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LDRC Libel Defense Resource Center

LIBELLETTER

Reporting Developments Through December 17, 1999

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SUPREME COURT LEAVES MERITS Of CALIFORNIA SELECTIVE ACCESS LAW UNDECIDED

Reverses Ninth Circuit on Procedural Grounds

By Nory Miller and Guylyn R. Cummins

Less than two months after it was argued, the Supreme Court has issued a decision in *Los Angeles Police Department v. United Reporting Publishing Corp.*, No. 98-678 (December 7, 1999). At issue was the constitutionality of a California statute denying commercial users access to the addresses of addressees while granting access to most others.

A majority of the Court rejected United Reporting's First Amendment challenge on a procedural ground, finding that the specific procedural premise for the Ninth Circuit's decision was error. Eight justices, in two concurrences and a dissent, addressed the substantive First Amendment questions, but appeared to be evenly divided on the constitutionality of the statute.

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Thus, the constitutionality of this and similar statutes that limit access only information on certain disfavored speakers remains an open issue.

The Access Statute

United Reporting is challenging a 1996 California statute that provides access to the addresses of arrestees for journalistic, political, governmental and scholarly purposes, but denies access if the information is likely to be used directly or indirectly to sell a product or service. The statute specifically requires anyone who requests access to this information to sign a declaration under penalty of perjury that the information will not be used directly or indirectly to sell a product or service.

Before the 1996 provisions were enacted, since 1968, California police departments provided access to the names and addresses of arrestees to anyone who inquired. California police departments continue to provide access to the names and birth dates of arrestees, and to the circumstances of their arrests, to anyone who inquires.

United Reporting publishes a newsletter and otherwise provides the names and addresses of recent arrestees to attorneys, drug counselors, driving schools, bail bondsmen and others interested in offering services to them, who use the addresses to send solicitations by mail. Because its employees could not sign the required oath, the Los Angeles Police Department denied it access to the addresses, whereupon United Reporting challenged the law on First Amendment and other grounds.

Lower Court Finds It Invalid

The district court found the statute invalid on First Amendment grounds, and the Ninth Circuit affirmed.

The Ninth Circuit analyzed the statute as a commercial speech restriction, albeit an indirect one, and found that it failed the *Central Hudson* test. The only interest asserted by the government to justify restricting access to the arrestees' addresses was an interest in protecting the arrestees' privacy. The courts found that the selective access provision was incapable of materially furthering that interest because the government provided the same information for publication and broadcast by the press and to many others.

The Opinion of the Court

The majority opinion, written by Chief Justice Rehnquist and joined by all but Justices Stevens and Kennedy, reversed the Ninth Circuit on the ground that the Ninth Circuit had decided only a facial challenge, and that United Reporting was not entitled to bring a facial challenge.

The Court analyzed the challenge as one solely under the overbreadth doctrine, regarding United Reporting as having undertaken to press the rights of its customers.

The Court found that, "at least for purposes of facial invalidation," the California statute was a rule denying access to information in the government's possession rather than a restriction on speech, that a rule denying access is more of a restriction on conduct than a pure speech regulation, and that therefore the overbreadth "exception" to traditional rules of practice should not apply.

Under the Court's reasoning, United Reporting suffered only denial of access. It had not obtained the addresses in question (because it had been unable to sign the required declaration without risking prosecution for perjury), and was free to publish any information it possessed. The Court found that the overbreadth doctrine was not required here to protect United Reporting's customers' First Amendment rights because they were not subject to any risk of prosecution or cutoff of funds, and could seek access to the information directly as a basis to challenge the statute themselves.

The Court's approach may have focused on the overbreadth doctrine on the theory that the Ninth Circuit had invalidated the statute based on the commercial speech rights of United Reporting's

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customers, rather than addressing the First Amendment rights of United Reporting as a publisher of the information it sought. The Court did not address the availability of facial challenges in the First Amendment context generally, and in any event, expressly left open the various alternative arguments for finding the statute invalid. However, in light of the Court's increasing hostility to facial challenges in other legal contexts, the majority opinion here may signal an increased interest, at least by some Justices, in limiting the availability of facial challenges in First Amendment cases, where they have long enjoyed a special status.

Justice Scalia's Concurrence

Justice Scalia, joined by Justice Thomas, concurred with the majority's view that an access limitation does not impose the type of "chill" on speech that requires courts to permit plaintiffs to vindicate the First Amendment rights of others. The concurrence then addressed the substantive issue, explaining that the two key questions remained open: first, whether a law like California's, even though formally a restriction on access to information, should be analyzed as an access restriction or a speech restriction; and second, if it is a restriction on speech, whether it is an impermissible one.

Although Justice Scalia's concurrence did not specifically say where he and Justice Thomas stand on these questions, the description of the California statute as, "in effect [making] the information part of the public domain" and then denying access to those "who wish to use the information for certain speech purposes" appears to telegraph their views at least with respect to the first question.

Justice Ginsburg's Concurrence

Justice Ginsburg, joined by Justices O'Connor, Souter, and Breyer, argued that the California law restricts access rather than speech, that access is a form of government subsidy, and that therefore differential access should be reviewed under the same rules as differential subsidies, *i.e.*, impermissible under the First Amendment only if viewpoint-based. Justice Ginsburg set forth a further policy-type argument for her approach, speculating that if states were required to choose between keeping proprietary information to themselves and making it available without limits, they might well choose to deny access to everyone.

Justice Stevens' Dissent

Justice Stevens, joined by Justice Kennedy, challenged both the majority's procedural conclusions and Justice Ginsburg's views on the substantive issues. The dissent explained that United Reporting had advanced an "as applied" challenge as well as a facial challenge and that United Reporting had already been injured and would continue to be injured, and that the judgments below were justified on that basis. The dissenters concluded that because United Reporting complained of the application of the California law to itself, it was not necessary to invoke the overbreadth doctrine.

On the substantive question, the dissenters would have affirmed the Ninth Circuit's decision, but on a very different legal theory. The dissenters found the Ninth Circuit's reliance on the *Central Hudson* test inappropriate. Instead, they analyzed the law as a restriction on access to government information rather than a direct restriction on protected speech.

Explaining that California may constitutionally deny access to everyone or may constitutionally release the information on a selective basis to a limited group of users who have a special, and legitimate, need for the information, the dissenters found that the instant law presented a different question because it made the information generally available but denied access to a small disfavored class. Because United Reporting's and its customers' proposed uses of the information were lawful protected speech, and California's refusal to provide the information was motivated solely by "its desire to prevent the information from being used for

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constitutionally protected purposes," the dissenters argued that the State must assume the burden of justifying its rule.

They concluded that California's asserted justification of protecting the privacy of victims and arrestees was insufficient in light of the statute's provision for widespread dissemination of the material, that, with respect to protecting privacy, the statutory scheme is undermined by its overall irrationality. The dissenters postulated a second potential state interest, not articulated by the government — upholding the ethics of the legal profession by preventing lawyers from soliciting law business from unrepresented defendants — but found that interest inadequate to overcome the lawyers' First Amendment interest in engaging in protected speech and potentially providing criminal defendants with better access to needed professional assistance.

Finally, the dissenters pointed out the established First Amendment principle that the government's ability to withdraw government benefits altogether does not insulate selective withdrawal, and the Court's longstanding concern that permitting the government to produce a result indirectly that it cannot command directly undermines the First Amendment's guarantees. Because "California could not directly censor the use of this information or the resulting speech," the dissenters viewed "the State's discriminatory ban on access to information — in an attempt to prohibit persons from exercising their constitutional rights to publish it in a truthful and accurate manner — [as] equally invalid."

Most Issues Remain Open

The larger import of the *United Reporting* decision and opinions is far from clear. More questions are left open on remand or for other courts in other cases than are answered. All questions with respect to the constitutionality of selective access statutes remain open. Are they to be analyzed as access restrictions or speech restrictions? Under either approach, what is the constitutional test? What limits does the First Amendment impose on discrimination among speakers?

Does a specific denial of access when access is widely provided raise concerns similar to those raised when the government conditions benefits on relinquishment of a constitutional right, or does it raise concerns more like those raised when the government chooses to use its limited resources to subsidize certain expressive activities but not all? Or does such a denial of access raise different First Amendment concerns altogether, or none?

With respect to procedural issues in First Amendment cases, the decision is so specific to the case at bar and refrains so resolutely from addressing doctrinal questions, that it need not have any immediate effect on lower court decisions with respect to facial challenges in First Amendment cases, especially outside the selective access context. The majority opinion, nonetheless, does raise concerns that this area of the law may be revisited in the foreseeable future and that at least some members of the Court may be interested in further confining the procedural alternatives available to First Amendment plaintiffs.

Nory Miller is a partner of Jenner & Block, Washington D.C., and Guylyn R. Cummins is a partner of Gray Cary Ware & Freidenrich, San Diego, California, which represented United Reporting Publishing Corporation before the Supreme Court. In addition, Gray Cary Ware & Freidenrich represented United Reporting before the District Court and the Ninth Circuit.

Any developments you think other LDRC members should know about?

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

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$450,000 Jury Verdict Affirmed in Wisconsin Libel Case

A Wisconsin appellate court has affirmed by 2-1 the first libel verdict against a media defendant in the state in over fifty years. In a majority opinion by Judge Ted Wedemeyer, the Wisconsin Court of Appeals, District I, upheld a key finding that the plaintiff, a lawyer, local activist, and angry ex-spouse, was not a limited purpose public figure in her efforts to discredit her husband.

The court also held that use of the word "assault" "almost always implies phyusical contact and sudden, intense violence," and thus a verbal encounter could not, consistent with substantial truth, be characterized as an assault. *Maguire v. Journal Sentinel, Inc.*, No. 97-3675 (Wis. Ct. App. 1st Dist. Dec. 14, 1999). The court affirmed a $450,000 verdict leveled against the *Milwaukee Journal-Sentinel* for its report of plaintiff Marjorie Maguire's actions following estrangement from her husband.

The Article

The newspaper article that incited Maguire's suit reported that her estranged husband, a theology scholar at Marquett University, had obtained a court injunction prohibiting her from disrupting his speaking appearances (a true statement). The article explained that the university had posted a guard outside of Daniel Maguire's classroom after Marjorie Maguire "assaulted him at the university." *See LDRC LibelLetter*, January 1998 at 8.

Following the article's publication, Marjorie Maguire sued the *Journal-Sentinel* and five of its employees. At first, she alleged five counts of libel based on statements in two articles. All of her claims were dismissed by the trial court based on a statutory privilege protecting fair reports of judicial proceedings (most of the reports concerned the injunction proceedings). However on appeal the Court of Appeals reinstated Maguire's claim based on the "assault" statement, finding that because it was based upon a statement by Daniel Maguire outside of the courtroom it fell out of the scope of the privilege. *Maguire v. Journal Sentinel, Inc.*, No. 95-0841 (Wis. Ct. App. Nov. 14, 1995).

Trial Court

On remand, the trial court declined to find Maguire a public figure, and trial ensued. Maguire was awarded $450,000 for past earnings, future loss of earnings, mental anguish, humiliation, and loss of reputation. The *Journal* appealed the award, asserting that Maguire was a limited purpose public figure, and in the alternative that the statement referring to an "assault" was substantially true.

Court of Appeals

While the defendants argued that the alleged defamation was pertinent to a public controversy involving Marjorie Maguire's attempts to discredit her husband as a Catholic leader, the court found that this matter did not amount to a public controversy. There had been no press coverage regarding Maguire's dispute with her husband prior to the publication of the *Journal*'s article. Furthermore, the court found that Maguire's inability to have her denial of the "assault" allegation printed in the *Journal* showed her lack of influential access to the media.

Substantial Truth v. Incremental Harm

Turning to the question of substantial truth, the court distinguished the defense from the doctrine of incremental harm, which, it held, Wisconsin courts have not recognized. According to the record, Marjorie Maguire never physically attacked her husband at the university, as stated in the article. She had confronted him there, however, and the organizer of a pro-choice group, informing them of her views on why he was not an appropriate spokesman for the group and threatening to tell the group about him if he was allowed to speak. It was that event that led to the requested injunction against her.

Moreover, she had at different times verbally assaulted him, grabbed his coat, dumped baptismal water on him, and embraced him against his will. The *Journal* argued that had it reported all of these true episodes, Marjorie Maguire would have suffered even greater harm to her reputation.

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$450,000 Jury Verdict Affirmed

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The court, however, refused to find that the underlying facts made this particular statement substantially true. It noted: "There is a great distinction between printing a statement that contains 'slight inaccuracies' and attempting to define slight inaccuracies to include separate conduct or incidents not discussed, addressed or contemplated when the statement was printed." The question of whether a false statement (rather than a slightly inaccurate one) damaged the plaintiff's reputation in light of the "whole truth" related more to incremental harm.

The defendants also argued that the ambiguity of the term "assault" made it "close enough to the truth to protect the newspaper from liability." Here, the court deferred to the jury's determination that the statement was false and defamatory, referring to evidence presented by the plaintiff of the word's popular connotations of "physical contact and sudden, intense violence."

Maguire also filed a cross-appeal addressing several issues, both substantive and procedural, including the trial court's dismissal of her punitive damage claim and the constitutionality of the state fair report statute. The court affirmed the judgment with respect to all challenges. On the punitive damage claim, the court affirmed the finding that the plaintiff failed to prove actual malice.

The Dissent

In a partial dissent of considerable length, Judge Charles Schudson challenged the majority on its findings that Maguire was not a limited-purpose public figure and that the statement in question was not substantially true. The opinion asserts that though Maguire's personal dispute with her husband was not itself a public controversy, she "attempted to *connect* what she viewed as Daniel's hypocritical statements and behavior to broad, public issues on which she and he were publicly recognized authorities ... Thus Marjorie became a limited purpose public figure."

Judge Schudson also accepted the defendants' argument that "assault" was an ambiguous term. Finding that even the "popular" definition favored by the plaintiff would apply to several confrontations Maguire had with her husband, the dissent characterizes the reference to an assault at the university as a "'slight inaccuracy' about the location of the assault."

Further, according to the dissent, Maguire's continued public attempts to discredit her husband could constitute "assault" in a broader sense of the term. Deeming the use of an alternative sense of a word libelous could, according to Judge Schudson, violate the First Amendment: "if a newspaper's First Amendment rights recede based on an appellate court's dubious determination of what 'the popular definition' of a word 'almost always implies,' journalists will forever be chilled."

The question of further appeal is under consideration.

The *Journal-Sentinel* and the reporter were represented by James L. Huston of Foley & Lardner in Milwaukee, Wisconsin.

FOR A PREVIEW OF THE LATEST LDRC BULLETIN, *SEE PAGE 31.*

Internet Service Provider Not Liable for Imposter's E-mail Messages Under N. Y. Law

Highest Court Decides Lunney v. Prodigy

New York's highest court has held that under New York common law an Internet service provider (ISP) was not liable in a defamation suit brought by a teenager whose name was used to make vulgar postings on an Internet bulletin board and to send a threatening e-mail message. *Lunney v. Prodigy Servs. Co.*, No. 164 (N.Y. Ct. App. Dec. 2, 1999). Although the court held that the false attribution of the messages was defamatory as a matter of law, it found that the ISP was not the publisher of the material and that it also was protected by a qualified common-law privilege. The defamation in this case occurred before enactment of the Communications Decency Act, and the court did not reach the issue of whether or not the Act's immunization of ISPs is retroactive.

[T]he court analogized Prodigy to a telephone company, "which one neither wants nor expects to superintend the content of its subscribers' conversations."

False Accounts

In 1994, an anonymous Internet user opened several Prodigy membership accounts, all of them under variations of the name of the plaintiff, Alexander Lunney, a teenaged Boy Scout at the time. The imposter used these accounts to post vulgar messages on a Prodigy Bulletin Board and to send a threatening and obscene message to a local scoutmaster. The scoutmaster reported the message to the local police in Bronxville, New York, and to Lunney's own scoutmaster. After investigating, the police accepted Lunney's professed innocence.

Meanwhile, Prodigy sent Lunney a letter advising him of termination of an account in his name due to the transmission of obscene material through the Prodigy service. When Lunney explained that the accounts had been opened by an imposter, Prodigy apologized and quickly closed four other "Alexander Lunney" accounts that it uncovered. Lunney sued Prodigy, claiming that he had been defamed through improper use of his name and that Prodigy had been derelict in allowing it.

The trial court denied Prodigy's three motions for summary judgment. On consolidated appeal from denial of the second and third motions, the New York Supreme Court, Appellate Division, Second Department reversed. That court found that the messages were not of and concerning Lunney, though they were attributed to him, that the stigma caused by the misattribution did not reach the level of defamation, and that Prodigy was not the publisher of the messages. In the alternative, the court held that a qualified common-law privilege shielded the ISP from liability. *Lunney v. Prodigy Servs. Co.*, 250 A.D.2d 230, 683 N.Y.S.2d 557, 27 Media L. Rep. 1373 (N.Y. App. Div. 2d Dep't 1998).

Telephone Company Analogy

The Court of Appeals assumed for the purposes of the opinion that the attachment of Lunney's name to the obscene statements was defamatory, noting *Clevenger v. Baker Voorhis & Co.*, 8 N.Y.2d 187, in which case improper attribution of a flawed article to the plaintiff scholar was held to state a cause of action. However, the court agreed with the Appellate Division that Prodigy was not liable under *Anderson v. New York Tel. Co.*, 35 N.Y.2d 746.

In that case the Court of Appeals held that a telephone company was not the publisher of an obscene recording that people could hear by ringing a certain telephone number, because "'in no sense has . . . [it] participated in preparing the message, exercised any discretion or control over its communication, or in any way assumed responsibility.'" In the

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ISP Not Liable for Imposter's E-mail Messages

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alternative, the *Anderson* court found, telephone companies in general, which play a passive role in the transmission of material, are entitled to a qualified privilege against liability for material transmitted via their service, subject to a malice exception.

With regard to the e-mail message that the imposter sent directly to the scoutmaster, the court analogized Prodigy to a telephone company, "which one neither wants nor expects to superintend the content of its subscribers' conversations." The ISP was "merely a conduit," not the "publisher" of the message. Furthermore, the court granted Prodigy the common-law privilege, reasoning that the public "would not be well served by compelling an ISP to examine and screen millions of e-mail communications, on pain of liability for defamation." As the plaintiff had alleged no malice on the part of Prodigy, the privilege applied.

Bulletin Board is Closer Question

The court found the bulletin-board postings a closer case, but ultimately concluded that Prodigy could not be considered the publisher of them either, despite its reservation of editorial discretion. Agreeing with the logic of the lower court's opinion, the Court of Appeals viewed the role Prodigy played as a passive conduit in those messages it chose not to edit. Again, the sheer volume of messages posted on such bulletin boards seems significant in the court's decision. It reserved the right to rule otherwise, however, if the facts in another case proved the ISP to qualify as a publisher.

Lunney also brought a negligence claim against Prodigy, asserting a duty to prevent imposters from opening accounts in others' names. This claim was similarly unsuccessful at the appellate level, as once again the court considered the daunting task of monitoring millions of Internet subscriptions:

> The rule plaintiff advocates would, in cases such as this, open an ISP to liability for the wrongful acts of countless potential tortfeasors committed against countless potential victims.

No Ruling on CDA

As one of its defenses, Prodigy had invoked the Communications Decency Act, 47 U.S.C. § 230), which the Fourth Circuit held in *Zeran v. America Online*, 129 F.3d 327 (4th Cir. 1997) to immunize ISPs from liability based on their exercise of editorial discretion. Prodigy argued that the statute would apply retroactively. The Court of Appeals declined to rule on the issue, as it was unnecessary to the disposition of the case.

6th Circuit Access Case Sent Back in Light of *U.S. Reporting*

On December 13 the United States Supreme Court vacated the Sixth Circuit's striking down of a Kentucky statute which denied access to accident report records, unless requested by a party to the accident, their attorney or insurer, or a journalist. *McClure v. Amelkin*, No. 99-2000, 1999 U.S. 8270 (U.S. Dec. 13, 1999). In a brief order, the Court remanded the case to the Sixth Circuit for reconsideration in line with its recent opinion in *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, No. 98-678 (U.S. Dec. 7, 1999), which refused to allow a facial challenge to a similar statute in California, restricting access to arrest reports.

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Illinois Court Holds That "Malice" Can Never Defeat the Official Report Privilege

By Peter M. Storm

An Illinois Appellate Court has taken a further step toward establishing that the official report privilege cannot be overcome in libel cases by proof of "malice." In *Tepper v. Copley Press, Inc., et.al.*, __ Ill.App.3d __ (Doc. No. 2-98-0473, 2d Dist. 1999) the Court held that the only way a libel plaintiff can defeat the official report privilege is to establish that a news account is not an accurate and complete report, or a fair abridgement of the official report or statement. In other words, neither a reporter's knowledge that the governmental report contains false and defamatory material, nor a spiteful motive for publishing the report or statement, can overcome the privilege.

Article on Lawyer Discipline

Tepper is a lawyer who alleged that a news account in *The News Sun* of Waukegan, IL defamed him because it republished a disciplinary board's official finding that he had misappropriated client funds. Having ultimately persuaded an appeals panel to reverse that finding (after publication of the article), Tepper reasoned that the reporter's article should have included Tepper's evidence and arguments, not just the board's findings.

Tepper also made the incredible claim that the article was published only because his wife and the wife of an editor at the newspaper had opposing interests in a local election and a civil suit. Tepper contended that these circumstances constituted sufficient "ill-will" or "common law malice" to overcome the report privilege.

The Court found that neither "actual malice" nor "common-law malice" can defeat the official report privilege. The Court traced the evolution of the privilege under Illinois law, and concluded that the accuracy of the news account, not the truth or the falsity of the information being summarized, should determine the applicability of the privilege. It noted that when the press reports on an official statement or report from the government, it is simply acting as the public eye, reporting information that any member of the public could have acquired themselves. Thus, as in *Tepper*, even if a reporter allegedly knows of evidence that contradicts the findings set out in an official report or statement, he is still privileged to report those findings, so long as his account is a fair abridgment or summary of the official report.

Privilege's Murky Past

The official report privilege in Illinois has come through murky water. Two years *after New York Times v. Sullivan*, the Illinois Supreme Court held that media defendants should be afforded a qualified privilege against libel claims where the allegedly defamatory material was based upon the written or verbal statements of governmental agencies or governmental officials made in their official capacities. *See, Lulay v. Peoria Journal-Star, Inc.*, 34 Ill.2d 112. 114-15(1966).

The Illinois Supreme Court adopted a two-prong test, taken from the Section 611 of the Restatement of Torts. At that time Section 611 provided:

> The publication of a report of judicial proceedings, or proceeding of legislative or administrative body***or of a body empowered by law to perform a public duty is privileged,although it contains matter which is false and defamatory, if it is
>
> (a) accurate and complete or a fair abridgement of such proceedings, and;
> (b) not made solely for the purpose of causing harm to the person defamed.

Restatement of Torts Sec. 611, at 293 (1938).

The *Lulay* court went on to hold expressly that the privilege to report either governmental acts or utterances could be defeated, but only by proving a particular publication was motivated solely by "actual malice." *Lulay*, at 115. However, in using the term "actual malice", the Illinois Supreme Court was referring to "malice in fact" or "ill-will" towards person

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"Malice" Can Never Defeat Official Report Privilege

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allegedly defamed, and not "New York Times malice." (*See, Judge v. Rockford Memorial Hospital*, 17 Ill.App.2d 365 (2d Dist.1958)).

Confusion Over Malice

Subsequent Illinois decisions reflect confusion as to whether or not this "official report privilege" could be overcome by proof of "malice", and, if so, whether it was "*New York Times malice*" or "common law malice" that was required. For example, in 1986, the First District Appellate Court in *O'Donnell v. Field Enterprises*, 145 Ill.App.3d 1032,1036 (1st Dist.1986) recognized that the official report privilege was far broader than other qualified privileges because "the privilege exists even though the publisher does not believe the defamatory statements ... are true and even though the publisher knows that they are false."

Yet, last year in *Lykowski v. Bergman*, 299 Ill.App.3d 157,166 (1st Dist. 1999) without mentioning *O'Donnell*, another division of the same appellate district announced that the fair report privilege is never an affirmative bar to a defamation claim, but instead merely forces a plaintiff to prove the defendant intentionally published the material knowing the matter was false, or with a reckless disregard as to its falsity. The Court also said the application of the privilege is limited to those situations where the statements are not made solely for the purpose of causing harm to the person defamed. Thus, even in the same appellate district, Illinois courts could not agree on whether malice could defeat the privilege.

Neither the *O'Donnell* or *Lykowski* courts seemed aware that, when the *Second Restatement of Torts* was published in 1977, Section 611 was revised to eliminate the second prong, and now reads:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

Restatement (Second) of Torts, sec. 611 (1977). In 1980, the Illinois Supreme Court also observed that when *Lulay* was decided, the "common law malice" limitation imposed by the First Restatement version of Section 611 had already been rendered obsolete by the ruling in *New York Times v. Sullivan*. *See, Catalano v. Pechous*, 83 Ill.2d 146,168 (1980). (The *Lulay* court's failure to discuss *New York Times malice* probably is explained by the fact that the news account at issue in *Lulay* was published in 1959, although the case did not reach the Illinois Supreme Court until 1966.)

Whether based upon the revision of Section 611 of the Restatement, or the decision in *New York Times*, it seemed clear the Illinois Supreme Court was saying in *Catalano* that the official report privilege could no longer be defeated by a showing of "common law malice". The Court stopped short, however, of deciding whether *New York Times* malice could overcome the privilege, because it found that the plaintiff had not shown sufficient evidence of "actual malice." *Id.*, at 168.

The *Tepper* decision ought to eliminate whatever confusion may still exist as to whether either type of "malice" is ever relevant to the application of the official report privilege. The sole judicial focus should be upon whether the news account is a fair abridgment of the official statement or report, thus assuring that the press need not censor itself in reporting on governmental matters, even when a reporter may suspect or know that the official report or statement contains false information. It is also a more workable approach, because a Court need only compare the news account to the official statement or report to determine the availability of the privilege.

Peter M. Storm is a partner in Cooper and Storm, Geneva, Illinois firm of , and, with the company's legal department, was counsel for The Copley Press, Inc. in this matter.

New York Trial Court Dismisses 13-year-old Libel Action

Former NYC Chief Medical Examiner Gross v. The New York Times Company

By Steven Lieberman, Dean Ringel and George Freeman

On November 18, 1999, Justice Elliott Wilk of Supreme Court, New York County, granted summary judgment in favor of The New York Times Company and four of its present and former employees (the "Times Defendants") dismissing a libel complaint against them filed by Elliott M. Gross, the former Chief Medical Examiner of the City of New York. Justice Wilk held that Dr. Gross had failed to meet his burden of showing that there are triable issues of fact as to whether the Times Defendants had acted with reckless disregard for the truth. Gross v. The New York Times Co., No. 1686/86 (N.Y. Sup. Ct. N.Y. County, Nov. 22, 1999).

Specifically, the Court noted that Mr. Shenon had "conducted more than 250 interviews with a variety of professionals and that Shenon deliberately sought out sources who were friendly with or neutral towards Plaintiff."

Dr. Gross filed his 60-page, 15-count Complaint in 1986 seeking $250 million in damages. Dr. Gross' Complaint was based on a 15,000-word, four-part series of investigative reports published by *The New York Times* ("*The Times*") in late January-early February 1985 (and certain follow up articles). According to a 1993 decision of the New York Court of Appeals in the case, the articles in question charged plaintiff, the former Chief Medical Examiner of the City of New York, with having mishandled several high-profile cases and having used his authority to protect police officers and other city officials from suspicion after individuals in their custody had died under questionable circumstances.

Defendants' articles spawned four separate criminal investigations into plaintiff's conduct, each of which terminated with findings that there was no evidence of professional misconduct or criminal wrongdoing by [Dr. Gross]. *Gross v. The New York Times Co.*, 82 N.Y.2d 146, 603 N.Y.S.2d 813, 21 Media L. Rep. 2142 (1993).

Round One: Was It Opinion

The Times Defendants filed a pre-answer motion to dismiss, principally on the basis that the statements that Dr. Gross alleged to be defamatory constituted non-actionable opinion. On June 10, 1991, the Supreme Court, New York County, granted the Times Defendants' motion to dismiss, holding that the statements complained of constituted non-actionable opinion. 151 Misc. 2d 571, 575 N.Y.S.2d 221, 18 Media L. Rep. 2362 (Sup. Ct. N.Y. Co. 1991). That decision was affirmed by the Appellate Division, First Department, in 1992 (180 A.D.2d 308, 587 N.Y.S.2d 293, 20 Media L. Rep. 1274)), but was then reversed by the New York Court of Appeals the following year. 82 N.Y.2d 146.

Round Two: Malice

After the case was returned to the trial court, Dr. Gross proceeded with the first phase of discovery directed solely to actual malice. Following the parties' production of documents, Dr. Gross deposed the author of the investigative series (Phil Shenon) for eleven days, a second New York Times reporter who had written several of the follow-up articles (Sam Roberts) for five days, and two editors (A. M. Rosenthal and Peter Millones) for two days each. The Times Defendants then moved for summary judgment on the ground that Dr. Gross could not meet his burden of establishing actual malice.

Dr. Gross opposed the motion principally on the theory that the author of the articles had "purposefully avoided" learning the truth regarding Dr. Gross' motives and actions "by only consulting sources known to be strongly biased against [Dr. Gross] and by failing

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N.Y. Ct. Dismisses Libel Action Against New York Times Company

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to adequately investigate the charges made against Dr. Gross" (Slip Op. at 3), citing *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989), for this proposition.

Justice Wilk rejected this argument, holding that the record demonstrated that Mr. Shenon had investigated the allegations reported in *The Times* series fully and carefully. Specifically, the Court noted that Mr. Shenon had "conducted more than 250 interviews with a variety of professionals and that Shenon deliberately sought out sources who were friendly with or neutral towards Plaintiff". Slip Op. at 3.

The Court observed (in response to Dr. Gross' argument that virtually everyone at the New York OCME was hostile towards him), that Mr. Shenon had prepared and sent a letter seeking the assistance of doctors outside the New York City pathology community "asking them to help him make sure that he was not making unfounded charges against Plaintiffs' office", and that Mr. Shenon had conducted a series of four pre-publication interviews with Dr. Gross (taped by both Mr. Shenon and by Dr. Gross) in which Mr. Shenon "advised Plaintiff of the specific charges leveled against him, identified, in many cases, the sources of those criticisms and urged plaintiff to provide a detailed response." Slip Op. at 3-4.

The Court then noted that while Dr. Gross in those interviews had "made some general denials", "he declined to speak about most of the allegations" and "did not, in those interviews, challenge the competence or integrity of the sources he now accuses of being biased". Slip Op. at 4.

Dr. Gross' attorney has already advised the press that he intends to appeal Justice Wilk's ruling.

The Times Defendants were represented in this case by Dean Ringel, Floyd Abrams, and Janet A. Beer of Cahill Gordon & Reindel; Steven Lieberman of Rothwell, Figg, Ernst & Kurz; and George Freeman of The New York Times Company.

New Hampshire Federal Court Rules that Prominent Businessman is a Limited Purpose Public Figure

A New Hampshire federal court has ruled that a prominent businessman is a limited purpose public figure in connection with news reports concerning false rumors that he was a convicted felon. *Howard v. Antilla*, D. N.H. 97-543-M (November 17, 1999).

Rumor Affecting Stock

The plaintiff Robert Howard is the founder of several companies, including Presstek, Inc., a public company that manufactures printing products. In the fall of 1994, Presstek stock was being adversely affected by a market rumor that Howard was in fact Howard Finkelstein, a convicted felon who used the alias of Robert Howard.

The defendant Susan Antilla, then a *New York Times* business reporter, wrote an article about how the rumor, which turned out to be false, was moving Presstek stock and was being promoted by short sellers (investors who profit if the price of a stock declines). The article also reported that the SEC was unable to confirm or deny whether Howard was Finkelstein, despite having recently settled an insider trading case against Howard and having earlier prosecuted Finkelstein.

On the same day that Antilla's article was published by *The Times*, the *Wall Street Journal* published its own article concluding that the rumor was false and describing the effect it had been having on Presstek stock.

Howard sued Antilla (but not *The Times* or the *Journal*), alleging that her article falsely implied that the rumor was true. In an earlier decision, the court denied Howard's motion to compel the disclosure of Antilla's confidential sources. The court held that the identity of short sellers who told Antilla about the rumor was not central to plaintiff's libel claims, since Howard did not dispute that the rumor was in circulation and was negatively affecting Presstek's stock, and since Antilla was not otherwise relying on the short seller sources to defend the case. *Howard v. Antilla*, 1999 U.S. Dist. LEXIS 17045 (1999).

Stock is Public Controversy

In granting Antilla's motion for partial summary judgment on Howard's public figure status, the court relied on First Circuit precedent holding that the public figure issue is a question of law for the court to decide. *See Pendleton v. City of Haverhill*, 156 F.3d 57, 67-68 (1st Cir. 1998). Following the *Waldaum* test established by the D.C. Circuit, the court described its task as (1) isolating the relevant public controversy; (2) examining plaintiff's involvement in that controversy; and (3) determining whether the alleged defamation was germane to the plaintiff's participation in that controversy. *See generally Walbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1297 (D.C. Cir. 1980); *Silvester v. American Broadcasting Companies, Inc.*, 839 F.2d 1491, 1494 (11th Cir. 1988).

In applying this test, the court refused to adopt plaintiff's position that he was being labeled a public figure simply for denying a false and scurrilous rumor that he was a convicted felon. Instead, the court viewed the public controversy at issue as "the performance of a publicly traded company's stock and various factors (both legal and illegal) that influence, or can be manipulated to affect, the market value of that stock." Slip op. at 5.

In that regard, the court noted that Howard had enjoyed a well-publicized business career, including extensive publicity concerning his role in Presstek, short traders' interest in the company, and his settlement of an SEC insider trading case just eight months before the article was published. Because of Howard's voluntary role in the "open and public debate concerning the fairly prolonged periods during which public trading of [the] company's stock was quite volatile and the possible influence short traders of the company's stock had on that volatility," he was a limited purpose public figure with respect to news reports about that controversy. Slip op. at 5-6. Howard has moved for reconsideration of the ruling.

Susan Antilla is represented by William L. Chapman of Orr and Reno in Concord, N.H. and Jonathan M. Albano of Bingham Dana LLP in Boston, MA.

Pennsylvania Federal Court Applies Broad Public Figure Standard in Rejecting $54 Million Libel Claim

By Mark R. Hornak and David J. Porter

On August 20, 1999, Senior District Judge Maurice B. Cohill, Jr. set aside a Magistrate's recommendation and granted summary judgment in favor of The New York Times Company and *The Santa Rosa Press Democrat*, in a defamation case filed by Pennsylvania resident Angelo Medure in the United States District Court for the Western District of Pennsylvania. Key to the decision is the distrcit court's conclusion that the plaintiff, businessman Angelo Medure, is a limited purpose public figure with respect to the subject matter of the allegedly defamatory article. *Medure v. New York Times Company*, 60 F. Supp. 2d 477 (W.D. Pa. 1999).

Background of the Case

In June, 1994, Angelo and Charlotte Medure commenced an action against The New York Times Company and its regional newspaper, *The Santa Rosa Press Democrat*, in the United States District Court for the Western District of Pennsylvania. Plaintiffs alleged causes of action for defamation and loss of consortium, and sought compensatory, special and punitive damages. In particular, plaintiffs alleged special damages in the amount of $54 million in the nature of lost California business opportunities resulting from the alleged defamation.

Plaintiff Angelo Medure is a lifelong resident of New Castle, Pennsylvania, where he has been involved in pizza, construction and food warehouse businesses. In 1991, Medure became interested in the emerging business of managing casinos on Indian reservations. He formed a company called Gaming World International, Ltd., negotiated a management contract with a Minnesota Indian tribe and opened a casino on the tribe's reservation. From its inception, the Minnesota venture was surrounded by controversy due to tribal dissension over the selection of Medure as casino manager and a concern by some over the infiltration of Indian gaming by organized crime.

In 1992, Medure began investigating Indian gambling in California and communicated with various tribes regarding the development of a casino. In early-1993, Medure, through another company owned and controlled by him, developed a proposal to convert an exclusive country club in Santa Rosa, California into an Indian casino. Medure's company hired a prominent public relations firm to design and implement an extensive advertising and public relations campaign to influence public opinion in favor of the proposed casino. Medure and his representatives then launched a sustained public relations blitz in conjunction with a public announcement of the casino project.

Medure's casino proposal foundered in July, 1993 after it failed to gain the support of city and county supervisors. The Indian tribe with which Medure was working terminated its relationship with Medure's company. About that same time, Medure was one of several casino promoters profiled in a *U.S. News & World Report* article titled "Gambling with the mob?" The *U.S. News* article generally discussed the threat of infiltration by organized crime into the Indian gambling industry, and noted Medure's plans to develop Indian casinos in northern California.

During this period, *The Press Democrat* published dozens of articles reporting on each of Medure's activities in the Santa Rosa vicinity, the controversy surrounding his Minnesota casino, and the allegations in the *U.S. News* article. Medure's lawsuit alleged that two of those articles defamed him by stating false information concerning his involvement in the Minnesota casino and by falsely implying that he was involved with the mafia in Pennsylvania.

Prelude: Unfavorable Venue and Choice of Law Rulings

The first battle concerned the appropriate venue and choice of law. Defendants argued that Medure's claims should be resolved in California under California law

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because the disputed articles concerned his deliberate participation in a California controversy, all material events relating to the alleged defamation occurred in California, and plaintiffs were unable to identify any Pennsylvania resident who had read the articles. (The California retraction and anti-SLAPP statutes would have effectively blunted most of plaintiffs' claims.) The court disagreed, deferring to plaintiffs' choice of forum and holding that Pennsylvania has an interest in protecting the reputations of its citizens who do business in other jurisdictions.

Defendants also asserted that the entire case should be tried in California, where all of the events underlying the action occurred. Again, the court disagreed, relying upon plaintiffs' representations that Medure does not have and never had any significant business interests in California, his reputation was damaged in Pennsylvania rather than California, his principal business activities are located in Pennsylvania, and the harm that he suffered occurred only in Pennsylvania. In their pretrial statement, filed nearly four years after the initial skirmish over venue and choice of law, plaintiffs alleged $54 million in lost profits from lost Indian casino management opportunities and did not identify any damage suffered in Pennsylvania.

Interlude: A Narrow Public Figure Standard, Textual Criticism and Partial Summary Judgment

After limited discovery, defendants moved for summary judgment, arguing that Medure was a limited purpose public figure and could not prove actual malice. Defendants also argued that summary judgment should be granted because the disputed articles were protected by various common law privileges, including the official reports privilege, the neutral reportage doctrine and the wire service defense.

As is so often the case, the key issue at the summary judgment stage was Medure's status as a limited purpose public figure and the scope of his public figure status. Defendants argued that Medure was a public figure with regard to anything having to do with (1) Indian casino gambling; (2) his efforts to establish Indian casinos in California; (3) his prior track record as an Indian casino promoter and manager in Minnesota; and (4) and the alleged influence of organized crime in Indian gaming.

By contrast, plaintiffs asserted that Medure could be considered a limited purpose public figure only with respect to the particular controversy surrounding the proposed casino in Santa Rosa, California. According to plaintifffs, Medure's efforts to establish Indian casinos elsewhere in California, his experience with Indian casinos in Minnesota and his background generally, including alleged ties to organized crime, were all matters with respect to which he should be considered a private figure.

The United States Magistrate Judge who was handling the case in its pretrial stage initially recommended granting in part and denying in part the motion for summary judgment. Relying heavily upon the opinion of a Pennsylvania state trial court in a libel case that Medure was simultaneously prosecuting against *U.S. News & World Report*, the court agreed with plaintiffs that Medure was not a limited purpose public figure with regard to his experience as a casino promoter and manager in Minnesota, his business activities in Pennsylvania, his associations with mafia figures in Pennsylvania and the infiltration of organized crime into Indian gambling facilities.

Having determined that Medure retained his status as a private figure as to large chunks of the disputed articles, the court closely examined two dozen specific features of the disputed articles that, according to plaintiffs, created a genuine issue of material fact as to whether defendants acted with actual malice. Among other things, the court parsed individual phrases and subheadlines, considered the juxtaposition of sentences and found defamatory implications, concluding that many genuine factual disputes required that the case be tried before a jury.

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On September 16, 1998, the District Judge accepted the Magistrate Judge's Report as the opinion of the court.

Postlude: Bose and Sullivan To the Rescue

Finding the grant of partial summary judgment unsatisfactory, defendants moved for reconsideration, stressing the principles of *New York Times v. Sullivan* and the constitutional obligation imposed on the district court by *Bose v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984) to make an independent examination of the whole record in order to "be sure that the speech in question actually falls within the unprotected category and to confine the parameters of any unprotected category within acceptably narrow limits in an effort to ensure that protected expression will not be limited." *Id.* at 505.

District Judge Cohill granted defendants' motion for reconsideration, and, after oral argument withdrew the court's prior opinion, and granted summary judgment as to all claims in favor of defendants. In his August 20, 1999 opinion, Judge Cohill adopted the broader definition of the controversy giving rise to the alleged defamation urged by defendants, noting that Medure "thrust himself to the forefront of a broad public controversy over gaming casinos on Indian property," and holding that "this controversy encompassed more than just the isolated [Santa Rosa] project."

Accordingly, the court held as a matter of law that Medure was a limited purpose public figure "for the purposes of all statements made in the disputed articles, including the alleged involvement of organized crime in the Indian gaming industry, and including his past business activities in Minnesota and Pennsylvania." Having adopted the more expansive public figure standard, the court easily concluded that plaintiffs did not produce clear and convincing proof from which a jury could find that defendants acted with "actual malice." Because Judge Cohill's decision turned on the dispositive issue of Medure's status as a limited purpose public figure and his inability to adduce any evidence of actual malice, he did not reach the common law defenses asserted by defendants.

Ironically, the last major *Sullivan*-based opinion in a libel case arising out of the United States District Court for the Western District of Pennsylvania was also authored by Judge Cohill. *See Steaks Unlimited, Inc. v. Deaner*, 468 F. Supp. 779 (W.D. Pa. 1979)(granting summary judgment in favor of defendant station because public figure plaintiff failed to carry its burden of proof as to actual malice), *aff'd*, 23 F.2d 264 (3d Cir. 1980). Judge Cohill's more recent opinion in *Medure v. the New York Times Company, et al.* serves to update and forcefully reaffirm the principles of *Sullivan* in the decisional law of that district.

Plaintiff has now appealed to the Third Circuit.

Mark R. Hornak and David J. Porter of Buchanan Ingersoll Professional Corporation, and George Freeman, Assistant General Counsel for the New York Times Company, represented The New York Times Company and The Press Democrat in this matter.

Former Miami Mayor's Libel Suit Dismissed

Colorful Language Concerning Mental Status Protected Opinion

By Sanford Bohrer

Finding that references to the Mayor of Miami as "loony," "deranged," "crazy," and "paranoid," were "expressions of pure opinion in an opinion column in a newspaper, based on facts disclosed in the column or the newspaper or already generally known to the readers," Florida Circuit Court Judge Amy N. Dean dismissed a complaint filed by former Miami Mayor Xavier Suarez against The Miami Herald. *Suarez v. The Miami Herald Publishing Co.*, Case No. 99-22198 CA-06 (Dade County, Florida December 2, 1999).

Xavier Suarez is a two time Mayor of the City of Miami. During his second term, which began in November, 1997, he engaged in conduct which resulted in widespread publicity regarding his mental health and stability. Among those who made such comments was *Miami Herald* columnist Carl Hiassen, who wrote a column in December, 1997 which began by saying that while Suarez was in New York City meeting with Wall Street folks to convince them the City of Miami was in good shape financially, "he should drop by Bellevue for a checkup" because "the mayor is either certifiably nuts or seriously under-medicated."

Hiassen added that "Suarez's transformation from a reasonably bright, thoughtful guy to a babbling fruitcake has been both astonishing and sad to watch." The column included references to "delusional loner," "loonier" conduct, and a "crazy person," and concluded by stating the City's bond rating, already at the junk level, could drop to a newly created level: "Triple D, for deranged."

Almost two years later after his election was overturned because of voting irregularities, Suarez, appearing pro se, sued for libel over the column, but not another column in which Hiassen dubbed Suarez "Mayor Loco." (Hiassen, obviously not one intimidated by authority figures, later named his own publisher "Publisher Loco" when the publisher announced he might run for governor.) The lawsuit was also based on a straightforward newspaper report of some campaign financing irregularities and a statement attributed to Suarez in another columnist's column, which Suarez claimed he did not make.

The court found the newspaper article, which included responses by both Suarez and his campaign officials responsible for the matters at issue, to be comprised of privileged reports of official records or statements of public officials. It is clear the court was influenced by the fact that Suarez and his campaign officials were given the opportunity to comment and that the complaint did not state the official records or statements of the public officials were inaccurately or unfairly quoted. At oral argument, the court made more than one reference to this, indicating that good journalism, including fairness, is a strong legal defense with judges. The court quickly disposed of Suarez's claim that the *Herald* had defamed him by attributing a statement to him that he claimed he had not made. The court noted that the statement said nothing defamatory about Suarez and therefore, there was no basis for a defamation action.

Finally, recognizing the environment in which the Hiassen column appeared, the court, without reaching the Herald's "libel proof" defense, seemed to accept the fact that Hiassen was not alone in his views, and that his views were opinion, not fact, and dismissed the claim with prejudice. "Count 3 alleges it was false and defamatory for Carl Hiassen to refer to Plaintiff as 'loony,' 'deranged,' 'crazy,' and 'paranoid' in his December 12, 1997 column. The words complained of are expressions of pure opinion in an opinion column in a newspaper, based on facts disclosed in the column or the newspaper or already generally known to the readers."

While the case is still pending, because the dismissal of the first two counts was without prejudice, the order makes it appear likely they will be dismissed with prejudice.

Sanford Bohrer, a partner with Holland & Knight LLP in Miami, Florida, represented The Miami Herald.

European Court Finds For Romanian Journalist

A Romanian journalist who was found guilty of criminal libel for questioning the actions of public officials has been vindicated by the European Court of Human Rights. Case of *Dalban v. Romania* No. 28114/95 (E.C.H.R. Sept. 28, 1999).

The court ruled unanimously that the government's actions against Ionel Dalban violated Article 10 of the European Convention of Human Rights, which declares that "everyone has the right to freedom of expression," which includes the "freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."

Dalban, who died during the appellate process before the decision of the Supreme Court of Romania, had received a sentence of three months in jail (suspended), damages, and an indefinite ban from practicing as a journalist for publishing in his local weekly magazine in 1992, *Cronica Romascana,* an article about frauds "of almost incredible proportions" allegedly committed by the chief executive of a state-owned agricultural company, Fastrom. A 1993 article also at issue, which was based on police reports, raised questions about the behavior of a senator, who was also the State's representative on the board of Fastrom.

On appeal, the Romanian mid-level court had set aside he ban on practicing journalism, but uupheld the rest of the penalties. The Supreme Court acquitted Dalban for his article on the agriculture executive, finding he had acted in good faith. The court upheld the conviction as to the article on the Senator, but ordered prosecution discontinued due to Dalban's death.

The European Court of Human Rights states that under the provisions of Article 10, in order for a state to justify "interference by public authority" of an individual's freedom of expression, a multi-part analysis must be undertaken looking at "whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient."

The court held that the press's function as "a public watchdog" was essential to a democratic society. The press "must not overstep certain bounds" with respect to the reputation and rights of others and the need to prevent disclosure of confidential information, but journalists are allowed to engage in some exaggeration and even provocation.

"It would be unacceptable," the court said, "for a journalist to be debarred from expressing critical value judgments unless he or she could prove their truth." It held that there was no proof that Dalban's description of events was totally untrue or designed to ruin the reputation of the farm executive and the senator.

The court concluded that the interference here with Dalban's rights to freedom of speech was disproportionate interference with the exercise of his freedom of expression as a journalist.

Dalban's widow, who pursued the appeals after his death, sought damages in the amount of 250,000,000 Romanian lei. The court determined that to be excessive, but did award her FRF 20,000, to be converted into Romanian lei on the date of settlement to avoid problems associated with the high rate of inflation in Romania.

Interesting issues of standing are addressed by the court, both with respect to the right of the widow to continue to pursue the claims, and the question of whether the Supreme Court of Romania's actions in ordering discontinuance of the prosecution as a result of Dalban's death ended the claim for purposes of European court review.

LDRC would like to thank Fall intern — Jeff Storey, Cardozo Law School, Class of 2001 — for his contributions to this month's *LibelLetter*.

MASSACHUSETTS APPEALS COURT: "Newsworthiness" May Be Decided as Question of Law on Summary Judgment in Invasion of Privacy Claim

By Elizabeth A. Ritvo

In a decision favorable to First Amendment concerns, the Massachusetts Appeals Court has ruled that constitutional interests in free speech and press favor early disposition of invasion of privacy claims and that the issue of "newsworthiness" may be resolved as a question of law on summary judgment. *John M. Peckham, III v. Boston Herald, Inc., and another*, No. 97-P-1678 (Mass. App. Ct., November 26, 1999).

A Social Column

The suit arose following publication by the Boston Herald of a story by its regular social columnist, Norma Nathan, concerning John Peckham, a well-known real estate developer, and a paternity action brought against him by a former employee, Louise Gendron. The column referred to the paternity complaint and Peckham's answer. It quoted Gendron's attorney as stating, "[Peckham] showed her a great time until she got pregnant. Then he fired her and refuses to acknowledge the baby." The column added that Gendron said she would go on welfare if she did not receive financial support from Peckham.

Peckham insisted on genetic testing to determine whether he was the child's father. When tests confirmed Peckham's paternity, he openly acknowledged the child.

On the newspaper's motion for summary judgment, it was undisputed that Peckham had told his daughter and a business colleague of Gendron's announcement of her pregnancy and had told those two individuals and another friend of Gendron's filing the paternity action. The record was devoid of any evidence concerning how Nathan initially learned of the paternity action and whether she had a copy of the paternity complaint or answer, pleadings which by statute were not open to public inspection unless ordered by a court for good cause shown.

The Claim

Peckham initially sued Gendron and her attorney. Nathan died shortly after Peckham first filed his suit. She was never named as a defendant and never provided any testimony concerning her column. Peckham later added the Boston Herald as a party, suing in tort for public disclosure of private facts under Massachusetts General Laws c. 214, §1B. The statute provides that, "A person shall have a right against unreasonable, substantial or serious interference with his privacy."

The Lower Court: No Disclosure of Private Facts

The lower court entered summary judgment in favor of the Boston Herald on the ground that Peckham himself had made public the existence and details of Gendron's paternity action by his disclosures to his daughter, his business colleague and his friend. In these circumstances, the court concluded that Peckham had relinquished his right of privacy. Thus, the newspaper was not liable for any disclosure of private facts. *Peckham v. Franklin Levy, et al.*, C.A. No. 92-4304 (Suffolk Superior Court, June 27, 1997).

Appeals Court: Newsworthiness Bars Claim

Declining to address the basis of the lower court's decision and resolve whether the Peckham's own disclosures had made the fact of the paternity claim and paternity action public, the Appeals Court affirmed summary judgment on the more fundamental ground argued by the Boston Herald: that, under common law and the First Amendment, there can be no invasion of privacy for publication of

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"NEWSWORTHINESS" MAY BE DECIDED AS QUESTION OF LAW

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information that is a matter of legitimate public concern.

The Appeals Court recognized that Massachusetts has not comprehensively explored the boundaries of "legitimate public concern" and looked to the Restatement (Second) of Torts §652D comment (g) "News" and (h) "Private Facts" for guidance.

Noting the lack of agreement among courts in other states on the issue of whether newsworthiness (a term used interchangeably with "legitimate public concern") was a question of law or a question of fact, the Appeals Court rejected the view that legitimacy of public concern should always be deemed a question of fact.

It held that,

> One factor supporting early disposition as a matter of law is the importance of the constitutional interests in free speech and press that may be chilled if protracted litigation is allowed to be the norm rather than the exception — the same reason for which summary judgment is particularly favored in the defamation context ... This need may be strongest where the tort of disclosure is concerned, because it involves concededly truthful rather than false publication."

The court then determined that the newsworthiness of the publication could appropriately be decided as a question of law on summary judgment.

In deciding whether there was a jury question presented on the issue of "legitimate public concern," the court asked whether reasonable minds could differ as to how the community would regard the Boston Herald's publication. The court found that reasonable minds would agree on the publication's newsworthiness.

First, Peckham was a prominent business and civic leader and the circumstances of the paternity suit had a nexus to both of those roles in the community. Second, the article touched on topics of general modern pubic interest—a workplace liaison between an employer and her superior, the subsequent disavowal of paternity and layoff of the employee and the possibility a mother would be forced to seek public assistance because the putative father refused to give support. Third, the focus of the column was a judicial proceeding on a subject of inherent interest and public concern.

With *Peckham*, the Appeals Court has both further defined the contours of privacy and recognized the appropriateness of using summary judgment in invasion of privacy cases to protect First Amendment interests.

Elizabeth A. Ritvo, a senior member of Brown, Rudnick, Freed & Gesmer, Boston, MA was counsel to the Boston Herald in this matter.

Floyd Abrams is a New York Award

LDRC was not the only organization to honor Floyd Abrams this season. For those of you who get *New York Magazine*, note that in the December 20-27 issue he is a the man with the big shark looking over his shoulder. New York Magazine gave Floyd their Award in the Civics category honoring his representation of the Brooklyn Art Museum against Mayor Rudy Giuliani's threat to cut off city funding, remove the Board of Directors, and evict the Museum from its century-old home as a result of its refusal to take down a painting in the recent "Sensation" exhibit of the Virgin Mary that the Mayor felt offended Catholics. The shark only looks familiar to those who swim in the legal practice waters of New York. It is really part of that controversial exhibit that provoked the Mayor and his city government to yet again challenge basic First Amendment principles and to engage in their twenty-somethingish absolutely-lost-cause First Amendment suit.

TRESSPASS AND FRAUD DISMISSED AGAINST CBS
B-Roll Libel Claim Remains

By Cameron Stracher

On the same day the Fourth Circuit decided the *Food Lion* case, Judge Robert Carter in the Southern District of New York, granted CBS's motion, in part, to dismiss plaintiff La Luna Enterprise's claims of fraud, trespass, and defamation, arising out of a CBS Evening News broadcast concerning Russian organized crime, and containing interior footage of plaintiff's Miami restaurant and nightclub. *La Luna Enterprises v. CBS Corp.*, No. 98 Civ. 5852 (RLC), 1999 U.S. Dist. LEXIS 16080 (S.D.N.Y. Oct. 20, 1999) The Court, applying Florida law,[1] found that plaintiff's fraud claim failed because "it impermissibly threatens 'to punish the expression of [even] truthful information or opinion.'" (quoting *Cohen v. Cowles*).

"If allowed to proceed on this claim," the Court wrote, "plaintiff could succeed regardless of its defamation claim and the truth or falsity of the broadcast. Such a result threatens to circumvent the constitutional requirement that a media defendant may not be held liable to a private figure for reputational injury caused by publication of defamatory statements that are true and at least not negligently reported."

By the same reasoning, the Court also found that plaintiff was not entitled to damages for trespass based on an alleged injury to its reputation, but that plaintiff might be entitled to nominal damages. Finally, although it found it a "close call," the Court found that plaintiff had stated a claim for defamation.

Plaintiff alleged that CBS contacted La Luna in September 1997 to request permission to film its cabaret show for background footage for a broadcast about tourism in Miami. In contrast to the representations made by CBS, plaintiff alleged, CBS featured the footage of plaintiff's restaurant in a broadcast graphically depicting the violent threat posed by the new Russian mob in America; in particular, Miami.

Specifically, plaintiff objected to the segment of the broadcast in which CBS correspondent James Stewart states:

> [visual of La Luna] Inside you'd swear this was Russia. Everything from the food to the music says Moscow, but one look outside [visual of Miami Beach] and you know it's not. This is Miami Beach, and the Russians aren't just coming anymore, they're already here. [visual of La Luna]. But just who, wonders American law enforcement lately, are these people? Are they hard working immigrants or are they from Russia's violent underworld [visual of individuals covered with blood on a Russian street] . . . .

CBS argued that even if plaintiff's allegations were true, the broadcast failed to state a cause of action for defamation because the broadcast was not "of and concerning" La Luna, nor was it defamatory. La Luna was never identified in the broadcast, and the broadcast never imputed any criminal activity to the restaurant itself, even if the broadcast could be interpreted as implying that La Luna's employees and patrons were involved in the "new Russian mob."

The Court found that CBS's argument was "a reasonable one;" however, the Court held "that a reasonable jury could interpret the broadcast, when both viewed in its entirety and 'construed as the common mind would naturally understand it,' as leaving a viewer with the opposite impression that law enforcement officials are suspicious of both Russian immigrants and Russian businesses, including the Russian restaurant and nightclub featured in the broadcast" (citation omitted).

According to the Court, CBS's statements that law enforcement officials were questioning the activities of Russian immigrants while simultaneously running footage of La Luna could lead a reasonable juror to conclude that this "cloaked the restaurant as well as its employees in a veil of suspicion."

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La Luna Enterprises v. CBS

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The Court also held that while defamatory statements about a corporation's employees generally do not give rise to a cause of action for the corporation, the Court found that one paragraph of plaintiff's complaint sufficiently alleged that the broadcast separately defamed La Luna; to wit: "At the time of the broadcast, the defendants knew or should have known that such broadcast directly implied [sic] plaintiff and would lead a reasonable person to believe that the broadcast was referring to plaintiff, portraying plaintiff's employees, musicians, dancers and patrons as members of 'Russia's violent underworld.'"

CBS was represented by in-house counsel Susanna Lowy and Cameron Stracher. Mr. Stracher, now at Levine, Sullivan & Koch, continues to represent CBS, along with Michael Sullivan.

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[1] The court found that Florida law applied because plaintiff was domiciled in Florida, and that is where its injuries were alleged to have occurred.

Defendants File Answer to Ventura Complaint

The *Cincinnati Enquirer* and its parent, the Gannett Company, who are defending a "broken promise" lawsuit brought by a source for an investigative series on Chiquita Brands International, recently filed an answer to the source's complaint. The answer responds to claims for breach of contract, tortious breach of contract, promissory estoppel, promissory fraud, and negligence based on allegations that reporters employed by the *Enquirer* broke their promise to preserve the anonymity of Chiquita attorney George C. Ventura when he provided them with inside information.

Ventura filed his complaint against the media in late September, after pleading no contest to misdemeanor charges of attempted unauthorized access to computer systems. *See LDRC LibelLetter*, October 1999 at 39. Reporter Mike Gallagher, one of two reporters investigating the Chiquita story, pled guilty to felony charges for obtaining unauthorized access to Chiquita's voice mail system. The *Enquirer* paid Chiquita a $10 million settlement.

In the complaint, Ventura alleges that he responded to a request for information that Gallagher and fellow investigative reporter Cameron McWhirter posted on the Internet pursuant to investigating Chiquita. Ventura agreed to act as a source for the reporters but, he asserts, repeatedly insisted and was promised that his identity would remain a secret. He claims that the reporters recorded their conversations with him, retained the recordings, and even gave them to law enforcement officials, leading to his identification as a source of proprietary information. Ventura asserts that the disclosure resulted in the aforementioned state criminal prosecution, as well as possible federal charges and perhaps a civil lawsuit. According to the complaint, he was also forced to resign from his law firm.

In defense, the *Enquirer* and Gannett deny the allegations of the reporters' wrongdoing vis-a-vis Ventura, particularly the allegation that they are responsible for the disclosure of Ventura's identity. They further claim that Ventura's claims are barred by reason of his own illegal conduct (for which criminal charges were leveled against him) and by his disclosure of himself as a source. The answer also asserts that Gallagher's wrongdoing "if any" did not occur within the scope of his employment at the *Enquirer*. Clearly this responds to Ventura's claim of negligence based on a theory that the *Enquirer* negligently hired Gallagher, who, the complaint asserts, falsified stories in the past.

Apparently in anticipation of discovery, and perhaps with a touch of irony, the answer repeatedly invokes the Ohio Shield Law (Ohio Rev. Code Ann. § 2739.12), stating that the defendants "respectfully refuse to disclose confidential sources of information obtained by them in gathering, procuring, compiling, editing, disseminating or publishing news."

The Charlotte Observer to Petition the U.S. Supreme Court in Damaging N.C. Court Closure and Sealing Ruling

By John Hasty

On January 22, 1996, A. Ron Virmani, a Charlotte, North Carolina doctor, filed suit against Presbyterian Health Services Corp. alleging that the hospital had not afforded him due process in a peer review which resulted in his being barred from practice at the hospital. Dr. Virmani did not challenge the medical findings of the peer review (his patients' care) in the action. Thereafter, through a series of *ex parte* orders sought by the hospital, the trial court sealed the records of the proceeding, including those documents which had been filed in open court with the original complaint.

Reporter Objects to Closure

On May 2, 1996 the summary judgment motion filed by the hospital was on to be heard by the trial court, and the hospital moved that the proceedings be closed and the documents which the hospital was presenting to the court in support of their motion be sealed. A reporter for *The Charlotte Observer* was present and objected to the closure and sealing motion and asked for a short continuance until he could have his lawyer present to present the paper's objections. The trial court summarily denied the reporter's requests and objections, allowed the hospital's motions, ejected the reporter and locked the courtroom.

The next day, attorneys for the newspaper filed a motion to intervene for the limited purpose of objecting to the closure, which the trial court likewise summarily denied without allowing the newspaper to be heard. Oddly enough, Dr. Virmani, throughout this litigation, has never sought to seal or close any of the peer review documents or court proceedings and, in fact, joined in *The Observer's* position that they should be open to the public.

A Thoughtful Appellate Court

On November 18, 1997, having allowed *The Observer's* motions for extraordinary relief, the North Carolina Court of Appeals, in a scholarly, well reasoned and correct decision, held that Article I, Section 18 of the North Carolina Constitution creates a presumption that civil proceedings and their records are open to the public, reversing the lower court rulings sealing the records and closing the summary judgment hearing and not allowing the paper's motion. *See* 127 N.C. App. 629, 493 S.E. 2d 310 (1997)

N.C. Supreme Court Muddle

On June 25, 1999 the North Carolina Supreme Court, while holding that the North Carolina Constitution created a presumption of openness in civil proceedings, proceeded, in what one commentator in the 1999 PLI Communications Law outline has described as ". . . a procedural and substantive muddle," to declare:

(1) that the public and media have no right to appear before the trial courts and object to closure motions and must resort to the appellate courts for redress of their rights;

(2) that such appellate procedures, which in this case took three years, are a timely protection of the public's rights;

(3) that North Carolina statute §131E-95 mandates the closure, without hearing or findings of fact by the trial court, of any proceeding and its records in which peer review information is voluntarily introduced by a party;

(4) that a party wishing to voluntarily use peer review information in a civil court proceeding can do so by handing such peer review information to the trial judge for consideration on the merits of the case in secret, off the record and can even withhold this information from the other party; and

(5) that while the Supreme Court of the United States would in all likelihood hold that the First Amendment would likewise create such a presumption in civil cases, it was not bound by:

- the decisions of the various Federal circuits and other state appellate courts which have held that the public has a right to be heard,
- the decisions of the United States Supreme

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Charlotte Observer to Petition the U.S. Sup. Ct.

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Court that mandatory closure statutes are unconstitutional,

• or that it is improper for a trial court to consider off record evidence in reaching decisions on the merits of a case

See 350 N.C. 449, 515 S.E.2d 675 (1999).

The North Carolina Court, in their desire to allow the medical profession in North Carolina to litigate peer review matters in secret while basking in *res judicata* which can only be afforded by the public's courts, declared ". . . there simply must be a way for a court to review . . . documents . . . without making them public. . . ."

Irrespective of the question regarding off-record considerations by a trial court and mandatary closure statutes, the most abhorrent aspect of this decision is holding that the public cannot appear or be heard at the trial court level on the question of closure. Not a day goes by that litigants in civil actions don't ask a trial judge to close some aspect of a civil proceeding, and if this decision stands the media in North Carolina will be severely hampered in reporting on matters of public importance in the courts of this state.

The Paper Pushes On

The Charlotte Observer has consistently and aggressively asserted the public's First Amendment right to attend and report about court proceedings. See *In re The Knight Publishing Company d/b/a The Charlotte Observer,* 743 F.2d 231 (4th Cir. 1984) (holding that the public has a right to notice and hearing before trial courts may consider closure of courtrooms or sealing of documents in a criminal case); *In re The Charlotte Observer; The United States of America v. James O. Bakker and Richard W. Dortsch*, 882 F.2d 850 (4th. Cir. 1989) (holding that the public has a First Amendment right of access to change of venue hearings in criminal cases); *Davis v. Jennings*, 304 S.C. 502, 406 S.E. 2d 601 (1991) (holding that the public has a presumptive right of access to records in a civil case); *In re The Charlotte Observer,* 921 F.2d 47 (4th. Cir. 1990) (holding that a trial court may not prohibit publication of grand jury-related information referred to in open court); and *U.S. v. Byrd*, 20 Media L. Rep. 1804 (D.S.C. 1992) (holding that the public has a right of access to criminal sentencing hearings).

Much to the newspaper's credit, they have authorized the filing of a petition for writ of certiorari with the Supreme Court of the United States seeking review and reversal of the North Carolina Supreme Court's decision. The petition, which will be filed by December 16, 1999, will raise the following issues:

(1) Does the First Amendment of the United States Constitution create a presumptive right in the public to attend civil court proceedings and have access to civil court records?

(2) Is it implicit in the First Amendment right of the public to attend civil court proceedings and to access civil court records that the public has the procedural right to appear at such civil court proceedings for the limited purpose of being heard on its objections to the closure of such proceedings or the sealing of such records?

(3) Does North Carolina's mandatory closure of civil proceedings and records in cases involving hospital peer reviews violate the First Amendment to the United States Constitution?

The etition asks the Court to declare: (1) that the First Amendment right of access to judicial proceedings applies to civil cases; (2) that the substantive right of access to judicial proceedings should be reinforced by the procedural right to be heard in a timely manner on the issue of closure parallel to those that exist in criminal proceedings; (3) that North Carolina's mandatory closure of civil proceedings involving hospital peer reviews violates the First Amendment; and (4) that there is a First Amendment right of access to judicial records.

It is also envisioned that motions to be allowed to file *amicus* briefs in support of the petition will be filed by the Reporters Committee for Freedom of the Press as well as by a group of other interested media organizations.

John Hasty is with Waggoner, Hamrick, Hasty, Monteith and Kratt, PLLC, Charlotte, North Carolina and represented The Charlotte Observer in this matter.

CBS FIGHTS JASPER SUBPOENA

Subpoena Fights Highlight Need for Texas Shield Law

By Mike Raiff and Tom Leatherbury

In a high profile capital murder case, the Texas courts remained unwilling to recognize any reporter's privilege in criminal cases. After several evidentiary hearings, several contempt and commitment orders, several emergency appeals, several emergency stays, a release from jail on bond, and a final denial by the highest criminal court in Texas, CBS decided to publish on the Internet the transcript of Dan Rather's interview of the third defendant to be tried for the dragging death of James Byrd of Jasper.

The disputes between CBS and the Jasper prosecutors, which received a great amount of attention in Texas, have become a springboard for renewed efforts to obtain a shield law in Texas when the Texas Legislature reconvenes in January 2001.

A Fishing Expedition in CBS Tapes

In September 1999, Dan Rather conducted an on-camera interview of Shawn Berry, who was facing capital murder charges. CBS later aired portions of the interview on the CBS news program *60 Minutes II*.

Just prior to Berry's criminal trial, the prosecution team served a subpoena on a *60 Minutes II* producer who lives and works in Dallas, Texas. In the subpoena, the prosecutors requested the producer to turn over the outtakes of the Berry interview and any transcripts of the interview. The Jasper sheriff who served the subpoena admitted that the prosecutors were on a "fishing expedition" to find out what was on the outtakes. And later, the lead prosecutor also admitted that the unbroadcast portions of the interview would not be critical to his case.

CBS and its producer challenged the subpoena on several grounds, including the reporter's privilege. They faced an uphill battle because Texas has no shield law, and the courts have been unwilling to recognize any reporter's privilege in criminal cases. In addition to urging the courts to recognize the reporter's privilege, CBS and the producer further argued that the producer had no possession or control over the outtakes and that the prosecutors were required to go to New York, where the outtakes were located, to obtain them. The prosecutors were trying to circumvent the procedures for subpoenaing an out-of-state witness by serving a subpoena on a CBS producer located in Texas.

In an effort to follow the proper procedures for obtaining evidence from an out-of-state witness, the prosecutors instigated an action in New York to supplement their efforts in Texas. In New York, they requested a New York court to order Dan Rather to appear to testify in Jasper, Texas, and to produce the outtakes of the Berry interview.

A Run Through Texas Courts

In the first round of legal battles in Texas, the Texas trial court ordered the producer to turn over the transcript and the outtakes, and later held her in contempt for not doing so. The lower court's orders, however, were stayed pending a resolution in the Beaumont Court of Appeals.

After hearing oral argument, the Beaumont Court of Appeals refused to grant the producer any relief and eventually lifted its stay of the lower court's contempt orders.

An emergency appeal and petition for writ of habeas corpus were then filed in the Texas Court of Criminal Appeals, the highest criminal court in Texas. While the parties briefed the issues, the Texas Court of Criminal Appeals effectively stayed the matter by allowing the producer to remain free on a $2,000.00 bond. But a few days later and without hearing any oral argument, the Texas Court of Criminal Appeals rejected the producer's request for relief and vacated the order setting bond.

After fighting in every Texas court possible and exhausting all legal options in the Texas courts, CBS decided to post the entire interview transcript on CBS's web page. In light of CBS's decision, the

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CBS FIGHTS JASPER SUBPOENA

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prosecutors agreed to drop all proceedings against the producer, to cooperate in vacating all contempt and commitment orders against the producer, and to end all efforts to obtain the outtakes through the producer. Additionally, the prosecutors decided not to proceed in New York to obtain the outtakes and testimony of Dan Rather.

As it turns out, while the prosecutors used at trial parts of the aired portions of the Berry interview, the prosecutors did not rely on any of the unaired parts of the Berry interview. Berry was convicted and given a life sentence.

CBS's Susanna Lowy and Anthony Bongiorno, along with Tom Leatherbury and Mike Raiff of Vinson & Elkins, represented CBS and Mary Mapes. Additionally, Charles Babcock and Leon Carter of Jackson Walker represented Mary Mapes, individually. Floyd Abrams of Cahill Gordon & Reindel represented Dan Rather in the New York proceedings.

CORRECTION

Last month, the *LibelLetter* reported on the gag agreement entered into by Aaron McKinney, one of the men who murdered gay University of Wyoming college student Matthew Shepard and prosecutors in the case. We quoted from *Editor & Publisher* to the effect that the agreement bound "almost anyone ...connected with the murder case from ever discussing it." A more accurate statement would be that the agreement binds McKinney and every member of the defense team from discussing the case with the media. McKinney also agreed not to present any evidence reflecting on the character of his victim, Matthew Shepard, during the sentencing phase of the proceedings. Mr. McKinney also accepted consecutive life sentences, but obtained in return dismissal of the government's intent to seek the death penalty for the crimes.

Also in last month's LibelLetter, we attributed the article on page 4, concerning the statute of limitations for newspaper articles first issued on Internet sites, to Blaine Kinrey of Lathrop & Gage. It should have been Blaine Kimrey.

Prior Restraint on Publishing Juvenile's Name Rebuffed in New Hampshire

A New Hampshire court recently rejected a TRO request from defense counsel representing a juvenile seeking to bar the local news organizations from further publishing the name of his client. *Doe v. Keene Publishing Corporation*, 99-E-0144 (Super.Ct. N.H. 1/30/99) The juvenile, charged in an assault that had drawn particular public attention, was photographed by the Keene Publishing Corporation at the time of his arrest. The picture ran without the boy's name, which was at that point unknown to the newspaper. The following day the paper was able to determine the boy's identity and his name was run in a subsequent article.

Defense counsel argued that a New Hampshire law which, with certain limited exceptions not relevant here, purports to make it unlawful for any newspaper, radio or television station to make public any identifying information regarding a juvenile arrestee, allowed the court to enjoin the media from further publication of his client's name. Keene Publishing Corporation responded that the statute as it was being applied in this matter was unconstitutional. Moreover, the paper contended, even if the statute was constitutional, the prior restraint being sought would be impermissible.

While not ruling on issues related to possible claims, remedies or defenses under the statute, the court found that a prior restraint was unwarranted. Citing New Hampshire cases that correctly found that prior restraints were "inherently suspect" and bore a "heavy presumption against its constitutional validity," the court denied the request.

Keene Publishing Corporation was represented by William L.Chapman of Orr & Reno in New Hampshire.

Vermont Judge Corrects Erroneous Restraining Order Barring Publication of Juvenile Photos

Clerk's Mistake Exceeded Court's Power to Censor

In late November, a state court judge in Vermont vacated an order preventing local media and the Associated Press from publishing the photographs of three juveniles who were arraigned on criminal charges of disorderly conduct. *State of Vermont v. West*, No. 1447/1448/1449-11-99 (Franklin Dist. Ct. Nov. 24, 1999). District Court Superior Judge Howard VanBenthuysen, noting that a clerk had mistakenly issued the order while the Judge was away on holiday, vacated the order in its entirety and set the issue for hearing "in due course," finding that prohibiting all photography of the suspects would exceed the court's powers. This ruling came at the motion of several news organizations, including *The Burlington Free Press* (a Gannett publication), Vermont Publishing Corp. (publisher of the *St. Albans Messenger)*, and AP.

Jordan West, Melissa Garrow, and Michael Cook, who are all minors, were arrested for allegedly plotting to kill administrators and students at their high school. Before their arraignment, West and Garrow filed motions to bar the media from photographing them, arguing that as they were seeking transfers to Juvenile Court, the press should be restricted.

Although Judge VanBenthuysen had left for a holiday on the evening of November 19, an order bearing his name was issued on November 22, which said: "It is ordered that the juveniles' faces will not be shown by print or electronic media." A different judge presided at the November 22 arraignment, at which, according to the media organizations' brief in support of their motion to vacate the order, reporters were present and a pool photographer took photographs without restriction.

The next day, the media organizations moved that the restraining order be vacated as a prior restraint of speech in violation of the First Amendment. They further argued that neither the criminal defendants nor the court had followed the procedures required by Rule 53 of the Vermont Rules of Criminal Procedure in disposing of the applications to restrict photographic coverage.

In a November 24 opinion vacating the order, Judge VanBenthuysen — the original judge whose name appeared on the prior restraint — said he did not learn of that order until November 23, and that he had never issued it. The new order stated that after the judge had left for his holiday, a clerk misconstrued a note left on a case file and issued the order.

In lifting the prior restraint, the judge held that the generality of the restrictions exceeded the court's discretion under Rule 53. While the order appeared to prohibit publication of any photographs of the defendants, the judge noted, "the authority of the Court to issue such an order is generally considered to be limited to the Courthouse and its environs."

The judge said that restriction of photography "may seem, at first blush, to be appropriate," particularly if the criminal cases are transferred to Juvenile Court, as West and Garrow have requested. However, the court could not issue such an order without a hearing: "Because of the obvious 1st Amendment issues such Motions raise, a hearing is clearly required."

The court vacated the order in its entirety and called for a hearing on the defendants' motions to prohibit photography. That hearing will proceed simultaneously with West's and Garrow's motions to transfer their cases, the judge finding no emergency justification for an immediate hearing.

1999 Defense Counsel Section Annual Breakfast Meeting Minutes

DCS President Tom Leatherbury (Vinson & Elkins) called the meeting to order, thanking members for attending. He thanked Sandra Baron and the LDRC staff for their work in the past year.

New DCS Officers and Election of Treasurer

Tom Leatherbury noted that each officer serves in a particular post for one year and then ascends to a higher rank. The President rotates off of the Executive Committee to the post of President Emeritus and the DCS elects a new Treasurer. The Executive Committee has tried to maintain geographic diversity among its officers.

This year, Thomas Kelley (Faegre & Benson) becomes the new DCS President, Susan Grogan Faller (Frost & Jacobs), Vice President, and David Schulz (Rogers & Wells), Secretary. Tom Leatherbury, the new President Emeritus, turned the proceedings over to his successor.

Thomas Kelley thanked Tom Leatherbury for his service as President and announced the uncontested election of Luther Munford (Phelps Dunbar) to the post of DCS Treasurer.

Executive Director's Report

Thomas Kelley called on Sandy Baron to deliver the Executive Director's report. Sandy thanked LDRC's staff and the DCS membership for their many contributions. She also thanked Tom Leatherbury for his service on the Executive Committee, and Laura Handman for her continuing involvement as President Emeritus.

She noted the success of the 1999 NAA/NAB/LDRC Libel Conference, which took place in Arlington, Virginia in September and the tremendous contributions of DCS and Media members to the success as well as to the success of the LDRC *LibelLetter*, BULLETIN and **50-STATE SURVEYS**. Sandy urged members to continue to submit briefs for the LDRC brief bank, names of retired media personnel for the expert witness database, and news on media cases in their respective geographic areas. She reported that in 1999, as in past years, LDRC fielded a substantial number of requests for briefs and expert witnesses.

Sandy noted that LDRC is a cooperative organization. As a consequence, any progress or successes it achieves are really those of its membership, without whom nothing would be accomplished.

Reports from Committee Chairs

New Legal Developments

In the absence of Jack Weiss, chair, Tom Leatherbury reported that new vice-chairs have been nominated and that the committee will be taking an active role in advising LDRC staff on issues and cases of note that should be addressed and on proposed content for the fourth quarter LDRC BULLETIN which annually addresses "new developments."

Advertising and Commercial Speech

Sandy Baron reported that the committee is going to be looking for new projects for the upcoming year. Cam DeVore, current chair, organized a decade-long review of commercial speech decisions for the upcoming LDRC BULLETIN on New Legal Developments.

Agricultural Disparagement

Chair Bruce Johnson (Davis Wright Tremaine) reported that the Committee is monitoring the status of "veggie libel" statutes. The committe was helpful in the effort to defeat adoption of such a law in Arkansas. A bill was introduced in Texas to repeal the state "veggie libel" statute, but was defeated despite the lobbying efforts of media organizations and defense counsel.

Conference and Education

Co-chair Peter Canfield (Dow Lohnes &

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1999 DCS Annual Breakfast Meeting Minutes

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Albertson) reported on the 1999 NAA/NAB/LDRC Libel Conference held in September. He noted that the conference enjoyed record attendance and was a decided success.

Cyberspace

Chair Steve Lieberman (Rothwell, Figg, Ernst & Kurz) reported on the collection of articles on cyberspace law, which Committee members authored and assembled, and which LDRC published earlier this year. These articles were also distributed to attendees of the Conference.

Tom Leatherbury noted that Steve will be stepping down at the end of this year as chair of the Cyberspace Committee, a position that he has held for several years and with a result of notable productivity by the committee. The DCS joined with Tom in thanking Steve for his extraordinary efforts. The new chair will be Kurt Wimmer (Covington & Burling), currently the vice-chair of the Committee.

Employment Law

Vice Chair Sanford Bohrer (Holland & Knight) reported that production of the 2000 SURVEY is currently under way. He urged members to let their clients know of the existence of the text – and particularly clients who are not part of the media and might not otherwise be aware of LDRC publications. He stated that the text is such a valuable compendium for those who have to contend with employment matters, and particularly those with employees in more than one jurisdiction, that the book is an "easy sell."

Expert Witness

Chair James Stewart (Butzel Long) reported on the Committee's efforts to expand LDRC's expert witness data bank listings of retired journalists, editors, publishers and others experienced in the media. These individuals are particularly valuable as expert witnesses because they appreciate and can apply their background experience to the matter in litigation. He urged members to send LDRC the names of media professionals that have recently retired.

International Media Law

Co-Chair Kevin Goering (Coudert Brothers) reported on the success of the well-attended international panel which took place on the first day of the 1999 NAA/NAB/LDRC Libel Conference in September. He reported on the progress of the London 2000 conference, noting that a venue has been chosen and that much interest is apparent among the membership. He urged those members hoping to attend the conference to reserve their places early.

Jury Instructions

Vice Chair David Klaber (Kirkpatrick & Lockhart) reported that the Committee is close to completing an update of the 1995 Jury Instruction Manual.

Legislative Affairs

James Grossberg (Levine Sullivan & Koch), who will be assuming the remaining term as chair from Lee Levine, reported on the LDRC BULLETIN on the Texas interlocutory appeals statute, which Committee Chair Lee Levine (Levine Sullivan & Koch) and Tom Leatherbury helped organize, and which LDRC distributed earlier this year. That LDRC BULLETIN has already been put to use by lawyers in Pennsylvania looking into the possibility of such a provision in that state. Other LDRC members were urged to consider whether such a provision might not be adopted in some manner in their jurisdictions, noting again the success that Texas First Amendment litigators have obtained as a result of this provision.

The Committee's subcommittee on the Uniform Correction and Clarification Act has also been active in encouraging and providing support materials for those who are seeking enactment of the provision in their jurisdictions.

LibelLetter

Chair Adam Liptak (The New York Times)

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1999 DCS Annual Breakfast Meeting Minutes

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remarked on the continuing success and growth of the *LDRC LibelLetter* in spotting trends in media law and reporting on important cases. He thanked the membership for its contributions to the newsletter and urged members to keep LDRC abreast of cases and trends in their respective geographic areas.

Pre-Publication/Pre-Broadcast

Vice Chair David Korzenik (Miller & Korzenik) reported on the Committee's new initiative to create a CD ROM of materials to be used as examples in newsroom legal seminars, with an accompanying catalogue. He urged members to contribute examples of print or broadcast material that has engendered litigation or the threat of litigation. The completed project should not be cost-prohibitive and would be of use to many media counsel who engage in journalist education.

Pre-Trial

Co-Chair Charity Kenyon (Riegels, Campos & Kenyon) reported on the progress of the Committee's summary judgment checklist. The Committee is currently putting the material they have gathered into a checklist format, which will hopefully be ready for distribution in the near future.

Trial Techniques

Chair David Bodney (Steptoe & Johnson) reported on the Committee's project, in conjunction with the Jury Instructions Committee, to conduct systematic post-trial juror interviews is still in its preliminary stages. The two committees will be meeting, and with the help of Tom Kelley, hope to work through the logistics of such a valuable, but challenging project.

Membership

Chair Richard Goehler (Frost & Jacobs) reported on the Committee's efforts to identify and contact potential new members. Of particularly interest might be those firms who are representing new media, such as Internet publishing entities. He urged DCS to let him know of any law firms that would make worthy new members of the organization. He also urged DCS members to alert their new media clients to the benefits of LDRC membership.

LDRC Institute

LDRC staff attorney David Heller reported on the Institute's project to create Fred Friendly-style seminars for high school students to teach and promote First Amendment values. The Freedom Forum has indicated an interest in contributing to this project. A number of members present at the breakfast suggested that judicial education seminars or some manner of bench/media interactive programs or sessions might also be useful in increasing judicial consideration of First Amendment issues. It was suggested that LDRC look into what is currently being done on that front and the possibility of our contributing to that effort.

Tom Leatherbury again thanked the members for coming to the Breakfast and Annual Meeting, and for their contributions to LDRC on all fronts, and, with Sandy Baron, told the membership that they looked forward to working with them in 2000 and for many years thereafter.

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LDRC BULLETIN Publishes Decade-End Review of Most Significant Issues
The Media at the Millenium

LDRC's annual year-end review of significant developments typically lends itself to identifying trends in the development and application of the law. As we approach the end of the decade of the 1990's, we thought it was important to review the media First Amendment issues that significantly shaped this decade and that were in turn, shaped during the decade. This month, LDRC published **Part II** of the **LDRC BULLETIN 1999:4.** It contains 14 articles that analyze areas of law that underwent important development over the course of the decade or otherwise changed in subtle, but nevertheless, significant ways. Of course, the end of 1999 also marks the beginning of a new decade and millennium, and many of the articles venture a look forward to see how the trends and developments of the 1990's will play out over the decade to come.

Contributing to this analysis is the fortuitous fact that in 1999 several major cases were addressed by the Supreme Court, the federal Courts of Appeal and state courts. Perhaps most notable in this regard was the Supreme Court's decision in *Wilson v. Layne*, 119 S. Ct. 1692 (1999) and the Fourth Circuit's decision in *Food Lion v. ABC*, (4th Cir. Oct. 20, 1999). In a general, but perhaps oversimplified way, *Wilson* and *Food Lion* tell the story of the decade from a media lawyer's perspective, illustrating, among other things, the rise over the last ten years of claims against the media for its methods of investigating and gathering the news, coupled with the palpable increase in public and judicial animus toward the media.

The 1990's, as we know, demanded that media lawyers not only master the elements of a panoply of common law torts not previously significant in media cases, but also analyze again how the First Amendment interacts, or, more importantly, should interact with common law claims. Issues of liability and damages demanded thoughtful and rigorous analysis of basic principles.

Old Torts in News Suits

Food Lion was one of the most closely watched cases of the decade, raising the specter of enormous liability for newsgathering for violating a range of common law torts, such as trespass and misrepresentation, that traditionally had little or no application to the media. Three articles in the LDRC BULLETIN deal with themes and results of the case — which in the end saw a $5.5 million dollar jury award reduced to two dollars.

Common Law Claims

Lee Levine explores common law claims and defenses, claims which arose, at least in part, from a decision from the beginning of the 1990's, *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). *Cohen* contributed the now well-known plaintiffs' mantra that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at 669. He notes that as the decade marched on, in case after case and with barely a dissenting voice, courts invoked *Cohen* to preclude media defendants from invoking the First Amendment to protect them against claims that they had run afoul of "generally applicable laws" — from trespass to intrusion to fraudulent misrepresentation — in gathering the news.

Constitutional Analysis

After a decade bookended by *Cohen* and *Food Lion*, the development of a framework by which to judge liability and measure damages for newsgathering torts will be a major task confronting media lawyers in the years ahead. In this connection, David Schulz examines the constitutional policies and judicial precedents which show that newsgathering is a constitutionally protected activity, *Cohen* not to the contrary, and outlines a set of legal principles that should guide the development of clear standards for the protection of newsgathering activity.

Damages

Floyd Abrams analyzes the issue of compensatory damages as it arose in *Food Lion* and reflects on the

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Fourth Circuit's decision, which while rejecting the applicability of First Amendment principles in analyzing liability, held that the First Amendment barred plaintiff from obtaining publication damages in the guise of claims for newsgathering. While not 100 percent favorable to the media, the decision does send a clear message that generic torts such as fraud and trespass cannot be bent out of shape to bypass the protections of *New York Times v. Sullivan*.

Ride-Alongs One method of newsgathering, the so-called "ride-along," got mixed judicial treatment during the decade before going up to the Supreme Court in 1999 in *Wilson v. Layne*. One of the strongest expressions of animus toward the media occurred in the middle of the decade in a ride-along case when one court described the media's presence during the execution of a warrant as "the equivalent of a rogue policeman using his official position to break into a home in order to steal objects for his own profit or that or another." *Ayeni v. CBS*, 848 F. Supp. 362, 368 (E.D.N.Y. 1994). When the Supreme Court decided *Wilson* in 1999 its language was much more temperate, but the decision nevertheless put an effective end to media ride-alongs during the execution of search warrants in private homes. The legal history of media ride-alongs and the questions that remain open in the wake of *Wilson* are examined by Victor Kovner.

Reporter's Privilege The law of reporter's privilege is reviewed in two articles, analyzing the issue on the federal and state levels, respectively. On the federal level, at the beginning of the decade the existence of a federal reporter's privilege was a virtual certainty. As explored by Laura Handman, this certainty turned toward reexamination, as illustrated in the Second Circuit's decision in *Gonzales v. National Broadcasting Co.*, No. 97-9454 (2d Cir. August 27, 1999). Having determined last year that there was no privilege for reporters' nonconfidential materials, the court on reconsideration held that a qualified privilege does exist for nonconfidential material, but it then articulated a less demanding standard for the requesting party to obtain such material. Whether others courts will apply this diluted version of the privilege and whether this may spur a federal privilege statute are some of the questions discussed in her article.

On the state level, the roll call of states with shield statutes rose over the decade, but according to Jeremy Feigelson, these numbers hardly give comfort. Despite the statutory protections available at the state level, he describes a state of unease among the First Amendment bar in recent years that in close cases there is little confidence that judges will give First Amendment interests any deference.

SLAPP Running contrary to these wary assessments is the report by Mark Goldowitz on the history and impact of California's anti-SLAPP statute. The statute, enacted in 1992 to combat meritless retaliatory lawsuits, is now one of the most powerful weapons in the hands of defamation defendants in California. The article reviews the legislative and legal history of the statute and suggests that lessons can be drawn to try and duplicate this success in other states or at the federal level. In a companion article, David Heller reviews anti-SLAPP statutes in other states, statutes which to date have not approached the broad scope of California's law.

Incitement The developments surrounding newsgathering take on an even more extreme edge with a trend in the latter part of the 1990's suggesting that courts, in an unpredictable and ad hoc way, will demand greater accountability on the part of media and other speakers whose speech is alleged to have inspired violent acts. Tom Kelley and Steve Zansberg report on a disturbing trend by courts to expand the previously defined category of "incitement" or, alternatively, to circumvent the application of that test altogether, to permit plaintiffs' claims to proceed against media defendants, as in *Rice v. Paladin*, 128 F.3d 233 (4th Cir. 1997).

Libel On the libel front, the decade started with the prediction that *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), would lead to the demise of the opinion defense. That has not happened. As examined by Rod Smolla, on balance, *Milkovich* has not had a dramatic impact on the level of legal protection provided to the expression of opinion under defamation law. While there

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have been hundreds of decisions interpreting *Milkovich*, with some very distinct variations among jurisdictions, Rod Smolla argues that *Milkovich* has had a modest impact in the formal articulation of legal doctrine, but little if any discernable impact in the actual outcome of cases. *See* pages 129-137.

The more subtle doctrinal developments in the concepts of incremental harm and libel by implication are examined by Slade Metcalf and Gayle Sproul, respectively. Although criticized and ridiculed, the incremental harm doctrine has not yet been consigned to the dust bin of invalid legal theories. Just last year, a federal judge in New York recognized the existence of this much maligned doctrine in *Jewell v. N.Y.P. Holdings, Inc.*, 23 F. Supp. 2d 348 (S.D.N.Y. 1998). Gayle Sproul identifies a trend in libel law that a libelous implication be intended by a defendant and suggests that the intent be measured subjectively and without regard to the plaintiff's status. *See* pages 147-152.

Commercial Speech According to Cam DeVore and Eric Stahl, commercial speech jurisprudence walked an uneven path over the decade — though in the 1990s the path, from the First Amendment practitioners' perspective, appears to be heading in the right direction. The decade's advances unquestionably were significant and they occurred, surprisingly, under the same constitutional test — *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) — that, after its first ten years of life, seemed incapable of protecting speech in any predictable fashion. A question for the near term is how lower courts will give effect to the substantially strengthened *Central Hudson* test. A question for the decade ahead is whether the Supreme Court will keep *Central Hudson* as the framework of choice, or will "a more straightforward and stringent test" eventually win the day? .

Cyberspace Finally, no review of the decade would be complete without a reflection on developments in cyberspace. Bruce Keller and Peter Johnson opine that many common law theories have proven adaptable to the Internet making it unnecessary, if not misguided, to seek out a new "law of the web."

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