-0600957 (Ill. App. 1st Dist. July 31, 2008) (Murphy, Neville, Campbell, JJ.).

The complained of article ("Prosecution on Trial in DuPage") was part of a *Tribune* five-part series entitled "Trial & Error: How Prosecutors Sacrifice Justice To Win." The series was a finalist for the Pulitzer Prize but did not win after drawing fierce criticism from prosecutors' organizations.

Knight had prosecuted three young men for the capital murder of a nine year old girl. The jury found two of the three defendants guilty but could not reach a verdict on the third. The Illinois appellate courts reversed the jury decision and ultimately a court acquitted Rolando Cruz, the lead defendant. The other two defendants were released.

Following Cruz's acquittal, a grand jury indicted seven law enforcement officials, including Knight, for obstruction of justice in their various roles prosecuting Cruz and the other defendants. The *Tribune* series ran shortly before Knight's criminal trial where he won an acquittal.

This libel suit followed and after substantial motion practice, summary judgment was denied and the case was sent out for trial. This was the first libel trial for the *Tribune* in over 40 years. After the jury verdict, Knight filed a motion for judgment notwithstanding the verdict. The trial judge, however, denied that motion and entered judgment for defendants in a thoughtful and well-reasoned opinion.

Appellate Decision

On appeal the plaintiff argued that the actual malice finding should be disregarded because the jury was tainted by evidentiary rulings permitting evidence of other news publications about him which, defendants had argued, had a negative impact on his reputation. Finally, Knight argued that the judge had erred in his damage instruction.

The Court of Appeal rejected all of these arguments. With regard to the "other publicity," the court noted that Knight rested his argument on a decision of another Illinois appellate court which had rejected the incremental harm doctrine. The court wrote: "Knight reads *Myers* as authority for barring any evidence of the plaintiff's reputation, whenever the plaintiff has stated a cause of action for defamation per se…. We do not believe the holding of *Myers* reaches so far."

Instead, the court ruled this evidence is permitted because the presumption of damages in a per se case is not "irrebuttable" and that "disallowing all evidence of the plaintiff's reputation would set Illinois law far from the law of other jurisdictions, as most states permit defendants to present, in mitigation of damages, evidence of the Plaintiff's reputation before the alleged defamation."

The court then turned to the jury's "actual malice" finding which, Knight maintained, had been tainted by the improperly admitted evidence. The court rejected this notion, observing that while the evidence might have affected the jury's opinion of Knight, it "would not affect the credibility of Possley and the editors."

Knight argued that defense counsel's closing argument required reversal but the appellate court noted that his only objections in closing had been sustained. Finally, it was argued that the trial judge had refused an instruction on defamation per se and future damages but the court rejected these claims.

Knight has filed a motion for rehearing and has vowed to take his appeal to the United States Supreme Court where he hopes to overturn *New York Times v Sullivan*.

Chip Babcock, Jackson Walker LLP, represented the Tribune Company in this case.

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Policeman Wins $1.5 Million Jury Verdict in Libel Suit Against Indiana Star-Tribune

Newspaper Reported Misconduct Allegation

An Indiana jury awarded a policeman $1.5 million in libel damages over a newspaper report of alleged police misconduct during a traffic stop. *Maynard v. Tribune-Star Publ. Co*., No. 77C01-0406-CT-00219 (Ind. Cir. Ct., Sullivan County jury verdict July 24, 2008).

Background

In March 2004, the Terre-Haute, Indiana *Tribune-Star* published an article headlined "Woman: Clay deputy made sexual innuendoes." The article reported that a woman – unnamed in the initial stories – had complained to the Clay County Sheriff's Department that during a traffic stop Deputy Sheriff Jeff Maynard "suggested she could get out of a ticket in exchange for exposing her chest," that Maynard was abusive, pushed her and grabbed her chest. The article included a comment from County Sheriff Ron Carter saying that he referred the complaint to the Indiana State Police for investigation and that it "would be very much out of character" for Maynard to have done what was alleged. Maynard gave a "no comment" to the newspaper. The newspaper had interviewed another officer for the article – Mike Deakens – and reported Deakens' comment that he made the traffic stop and there was no misconduct.

In April 2004, the newspaper published a second article headlined "Prosecutor gets case against Clay deputy." The article repeated these allegations and added that the "Indiana State Police have concluded their investigation" and "now the case rests" with the prosecutor. Following the second article, Maynard contacted the newspaper and asked for a retraction which was denied.

On June 8, the Indiana State Police issued a press release stating that the investigation concluded that the complainant Sandra Buscek had lied about the traffic stop and would be charged with the misdemeanor crime of making a false report. The next day the newspaper reported that Maynard had been cleared. Maynard filed his suit against the newspaper on June 30, 2004.

The misdemeanor charge against Buscek was ultimately dismissed as part of a plea bargain of other charges against her. Buscek later filed a federal suit claiming that she had been harassed by different officers, and had misidentified Maynard. *Buscek v. Clay County*, Civil No. 04-00285 (S.D. Ind. filed Nov. 1, 2004). Claims against most defendants in the federal case were dismissed and the case was settled in February 2007.

Summary Judgment Denied

The libel suit against the *Tribune-Star* was transferred to Sullivan County under a long-standing arrangement to relieve the case backlog in Vigo County, where it was originally filed.

In February 2006, the newspaper argued that Maynard's suit should be dismissed under Indiana Code § 34-7-7, et seq., Indiana's anti-SLAPP statute, passed in 1998. The statute provides in relevant part that:

> It is a defense in a civil action against a person that the act or omission complained of is: (1) an act or omission of that person in furtherance of the person's right of petition or free speech under the Constitution of the United States or the Constitution of the State of Indiana in connection with a public issue; and (2) an act or omission

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taken in good faith and with a reasonable basis in law and fact.

Ind. Code § 34-7-7-5.

According to coverage in the *Tribune-Star*, arguments during the motion hearing dwelled on the second prong of the statute's requirements: whether the newspaper had acted with "good faith and with a reasonable basis in law and fact" when it published the articles.

Plaintiff's counsel pointed out that the newspaper had published the story after the county sheriff said plaintiff was not involved in the traffic stop and cautioned the newspaper to wait for the results of the investigation. The newspaper's attorney argued that the reporter accurately reported the allegations that had been made against Maynard and contacted the complainant and all the officials involved in the situation before publishing the stories.

On March 15, 2006, Judge P.J. Pierson denied the anti-SLAPP motion without giving any reasons or written opinion. He certified an interlocutory appeal of this ruling, but the Indiana Court of Appeals did not accept the appeal. *Tribune-Star Publishing Co., Inc. v. Maynard*, No. 77 A 01-0606-CV-00238 (Ind. App. July 24, 2006).

Trial and Verdict

The case proceeded to trial before Judge Pierson in July 2008. Plaintiff was deemed a public official and was required to prove actual malice. During the three-day trial, plaintiff's counsel argued that the articles were published recklessly. County Sheriff Ron Carter testified that he told the reporter before publication that plaintiff was not involved in the traffic stop, was wrongly identified, and that the newspaper should wait for the investigation to be completed.

The reporter's notes were produced at trial and they confirmed the Sheriff's comment to the reporter that the newspaper "had the wrong guy." Under examination, the reporter testified that she considered Sheriff Carter a reliable and trustworthy source. No other local newspaper reported the story. Sheriff Carter also testified that even though the newspaper was reporting Buscek's allegations, the public believes the newspaper made the allegation.

Plaintiff also argued that the headline of the second article – "Prosecutor gets case against Clay deputy" – falsely implied that he was the target of an investigation. The county prosecutor testified for the plaintiff that he declined to comment about the investigation and that there was "no case" against plaintiff.

The newspaper stressed that it accurately reported newsworthy allegations that were the subject of a police investigation. Moreover, the reporter had interviewed Buscek who reconfirmed the story. The newspaper argued that while there were conflicting accounts of the incident, the reporter did not entertain serious doubts about Buscek's allegations.

As for damages, although plaintiff was cleared of misconduct and promoted to detective, he testified that the false allegations harmed him and led to his divorce. In closing, plaintiff's counsel asked for $500,000 to $1,000,000 in compensatory damages and $250,000 in punitive damages, representing approximately $10 per newspaper subscriber.

After two hours of deliberation, the six-member jury found in favor of plaintiff and awarded him $500,000 in compensatory damages and $1 million in punitive damages. Under Indiana law, 75 percent of the punitive award goes to state violent crime victims' compensation fund. *See* Ind. Code § 45-51-3-6.

A post-verdict motion by the defense for judgment on the evidence – equivalent to a JNOV motion (see Indiana Trial Rule 50) – was denied. On August 22, 2008, the newspaper filed a brief with the trial court on its motion to correct errors. The brief argues that there was insufficient evidence of actual malice to support the verdict; and that the damage award was excessive.

The Tribune-Star was represented by David W. Sullivan of Cox Zwerner Gambill & Sullivan in Terre Haute, Ind. Plaintiff was represented by Eric A. Frey of the Frey Law Firm in Terre Haute, Ind.

For the link to the brief, click here

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Wrongful Death Claim Against CNN and Nancy Grace Survives Motion to Dismiss

Plaintiffs Stated Claim Under Notice Pleading Standard

A Florida federal district court denied CNN and talk show host Nancy Grace's motion to dismiss a wrongful death / intentional infliction of emotional distress lawsuit brought by the family of a woman who killed herself the day after being interviewed by Grace. *Duckett v. CNN*, No. 5:06 cv 444 (M.D. Fla. July 31, 2008) (Hodges, J.).

The court noted that under lenient federal notice pleading standards, plaintiffs had stated a claim and some discovery would be necessary to resolve the merits of the claim.

Background

On September 7, 2006, the decedent, Melinda Duckett, was interviewed over the telephone by Nancy Grace about the disappearance of her two-year old son Trenton. Grace is a former prosecutor and host of a nightly "justice themed interview debate" program on CNN. On September 8, before the program was scheduled to air, Duckett killed herself. The interview was included on that night's Nancy Grace show and Duckett's suicide was noted in a scrawl at the bottom of the screen.

The program was headlined "2-Year-Old Disappears From Bedroom" and included interviews with lawyers, investigators, a psychologist, Melinda Duckett and other family members. The program contained the following exchange:

> GRACE: Right, why aren`t you telling us and giving us a clear picture of where you were before your son was kidnapped?
>
> MELINDA DUCKETT: Because I`m not going to put those kind of details out?
>
> GRACE: Why?
>
> MELINDA DUCKETT: Because I was told not to.
>
> GRACE: Ms. Duckett, you are not telling us for a reason. What is the reason? You refuse to give even the simplest facts of where you were with your son before he went missing. It is day 12.
>
> MELINDA DUCKETT: (INAUDIBLE) with all media. It`s not just there, just all media. Period.
>
> GRACE: Let`s go to Dr. Lillian Glass, psychologist. Weak spots?
>
> GLASS: This doesn`t make any sense to me. And the fact that she`s skirting around the issue and can`t get to the point concerns me a lot. Her reaction is not the typical reaction of a mother who has a missing child, whose child was taken from the bed when she says I don`t cry my eyes out. Most people would be emotional about it and the fact that she`s been skirting the issue through this entire interview concerns me.

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The entire transcript is available online at: http://transcripts.cnn.com/TRANSCRIPTS/0609/08/ng.01.html

The plaintiffs alleged that the defendants had promised that the interview would help efforts to find her missing son, but "their true intention was to 'ambush' Melinda Duckett with accusations, questions and verbal assaults intimating that Ms. Duckett had murdered her own child." Slip op. at 3.

Plaintiffs sued CNN and Nancy Grace under Florida's Wrongful Death Act, Florida Statute Section 768.19, alleging that this conduct was the proximate cause of Duckett's death and that the broadcasts of the program caused Duckett family members severe emotional distress.

Motion to Dismiss

The gist of the defendants' argument on the motion to dismiss was that "the law does not permit people to recover money from reporters who ask routine questions while covering ongoing stories of national significance to the public." Defendants' Brief at 2. They attached a DVD and transcript of the broadcast and requested the court rule that the interview was not outrageous conduct as a matter of law. The defendants also cited extensive case law that aggressive newsgathering is not actionable. *See, e.g., Howell v. New York Post Co.*, 81 N.Y.2d 115, 126 (N.Y. Ct. App. 1993) (trespass onto grounds of psychiatric hospital to photograph plaintiff "does not remotely approach the required standard" for emotional distress).

The Decision

Denying the motion to dismiss, Judge Wm. Terrell Hodges declined to review the exhibit, finding that it would be premature to review and would require turning the motion into one for summary judgment. Moreover, the court noted that the complaint referred to other conversations with show producers which are not included in the broadcast.

The court acknowledged that Florida has a very high standard for claims of intentional infliction of emotional distress "and only in extreme circumstances will courts uphold such claims" – but under the lenient federal notice pleading standard the complaint was sufficient to state a claim. Plaintiffs stated a claim by alleging:

> 1) the Defendants acted intentionally and/or recklessly when they convinced Ms. Duckett to appear on the "Nancy Grace" show, as well as when they verbally badgered Ms. Duckett on the show and inferred that she was involved in her son's disappearance; 2) the Defendants' conduct was outrageous, particularly in light of the fact that the Defendants were aware of Ms. Duckett's precarious emotional and mental state; and 30 the Defendants' conduct caused Ms. Duckett severe emotion distress, which resulted in her suicide.

Slip op. at 11.

Plaintiffs also stated a claim for intentional infliction of emotional distress as to themselves because of the repeated airing of the interview. "When dealing with survivors of a decedent, 'behavior which in other circumstances might be merely insulting, frivolous, or careless becomes indecent, outrageous and intolerable." Slip op. at 15.

Defendants are represented by Judith Mercier and Charles Tobin of Holland & Knight LLP. Plaintiffs are represented by Jay Paul Deratany and Kara Skorupa, Deratany, Skorupa & O'Hara, P.A., North Palm Beach, Florida.

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Print-On-Demand Publisher Not Liable For Tort Claims

Court Holds That Without Knowledge There Can Be No Liability

A federal judge in Maine granted summary judgment for a print-on-demand ("P.O.D.") publisher against tort claims arising out of a book the company published. *Sandler v. Calcagni, et al.*, 2008 WL 2761892, No. 07-CV-29-GZS (D. Me. July 16, 2008) (Zingal, C.J.). The judge found that the P.O.D. publisher could not be liable for allegedly defamatory statements because the publisher took no part in editing or fact-checking the book.

Background

The case began with a high school feud. What was a normal tiff between teenage girls erupted into accusations of racial epithets and symbols. In 2003, plaintiff Shana Sandler and defendant Mia Calcagni were friends whose relationship quickly began to sour. After a fight over a boy, the girls began spreading rumors about each other with Calcagni allegedly making anti-Semitic comments about Sandler. Both girls were suspended from high school soon after.

Eventually the police became involved and both girls had anti-harassment/restraining orders against each other. Despite the order, Calcagni was involved with a group of students who painted swastikas on signs near Sandler's house. Although Calcagni denied involvement, other students in the car that night claimed it was her. She was convicted of criminal mischief.

Calcagni's family maintained her innocence and sought to clear her name. They eventually decided to write a book, *Help Us Get Mia*, in the hope that it would exculpate their daughter. They hired defendant Peter Mars to assist them in collecting materials (such as the attorney general investigation of their daughter and her court proceedings) for the book.

Originally the Calcagnis contacted well-known publishers. However, when they received no interest in their book, they turned to a P.O.D. publisher to "self publish" the book. They made a deal with BookSurge to convert a PDF version of their book into a book format. Eight hundred and forty copies of the book were produced, with most of the copies going to friends and family of the Calcagnis and a few sold online.

In 2007, Sandler sued BookSurge, the Calcagnis and Peter Mars for defamation, false light and disclosure of private facts.

Summary Judgment Motion

BookSurge moved for summary judgment on all claims. The basis for the motion was that there could be no liability without fault. BookSurge agreed to print the book without ever reading it or even discussing the content. At no time did BookSurge edit, review or fact-check, nor was it expected to by the Calcagnis. In fact, defendant Mars was to provide the fact-checking for *Help Us Get Mia*. Although the copyright page stated "Published by BookSurge, LLC," BookSurge did not provide that copyright page and offers copyright pages to its customers that do not cite BookSurge as the publisher.

Libel Claim

The court began by noting that traditionally, everyone involved in a publication can be liable in defamation. However, the court went on to caution that just because BookSurge was a part of the publication process for *Help Us Get Mia*, that fact alone did not establish legal liability on their part. Maine law requires that a plaintiff must at a minimum show that defendant acted with negligence.

To determine if BookSurge was liable, the court looked to its level of responsibility. For there to be liability, there must have been knowledge of the defamatory content. The level of responsibility that BookSurge had would determine if they had or should have had the knowledge of the content. The court categorized the participation by BookSurge as minimal. Again stressing the fact that BookSurge took no part in reviewing the work, the court found "little communal effort" between BookSurge and the Calcagnis.

Other evidence also pointed to BookSurge lack of liability. The court pointed out that the copyright page language was produced by Robert Calcagni, Mia's father, and normally BookSurge offers copyright pages that do not name it as the publisher. BookSurge also did not attempt to market

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Print-On-Demand Publisher Not Liable For Tort Claims

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or promote the book as a traditional publisher would do.

The court held that BookSurge had no knowledge of, and no reason to know of, the alleged defamation and also "had no duty to inspect" the book and thus it could not be found liable. The reasoning was that the very nature of the business of P.O.D. publishing would be altered if P.O.D. publishers were liable for the contents of everything that they printed. *Sandler*, 2008 WL 2761892, at *9 (citing *Maynard v. Port Publications, Inc.*, 297 N.W.2d 500, 509 (Wis. 1980)).

False Light

The court next addressed plaintiff's false light claim. The test is whether the defendant placed plaintiff in a false light that would be "highly offensive to a reasonable person" and had knowledge of, or reckless disregard for, the falsity of what defendant publicized. For the same reasons BookSurge could not be liable on a defamation claim it could also not be found liable on the false light claim. The court reiterated that BookSurge had no knowledge of the alleged statements and did not act recklessly with regard to their truth.

Private Facts

Plaintiff also claimed that six categories of statements contained in *Help Us Get Mia* were an invasion of privacy for revealing private facts. The first category was information that Sandler had posted on her own myspace.com profile. The second and third involved her Jewish heritage and her enrollment in college. These three categories were admittedly not private facts and thus the court found there could be no liability.

The fourth category dealt with Sandler's having sought psychological care. Yet this fact had also been disclosed by Sandler on her myspace.com page, and thus was not private nor would disclosure of it be highly offensive since she had disclosed it herself.

The fifth category concerned her transfer during high school between schools. This was public information and the court found it would not highly offensive since there are many reasons for a transfer that would not attach negative inferences.

Finally, the court found that statements about Sandler's plastic surgery were not invasions of her privacy. The court began by questioning "whether this matter is truly private: cosmetic surgery on one's face is by its nature exposed to the public eye." *Id.* at *12. Plaintiff also failed to demonstrate any triable issue of fact that this disclosure would be highly offensive.

Separate from analyzing each category, the court also reiterated that BookSurge could not be liable since it did not know, nor had reason to know, that *Help Us Get Mia* revealed private facts about plaintiff that would be highly offensive.

Plaintiff is represented by Bernard J. Kubetz, Eaton Peabody, Bangor, Maine. Booksurge is represented by Kirkpatrick & Lockhart, Preston Gates Ellis LLP.

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Texas Jury Finds for Political Newsletter

Charges of Vote Buying Not Proven False

In a case of fraternal rivalry and small-town politics, with a tinge of racial issues, a Conroe, Texas jury determined in mid-July that the print and online publication *The Watchdog* had not libeled a local political activist when it reported that "sources" said that plaintiff had given people money and alcohol to vote for a city council candidate. *Dixon v. Martin,* No. 06-11-11017-CV (Texas Dist. Ct., Montgomery County, 9th Dist. jury verdict July 11, 2008).

The case was tried under a negligence standard, and after a three-day trial the jury found by a 10-2 vote that plaintiff had not proven falsity.

Background

The Watchdog is a local political newsletter edited by Guy Martin, who founded the publication in September 2006 after he lost a June 2006 campaign against his brother, incumbent Jay Ross Martin, for a seat on the Conroe City Council. Guy Martin apparently decided to run against his brother after they clashed over politics and ownership of land.

The plaintiff J.D. Dixon is an African American ordained minister in Conroe who operated a shoe shine stand at a local bank. Dixon was active in local politics and supported Jay Martin's reelection bid.

The first issue of *The Watchdog* included an article headlined "Sad But True…" which stated that "sources say" that Dixon had given out "beer and $" to voters to support the re-election of Jay Ross Martin. The article also stated that while "[t]here are some fine leaders in the black community; J.D. Dixon is simply not one of them." The web version of the article included a photograph of a bank billboard featuring Dixon at his shoeshine stand, with the slogan, "It's all good!" The billboard, the article said, "looks like a billboard from the 50's."

Dixon sued Guy Martin, who is listed as editor of the publication, and the other individuals identified with the publication, for libel, seeking $5 million in compensatory damages and unspecified punitive damages. Besides Guy Martin, the defendants named were "Coordinator" Sandy Martin, Guy's wife; Associate Editor Bill Cochran Jr.; and Contributing Editor Melvin Douglas. Cochran and Douglas are both former Conroe City Council members who contributed articles to the newsletter.

All the defendants moved jointly for summary judgment. The court carried the motion over until trial and then denied the motion without opinion.

Jury Selection

Conroe County has a history of racial tension linked to a capital murder case. In 1980, a white high school cheerleader was raped and murdered. Clarence Brandley, an African American school janitor, was convicted of the crime and spent nine years on death row before his conviction was reversed on habeas relief. The appellate court criticized the police investigation as a sloppy rush to judgment and suggested that Brandley was prosecuted because of racial bias. *Ex parte Brandley*, 781 S.W.2d 886 (Tex. Crim. App. 1989), cert. denied sub. nom. Texas v. Brandley, 498 U.S. 817 (1990).

Plaintiff's counsel tried to raise the specter of this history during voir dire, and paint the defendants as racist bullies. Several potential jurors said they were offended by this argument and they were struck from the pool. The jury contained seven men and five women, with 11 whites and one Hispanic selected.

Trial Themes

The trial was covered in detail by *The Courier of Montgomery County*, the local daily newspaper. In his opening statement, plaintiff's counsel argued that Guy Martin attacked his brother – and, incidentally, Dixon – in an effort to recover his "glory days" as a high school football star who received a scholarship to the University of Texas, before an injury and two failed marriages. There was so much animosity, the lawyer said, that Guy Martin "started to work over anybody and everybody who helped Jay Ross Martin."

Defense counsel for Guy and Sandy Martin declined to give an opening. The lawyer for contributors Cochran and Douglas simply stated that they had nothing to do with the article at issue. But he added that Guy Martin's statements in the article were true: "He was careful in his wording and drafting of the article so that he was not stating an untruth," he said. "It was based on information he had received."

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Texas Jury Finds for Political Newsletter

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Trial Testimony

The first day of testimony featured both brothers. The defendant Guy Martin began by testifying about his relationship with his brother, but was interrupted when Jay Ross Martin made a surprise appearance in court, having just been released from the hospital, where he was being treated for liver problems. Jay Ross Martin then took the stand, and adamantly denied that he or J.D. Dixon would buy votes.

Jay Ross Martin also denied that Dixon was paid for his election work. "I know J.D.'s character," Jay Ross Martin said, "and I can't imagine he did it for money. That's just not J.D."

On cross examination, defense lawyers pointed out that Dixon had prior felony convictions for possession of cocaine and aggravated assault. Jay Ross Martin was not aware of Dixon's criminal past, but still vouched for Dixon's integrity.

Dixon's sister, Pamela Hayes, also said that she was unaware of her brother's convictions. She testified about an altercation between Guy Martin and Dixon when Dixon was driving voters to the polls in a van with political advertisements on it.

As the first day of trial concluded, Bill Cochran Jr. – one of *The Watchdog* contributors named as a defendant in the case – collapsed and was taken to the hospital. He was released later that evening, and testified in the case the next day.

On the second day of trial, Sandy Martin, the newsletter's "coordinator" testified that she was one of the sources for her husband's article. She said that she had received a call from someone at the Montgomery County, Texas election headquarters saying that several voters were being "hauled" in to vote, and when she arrived there was told that they appeared inebriated and were asking who to vote for and how much they would be paid. She saw Dixon driving voters to the polls, but did not see him give money or alcohol to people.

Bill Cochran then testified that Jay Ross Martin had previously spoken about using money to buy votes, and that in the 2002 city council election Martin had come to his office and left an envelope containing $1,700 for community activist Walter Milo, Sr. (whose own lawsuit against *The Watchdog* is pending). Milo and Jay Ross Martin later testified to deny those allegations.

The plaintiff, J.D. Dixon, testified that the article was false and denied he had given voters money or beer. He also testified about the how *The Watchdog* article affected him, including causing depression and trouble sleeping. He said that he was not fired from his job at the shoeshine stand at the bank, but that he left voluntarily after the bank president told him that he had to "make a decision between politics and your job."

Finally, Robert Barnett, a friend of both Guy Martin and Jay Ross Martin, testified that during the 2006 election two men approached him at a pharmacy and told him that "J.D." was "down in the Dugan area buying votes," and that he passed this message along to Jay Ross Martin.

Closings and Verdict

The parties argued over the plaintiff's status as a public or private figure while crafting the jury charge. In the end, Judge Edwards held that Dixon was a private figure. According to defense counsel, the judge's rationale was that he did not want to discourage others from actively campaigning for candidates.

In his closing, plaintiff's counsel said that the statements in *The Watchdog* were a way for defendants to get revenge against Dixon for supporting their opponents in elections. "He is a minister," he said, "and they are going to send out a publication that says he sold his soul?"

In the defense closing, counsel argued that Dixon had not shown that the statements actually harmed him, and that the article was accurate when it attributed the allegations to "sources."

The jury deliberated for four hours before deciding by a vote of 10-2 that none of the statements were false. After the verdict, jurors told defense counsel that they did not like the article published, but felt compelled to find for the defendants because plaintiff had not proven falsity.

Defendants Guy and Sandy Martin were represented by John Paul Hopkins of Conroe, Tex., while defendants Bill Cochran, Jr. and Melvin Douglas were represented by Joe Micah Enis of Conroe, Tex. Plaintiff J.D. Dixon was represented by Reginald E. McKamie of Houston.

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First Circuit Affirms Summary Judgment Dismissing University Official's Libel Case

Plaintiff Deemed a Public Official

By John M.R. Paterson

In the recent case of *Fiacco v. Sigma Alpha Epsilon Fraternity*, 528 F.3d 94 (1st Cir. 2008) (Boudin, Torruella, Stahl, JJ.), the First Circuit affirmed a grant of summary judgment in a suit brought by a University of Maine official against a national fraternity, its local chapter and certain individual members claiming that they had caused him psychological harm by publicly exposing certain of his past legal problems.

Background

David Fiacco was Director of the university's Office of Community Standards, Rights and Responsibilities. In that capacity he investigated allegations of student misconduct, assigned case managers to handle grievances, oversaw the student discipline process and generally administered the enforcement of the student code of conduct. In 2002, acting in that role, he commenced an investigation of the SAE fraternity on the UM campus. In response, a group of the local chapter members (the "fraternity defendants") hired a private investigator with the goal of uncovering evidence about Fiacco's past conduct in the hope that it might demonstrate that Fiacco was biased against fraternities in general and SAE in particular.

Although the fraternity defendants did not find the evidence they were looking for, they did find several court records and newspaper articles dating back to Fiacco's college years indicting his past involvement in two legal proceedings: a conviction for Driving While Ability Impaired (DWAI) that resulted in his departure from a position as Public Safety Director at Fort Lewis College in Colorado, and a TRO secured against him by a former girlfriend under the Colorado Domestic Abuse Act. The fraternity defendants assembled these documents into a package along with a memorandum that stated:

> Enclosed please find newspaper articles and court documents detailing Mr. Fiacco's previous legal difficulties: DWI, Sexual harassment, and Domestic Violence. Is this honestly the best qualified candidate the University of Maine could find for the *Office of Judicial Affairs.*

and surreptitiously sent the package to the UM President, the Board of Trustees, several deans and two local papers. Fiacco brought suit in the U.S. District Court in Maine claiming, *inter alia*, intentional infliction of emotional distress. The District Court granted summary judgment for the defendants holding that Fiacco was a limited purpose public figure and that he had failed to prove that the memorandum contained a false statement of fact made with actual malice.

First Circuit Decision

The First Circuit affirmed the decision of the District Court. The court first noted that a claim of infliction of emotional distress was subject to the actual malice test established in *Hustler v. Falwell,* 485 U.S. 46 (1988). Next the court analyzed whether Fiacco was a public figure. In so doing it used the three part test established by the First Circuit in *Mandel v. Boston Phoenix,* 456 F.3d 198 (1st Cir. 2006): i.e. a person is a public official who "(1) holds a position of influence over issues of public importance, as defined by the position's inherent attributes, (2) has special access to the media as a means of self-help, and (3) assumed the risk of diminished privacy upon taking on the position." The court affirmed that Fiacco's position at the University warranted a designation as a "public official."

Finally the court analyzed whether the memorandum prepared by the fraternity defendants falsely characterized the underlying legal documents and newspaper articles. The court held that, although there were technical discrepancies between the articles and court records on the one hand and the memorandum characterizing them on the other, such discrepancies did not rise to the level of constitutional malice, citing *Masson v. New Yorker Magazine,* 501 U.S. (1991).

John Paterson is a Shareholder in Bernstein Shur in Portland, Maine and Chair of its Litigation Practice Group. Bernard J. Kubetz, Eaton Peabody, Bangor, Maine, represented plaintiff. Catherine R. Connors, Peter W. Culley, Eric J. Wycoff, of Pierce Atwood LLP, Portland, Maine, represented defendant.

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No Viable Claim for Prima Facie Tort After One Year

Court Rejects Attempt to Evade Limitations for Intentional Torts

By Rachel F. Strom

Last month, the United States District Court for the Southern District of New York reaffirmed New York's rule that, in an editorial context, *prima facie* tort claims are governed by New York's one year statute of limitations for intentional torts. In *McKenzie v. Dow Jones & Company, Inc.*, 2008 WL 2856337 (S.D.N.Y. Jul. 22, 2008), the Southern District of New York dismissed a *prima facie* tort lawsuit brought by one Brett McKenzie against Dow Jones & Company, Inc., the publisher of *The Wall Street Journal*.

The court held that the plaintiff could not avoid New York's one-year statue of limitations for intentional torts, which includes defamation claims, by recasting his claim as one for *prima facie* tort. The court further held that, even if the plaintiff had filed his *prima facie* tort claim in a timely manner, his claim would still fail as a matter of law because he failed to allege special damages with particularity, as required by New York law.

Background

In 2003, plaintiff Brett McKenzie and others brought, on an anonymous basis, a sexual abuse case against the Roman Catholic Diocese of Manchester, New Hampshire. In that suit, plaintiff alleged that he had been sexually abused by Father Gordon MacRae, a Roman Catholic Priest and Catholic school teacher, when he was a student at the Sacred Heart School in the Parish of Our Lady of Miraculous Medals. Plaintiff's lawsuit against the Diocese ended in a confidential settlement.

WSJ Column and the Complaint

On April 27, 2005, Dow Jones published a column entitled, "A Priest's Story" in *The Wall Street Journal*. The column, written by *Wall Street Journal* editorial board member Dorothy Rabinowitz, identified the plaintiff as an alleged victim of sexual abuse and discussed plaintiff's sexual abuse case. The column also commented on the treatment Father MacRae received from the police department in Keene, New Hampshire and from the Diocese of Manchester in the face of several allegations of sexual abuse.

On April 15, 2008, nearly three years after Dow Jones published the column, plaintiff filed a complaint in the Southern District of New York against Dow Jones. The complaint asserted a single cause of action for *prima facie* tort arising out of the publication of the column. Plaintiff alleged that he suffered great mental pain as a result of the column's identification of him as an individual who claimed that he was sexually abused by a priest. Plaintiff also asserted that the column falsely implied that he had fabricated the claim of sexual assault. Plaintiff sought compensatory, exemplary and punitive damages in the round figure amount of $7,700,000.

On May 21, 2008, Dow Jones moved to dismiss the complaint on the grounds that the action was time-barred by New York's one-year statute of limitations for *prima facie* tort claims or, in the alternative, because plaintiff could not make out the elements of a *prima facie* tort claim.

The Decision

In a Decision and Order dated July 22, 2008, Judge Shira A. Scheindlin granted Dow Jones' motion to dismiss in its entirety and held that plaintiff's claim was time-barred and that plaintiff could not make out the elements of a *prima facie* tort claim.

In dismissing the *prima facie* tort claim on statute of limitations grounds, the court determined that plaintiff's "claim is governed by the one-year statute of limitation that applies to defamation [actions]" because "[t]he factual allegations in the Complaint indicate that [plaintiff's] prima facie tort claim is no more than a thinly-veiled defamation claim." In so holding, the court noted that New York's "one-year statute of limitations applicable to the intentional torts . . . applies to other causes of action which allege that defendant intentionally caused injury to plaintiff's reputation." (citations omitted). The court went on to note that "where a plaintiff alleges prima facie tort in order to overcome the strictures of a less favorable statute of limitations, courts do not hesitate to dismiss the claim." (citations and quotations omitted).

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No Viable Claim for Prima Facie Tort After One Year

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The court reasoned that:

> McKenzie asserts that he brought a claim for prima facie tort because the facts of the case did not allow him to plead a traditional tort of defamation. Noting that truth is a complete defense to a defamation claim, McKenzie points out that he does not allege that the statements in the Article are false. McKenzie argues that because he does not dispute the truthfulness of the Article's content, he cannot avail himself of traditional tort remedies.
>
> The Article's factual statements, however, are not at the heart of McKenzie's claim. Rather, McKenzie takes issue with the allegedly false impression created by the Article that his claim of sexual abuse by a priest was a fraud perpetrated to extract money….. McKenzie contends that these false implications are "reasonably susceptible of a *defamatory* connotation" and were known by Dow Jones to be false when the Article was published.

As such, the court concluded that "it is apparent that McKenzie's action sounds in defamation" and is governed by New York's one-year statute of limitations for intentional torts. Accordingly, because plaintiff brought suit nearly three years after the column was published, the court determined that plaintiff's complaint was time-barred.

The court also held that even if plaintiff's claim were timely, "Dow Jones' motion to dismiss his claim for prima facie tort would still be granted" because plaintiff did not adequately plead special damages. The court noted that "McKenzie merely states that he 'is entitled to an award of exemplary and punitive damages in the amount of $7,700,000, an amount that is sufficient to deter . . . Dow Jones . . . and others[ ] from such conduct in the future.'" And, the court held that "a damage allegation consisting entirely of round figures and lump sums, without any explanation of how plaintiff arrived at such figures" is insufficient to" plead special damages under New York law. (citations and quotations omitted).

The court concluded its Decision and Order by denying plaintiff leave to replead his claim because "McKenzie's claim is barred by the statute of limitation no matter how the claim is pleaded." As such, the court reaffirmed New York's principle that a plaintiff may not circumvent New York's one-year statue of limitations for intentional torts, such as defamation, by labeling his claim as one for *prima facie* tort.

Defendant Dow Jones & Company, Inc. was represented by Slade R. Metcalf and Rachel F. Strom of Hogan & Hartson LLP, New York City. Brett McKenzie was represented by Richard M. Mortner, Esq., of New York City.

MLRC Calendar

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Court Tosses Parts of Suit Based on Article About Plaintiff's Sexual Assault Lawsuit

By Laura M. Leitner

A New York trial court recently dismissed two out of three of the claims in a complaint for libel, "invasion of privacy", and "intentional infliction of severe emotional distress". In *Ava v. NYP Holdings, Inc.*, 20 Misc. 3d 1108(A), 2008 WL 2522631 (Table) (Sup. Ct. N.Y. Cty. June 24, 2008), Justice Walter B. Tolub held that two of plaintiff's claims against NYP Holdings, Inc. (the publisher of the *New York Post*), three of its reporters (Dareh Gregorian, Lucy Carne, and Peter Cox), and one of its editors (Michelle Gotthelf) were defective. The court also denied the plaintiff's application to seal her medical records, which she had openly filed in another lawsuit and which were publicly accessible in the courthouse.

Background

The *New York Post* published an article about a pending civil suit in New York brought by the plaintiff, Ava aka Maximilia Cordero, who claimed that she had been sexually assaulted by one Jeffrey Epstein while she was underage. At the time the article was written, Cordero had previously sued another older man named Glen Jeremiah Gentile, her former attorney, alleging that he also sexually assaulted her when she was underage.

Her complaint in the Gentile case, which was filed in 2004, was filled with explicit details about her sex life and drug usage. It included allegations that Cordero had engaged in "deviant sexual acts" with Gentile, that she "used her unique body to perform bizarre and unusual sexual acts," and that Gentile intended to get Cordero "hooked on heroin and other illegal drugs so that she would be a sexual slave for his carnal desires." Most of the charges in that case were dropped, however, when Gentile's attorney proved that Cordero had actually been 18 or older at the time the alleged sexual acts took place.

Cordero then filed a very similar lawsuit against Epstein in October of 2007, which was the basis for the *Post* article. The amended complaint against Epstein was even more sexually graphic than the Gentile complaint. Her first complaint against Epstein alleged that she had been introduced to Epstein by a friend, who said Epstein could help Cordero with her modeling career. Cordero alleged that instead, when she went to meet Epstein for the first time, he gave her a tour of his mansion, including his massage room.

On this first visit, Epstein allegedly lured Cordero into the massage room, stripped, and demanded a massage from Cordero that culminated in oral sex. After that incident, according to Cordero's complaint, she returned to visit Epstein several times, and engaged in "bizarre and unnatural sex acts" with him. Cordero then filed a second amended complaint in the Epstein lawsuit, which included even more sexually graphic details, alluded (without explicitly stating) to the fact that Cordero had been born a male, and accused Epstein of "treat[ing] [Cordero] as a sex doll to fulfill his own perverted lust."

The article reported on the allegations in this lawsuit against Epstein. It quoted Cordero's live-in boyfriend, William J. Unroch, who was acting as her attorney in the Epstein case (as he had in the Gentile lawsuit), as well as Epstein's press representative and his attorney (who denied Cordero's claims). The primary thrust of the article was that Cordero, who now lives as a woman, was born a man. The article also referred to three MySpace pages that purportedly contained her photograph, one of which included a description of a "masturbatory fantasy," which was: "On one of at least three MySpace pages featuring her pictures, she lists her gender as 'male.' She is listed as female on the other two. On one, she gives a graphic depiction of a 'masturbatory fantasy' she has of being with multiple men and then multiple women, and on the other, the 23-year-old describes herself as 'a 17 year old model from New York City.'" The article also described Cordero as looking "sickly" when *Post* reporters saw her, and said that she uses illegal drugs.

Both prior to and subsequent to the publication of the *Post* article at issue, Cordero and Unroch sought publicity for their lawsuit against Epstein, contacting numerous blogs and newspapers about their claims. Furthermore, when Epstein moved to dismiss the lawsuit against him, Cordero's opposition to the motion included some of her medical and psychiatric records as exhibits. All of these medical and psychiatric records had been publicly filed, rather than under seal.

The Decision

Cordero's primary cause of action was for defamation, although she also tried to assert claims for "invasion of privacy," and "intentional infliction of severe emotional distress". There were also additional claims against other parties that were not the subject of the court's decision. Cordero also cross-moved to seal the medi-

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Court Tosses Parts of Suit Based on Article About Plaintiff's Sexual Assault Lawsuit

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cal records she had openly filed in the Epstein lawsuit.

Although it was not entirely clear from the complaint which statements Cordero believed to be defamatory, the court noted that any claims based on her gender at birth, her psychiatric problems, her (illegal) drug use, and her HIV-positive status were all admissions by plaintiff based on documents she had filed in the Epstein lawsuit. (Cordero had argued that the statement that she "looked sickly" somehow meant that the *Post* was reporting that she was HIV-positive.) The court determined there were only two remaining allegations that could possibly be actionable: (1) Cordero's claim that the article had called her a thief; and (2) her allegation that the article portrayed her as a "promiscuous lying slut."

Plaintiff argued that statements made by Epstein's representatives that her lawsuit had no merit were defamatory because they implied that she was a thief who had filed a "phony lawsuit" in order to "defraud" Epstein out of money. The court observed that the article gave a voice to both parties in the Epstein lawsuit. While the statements made by Rubenstein's representatives, according to the court, did not "reflect well on Ms. Cordero's character," they did not accuse her of criminality. The court found that the statements at issue could not be stretched into a cause of action for defamation.

Next, the court turned to Cordero's allegation that the article implied she was promiscuous. The court found that the only statement in the article itself relating to Cordero's sexual conduct that was not already contained in either the Gentile or Epstein lawsuits was the quote from the MySpace page discussing Cordero's alleged sexual fantasy. (Cordero claimed that she had not been the poster of the MySpace page describing the masturbatory fantasy.) The *Post* defendants had argued that stating that someone has a masturbatory fantasy is not capable of a defamatory *per se* meaning, since it in no way implied that Cordero had actually acted on that fantasy, and thus did not fit within the historical definition of unchastity.

The *Post* defendants further argued that, even if a statement that someone has a masturbatory fantasy was capable of a defamatory meaning, such a statement could not be defamatory as to Cordero herself because she had already put so many details of her vivid sexual history into the public record in these lawsuits. The court, however, was apparently uncomfortable in making the determination as a matter of law that a young person in the twenty-first century can have slightly outré sexual *thoughts* without having her reputation irretrievably damaged. The court did acknowledge that "changing social mores could affect how certain sexual conduct is viewed by the community," and "what was once considered defamatory *per se* may no longer be considered defamatory today."

Justice Tolub ultimately held, though, that "it is for the community to decide whether the language has a defamatory import, and whether the Article may be considered defamatory in the context in which it is presented." Thus, the court declined to dismiss the cause of action based on the sentence about Cordero's masturbatory fantasy as being legally incapable of a defamatory per se meaning.

The court then proceeded quickly to dismiss the two remaining causes of action. First, the court found that Cordero was unable to sustain a cause of action for privacy because the right to privacy in New York is governed exclusively by N.Y. Civ. Rights Law §§ 50-51 and Cordero had not asserted a § 51 claim against NYP Holdings, Inc., the reporters, or the editor. Rather, she had attempted to assert a claim based on a number of privacy statutes that clearly did not apply. Second, the court found that Cordero could not sustain a claim for intentional infliction of emotional distress because allegations that Post reporters had asked had asked her relatives about her HIV status did not "constitute extreme and outrageous conduct of a character and degree so as to exceed the bounds of decency."

Finally, the court declined to seal Cordero's medical and psychiatric records, noting that there was a constitutional presumption that court proceedings and judicial records would be open, and that Cordero had provided no basis for sealing the records. In so holding, the court stated, "[t]o date, [Cordero] has commenced three cases under her own name in which she openly discusses her sex life. After making so many allegations over the years and permitting her attorney to speak to the media about such allegations, [Cordero] cannot turn the clock back to seal the documents now."

NYP Holdings, Inc. and the Post reporters and editor are appealing the denial of the motion to dismiss as it applies to the statement about the masturbatory fantasy. Cordero is cross-appealing the denial of the motion to seal her psychiatric and HIV records. The appeal is currently scheduled for the October Term in the New York Appellate Division, First Department.

Laura M. Leitner is an associate at Hogan & Hartson LLP in New York City. Defendants NYP Holdings, Inc., Dareh Gregorian, Lucy Carne, Peter Cox, and Michelle Gotthelf were represented by Slade R. Metcalf and Laura M. Leitner of Hogan & Hartson LLP, New York City. Ava aka Maximilia Cordero was represented by Jacqueline Mari, New York City.

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California Supreme Court To Decide Burden of Proof in the "Commercial Speech" Exemption to California's anti-SLAPP Statute

By Thomas R. Burke

The California Supreme Court announced it will decide which party bears the burden of persuasion regarding the applicability of the so-called "commercial speech" exemption to California's anti-SLAPP statute (California Code of Civil Procedure Section 425.17 (c). *Simpson Strong-Tie Co. v. Gore et al,* No. S164174, 2008 WL 3823040 (Cal., July 30, 2008).

California's highest court also agreed to decide whether this same provision exempts from anti-SLAPP protection, an advertisement by a lawyer soliciting clients for a contemplated lawsuit. Four members of the Supreme Court agreed to hear these two questions raised by plaintiff Simpson Strong-Tie, Co. in connection with a high profile libel/trade libel lawsuit that Simpson filed two years earlier against a Bay Area plaintiff's attorney.

Background

As discussed previously at in the May 2008 MediaLawLetter, in *Simpson Strong-Tie Co. v. Gore et al.* No. H030444, 2008 WL 1897887 (Cal. App. April 30, 2008), galvanized screw manufacturer Simpson Strong-Tie sued Gore for libel, trade libel, false advertising and unfair business practices after he placed an advertisement in a local newspaper to locate potential plaintiffs for a class action lawsuit he intended to file. Gore's ad stated that if a consumer's deck was built with galvanized screws manufactured by Simpson (or two other manufacturers), the consumer "may have certain legal rights and be entitled to monetary compensation, and repair or replacement of your deck. Please call if you would like an attorney to investigate whether you have a potential claim."

Gore filed a motion to strike the action as a SLAPP (strategic lawsuit against public participation). The trial court agreed with Gore, granting the motion in full and awarding Gore all of his attorneys' fees. On appeal, as it had claimed in the lower court, Simpson argued that its lawsuit was exempt under Code of Civil Procedure Section 425.17(c), an exemption generically described by other courts as the "commercial speech" exemption to the anti-SLAPP statute.

The California Court of Appeal unanimously affirmed the trial court's ruling and issued a detailed published decision that included helpful language for libel defendants regarding the broad protection afforded by the Constitution for opinion and the limited applicability of the so-called "commercial speech" exemption to California's anti-SLAPP statute. By agreeing to review the ruling, the Supreme Court's action the Court of Appeal's decision may no longer be cited as legal precedent.

Court of Appeal Decision

The Court of Appeal, relying on a "well-recognized principle" that claiming an exemption from a general statute have the burden of proving they come within the exemption, ruled that the plaintiff (here, Simpson) bore the burden of showing that the act is exempt from the protections of the anti-SLAPP statute. In making this determination, the Court disapproved a decision from another Court of Appeal — *Brill Media Co., LLC v. TCW Group, Inc.*, 132 Cal. App. 4th 324 (2005) — that had placed the burden on the defendant seeking the protection of the anti-SLAPP statute to demonstrate that the exemption should not apply.

The *Brill* Court of Appeal had reasoned that because in the first stage of the anti-SLAPP procedure the burden rests on the defendant to show that the acts about which the plaintiff complains were taken in furtherance of defendant's right to free speech, the defendant also bears the burden of showing that no exemptions to the statute apply. The appellate court in *Simpson Strong-Tie* rejected that reasoning, determining that it contradicted the long-standing rule that parties seeking an exemption have the burden of proving that they are entitled to the protection of the exemption**.** By accepting review, the California Supreme Court will now decide whether *Brill* was wrongly decided.

By accepting review, the California Supreme Court will now decide whether Brill was wrongly decided.

Supreme Court Review

On a broader level, the Supreme Court is also expected to decide whether Simpson's reliance on this particular exemption to avoid California's rigorous anti-SLAPP statute was contrary to the Legislature's desire to protect public interest or consumer class plaintiffs from the growing misuse of anti-SLAPP motions by commercial enterprises seeking to impede or obstruct litigation

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California Supreme Court To Decide Burden of Proof in the "Commercial Speech" Exemption to California's anti-SLAPP Statute

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brought against them. The Court of Appeal determined that by its lawsuit against Gore, Simpson sought to achieve the same results with the Section 425.17(c) exemption that commercial enterprises had earlier tried with the anti-SLAPP motion, a result the Court could not countenance.

"Here a seemingly large commercial enterprise has attempted to use the new exemptions to perpetuate a lawsuit that may fairly be described as a paradigmatic SLAPP in that it plainly arises from conduct protected by the anti-SLAPP statute and . . . lacks substantial merit," the Court stated. "To permit this effort to succeed would be a perversion of legislative purpose at least as striking as the one that motivated the Legislature to enact the exemptions that Simpson invokes."

The parties are expected to complete briefing this year. Oral argument is expected in 2009 or later.

Thomas R. Burke and Rochelle Wilcox *of Davis Wright Tremaine LLP have represented Ben Pierce Gore et al. at all court levels. Plaintiff is represented by Arthur Shartsis, Shartsis Friese LLP, San Francisco.*

For a link to appellate decision, click here

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Seen here: Kathleen Conkey of Jacobs DeBrauwere, LLP and film maker Norman Green at the Drama Book Shop in NYC July 22.

Bruce Johnson, Davis Wright Tremaine, speaking at an MLRC Institute Panel "Shining a Light on Reporters and the Law" held on July 18 in Seattle. Available online here.

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Pennsylvania Judge Quashes Subpoenas to Reporters in High Profile Inquiry into Alleged Grand Jury Leaks

By Michael Berry

On July 17, 2008, Judge Todd A. Hoover of the Pennsylvania Court of Common Pleas quashed subpoenas issued to reporters in connection with a high profile inquiry into alleged leaks from a grand jury investigating whether a Pennsylvania casino operator lied in his application for the first license for a free-standing casino issued in Pennsylvania.

The inquiry was ordered by the Pennsylvania Supreme Court after the casino operator and two other defendants, all of whom had been charged with perjury, complained that press reports about the grand jury's investigation included secret grand jury information. Once the Supreme Court ordered the investigation, the three defendants subpoenaed five newspapers, The Associated Press, and more than a dozen reporters to testify and produce evidence about their reporting. The reporters moved to quash the subpoenas based on the common law reporter's privilege and Pennsylvania's shield law. Judge Hoover granted the motions to quash in a one-sentence order.

Factual Background

Pennsylvania's burgeoning gaming industry has been mired in controversy since the state enacted legislation authorizing slots casinos in 2004. The latest controversy involves the first license issued for a free-standing casino. Almost as soon as the state issued the license to Louis A. DeNaples and his company, Mt. Airy #1, LLC, a grand jury began to investigate whether DeNaples and Mt. Airy had lied in their license application about their connections to people involved with organized crime and other criminal activity.

From the moment the grand jury began its investigation, information about the investigation was widely and publicly available: The local district attorney's web page listed the grand jury's schedule; grand jury witnesses appeared to testify in a public courthouse; and witnesses' names were announced by courthouse personnel in the hallway outside the grand jury room before they testified. Additionally, many of the witnesses and attorneys involved in the investigation freely discussed their testimony and the nature of the grand jury's investigation. Newspapers throughout Pennsylvania reported on the investigation and included this public information in their reports.

In July 2007, DeNaples and Mt. Airy complained to Judge Hoover, who was presiding over the grand jury, about the press coverage and alleged that the newspapers were reporting secret grand jury information. They asked Judge Hoover to conduct an evidentiary hearing into the alleged grand jury leaks. Despite saying during an *in camera* hearing that he was inclined to call the reporters to testify, the Judge apparently never acted on the request, prompting DeNaples and Mt. Airy to petition the Pennsylvania Supreme Court for a hearing into the alleged leaks.

The Supreme Court promptly stayed the grand jury investigation. Ultimately, however, it denied the petition, concluding that the allegations of secrecy violations were based on little more than "newspaper articles that discuss information relating to the on-going investigation which is in the public realm (e.g., judicial orders, subpoenas, etc.)," and identified "nothing that threatens to expose the 'sanctity' of the Grand Jury's inner-workings." *In re Dauphin County Fourth Investigating Grand Jury (Petition of DeNaples)*, 943 A.2d 929, 935-36 (Pa. 2007).

The grand jury then restarted its investigation, and, in December 2007, recommended that perjury charges be filed against Father Joseph Sica, a close confidante of DeNaples. The following month, the grand jury issued a report recommending that perjury charges be filed against DeNaples and Mt. Airy. After the charges were filed, all three defendants again petitioned the Supreme Court, renewing their request for the Court to initiate an investigation into the alleged violations of grand jury secrecy. On May 2, 2008, the Supreme Court granted the defendants' renewed request and remanded the matter back to Judge Hoover with instructions that he conduct an "expedited evidentiary hearing" to determine whether a special prosecutor should be appointed to investigate the alleged leaks and issue an opinion within 90 days containing his recommendation to the Supreme Court regarding the need for a special prosecutor.

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Pennsylvania Judge Quashes Subpoenas to Reporters in High Profile Inquiry into Alleged Grand Jury Leaks

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The Proceedings Before Judge Hoover

Soon after the matter was remanded to Judge Hoover, the defendants served subpoenas on The Associated Press, The Allentown Morning Call, The Philadelphia Inquirer, The Philadelphia Daily News, The Scranton Times-Tribune, The Citizens' Voice, and more than a dozen of their reporters and things at the hearing, including any "notes" of communications with "any person sworn to secrecy . . . regarding any matter occurring before the Grand Jury," "all telephones" used by the reporters "on which telephone numbers are stored," and "all documents upon which [the reporters] relied in preparing" their articles about the grand jury investigation.

The reporters quickly moved to quash the subpoenas based on the common law reporter's privilege and Pennsylvania's shield law, which provides an absolute privilege for confidential sources. The reporters argued that the common law privilege protects their unpublished journalistic work product, whether that work product would reveal a confidential source or not, and contended that the defendants could not meet their burden to overcome the privilege.

The Pennsylvania Supreme Court has adopted the formulation of the reporter's privilege articulated by the U.S. Court of Appeals for the Third Circuit, which is the traditional three-part test. Thus, the reporters argued, first, that the defendants could not establish that the reporters were the only source for the information they sought and had not exhausted other possible sources. Only certain people enumerated by court rules and statute were sworn to secrecy before the grand jury, and those people were not called to testify before the reporters were subpoenaed.

The defendants also could not show that the reporters' testimony and evidence were crucial because none of their articles reported secret grand jury information. The reporters pointed out that the law requires secrecy over only certain information – testimony, evidence, deliberations, and votes. The only grand jury information that the newspapers published, however, was publicly available, such as witnesses' names, and voluntary statements made by witnesses and their attorneys, which are permitted under Pennsylvania law.

The reporters also argued that, even if all alternative sources had been exhausted and secret information had been reported, Pennsylvania's shield law flatly prohibits any attempt to identify reporters' unnamed sources. The shield law unambiguously provides that no reporter "shall be required to disclose the source of any information... in any legal proceeding, trial or investigation before any government unit," and no Pennsylvania appellate court has ever required a reporter to identify a confidential source, even when the reporter has received information that is subject to grand jury secrecy rules.

It should be noted that defense counsel for DeNaples and Mt. Airy also represent the plaintiffs in *Castellani v. The Scranton Times*, a defamation case arising from press reports about a different grand jury, which is now before the Supreme Court of Pennsylvania on interlocutory appeal. *See MLRC MediaLawLetter*, Jan. 2007, at 9; *MLRC MediaLawLetter*, June 2005, at 21.

In *Castellani*, plaintiffs' counsel has argued that a crime-fraud exception must be read into the shield law so that the law would not protect sources that disclose secret grand jury information to the press.

Shortly before the argument on the reporters' motions, Judge Hoover quashed the *duces tecum* portion of the subpoenas without elaboration. He then held argument on the motions in chambers and later conducted the evidentiary hearing called for by the Supreme Court behind closed doors without the reporters being called to testify. Ultimately, on July 17, Judge Hoover granted the reporters' motions and quashed the subpoenas in a one-sentence order.

In early August, Judge Hoover filed his recommendation with the Supreme Court on whether to recommend a special prosecutor. That opinion – as well all of the filings, transcripts, evidence, and nearly all of the orders that have been entered since the Supreme Court remanded the matter back to Judge Hoover – remain under seal. Indeed, even the reporters' motions to quash the subpoenas are sealed. The dockets themselves do not even list what documents have been filed nor who filed the underlying documents, instead simply stating "sealed entry" at least forty-five times on each of the criminal defendants' dockets. On August 15, 2008, AP filed a motion to unseal the proceedings.

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The proceedings before Judge Hoover included one other bizarre and troubling twist involving the defendants' efforts to show that law enforcement officials spoke with the subpoenaed reporters. It has been reported that, prior to the hearing, the defense obtained certain law enforcement officials' telephone records by subpoenaing their cellular telephone service providers.

Subsequently, several of the subpoenaed reporters publicly stated that they received telephone calls from a person identifying himself as a reporter for another newspaper seeking confirmation of their names and/or telephone numbers. The reporters later learned that no such person worked for the newspaper.

In addition, an aide to a state senator called several of the subpoenaed reporters seeking the same information pursuant to a request made by Father Sica's attorney. After these public reports, law enforcement officials around the state called for a new law to provide greater protection for cell phone records.

A bill is now pending before the Pennsylvania General Assembly that would permit telephone companies to disclose a subscriber's phone records only if: (1) the subscriber consents; (2) a court orders the disclosure after the subscriber is given notice and an opportunity to object (except in criminal investigations conducted by law enforcement authorities); (3) the government or a grand jury issues a subpoena; or (4) the government obtains a search warrant.

The Associated Press, The Allentown Morning Call, Inc., and their reporters are represented by Gayle C. Sproul and Michael Berry of Levine Sullivan Koch & Schulz, L.L.P. in Philadelphia. The Scranton Times-Tribune, The Citizens' Voice, and their reporter are represented by Kevin C. Abbott and Kim M. Watterson of Reed Smith LLP in Pittsburgh. The Philadelphia Inquirer, The Philadelphia Daily News, and their reporters are represented by Christopher H. Casey, Patrick M. Northern, and Joseph U. Metz of Dilworth Paxson LLP in Philadelphia. Defendants Louis A. DeNaples and Mt. Airy #1, LLC are represented by Richard A. Sprague of Sprague & Sprague. Defendant Joseph Sica is represented by Sal Cognetti, Jr. of Foley, Cognetti, Comerford, Cimini & Cumins. The Commonwealth of Pennsylvania is represented by Dauphin County First Assistant District Attorney Francis T. Chardo.

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Max Mosley Wins Privacy Case Against Tabloid

F1 Boss Has Sick Orgy With 5 Hookers - But Not, As It Turns Out, A Nazi Orgy

By David Hooper

Round Eins of the litigation brought by Max Mosley, President of Federation Internationale de l'Automobile has resulted in an award of £60,000 to Mosley by Mr Justice Eady against the News of the World for breach of confidence and unauthorised disclosure of personal information. *Mosley v. News Group Newspapers Limited.*

The Sunday tabloid newspaper had got wind of a sadism and masochism session, which Mosley had paid some £2,500 to set up with five ladies who were adept with their canes. The newspaper went to town on the story zeroing in on what it considered to be the Nazi overtones of the incident.

Page after page told the same story with sub-headlines such as "Son of Hitler-loving Fascist in Sex Shame". The allegation was almost flogged to death. One of the women was, the following week, persuaded to reminisce about the encounter and the headline was "Exclusive: Mosley Hooker Tells All - My Nazi Orgy with F1 Boss".

The Nazi issue was problematic for Mosley. His father had been the leading Fascist in the 1930s and had been interned during the war albeit in some comfort as he was, after all, a British Baronet and married to one of the famous Mitford daughters. He had previously been married to a daughter of Lord Curzon, a Viceroy of India during the heyday of the British Raj.

My name is George Nathaniel Curzon,
I am a very superior Purzon.
My cheek is pink, my hair is sleek,
I dine at Blenheim once a week

they said at the time.

Mosley's parents had married in the home of Josef Goebbels and Adolf Hitler was a welcomed guest. Max Mosley himself had unwisely flirted with his father's fascist policies in his youth but that was all behind him - just like his five cane-wielding friends.

High Court Judgment

Key to the determination of the case was the decision of Mr Justice Eady that there was in fact no Nazi theme. The Luftwaffe uniform worn by one of the ladies turned out to be a modern outfit and not of the Nazi era. Seemingly appalling pieces of evidence about checking for lice the "prisoners" who were garbed in prison uniform and referring to the facility and the conversations in German and mock-German were, in the judge's view, not indicative of a Nazi theme, but simply lent a disciplinarian tone to the proceedings which apparently is part and parcel of such S&M events.

The Judge concluded that the comment by one of the ladies "we are the Aryan race - blondes" was simply a remark "gasped by the woman in media res" which it would appear is effectively the Latin for the heat of the moment. The Judge felt that this was offset by one of the girls countering a shout of "brunettes rule."

Were the facts not so unpleasant, one would have to laugh at Mosley's evidence on the subject which was accepted by the Judge "It was perfectly possible that his hearing aids may not have picked up this (remark about Aryans) in the excitement". Mosley is a gentleman of a certain age as well of certain tastes. On analysis, however, it did seem that the evidence at most gave rise to a suspicion that there may have been a Nazi overtone, but on closer examination the evidence was consistent simply with a prison theme with one of the participants being called Smith, another Barnes and remarks being made such as "welcome to Chelsea" and the prison uniforms having been bought in a local party shop. All good British fun in other words.

The newspaper's defence was that Mosley in the circumstances had no reasonable expectation of privacy and/or that any rights of privacy that he did have were overridden by the public interest in the exposure of such behaviour particularly in regard to a man who sat in judgment over the orderly running of Formula 1 motor racing throughout the world. Mosley had presided over the fining of the Maclaren team the sum of $100 million for their dealings with secret Ferrari specifications in the 2007 Formula One Championship.

Mr Justice Eady stressed that his decision in favour of Mosley was not a landmark decision. This type of consensual sexual activity that did not involve any breach of the criminal law and in the Judge's view fell fairly and squarely within the type of private information or private sector of a person's life which the law would now protect.

Trying to claim that the conduct involved technical assaults under the Offence against the Persons Act 1861 "with every thwack" was, in the Judge's view, unrealistic. The Judge noted

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that the participants were perfectly happy to engage in this activity albeit, as he noted, that it was "painful", as one of the ladies observed, "in a nice way". The fact, the Judge observed, that some people would view this conduct with distaste and moral disapproval did not provide justification for intrusion into the personal privacy of Mosley.

The fact therefore that this was private information in respect of which Mosley had a reasonable expectation of privacy and also in respect of which the Judge felt that there was a relationship of confidence between the participants not to provide details of what took place to other parties meant that Mosley would enjoy the rights of privacy afforded to him under Article 8 of the European Convention of Human Rights. The Judge was required to apply an intense focus on the facts to determine whether the law of privacy was engaged. He then had to apply the ultimate balancing test of whether the degree of intrusion was proportionate to the public interest served by its disclosure - the Article 10 right.

Here the newspaper had a problem. One of the women known as Woman E had been fitted up with a secret camera and had secretly filmed the orgy. The newspaper had helpfully put the video footage on its website which had a massive number of hits with traffic on the site being increased by 400% reportedly 3.5 million hits- perhaps an unfortunate term in the circumstances. Mosley incidentally had 88 hits. The circulation of the newspaper on the first Sunday of the exposure had increased by 200,000 copies.

This type of consensual sexual activity… fell fairly and squarely within the type of private information or private sector of a person's life which the law would now protect

What the case underlined, however, was the intrusive nature of photography as had been discussed in *Von Hannover v. Germany [2005] 40 EHRR 1*. In the case of *D v. L [2004] EMLR 1*, Lord Justice Waller had stated that a court may restrain the publication of an improperly obtained photograph, even if the Defendant is free to describe the information which the photograph conveys. In the case of *Theakston v. MGN [2002] EMLR 22* where a paper had been allowed to publish information about the antics of a role model TV presenter in a brothel, the court had, however, granted an injunction to prevent publication of photographs of his conduct in the brothel.

It is probable now that the *Theakston* decision might be different. Mr Justice Eady indicated that arguments such as that there is a greater public interest in the private lives of public figures and that public figures have a lower entitlement to privacy because they may be role models, are less likely to find favour with the court. One adds to that that there may well be a distinction between being able to publish the fact of some misbehaviour which could be permissible but publishing a photograph of the activity in question which might well not be permissible, particularly if the way in which the photograph was obtained was surreptitious and/or the photograph unduly intrusive.

Mr Justice Eady approved the statement of the European Court of Human Rights in *Leempool v. Belgian* App No. 64772/01, 9 November 2006 "publication whose sole aim is to satisfy the curiosity of a certain public as to the details of the private life of a person, whatever their fame, should not be regarded as contributing to any debate of general interest to society".

In the Mosley case, the newspaper had been keen to run a defence of public interest based partly on the depraved nature of the conduct and partly on the fact that Mosley held this responsible position at the FIA. However, that was always going to be difficult for the newspaper to establish, bearing in mind the intrusive nature of the photography and the fact that rather than measured criticism of Mosley's conduct, it had published "every gory detail" even down to the shaving of Mr Mosley' backside and the sticking plasters that had become necessary.

One adds to this the suspicion on the part of the judiciary that with the red-blooded tabloid press there is a tendency to decide to publish the details of the orgy first and then to look for the public interest justification afterwards. *The News of the World* did not cover itself with glory. The Judge felt that the newspaper had come close to blackmailing two of the women into cooperating with its second article on the basis that if they talked about Mosley's misdeeds, they would not themselves have their identity exposed.

Mosley obtained an injunction against the paper preventing them revealing the women's identities. Woman E, who was the newspaper's informant and upon whom they relied to paint the picture of a Nazi style orgy, ultimately refused to give evidence

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in court. It turned out she was married to a then serving MI5 intelligencer officer. The fact that the newspaper had originally been willing to pay her £25,000, which was reduced by the paper to £12,000 suggested either flexible ethics on the part of the newspaper or alternatively that she had not come up with the Nazi goods.

The Judge's view seemed to be that this was more of a story about hanky spanky than real public interest. In the view of Mr Justice Eady, the fact that the conduct may have been immoral, depraved or adulterous was irrelevant, people are now entitled to make choices about their sex life. The court should be wary about making judgments about conduct which might be distasteful. It was irrelevant that the conduct might be contrary to moral or religious teaching and it was no part of the court role to interfere or condemn such conduct.

The court's modern approach was to allow personal privacy to apply in relation to sexual preferences and practices, even though these were very different from the practice of previous generations. There was a greater willingness in Strasbourg jurisprudence to accord respect to the right of individuals to conduct their private life without interference or condemnation of the courts or the state. The Judge did indicate that had the evidence shown a real Nazi theme and had it been shown to be disrespectful of the victims of the Holocaust, there would probably have been sufficient public interest in publishing the story. There might have been arguments about the detail published.

The Judge also considered the question of responsible journalism. He accepted that there must be some allowance for editorial judgment where the facts allow for a number of reasonable possible conclusions. He felt this was analogous to the *Reynolds* responsible journalism test and that there could be allowances for judgments made by the journalists at the time. However, although he was prepared to accept the evidence of the journalist that what they had seen appeared to them to have a Nazi element, he felt that they had failed to consider the countervailing arguments to the effect that this was simply an S&M scenario without Nazi overtones. Allowance is therefore given for the exercise of editorial judgment in accordance with the Reynolds approach but journalists have in such circumstances to consider all the evidence.

Damages

The Judge refused to award exemplary damages but he did award the high sum of £60,000 compensatory damages. He felt that damages had to provide an adequate financial remedy for the purpose of acknowledging that the privacy of Mosley had been infringed and to compensate him for the injury to his feelings, embarrassment and distress caused by the articles. It was not an exaggeration in the Judge's view to say that Mosley's life had been ruined by these articles.

However, he felt that what could be achieved by a monetary award was limited and that damages must be proportionate. In that context he noted that the award for injuries of maximum severity in terms of general damages was £220,000. On that basis he awarded £60,000. The costs of both sides were said to total £850,000, the large part of which will have to be paid by the newspaper.

The Judge refused to award exemplary or punitive damages on the basis that the newspaper may have made a calculation to the effect that Mosley was unlikely to sue and that in any event the profits generated by this article would outweigh the damages they might have to pay. The newspaper had certainly not helped itself by its editorial "our sensational expose of Max Mosley's Nazi Orgy Made Global Headlines and Sent Shockwaves through the World of Motor Racing."

However, the Judge felt that the award of exemplary damages could not be justified under Article 10 (2) ECHR as being proscribed by law or necessary in a democratic society. He felt that the effect of awarding exemplary damages in such cases would have "an obvious chilling effect" and there was no basis for extending the limited circumstances in which exemplary damages could be awarded.

Libel Lawsuit

Now on to Round Zwei with Mosley suing the News of the World for libel, presumably on the basis that they had falsely suggested that he is the sort of cad who would indulge in a Nazi-style orgy as opposed to an English gent engaging in the consensual S&M activities in his Chelsea flat that no doubt reminded him of his schooldays.

David Hooper is a partner at Reynolds Porter Chamberlain in London. Plaintiff was represented by barristers James Price QC and David Sherborne of 5RB and solicitors Steeles. The News of the World was represented by barristers Mark Warby QC, 5RB, Anthony Hudson, Doughty Street Chambers, and solicitors Farrer & Co.

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THE OTHER SIDE OF THE POND
Developments in the United Kingdom and Europe

By David Hooper

Conditional Fee Agreements

The UK government has now published its response to the CFA consultation between media organisations and claimant lawyers. The report can be found at http://www.justice.gov.uk/docs/CP1607-response.pdf.

Readers will recollect that amongst the problems of CFAs as they operate in media cases, is that they lead to disproportionately high legal costs with claimant lawyers being able to double their fees of £400-£500 per hour by way of a success fee. Furthermore, the after the event insurance ("ATE"), the cost of which has to be picked up by the unsuccessful defendant involves a premium of £68,250 for a mere £100,000 of cover.

CFAs are, however, here to stay. In a political sense they work pretty well in the personal injury field, giving access to justice for those who cannot afford to pay legal fees. The justification politically for CFAs in the libel field is that they make the law of libel available to all and politicians are not sorry to see fetters put on the press.

The government has not as yet produced a solution but has referred the whole question of CFAs to a group of academics headed by Professor Richard Moorhead of Cardiff University. The proposals for staged success fees which would in effect increase percentage-wise as the risk increased and also for changes to the regime for after the event premiums are not being implemented for the time being.

The government has, however, recommended that parties to media litigation could adopt an amended form of the agreement similar to that that has been entered into between Times Newspapers Limited and the law firm Carter-Ruck on a voluntary basis. This provides for staged success fees and ATE premiums but neither would be payable if a defendant admitted liability within 14 days of the notification of a claim, which period could be extended by agreement.

At the same time the Civil Procedures Rule Committee are launching a consultation process on costs capping guidance. At present therefore the key thing for media defendants to consider at an early stage in any CFA funded litigation is applying to the courts for a costs cap, which effectively places a limit on the legal costs which can be charged on both sides.

UN Human Rights Committee Report

On 18 July 2008 the UN Human Rights Committee based in Geneva commented on the report which the UK is obligated to submit every three years on its compliance with human rights under Article 40 of The International Covenant on Civil and Political Rights.

Although the UK government received a slight pat on the back for steps it had taken such as the Racial and Religious Hatred Act 2006, the Civil Partnership Act 2004 and the Abolition of Blasphemy in the Criminal Justice and Immigration Act 2008, the Committee on the whole panned the UK.

It did not like the way the governor of the Cayman Islands, still a British protectorate, had behaved nor did it think that the rights of the Chagos Islanders had been sufficiently protected nor did it like the regime of anti-social behaviour orders in the UK nor the criminal procedure in Northern Ireland, let alone the terrorist legislation, discipline in the armed services and the policies of appointment to the judiciary in that they made insufficient allowance for women and ethnic minorities.

They also criticised the operation of the Official Secrets Act which prevented employees from raising matters for public interest, as to which see the comments on the *Griffin* case below. What, however, attracted the greatest degree of publicity were the comments of the Committee on the operation of English libel laws, sentiments one felt which could have been written by the MLRC.

In the light of the *Ehrenfeld* case where Sheikh bin Mahfouz was able to obtain an award for damages in respect of the 23 copies of her book, which had seeped into the UK, there was concern expressed at the concept of libel tourism and the consequent restriction of media reporting matters of serious public interest. This, it pointed out, was accentuated by the advent of internet and the international distribution of foreign media which created the danger that

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the UK's libel laws would affect freedom of expression worldwide.

The problem is that virtually any publication – and examples are given elsewhere in this survey of such cases – can be downloaded in the UK and can trigger the relatively low threshold for conferring jurisdiction on UK courts. The solution suggested by the Committee was that there should be a requirement for the proof of actual malice in relation to public figures and that there should be a modification or abolition of the requirement that an unsuccessful defendant should have to pay the claimant's legal costs. There should also be a radical revision of the CFA regime.

My advice would be that no-one holds their breath on this. No doubt lip service will be paid by the UK government to these thoughts and eventually the CFA regime will be improved, as indicated above. There may be further improvements in the scope of the *Reynolds* defence but it is unlikely in the extreme that the requirement of *Sullivan* actual malice will be imported into the UK law in the foreseeable future.

Already strategies are being devised by UK claimant lawyers to get around the Libel Terrorism Act and decisions such as *Bachchan* under which libel judgments cannot be enforced unless they are First Amendment compliant. UK claimants are now trying to seek rulings in their UK cases that there was actual malice. They are also looking towards suing UK-based distributors of hard copy publications where the owners of the publication have no assets in the UK. Such distributors should, however, have a defence of innocent dissemination under Section 1 Defamation Act 1986. Where jurisdiction is based on internet downloading from a website operated outside the UK, there will, however, be no such distribution to sue within the UK.

Internet Libel

There have been a number of interesting decisions which have not directly concerned the media but are clearly of interest to the media . On 3 April 2008, settlement was announced of a claim brought by Peter Walls, the Chief Executive of a company known as the Gentoo Group Limited and various of its employees against a Mr John Finn and his company Pallion Housing Limited.

The individuals were involved with social housing in the Sunderland area. Finn turned out to have run anonymously a website called Dad's Place which was said to have run a malicious and relentless campaign over a period of six months alleging nepotism and corruption against the claimants. An order - known as a *Norwich Pharmacal* order - which are being increasingly used by claimants had been obtained compelling the ISP to provide details of the person posting the messages. Walls was awarded £100,000 damages, Gentoo £5,000 and the various employees £14,000. This was reported to be the largest online award of damages. *See Gentoo Group Ltd & Anor v Hanratty* [2008] EWHC 627 (QB) (April 7, 2008).

To similar effect was a Facebook libel claim, *Applause Store Productions Limited and Matthew Firsht -v- Grant Raphael* 2008 EWHC 1781. Although he denied it and blamed some strangers who came to his apartment and used his computer without authority, Grant Raphael was held to have created a false profile for Matthew Firsht which purported to give distinctly unflattering details of Firsht's social and private life.

Mr. Justice Eady observed that such bulletin board entries were read by relatively few people and that the postings were rather like contributions to casual conversation

In particular, it also had the headline "Has Matthew Firsht lied to you?" which may perhaps have raised suspicions that he was not the person who had set up the posting. Again a *Norwich Pharmacal* order was obtained against Facebook Inc and this established when and where the Facebook entry was created. As only a limited number of people would have seen the offending entries and as they were only in place for 17 days, damages were relatively low, £15,000 to Firsht for libel plus £2,000 for an invasion of his privacy and the company was awarded £5,000 for libels in relation to it.

A claim, however, failed in relation to a bulletin board libel action in the case of *Nigel Smith -v- ADVFN plc* 2008 EWHC 1977. Mr Justice Eady stayed 37 libel actions

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brought by Mr Smith concerning postings on the bulletin board. Smith was an unemployed shareholder harbouring a grievance about an allegedly fraudulent share scheme. His scattergun approach to libel litigation was always going to be a problem for him, but the interest of the case is what Mr Justice Eady said about postings on bulletin boards. He observed that they were more akin to slander than ordinary libel which under English law has the significance that one would have to establish actual damage, unless one fell within the rather quaint exceptions including imputing unchastity to a woman or an infectious disease to a male or female.

Mr. Justice Eady observed that such bulletin board entries were read by relatively few people and that the postings were rather like contributions to casual conversation**.** One cannot conclude from this that libel actions cannot be brought in respect of bloggers, but it does show that the courts are now addressing the question of spontaneous communications on the internet. The problem of the internet, it has always seemed to me, is that it has the permanence of a letter but the indiscretion of a telephone call. That, fortunately, is a matter which Mr Justice Eady has now considered.

Forum Shopping

There seem to be an increasing number of cases where foreign language websites are sued upon in respect of downloading in the UK. *See Akhmetov -v- Serediba [2008] All ER (D), 5 June 2008.* In this case a Ukrainian businessman and Member of Parliament who was known in the Ukraine community in the UK sued in respect of two articles which appeared on a Ukrainian current affairs website suggesting that he had exported money and had participated in the torture of an opponent to death.

Although the judge took the view that these were very serious allegations, he awarded the sum of £50,000 reduced no doubt because of the limited extent of the publication but at the same time sufficiently large, as he would be mindful perhaps of the limited likelihood of such an award being enforceable in the Ukraine. The case was not contested but it adds to the sad litany of cases showing the ease of establishing jurisdiction in the UK.

Damages

Reminders of the potentially high level of damages came in the litigation which arose out of the shocking tabloid reporting of the circumstances of the disappearance of the five year old Madeleine McCann while on holiday in Portugal. The parents recovered £550,000 on an agreed settlement with Express Newspapers which had written about the topic repeatedly and prominently for many months. The allegations against the parents who had waged an incessant campaign to find their daughter and raised large sums of money in order to do so, could scarcely have been more serious. The awards were against four newspapers in the Express and Star group of newspapers and separate claims could have been brought in respect of each libel. The maximum sums recoverable have not been increased but if there is a pattern of libelling, the sums awarded can be very large.

This proved to be the case in another Maddie McCann related case namely that brought by Robert Murat and two of his friends. Murat lived in Portugal and had been designated an official suspect by the Portuguese police, although there was no evidence against him. This led to a field day for the UK tabloid press which strongly pointed the finger of suspicion of guilt at him and implied that he was part of some sort of pornographic and paedophile ring. He sued ten newspapers in respect of approximately 100 articles and damages in his case were agreed at £600,000 on the same basis as the McCanns. His two friends who had similar allegations levelled at them each recovered an unspecific six-figure sum.

Confidentiality Agreements

Since October 1996 following a spate of memoirs published by former members of the Special Forces, the Ministry of Defence has required those who are serving in the Special Forces to enter into confidentiality agreements whereby they will not disclose any information which they have obtained as a result of their service in the Special Forces without the express written authority of the Ministry of Defence. Furthermore, such employees have to assign any rights they might otherwise have in the information to the MoD.

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In *Ministry of Defence -v- Griffin* [2008] EWHC 1542, a decision of Mr Justice Eady on July 3, 2008, a former SAS soldier, Ben Griffin, who had signed such an agreement but had not obtained permission for the disclosures he intended to make in a book, was injuncted from disclosing any such information. The confidentiality agreement was upheld and the fact that he claimed that the information was in the public domain and that what he intended to reveal was of public interest was, by virtue of the express terms of the contract, held to be irrelevant.

What a person in Griffiths' position has to do is to submit his material to the MoD for approval. If the outcome of that process is unsatisfactory to him, his only remedy is to seek judicial review of the decision on the basis that it was unlawfully reached.

Production Orders in Terrorism Cases

In *Shiv Malik -v- The Chief Constable of Manchester* [2008] EWHC 1362, the Administrative Court upheld a judge's decision requiring the journalist, Shiv Malik, to hand over information which he had in his possession in relation to a book he was writing about Hassan Butt, a person believed to have close links to Al Qaeda. Malik's book was called "Leaving Al Qaeda: Inside the Mind of a British Jihadist."

Butt was said to have admitted involvement in a terrorist operation which involved an attack on a US Consulate in Pakistan. Production was sought under Schedule 5 Terrorism Act 2000 and Malik was required to hand over all information in his possession including notes of interviews he had had with Butt, Malik's attempt to set aside the criminal court judge's order was given short shrift in the Administrative Court, although insofar as the original order might require Malik to disclose his other sources, it was amended so that their identities could be redacted.

ECHR on Irresponsible Journalism

There was in an interesting decision in *Flux -v- Moldova* Applic No. 22824/04 on July 29, 2008 where the question arose of the extent to which freedom of speech would prevail where a newspaper appeared to have behaved irresponsibly. The case arose out of a feisty article based on an anonymous letter from a group of students' parents alleging that the principal had misspent money on the inappropriate provision of a separate bathroom for himself and decorating his offices and had permitted the launching of a school magazine which only published articles about students' sex and relationships. For good measure it also suggested that he took bribes for enrolling children in the school.

The paper had not, it seemed, carried out any independent realistic research and had cavalierly dismissed a request for a right of reply from the editors of the school newspaper. The newspaper was apparently incensed when his reply was published in a competing publication. The newspaper did not, it seem, care for the understandable approach of the student editors who they seem to have thought had ideas above their station. "The editors who came to our office were arrogant and spoke down to us from a great height. We had the impression these editors were from the *New York Times* or at least *Le Monde*." So much then for the view of the *New York Times* in Moldova!

The European Court of Human Rights felt that the allegations amounted to imputations of a criminal offence. It upheld the award of a very modest sum of damages plus an order for the publication of an apology, stressing that the right to freedom of expression cannot be taken to confer on newspapers an absolute right to act in an irresponsible manner by charging individuals with criminal acts in the absence of a basis of fact at the material time. They felt that the paper was guilty of unprofessional behaviour and a flagrant disregard of the duties of responsible journalism.

It should be noted however, that there was a dissenting faction of three who felt that "when subservience to professional good practice becomes more overriding than the search for truth itself, it is a sad day for freedom of expression". It may be, however, that this article in Moldova was not the cause to go to the stake for.

Privacy

In addition to the Mosley case discussed in this issue of the MediaLawLetter, there have been some interesting regulatory decisions on privacy based on the professional codes of broadcasters and newspapers. These are of some significance as the courts pay considerable regard to the standards

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that the industry sets itself, even though the court may well itself then proceed to set a higher standard. The regulatory codes therefore are increasingly the minimum standards of professional conduct when it comes to matters such as privacy.

In *Rebecca Gauld -v- ITV* (Ofcom Bulletin Issue 113 p. 17) a nanny employed by a celebrity complained about her appearance in a programme about the celebrities life entitled "*Kate and Peter: The Baby Diaries.*" She had fallen out with her employers and had been asked to leave because they believed she had misled them. In the film there was footage of her bedroom and personal belongings and a private telephone conversation with her employers which catalogued her alleged misbehaviour was filmed. This was felt to be a breach of her privacy. She had not consented to the filming of her bedroom, nor was she given a proper opportunity to respond to the allegations against her not had she consented to her participation in the telephone conversation being broadcast.

The contrary decision was reached in *Gareth Nixon -v- ITV* (Ofcom Bulletin Issue 112 p. 59). Mr Nixon had, in one of his less sober moments, featured without his consent in a programme called "*The Truth about Binge-Drinking.*" The film showed his face but the picture was of him drunk in a public place in circumstances where he would have no reasonable expectation of privacy.

In a case which will have resonances with American readers, *Popple -v- the Scarborough Evening News*, a decision of the Press Complaints Commission, the newspaper had published photographs in the paper and a video-clip on its website of footage of drugs and cash allegedly being recovered in her flat. The reporter had been invited along by the police, but the PCC felt that insufficient regard had been paid to her privacy.

Schadenfreude Corner

Alas poor Burstein! Flushed by his triumph against Times Newspapers over an allegation of involvement with a group of hecklers at the production of the opera *Gawain*, Keith Burstein had sued Associated Newspapers Limited for a review in the London Evening Standard which had slated his opera *Manifest Destiny* on the basis that it appeared to the reviewer to glorify terrorism. This was held to be fair comment. *See Associated Newspapers Ltd. v Keith Burstein* [2007] EWCA Civ 600 (22 June 2007).

Burstein's lawyers were on a Conditional Fee Agreements so they did not get paid as they had lost the case. Burstein, however, was ordered to pay £67,000 to Associated Newspapers. He claimed that this should be stayed until his appeal in the European Court of Human Rights had been heard. The bankruptcy registrar refused that and Mr Burstein has been made bankrupt.

David Hooper is a partner with Reynolds Porter Chamberlain in London.

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Court Summarily Dismisses Copyright and RICO Lawsuit Filed by Talk Show Host Michael Savage

By Thomas R. Burke

A U.S. District Court Judge in San Francisco summarily dismissed a lawsuit filed by conservative radio talk show personality Michael Savage against the Council on American-Islamic Relations ("CAIR"), the nation's largest Muslim civil rights organization, prompting Savage to abandon the lawsuit derided for its threat to free speech rights. *Savage v. Council on American Islamic Relations, Inc.*, No. C 07-6076 (N.D. Cal. July 25, 2008).

In a 21-page opinion, U.S. District Court Judge Susan Illston granted CAIR's motion for judgment on the pleadings, summarily dismissing Savage's copyright claim with prejudice. Savage sued CAIR in December of 2007 alleging that CAIR infringed his copyright interest in "*The Savage Nation*," Savage's nationally-syndicated week-day radio.

CAIR posted four minutes of audio excerpts from Savage's October 29, 2007 radio program on its website to reveal and to criticize and counter anti-Muslim and anti-CAIR remarks that Savage made during a prolong tirade. Among other things, Savage said CAIR "need deportation. . . You can take [CAIR] and throw them out of my country" and that "the Quran is a document of slavery and chattel." Savage's lawsuit also included a federal racketeering claim stemming from the alleged copyright infringement, asserting that CAIR was somehow responsible for the September 11, 2001 terrorist attacks on the nation. Judge Illston characterized the dispute as "not about the 9/11 or efforts by the United States to prevent future terrorist activities. It is, rather, a dispute about the ideas expressed in a four-minute audio clip and the protections of the First Amendment, protections upon which plaintiff relies for his livelihood and the airing of his radio program."

Dismissing Savage's copyright claim with prejudice, Judge Illston determined that CAIR's use of the audio excerpts of Savage's anti-CAIR, anti-Muslim on-air tirade to criticize him was barred by the doctrine of fair use doctrine, 17 U.S.C. § 107. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). Treating the allegations in Savage's complaint as true for the purposes of CAIR's motion, the Court observed:

> The complaint affirmatively asserts that the purpose and character of [CAIR's] use of the limited excerpts from the radio show was to criticize publicly the anti-Muslim message of those excerpts. To comment on [Savage's] statements without reference or citation to them would not only render [CAIR's] criticism less reliable, but be unfair to [Savage]. Further, it was not unreasonable for [CAIR] to provide the actual audio excerpts, since they reaffirmed the authenticity of the criticized statements and provided the audience with the tone and manner in which [Savage] made the statements.

Analyzing Savage's copyright infringement claim in considerable detail, ironically, Judge Illston principally relied on controlling Ninth Circuit precedent (*Hustler Magazine Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986)), established by the late Reverend Jerry Falwell who, after famously losing his "outhouse parody" invasion of privacy lawsuit in the United States Supreme Court. Falwell successfully defended a copyright lawsuit later brought by *Hustler* when his Moral Majority mailed a complete copy of the *Hustler* parody without permission for fundraising and political purposes to raise over a million dollars.

CAIR was entitled to use the audio excerpts of Savage's tirade to counter and criticize Savage's public anti-CAIR and anti-Muslim remarks.

Like the protection given to Rev. Falwell to use the entire parody to provide a defense against *Hustler*'s attack**,** CAIR was entitled to use the audio excerpts of Savage's tirade to counter and criticize Savage's public anti-CAIR and anti-Muslim remarks. Judge Illston also found that Savage failed to show any copyright damage or to even "allege or suggest an impact on the actual or potential sale,

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marketability, or demand for the original, copyrighted work." Instead, Savage merely contended that CAIR's use of the audio excerpts caused him to suffer an alleged loss of one million dollars in national advertising. (Had Savage sued CAIR for libel or misappropriation, his complaint would have been subject to California's anti-SLAPP statute, which otherwise is not available against federal claims.)

Addressing Savage's racketeering claim, Judge Illston found numerous fundamental flaws (including Savage's lack of standing, failure to meet the heightened pleading requirements, and failure to prove CAIR's conduct proximately caused Savage any injury) and expressed concerns that Savage's RICO claim appeared to be based on CAIR's First Amendment-protected activities. Considering CAIR's First Amendment defense, the Court characterized Savage's RICO claim as raising "serious First Amendment concerns."

The Court observed: "Here, much of plaintiff's RICO clam is based on defendants' involvement in the filing of lawsuits and amicus briefs, the Court finds that defendants are entitled to *Noerr-Pennington* protection." The Court also dismissed the RICO claim but allowed Savage leave to amend his complaint provided that he could cure the numerous deficiencies outlined by the Court.

Savage, who is infamous for making outrageous statements on his radio program, branded Judge Illston a "radical liberal judge" on his website and compared Illston to members of the Third Reich among other things in reaction to the Court's earlier tentative ruling against him. After the court's order was filed in an interview with the *San Francisco Chronicle*, Savage's attorney, Daniel Horowitz, publicly promised to file a revised complaint. However, facing a threat of Rule 11 sanctions by CAIR's counsel, Horowitz later announced in an unusual court filing that Savage would abandon the action entirely. Judge Illston formally dismissed Savage's complaint with prejudice on August 15. CAIR plans to seek the recovery of its attorneys' fees and costs.

CAIR was represented by partners Thomas R. Burke, Eric Stahl, and associate Jeff Glasser in the San Francisco, Seattle and Los Angeles offices of Davis Wright Tremaine LLP and Matthew Zimmerman, of the Electronic Frontier Foundation in San Francisco. Michael Savage was represented by Daniel A. Horowitz of Lafayette, CA.

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DVR System Not a Direct Infringement of Content Owners' Copyrights

"Who's Doing the Copying?"

By Toby M.J. Butterfield and Al J. Daniel, Jr.

The Second Circuit recently held that Cablevision would not be a direct copyright infringer by operating without license its remote digital video recorder system, an elaborate computer server farm which makes individual copies of television programming content at the request of individual subscribers, in their separate storage areas, for later viewing or storage. *The Cartoon Network LP v. CSC Holdings, Inc. and Cablevision Systems Corp.*, Nos. 07-1480-cv and 07-1511-cv (2d Cir., Aug. 4, 2008) (Walker, Sack, Livington, JJ.).

The Circuit reversed the District Court and vacated its injunction.

The Second Circuit's decision turns on its analysis of "Who is doing the copying?" The Court found individual subscribers "make" the copies using the Cablevision-supplied remote control, not Cablevision, which provides the multi-million dollar server farm system which creates, stores and delivers the copies to subscribers for viewing. Both sides were amply supported by *amici*, as this case may present an opportunity for the Supreme Court of the United States to review its decisions in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (*Sony Betamax*) and *Metro-Goldwyn-Mayer Studios, Inc., v. Grokster, Ltd.*, 545 U.S. 913 (2005) (*Grokster*).

"Remote Storage DVR System"

Cablevision is a cable television operator providing licensed copyrighted content to subscribers, through set-top boxes and, for an additional fee, through set-top digital video recorders, which allow subscribers to download and store programming on hard disks, just as VCRs allowed copying on video tapes.

In March 2006, Cablevision announced it would soon offer a new service called a "remote storage DVR system," allowing individual subscribers using their remote controls to request that Cablevision make individual copies of specific television programming for storage and future viewing. Cablevision's remote server farm would then create and store a separate copy for each requesting subscriber.

Claim Of Direct Infringement

On May 24, 2006, Twentieth Century Fox Film Corp., other motion picture and television production companies, and other major television networks sought a declaratory judgment from the United States District Court for the Southern District of New York that Cablevision's proposed system would infringe their reproduction and public performance copyrights in violation of 17 U.S.C. § 106.

The complaint alleges that Cablevision is a direct infringer, not a contributory infringer. Cablevision's answer includes a two page "Introductory Statement" brief, arguing that its system is merely an updated version of the Sony Betamax machine, and that Cablevision would no more be an infringer by operating its system than was Sony for manufacturing the Betamax machine. Cablevision's answer does not assert a defense of fair use, though its counterclaim seeks a declaratory judgment that its system would constitute a fair use under the Supreme Court's decision in Sony Betamax. The Cartoon Network LP filed a similar complaint, later consolidated with Twentieth Century Fox's action.

District Court Finds Direct Infringement

On March 22, 2007, Judge Denny Chin granted plaintiffs' motion and denied defendants' motions for summary judgment. Judge Chin's decision describes Cablevision's system, and concludes that it would infringe the plaintiffs' copyrights in three ways: (1) by storing a copy of plaintiffs' copyrighted programming; (2) by making temporary copies of portions of the programming in a data "buffer;" and (3) by "performing" the works publicly without authorization.

The parties and Judge Chin agreed that "the question is *who* makes the copies" of the complete programs on Cablevision's servers. *Cablevision*, 478 F.Supp.2d at 617 (emphasis in original). The District Court rejected Cablevision's argument that it was simply providing a time-shifting service, analogous to a Sony Betamax machine, stating that "[t]he RS-DVR is clearly a service, and I hold that, in providing this service, it is Cablevision that does the copying." *Id.*, at 618. The District Court also held that copies of the programs were made when portions were briefly copied in

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buffers on their way to storage in Cablevision's server farm. *Id.* at 621-622. Finally, Judge Chin held that Cablevision would be publicly performing the works and making unauthorized transmissions when it downloads the programs for viewing at a subscriber's request. *Id.* at 622-624. Judge Chin permanently enjoined Cablevision from using its digital video recording system to copy or publicly perform plaintiffs' copyrighted works without a license to do so. *Id.,* at 624.

Second Circuit Reverses

On appeal, the Second Circuit reversed. It held that it is the subscriber, with remote control in hand, who actually does the copying, and that Cablevision is therefore not a direct infringer**.** The Court does not address whether Cablevision might be a contributory infringer, because plaintiffs stipulated that they would only assert direct infringement claims. Similarly, the Court did not address the "fair use" defense, which Cablevision stipulated not to raise.

The Second Circuit next held that because buffers contained data for only a brief period of time on their way to storage, the buffers failed to satisfy the durational requirement in the definition of a "copy" in § 101 of the Copyright Act. The Circuit distinguished cases in which the storage of a computer program in RAM for several minutes was sufficient to constitute infringement. Slip Op. 13-14.

As to the complete copy of plaintiffs' programming stored on Cablevision's servers, each at the request of individual subscribers, the Second Circuit held that "the core of the dispute is over the authorship of the infringing conduct …," *i.e.*, "*who* made this copy." Slip Op. 21 (emphasis in original). It rejected the District Court's analysis, holding that Cablevision's conduct in designing, constructing, housing and maintaining the digital video storage system on which all copyrighted works are actually stored was not sufficient to qualify as a direct infringement. *Id.,* 23. The Court discussed or distinguished cases involving copy shops, internet service providers, and video on demand systems. *Id.,* 26. The Court acknowledged that the continuing relationship between Cablevision and subscribers might make Cablevision liable as a contributory infringer, discussing *Sony Betamax,* but concluded that could not support direct liability. *Id.,* 26-27.

that it is the subscriber, with remote control in hand, who actually does the copying, and that Cablevision is therefore not a direct infringer

Finally, the Court of Appeals rejected the District Court's conclusion that Cablevision's transmission of the programming for viewing at the request of the subscriber "does not involve the transmission of a performance 'to the public …,'" based upon the Court's analysis of the definition of public performance in the Copyright Act, 17 U.S.C. § 101. Slip Op. 31. The Second Circuit distinguished cases with facts extremely close to those present here. Accordingly, the Court of Appeals reversed and remanded for partial entry of judgment for Cablevision, and vacated the lower court's permanent injunction. *Id.,* 29, 44.

Analysis

The Copyright Act provides that "the owner of copyright … has the exclusive rights *to do and to authorize* any of the following" exclusive rights, including reproducing copies of the works and "perform[ing] the … work publicly." 17 U.S.C. § 106(1) and (4) (emphasis added). The Court's decision on whether the passage of programming data through the "buffer" are unlawful copies turns on its technical statutory construction of the definition of a "copy" under the Act, 17 U.S.C. § 101. Its rejection of the "public performance" claim related to downloading and playing the works from Cablevision's servers also turned on technical statutory construction of the definition of public performance in the Act. *Id.*

However, the decision on the principal issue of infringement by storage of complete copies on Cablevision's server farm comes down to which legal person is "authorizing" or "making" the copies. The parties' positions could not be more starkly different: the plaintiffs believe that Cablevision itself is doing the "making," as it has created and maintains a huge and very expensive system to conduct all the "making."

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In plaintiffs' view, Cablevision cannot claim that the computers, guided by end-users, are "making" the copies, as this is tantamount to blaming the machine for making the copies, when that is exactly what the owner and controller of the machine has designed it to do. Copyright infringement is a strict liability tort, just as no motorist is able to evade liability to the pedestrians whom they strike by saying "it wasn't me who hit you, it was my car."

Cablevision argues that it is more analogous to view it like the provider of photocopying machines, who does not have any humans doing any volitional act to make any of the copies. In essence, it analogizes itself to a copy shop which merely provides the equipment in a public area of the shop. Had secondary liability been in issue in this case, it would seem to be easy to find liability, as Cablevision operates a "closed shop" in which only its subscribers can operate Cablevision's elaborate computer server farm on which copies of programs are store and from which they are downloaded for viewing.

The Court's analysis on direct infringement abides in a more abstract, philosophical realm, asking who is "the doer," and focusing on the pressing of the button by the customer. Arguably such "doing" requires at least a symbiotic relationship. Cablevision devised and controls the system for a single purpose - to allow its subscriber to simply push a button on a remote control in order to make a complete copy of copyrighted works and to later download and view them. Cablevision's system won't make a copy and deliver it for viewing unless a subscriber requests it; on the other hand, the subscriber could not copy and view the copy of the programs if Cablevision had not created and maintained its closed system – available only to subscribers and only capable of making copies of copyrighted television programs.

Although the parties do not appear to have focused on it, it is possible that plaintiffs could argue that by making its system and offering its services to consumers, Cablevision is "authorizing" its customers to make copies of the copyrighted programming, an exclusive right under the Act. This analysis would render Cablevision's position closer to that of a printer, whom courts have regularly found to be a direct infringer, even when the printer has no knowledge that the book it has been handed by its customer to print contains copyrighted material belonging to others. *See Fitzgerald Publ. Co., Inc. v. Baylor Publ. Co., Inc.,* 807 F.2d 1110 (2d Cir. 1986) (innocent printer directly liable for unauthorized copying requested by printer's customer).

Although en banc or certiorari petitions will probably follow, this case, which focused purely on a direct liability, may yet evolve into a test about secondary liability and the *Sony Betamax* arguments excluded from analysis so far. If other cable channels (not bound by the present stipulation to pursue only direct liability claims) intervene, plaintiffs may get a "second bite of the apple."

The Supreme Court's *Grokster* decision suggests stricter secondary liability standards than the Court tolerated in *Sony Betamax.* Four justices dissented in *Sony Betamax*, while the Court unanimously decided that *Grokster* had both contributory and vicarious liability for operating that system. The United States itself, which pointedly did not express a view in *Sony Betamax*, also sided with the plaintiffs as amicus in *Grokster*.

Even if this case winds up determined by secondary liability issues, this Second Circuit decision may still be relevant for its analysis of when there is a "transitory copy" in a buffer or in RAM in a computer and the "public performance" analysis.

Meanwhile, rights holders will be troubled by the Court's conclusion that Cablevision cannot be liable as a direct infringer, even when it creates and operates an elaborate closed system for copying and replaying copyrighted works at the request of its subscribers.

Toby M.J. Butterfield and Al J. Daniel, Jr., are with Cowan DeBaets Abrahams & Sheppard LLP in New York. Cablevision was represented by Jeffrey Lamken, Robert Kry, Joshua Klein and Timothy Macht of Baker & Botts. Plaintiffs, including The Cartoon Network, Twentieth Century Fox, CNN, NBC and Disney were represented by Katherine Forrest and Antony Ryan of Cravath Swaine & Moore; and Robert Alan Garrett, Hadrian Katz, Jon Michaels, Peter Zimroth and Eleanor Lackman of Arnold & Porter.

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Third Circuit Finds Right Of Access To Juror Names Before Commencement Of Criminal Trial

Presumptive Right of Access Prior to Empanelment

By Robert Clothier

In a second victory for access rights in a highly publicized criminal case in Pennsylvania, the Third Circuit ruled that the press and public have a First Amendment right of access to the names of trial and prospective jurors prior to trial in a criminal case.

United States v. Wecht, No. 07-4767; 2008 WL 2940375 (3rd Cir. Aug. 1, 2008). The Third Circuit, however, declined to strike down the district court's voir dire process that relied solely on written questionnaires until the venire was reduced to a pool of forty. See

(In a prior Third Circuit decision arising out of the same case, the Third Circuit addressed a gag order incorporating Western District of Pennsylvania Local Rule 83.1 limiting what attorneys can say about ongoing criminal cases. While declining to rule on constitutional grounds, the Third Circuit exercised its "supervisory authority over the application of local rule of practice and procedure" and required that "district courts apply Local Rule 83.1 to prohibit only speech that it substantially likely to materially prejudice ongoing criminal proceedings."

The Third Circuit also ruled that the press and public have a common law right to access to so-called *Orsini* records filed with the district court, and that the trial court did not abuse its discretion in allowing public access to the records. *See United States v. Wecht,* 484 F.3d 194 (3d Cir. 2007). That ruling was discussed in the MediaLawLetter April 2007 at 46.)

Procedural Background

The decision arose out of a federal criminal prosecution of "an acclaimed forensic pathologist" alleging that he "used his public office" as county coroner "for private financial gain."

At issue on appeal was the district court's decision to empanel an anonymous jury and to conduct voir dire through use of a written questionnaire and without venirepersons physically present in an open courtroom until the pool of prospective jurors was reduced to 40. On December 4, 2007, WPXI, Inc., PG Publishing Co., d/b/a the *Pittsburgh Post-Gazette*, and the Tribune-Review Publishing Co. (the "Media-Intervenors") filed a motion challenging the court's decision. They did not seek the jurors' addresses or the actual jury questionnaire. When the district court denied their motion, the Media-Intervenors appealed to the Third Circuit on December 21, 2007, moving for summary reversal and/or for stay of jury selection.

On January 9, 2008, the Third Circuit vacated the district court's ruling to the extent it restricted public access to the names of trial jurors or prospective jurors, denying all other relief sought. The Third Circuit's Order decreed that "juror and prospective jurors' names" shall be disclosed prior to the swearing and empanelment of the jury. On August 1, 2008, the Third Circuit released its opinion in support of January 9th ruling.

The Collateral Order Doctrine

The Third Circuit first addressed whether the Media Intervenors' appeal was appealable under the collateral order doctrine. The Third Circuit confronted the stringent rule set forth in *Flanagan v. United States*, 465 U.S. 259, 263 (1984), which "prohibits appellate review until conviction and imposition of sentence" in a criminal case unless the asserted right would be "destroyed if it were not vindicated before trial." The issue was "whether *Flanagan* had effectively overruled" prior Third Circuit cases applying the collateral order doctrine and permitting interlocutory appeals from denials of access in criminal cases.

The Third Circuit's treatment of this issue presaged its ultimate ruling in favor of access. Addressing the collateral order doctrine's third requirement first (because *Flanagan* "has its greatest impact" on that requirement), the court concluded that "it would be impossible for us to vindicate the public's asserted right of access if we foreclosed appeal of this matter until after final judgment." That was because the "value of right of access" – the public's ability to "verify the impartiality of key participants in the admini-

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stration of justice" – "would be seriously undermined if it could not be contemporaneous."

Having surmounted this hurdle, the court easily found the remaining two elements for the collateral order doctrine -- hat the district court's order "conclusively determine[d] the disputed question," and that the order "resolve[d] an important issue completely separate from the merits of the action."

The Third Circuit also rejected the government's contention that the Media Intervenors' appeal was untimely because the district court had made its intention to establish an anonymous jury clear one and one half years before the appealed-from order. The court stated: "Because the media acts as a surrogate for the public in asserting a right of access, …, we decline to reject the appeal even assuming *arguendo* that the Media-Intervenors were not diligent in asserting this right." In other words, the court refused to punish the public for what might have been the press' lack of diligence.

Presumptive Right of Access to Juror Names

The Third Circuit then addressed whether the press and public have a presumptive First Amendment right of access to the names of trial and prospective jurors prior to empanelment of the jury. That question was "one of first impression in our circuit" and one, the Court felt, left unresolved in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("Press-Enterprise I"), which ruled in favor of a right of access to voir dire proceedings. While the Media-Intervenors argued for a common law right of access, the Third Circuit did not reach that argument.

The Court applied the familiar "experience and logic" test set forth in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8-9 (1986) ("*Press-Enterprise II*"). On the "experience" prong, the Court, relying heavily on the Supreme Court's decision in *Press-Enterprise I* as well as the Fourth Circuit's decision in *In re Baltimore Sun Co.*, 841 F.2d 74, 75 (4th Cir. 1998), found that the "instances of courts withholding jurors' names appear to be very rare before the 1970s" and concluded that "jurors' names have traditionally been available to the public prior to the beginning of trial."

Turning to the "logic" prong, the court found that the "purposes served by the openness of trials and voir dire generally are also served by public access to jurors' names," adopting the First Circuit's reasoning in *In re Globe Newspaper Co.*, 920 F.2d 88 (1st Cir. 1990) (holding that public has right of access to names and addresses of jurors following completion of criminal trial).

Knowledge of juror identities helps the public ensure jurors' impartiality and serves to educate the public about the judicial system generally. The court recognized the risks – e.g., "jury tampering" and "excessive media harassment." But the court did not consider "these risks so pervasive as to overcome the benefits of public access," believing that that district court judges can "address these risks on a "case-by-case basis."

Finally, and significantly, the court determined that the presumptive right of access to juror names "attaches no later than the swearing and empanelment of the jury" because "[c]orruption and bias in a jury should be rooted out before a defendant has run the gauntlet of a trial." It is this part of the Third Circuit's decision that is most significant, as few courts around the country have found that such a presumptive right of access arises before trial. Also significant is the Third Circuit's firm rooting of such a right on the First Amendment. The First Circuit's decision in *In re Globe Newspaper Co.* and the Fourth Circuit's decision in *In re Baltimore Sun* both avoided relying on constitutional grounds.

Countervailing Interests

The court then turned to "whether the District Court articulated the necessary findings and consideration of alternatives to overcome the presumption that the jurors' names should be publicly available." The court rejected the three reasons given by the district court.

First, the district court found that "withholding the jurors' names is necessary to prevent the media from publishing stories about them," which would impact "jurors' willingness to serve" and their "abilities to remain fair, unbiased, and focused on th[e] case." The Third Circuit found this "not a legally sufficient reason to withhold the jurors' names from the public," calling such "generalized" privacy

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concerns "a necessary cost of the openness of the judicial process."

Second, the district court cited the "possibility that friends or enemies of [the defendant] would attempt to influence the jurors." This "conclusory and generic" explanation was also "insufficient" and "would justify anonymity in virtually every jury trial, whether or not it attracts media attention, since almost all defendants have friends or enemies who might be inclined to influence jurors."

Lastly, the district court emphasized evidence that the defendant had "acquired many enemies" as a prominent coroner involved in publicized criminal trials. The Third Circuit felt that this evidence supported openness, because knowledge of juror identities made it possible to ensure that the defendant's enemies would not become jurors. Such evidence, the court found, did not arise to the level of a "serious and specific enough" risk that would justify the denial of access.

Voir Dire

The Media-Intervenors also challenged the voir dire process that relied "solely on written questionnaires without jurors being physically present in the courtroom prior to reduction of the venire to a pool of forty." They did not request "immediate access to the actual questionnaires" but rather that the district court "conduct voir dire in open court in addition to using the questionnaires." The Third Circuit rejected this request, finding that the media was seeking not merely access to information but that the district court "conduct a specific procedure." The court felt that "the method of conducting voir dire is left to the sound discretion of the district court."

The Dissent

The dissent asserted that the order at issue was not appealable under the collateral order doctrine, which is "reserved for only the most rare of circumstances." In particular, the dissent felt that the district court's order, issued three weeks before trial, was "not set in stone" and therefore did not conclusively determine the matter in question. And the dissent felt that the right of access would not be "destroyed" if not vindicated prior to trial. The dissent expressed concern that the majority's "expansion" of the collateral order doctrine "will undoubtedly cause significant problems and delays in our district courts…"

On the merits, the dissent criticized the majority's disregard for recent trends favoring juror anonymity and felt that given "the increased media presence and role in judicial proceedings, the collective experience of courts over the last few decades in managing high-profile trials is arguably more relevant than the early development of the jury system…" On the "logic" prong, the dissent saw little value in pre-trial disclosure of juror names and stressed concerns about juror privacy and resulting deterrent effect on juror's willingness and ability to serve. Lastly, the dissent felt that even if there were a presumptive right of access, the district court's reasons were sufficient to deny access to juror names.

The dissent chastised the majority for "effectively creat [ing] a new constitutional right" and felt that in this "age of pervasive media coverage," the district court should be given discretion and not be "micro-managed" by an appellate court.

Robert C. Clothier is partner and chair of the Media, Defamation and Privacy Law Practice Group in the Philadelphia office of Fox Rothschild LLP. Counsel for the media intervenors are David Strassburger of Strassburger, McKenna, Gutnick & Potter, P.C. (Tribune-Review Publishing),David J. Berardinelli and Walter DeForest of DeForest Koscelnik Yokitis, Kaplan & Berardinelli (on behalf of WPXI, Inc.), and David J. Bird and W. Thomas McGough, Jr. of Reed Smith LLP (PG Publishing Co.). Counsel for the defendant are Richard L. Thornburgh, Amy L. Barrette and Jerry S. McDevitt of Kirkpatrick & Lockhart.

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North Dakota Supreme Court Clarifies Standard for Releasing Juror Questionnaires After Criminal Trials

By Kyle W. Brenton

In *Forum Communications Co. v. Paulson*, 2008 ND 140 (July 7, 2008), the North Dakota Supreme Court reversed an order sealing answers to juror questionnaires after a criminal trial concluded. In reaching its decision, the court reinforced the importance of the public's right to know and the openness of the criminal justice system, and clarified the standard whereby trial judges may keep juror questionnaires secret.

Background

On September 13, 2006, Valley City State University student Mindy Morgenstern was killed. Moe Maurice Gibbs was arrested and charged with murder, and was tried in Minot, North Dakota, in the summer of 2007. After his first trial resulted in a hung jury, Gibbs was re-tried in Bismarck.

To speed voir dire, the parties produced a 169-question form to be filled out by prospective jurors. The questionnaire assured jurors that their answers would not be released and that they could answer "Confidential" to any question. After Gibbs' conviction, Forum Communications asked the court to release the names of the jurors.

The trial judge refused, noting that "because the Court gave its word to the jurors . . . that it would protect [their] identity" and because some juror harassment had occurred in the first trial, the questionnaires would be sealed. *Id.*at ¶6. Forum Communications filed an action for a supervisory writ (North Dakota's version of mandamus) to force the judge to release the questionnaires. *Id.* at ¶7.

Decision

The court began by noting that "the general public and the media have a constitutional right of access to criminal trials." *Id.* at ¶11. This right creates a presumption that all criminal proceedings are open to the public. *Id.* at ¶13. With regard to juror questionnaires, a trial court may curtail public access when necessary, but only in accordance with *Press-Enterprise v. Superior Court*, 464 U.S. 501, 510 (1982).

According to the North Dakota court:

> [T]he presumption of openness can only be overcome by an overriding interest and must be articulated with findings specific enough to permit effective review, and that any closure must be narrowly tailored to serve the competing interests [of the jury, the defendant, and the public].

Forum, 2008 ND 140 at ¶16.

The court held that neither the trial court's promise of confidentiality nor its vague reference to juror harassment were sufficient to overcome the presumption of access. *Id.* at ¶20. The court suggested that juror questionnaires should contain a statement that they will be released, and that jurors concerned with confidentiality should answer questions orally *in camera*. *Id.* at ¶21. The court finally remanded the case to the trial court to determine whether any interests other than those originally identified might overcome the presumption of openness. *Id.* at ¶22.

The court indicated, however that on remand some information—juror dates of birth, addresses, and telephone numbers not generally available—should remain confidential because of "recognized privacy concerns." *Id.* Additionally, it stated that the lower court should consider for redaction information about medications, whether jurors had been victims of crimes, and racial and ethnic identifiers. *Id.*

Chief Justice VandeWalle concurred, but expressed concern that the decision might make attorneys less willing to use juror questionnaires to expedite voir dire. *Id.* at ¶32. He pointed out that the court left room for "some, but certainly not all, specific information" to be kept confidential, and that the opinion puts the media and the public on notice of that fact. *Id.*

Kyle W. Brenton is a Summer Associate at DCS member firm Faegre & Benson, LLP. Steven A. Johnson and the Vogel Law Firm, Fargo, ND, represented Forum Communications. Steven A. Storslee of the North Dakota Attorney General's Office represented Judge Paulson. Jonathan R. Byers of the North Dakota Attorney General's Office represented the state.

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Washington Supreme Court Holds Teachers Accused of Sexual Misconduct Need Not Be Identified in Public Records if Allegations Are "Unsubstantiated"

By Eric M. Stahl and George Radics

In a split decision last month, the Washington Supreme Court held that the names of teachers accused of sexual misconduct with students are exempt from disclosure under the state Public Records Act (PRA) if the allegations in question are "unsubstantiated." The decision, *Bellevue John Does 1-11 v. Bellevue Sch. Dist No. 405*, No. 78603-8 (Wash. July 31, 2008), reversed a Court of Appeals opinion that had held the teachers' identities were subject to disclosure so long as the allegations were not "patently false."

In 2002, *The Seattle Times* submitted Public Records Act (PRA) requests to three large school districts, seeking the names of teachers accused of sexual misconduct with students. Thirty-seven teachers sued to enjoin release of the records. They claimed the records were exempt from disclosure, under a PRA provision permitting public agencies to withhold records containing "[p]ersonal information" in public employee files "to the extent that disclosure would violate their right to privacy." RCW 42.56.230(2), *formerly* RCW 42.17.310(1)(b).

The trial court ordered the school district to disclose the identities of teachers against whom the allegations were "substantiated," or who had faced some form of discipline or an inadequate school investigation.

The Court of Appeals reversed in part. Based on Washington law holding that that no privacy-based PRA exemption applies where the issue involves a matter of legitimate public concern, and on its conclusion that allegations of sexual abuse in schools is of the utmost public interest, the Court of Appeals held that the teachers' identities could be withheld "only if the accusation of misconduct is patently false." 129 Wn. App. 832, 120 P.3d 616 (2005). In other words, the identity of teachers accused of abuse was disclosable even if the allegations were not substantiated or resulted in no discipline.

A majority of the state Supreme Court sharply rejected the Court of Appeals' reasoning, finding that the distinction between "patently false" and "unsubstantiated" accusations to be "vague and impractical," and that the burden on agencies and courts to make such a distinction would be "unworkable, time consuming, and, absent specific rules and guidelines, likely to lead to radically different methods and conclusions." *Id.*

Construing the specific PRA exemption at issue, the Supreme Court first addressed whether allegations of sexual misconduct constitute employee "personal information." The Court of Appeals had held that the information was not "personal," relying on precedent holding that records relating to "specific instances of misconduct" fell outside the statutory exemption. The Supreme Court majority disagreed. Taking a literal approach, the court held that the identities of teachers accused of misconduct is "personal information," "because they relate to particular people." The court also held that letters of direction issued to accused teachers were not personal information, finding them akin to routine "employee evaluations" that are exempt from PRA disclosure.

Under the PRA, employee personal information is exempt from disclosure only to the extent disclosure would violate the employee's right to privacy. RCW 42.56.230(2). The PRA defines when the right to privacy is violated, but the *Doe* majority found it necessary to determine the extent of the right, and whether it covered unsubstantiated allegations of sexual misconduct. The court noted, "A public employee has a right to privacy in some information within a personnel file, but the scope of this right is not clear." The court held that while public employees have no right to privacy with respect to work-related misconduct that "is substantiated or results in some sort of discipline," they do have a right to privacy where the accusations are unsubstantiated. "The mere fact of the allegation of sexual misconduct toward a minor may hold a teacher up to hatred and ridicule in the community, without any evidence that such misconduct ever occurred."

The court also held that this right of privacy would be violated by disclosure of unsubstantiated abuse allegations because such disclosure would be highly offensive and of no legitimate public interest. RCW 42.56.050 (*formerly* RCW 42.17.255) (defining invasion of privacy). The court found that the public has no legitimate interest in the identities of teachers who are the subject of unsubstantiated investigations, "other than gossip and sensation," and that the

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public interest in assuring that school districts adequately investigate such allegations can be served by releasing investigation-related documents (including letters of direction) with the accused teachers' names redacted.

Five justices signed the majority opinion written by Justice Mary Fairhurst, with a sixth concurring only in the result.

Three dissenters accused the majority, first, of reformulating and unduly limiting the established definition of the right to privacy. "Under the correct definition of the right to privacy, the teachers have no right to privacy in their identities," nor in "material in a teacher's file relating to allegations of sexual misconduct[.]" Teachers' interactions with students concerns performance of their public duties, not "intimate personal details" of the sort that typically fall within the right of privacy, the dissent reasoned.

The dissent, written by Justice Barbara Madsen, also pointed out the practical problems with the majority approach. "It is important to bear in mind that unsubstantiated does not mean untrue," the dissent wrote. The dissent predicted that as a result of the decision, school districts will be less rigorous in investigating abuse allegations, and more likely to reach agreements with accused teachers that "exhang[e] resignation for silence." As a result, "the public of Washington will not have access to information necessary for determining whether the State's school districts satisfactorily address allegations of teacher sexual misconduct," and "predatory teachers may go undetected and unpunished."

Eric M. Stahl is a partner and George Radics is a summer associate at Davis Wright Tremaine LLP in Seattle. The firm represented the Seattle Times Company in the Bellevue John Doe *litigation.*

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Court Orders Priest Sex Abuse Records Unsealed on Newspapers' Motion

Disclosure of Alleged Crimes Not a Violation of Privacy

By Paul C. Watler and Jeremy T. Brown

Diocesan records of alleged sexual misconduct by a Catholic priest were properly unsealed by the trial court upon the motion of Dallas and Fort Worth newspapers, according to an opinion from the Texas Second District Court of Appeals in *Reverend Joseph Tu Ngoc Nguyen, O.P. v. The Dallas Morning News, L.P. and The Fort Worth Star-Telegram,* 2008 WL 2511183 (Tex. App.—Fort Worth June 19, 2008).

Because the priest's conduct falls within the family code definition of child abuse, there was a legitimate public concern in the case and, therefore, the unsealing of the records, which had been filed with the court, did not violate the priest's right to privacy.

Newspapers Motion to Unseal Records

The *Nguyen* case arose from a lawsuit by two "John Doe" plaintiffs against the Roman Catholic Diocese of Fort Worth, former Bishop Joseph P. Delaney, and the late Father Thomas H. Teczar, alleging that Teczar sexually abused them while they were minors. During discovery, the Doe plaintiffs requested production from the Fort Worth Diocese of files (the "Cleric Files") relating to accusations of sexual misconduct against minors by other Catholic priests, including Reverend Joseph Tu Ngoc Nguyen ("Father Tu").

The Diocese objected to production of the Cleric Files, which included 16 pages of Father Tu's personnel file relating to sexual misconduct allegations. After inspection, the trial court ruled that the Cleric Files were discoverable and ordered the Fort Worth Diocese to produce them to the Doe plaintiffs subject to a protective order sealing the documents.

The case ultimately settled, and the court ordered the return of the Cleric Files to the Fort Worth Diocese. *The Dallas Morning News* and *The Fort Worth Star-Telegram* immediately intervened in the dismissed lawsuit pursuant to Texas civil procedure rule 76a governing the sealing of court records. Upon motion by the newspapers, District Court Judge Len Wade ordered the Cleric Files unsealed and open for public inspection. Father Tu appealed the unsealing order.

Disclosure Doesn't Violate Right of Privacy

To determine whether Father Tu's records should be unsealed, the appellate court engaged in a two step analysis. The court first considered whether Father Tu's files were "court records" under Texas Rule of Civil Procedure 76a. If documents are court records under Rule 76a, then they are presumed open to the public. Under Rule 76a documents are court records if they are "filed in connection with any matter before any civil court . . . ." Tex. R. Civ. P. 76a(a). Additionally, "discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety" are also considered court records under Rule 76a. The newspapers contended the Cleric Files were court records on both counts.

The Fort Worth court of appeals wrote, "[a] document is 'filed' when it is delivered or tendered to, or otherwise put under the custody or control of, the court's clerk … regardless of whether the document is file stamped." *Nguyen*, 2008 WL 2511183 at *3 (citing *Jamar v. Patterson*, 868 S.W.2d 318, 319 (Tex. 1993); *Biffle v. Morton Rubber Indus., Inc.*, 785 S.W.2d 143, 144 (Tex. 1990)). In the underlying suit, one of the Doe plaintiffs filed the Cleric Files as an exhibit to his response to the Diocese's motions for summary judgment although they were not filed stamped. Despite this, the trial court found that the Cleric Files had indeed been filed with the court and were "court records" under Rule 76a. The appellate court did not reach the question of whether the Cleric Files were also "court records" under the provision of Rule 76a dealing with unfiled discovery.

The court proceeded to the second step of its analysis – whether Father Tu could rebut the presumption of openness. Father Tu argued that the unsealing order violated "his privacy rights in the documents under the federal and state constitutions and canon law." To determine Father Tu's privacy rights, the *Nguyen* court looked to the state law tort

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of invasion of privacy. The court assumed that if disclosure would not give rise to an invasion of privacy action under tort law, then it would not be protected as a privacy right by the United States or Texas Constitutions.

The court acknowledged an individual's privacy interest in avoiding the disclosure of certain personal matters including marital relationships, procreation, contraception, family relationships, and even some employment records. *Nguyen*, 2008 WL 2511183 at *4. But not every publication of embarrassing or personal information constitutes an invasion of the constitutionally protected zone of privacy. *Id.*

… criminal allegations related to sexual misconduct are of legitimate public concern, so publication of these allegations does not violate an individuals' right to privacy

Specifically, under Texas tort law, one's privacy is not invaded if the matter publicized is of legitimate public concern – the newsworthiness exception to the privacy tort. The court construed "newsworthiness" broadly to include not only "news in the sense of current events [and] commentary on public affairs," but also "all issues about which information is needed or appropriate so that individuals may cope with the exigencies of their period." *Id.*

The court found that **"**criminal allegations related to sexual misconduct are of legitimate public concern, so publication of these allegations does not violate an individuals' right to privacy**."** *Id.* at 15 (citing *Lowe v. Hearst Comm'ns, Inc.*, 487 F.3d 246, 250-52 (5th Cir. 2007); *Fort Worth Star-Telegram v. Doe*, 915 S.W.2d 471, 474-75 (Tex. 1995)). The court reviewed the allegations against Father Tu and found that they did indeed constitute criminal allegations relating to sexual misconduct. The court therefore concluded that the trial court's refusal to seal the Cleric Files did not violate Father Tu's privacy rights.

Paul C. Watler of Jackson Walker L.L.P. represented The Dallas Morning News and the Fort-Worth Star Telegram. Father Tu was represented by James Pennington of Forth Worth.

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ETHICS CORNER

Ethical Issues in Outsourcing Legal Work Overseas

By Timothy J. Conner

Outsourcing of United States legal work overseas, which began slowly around the mid-90s, has taken off and grown exponentially in the last few years. In 2008 some experts predict that 29,000 legal jobs will be sent overseas; by 2015 that number will be 40,000. The estimated value of that legal work if sent to U.S. lawyers: $4.3 billion, the bulk of it headed for India.

Who's sending the work? U.S. law firms (large and small) and major U.S. corporations' legal departments, some with established legal offices overseas. Microsoft, American Express, Oracle, Morgan Stanley, West Publishing, DuPont, United Technologies, TransUnion, and Trico Marine Services, among others, have all reportedly sent U.S. legal work overseas.

Until fairly recently there has been no official guidance on how to address the ethical issues raised by overseas outsourcing

The type of work ranges from litigation support like creating databases from large volumes of documents in discovery and organizing mounds of evidence, to preparing briefs for use in litigation, preparing patent applications and conducting prior art research, among any number of other tasks. The American Bar Association reported in April this year that the changes in e-discovery rules have boosted legal outsourcing to India even further.

Some critics have raised issues regarding ethical considerations though. In an April 3, 2008, Time article entitled "Call My Lawyer … in India", by Suzanne Barlyn, Mary C. Daly, dean of St. John's University Law School in New York City, is quoted as saying "[l]awyers are being seduced by the business end of outsourcing and are not being concerned enough with the ethical issues it's raising. I'm deeply troubled that outsourcing companies do not understand the scope of a lawyer's duty to confidentiality, nor are they familiar with conflict-of-interest rules."

Until fairly recently there has been no official guidance on how to address the ethical issues raised by overseas outsourcing**.** On July 25, 2008, The Florida Bar Board of Governors approved a professional ethics opinion which had been issued earlier this year. That opinion concluded that a lawyer could ethically outsource U.S. legal work overseas to both foreign lawyers and non-lawyers provided a number of ethical issues are addressed. *Professional Ethics of the Florida Bar Opinion 07-2, January 18, 2008*.

That opinion largely followed ethics opinions from the City of New York Bar Association's Committee on Professional and Judicial Ethics, Formal Opinion 2006-3, and the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee's Opinion No. 518. The San Diego County Bar Association has also provided guidance in its Ethics Opinion 2007-1.

So what are the ethical considerations involved? The ethics opinions commonly address six issues: (1) aiding in the unauthorized practice of law; (2) adequate supervision by a U.S. licensed attorney; (3) protecting client confidentiality; (4) conflicts of interests; (5) billing; and (6) when to obtain client consent.

Unauthorized Practice of Law

The definition of the practice of law varies, but it is clear that much of the work performed through the outsourcing process constitutes the practice of law. For instance, The New York State Bar Association's Lawyer's Code of Professional Responsibility provides that "[f]unctionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is the educated ability to relate the general body and philosophy of law to a specific legal problem of a client … ." EC3-5. The California Supreme Court has defined the practice of law as "the doing and performing services in a court of justice in any matter depending therein throughout

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its various legal stages and in conformity with the adopted rules of procedure" and which "includes legal advice and counsel and the preparation of legal instruments and contracts by which legal rights are secured although such matter may or may not be pending in a court." *People ex rel. Lawyers' Institute of San Diego v. Merchants Protective Corp.*, 189 Cal. 531, 535 (1922) (internal quotations and citations omitted). State Bar rules prohibit a person from aiding or abetting anyone in engaging in the unauthorized practice of law. Accordingly, the ethics opinions address whether outsourcing constitutes aiding and abetting the unauthorized practice of law.

In Ethics Opinion 2007-1, the San Diego Committee discussed this issue in the hypothetical context of a California law firm that had engaged a firm in India "to do legal research, develop case strategy, prepare deposition outlines, draft correspondence, pleadings, and motions" with respect to a case involving U.S. intellectual property issues. The Indian firm utilized foreign-licensed attorneys to perform the work, none of whom held a license from a U.S. jurisdiction. The California attorney reviewed all legal work, and signed court submissions and correspondence with opposing counsel.

The Committee had no trouble concluding that if the Indian firm had performed the work directly for the client it would have constituted the unauthorized practice of law. Because the California lawyer reviewed the work, and exercised independent judgment in deciding how and whether to use it on the client's behalf, however, the Committee determined that the California lawyer had not aided in the unauthorized practice of law. In the Committee's opinion, the lawyer's "fiduciary duty and potential liability to his corporate client for all of the legal work that was performed were undiluted by the assistance he obtained" from the overseas firm.

Likewise, the N.Y. Committee decided that "to avoid aiding the unauthorized practice of law, the lawyer must at every step shoulder complete responsibility for the non-lawyer's work. In short, the lawyer must, by applying professional skill and judgment, first set the appropriate scope for the non-lawyer's work and then vet the non-lawyer's work and ensure its quality." (it should be noted that the N.Y. Committee defines "non-lawyer" as both a foreign lawyer not admitted to practice in N.Y., or in any other U.S. jurisdiction, and lay persons).

The Florida Committee and the Los Angeles Committee also resolved this issue by emphasizing the duty of a lawyer to oversee and be ultimately responsible for the work performed.

Duty to Adequately Supervise

The responsibility to adequately supervise legal work performed overseas encompasses numerous issues from the quality of the work, to adherence to ethical constraints in the U.S. such as conflicts of interests, and maintaining confidentiality of client confidences and secrets. The ethics opinions agree that when legal work is sent overseas the duty to supervise is heightened.

After reviewing several of the considerations inherent in the duty to supervise, the N.Y. Committee stated:

> Given these considerations and given the hurdles imposed by the physical separation between the New York lawyer and the overseas non-lawyer, the New York lawyer must be both vigilant and creative in discharging the duty to supervise. Although each situation is different, among the salutary steps in discharging the duty to supervise that the New York lawyer should consider are to (a) obtain background information about any intermediary employing or engaging the non-lawyer, and obtain the professional resume of the non-lawyer; (b) conduct reference checks; (c) interview the non-lawyer in advance, for example, by telephone or by voice-over-internet protocol or by web cast, to ascertain the particular non-lawyer's suitability for the particular assignment; and (d) communicate with the non-lawyer during the assignment to ensure that the non-lawyer understands the assignment and that the non-lawyer is discharging the assignment according to the lawyer's expectations.

The San Diego Committee determined that an attorney should have an understanding of the legal training and busi-

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ness practices in the jurisdiction where the work will be performed in order to discharge the duty to adequately supervise. Noting that the training to become a lawyer differs around the world, the Committee stated that one factor to be considered when outsourcing work is the educational background of those who would perform the work. The U.S. lawyer must know something about the requirements of lawyering where the work is to be performed and the credentials of those who will perform the work. In cases where the attorney is supervising non-lawyers, reasonable steps should be taken to make sure the non-lawyers conduct comports with the U.S. lawyer's professional obligations.

Client Confidentiality

One of the most sacrosanct duties of counsel is to preserve inviolate the confidences and secrets of the client. But what happens if a client's confidences need to be shared with either a non-lawyer or lawyer overseas in order to perform certain work**?** Security breaches in other contexts have raised concerns about confidentiality. The San Diego Committee noted an instance involving a medical transcription project performed by an Indian firm that resulted in a debacle when the Indian firm threatened to post confidential medical information online unless the medical center involved retrieved money, owed to the Indian firm, from a third party. The Florida Committee also noted numerous examples of data breaches involving sensitive information being processed overseas.

… what happens if a client's confidences need to be shared with either a non-lawyer or lawyer overseas in order to perform certain work?

The San Diego Committee noted that the "legal and ethical standards applicable to foreign lawyers may differ from those applicable to domestic lawyer[s], particularly with respect to client confidentiality, the attorney-client privilege, and conflicts of interest." That Committee resolved the issue by concluding that because any disclosure of attorney-client privileged information would have been reasonably necessary for the accomplishment of the tasks at hand there could be no waiver under California law.

The New York Committee went further in its focus on this issue. First, the Committee stated that if the outsourcing assignment requires the lawyer to disclose client confidences or secrets, then the lawyer should secure the client's informed consent in advance. The Committee noted that the lawyer must be mindful of differing traditions and laws in the foreign jurisdiction on confidentiality as some foreign jurisdictions provide less protection than the U.S. In addition, the Committee recommended that a lawyer take steps to help preserve client confidences and secrets, e.g., restricting access to the information, contractual provisions addressing confidentiality and remedies in the event of a breach, and periodic reminders regarding the duty to keep matters confidential.

The Florida Committee also suggested that in light of varying rules and regulations regarding the use of data and information, "an attorney should require sufficient and specific assurances (together with an outline of relevant policies and processes) that the data, once used for the service requested, will be irretrievably destroyed, and not sold, used, or otherwise be capable of access after the provision of the contracted-for service." The Committee also balked at allowing the overseas provider remote access to a law firm's computer system, and stated that access needed to be limited to only the information necessary to complete the work for the particular client.

The Florida Committee went a step beyond the other ethics opinions and also raised the issue of protecting the confidentiality of information regarding the opposing party and third parties. One might give some thought to addressing these issues in the appropriate case where voluminous discovery may well be sent overseas to be sorted, processed, and analyzed, through appropriate provisions in a protective order for instance.

Conflicts of Interests

Just as with any lawyer, the company to whom a legal project is outsourced overseas may be working on other matters which conflict with, and are potentially or actually

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adverse to, the client and their interests. Whose conflicts of interests rules apply, and what should a U.S. lawyer do to avoid a conflict in this context? Would a conflict be imputed to the U.S. Lawyer? The Committees all seem to assume that the conflicts rules of the jurisdiction of the outsourcing lawyer would apply.

In addition, the Los Angeles Committee stated that "the attorney should satisfy himself that no conflicts exist that would preclude the representation. [cite omitted] The attorney must also recognize that he or she could be held responsible for any conflict of interest that may be created by the hiring of Company and which could arise from relationships that Company develops with others during the attorney's relationship with Company." The Florida Committee cited this language in its opinion, and agreed explicitly with it.

The N.Y. Committee also concluded that:

> As a threshold matter, the outsourcing New York lawyer should ask the intermediary, which employs or engages the overseas non-lawyer, about its conflict-checking procedures and about how it tracks work performed for other clients. The outsourcing New York lawyer should also ordinarily ask both the intermediary and the non-lawyer performing the legal support service whether either is performing, or has performed, services for any parties adverse to the lawyer's client. The outsourcing New York lawyer should also pursue further inquiry as required, while also reminding both the intermediary and the non-lawyer, preferably in writing, of the need for them to safeguard the confidences and secrets of their current and former clients.

The considerations noted above addressed by the Florida Committee regarding the retention of information that may contain client confidences and secrets would apply equally here as well.

Billing Issues

How should outsourced work be billed? The N.Y. Committee noted that because the outsourced work is technically not legal work, it is inappropriate for a New York lawyer to include the cost of outsourcing in his or her legal fees. The Committee stated that "[a]bsent a specific agreement with the client to the contrary, the lawyer should charge the client no more than the direct cost associated with outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service."

The Florida Committee said that a lawyer may charge the actual cost, but "in a contingent fee case, it would be improper to charge separately for work that is usually otherwise accomplished by a client's own attorney and incorporated into the standard fee paid to the attorney, even if that cost is paid to a third party provider."

The Los Angeles Committee concluded that a lawyer could pass the cost directly to the client, mark up the cost and pass the marked up cost on to the client, or charge the client a flat fee. Each of these scenarios implicates differing disclosure and client consent issues.

Consent of the Client

When should a lawyer advise the client and seek consent to outsource legal work? As already noted above, if client confidences and secrets are to be revealed in performance of the assignment, then a client's consent should be obtained in advance. But what about under other circumstances?

The San Diego Committee recognized that client consent generally turns on whether the outsourcing constitutes a "significant development." If the outsourcing is a "significant development" then client consent should be obtained. The Committee outlined various considerations for determining whether the outsourcing is a "significant development", e.g.: (1) whether responsibility for overseeing the client's matter is being changed; (2) whether the new attorney will be performing a significant portion or aspect of the work; and (3) whether staffing of the matter has been changed from what was specifically represented to the client. The Committee also stated that whether a development qualifies as "significant" depends on the client's "reasonable expectation under the circumstances" on whether outsourcing was intended to be used. The Los Angeles Committee essentially provided the same analysis under California law.

The N.Y. Committee noted an evolving approach under New York law that had become more "nuanced" than previously. The Committee stated there is little to be gained from

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requiring a disclosure to a client every time a piece of legal work is outsourced. The presence of one or more additional factors, however, that should be considered (similar to those noted by the San Diego and Los Angeles Committees) were outlined.

The Committee stated that factors informing whether client consent may be required include "if (a) non-lawyers will play a significant role in the matter, e.g., several non-lawyers are being hired to do an important document review; (b) client confidences and secrets must be shared with the non-lawyer, in which case informed advance consent should be secured from the client; (c) the client expects that only personnel employed by the law firm will handle the matter; or (d) non-lawyers are to be billed to the client on a basis other than cost, in which case the client's informed advance consent is needed."

The Florida Committee stated that the requirement for informed consent from a client should generally be tied to the degree of risk involved for the type of activity sought to be outsourced, whether the client would reasonably expect the lawyer or firm to personally handle the matter, and whether the non-lawyer will have more than a limited role in the matter.

Conclusion

The handful of ethical opinions published to date have all concluded that a lawyer may ethically outsource U.S. legal work overseas to either foreign lawyers, or non-lawyers. If the U.S. lawyer maintains ultimate authority and responsibility over the work product then the Committees considering this issue have said there should be no unauthorized practice of law issues. It is crucial for the U.S. lawyer to provide adequate supervision over the work for numerous reasons that are self evident.

Client confidences must be preserved, and guidance has been provided in the ethics opinions outlined above regarding steps that may be taken to ensure that confidential information remains protected. A lawyer must investigate whether there might be conflicts of interests, and assure that the overseas provider is not compromised in the work to be performed, thus potentially compromising a client's interests as well as the U.S. attorney's. Billing issues must be dealt with appropriately. And, finally, an assessment must be made regarding whether and when to obtain the client's informed consent for the outsourcing.

Timothy J. Conner is a partner in the Jacksonville, Florida office of Holland & Knight LLP.

MLRC Calendar

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