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MEDIA LAW LETTER

Reporting Developments Through December 27, 2004

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Thank you to Hal Fuson Chair, MLRC Board of Directors 2004

Anyone who knows Hal Fuson will understand why he was such an exceptional Chair of the MLRC Board of Directors. Hal is one of the most understated men in this business. He is unflappable. He is mild mannered. And yet from afar – California, that is and most often by telephone – he exudes such a presence and control over the robust activities and debate within MLRC that he is a giant in our midst. Disembodied, perhaps, but giant nonetheless. And an incredibly funny one at that.

We all know that Hal is incredibly knowledgeable about the law in the field. We admire his deep sense of the history of First Amendment press issues and the need for commitment to them. We pass out his small book for journalists on the media law because it is so literate and thoughtful and valuable.

But his extraordinary talent as a Chair comes as much as anything from his solid, smart balance. He is just one of the most grounded humans we all know. He just puts things in the right place, and points us in the right direction, even when the arrows are pointing up and down simultaneously. And did I mention how funny he is...

Hal's tenure has been one of significant accomplishment for the MLRC. For one, he has presided over our most seri-

ous efforts to reach our West Coast members with a California Listserv and an annual conference with Southwestern Law School in Los Angeles. With Hal at our helm, and with Hal continuing on the Board, we will continue to create programs and services for the West Coast MLRC constituency.

During his tenure, MLRC conceived, contracted and struggled – oh goodness, did we all struggle – to bring a website to our membership. That Hal survived all of the angst generated by this difficult delivery would be testament enough to his stamina, common sense, and good humor. This was a project that could have driven any Chair mad. But not Hal.

He presided over MLRC's reconfiguration of dues levels, and our raising sufficient revenue to hire the additional lawyer that we sorely needed. We have grown in countless ways, and Hal has been a key reason for that growth.

This would be the point at which one might say: we will miss him...but we won't. While he is stepping down as Chair, he remains on the Board. And that, my friends and colleagues, is a very good thing. Thank you, Hal... from all of us.

And Thank You Bruce Johnson

Bruce Johnson will be stepping down at the end of the year as President of the DCS Executive Committee. He will assume the role of President Emeritus on the DCS Executive Committee through 2005.

Along with Hal Fuson, Bruce has presided over MLRC's expansion of West Coast oriented services and programs. And we hope he will continue to preside over them, along with Hal, well into the future...even while he is already taking on new assignments for this organization.

I already told you about Hal – but Bruce Johnson is another one of those balanced people, who combines really exceptional intellect with a big dollop of decency and common sense. And did I mention...a glorious sense of humor.

Bruce, like Hal, got the pleasure of presiding over the tumult of the website development, and the readjustment of our dues levels. But he was President as well over one of the most productive years in the DCS managed committees

to date. We organized more events, more task forces, more programs...more of almost everything, under Bruce's leadership. He nudged and cajoled and persuaded more people to get more done.

Bruce has that low key, but utterly disarming way of leading you to your best work. And in the end, you just love the fact that you are working with Bruce, that he is your colleague and he is your friend. He is an extraordinary asset to this organization and I can only hope that he will remain a leader of MLRC forever.

As many of you know, I have known Bruce longer than anyone else in the membership. I have resisted long the impulse to publish the picture of us on a scaffold with the rest of the high school theater crew. But just as Bruce was talented, and dedicated, and productive back then...he is today. And just as he was more fun than almost anyone else around, he is today. Thank you Bruce...

SAVE THE DATES!

**Los Angeles
January 27, 2005**

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Reporter Sentenced to Six Month's House Arrest for Criminal Contempt

On December 9, reporter James Taricani of station WJAR-TV in Providence, Rhode Island was sentenced to six months home confinement for criminal contempt for refusing to disclose the identity of a confidential source who leaked to the reporter a surveillance videotape from the criminal corruption trials of several Providence officials. *In re Special Proceedings*, M.C. 01-47 (D. RI 2004). See also *MediaLawLetter* October 2003 at 19, March 2004 at 30 and June 2004 at 6.

Rhode Island Federal District Court Chief Judge Ernest Torres sentenced Taricani to home confinement rather than jail because of health concerns. The reporter is a heart transplant recipient and has severe hypertension. The sentence, though, applies some federal prison conditions. Taricani is not allowed to work from home or have Internet access and visitors are restricted. He will be eligible to petition for early termination of the sentence after four months. Taricani announced he will not appeal the sentence.

Interestingly, about ten days prior to sentencing the source came forward and identified himself though it was too late to purge the criminal contempt conviction and played little role in the sentence. James Bevilacqua Jr., a defense lawyer for one of the Providence officials involved in the corruption scandal, confirmed that he leaked the videotape. Bevilacqua now faces possible perjury charges.

A transcript of the sentencing hearing is available online at the district court's website www.rid.uscourts.gov/.

Judge Addresses Media "Myths"

A large portion of the sentencing hearing is a discussion by Judge Torres of the perception of the case – which he found was marked by five media "myths." Portions are excerpted below, but it is an interesting discussion well worth reading in full. It outlines the case against the reporters privilege in the context of criminal leak investigations and raises issues that will undoubtedly be raised on the road toward a federal shield law.

Myth One, according to Judge Torres, was that the promise of confidentiality enabled Taricani to uncover evidence of corruption. This was false because the tape was already evidence in ongoing prosecutions.

All that it accomplished ... was to provide Mr. Taricani and his station with a scoop during sweeps week, and there's nothing wrong with that But at the same time, it did so at the cost of threatening to compromise the ongoing grand jury investigation and threatening to deprive the defendants of their constitutional right to a fair trial by poisoning the jury pool.

Myth Two was that requiring disclosure in this case would deter sources from coming forward with important information. Instead, according to Judge Torres, the real issue in the case was "whether a reporter has a right to conceal the identity of a source who committed a criminal act in providing material to the reporter." If someone violates the law by revealing to a reporter the identity of an undercover intelligence or law enforcement officer "that person ought to be punished and others tempted to do the same ought to be deterred and a reporter has no right to conceal the identity of that person."

Myth Three was that Taricani was being punished for "just doing his job."

There is no question that a reporter's job is a very important and honorable job, but this is still a myth unless one defines a reporter's job by gathering news obtained by others by illegal means and even encouraging and assisting others in doing so, and then concealing the identity of the individual who violated the law in order to provide the information.

Taricani, Judge Torres pointed out, was not found guilty of criminal contempt for airing the tape, but for refusing to comply with a lawful court order that was affirmed by the First Circuit.

Myth Four and Five are the "most troubling" and both involve the media's position on reporter's privilege and the First Amendment.

Myth Four, according to Judge Torres, is that "every reporter has an absolute right to be the sole arbiter of whether and under what circumstances the identity of a source should remain confidential no matter what the law or the court may say." The media's insistence on absolute protection for sources is "contrary to the public interest."

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Reporter Sentenced to Six Month's House Arrest for Criminal Contempt

(Continued from page 7)

It defies logic and common sense, as well as the law, to say that a promise of confidentiality made under [competitive pressure] should be absolute and unreviewable by a court or anyone else.... The court is in the position to hear all the facts. The court is in a position to determine the applicable law and to balance any competing public interest

The Fifth Myth – the biggest and most misleading one – is that ordering Taricani to reveal his source is “an assault on the First Amendment.”

The assaults we have here are assaults on the rule of law, assault on the effective administration of justice, and assault on the constitutional right to a fair trial.

Moreover, Judge Torres criticized the “implication that it was okay, even laudable for Taricani to refuse to comply with the order because he has what he thinks is a good reason.”

D.C. Circuit Hears Miller and Cooper Contempt Appeal

On December 8, Judges David Sentelle, Karen Henderson and David Tatel of the D.C. Circuit Court of Appeals heard the combined appeals of reporters Judith Miller and Matthew Cooper. *In re Grand Jury Subpoenas*, Nos. 04-3138, 04-3139

Miller and Cooper were held in civil contempt in October by District Court Chief Judge Thomas F. Hogan for refusing to answer questions from the special prosecutor investigating whether any government official(s) violated the Intelligence Identities Protection Act of 1982 by leaking to the press the identity of undercover CIA agent Valerie Plame.

Floyd Abrams, representing the reporters, argued that Judge Hogan erred in concluding that no First Amendment or common law-based reporter's privilege existed at all in the grand jury context. The reporters' brief argued that Justice Powell's concurring opinion in *Branzburg v. Hayes* and the case law evolving from it, including in the D.C. Circuit, demonstrate the existence of a privilege that would require some examination and balancing of the need for the reporters' testimony.

Judges Sentelle pressed Abrams to distinguish the case from the *Branzburg*, at one point remarking “if there is an answer to my question, I'd love to hear it. The question is as simple as it can be. I take it you don't have one since you haven't advanced it yet given three, four or five opportunities.” Abrams was also asked whether the reporter's

privilege would extend to Internet bloggers. Abrams agreed it could based on the nature of the publication.

In an intriguing question, Judge Tatel asked the government's lawyer, U.S. Attorney James P. Fleissner, whether a reporter's privilege is much of a step beyond the recently recognized privilege for psychotherapists to maintain the confidentiality of their patients even in the context of criminal grand jury investigations. *See Jaffee v. Redmond*, 518 U.S. 1 (1996). There was no clear indication, though, that Judge Tatel or other members of the panel were prepared to adopt a similar privilege for reporters.

A decision is expected soon.

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Ex-Prosecutor Wins \$950,000 Libel Verdict Against *Boston Phoenix*

A former county prosecutor won a \$950,000 jury verdict against the *Boston Phoenix* over an article that described him as a “child molester” in discussing his custody dispute with his ex-wife. *Mandel v. The Boston Phoenix, Inc.*, Civ. No. 03-10687 (D. Mass. jury verdict Dec. 17, 2004).

Background

At issue in the libel suit was a January 2003 article entitled “Children at Risk,” written by reporter Kristen Lombardi. The article focused on several cases in which family courts awarded custody to fathers accused of sexually molesting their children.

The article discussed the bitter custody battle between plaintiff and his ex-wife under the subheading, “Losing custody to a child molester.” The article described Marc Mandel as “a man who Baltimore, Maryland, child-protection workers believe is a child molester,” and stated that the Baltimore Court Department of Social Services had determined that plaintiff had assaulted his daughter from a previous marriage.

It also stated that Fitzpatrick “had accumulated a battery of documentation and witnesses to back up her sexual abuse claims, including the Baltimore DSS findings that Mandel had assaulted his oldest daughter.”

Mandel sued the *Phoenix*, Lombardi and the article’s editor for libel in April 2003, based on publication of the article in the newspaper and on its website. The suit alleged, among other things, that he lost his job as a county prosecutor in Baltimore County, Maryland because of the article. In May 2003, after Lombardi appealed on an episode of the regional cable program *NiteBeat with Barry Nolan*, the suit was amended to also cite the program; the claim was later dropped.

Plaintiff a Private Figure

In June 2004, federal District Court Judge Edward F. Harrington ruled that plaintiff was a private figure and denied a motion for summary judgment. *Mandell v. The Boston Phoenix, Inc.*, 322 F. Supp. 2d 39 (D. Mass. 2004).

The court distinguished plaintiff’s position from police officers who are generally deemed to be public officials. Plaintiff “was the lowest level prosecutor in the Maryland court system;” “did ordinary legal work;” did not exercise significant judgment without oversight from his superiors or

interact with the public; and had no access to the press.

The judge also issued several significant pretrial rulings. He granted plaintiff summary judgment that the statements were defamation *per se*, and thus plaintiff did not have to show special damages. He denied a defense motion to allow the DDS report into evidence, and barred the newspaper from making a fair report defense. The judge also rejected defense arguments that the subhead was incapable of a defamatory meaning.

Trial Themes

Plaintiff’s case focused on the alleged falsity of the charges against Mandel, and the alleged emotional and professional damage that had been done to his reputation. The defense argued that the article had been thoroughly and responsibly researched, and that the statements in the article were true.

Verdict

After a seven-day trial and three days of deliberation, the eight-person jury – evenly split between men and women – returned a verdict for plaintiff.

Answering a special verdict form, the jury found that plaintiff proved false three of the statements at issue: 1) the subhead implying that he was a child molester, 2) that Baltimore child protection workers believe he is a child molester, and 3) that a DSS report concluded that he fondled a daughter from a previous marriage. A fourth statement at issue, that DSS concluded plaintiff had “assaulted” his daughter was found not false – apparently because plaintiff was found to have physically hit the daughter.

The jury found that the *Phoenix* was negligent in publishing statements 1) and 3) and awarded \$950,000 in compensatory damages.

The Phoenix has announced plans for post-trial motions, and an appeal.

The Phoenix was represented by Daniel J. Gleason and Rebecca L. Shuffain of Nutter, McClennen & Fish in Boston and Robert L. Hanley of Nolan, Plumhoff & Williams in Towson, Md. The plaintiff was represented by Jennifer J. Coyne and Stephen J. Cullen of Miles & Stockbridge in Towson, Md. and Mary Alys Azzarito of Salem, Mass.

Minnesota Public Official Awarded \$625,500 in Libel Suit Against Local Newspaper

Following a one week trial, a Minnesota jury awarded an elected public official \$625,500 in damages over a newspaper editorial that accused plaintiff of firing a county official over a “personal grudge.” *Workman v. Southwest Publishing Co., et al.*, (Minn. Dist. Ct. jury verdict Dec. 22, 2004). The award was comprised of \$425,000 in compensatory damages and \$200,500 in punitive damages, including \$500 assessed personally against the editor who wrote the editorial.

At issue was an editorial published in the *Chanhassen Villager*, a weekly newspaper published by Southwest Publishing Co., that criticized Tom Workman, the commissioner of Carver County, Minnesota. The editorial accused Workman of wrongly firing a longtime town administrator and suggested plaintiff might have violated state open meetings laws.

The editorial erroneously claimed that the county had successfully sued plaintiff and that was his motive for firing the administrator. Plaintiff previously was an employee of a firm that was sued unsuccessfully by the county.

The editor who wrote the editorial claimed in depositions that he had investigated his claims, but then testified at trial that he had not checked the facts before publication and assumed they were true. Plaintiff argued that the newspaper ignored its own files on the subject which would have shown falsity. In addition, plaintiff apparently argued that the newspaper’s endorsement of his opponent was evidence of bias.

The newspaper was represented by Paul Hannah in St. Paul. Plaintiff was represented by Julianne Ortman, an elected Minnesota state senator. MLRC will publish a more detailed report on the trial next month.

UPDATE: \$400,000 Award to Local Politico Reversed JNOV Granted in Case Over Column on College Land Sale

Cook County, Ill. Circuit Judge Carol McCarthy granted judgment notwithstanding the verdict on Dec. 7 in a case where a local Democratic party official and college trustee sued a local newspaper that criticized his role in the college’s sale of real estate. The JNOV vacated a \$400,000 verdict that had been awarded by the jury in September. *Board of Trustees v. Southland Community Newspaper*, No. 01-L-1828 (Ill. Cir. Ct., Cook County JNOV motion granted Dec. 7, 2004).

The case stemmed from a January 2001 article in *The Southland Community Newspaper* which stated that South Suburban College in suburban Chicago sold 50 acres of property to a developer for \$250,000 without open bidding for the parcel. The college had actually sold 12.9 acres for \$1.25 million.

College Trustee Frank Zuccarelli sued the newspaper and reporter Ray Hanania. He also sued the newspaper’s owner, William Shaw (who was quoted in the story and was running against Zuccarelli for a town supervisor po-

sition at the time), and another local politician quoted in the article criticizing the land sale.

After less than two hours of deliberation, the 12-member jury awarded \$150,000 in compensatory and \$250,000 in punitive damages, split evenly among the four defendants. *See MLRC MediaLawLetter*, Sept. 2004 at 27.

In granting the JNOV motion, Judge McCarthy vacated the jury verdict in its entirety and dismissed the case, holding that the verdict was not supportable because the plaintiffs had not presented evidence of the actual value of the land. “In order to conclude that the statements in the article defamed plaintiff, the jury was left to speculate that the statements were necessarily untrue and therefore defamatory,” McCarthy wrote, according to the *Northwest Indiana Times*. “The truth or falsity of the statements has never been proved by anyone in the trial record at bar.”

Christopher Millet of Bougeois & Millet in Westchester, Ill. represented the defendants; Steven A. Adatto of Kusper & Raucci in Chicago represented the plaintiffs.

7th Circuit Affirms Dismissal Of Islamic Charity's Libel Suit Against Six National News Organizations

By Michael M. Conway and Miki Vucic Tesija

The Seventh Circuit Court of Appeals embraced a pragmatic and helpful legal definition of "substantial truth" in affirming summary judgment in favor of six national news organizations which had published post-9/11 news reports that a domestic Islamic charity was being investigated by the federal government for financial ties to terrorism.

In *Global Relief Foundation, Inc. v. The New York Times Company, et al.*, No. 03-1767, 2004 WL 2725742 (7th Cir. Dec. 1, 2004), Circuit Judge Ilana D. Rovner, in a 32-page opinion, held that six different stories by *The New York Times*, *New York Daily News*, *ABC*, *Associated Press*, *Boston Globe*, and *San Francisco Chronicle* were substantially true under Illinois law.

These stories, disseminated between September and November 2001, reported that Global Relief Foundation, Incorporated ("GRF") was under scrutiny by federal officials for financial ties to terrorism. The Court rejected GRF's position that the issue of truth turned on whether GRF actually had ties with Al-Qaeda or other terrorist organizations, rather than whether the U.S. Government had been investigating GRF for such ties.

News Reports on Alleged Terror Links

The challenged news accounts were published in the aftermath of the September 11 terrorist attacks after President Bush issued Executive Order No. 13224 declaring a national state of emergency, authorizing the Treasury Secretary to freeze assets of groups that assist or provide financial or other support to terrorist organizations, and listing 27 people and organizations whose assets would be frozen. GRF, an Islamic charitable organization based in Bridgeview, Illinois, was not named.

Nonetheless, the defendant news organizations, relying for the most part on confidential governmental sources, reported in various broadcasts or news articles that GRF

was a target of the federal investigation and was being considered for placement on the government's list of entities that sponsored or financed terrorists. At that time, the investigation of GRF was not public.

On November 15, 2001, GRF sued the news organizations and their reporters for defamation and commercial disparagement and sought \$125 million in damages.

The appeal arose after the federal district court in Chicago (Hon. David Coar) had examined each of the six challenged articles or broadcasts and found each to have been a substantially true account of the government's investigation of GRF. See *MediaLawLetter* March 2003 at 7-8 for a detailed account of district court proceedings.

The news organizations' reliance on substantial truth arose, in large part, from the possible unavailability of a "fair report" privilege.

Substantial Truth

On appeal, GRF framed the controlling legal question to be: whether the district court correctly held that the news reports were substantially true "when defendants only established that they accurately repeated defamatory suspicions held by the government and not that GRF was guilty of aiding terrorism."

GRF argued that the district court had too narrowly defined the defamatory sting of the publications to relate only to the on-going governmental investigations, rather than the implication that GRF funneled money to Osama bin Laden. Citing *Dubinsky v. United Airline Master Exec. Council*, 708 N.E.2d 855 (Ill. App. 1999), GRF argued that the district court's ruling ran afoul of the "repetition rule," which it argued does not allow a publisher to rely on "truth" by simply "(a) identifying the originator of a defamatory statement; (b) qualifying the defamatory statement with language such as 'it is alleged', 'it is rumored', or 'it is predicated'; (c) expressing disbelief about a defamatory statement made by another."

GRF argued that the district court had too narrowly defined the defamatory sting of the publications to relate only to the on-going governmental investigations, rather than the implication that GRF funneled money to Osama bin Laden. Citing *Dubinsky v. United Airline Master Exec. Council*, 708 N.E.2d 855 (Ill. App. 1999), GRF argued that the district court's ruling ran afoul of the "repetition rule," which it argued does not allow a publisher to rely on "truth" by simply "(a) identifying the originator of a defamatory statement; (b) qualifying the defamatory statement with language such as 'it is alleged', 'it is rumored', or 'it is predicated'; (c) expressing disbelief about a defamatory statement made by another."

In GRF's view, holding news organizations liable under a strict view of the repetition rule was proper because "[j]ournalists should be more careful when they report about secret proceedings because other journalists and the public do not have an opportunity to test the truth of the

(Continued on page 12)

7th Circuit Affirms Dismissal Of Islamic Charity's Libel Suit Against Six National News Organizations

(Continued from page 11)

defamatory statements by looking at the secret record underlying the journalist's report." Finally, GRF argued that the publications went beyond reporting about the government investigation to present facts that GRF had ties to Osama bin Laden and al Qaeda.

The news organizations' reliance on substantial truth arose, in large part, from the possible unavailability of a "fair report" privilege. The publications relied extensively on confidential sources and non-public information about the fact of the government's investigation, so the traditional bases for a fair report privilege were absent. Instead, Defendants crafted the argument that the publications were reporting on an "event" — the existence of a governmental investigation — and not reporting the defamatory statements of others or endorsing the truth that GRF was guilty of the conduct the government was investigating. This is the position that the Seventh Circuit embraced.

Seventh Circuit Examined "Sting" of Allegations

With this legal framework, the news organizations urged the Seventh Circuit to examine each publication on its own to determine its gist or sting (something which GRF failed to do but which the district court had insisted upon), arguing that there was only one conclusion regarding each — that the publication merely reported that GRF was under investigation and nothing more. Relying on affidavits of government officials submitted in other proceedings involving GRF or its founders, which established that GRF had been under investigation for some time before the publications, defendants further urged that the undisputed facts before the Court showed each publication to be substantially true.

In a thoughtful opinion, the Seventh Circuit rejected GRF's arguments and affirmed judgment in favor of each news organization. The Court first grappled with whether the issue turned on the plaintiff's failure to show falsity in a defamation suit against media defendants, citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), or the Defendants' burden to establish truth because some Illinois decisions treat truth as an affirmative defense.

The Court reconciled this seeming discord by finding that a plaintiff may be able to show that a statement is technically false in some way, thereby meeting its burden to show falsity, but a defendant can defeat the claim by showing that the statement, although not technically true in every respect, is nonetheless "substantially true", *i.e.*, the "gist" or "sting" of the material is true.

The Court of Appeals analyzed, and extensively quoted, each publication in its opinion and determined that each was either true, such that GRF could not meet its initial burden of falsity, or substantially true, such that GRF could not defeat Defendants' affirmative defenses. Specifically, the Court found that each article accurately reported that GRF was under investigation by the federal government for ties to terrorism and was being considered for placement on a U.S. Treasury Department list of "Specially Designated Global Terrorists" ("SDGT").

Indeed, GRF was in fact placed on the government's SDGT list on October 18, 2002. The Court found that the only inaccuracies regarded the timing of the government's actions, which did no more to harm GRF than the true statements in the articles.

Finding cases applying Illinois law to be directly on point (*Gist v. Macon County Sheriff's Dep't*, 671 N.E.2d 1154 (Ill. App. 1996), *Sivulich v. Howard Publications, Inc.*, 466 N.E.2d 1218 (Ill. App. 1984) and *Vachet v. Central Newspapers, Inc.*, 816 F.2d 313 (7th Cir. 1987)), the Court also expressly rejected GRF's argument that in order to prevail on the defense of truth, Defendants must be able to prove the truth of the government's charges before reporting on the investigation. In doing so, it implicitly adopted Defendants' argument that the republication rule is simply not applicable to truthful reports about the on-going conduct of the government. The Court also rejected GRF's attempts to distinguish these cases on the grounds that they each involved public investigations and proceedings. Citing its opinion in *Haynes v. Alfred A. Knopf*, 8 F.3d 1222 (7th Cir. 1993), the Court found that "there is no difference between public and private proceedings in the applicability

The Court also expressly rejected GRF's argument that in order to prevail on the defense of truth, Defendants must be able to prove the truth of the government's charges before reporting on the investigation.

(Continued on page 13)

7th Circuit Affirms Dismissal Of Islamic Charity's Libel Suit Against Six National News Organizations

(Continued from page 12)

of the defense of substantial truth The fact of the investigation was true whether or not it was publicly known.”

While both the Seventh Circuit and the district court acknowledged that the issue of truth was normally for the jury to decide, no reasonable jury could conclude that GRF had not been under government investigation at the time of the publications and, given that was the factual question whose truth was being measured, summary judgment was warranted.

Circuit Judges Terrance Evans and Ann Claire Williams joined in the unanimous decision.

Michael M. Conway and Miki Vucic Tesija of Foley & Lardner, LLP in Chicago represent The New York Times Company, and its reporters Judith Miller and Kurt Eichenwald; Globe Newspaper Company and its reporter, Mac Daniel; Daily News, L.P. and its columnist Zev Chafets. David P. Sanders of Jenner & Block LLP in Chicago represents American Broadcasting Companies, Inc., and its reporter Antonio Mora, Hearst Communications, Inc., and its reporters Scott Winokur and Christian Berthelsen. David A. Schulz of Levine, Sullivan, Koch & Schulz in New York and Sarah R. Wolff and Bruce Braverman of Sachnoff & Weaver, Ltd. in Chicago represent the Associated Press and its reporter Martha Mendoza. David P. Sanders of Jenner & Block LLP argued on behalf of all defendants in the 7th Circuit.

New York Times Wins Libel Suit Arising From Anthrax Columns

By David McCraw

A federal judge in the Eastern District of Virginia has dismissed a libel suit brought against *The New York Times* and columnist Nicholas Kristof by Steven Hatfill, the biological warfare expert who became a “person of interest” in the FBI’s anthrax investigation. *Hatfill v. The New York Times Co.*, CA No. 1: 04cv807 (Nov. 24, 2004) (Hilton, C.J.).

Hatfill alleged that the columns – which criticized the FBI’s anthrax investigation and suggested that the bureau should complete a thorough investigation of Hatfill – implied that he was guilty of committing the anthrax murders.

In a 31-page decision issued on November 24, 2004, Chief Judge Claude Hilton rejected that theory, finding that columns were not defamatory because they did no more than report that Hatfill was under investigation, a fact that Hatfill had repeatedly conceded.

The decision is important vindication of the news media’s right to report on an investigation prior to arrest or indictment – at which point the press can usually rely upon privileged official documents – without fearing liability for proving the truth of the underlying accusation. That is a marked departure from the traditional republication doctrine. Under that doctrine, when the press reports the accusations or suspicions of an investigator about a

particular individual, it becomes responsible for any falsehoods in the investigator’s comments.

Background

The Hatfill case grew out of a series of columns that Kristof wrote in 2002 criticizing the FBI for failing to aggressively investigate the deaths of several people who received anthrax in the mail in 2001. As an example of the FBI’s failings, Kristof questioned why the FBI was not looking more thoroughly into Hatfill, who was identified only as “Mr. Z” in the early columns.

Kristof later identified Hatfill by name after Hatfill held a press conference to discuss the case in August 2002.

The columns offered a summary of some of the evidence that Kristof believed deserved a closer look, including:

- Hatfill’s failure to pass a lie detector test given by the anthrax investigators;
- His administering of Cipro to visitors;
- His presence in Rhodesia in the late 1970s, when thousands died from an anthrax outbreak; and
- His apparent use of multiple passports.

Kristof also wrote that Hatfill had “once been caught with a girlfriend in a biohazard ‘hot suite’ at Ft. Detrick, surrounded only by blushing germs.”

Throughout the columns, Kristof noted that Hatfill had not been accused of the crime by authorities, that he enjoyed

(Continued on page 14)

NYT Win Libel Suit Arising From Anthrax Columns

(Continued from page 13)

a presumption of innocence, and that Hatfill's friends believed that he had unfairly become a subject of interest to investigators.

An action for libel was commenced on June 18, 2003 when Hatfill quietly filed suit against The Times and Kristof in a Virginia state court. The complaint was never served and was then voluntarily withdrawn less than a year later. The Times never learned of the lawsuit during its pendency. Under Virginia law, that filing tolled the statute of limitations and allowed Hatfill to refile in federal court.

Hatfill commenced his case in the Eastern District of Virginia in July 2004. In addition to arguing a theory of libel by implication, he alleged that 11 discrete statements – including those listed above – were themselves libelous.

Presented with the defendants' motion to dismiss, Judge Hilton rejected Hatfill's libel-by-implication cause of action on two grounds. First, Judge Hilton held that the columns could not reasonably be read to state that Hatfill committed the murders.

He noted that Virginia law required that the court look not at whether some "interpretation is possible or plausible" but whether the columns reasonably conveyed to readers the defamatory meaning alleged: that Hatfill was the anthrax culprit. Judge Hilton concluded that the reasonable reader would understand that the columns stated only that Hatfill was under investigation and did not imply that he was guilty.

Second, the court ruled, even if the columns did imply that Hatfill was responsible for the murders, the claim must still fail because nothing in the columns indicated that Kristof intended that implication – a requirement for a libel-by-implication claim in Virginia. Judge Hilton found significant that the focus of the columns was not Hatfill's guilt or innocence but Kristof's opinion that the FBI was not doing its job adequately. He also found significant that the "columns specifically caution that there may be no connection [between Hatfill and the murders], that his friends consider him a patriot, and that a thorough FBI investigation may well exculpate him."

Relying largely on *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1992), and *Green v. CBS*, 286 F.3d 281 (5th Cir. 2002), Judge Hilton concluded that a newspaper was free to "accurately report questions being raised in the context of an ongoing public controversy" without having to prove that the allegations being made were true.

Without saying so, the decision effectively rejects the common-law republication doctrine, which holds the republisher responsible for allegations repeated, and embraces something very close to the neutral reportage privilege.

Having disposed of the implication-based claim, the court then went on to dismiss the libel claim based on the discrete statements contained in the columns. Because Hatfill had failed to include a claim based on these "discrete untruths" in his original, state court complaint, the statute of limitations was not tolled as to these claims, the court ruled, in light of Virginia's *in haec verba* requirement.

In addition, in the view of the court, none of these statements were themselves libelous in any event, but became so only if they were read to imply that Hatfill was guilty of mailing the anthrax. Because that implication could not reasonably be found in the columns as a whole, the judge concluded that no libel claim arose from any of the individual statements as well.

The judge also dismissed a claim alleging intentional infliction of emotional distress, holding, among other things, that the publication of news or commentary on a matter of public concern was not "outrageous or intolerable" as a matter of law. He also found that Kristof was not subject to the court's jurisdiction because he did not have sufficient contacts with Virginia. Prior to oral argument, Plaintiff's attorney had already agreed to dismiss Kristof as a named defendant.

David McCraw is Counsel at The New York Times Company. David Schulz, Jay Brown, and Halimah DeLaine of Levine Sullivan Koch & Schulz of New York and Washington represented The Times and Kristof. Plaintiff's counsel was Victor Glasberg of Alexandria, Va.

The decision effectively rejects the common-law republication doctrine, which holds the republisher responsible for allegations repeated, and embraces something very close to the neutral reportage privilege.

California Supreme Court Overrules "Briscoe"

By Louis Petrich

On December 6, 2004, the California Supreme Court unanimously affirmed that its 1971 decision in *Briscoe v. Reader's Digest Association, Inc.*, 4 Cal. 3d 529, has been overruled in light of the U.S. Supreme Court's decision in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) and its progeny. *Gates v. Discovery Communications*, 2004 WL 2785534 (Ca. Dec. 6, 2004 (Werdegar, J.)).

In *Briscoe*, a formerly convicted felon sued for invasion of his privacy complaining that a *Reader's Digest* article about truck hijackers, published 11 years after the crime, impermissibly made a public disclosure of a "private" fact (his identity) in discussing that crime. In reversing a dismissal, the Court created a "rehabilitation" exception, based on the passage of time, to the general right to publish public facts. Whether disclosure of the identity after the passage of time was a matter of legitimate public interest was deemed a jury question.

Four years later, in 1975, in *Cox Broadcasting Corp. v. Cohn*, the U.S. Supreme Court held that under the First Amendment a journalist could not be held liable for the public disclosure of a private fact tort for publishing a rape victim's name which was obtained from a judicial record accessible to the public, specifically, an indictment.

Later decisions of the Supreme Court held that where facts were inadvertently published by the State or gathered from other than the public record, they were nevertheless entitled to publication unless the state could show a countervailing interest "of the highest order." Neither the states' interest in potential rehabilitation of a delinquent perpetrator or in a victim's privacy was deemed sufficient. *Smith v. Daily Mail Publ. Co.*, 443 U.S. 97, 101-06 (1979) and *The Florida Star v. B.J.F.*, 491 U.S. 524, 536-41 (1989).

No Private Facts Claim

Recognizing these intervening decisions, the California Court of Appeal in *Gates* held that the cablecast of a reality program re-creating a notorious crime occurring 13 years earlier and disclosing plaintiff's name, his arrest mug shot, the indictment, his subsequent guilty plea as an accessory to murder and sentence was well within the First

Amendment protection provided by *Cox Broadcasting*, et al. See *MediaLawLetter* October 2004 at 17.

In affirming, the California Supreme Court quoted at length from the Court of Appeals decision. The California Supreme Court concluded that "any state interest in protecting for rehabilitative purposes the long-term anonymity of former convicts" was not an interest "of the highest order." It also rejected the argument that the Supreme Court's decisions were distinguishable because they did not involve the passage of lengthy time periods. Plaintiff has stated an intention to seek U.S. Supreme Court review.

Louis P. Petrich and Robert S. Gutierrez of Leopold, Petrich & Smith of Los Angeles represented Discovery Communications and New Dominion Pictures, Inc. Plaintiff was represented by Niles R. Sharif.

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John Gotti, Jr. Loses Bid to Silence Radio Talk Show Host

By Nathan Siegel

Proving there are some offers that may still be refused, John Gotti, Jr., son of the notorious “Dapper Don”, lost his bid to impose a gag order on Curtis Sliwa, a radio talk show host for WABC-AM. *United States v. Gotti*, 2004 WL 2757625 (S.D.N.Y., Dec. 3, 2004). Although the case presented very unusual facts, Judge Shira Scheindlin’s decision should provide a useful precedent in any case involving a conflict between free press and fair trial rights because it endorsed many of the practical arguments media practitioners regularly raise in that context.

Gotti’s Motion for a Gag Order

The case arose out of pre-trial proceedings in the prosecution of Gotti for the attempted murder of Sliwa. Sliwa, well-known in New York as the head of the Guardian Angels, was brutally attacked twice in 1992. Sliwa has maintained since the attacks that the Gottis were responsible, but Gotti was never formally charged until July 2004. Gotti is currently serving a prison sentence for unrelated crimes and trial is set for August 2005. Sliwa is expected to be one of the prosecution’s principal witnesses.

Sliwa also serves as a co-host of a morning radio talk show program on WABC-AM in New York. Sliwa’s show features a regular “Mob Talk” segment. Since Gotti’s indictment Sliwa has regularly lambasted Gotti and his associates and proclaimed their guilt on the air. Last month Gotti filed a motion for a gag order against Sliwa, ostensibly asking the court to enforce a local rule (Local Rule 23.1) concerning pre-trial publicity as long as the case is pending. Gotti argued that a gag order was necessary to protect his right to a fair trial because Sliwa used his show as a soapbox to sway potential jurors. As a practical matter, if granted Gotti’s proposed order would have effectively barred Sliwa from discussing the case until Gotti’s trial is over.

Novel Issues Raised by Gotti’s Motion

The dispute presented several novel legal issues. First, though the case law in the Second Circuit strongly

discourages gag orders, no court in that jurisdiction in any available decision had directly confronted what legal standard should govern requests for gag orders directed at witnesses, as opposed to parties or attorneys. Sliwa and WABC argued that such gag orders should be treated no differently than any other classic prior restraint, while Gotti naturally argued that a lower level of scrutiny applied. Case law from other circuits has reached conflicting conclusions about the question.

Second, a request for a gag order directed at a single non-party witness – as opposed to trial participants generally – had no precedent known to counsel. Finally and most importantly, none of the parties involved could find any other instance in which a court had considered a request for a gag order where a key witness was also a member of the media. Gotti urged that Sliwa’s status as a member of the media gave him no greater legal protection than any other witness, and actually weighed in favor of a gag order because his ability to influence jurors was much greater. Sliwa and WABC countered that Gotti’s motion raised the danger that Gotti was using the proceedings as a vehicle to single out and silence a media critic and therefore his request required especially strict scrutiny.

Judge Scheindlin ultimately found it unnecessary to definitively resolve those issues because she found that Gotti’s request failed to satisfy the standards of the Local Rule he sought to invoke. Nevertheless, her rationale suggests that gag orders directed at witnesses should be subject to the same level of scrutiny as prior restraints aimed at the media.

The Court Finds that Sliwa’s Comments Could Prejudice a Fair Trial

Initially, however, the Court agreed with the premise of Gotti’s motion: that the substance of Sliwa’s comments posed a danger to his fair trial rights. She noted the local rule first requires any party seeking a gag order to demonstrate that “the speech is likely to interfere with the accused’s right to a fair trial.” Local Rule 23.1(h). Although one provision of the rule lists a number of subjects that “presumptively” pose a “substantial likelihood” of prejudicing a criminal trial — such as state-

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John Gotti, Jr. Loses Bid to Silence Radio Talk Show Host*(Continued from page 17)*

ments about the merits of a case — Judge Scheindlin found that portion of rule could not apply to Sliwa because it is plainly directed at “lawyers and law firms”, not witnesses. 2004 WL 2757625, *3.

She also rejected Gotti’s claims that Sliwa had access to and revealed confidential information about the government’s investigation. Nevertheless, she found that Sliwa’s comments were intended to persuade his audience that Gotti is guilty and that listeners were likely to be particularly influenced by Sliwa “because of the perception . . . that he is intimately acquainted with the facts of the case.” *Id.*

A Gag Order Would Be Unnecessary and Counter-Productive

However, the Court then turned to the second element of the Local Rule: whether a gag order is the “necessary” remedy for any potential prejudice to fair trial rights. In that regard, Judge Scheindlin recognized that Gotti sought a “prior restraint” and invoked the standards of *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976), thus appearing to treat the request much the same as any other proposed prior restraint on the press. *Id.* Turning to the facts, the Court concluded that the proposed gag order was not necessary to remedy any possible prejudice for two reasons.

First, Judge Scheindlin found that a careful *voir dire* and targeted jury instructions would easily remedy any harm caused by the publicity. Using ratings data provided by WABC, she noted that only about 3% of the potential jury pool listens to any portion of Sliwa’s program at some point in an average week. As a result, the vast majority of potential jurors would likely never be exposed to his commentary and those that were could

easily be identified and questioned for potential prejudice during *voir dire*. Moreover, she noted that jurors can easily “distinguish[] between in-court testimony and extrajudicial statements” and follow instructions to disregard the latter. *Id.* at 4.

Second, the Court found that a gag order would likely do more harm than good. She noted that the controversy over Gotti’s motion had already attracted more attention to Sliwa’s comments in the broader media than they had ever received before. Were a gag order to be issued, she concluded, “every media outlet in New York City” would likely disseminate Sliwa’s comments “in the context of reporting on the gag order,” so “the number of potential jurors exposed to his comments would increase” if the order were issued. *Id.* Finally, though she denied the motion, she also expressed hope that Sliwa would take Gotti’s fair trial rights into consideration when discussing the case in the future.

The Court’s conclusions about the efficacy of *voir dire* and jury instructions as well as the practical futility of restraints on the media are applicable to any issue implicating free press/fair trial disputes, including disputes about access as well as all forms of prior restraints. Her careful analysis provides a refreshing exception to what seems to be a growing trend of judicial deference to celebrity demands for secrecy in high-profile criminal proceedings.

David Schulz, Nathan Siegel and Alia Smith of Levine Sullivan Koch & Schulz LLP represented Curtis Sliwa and WABC. Jeffrey Lichtman of the Law Office of Jeffrey Lichtman and Marc Fernich of the Law Office of Marc Fernich represented John A. Gotti, Jr. The United States took no position on the proposed gag order.

Any developments you think other MLRC members should know about?

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

Texas Supreme Court Addresses Constitutional Limits on Punitive Damages

In *Bunton v. Bentley*, 2004 WL 2913693 (Tex. Dec. 17, 2004) the Texas Supreme Court addressed the constitutional limits on punitive damage awards, vacating and remanding for review as potentially excessive a \$1 million punitive damage award.

Plaintiff, a state court judge, sued the host of a public access cable show for repeatedly referring to him as “corrupt” and a “criminal.” A jury awarded plaintiff \$150,000 for damage to reputation, \$7 million for mental anguish and \$1 million in punitive damages.

On appeal, the award for mental anguish was remitted to \$150,000, but the court of appeals did not adjust the punitive award, finding that defendant had not objected and, in any event, that the award was within the ratio set by the U.S. Supreme Court in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 424 (2003).

Remanding, the Texas Supreme Court held that courts must conduct a de novo review of punitive damage awards to consider

(1) the degree of reprehensibility of the defendant’s misconduct;

(2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and

(3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. (citations omitted).

These factors are intertwined and should not be viewed in isolation. Specifically, the court noted, that a reviewing court cannot conclude that a particular ratio is constitutionally permitted unless that court examines the ratio in light of the other factors and in light of the actual harm to the plaintiff.

While the 3:1 damage ratio in *Bunton* (\$300,000 total compensatory damages to \$1 million punitive) was in line with ratios upheld by the Supreme Court, “the analysis cannot end there.”

Instead, the lower court should have sua sponte reviewed the reasonableness and proportionality of the punitive damage award in light of the adjusted compensatory award, even though the defendant did not originally challenge the punitive damage award.

Ohio General Assembly Again Passes Tort Reform Legislation

By Rob Shank and Steve Gracey

On December 9, 2004, the Ohio General Assembly passed Amended Substitute Senate Bill 80 (“Senate Bill 80”). Senate Bill 80 is the Ohio Legislature’s third attempt in the past decade to enact broad reforms to the State’s personal injury lawsuit system. Senate Bill 80 is awaiting the signature of Governor Bob Taft, after which it will become law in 90 days.

If passed, Senate Bill 80 contains a wide array of provisions that will affect, among other things, the amount of noneconomic and punitive damages that can be awarded in tort actions, including but not limited to defamation, invasion of privacy, and intentional infliction of emotional distress. Senate Bill 80 generally does not apply to tort actions pending prior to the effective date of the legislation. A summary of the limitations imposed on noneconomic and punitive damages is summarized below.

Limitations On Damage Awards

Senate Bill 80 limits noneconomic damages in “non-catastrophic” tort actions. It also limits punitive damages for tort actions generally. Juries are not to be informed of or receive instructions on these damage limitations.

Noneconomic Damages

Noneconomic damages include pain and suffering, emotional distress, and loss of companionship. For “non-catastrophic” tort actions, which are defined as all tort actions not involving permanent physical deformities and permanent injury preventing the injured party from being able to independently care for him/herself and perform life-sustaining activities, noneconomic damages are limited to the greater of \$250,000 or three times the plaintiff’s economic loss, up to a maximum of \$350,000 for each plaintiff or \$500,000 for each occurrence.

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OH General Assembly Again Passes Tort Reform Legislation

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Senate Bill 80 also enacts a judicial procedure by which noneconomic damage awards will be reviewed upon motion that the award is excessive. Upon a post-judgment motion, a trial court must review the evidence supporting an award of compensatory damages for noneconomic loss, which the defendant has challenged as excessive.

The trial court shall consider, without limitation, whether evidence and arguments inflamed the passion or prejudice of the jury, resulted in the improper consideration of the wealth of the defendant, resulted in the improper consideration of the misconduct of the defendant so as to punish the defendant improperly, whether the verdict is in excess of verdicts involving comparable injuries, and whether there were any other extraordinary circumstances that resulted in excessive noneconomic damages.

If the trial court upholds the noneconomic damage award, it must set forth in writing its reasons for upholding the award.

Punitive Damages

Senate Bill 80 limits punitive damages in tort actions to two times the amount of compensatory damages. However, small employers and individuals are subject to lower punitive damage caps.

Small employers are those that employ not more than 100 persons on a full-time permanent basis, or for certain manufacturing employers, those that employ not more than 500 persons on a full-time permanent basis. For small employers and individuals, punitive damages are limited under Senate Bill 80 to *the lesser of* two times the amount of compensatory damages or ten percent of the small employer's or individual's net worth when the tort was committed, up to a maximum of \$350,000.

Punitive damages also cannot be awarded under Senate Bill 80 against a defendant that files with the court evidence showing that: (1) punitive damages have already been awarded and collected against the defendant based on the same act or course of conduct; and (2) the aggregate of the previous punitive damages award(s) exceeds the maximum applicable punitive damage caps under Senate Bill 80.

This exception for punitive damages awards does not apply if the court determines the plaintiff will offer new and substantial evidence of previously undiscovered, additional behavior warranting punitive damages, other than that which caused the injury or loss suffered by the plaintiff. This exception also does not apply if the court determines that the total amount of prior punitive damages awards was insufficient to punish the defendant's behavior and to deter the defendant from similar behavior in the future.

The punitive damage limitations enacted by Senate Bill 80 do not apply to tort actions resulting from defendants who act with one or more of the culpable mental states of "purposely and knowingly." The punitive damage limitations also do not apply when the defendant has been convicted of or pled guilty to a felony, of which an element of the felony is the mental state of "purposely and knowingly," and the felony is the basis of the tort action.

Finally, when a claim has been made for compensatory and punitive damages, the court must bifurcate the trial upon the motion of any party. During the initial, compensatory damage phase of the trial, the court shall not permit evidence that relates solely to the issue of punitive damages.

If the jury determines that the plaintiff is entitled to recover compensatory damages, a second phase of the trial will be held to determine whether the plaintiff is entitled to recover punitive damages. Senate Bill 80 also requires courts to instruct the jury regarding the extent to which an award of compensatory or punitive damages is taxable under federal or state income tax laws.

Rob Shank and Steve Gracey are associates at Frost Brown Todd LLC in Cincinnati, Ohio.

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Court Rules that Public Official Plaintiff Must Testify about Private Matters *Plaintiff Cannot Block Discovery of Personal Matters Directly at Issue*

By Devereux Chatillon and Rachel Balaban

The federal court in New York hearing the high-profile libel suit by Gary Condit against writer Dominick Dunne granted a defense motion seeking to compel Condit to answer questions about his relationship with Chandra Levy. *Condit v. Dunne*, No. 02 Civ. 9910, 2004 WL 2827640, at *8 (S.D.N.Y. Dec. 8, 2004).

Background

Gary Condit, the former Congressman from California, sued *Vanity Fair* writer Dominick Dunne for defamation in federal court in the Southern District of New York. Condit did not sue over any of Mr. Dunne's several articles in *Vanity Fair* about the investigation into the 2001 disappearance and murder of Chandra Levy, the Washington intern who had had an affair with Condit.

Instead, Condit sued Mr. Dunne in his individual capacity over statements he made during an appearance on a radio program hosted by Laura Ingraham, one appearance on Larry King Live, two private dinner parties and what the complaint characterized as an interview by ET Online.

Condit claims that Mr. Dunne's statements, including theories Dunne recounted about the disappearance of Chandra Levy during certain of these appearances, accused Condit of murdering Chandra Levy. Dunne's position is that he never accused Condit of murdering Ms. Levy, but believed at the time he made these appearances, as he believes now, that Condit knew more about Chandra Levy than he has said.

Early in the action, Dunne brought a motion to dismiss, which was denied in part by Judge Peter Leisure. *Condit v. Dunne*, 317 F. Supp. 2d 344 (S.D.N.Y. 2004). The court held that Dunne's statements could be construed as more than just his opinions and theories about what happened to Ms. Levy, but could be understood to imply false statements of fact.

Discovery began with the depositions of Gary Condit and Dominick Dunne. At his deposition, Condit, at the instruction of his counsel, Lin Wood, answered some questions about Chandra Levy but not others — based on

a rather haphazard determination that certain of these questions could potentially require Condit to divulge some details that were irrelevant or violated his "right to privacy recognized under California constitutional law and the United States Constitution."

For example, Condit answered "no" to the question: "Did your relationship ever become a romantic relationship?" But he refused to answer the questions: "Did you have a sexual relationship with Ms. Levy?" and "was your relationship what people would consider an affair?"

Counsel for Condit also blocked answers to the following questions, on the grounds that "it could potentially go into issues of sexual conduct":

Q: Aside from her talking to you about her career, did she talk to you about other matters as well, over the time you knew her?

Q: Did you ever state to anyone that you were having a difficulty in ending any aspect of your friendship with Ms. Levy?

* * *

MR. WOOD: Next question, please. You're back to the "any aspect," excuse me, it's overbroad. I contend that because it's so overbroad when you use terms like "any aspect," that it is going to be a situation where at this point in time we're going to invoke the privacy and relevancy instruction.

Similarly, Condit refused to answer questions about his net worth, investments, and real estate holdings on the grounds of privacy and relevancy. At the same time, Condit claims damages from Mr. Dunne based on his own failure to be re-elected and look for a job since he lost the primary in California for his congressional seat to one of his former staffers, because, as Condit testified at his deposition, he is fearful that Mr. Dunne will ridicule him and any prospective employer.

Condit Ordered to Answer

Dunne moved to compel discovery relating to these private matters. In granting that motion, the court first ruled that although California law would provide the substantive law of defamation based largely upon the plain-

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Court Rules that Public Official Plaintiff Must Testify about Private Matters

(Continued from page 21)

tiff's residence in California, New York law governed any assertions of privilege, stating that "New York has a compelling interest in ensuring its citizens sued in its forum state are allowed full and accurate discovery in order to properly defend themselves in the suit. Defendant Dunne did not ask to be sued, and plaintiff Condit should not be allowed to use the court system as both a sword and a shield."

The court rejected Condit's argument that Dunne could not assert a defense of substantial truth because he had admitted both in print and at his deposition that one specific theory he had recounted in one appearance turned out clearly not to be true after Ms. Levy's remains were found in Rock Creek Park in May of 2002.

The court also made short work of counsel for Condit's contention that questions in this area would lead down a "slippery slope" and that the court should draw the line "at the bedroom door." *Id.* at *10. "Unfortunately for plaintiff, he opened that door himself by filing this lawsuit, the Court cannot allow plaintiff to walk through freely while holding defendant in check at the gate."

The court based its decision on the broad scope of discovery and definitions of relevance under the Federal Rules of Civil Procedure and well established law within the Southern District and elsewhere that a party may not put an issue in controversy and then refuse to provide dis-

covery of facts that could be helpful in establishing or rebutting that theory.

The court also noted that even while the California courts have extended the right to privacy established in California's Constitution to encompass a privilege justifying a litigant's refusal to answer deposition questions that unreasonably intrude on this right, if the assertion of that privilege impinges on another party's need for truthful discovery, that privilege can no longer act as shield to block relevant discovery.

In addition, based on the court's rejection of the same fundamental relevancy principle that a party cannot put something directly at issue and then seek to shield discovery on that very

issue, the Court ruled that Mr. Dunne has the right to inquire about Condit's financial status. *Id.* at *11-12. Since Condit has claimed special damages — loss of employment opportunities — the Court rejected outright the plaintiff's claim that this was not discoverable.

Mr. Dunne will resume the deposition of Mr. Condit in the near future. This deposition, as well as Dunne's deposition, will be supervised by the Magistrate Judge assigned to the case, as counsel for Dunne requested in the motion to compel discovery.

Devereux Chatillon and Rachel Balaban are with Sonnenschein Nath & Rosenthal LLP in New York and represent Dominick Dunne in this matter.

A party cannot put something directly at issue and then seek to shield discovery on that very issue.

Media Libel Defendants' Salary Not Discoverable

The Alabama Supreme Court ruled that a libel defendant's income is generally not discoverable since it is irrelevant to the elements of the claim. *Ex parte Crawford Broadcasting Co.*, CV-03-707, 2004 WL 2914924 (Dec. 17, Ala. 2004).

The defendants, Russ and Dee Fine, are hosts of a morning radio talk show in Birmingham. In a November 2003 broadcast they criticized Ted Dial, a former local councilman, for blocking a city project claiming he opposed it because it would "hurt the view he and his wife enjoyed from the front porch of their home." The Fines announced Dial's home telephone number and invited lis-

teners to call him and voice their disapproval.

Dial and his wife sued for invasion of privacy and libel and issued a third party subpoena to Crawford Broadcasting to discover defendants' salary. Plaintiffs claimed the information was relevant to actual malice and that it would show that they "are in the business of igniting public passion by defaming the character of their fellow man."

Granting a mandamus writ to quash, the Alabama Supreme Court held that defendants' income was "irrelevant" to their attitude toward the truth of their statements or ability to affect plaintiffs' reputation.

Reporter Charged With Crime For Telephoning a Source (All's Well That Ends Well)

By Mark J. Prak

Reporters often encounter obstacles and odd situations in digging up the facts and reporting the news. But, being arrested and charged with a crime for leaving three phone messages with a source is truly out of the ordinary.

For Demorris Lee, a reporter for the *Raleigh News & Observer*, the truth of this situation really was stranger than fiction. Nonetheless, there was a happy ending to the story, due to an increasingly rare individual, a District Attorney with an understanding of and appreciation for the First Amendment.

Background

The matter began this way: reporter Lee was attempting to contact for comment on a story one Ruth Brown, a woman who had, some two years previously, been the victim of an armed assault and robbery. Ms. Brown testified at a criminal trial that 15-year-old Eric Daniels was among three young men who robbed her at gunpoint of \$6,000. Daniels was convicted of the crime.

At the time of the Daniels' criminal trial, reporter Lee covered the story and had sought comment from the victim/witness. During this exchange, which apparently became contentious, Ms. Brown told reporter Lee that he was "to never call me again for the rest of my life."

With the passage of time, new evidence developed which raised questions about whether the defendant Eric Daniels was, in fact, actually innocent. The North Carolina Center on Actual Innocence has undertaken to represent Daniels to challenge his conviction – arguing mistaken identity.

In connection with his assignment to cover that new developing story, reporter Lee left three recorded voice mail messages identifying himself and his newspaper, the subject matter of the call and the phone number where Ms. Brown could reach him. The tenor of the calls was professional. As it happens, Ms. Brown is employed as a property room technician by the Durham Police Department.

Rather than responding to the messages, the procedure savvy Ms. Brown proceeded to swear out a warrant for the reporter's arrest – for the crime of making harassing phone calls.

The magistrate issued the warrant and sheriff's deputies arrested the reporter, handcuffed him and took him to jail where he was fingerprinted, booked and, ultimately, released after some two hours while awaiting the posting of bond by his editors.

A controversy of national proportions developed, with protests lodged by the National Association of Black Journalists, ASNE, SPJ, National Association of Hispanic Journalists, and AFTRA.

Imagine that! A reporter arrested and jailed for leaving three voice mail messages for a source. To paraphrase Judy Collins, these are hard times for reporters.

Under the local rules of court in most North Carolina counties, magistrates issue warrants for arrest charging persons with criminal misdemeanors based on the testimony of citizens. However, in some cases, such as those charging law enforcement officers, emergency services personnel and public school representatives with crimes, magistrates in Durham County have, for the past 20 years, been forbidden, as a matter of policy, from issuing arrest warrants without an independent investigation conducted by law enforcement officials. This policy exists to keep citizens from making frivolous complaints against such persons. Reporters did not enjoy the protection of this policy -- until now.

Durham County District Attorney Jim Hardin responded to the jailing of reporter Demorris Lee in a fashion befitting a lawyer with an understanding of the First Amendment. He recognized the serious constitutional questions raised by the local practice and procedure. Hardin dismissed the charges against the reporter (noting that he could not prove the elements of a crime beyond a reasonable doubt), and he persuaded the Senior Resident Superior Court Judge to add reporters (for print and broadcast media) to the list of persons protected by the policy of requiring an independent investigation prior to the issuance of an arrest warrant by a magistrate.

The magistrate issued the warrant and sheriff's deputies arrested the reporter, handcuffed him and took him to jail.

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Reporter Charged With Crime For Telephoning a Source

(Continued from page 23)

Interestingly, the District Attorney's sensitivity to the First Amendment issues was born of his past experience in dealing with questions relating to practices and procedures for public review of returned search warrants. Fortuitously for reporter Lee, a lawyer living in Durham, who represents press interests across North Carolina and nationally, had worked hard for many years to raise the District Attorney's interest in First Amendment issues. Those efforts plainly bore fruit and led to a positive outcome in what was otherwise an outrageous and frustrating case.

Having read this tale, ask yourself, could this happen to reporters in your jurisdiction?

Could they be arrested for attempting an interview?

If so, how could you take steps to head off such a problem?

Links to news and editorial reports concerning this story can be found by "googling" the name of reporter, Demorris Lee.

Mark J. Prak is a partner with Brooks, Pierce, McLendon, Humphrey & Leonard in Raleigh, North Carolina.

10th Circuit Applies Libel Proof Plaintiff Doctrine

On December 9, 2004, the Tenth Circuit Court of Appeals affirmed the dismissal of Thomas Lamb's libel claim against a *Kansas City Star* newspaper reporter on grounds of the libel-proof plaintiff doctrine. *Lamb v. Rizzo*, 2004 WL 2823309 (10th Cir. Dec. 9, 2004) (McKay, J.) (applying Kansas law), *aff'g*, 242 F. Supp. 2d 1032 (D. Kan. 2003).

Thomas Lamb is serving three consecutive life sentences for two counts of first degree kidnapping and one count of first degree murder. Lamb had previously been imprisoned for various burglary charges and for prison escapes.

In July 2001 *Kansas City Star* reporter Tony Rizzo wrote two articles about Mr. Lamb's convictions and his upcoming parole hearing. After Lamb's request for parole was denied, he sued Mr. Rizzo asserting that the articles contained "lies and false information" relating to details about his criminal history which caused Mr. Lamb to be denied parole.

Upon defendant's motion the District Court of Kansas dismissed Lamb's case predicting that the Kansas Supreme Court would adopt the libel-proof plaintiff doctrine. On appeal the Tenth Circuit affirmed. The Court rejected Lamb's contention that Kansas would not adopt the libel-proof plaintiff doctrine and that even if adopted the doctrine should not apply with respect to crimes which were committed more than 30 years ago.

The Court ruled that the most compelling cases for application of a libel-proof plaintiff doctrine are situations in which the plaintiff has had "criminal convictions for behavior similar to that alleged in the challenged communication," *citing Cardillo v. Doubleday & Co.*, 518 F.2d 638, 639-40 (10th Cir. 1975).

Michael J. Abrams of Lathrop & Gage L.C. in Kansas City, Missouri represented the reporter in this case.

Thomas Lamb proceeded pro se.

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A Victory for the Reporter's Privilege in Federal Criminal Proceedings

By Nathan Siegel

In *United States v. Grant*, No. 04-CR-207 (S.D.N.Y., Nov. 17, 2004), Judge Barbara S. Jones of the United States District Court for the Southern District of New York provided a rare breath of fresh air for the federal reporter's privilege by decisively quashing a subpoena for unpublished outtakes of an MTV Networks ("MTV") documentary.

The decision is significant in several respects. It is the first district court decision following the Second Circuit's re-evaluation of the privilege for non-confidential materials in *Gonzales v. Nat'l Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1998) (civil case), to conclude that the privilege remains viable in federal criminal cases.

It also applies the *Gonzales* test in a manner that suggests the non-confidential privilege continues to have real teeth. Finally, it applies the source exhaustion prong of the privilege in a way that is very helpful to any press entity seeking to protect video outtakes from compelled disclosure.

What the Government Subpoenaed

The subpoena arose out of the prosecution of the owners of a New York dance club, Sound Factory, for allegedly permitting the sale and use of drugs by customers. One episode of the MTV documentary series "True Life" focused on the dance club culture and included footage shot inside and outside Sound Factory. The government subpoenaed all outtakes of that footage.

The government claimed that a few seconds of footage included in the program showed a couple of patrons in states that suggested they were under the influence of illegal narcotics. The government speculated that the outtakes would contain additional evidence of drug-intoxicated customers.

The Subpoena Passes Muster Under Rule 17(c)

MTV moved to quash the subpoena, raising both Rule 17(c) of the Federal Rules of Criminal Procedure (governing all subpoenas for production of materials) and the reporter's privilege.

The court first addressed Rule 17(c) and found that the subpoena satisfied, albeit barely, the three requirements of (1) relevancy, (2) admissibility and (3) specificity articulated for that rule by *United States v. Nixon*, 418 U.S. 683, 700 (1974). Slip Op. at 2-4.

The court found that the outtakes were likely to be of "minimal value" to the prosecution. And it noted that it was unclear whether the outtakes contained the kind of footage the government wanted and even if they did, images of drug-intoxicated customers would not in and of themselves prove what the government ultimately needed to show: that the club and its owner knowingly permitted drug activity on the premises. Slip Op. at 3-4.

Nevertheless, the court concluded the subpoena satisfied the minimal standards of relevance and admissibility necessary to pass muster under Rule 17(c).

The Reporter's Privilege

Although the origin or existence of a reporter's privilege applicable to these facts was (somewhat surprisingly) not disputed by the government, Judge Jones found that *Branzburg v. Hayes*, 408 U.S. 665 (1972) supported the development in the lower courts of "a qualified privilege for newsgatherers" in criminal cases, Slip Op. at 4 – a view of *Branzburg* that once dominated the federal judiciary but seems to be in rapid retreat.

The court then held that the privilege for non-confidential information articulated in *Gonzales* applied, requiring the party issuing the subpoena to demonstrate that the materials sought are "of likely relevance to a significant issue in the case, and are not reasonably obtainable from other sources." Slip Op. at 5, citing *Gonzales v. Nat'l Broadcasting Co.*, 194 F.3d 29, 36 (2d Cir. 1999).

Moreover, the Court interpreted *Gonzales* to require more than a mechanical application of a two-part test. Rather, the Court held that *Gonzales* ultimately mandates a balancing exercise, whereby the issues of likely relevance and other available sources should be balanced against "the public interest in a free press." Slip Op at 5.

United States v. Grant should prove to be a very helpful precedent in the battle to maintain the continued viability of the non-confidential reporter's privilege.

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A Victory for the Reporter's Privilege in Federal Criminal Proceedings

(Continued from page 25)

Thus, the decision suggests that the two specific factors recognized in *Gonzales* are a necessary, but not always sufficient basis to overcome the privilege, a view that could significantly assist the press if followed by other trial courts in the Second Circuit.

Applying the privilege to the facts, the court first noted that its Rule 17(c) analysis already found that the outtakes had "limited relevance." *Id.* Turning to the exhaustion prong, the court noted the existence of a dispute regarding outtakes that has bedeviled many courts considering the issue: whether an "alternative source" means an alternative source of similar, physical videotape – which rarely exists where outtakes have been subpoenaed – or alternative sources of the information captured on the videotape, which may well exist. *Id.*

Judge Jones seems to conclude that neither definition holds exclusive sway, but rather all forms of alternative sources should be considered as part of the ultimate exercise of balancing the need for the material against the press interests recognized by the privilege. Thus, the court found it significant that the government had conducted years of undercover surveillance at the club and had numerous witnesses who allegedly could testify

about drug use on the premises, essentially the same information it hoped to get from MTV. *Id.* at 6.

Finally, turning to a broader balancing test, the court adopted an argument from MTV's briefs that cases requiring news organizations to turn over outtakes in New York, under state and federal law, typically involved circumstances where the video "contained images of the tortious conduct or crime itself." *Id.*

This case plainly involved nothing of the kind. Thus, the court held that on balance the government's need for the materials "is simply not great enough to outweigh the public interest in a free press." *Id.* at 7. The court found that the concerns *Gonzales* articulated about making journalists "appear to be an investigative arm of the judicial system, the government or private parties" were squarely implicated by this subpoena. *Id.*

All in all, *United States v. Grant* should prove to be a very helpful precedent in the battle to maintain the continued viability of the non-confidential reporter's privilege, particularly within the Second Circuit.

Nathan Siegel is of counsel at Levine Sullivan Koch & Schulz, L.L.P. in New York. MTV was represented in this matter by Susanna M. Lowy and Naomi B. Waltman of the Viacom Law Department.

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U.S. Supreme Court Imports “Newsworthiness” Standard into Public Concern Doctrine

By Amy E. Serino

Reexamining the boundaries of a public employee’s free speech rights, a unanimous U.S. Supreme Court held that speech that is not “a subject of legitimate news interest” or “of general interest and of value and concern to the public” does not constitute a matter of public concern subject to First Amendment protection. *City of San Diego v. Roe*, No. 03-1669, 2004 U.S. LEXIS 8165 (Dec. 6, 2004) (*per curiam*).

Notably, the Court did not reach the *Pickering* balancing test – which weighs the employee’s interest in speaking on matters of public concern against the government’s interest in efficiency as an employer – because it concluded that the speech at issue was not newsworthy, and thus not a matter of public concern. See *Pickering v. Board of Education*, 391 U.S. 563 (1968). The ruling opens the door to greater regulation of speech by governmental employers where, in a court’s view, there is no legitimate news interest in the speech.

Background

The plaintiff at the center of the suit, officer “John Roe,” was a San Diego police officer whose side business was starting in and selling on eBay various videos in which he stripped off a police uniform and masturbated.

Police officials ultimately learned of the business, and, after investigating Roe’s activities, confronted him with charges of conduct unbecoming an officer, immoral conduct, and outside employment. Roe admitted to selling the videos, and his supervisors ordered him to cease his sales immediately.

Roe complied in part but maintained a seller profile that listed some of his prior video offerings and their prices. The police department added a new charge – failure to obey orders – and terminated Roe. Roe sued, alleging violation of his right to free speech under the First Amendment.

A federal district court dismissed Roe’s complaint, concluding that his conduct did not relate to a matter of “public concern.” The Ninth Circuit reversed. *Roe v. City of San Diego*, 356 F.3d 1108 (9th Cir. 2004). Highlighting the absurdity of the sordid facts underlying the case, well known

appellate blogger Howard Bashman observed at the time: “No doubt police officers throughout the Ninth Circuit who wish to sell videotapes of themselves stripping and masturbating are overjoyed with today’s ruling.”

Supreme Court Reverses Ninth Circuit

The Supreme Court reversed the Ninth Circuit’s ruling, concluding that it had given undue weight to the principles discussed in *United States v. National Treasury Employees Union* (“NTEU”), 513 U.S. 454 (1995). There, the Court had recognized that public employees’ right to speak or write on their own time on subjects unrelated to their work

should not be restricted without some justification.

But Roe’s speech could not be deemed *unrelated* to his employment (even if it did not comment on the workings of the police department) if it had a detrimental effect on his governmental employer. The police department’s legitimate and substantial interests were compromised by Roe’s conduct, which “brought the mission of the employer and the professionalism of its officers into serious disrepute.”

Looking to the traditional test set forth in *Connick v. Myers*, 461 U.S. 138 (1983), the Court held that the threshold question in Roe’s case was whether his expressive conduct addressed a matter of public concern. *Connick* adopted a dividing line between “public” and “private” discourse identical to that set by common law invasion-of-privacy jurisprudence.

Thus, the Court held in Roe’s case, an employee’s speech must be “a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.” The Court readily concluded that Roe’s conduct did not meet this standard, noting that it did not “inform the public about any aspect of the [police department’s] functioning or operation,” and that there was no basis for finding Roe’s speech to be of concern to the community.

Thus, the Court held in Roe’s case, an employee’s speech must be “a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication.” The Court readily concluded that Roe’s conduct did not meet this standard, noting that it did not “inform the public about any aspect of the [police department’s] functioning or operation,” and that there was no basis for finding Roe’s speech to be of concern to the community.

Amy E. Serino is a lawyer in the Media and Intellectual Property Group at Prince, Lobel, Glosky & Tye in Boston.

The ruling opens the door to greater regulation of speech by governmental employers where, in a court’s view, there is no legitimate news interest in the speech.

Student Press Wins Right to Publish Names of Assault Victims

The student press won an important victory this month when the New York Supreme Court ruled that the *Washington Square News*, New York University's independent student newspaper, would not be subject to a prior restraint preventing it from publishing the names of plaintiffs suing the university. *Jane Doe 1 v. New York University*, No. 109547 (N.Y. Sup. Dec. 8, 2004) (Edmead, J.).

Background

The plaintiffs, a female New York University ("NYU") student and a former student, brought a negligence action against NYU after they were allegedly sexually assaulted in an NYU residence hall in 2003. After learning that a student reporter for the *Washington Square News* had obtained their names from court filings for possible publication in the newspaper, plaintiffs moved for an order to seal the court records and to "permanently enjoin[] NYU or any of its affiliates from publishing names, or in any other way making the identities of the plaintiffs to this action known."

In response, *Washington Square News*, which was not named in the underlying negligence suit, filed a motion to intervene, as well as to deny the prohibition on publishing the plaintiffs' names and the sealing of the court records.

Judge Edmead first found that intervention by *Washington Square News* was warranted under NY CPLR 1012 in that the paper's interest in publishing the names would not be adequately represented by NYU, and that the *Washington Square News* could be bound by the outcome of plaintiffs' motion.

Presumption of Openness

In weighing the interest of the public in open records against the parties' desire for privacy, the court first recognized the historic right of access to civil and criminal court proceedings granted to the public and the press. As the court stated, "the 'sealing of court records acts as a prior restraint on the First Amendment rights of the

media to report, and any manner of prior restraint of expression bears a heavy presumption against its constitutional validity'" (citations omitted).

The court went on to recognize, however, that such right was not absolute, and could be overcome by a showing that allowing access to the records would "harm a compelling interest to plaintiffs," and that no means other than sealing court files existed for protecting plaintiffs' privacy interests.

In an effort to protect the privacy of victims of sex offenses, New York Civil Rights Law 50-b ("CRL") provides that no public officer or employee "shall disclose any portion of any police report, court file, or other document, which tends to identify [the victim of a sex offense]." As the court recognized, however, such statute applies only to public officials and employees, and thus would not "penalize media accounts of sexual offenses lawfully obtained."

The court went on to note the "critical difference" between a restraining order entered against a party to a lawsuit and one directed against the press, recognizing the latter as "embodying a form of censorship which the First Amendment sought to abolish from these shores.'" (citations omitted).

The court rejected plaintiffs' argument that such distinction should be disregarded when a "news gathering entity falls under the umbrella of the named defendant."

In light of its finding that plaintiffs' names were lawfully discovered by *Washington Square News* in its news gathering process and were already a matter of public record, the court held that neither the sealing of the record nor a prohibition on publishing plaintiffs' names was warranted, and that plaintiffs' interests would be adequately protected by redacting only the plaintiffs' names from the court records and allowing them to proceed under pseudonyms.

Washington Square News was represented on a pro bono basis by Joseph Finnerty of the Buffalo firm of Stenger & Finnerty and Michael Grygiel of the Albany firm of McNamee Lochner Titus & Williams. Plaintiffs were represented by Ripka, Rotter, King & Tacopina.

The court went on to note the "critical difference" between a restraining order entered against a party to a lawsuit and one directed against the press.

Libel and False Light Claims Against Radio Station Dismissed Under “Innocent Construction Rule”

By Chad R. Bowman

A federal judge in Chicago recently dismissed claims for defamation per se and false light against Infinity Broadcasting East Inc. station WBBM Newsradio 780 under the Illinois “innocent construction rule.” *Mancari v. Infinity Broadcasting East Inc.*, No. 04 C 3599, 2004 U.S. Dist. LEXIS 23606 (N.D. Ill. Nov. 22, 2004).

The Broadcasts

According to the complaint, WBBM broadcast the following news report twice during the early-morning hours of April 21, 2003:

Suburban car dealer, Bruno Mancari, is back in court this morning as jury selection begins in his trial for murder. The 52 year-old Mancari is charged with six counts of murder in the beating death of Joseph Russo in March of 1985. Prosecutors allege Mancari had Russo killed over fears he would tell police about an illegal chop shop operation at the car dealerships. Mancari is being held without bond and he could face life imprisonment if convicted.

Bruno Mancari was indeed on trial for murder that day; and the jury ultimately acquitted him.

The complaint in this case was filed by Frank Mancari, Bruno’s older brother, and the alleged sole owner of the four Mancari car dealerships – which joined the suit as co-plaintiffs. The complaint alleged that the broadcast about the murder trial of the “suburban car dealer” actually referred to Frank Mancari, rather than to his brother Bruno who was charged with the crime.

The plaintiffs further alleged that the broadcasts falsely implied that the Mancari auto dealerships had engaged in illegal conduct, i.e., “an illegal chop shop operation,” constituting defamation per se.

The Innocent Construction Rule

Infinity removed the action to federal court on the basis of diversity jurisdiction and sought judgment on the pleadings

that (1) the broadcasts were not “of and concerning” Frank Mancari and (2) the broadcasts did not directly attribute criminal activity to any of the plaintiffs.

Essentially, Infinity argued that even if some listeners could interpret the news report to be about Frank Mancari or as imputing criminal activity to the dealerships, the existence of reasonable, nondefamatory alternate interpretations mandated dismissal.

In considering the claims, U.S. District Judge Rebecca R. Pallmeyer recognized that “Illinois law expressly requires that ‘a nondefamatory interpretation must be adopted if it is reasonable.’”

The court recognized that a plaintiff cannot maintain a defamation action based solely upon a shared surname.

This innocent construction rule was first discussed by the Illinois Supreme Court in 1962, then formally adopted by that court two decades later in *Chapski v. Copley Press*, 442 N.E.2d 195 (Ill. 1982). The rule applies to claims for defamation per se – where damages are presumed – as well as to actions for false light invasion of privacy that similarly rely upon presumed harm to reputation.

In explaining the justification for the speech-protective rule, the *Chapski* court emphasized that the standard “comports with the constitutional interests of free speech and free press and encourages the robust discussion of daily affairs.”

Importantly, the rule applies both to the question of whether a challenged statement is “of and concerning” the plaintiff and to defamatory meaning.

As the *Chapski* court explained, where an allegedly defamatory statement “may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff it cannot be actionable per se.” (Neither Frank Mancari nor the dealership plaintiffs alleged defamation per quod.)

“Of and Concerning”

The court recognized that a plaintiff cannot maintain a defamation action based solely upon a shared surname. The court quoted from a recent state decision, *Myers v. The Telegraph*, 773 N.E.2d 192, 202 (Ill. Ct. App. 2002), which

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Libel and False Light Claims Against Radio Station Dismissed Under “Innocent Construction Rule”

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squarely rejected a plaintiff’s invitation to allow an action on this basis because “[s]uch a standard would mandate that every news story state the full name of the subject of the story every single time that person’s name is mentioned or else risk a lawsuit from anyone else of the same last name. That is not the law of Illinois.”

Judge Pallmeyer, however, distinguished *Myers*. She reasoned that the allegations of the complaint were that the WBBM broadcasts contained both the Mancari surname and a description of Frank Mancari – “suburban car dealer.”

As such, “[a] reasonable jury could conclude that the broadcast misstated Frank’s name as Bruno and, thus, referred to Frank.” Nevertheless, Judge Pallmeyer observed, this was merely one possible interpretation. The court decided as a matter of law that “reasonable listeners could also conclude that the broadcast referred to Bruno Mancari; indeed, the report expressly named 52-year-old Bruno as the individual on trial for murder.”

In light of this reasonable, innocent construction of the broadcasts as relating to someone other than the individual plaintiff, the court held that “Frank Mancari’s defamation per se and false light claims must be dismissed.”

The Dealership Plaintiffs

The court then turned to whether the statement about the “alleged . . . illegal chop shop operation at the car dealerships” represented defamation per se sufficient to state a claim by the dealership plaintiffs. Illinois recognizes five categories of statements that are actionable per se: (1) those imputing the commission of a crime; (2) those imputing infection with a loathsome communicable disease; (3) those imputing an inability to perform or want of integrity in the discharge of duties of office or employment; (4) those that prejudice a party, or impute a lack of ability, in his or her trade, profession or business; and (5) those imputing adultery or fornication.

The plaintiffs alleged that the WBBM news report “tied” or “linked” them to “implications” of criminal activity.

Again Judge Pallmeyer applied the innocent construction rule. Even where a statement on its face may be interpreted as falling within one of the per se categories, it nevertheless is not actionable as defamation per se if the statement is reasonably susceptible to an alternative, nondefamatory construction.

WBBM argued that even if the broadcasts could be understood to state that prosecutors alleged that illegal activities occurred at the physical location of the plaintiff dealerships, the broadcasts did not explicitly attribute illegal activity to the dealership plaintiffs. In essence, the broadcasts could reasonably be interpreted merely to state the allegation that someone else – namely, Bruno Mancari – had conducted illegal activities on the premises, without the corporate plaintiffs’ knowledge. The court agreed.

Judge Pallmeyer found *Bel-Grade, Inc. v. Etheridge*, 593 N.E.2d 91 (Ill. Ct. App. 1992), to be persuasive on this point. In that case, a defendant police chief stated that the plaintiffs’ tavern “was and had been suspected as a place where illegal activities were conducted.” The trial court in *Bel-Grade* applied the innocent construction rule to dismiss the per se claim, a decision the Illinois appellate court upheld because the statement at issue “does not accuse either plaintiff of being involved with criminal activity. Additional facts would be required to tie the plaintiffs to any criminal activity.”

The plaintiffs attempted to distinguish *Bel-Grade* as a case that turned on the word “suspected.” The court rejected this argument, as the WBBM broadcast used a similar word – “allege.” The court concluded that:

“This is not an express accusation of illegal activity; to the contrary, it reflects prosecutors’ speculation as to Mancari’s alleged motive for killing Russo. . . . The fact, if true, that the alleged wrongdoer sought to silence the victim does not suggest that the victim’s claims were true. As in *Bel-Grade*, additional facts would be required to establish that there was in fact a chop shop operation at the dealerships, or that Frank Mancari was somehow involved in illegal activity.”

Therefore, the court dismissed the per se claims by the dealership plaintiffs. Judge Pallmeyer’s opinion is expected to be reported.

Chad R. Bowman and Jay Ward Brown both of Levine Sullivan Koch & Schulz, L.L.P. in Washington, D.C., represented Infinity Broadcasting East Inc. together with in-house counsel Susanna M. Lowy and Naomi B. Waltman. Plaintiff was represented by Joseph N. Casciato, of Rusin Manciorowski & Friedman, Ltd.

Nevada “Son of Sam” Law Ruled Unconstitutional

The Nevada Supreme Court unanimously struck down as unconstitutional the state’s “Son of Sam” law, holding it was an impermissible content-based restriction on speech and over-inclusive. *Seres v. Lerner*, 2004 WL 2940958 (Nev. Dec. 21, 2004).

Background

Plaintiff, on behalf of her mother, sued Jimmy Lerner to recover the proceeds from his book entitled *You Got Nothing Coming, Notes from a Prison Fish*. The book was written by Lerner in 1998 while he was in jail for manslaughter for killing plaintiff’s brother.

The book was published in 1999 by Broadway Books, a division of Random House. It details Lerner’s experiences in prison and discusses the events surrounding his crime.

Nevada’s Statute

In 1981, Nevada enacted a “Son of Sam” statute modeled after New York’s statute. The New York statute was adopted in 1977 in the aftermath of the high profile “Son of Sam” murder case. The statute was spurred by concerns that the killer would profit by selling his story to the media. The U.S. Supreme Court declared the New York statute unconstitutional in *Simon & Schuster, Inc. v. N.Y State Crime Victims Board*, 502 U.S. 105 (1991). The Court held that while the government had a compelling interest to compensate crime victims, the statute was not narrowly tailored to achieve that interest.

In 1993, Nevada revised and recodified its statute in light of the Supreme Court’s decision. NRS 217.007 allows victims of felonies to sue the person who committed the felony to recover proceeds from “any contribution to any material that is based upon or substantially related to the felony which was perpetrated against the victim.”

The statute eliminated the state-administered fund feature of the original legislation (a feature found faulty in *Simon & Schuster*) and instead created a direct right of action.

Nevada Supreme Court Decision

The Nevada Supreme Court agreed that the state has a compelling interest to compensate crime victims and to prevent felons from directly profiting from their misconduct. But it concluded that NRS 217.007 was not narrowly tailored to meet these interests.

First, a victim’s ability to recover the proceeds from “any contribution to any material that is based upon or substantially related to the felony,” applies to works only partially or tangentially related to the crime committed.

Here the court found – and plaintiff conceded – that the defendant’s book deals only in part with the murder he committed. Thus the statute “penalizes that speech based upon its discrete content by seizing all proceeds, regardless of the extent to which the work relates to the crime against the victim. This breadth of coverage violates *Simon & Schuster*.”

The court found wholly unworkable the state’s suggestion that judges and juries could apportion publication proceeds and award only those proceeds that exploited criminal misconduct.

NRS 217.007 was also faulty because it was not limited to convicted felons, but extended to persons who admit to or are simply charged with crimes – a defect identified in *Simon & Schuster*. The court declined to construe the statute as limited to convicted felons since this construction would not save the law from its over-inclusiveness.

Clearly, NRS 217.007 allows recovery of proceeds from works that include expression both related and unrelated to the crime, imposing a disincentive to engage in public discourse and nonexploitative discussion of it.

Finally, the court considered *sua sponte* whether strict scrutiny is the appropriate standard to apply to analyze a content-based speech restriction. Justice Kennedy addressed this issue in his concurrence in *Simon & Schuster* where he argued that such restrictions should be unconstitutional even if narrowly tailored to serve a compelling interest.

The issue has also been the subject of academic debate. See, e.g., Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Pennsylvania L. Rev. 2417 (1997). While finding this approach “inviting” the court concluded the issue was unnecessary to decide in the case.

Plaintiff was represented by Hardy & Associates and Ian E. Silverberg, Reno. The defendant was represented by Scott N. Freeman and Kenneth E. Lyon III, Reno.

“Girls Gone Wild” Wins Summary Judgment In Arizona Privacy Action

By David Bodney

The Arizona Superior Court recently granted a motion for summary judgment for defendants in an invasion of privacy lawsuit filed by a college student who appeared in two *Girls Gone Wild* videos and related advertisements. *Schindler v. MRA Holdings, LLC*, No. CV2003-000490 (Ariz. Super. Court, Maricopa County, October 15, 2004) (Schwartz, J.). The court’s ruling may be found at <http://www.courtminutes.maricopa.gov/docs/Civil/102004/m1567922.pdf>.

Background

As an 18-year-old college freshman, plaintiff had attended a “*Girls Gone Wild* Party” at a fraternity on the campus of Arizona State University and later at a local nightclub. Throughout the evening, plaintiff drank alcoholic beverages and three times “flashed” on camera, exposing her breasts to a camera operator wearing “*Girls Gone Wild* Staff” attire. Subsequently, plaintiff’s partially-nude image appeared in two videos made available for sale to the public, “*Girls Gone Wild On Campus*” and “*Girls Gone Wild Craziest Frat Parties*,” and in television and internet advertising for *Girls Gone Wild* products.

Plaintiff sued MRA Holdings, LLC and Joseph Francis (collectively, “MRA”), who created the *Girls Gone Wild* videos series. Plaintiff alleged that defendants’ conduct in obtaining videotape of her image and her subsequent appearance in *Girls Gone Wild* videos and advertising constituted, *inter alia*, false light invasion of privacy, commercial appropriation (invasion of the right of publicity), intentional infliction of emotional distress, negligence and negligent supervision. Plaintiff did not sue the entities that had contracted with *Girls Gone Wild* to plan the fraternity party, hire the camera operators or produce the videos and advertisements in which she appeared.

Plaintiff admitted that the videos and advertising showed her actual conduct, but argued that by linking her to *Girls Gone Wild* products and placing the caption “Wild Girl of the Month” with her image on the *Girls Gone Wild* website, defendants attributed to her values or beliefs she did not hold. Plaintiff also argued that MRA’s inclusion of her image in advertising without her consent afforded them a commercial advantage and constituted commercial appropriation. Plaintiff contended further that MRA owed her a duty to su-

perverse the party planners and video camera operators, and that defendants knew or should have known that their conduct was likely to cause her severe emotional distress.

Video Captured True Conduct

After deposing the plaintiff and taking written discovery, MRA moved for summary judgment. Defendants argued that plaintiff’s admission that the videos and advertisements in which she appeared illustrated her actual conduct established that she was *not* placed in a false light. MRA also argued that because plaintiff’s image had no preexisting value -- she was not an actress or celebrity of any sort before her appearance in defendants’ videos -- she could not proceed to trial on her commercial appropriation claim.

Moreover, plaintiff’s repeated agreement to “flash” for the camera constituted consent to the subsequent use of her image. Regarding plaintiff’s negligence claims, defendants contended that they owed her no legal duty. Furthermore, MRA argued that its conduct, which was limited to publishing plaintiff’s already-public actions to a wider audience, was not outrageous, nor did plaintiff suffer severe emotional distress.

The court granted MRA’s motion for summary judgment in full. Significantly, the court held that reasonable jurors could not conclude that the admittedly accurate representation of plaintiff’s conduct at the *Girls Gone Wild* party was false. Accordingly, it could not support her false light invasion of privacy claim.

Plaintiff’s commercial appropriation claim failed on two fronts. First, because the cases defining the commercial appropriation tort in Arizona involve celebrity plaintiffs, and the plaintiff here was not famous, her name or likeness could not be used for commercial advantage. Second, the court recognized that plaintiff consented to the use of her image, because “it is not reasonable to infer that a camera man wearing a *Girls Gone Wild* t-shirt and filming girls at either a fraternity party publicized as a *Girls Gone Wild* party, or at [a nightclub], also an extension of the *Girls Gone Wild* event, would be promising privacy.”

As of this writing, no appeal has been filed.

Defendants were represented by David J. Bodney and Karen J. Hartman of the Phoenix office of Steptoe & Johnson LLP.

Publication of Teen's Spring Break Photo in Penthouse Not Actionable

By Laurence Sutter

On November 10, Chief U.S. Bankruptcy Judge Stuart M. Bernstein granted judgment for *Penthouse*, dismissing a young woman's claim that the publication of her photograph in the magazine was actionable under several theories. *In re General Media, Inc.*, No. 03-15078 (Bankr. S.D.N.Y. 2004) (marked not for publication). The claimant did not appeal.

Background

During Spring break, 2002, 17-year-old Carly Pirrotta and two friends were photographed sitting in a car in their bathing suits. A year later the photo appeared in *Penthouse's* "On The Road" feature in the April 2003 issue with the caption "The pretty maids all in a row." Accompanying copy and pictures described the Daytona Beach Spring Break phenomenon, and the participation of Penthouse Pets in some of the events, one highlighted by a male reveler diving nude into the water to retrieve Penthouse spring break beads.

Ms. Pirrotta filed a claim, ultimately alleging (the claim was unspecified) that the publication was libelous, constituted false light invasion of privacy, and unjustly enriched *Penthouse* by the commercial use of her likeness.

By the time counsel's claim letter reached *Penthouse* it was already under Chapter 11 protection (*In re General Media, Inc., et al., US Bankr. Ct., SDNY, No. 03-15078(SMB)*). The parties agreed to treat debtors' objection as a motion for summary judgment, and also that Florida law governed the case.

False Light & Defamation Claims

Supporting her claims for false light and defamation, Ms. Pirrotta argued that the juxtaposition of the photograph in the article associated her with *Penthouse*-sponsored activities and specifically with public nudity. Another allegedly actionable juxtaposition was the presence, two pages away, of an explicit lesbian photographic feature. "Publication of

my photograph in Penthouse Magazine damaged this reputation [as a person of high moral character and standards] in the eyes of my peers, colleagues, schoolmates and family," noted the court, quoting claimant's affidavit.

Turning first to the false light claim, Judge Bernstein observed that the required harm must not be subjective offensiveness but objective falsity "highly offensive to a reasonable person." He found that the only possible offensive reference in the feature was the nude swimmer, but that person clearly was identified as the only person who did this and did not suggest anyone else "disrobed or behaved inappropriately."

As for the explicit pictorial, alleged to have imputed unchaste behavior to the claimant, Judge Bernstein found that "no objective viewer would associate the Spring Break Feature or Pirrotta's photograph with the pictorial."

Viewing his role in the defamation claim as deciding whether or not "reasonable minds could differ" as to defamatory meaning, Judge Bernstein found that the claim "suffers from the same defect as the false light claim – no reasonable person could infer" that the article and the pictorial implied a false and defamatory statement about the claimant.

Unjust Enrichment / Contract Theories

As to the unjust enrichment/contract claim, Judge Bernstein was confronted at oral argument with competing contentions that the claimant's picture was of value – "otherwise there would be no purpose in placing her photographs in the magazine," as she argued in her brief – and from the debtor, that the picture had no intrinsic economic value.

Judge Bernstein noted that while Pirrotta claimed also that *Penthouse* "made money off the use of the photograph" she "offered no evidence to support these assertions." He rejected the notion that people bought the magazine because of her picture, since neither the cover

The suggestion that anyone whose picture appears in a periodical without consent may have a claim for its value is a troubling one, and should be dispelled by authority on incidental use, newsworthiness and the First Amendment

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Publication of Spring Break Photo in Penthouse Not Actionable

(Continued from page 33)

nor anything else evident put the purchaser on notice of her photograph. Nor was there evidence that word of mouth about Pirotta contributed to sales of the issue.

Judge Bernstein also found a fatal defect in claimant's failure to prove value conferred upon *Penthouse*, adding that "it is a stretch to think that her photograph added any measurable value to the issue." He found, finally, that considerations of equity – in particular, the claimant's lack of expectation of compensation – militated against finding that whatever enrichment there was, was unjust.

The suggestion that anyone whose picture appears in a periodical without consent may have a claim for its value is a troubling one, and should be dispelled by authority on incidental use, newsworthiness and the First Amendment, which may be found in abundance in the New York decisions (along with the well established precedent under NY Civil Rights Law §§ 50-51 that the mere fact that a publication is a for-profit enterprise does not qualify the use as for "purposes of trade").

The *Pirrotta* decision also augments those holding that the mere appearance of a picture or news item in *Penthouse* is insufficient to attribute to its subject the erotic activities depicted elsewhere in the magazine: *Grimsley v. Penthouse Magazine, et al.*, 709 F. Supp. 903 (N.D. Ala. 1988); *Fudge, et al. v. Penthouse International, Ltd. et al.*, 14 Med. L. Rep. 1238 (D.R.I. 1987), *aff'd*, 840 F.2d 1012 (1st Cir.), *cert. denied*, 109 S. Ct. 65 (1988); *see also Faloon v. Hustler Magazine, Inc.*, 607 F. Supp. 1341 (N.D. Tex. 1985), which was cited by Judge Bernstein.

Sanford L. Bohrer, Holland & Knight, Miami, argued for the debtors; Robert J. Feinstein and Beth E. Levine, Pachulski Stang Ziehl Young Jones & Weintraub, New York, were counsel for the debtor. Claimant was represented by Richard K. Slinkman, Slinkman & Slinkman, P. A., West Palm Beach

Laurence Sutter is Vice President and General Counsel of General Media Communications, Inc., a subsidiary of Penthouse Media Group, Inc., and publisher of Penthouse Magazine.

Another Twist in Comic Book Case: Bankruptcy

A comic book publisher ordered to pay a \$15 million verdict for misappropriation has filed for bankruptcy protection. *See In re Todd McFarlane Productions, Inc.*, No. 2-04-BK-21755 (Bankr. D. Ariz. filed Dec. 17, 2004).

Todd McFarlane Productions, Inc. was the sole remaining defendant in *Twist v. TCI Cablevision*, a misappropriation suit by former hockey player Tony Twist over the use of a like-named character in a comic book and cartoon series.

An initial jury verdict of \$24.5 million in July 2000 was vacated in a JNOV, but the Missouri Supreme Court reinstated the claim on appeal. *Twist v. TCI Cablevision*, 110 S.W.3d 363, 31 Media L. Rep. 2025 (Mo. July 29, 2003) (remanding for a new trial), *cert. denied sub. nom. McFarland v. Twist*, 540 U.S. 1106 (2004); *see MediaLawLetter* Aug. 2003 at 7.

The retrial ended with a \$15 million verdict for plaintiff. *Twist v. TCI Cablevision*, No. 972-09415 (Mo. Cir. Ct. St. Louis jury verdict July 9, 2004); *see MLRC MediaLawLetter* July 2004 at 13.

Twist is the largest creditor listed in the bankruptcy filing, followed by another of Todd McFarlane's seven companies. All seven, including Todd McFarlane Productions, will continue to operate during the bankruptcy proceeding.

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Florida Teacher's False Light Claim Dismissed

By Charles D. Tobin

A Tallahassee television station did not portray a teacher in a false light by incorporating footage showing her teaching into a story about students who failed standardized tests, a state circuit court judge has ruled. *Jones-Wilborn v. WCTV*, No. 04-232-CAA (Fla. Cir. Ct. Nov. 30, 2004) (Reynolds, J.).

The judge also ruled on November 30 that Tanya Jones-Wilborn, a middle school teacher in Gadsden County, Florida, failed to overcome the station's summary judgment motion with an affidavit in which she attested that she saw the broadcast and "do[es] not think" the script produced by the station in discovery accurately reflects the broadcast.

Background

Jones-Wilborn sued WCTV, a Gray Television station, over a May 2002 story about poor test scores in her county on the Florida Comprehensive Achievement Test ("FCAT"), a standardized test given to middle schoolers. The 50-second voiceover reported that parents were upset to learn that, despite receiving passing scores in their classes, those students who failed the FCAT were going to be held back a grade.

The story included footage of students milling about in front of a building and a brief interview with an angry parent and her son who had failed the test. The voiceover announced an upcoming school board meeting to discuss the parents' concerns.

The footage also included two six-second segments showing Jones-Wilborn teaching in front of a class. She was not mentioned in the voiceover, nor did the broadcast make any reference to teaching, teachers, or the ostensible reason for the failed FCAT scores.

False Light Claim

In her lawsuit, Jones-Wilborn alleged the images of her were taken from a "positive, unrelated" story that she voluntarily participated in a year earlier. She complained that she had not given the station permission to reuse the clips. She also alleged that by incorporating it into the later story, WCTV falsely made it appear as if she were responsible for the students' failures on the FCAT. She claimed that she received numerous negative comments after the broadcast and that the school district changed her job duties as a result.

State court judge George Reynolds, III, however, agreed with the station that the broadcast truthfully portrayed Jones-Wilborn in an accurate setting, teaching in front of a class. He observed that none of the words in the broadcast tied her to the failed FCAT scores. "I think it is clear it is background footage," the judge said in holding that, as a matter of law, the station did not portray the teacher in a false light.

Judge Reynolds specifically rejected two arguments Jones-Wilborn advanced, supported by her affidavit in opposition to summary judgment:

- Like many stations, WCTV does not retain aircheck tapes of broadcasts long-term and did not have a tape of the broadcast two years later, when Jones-Wilborn sued. The station submitted an affidavit authenticating the broadcast's script and its archive tape of the images that were shown as the script was read on the air. Jones-Wilborn challenged the authenticity of the script by attesting that she saw the original broadcast, and alleging in her affidavit that "I do not think" the script accurately reflects what was said on the air. Judge Reynolds agreed with the station that this testimony, especially in the absence of any statement about what Jones-Wilborn alleges actually was said, is insufficient to create a dispute of fact.
- Jones-Wilborn also alleged that she called the station immediately after the broadcast and asked to buy a copy of the aircheck tape. She said that when she identified herself as someone who had been portrayed in the broadcast, the station told her she could not buy the tape. Her lawyer argued that because the aircheck tape was recycled after this conversation, Jones-Wilborn was entitled to an inference that it contained information adverse to the station. Judge Reynolds disagreed, holding that a routine inquiry about buying a tape, without more, did not put the station on sufficient notice of a legal claim to warrant the adverse inference.

Jones-Wilborn is still within her window to appeal the summary judgment awarded to WCTV. She is represented by Brian C. Keri of Tallahassee.

Charles D. Tobin and Roxan A. Kerr, with Holland & Knight LLP in Washington, D.C., represented WCTV in this matter, along with George D. Gabel, Jr. and Jennifer A. Mansfield of the firm's Jacksonville, FL office.

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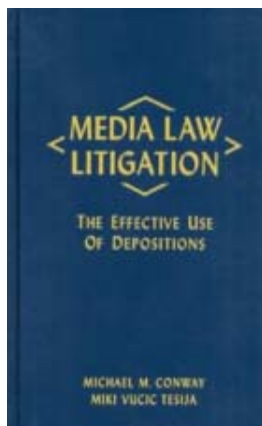
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***Media Law Litigation:
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A new media litigation practice book was published this month focusing on taking depositions in libel and privacy cases.

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Creating Defamation by Making Connections Between Unrelated Words and Phrases

By Shelby Sharpe

In *The Local Church, et al. v. Harvest House Publishers, John Ankerberg, and John Weldon*, currently pending in state district court in Houston, Texas, the plaintiffs have asserted that the mere presence of potentially defamatory language that appears in a few isolated, general statements in the introduction and appendix of a book have created a “tone and tenor” that defames everyone in the book, including the plaintiffs, and thus attributes deplorable and criminal conduct to the groups in the book.

More specifically, the plaintiffs state: “The introduction...includes many other statements attributing misdeeds and other approbations to the groups listed in the *Encyclopedia*,” and “...a section entitled ‘Doctrinal Appendix’.... attacks the groups included in the *Encyclopedia*, including the Plaintiffs....”

The authors and publisher have responded by pointing out that: 1) none of the allegedly defamatory language mentions the plaintiffs and 2) none of the language at issue points to the plaintiffs. The authors and publisher have also argued that when the language of the book is considered in its true context and in the light of how it would be understood by a reader of ordinary intelligence, it is not legally capable of being defamatory in regard to the plaintiffs or any of the groups in the book.

Background

The plaintiffs are comprised of The Local Church (an unincorporated California association), 96 individual Local Churches, and its publishing arm Living Stream Ministry. At issue is a brief 1¼-page entry titled “The Local Church” that appears in a 731-page book titled *Encyclopedia of Cults and New Religions*, published by Harvest House Publishers and authored by Dr. John Ankerberg and Dr. John Weldon.

In the 1¼-page entry on The Local Church, which makes no mention of the individual Local Churches, the authors present several strictly theological comments about the plaintiffs, with no word about conduct or behavior. The plaintiffs’ petition alleges a single cause of action for libel, and does *not* contend that the encyclopedia entry on The

Local Church is libelous, but rather, that the “tone and tenor” of a small number of words that appear in the introduction and appendix of the book have defamed the plaintiffs.

The case is still pending in the 80th Judicial District Court of Harris County, Texas (No. 2001-65993), where two motions for summary judgment were put forward by the defendants, both of which were denied without explanation by Judge Kent Sullivan. The publisher and authors have since filed an interlocutory appeal of the denial of summary judgment, which is now before the Houston First District Court of Appeals (No. 01-04-00231-CV).

Key Facts in the Case

The publisher and authors, in their motions and briefs, have pointed out that the plaintiffs are never named anywhere in the introduction of the *Encyclopedia*, and that none of the supposedly libelous language in the introduction or appendix names any of the plaintiffs. The publisher and authors also assert that none of the language at issue was intended to be generalized as applying to the plaintiffs or to any of the groups in the book. Moreover, the mention of The Local Church or Living Stream Ministry does not appear any closer than 19 pages in proximity to any of the allegedly defamatory language.

At the heart of the plaintiffs’ complaint is an allegation regarding a portion of the *Encyclopedia*’s introduction that contains some text describing 12 general characteristics of a “perfect cult.” According to the plaintiffs, “the introduction offers the reader a numbered list of negative attributes that the authors attribute to the ‘cults’ described in the text.”

The publisher and authors have responded by pointing out that the list of 12 characteristics is preceded by very clear language that states “not all the groups have all the characteristics”—thereby communicating that the only way a reader can find out which characteristics any one group possesses is to examine the individual entry on that group within the *Encyclopedia* itself.

The plaintiffs, in their original petition to the court, assert that among the “characteristics of cults” are rape, murder, child molestation, drug smuggling, and other abhorrent crimes. The *Encyclopedia*’s introduction, however, specifi-

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Creating Defamation by Making Connections Between Unrelated Words and Phrases

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cally states the authors would present “a dozen” characteristics, which are explicitly numbered 1 through 12. The words “rape,” “murder,” “child molestation,” and “drug smuggling” do not appear at all in the list of 12 characteristics. Rather, they are found in a rhetorical question that arises a distant 84 lines *after* the list of characteristics has concluded—meaning they are not *among* the authors’ “characteristics of cults.”

Elsewhere in their petition, the plaintiffs assert that “the groups in the book” are said to “engage” in “murder” and “child sacrifice.” These words appear on page 714, in the *Encyclopedia’s* appendix.

Yet page 713 sets the context for “murder” and “child sacrifice” by attributing this conduct to “fallen angels,” and not to the religious groups in the book. The publisher and authors argue that when context and language are considered, “murder” and “child sacrifice” can *only* refer to “fallen angels,” and not to the plaintiffs or any of the groups in the book.

It is in this manner that the plaintiffs have alleged defamation, by attempting to create connections between a small number of isolated and unrelated words (found in the introduction and appendix) and the *Encyclopedia’s* brief entry on The Local Church.

The publisher and authors, in their documents presented to both the trial and appellate courts, have provided a standard grammatical analysis of every word and phrase in the *Encyclopedia’s* introduction and appendix that, according to the plaintiffs, is defamatory. The analysis reasons that when the language at issue is considered in context it is not capable of being defamatory.

Subjective Interpretation vs. Objective Determination

The plaintiffs have sought support for their claims of defamation through the presentation of testimonies from expert and lay witnesses who aver they interpret the front and back matter of the *Encyclopedia* as having defamed the plaintiffs.

One of the expert witness reports states, “My analysis of the text of introductory and closing material of the *Encyclopedia* shows that its language *predisposes* readers to understand the groups referred to in the volume’s entries in particular, negative ways. Because the Local Church is among the groups to which an entry is devoted, the claims made about cults in the introduction and closing materials *can be assumed* to apply to them by what we *might* term a *process of inheritance*” (emphases added).

The publisher and authors have responded by pointing out that, according to *Lawrence v. Evans*, 573 So.2d 695,

698 (Miss. 1990), which is consistent with Texas decisions, “The defamation must be *unmistakable from the words* and not be the product of innuendo, speculation or conjecture.... If the reader must struggle to see how and

whether they defame, by definition the words are not defamatory in law” (emphasis added).

Every question of law—which would include determining whether or not language is capable of a defamatory meaning—is to be made by the court without “expert or non-expert” testimony, per the Texas Supreme Court’s ruling in *Lindley v. Lindley*, 384 S.W.2d 676, 682 (Tex. 1964). Both the First and Fourteenth Courts of Appeals in Houston have held to this same rule of law in *Schauer*, 856 S.W.2d at 451; *Lyondell Petro-Chemical Company v. Daniel*, 888 S.W.2d 547, 555 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Commonwealth Land Title Ins. Co. v. Nelson*, 889 S.W.2d 312, 322 (Tex. App.—Houston [14th Dist.], writ denied). In order to determine whether or not language is “reasonably capable of a defamatory meaning,” the “initial question” is one “of law to be decided by the trial court.” *Musser v. Smith Protective Services*, 723 S.W.2d 653, 654 (Tex. 1987).

The publisher and authors have also observed that even though a court must use the standard of “how a person of ordinary intelligence would perceive the entire statement,” according to *Musser*, it is still the court that “construes the statement” and “determines the language,”

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Plaintiffs have alleged defamation, by attempting to create connections between a small number of isolated and unrelated words (found in the introduction and appendix) and the Encyclopedia’s brief entry on The Local Church.

Creating Defamation by Making Connections Between Unrelated Words and Phrases

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not a witness. *Musser*, 723 S.W.2d at 655. Also, “The opinion of the parties has no bearing on whether the complained of words are actually defamatory.” *Id.* at 58.

Threat to Freedom of Speech

The publisher and authors have submitted affidavits contending that the allegedly defamatory language does not point to The Local Churches, and that there was never any intention for it to do so. They have also argued that to allow expert or lay testimony to determine what is defamatory and what isn’t, and to allow any party to impose its own interpretation upon any given piece of text, is to allow subjective assertions to replace objective determinations in the resolution of defamation lawsuits and would greatly inhibit First Amendment freedoms.

It would also expose writers to a frighteningly high risk of unsubstantiated, frivolous libel suits.

As noted earlier, the plaintiffs assert that the testimonies of their expert and lay witnesses are admissible as evidence that the language at issue is defamatory. Their argument, however, is contrary to very recent Texas Supreme Court authority in the libel case *New Times v. Isaacks*, 47 Tex. Sup. Ct. J 1140, which was handed down on September 3, 2004.

In the *New Times* opinion, several crucial points were made: “Whether a publication is capable of a defamatory meaning is initially a question for the court.” *Id.* at 1146. The “inquiry is objective, not subjective” and it does not matter “whether some actual readers were misled, as they inevitably will be, but whether the hypothetical reasonable reader could be.” *Id.* at 1148. Offering the “declarations of a few people” who state they understood the communication a certain way “does not raise a question of fact as to the average reader.” *Id.* at 1148.

Also, the *New Times* opinion states that a reasonable reader will observe “clues” in the material while interpreting it in context. 47 Tex. Sup. Ct. J. at 1149. The defendants, in their linguistic analysis of the language at issue in the *Encyclopedia of Cults and New Religions*, explained the many grammatical clues that prevent readers from interpreting the allegedly defamatory portions as pointing to The Local Church.

New Times also declares that “a court cannot impose civil liability based on the subjective interpretation of a reader who has formed an opinion” about the material at issue “after reading a sentence or two out of context” because “that person is not an objective reasonable reader.” *Id.* at 1149. *New Times* adds that “[t]he reasonable person has some feel for the nuances of law and language” and “would not consider...clues [in the writing] in isolation, but would consider each signal as part of the larger determination.” *Id.* at 1149.

The publisher and authors contend that if the court were to affirm that the mere presence of potentially defamatory language anywhere in a document does indeed defame a party mentioned elsewhere in that same document even though no connection can be made using ordinary rules of grammar and word usage, nor was intended to be made between the two, then the court would be creating a “totally unacceptable vulnerability to all publishers.” No writer or publisher, the publisher and authors conclude, would be able to produce a responsible, critical analysis on any subject matter without the fear that readers would allege a connection between two unrelated statements and link them together in an unsubstantiated manner in an attempt to create defamation.

Shelby Sharpe of Sharpe & Tillman, Fort Worth, Texas is the lead counsel representing Harvest House Publishers, John Ankerberg, and John Weldon. Barry B. Langberg of Stroock & Stroock & Lavan, Los Angeles, California is the lead counsel representing The Local Church, et al.

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Supreme Court to Review Grokster Case on Contributory Liability of File-Sharing Services

By Charles Sims

Entering the thicket of secondary liability for copyright infringement in the digital age, the Supreme Court agreed on December 10 to review a Ninth Circuit decision holding that file sharing services are not liable for copyright infringement. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154 (9th Cir. 2004), cert. granted, (No. 04-480).

Petitioners are the major motion picture studios, recording companies, and other copyright owners, including composers of popular songs. A wide array of copyright owners and those opposed to massive unchecked infringement urged the Court to review the case, including forty-five states; such artists as The Eagles, Brooks & Dunn, The Dixie Chicks, Bonnie Raitt, Sheryl Crow, Babyface, and The Grateful Dead!; Major League Baseball and the National Basketball Association; and numerous associations of copyright owners in various fields, such as the American Society Of Media Photographers, Professional Photographers Of America, Directors Guild Of America, Writers Guild Of America (West), Screen Actors Guild, Association Of American Publishers, and the Association Of American University Presses; the American Federation of Television and Radio Artists, the American Federation of Musicians of the United States and Canada, The Country Music Association, Inc., The Gospel Music Association, the Hip-Hop Summit Action Network, Jazz Alliance International, Inc., and the Rhythm & Blues Foundation.

Only one *amicus* brief was filed in opposition to review – by the computer industry association and the Internet Archive. The cert. petition and the supporting and opposing briefs are available at http://www.eff.org/IP/P2P/MGM_v_Grokster.

The question that the Court will review is whether the Ninth Circuit erred in holding, in conflict with Judge Posner's decision in *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003), that "the Internet-based 'file sharing' services Grokster and StreamCast should be immunized from copyright liability for the millions of daily acts of copyright infringement that occur on their ser-

vices and constitute at least 90% of the total use of the services."

Representing Grokster and Streamcast, the Electronic Frontier Foundation had urged the Court not to review the decision because it should be up to congress to depart, if at all, from the "staple article of commerce" rule that those manufacturing or distributing "staple articles of commerce" are not secondarily liable if the product in question "is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be capable of substantial non-infringing uses." See *Sony v. Universal Studios* 464 U.S. 417 (1984) (the "Sony-Betamax" decision).

The studios and recording companies, on the other hand, urged that secondary liability rules have historically been devised by the courts, and that the *Betamax* rule applied to manufactured items, not software programs devised to be used, and overwhelmingly used, for infringement.

They pointed to Judge Posner's decision affirming the preliminary injunction against Aimster, which held that, in assessing whether a file-sharing service is contributorily liable, the court should look at not only whether the software *could be* used for non-infringing purposes, but at whether it actually is being so used, as well as whether the business models of the defendants are in fact based on such infringing use, and whether defendants would have been capable, at the outset, in deterring or preventing infringing uses had they chosen to do so.

The copyright owners advised the Court that the Ninth Circuit radically rewrote the law of secondary copyright liability, "turning it into a blueprint for exploitation that perversely discourages on-line distributors from respecting the intellectual property of others, threatens legitimate on-line innovators, and breeds a culture of contempt for the rights of copyright owners," and that nothing in *Sony-Betamax* supports such a result.

The argument is expected in March or April, and a decision should be rendered by the end of June.

Charles Sims is a partner at Proskauer Rose in New York.

Federal Courts of Appeal Analyze Scope of DMCA

In two recent important decisions, federal courts of appeal have rejected attempts by product manufacturers to use the Digital Millennium Copyright Act (“DMCA”) against competitors who manufacture replacement parts. *Lexmark International Inc. v. Static Control Components, Inc.*, 387 F.3d 522 (6th Cir. 2004); *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381 F.3d 1178 (Fed. Cir. 2004).

The decisions emphasize that the DMCA was intended to prevent pirating of copyrighted digital media works, such as movies, music and computer programs. And they put a brake on manufacturers’ efforts to use the DMCA to create copyright protection for products and parts that use computer program lock-out codes.

Lexmark v. Static Control

The plaintiff in *Lexmark* is a manufacturer of printers and printer toner cartridges. Its toner cartridges are outfitted with a microchip containing a “Toner Loading Program,” a computer program which measures the amount of toner remaining in the cartridge. The program “uses an ‘authentication sequence’ that performs a ‘secret handshake’ between each Lexmark printer and ... Lexmark toner cartridge If the two values do not match, the printer returns an error message and will not operate, blocking consumers from using toner cartridges that Lexmark has not authorized.”

Each Lexmark printer is additionally furnished with plaintiff’s “Printer Engine Program.” After the authentication sequence concludes, the Printer Engine Program downloads a copy of the Toner Loading program from the cartridge’s microchip into the printer. If calculations performed after the data is downloaded results in data that does not match information stored on the microchip, the printer will not function.

Defendant Static Control Components (“SCC”) manufactures the “SMARTEK” microchip, which “permits consumers to satisfy Lexmark’s authentication sequence” and is sold to “third-party cartridge remanufacturers, permitting them to replace Lexmark’s chip with the SMARTEK chip on refurbished Prebate cartridges.”

The refurbished cartridges are a low-cost alternative to the Lexmark toner cartridges. To be compatible with Lex-

mark printers, each SMARTEK chip contains a copy of the Toner Loading Program.

Lexmark claimed that defendant’s inclusion of the Toner Loading Program on the SMARTEK chip amounted to copyright infringement. Additionally, it alleged that “SCC’s SMARTEK chip is a ‘device’ marketed and sold by SCC that ‘circumvents’ Lexmark’s ‘technological measure’ [the authentication sequence] ... which ‘effectively controls access’ to its copyrighted works (the Toner Loading Program and the Printer Engine Program)” in violation of the DMCA.

The district court agreed and entered a preliminary injunction against the defendant. *See* 253 F. Supp. 2d 943 (E.D. Ky. 2003). It found that Lexmark had established a likelihood of success on its copyright infringement and DMCA claims because its SMARTEK chip “circumvented” Lexmark’s authentication sequence and enabled consumers to access or “make use of” plaintiff’s copyrighted Printer Engine Program.

Digital Millennium Copyright Act

In relevant part, the DMCA, 17 U.S.C. § 1201, provides:

- (a) Violations regarding circumvention of technological measures.
 - (1) No person shall circumvent a technological measure that effectively controls access to a work protected under this title. . . .
 - (2) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that --
 - (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;
 - (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or

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Federal Courts of Appeal Analyze Scope of DMCA

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- (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.
- (3) As used in this subsection –
- (A) to “circumvent a technological measure” means to descramble a scrambled work, to decrypt an encrypted work, to otherwise avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; . . .

Sixth Circuit Decision

In a decision written by Judge Sutton, with Judge Merritt concurring, and Judge Feikens in partial dissent, the Sixth Circuit reversed. The court first held that the Toner Loading Program was not sufficiently original to even qualify for copyright protection since it essentially functioned as a simple lock-out code. Second, the SMARTEK chip did not violate the DMCA even though it made use of Lexmark's Printer Engine Program which enjoys copyright protection.

In entering the preliminary injunction, the district court had found that by “circumventing” the authentication sequence, defendant enabled consumers to access or “make use of” plaintiff's copyrighted Printer Engine Program. The Sixth Circuit disagreed, finding that it was not the authentication sequence that “controls access” to the Printer Engine Program, but instead the consumer's purchase of the Lexmark printer.

In his separate concurrence, Judge Merritt emphasized that:

our holding should not be limited to the narrow facts surrounding either the Toner Loading Program or the Printer Engine Program. We should make clear that in the future companies like Lexmark cannot use the DMCA in conjunction with copyright law to create monopolies of manufactured goods for themselves just by tweaking the facts of this case... If we were to adopt Lexmark's reading of the statute, manufacturers could potentially create monopo-

lies for replacement parts simply by using similar, but more creative, lock-out codes. Automobile manufacturers, for example, could control the entire market of replacement parts for their vehicles by including lock-out chips. Congress did not intend to allow the DMCA to be used offensively in this manner, but rather only sought to reach those who circumvented protective measures “for the purpose” of pirating works protected by the copyright statute.

Chamberlain v. Skylink

In *Chamberlain v. Skylink*, the Federal Circuit Court of Appeals applied similar reasoning in a claim against the manufacturer of a “universal” garage door opener.

The plaintiff manufactured garage door openers that used a copyrighted “rolling code” security software program to change the transmitter signals that would activate the garage door. Defendant began marketing a “universal transmitter” that could be programmed to work with other garage door opening systems, including plaintiff's.

Plaintiff sued alleging that under the plain language of the DMCA defendant was “circumventing” its rolling code technological measure to access its copyrighted computer programs.

The district court granted summary judgment in favor of defendant. *See* 292 F. Supp. 2d 1040 (N.D. Ill. 2003). The court found that plaintiff's customers had implicit authority to use any brand of transmitter to open their garage doors since copyright law allows them to use the copy of plaintiff's software embedded in the garage door opener they purchased.

Federal Appeals Court Decision

The Federal Court of Appeals affirmed in a decision written by Judge Gajarsa, and joined by Judges Linn and Prost. The DMCA introduced “new grounds for liability in the context of the unauthorized access of copyrighted material,” but it does not grant a plaintiff any new property rights.

Thus, plaintiff was subject to the presumption under existing copyright law that a consumer who purchased the plaintiff's system was authorized to use the copy of plain-

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Federal Courts of Appeal Analyze Scope of DMCA

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tiff's software embedded in the product the consumer purchased.

The court explained that plaintiff's:

“proposed construction would allow any manufacturer of any product to add a single copyrighted sentence or software fragment to its product, wrap the copyrighted material in a trivial ‘encryption’ scheme, and thereby gain the right to restrict consumers’ rights to use its products in conjunction with competing products. In other words, Chamberlain’s construction of the DMCA would allow virtually any company to attempt to

leverage its sales into aftermarket monopolies – a practice that both the antitrust laws and the doctrine of copyright misuse normally prohibit.

Chamberlain was represented by Karl R. Fink, of Fitch, Even, Tabin & Flannery, in Chicago. Skylink was represented by Richard de Bodo, Irell & Manella LLP, Los Angeles. Lexmark was represented by Christopher J. Renk, Banner & Witcoff, Chicago. Static Control was represented by Seth D. Greenstein, McDermott, Will & Emery, Washington, DC and W. Craig Robertson III, and E. Christine Lewis, Wyatt, Tarrant & Combs, Lexington, Kentucky.

Available in January 2005

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Contempt Ruling Against Canadian Reporter

By Brian MacLeod Rogers and Melissa Kluger

An Ontario Superior Court judge has found a reporter in contempt of court for refusing to answer a question that would reveal a confidential source and penalized the reporter \$31,600 (Cd) for costs “thrown away” by the parties in the civil trial over which the judge was presiding.

This is the highest penalty ever awarded against the media for contempt of court in Canada and is the first time in decades that a reporter has been found in contempt for refusing to answer a question in court over a confidential source. An appeal is being launched.

In fact, by the time the contempt hearing was held, the identity of the source had already been revealed. The source had stepped forward to testify and had released the reporter, Ken Peters of *The Hamilton Spectator*, from his obligation to maintain confidentiality. While he considered these developments to be “mitigating factors”, Mr. Justice David Crane was extremely critical of what he termed the “oppressive” culture of the newsroom that forces journalists “to break the law and endure the punishment” or face “never again be[ing] employed in a newsroom.”

Background

The issue arose at the end of the plaintiff’s case at trial in a civil action brought by a retirement home against the local municipality alleging abusive conduct and defamation. Ten years ago, the municipality had imposed orders to comply and a regime of inspections at the home located in Hamilton, Ontario; these steps followed a damning report by a consultant hired by the home to look into allegations that had been made by former employees.

The municipal officer of health also sought a coroner’s investigation into a high rate of mortality at the home. The whole matter had been treated as confidential for months and had been discussed at an in-camera meeting of a municipal council committee. Then, in April 1995 a confidential source turned over some of the documents about the matter to Mr. Peters, an experienced city hall reporter for the *Spectator*.

Major coverage in the newspaper soon followed, and a lengthy coroner’s inquest was eventually held resulting in recommendations critical of the home. As finally revealed last month, the source was a local alderman, who had been on the committee and handed over the documents in the presence of another alderman at City Hall. He said he was very disturbed by the allegations about the home and made the usual request, “You didn’t get them from me”, which the reporter accepted after reviewing the documents and establishing their importance and public interest.

The action by the retirement home was started in 1997 but only reached trial last Spring. By the time Mr. Peters was subpoenaed to testify, the plaintiff had taken some 60 days to put in its evidence and was at the end of its case. The home sought to show that the orders to comply should never have been issued and that any problems at the home were under control but city staff failed to apprise council members of this.

What really caused its damages, the home alleged, was publication of the erroneous confidential information in the media. To establish liability, the home sought to show that the municipality was responsible for the leak that triggered the damaging coverage. Therefore, the nature of the confidential documents and the identity of Mr. Peters’ source were found by the judge to be critical elements for the plaintiff’s case.

Motion to Quash Denied

On November 15, a motion was brought on behalf of the newspaper and reporter to quash the subpoena or, alternatively, limit the scope for questioning. The judge required Mr. Peters to testify but delimited areas for questioning; he specifically reserved his decision on whether the reporter’s confidential source had to be identified.

Accordingly, Mr. Peters took the stand and soon revealed there had been two persons present when the undertaking of confidentiality had been made. The judge ruled that the identity of the second person should be disclosed by Mr. Peters because he had not made any under-

This is the first time in decades that a reporter has been found in contempt for refusing to answer a question in court over a confidential source.

Contempt Ruling Against Canadian Reporter

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taking of confidentiality to that person. However, the reporter declined to answer on the basis that naming the second person “would have the effect of identifying” his source and put him in breach of his undertaking. However, the judge directed him to answer and immediately cited him for contempt when he refused. The contempt hearing was then scheduled to take place before the same judge in a week’s time.

Before the hearing could take place, a current municipal councillor went public with an allegation he knew one of those present when the confidential documents were handed over. In court, he named a former alderman, and soon the two former aldermen present when Mr. Peters was given the confidential documents were subpoenaed to testify.

The source renounced any further claim of confidentiality and described in court the entire event and his motivation for turning over the documents. As well, the source had already been contacted by Mr. Peters to discuss whether he still wished the confidentiality that had been promised nearly ten years ago. By the time of the contempt hearing, which had been adjourned to permit the evidence of the former aldermen, all had been revealed, and both had specifically released Mr. Peters from his commitment.

In view of this, the judge determined to proceed with a civil, not criminal, contempt hearing so that Mr. Peters would not end up with a criminal record. The contempt hearing took more than a day, and testimony was heard from Mr. Peters, *Spectator* editor-in-chief Dana Robbins (who had been city editor for the original coverage) and Vince Carlin, former chair of the Ryerson University School of Journalism and news media veteran.

Judge Finds Reporter in Contempt

None of the parties in the civil action sought a finding of contempt and refrained from making submissions. However, within minutes of closing arguments by Mr. Peters’ counsel, the Judge pulled out written reasons that he read out to the court. These included the following:

Society is about limits and citizenship is about subjecting ourselves to the law...It is my finding that Mr. Peters’ undertaking had a limit in law. When he was required to answer by the court, he had reached that limit...

Based on the evidence of this hearing, I am obliged to conclude that those who are in the business of selling “the news” employ journalists to search out newsworthy information using as one means, the undertakings of confidentiality to sources.

The evidence of Mr. Robbins and of Professor Carlin is that there is a culture of the newsroom, that is the employer’s place of employment, that the undertaking to a source is personal to the journalist in the service of which that journalist, at the limits, is to break the law and endure the punishment.

It is all very well for the employer and the educator to say that the protection of a source is a matter for the individual conscience of the journalist, when they also say any journalist that has revealed the source will never again be employed in a newsroom.

The oppressive nature of this culture on the individual has been the cause of the very real turmoil that Mr. Peters has been in for the last two weeks. The pressures on him have been enormous. ...

I conclude from my earlier reasons that Mr. Peters was a pawn in a much larger game. This court has sympathy for Mr. Peters in his dilemma, which is an ethical one, as he sees it. He has suffered in anguish between the court and what he has been told is the role of a journalist.

The judge noted that in refusing to answer the question, Mr. Peters may have relied on the fact that the court had not yet ruled on whether it would be necessary to identify the confidential source; he found this was a mitigating factor. However, the judge made no mention of submissions made about the need for a reporter in these circumstances to be given an opportunity to discuss the matter with his source after the court has found disclosure is necessary.

Such an opportunity would help determine whether there might be some means of reconciling the rights in conflict – the protection of the source on the one hand and the administration of justice’s interest in all evidence ruled necessary for a civil trial on the other. Indeed, from the judge’s point of view, once he had ruled that the question should be answered, any refusal would amount to contempt, even without any time to appeal the issue.

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Contempt Ruling Against Canadian Reporter

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However, the various mitigating factors were relied on by the court to determine that no imprisonment or fine would be imposed, as permitted even for civil contempt. Instead, the court evaluated the costs of the parties that would not have been incurred but for the contempt. He substantially moderated the claims made by the parties but still awarded \$31,600.00. The *Spectator*, which supported Mr. Peters throughout, made it clear that it would pay the monetary penalty.

The judge's approach contrasts sharply with that of fellow Superior Court judge, Madam Justice Mary Lou Bennett, in *R. v. National Post*, [2004] O.J. No. 178, where she quashed a police search warrant and assistance order to obtain evidence from a reporter of his confidential source. The judge found that:

To compel a journalist to break a promise of confidentiality would do serious harm to the constitutionally entrenched right of the media to gather and disseminate information. ... Insofar as the documents may reveal the confidential identity of a source, they are privileged.

Outside court, both Mr. Peters and the *Spectator* rejected the following recommendation by the judge:

In my view, the most salutary consequence of this hearing would be a directive by the *Spectator* to its employees, that all undertakings of confidentiality to sources are to contain the condition that the journalist will protect the anonymity of the source to the full extent of the law. Or, put another way, that the journalist's undertaking will be to exert all lawful means to protect the confidence.

Editor Dana Robbins responded in a column: "When sources request anonymity, they do so for a reason; they are looking for a promise of absolute protection, not one with a best-before date."

Instructions to appeal have been given. Numerous media and journalists' associations expressed alarm at the judge's ruling and have indicated they may seek to intervene on the appeal.

Brian MacLeod Rogers and Melissa Kluger represented Ken Peters and The Hamilton Spectator in the case.

British MP Wins Libel Trial Against Telegraph Newspaper

George Galloway, a controversial left-wing member of the British Parliament, won a £150,000 bench trial verdict on his libel claims against the *Daily Telegraph* newspaper over a series of articles and editorials that claimed Galloway had been receiving secret payments from Saddam Hussein. *Galloway v. Telegraph Group Ltd.*, [2004] EWHC 2786 (High Court Dec. 2, 2004).

The articles published in April 2003 were based on documents discovered by a *Telegraph* reporter in the Iraqi foreign ministry in Baghdad. They appeared to show that Galloway had been receiving £375,000 annually from Iraq, had obtained lucrative oil-for-food program contracts and was using a charity he established for personal gain.

The articles reported on the content of the documents and also reported that Galloway denied their authenticity and denied that he had taken money from Saddam Hussein. But the paper also published an editorial on the subject headlined "Saddam's little helper," which included the remark that "there is a word for taking money from enemy regimes: treason."

The case was tried without a jury to High Court Justice Mr. Eady. The newspaper did not attempt to prove that the allegations against Galloway were true, but argued that they were privileged.

In a lengthy opinion Mr. Justice Eady ruled that the articles were not entitled to the protection of the *Reynolds* privilege, but instead constituted an irresponsible "rush to judgment." He faulted the newspaper for not giving Galloway more time to review and respond to all the charges made by the paper and for not taking steps to verify the documents. He concluded that the paper was under no social or moral duty to report the allegations against Galloway.

MLRC will publish a more detailed report on the case next month.

Galloway was represented by barristers Richard Rampton QC and Heather Rogers and the firm Davenport Lyons. The *Daily Telegraph* was represented by barristers James Price QC and Matthew Nicklin and the firm Dechert.

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A New Era of Broadcast Content Regulation?

By Jerrienne Timmerman

On Veteran's Day this year, ABC aired, unedited, Steven Spielberg's Academy Award winning motion picture *Saving Private Ryan* – as the network had done on Veteran's Day in 2001 and 2002. However, the earlier airings occurred before the brouhaha over Janet Jackson's Superbowl wardrobe malfunction and the crackdown on perceived "indecent" by the Federal Communications Commission and Congress.

This year, 66 ABC affiliates preempted *Ryan* due to well-grounded fears that the film's strong language (including multiple uses of the f-word) would generate viewer complaints, an FCC investigation, and fines for airing indecent programming – and consequently even difficulties at license renewal time.

This article summarizes the resurgence in the regulation of broadcast content by the FCC and by Congress. Although the increased restrictions on allegedly indecent broadcast programming have received the most attention, the government has also unfortunately showed renewed interest in restricting violent content on television.

Beyond regulating these types of disfavored broadcast content, the FCC is also actively considering ways to "encourage" (or force) broadcasters to air a range of "good for you" programming, such as locally produced, public affairs, and political/electoral programming. Indeed, in its most recent order regulating broadcast content, the FCC has even come perilously close to regulating content on the Internet.

Indecency: Does the FCC Know It When It Sees It?

As everyone in the media business must be aware, the past year has seen a significant crackdown on allegedly indecent broadcast programming. In 2004, Congress considered legislation that, among other things, would have drastically increased the fines for airing indecent programming, up to \$500,000 per violation; mandated license revocation proceedings for stations with three or more indecency violations; and made it easier for the FCC to fine persons, including performers, who are not licensees but who utter indecent material aired on a station.

The House and Senate passed differing versions of this legislation in 2004, and the legislation will be reintroduced in the new Congress in 2005.

Even without congressional action, the FCC in 2004 imposed record fines on radio and television stations for airing indecent material.

The FCC, *inter alia*, has (1) increased the amounts of indecency forfeitures by routinely imposing the existing statutory maximum for indecency violations (raised from \$27,500 to \$32,500 to reflect inflation in June 2004); (2) imposed fines for each utterance of indecent material within a single program, thereby greatly further increasing the potential liability of broadcasters; (3) warned licensees that it may begin license revocation proceedings for serious indecency violations; (4) broadened indecency investigations to cover not just the station that is the subject of a public complaint but also co-owned stations that

The FCC in 2004 imposed record fines on radio and television stations for airing indecent material.

broadcast the same potentially indecent material; and (5) effectively increased the burden on licensees to be able to disprove allegations of indecency made by members of the public.

Purportedly to make its indecency enforcement more effective, the agency has also proposed to require all radio and television stations in the country – even noncommercial educational or religious ones – to make and retain, perhaps for months, recordings of all their programming. *See Notice of Proposed Rulemaking, Retention by Broadcasters of Program Recordings*, FCC 04-145 (July 7, 2004).

Hundreds of broadcast stations opposed this proposed recording mandate as unnecessary, vastly overbroad and burdensome (especially on smaller and noncommercial broadcasters and multicasting stations), as well as constitutionally suspect. *See Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (court invalidated provisions requiring noncommercial educational radio and television stations that receive federal funding to make audio recordings of all broadcasts in which any issue of public importance is discussed, and to retain those audio recordings for 60 days).

Most significantly, the FCC has also altered its interpretation of the indecency rules so that material previously thought acceptable may now be regarded as indecent or profane. According to the FCC's long-standing definition, material is indecent if, in context, it describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activi-

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A New Era of Broadcast Content Regulation?

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ties or organs. See *FCC v. Pacifica Foundation*, 438 U.S. 726, 732 (1978).

In considering whether material is indecent, the FCC has traditionally considered the following factors:

- (1) the explicitness or graphic nature of the description or depiction of sexual or excretory organs or activities;
- (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and
- (3) whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value. *Policy Statement*, 16 FCC Rcd 7999 (2001).

Pursuant to judicial decision, the FCC has established a “safe harbor” from 10:00 p.m. to 6:00 a.m. for the broadcast of indecent material (*i.e.*, the times during which indecent broadcasts may be aired). See *ACT v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (*en banc*).

In recent enforcement actions, the FCC has changed its interpretation of these standards so that even fleeting or isolated utterances of certain words may be found indecent or profane. Which words, you may ask? Well, broadcasters would certainly like to know – but the FCC has only said that the f-word and other words “as highly offensive as the f-word” can get you into trouble. *Complaints Against Various Broadcast Licensees Regarding Their Air- ing of the Golden Globe Awards Program*, FCC 04-43 (March 18, 2004) (use of the phrase “f***ing brilliant” by the singer Bono during a live broadcast of the Golden Globe awards found to be both indecent and profane).

We’ll find out which other words are deemed sufficiently offensive only after some broadcaster gets fined thousands of dollars for airing them. In addition, the FCC in this case expanded its definition of prohibited “profane language” to include not only blasphemous language but also language that may “provoke violent resentment” or is “grossly offensive.”

In other notable decisions, the FCC has (1) imposed a \$550,000 fine against Viacom for the Janet Jackson inci-

dent at the Superbowl, finding that the glimpse of a breast for a fraction of a second during live programming was “both explicit and graphic” and “designed to pander to, titillate and shock the viewing audience”; (2) proposed a total forfeiture of \$1,183,000 against Fox and its affiliates for an episode of the reality show *Married by America*, even though the nudity involved was obscured; and (3) negotiated multi-million dollar consent decrees with large media entities to resolve multiple pending indecency claims against them.

In the past year, the FCC has also imposed indecency forfeitures reaching hundreds of thousands of dollars against radio broadcasters, generally for sexually explicit language used by “shock jocks.”

What effect has this FCC crackdown had? It has caused the removal of shock jocks like Bubba the Love Sponge from the air. It has led to the announced departure of Howard Stern to Sirius satellite radio, which, like cable/satellite television, has not been subject to the tradi-

tional prohibitions on broadcast indecency. See 18 U.S.C. § 1464 (prohibiting broadcast of “obscene, indecent, or profane language”).

On December 15, the FCC reconfirmed that “subscription-based services,” such as satellite radio, “do not call into play the issue of indecency.” Letter from W. Kenneth Ferree, Chief, FCC Media Bureau, DA 04-3907 (Dec. 15, 2004) (rejecting petition requesting FCC to commence rulemaking to amend satellite radio rules to include a prohibition on indecency).

Stations are also much more leery of airing live programming. The television networks are now imposing delays on major awards programs and sporting events. This trend will only continue, as the FCC is now investigating indecency complaints about NBC’s live coverage of the Summer Olympics Opening Ceremonies in Athens. See Lisa de Moraes, *FCC Wary of Greeks Baring Gifts at Games*, Washington Post at C1 (Dec. 11, 2004).

Local stations are also concerned about broadcasting live from local events where the station cannot completely control what observers and by-standers might say or do. Television stations in Phoenix stopped broadcasting the live memorial service for Army Corporal Pat Tillman, who

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We’ll find out which other words are deemed sufficiently offensive only after some broadcaster gets fined thousands of dollars for airing them.

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left a pro football career with the Phoenix Cardinals and was killed in Afghanistan, because of the language used by some of the mourners, including family members.

Broadcasters have also edited out the salty language used by Marines in news reports from Iraq. So the FCC's crackdown has not only caused the removal of popular shock jocks from the radio, it is resulting in the censorship of news programming.

How far will this campaign to "clean up" the nation's airwaves go? FCC Chairman Michael Powell reportedly has recommended that the agency reject the indecency complaints filed against the ABC stations that aired *Saving Private Ryan* last month. See Los Angeles Times, *Powell Urges No Action on "Ryan" Airing* (Dec. 14, 2004).

Recent press reports have also cast doubt on the supposedly widespread nature of the public outrage against broadcast indecency. For example, a Freedom of Information Act request by a former TV Guide critic revealed that there were only three actual, discrete complaints against the Fox television show *Married by America* that received a nearly \$1.2 million fine, even though the FCC had initially cited 159 public complaints. See Frank Rich, *The Great Indecency Hoax*, New York Times (Nov. 28, 2004).

Earlier this month, MediaWeek reported that 99.8 percent of the 240,000 indecency complaints filed at the FCC in 2003 were filed by a single conservative activist group, the Parents Television Council. And apart from complaints over Janet Jackson's wardrobe malfunction, 99.9 percent of the indecency complaints filed at the FCC in 2004 again came from the Parents Television Council. Todd Shields, *Activists Dominate Content Complaints*, MediaWeek at 4 (Dec. 6, 2004). Whether these reports will slow the congressional bandwagon to impose even more draconian fines and other punishments on broadcasters may, unfortunately, be doubted.

Regardless of further public or congressional actions, however, one or more of the FCC's recent indecency decisions will almost undoubtedly be the subject of court appeals, perhaps all the way to the Supreme Court.

A large group of broadcasters, media associations, anti-censorship groups, and directors and writers have asked the FCC to reconsider its decision in the *Golden Globe* case about the fleeting and isolated use of the f-word. These parties argued that the FCC's new indecency enforcement policies embodied in the *Golden Globe* decision are unconstitutional and significantly chill protected speech.

Fox has also opposed the FCC's proposed forfeiture in the *Married by America* case on constitutional and other grounds, and Viacom has indicated that it does not accept the FCC's judgment that the Superbowl halftime show was indecent.

Given these multiple controversial indecency decisions

One or more of the FCC's recent indecency decisions will almost undoubtedly be the subject of court appeals, perhaps all the way to the Supreme Court.

(and likely additional ones in the future), a judicial reevaluation of the rationale for broadcast indecency regulation may be near at hand. It is more than possible that the Supreme Court will, in the relatively near future, be asked to reconsider *F.C.C. v. Pacifica Foundation*, 438 U.S. 726 (1978), and

the differential treatment of indecency in the broadcast media in comparison to all other electronic and print media.

Certainly *Pacifica's* premise that the broadcast media are uniquely pervasive and accessible (especially to children) seems highly questionable, in light of the development of cable/satellite television and radio and the Internet. See, e.g., *Denver Area Educational Telecomms. Consortium v. FCC*, 518 U.S. 727, 744-45, 748 (1996) (plurality).

But if broadcast media could still somehow be subject to differing First Amendment standards, that does not mean any and all regulation of perceived indecency would pass constitutional muster. See *Pacifica*, 438 U.S. at 750 (Court took pains to "emphasize the narrowness of [its] holding" allowing FCC to regulate as indecent a broadcast in the afternoon of George Carlin's extended "seven dirty words" monologue).

Even assuming that *Pacifica* remains valid, a convincing case can be made that the FCC has recently exceeded the constitutionally permissible scope of broadcast indecency regulation. See *id.* at 759-61 (stating that the FCC does not have "an unrestricted license to decide what speech, protected in other media, may be banned from the airwaves," and noting that the Court's holding "does not speak to cases involving the isolated use of a potentially offensive word") (Powell, J., joined by Blackmun, J., concurring).

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Violence: Regulating Wile E. Coyote and Shakespeare

As frustrating as broadcasters find the indecency debate, proposals to regulate violence on television are even more problematic. In 2004, the Senate passed legislation directing the FCC to prohibit the distribution of violent video programming during the hours when children are reasonably likely to comprise a substantial portion of the audience.

Raising a host of constitutional issues, this “safe harbor” restriction would apply to cable television, as well as broadcast. In March 2004, 39 members of the House of Representatives requested the FCC conduct an inquiry on violent television programming and its impact on children, and to produce a report to Congress on the subject.

In July, the FCC dutifully released a *Notice of Inquiry* seeking comment on numerous issues relating to violent programming on television, including its effects on children, how violent programming could be defined for regulatory purposes, and the statutory and constitutional limitations on the Commission’s and Congress’ authority to regulate this programming on both broadcast and cable television.

The *Notice* specifically requested comment about a “safe harbor” approach similar to the FCC’s regulation of broadcast indecency, which would restrict violent programming to airing in very limited hours. *Notice of Inquiry, Violent Television Programming and Its Impact on Children*, FCC 04-175 (July 28, 2004).

The practical, legal and constitutional problems raised by proposals to regulate television violence are numerous and clear. Media entities, including the National Association of Broadcasters, Motion Picture Association of America, National Cable and Telecommunications Association, Satellite Broadcasting and Communications Association and several advertising groups, delineated these issues in detail in comments filed with the FCC in October and November.

As an initial matter, these media entities urged the FCC to be skeptical when examining the “evidence” frequently offered to support claims that the government must act to restrict the content of television programming available to all viewers. Claims about the connection between media

violence and aggressive behavior have been greatly exaggerated, hyped and distorted since at least the 1950s when comic books were blamed, at least by some, for a rise in juvenile delinquency.

Moreover, a thorough and detailed examination of all the existing media violence studies (laboratory and field experiments and longitudinal studies) showed in 2002 that the empirical evidence did not support claims of a causal relationship between depictions of violence in the media and “real world” aggression.

Beyond lacking an evidentiary basis for regulating violent content in television programming, these media commenters pointed out that the FCC lacks the necessary, express statutory authority to regulate violent television programming via a safe harbor or other means. See *MPAA v. FCC*, 309 F.3d 796, 805 (D.C. Cir. 2002) (FCC’s general regulatory powers do not authorize adoption of rules “significantly implicating program content”).

The media commenters also argued that a safe harbor or similar restriction on violent television programming would be unconstitutional. Regulations restricting speech due to its content are rarely permissible, and must be narrowly tailored to achieve a compelling governmental objective. Particularly due to intractable problems with defining violence, it is highly likely that any regulation of violent television content would not be narrowly tailored and would be vague and overbroad. Thus, a reviewing court would find a safe harbor violative of the First Amendment. See, e.g., *U.S. v. Playboy Entertainment Group*, 529 U.S. 803, 813, 818 (2000); *Video Software Dealers Ass’n v. Webster*, 968 F.2d 684, 689-90 (8th Cir. 1992).

Indeed, as pointed out to the FCC in this proceeding, no one – not social scientists, policymakers or members of the public – has been able to define violence intelligibly. Certainly there is no reason to believe that the FCC would be able to succeed in this endeavor.

Defining violence makes defining indecency look simple, and, as recent events have shown, the FCC has not been noticeably successful in applying its indecency definition in a rationale, consistent and predictable manner. Just what would qualify as “violent” programming? Would a single fist fight, or even a car crash, in a program make it violent?

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Defined broadly, it would include everything from Roadrunner cartoons to Shakespeare – not to mention football and hockey games and news reports of terrorism and the war in Iraq. Adding qualifiers such as “excessive” or “gratuitous” makes things no clearer. In a crime drama, could a certain amount of blood be shown – say ten drops or, perhaps, half a cup – but would showing 15 drops or a full cup be excessive?

The FCC asked in its *Notice* whether there should be an exception for news or for violent programming of “cultural, historical, or artistic merit.” That the Commission would consider not excluding news and public affairs programs from suppression raises particularly serious First Amendment concerns. But such exclusions would also raise their own practical and legal problems.

In fact, if the FCC were to allow news programs to include violence, but at the same time restrict imaginative portrayals of similar violent acts or events, it would call into question the entire rationale for the proscription in the first place. If children are purportedly harmed by exposure to violence, how are they less harmed by real-life violence shown on a news program?

And how on earth would the FCC define programming with “cultural, historical, or artistic merit?” If there were a dispute as to whether a program had sufficient merit, how would it be resolved? The fact that the FCC even inquired about judging the merit of television programming shows the inherent First Amendment dangers in attempting to regulate depictions of violence. The Supreme Court has in fact already stated that the government may not legitimately make such cultural or artistic judgments:

The Constitution exists precisely so that opinions and judgments, including esthetic and moral judgments about art and literature, can be formed, tested, and expressed. What the Constitution says is that these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority.

Playboy, 529 U.S. at 818.

The FCC is currently preparing its report on television violence, which the House members requested by January 1, 2005. If the FCC or Congress, however unwisely, then acts to restrict violent portrayals on television, court challenges will inevitably follow.

“Good for You” Programs

Beyond regulating disfavored broadcast content, including sexually-oriented and violent programming, the FCC is also actively considering proposals to “encourage” (or force) broadcasters to air a range of “good for you” programming.

The FCC is also actively considering proposals to “encourage” (or force) broadcasters to air a range of “good for you” programming.

In a number of proceedings addressing the public interest obligations of analog and digital television broadcasters, digital audio broadcasting, and broadcast localism, the FCC is considering proposals to encourage or require radio and television stations to air programming in various favored categories, including public service announcements; news programming; locally produced programming; public affairs programming; political and electoral programming; and programming that meets the needs of underserved communities.

Some of these proposals include requirements for broadcasters to carry specific amounts of certain types of programs. As an example of the content specificity of these proposals, the supporters of a quota for electoral programming contend that broadcast programming discussing the strength or viability of a candidate or ballot issue; focusing on a candidate or ballot issue in relation to polling data, endorsements or fundraising totals; or discussing an election in terms of who is winning or losing, is not sufficient to qualify as electoral affairs programming.

Radio and television broadcasters have generally opposed these proposals as unwarranted intrusions into the editorial and programming prerogatives of licensees. While there is no doubt under the Communications Act of 1934 that broadcasters must serve the public interest (*see, e.g.*, 47 U.S.C. § 309(a)), the imposition of new and very specific content regulations – particularly at this time of technological change and increasing competitive and financial pressures on broadcasters – appears neither justified nor prudent.

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Broadcasters now face intense, and growing, competition from other electronic media, including cable operators, satellite television and radio providers, the Internet and related broadband services, and even video game providers, which are not subject to traditional public interest regulation. In the past, the Commission has generally reduced regulation on broadcast licensees as the number of outlets and competing services increased. See, e.g., *Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076 (1984).

With the development of digital technologies and the growth of the Internet, the need for direct regulation of broadcasters should be reduced, rather than increased. In any event, broadcasters today fulfill their public interest obligations by providing entertainment programming, national and local news and other informational programming, and emergency alerts, and by participating in local community events and activities. See NAB, *A National Report on Local Broadcasters' Community Service* at 2 (June 2004) (in 2003, radio and television stations contributed an estimated \$9.6 billion in community service nationwide, consisting of the value of airtime contributed for public service announcements and amounts raised for charitable causes and for victims of natural disasters).

Given the absence of an express congressional authorization, the FCC's authority to prescribe specific public interest requirements "significantly implicating program content" is, moreover, very much in doubt. *MPAA*, 309 F.3d at 806-07 (concluding that the FCC's general powers under the Communications Act did not authorize adoption of rules "about program content").

Specific content-based programming obligations also raise very serious constitutional questions. The Supreme Court has explicitly stated that the "FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations." *Turner Broadcasting System v. FCC*, 512 U.S. 622, 650 (1994).

Proposals to require specific amounts of particular types of programming would also require the FCC "to oversee far more of the day-to-day operation of broadcasters' conduct," and would "tend to draw it into a continuing case-by-case determination" of whether the programming aired by broadcasters did or did not fit the regulatory definition of, for ex-

ample, electoral affairs programming. *CBS v. DNC*, 412 U.S. 94, 125-27(1973) (finding that "the risk of an enlargement of Government control over the content of broadcast discussion of public issues" was inherently too great in a requirement that broadcasters "accept some editorial advertising").

Besides the constitutional problems, the FCC is not particularly well suited to "ordain" the "particular type[s]" of programming that must be offered by all broadcast stations across the nation. *Turner*, 512 U.S. at 650. Communities and the interest of consumers in them vary from one locality to another, and it borders on the illogical to assume that the regulatory decisions of a government agency in Washington, D.C. would consistently and accurately reflect the interest of viewers and listeners throughout the country. It was such considerations that historically caused the FCC to withdraw from involvement in content regulation. See, e.g., *FCC v. WCNC Listeners Guild*, 450 U.S. 582, 601 (1981).

And it is, after all, the interests of the consumers of programming that should be paramount under the *public* interest standard – not the interests of government regulators or even the interests of various "public interest" advocacy groups. See, e.g., T. Krattenmaker and L. Powe, *Regulating Broadcast Programming* at 315 (1994) (behind the "persistent demand from critics" of broadcasters for "more and better public affairs programming . . . is the belief that it is the right of elites to dictate tastes to viewers and listeners").

As of the publication date of this article, it is unclear whether the FCC will in fact adopt further regulations requiring broadcasters to air specified types of government-favored programming.

Several of the proceedings involving these proposals have been pending at the FCC for years, while others are still in the comment stage. See *Notice of Inquiry, Broadcast Localism*, FCC 04-129 (reply comments due Jan. 3, 2005). If the Commission were to adopt constitutionally suspect programming mandates without express authorization from Congress, a legal challenge would appear likely.

And because proponents of content-based programming obligations depend on notions of spectrum scarcity to defend their position, such a challenge would likely call into question the continuing validity of the Supreme Court's seminal decision in *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (Court sanctioned FCC's now-repealed "fairness doctrine" based on the perceived scarcity of the broadcast spectrum).

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The Next Frontier of Content Regulation?

On November 23, 2004, the FCC released an order increasing the obligations of television broadcasters to air children's educational and informational programming, and extending its regulation of the amount of commercial material in television programming directed to children ages 12 and under. See *Report and Order, Children's Television Obligations of Digital Television Broadcasters*, FCC 04-221.

Beyond directly regulating the content aired by television broadcasters, this order will also likely affect the content of certain Internet websites.

Since 1997, according to FCC processing guidelines, television broadcasters, in order to receive approval of their license renewal applications at the FCC staff level, have been required to air at least three hours of programming per week that serves the educational and informational needs of children ages 16 and younger. 47 C.F.R. § 73.671 and note 2. See also Children's Television Act of 1990, § 103 (in reviewing renewal applications of television licensees, FCC must consider extent to which the licensee "has served the educational and informational needs of children").

In its November order, the FCC expanded this requirement so that broadcasters in the digital environment who choose to multicast multiple programming streams will be required to air an additional three hours every week of children's educational and informational programming per each full-time programming stream.

These additional hours of children's programming will be required even if a broadcaster's multicast programming stream is, for example, a 24-hour news channel or other channel not oriented in any way toward child viewers. Beyond serving as a disincentive for broadcasters to experiment with new, innovative multicasting services, requiring stations to air specific amounts of government mandated programming raises obvious constitutional issues, as discussed above. No broadcaster has ever challenged the "three hour" children's television guideline on First Amendment grounds, and it remains to be seen whether any broadcaster will mount a constitutional chal-

lenge to these new and expanded children's programming requirements.

Perhaps even more notably, however, the FCC, in this children's television order, comes perilously close to regulating content on the Internet by expanding its regulation of advertising. Since 1991, Congress and the FCC have limited the amount and kind of commercial matter that may be aired during programming directed to children ages 12 and under. 47 U.S.C. §§ 73.670; 76.225; Children's Television Act of 1990, § 102. These commercial limits apply to children's television programming shown by both broadcast television licensees and cable operators.

In its recent order, the FCC expanded its commercial limit rules to prohibit the display of most (and perhaps virtually all) Internet website addresses during broadcast or cable programs directed to children ages 12 and under.

Specifically, a broadcaster or cable operator can display an Internet website address during such programs only if the website:

- (1) offers a substantial amount of *bona fide* program-related or other noncommercial content;
- (2) is not primarily intended for commercial purposes, including either e-commerce or advertising;
- (3) the website's home page and other menu pages are clearly labeled to distinguish the noncommercial from the commercial sections; and
- (4) the page of the website to which viewers are directed by the website address is not used for e-commerce, advertising, or other commercial purposes (*e.g.*, contains no links labeled "store" and no links to another page with commercial material).

Given these requirements (especially the last forbidding links to *another* page with commercial material), the Internet websites that may permissibly be displayed during children's programming may be an empty set. Moreover, in a *Further Notice of Proposed Rulemaking* included as part of its November order, the FCC requested comment on how to regulate interactive links to "commercial" Internet sites in children's television programming. Comments on this question of regulating interactivity will be due on March 1, 2005.

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The FCC, in this children's television order, comes perilously close to regulating content on the Internet.

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As of the publication date of this article, it remains unclear what, if any, actions broadcasters, cable operators or other media entities may take to challenge these FCC decisions.

Media entities could ask the FCC to reconsider any of the decisions made in its children's television order, or could decide to challenge the FCC's order in court. Clearly, the FCC's decisions raise a host of commercial speech and other First Amendment issues. *See, e.g., Greater New Orleans Broadcasting Ass'n v. U.S.*, 527 U.S. 173 (1999) (federal statute and FCC rules prohibiting broadcasters from airing advertisements about casino gambling violated First Amendment).

The decision to regulate strictly the website addresses that can be displayed during children's television programming further raises questions about the extent of the FCC's authority over Internet content. Media entities or advertisers with a significant web presence may be particularly concerned about the FCC's extension of its authority over television programming to affect the form and substance of the home pages, other menu pages, and links of Internet web sites.

The FCC's influence on Internet content may only increase in the future, depending upon the outcome of its

further proceeding on regulating interactive links between television programming and Internet websites.

A Judicial Resolution?

Just how far will all these efforts to regulate the content of broadcast programming ultimately go? Right now, it's still unclear, and depends in part on expected changes among the FCC Commissioners and the congressional appetite for imposing content regulation on broadcasters in a non-election year.

Certainly many observers expect court challenges to several of the FCC's indecency decisions in the near future. Restrictions on violent programming would in all likelihood be challenged in court, as would mandates requiring broadcasters to air specific amounts of government-favored programming.

Thus, there may be in the relatively near future a landmark Supreme Court case addressing the level of protection afforded broadcasters by the First Amendment and deciding whether broadcast content is uniquely regulable.

Jerrienne Timmerman is a lawyer with the National Association of Broadcasters.

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Atlanta Federal District Court Awards Publishers Over \$1.3 Million In Attorney's Fees in Airport Newsrack Dispute

By James C. Rawls and Eric P. Schroeder

Ending an eight-year long dispute over newsracks at Atlanta's Hartsfield-Jackson Airport, an Atlanta federal district court has awarded three publishers over \$1.3 million in attorney's fees for achieving a "substantial public benefit" by "securing ... vital First Amendment guarantees" limiting municipal regulation of newsracks.

The dispute giving rise to the consolidated cases *Atlanta Journal Constitution v. City of Atlanta Dept. of Aviation*, Case No. 1:96-cv-1738 and *USA Today v. City of Atlanta Dept. of Aviation*, Case No. 1:96-cv-1847 (N.D. Ga.) began when the City of Atlanta attempted to implement a newsrack plan ("1996 Plan") in conjunction with the Atlanta Olympics which required publishers to display newspapers in City-owned newsracks bearing Coca-Cola Olympic-related advertisements, charged a monthly profit-making fee of \$20 per newsrack, and gave City officials the unlimited discretion to pick and choose which publishers would receive newsrack permits and to cancel the permit at any time and for any reason.

The *Atlanta Journal Constitution* and *USA Today* prevailed in securing an injunction against the 1996 Plan before it was implemented. *The New York Times* later intervened.

In 1997, with the injunction still in place, the City of Atlanta submitted a revised plan ("1997 Plan") to the Court and claimed -- even though the 1997 Plan was not implemented -- that the 1997 Plan "mooted" the enjoined 1996 Plan. The City, however, did not withdraw the 1996 Plan and continued to defend its constitutionality in every respect. As a result, the Court refused to consider the 1997 Plan, and thereafter declared the 1996 Plan unconstitutional and permanently enjoined the City from enacting any newsrack plan which: 1) required publishers to use newsracks bearing advertisements for other products; 2) charged a fee that was not tied to the City's costs in administering its newsrack plan; and 3) allowed City offi-

cial "unbridled discretion" in selecting which publications would be granted permits to have newsracks at the Airport or determining when such permits would be canceled. *AJC, et al. v. City of Atlanta Dept. of Aviation*, 107 F. Supp. 2d 1375 (N.D.Ga. 2000) (Story, J.).

After an Eleventh Circuit Court of Appeals panel affirmed all three prongs of the injunction, the Eleventh Circuit, sitting en banc, affirmed the district court on the first and third prongs of the injunction, but reversed on the second prong, ruling that the City could charge a reasonable

"profit-making" rental fee if it was not "monopolistic" and if "structural protections" in the newsrack plan limited officials' discretion in setting the fee. *AJC v. City of Atlanta Dept. of Aviation*, 322 F.3d 1298 (11th Cir. 2003) (*en banc*).

Although the issue was not raised by the City, the opinion opened the question of "back-rent" for the publishers' newsracks operating at the Airport while the injunction was in place, and remanded the case to the District Court to review any new plan submitted by the City.

On remand, the District Court ruled in Spring 2004 that a new 2003 newsrack plan submitted by the City did not violate the permanent injunction. The publishers moved for their attorney's fees, and the City moved for an award of back-rent.

On the issue of restitution, the Court granted the City's request for an award of back-rent, but at a monthly rate substantially lower than that sought by the City. Although the City asked for escalating monthly fees ranging from the 1996 Plan's \$20 per newsrack to \$30, depending on the year, the Court ruled that no more than the 1996 Plan's monthly fee of \$20 could be charged, as this was all the City was enjoined from charging in 1996.

Further, because the \$20 fee included a \$5 cost for use of the City-owned newsracks which the publishers never used, the Court reduced the monthly rental rate to \$15. Thus, whereas the City demanded \$552,220 in back rent, it was awarded more than \$200,000 less.

The Court ruled that the publishers were prevailing parties who achieved a "substantial public benefit"... "particularly significant for publishers who may not have the economic ability to demand inclusion at newsstands."

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Atlanta Federal District Court Awards Publishers Over \$1.3 Million In Attorney's Fees In Airport Newsrack Dispute

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On attorney's fees, the Court ruled that the publishers were prevailing parties who achieved a "substantial public benefit" engendering "specific spill-over benefits to non-parties against a municipal defendant." The Court ruled this public benefit was "particularly significant for publishers who may not have the economic ability to demand inclusion at newsstands [in the Airport] or to bring suit to challenge the newsrack policy."

In sum, the Court stated that because of the publishers' efforts, "[a]ny publisher may now benefit from the procedural protections, limitations and restraints on official discretion that are required under the permanent injunction entered by the Court and upheld by the Eleventh Circuit."

Yet, because the publishers did not prevail on the issue of the City's ability to charge a "profit-making" fee, the Court ruled that the publishers' success fell "just short" of the "excellent result" which would entitle them to their full fees, and awarded the publishers 80% of their requested fees: \$678,487 to the Atlanta Journal Constitution, \$16,200 to the New York Times and \$659,016 to USA Today.

In making the award, the Court rejected the City's demand that the Court limit the publishers' fee award to work done on securing the initial 1996 preliminary injunction – which would have been an award of \$106,263 – because, the City argued, the publishers did not gain further relief after the 1996 preliminary injunction and the 1997 Plan submitted by the City was the same as the 2003 Plan which was determined not to violate the final injunction.

The Court rejected the argument, ruling that the limitations placed by the City on officials' discretion in granting and canceling permits and in setting a monthly rental fee in 2003 provided substantial relief to the publishers which went beyond the 1996 preliminary injunction. Further, expressing frustration with the City's litigation strategy in the case, the Court ruled that the City's "stubborn litigiousness" in refusing to withdraw the facially unconstitutional 1996 Plan when it submitted the 1997 Plan was "beyond this Court's comprehension" and that it would be "inequitable" to reduce the fee award more than 20% because the City's continued defense of the full 1996 Plan was "largely responsible for the long duration of the litigation and mounting attorney's fees."

If the City does not appeal the ruling, the Court's Order is the end of the case.

The City of Atlanta Department of Aviation was represented by William H. Boice of Kilpatrick Stockton LLP.

James C. Rawls and Eric P. Schroeder, partners at Powell Goldstein LLP in Atlanta, Georgia, represented USA Today. The Atlanta Journal-Constitution and New York Times was represented by Peter C. Canfield, Marcia Bull Stadeker and Leslie N. Green of Dow, Lohnes & Albertson PLLC.

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Board Dismisses Attorney Discipline Charges Over “Revolting” Radio Comments

Famed Attorney Geoffrey Fieger Compared Judges to Nazis

Professional misconduct charges were dismissed in early November against attorney Geoffrey Fieger for comments he made on his syndicated radio show in 1999 criticizing several judges of the Michigan Court of Appeals. *Grievance Administrator v. Fieger*, No. 01-55-GA (Mich. Atty. Discipline Bd. Nov. 8, 2004), available at <http://www.adbmich.org/download/01o-55.pdf>.

Fieger, a partner at Fieger, Fieger, Kenny and Johnson in Southfield, Mich., gained fame for defending assisted-suicide proponent Dr. Jack Kevorkian and for suing over the murder of a guest on *The Jenny Jones Show*. See *Graves v. Warner Bros.*, 656 N.W.2d 195, 31 Media L. Rep. 1255 (Mich. Ct. App. Oct. 22, 2002), cert. denied, 2004 WL 1373288 (June 21, 2004).

Fieger made his comments after the appellate court vacated a \$15 million judgment for his client in a medical malpractice case. The court specifically chastised Fieger in its ruling, writing that “even if defendants were not entitled to JNOV, defendants would be entitled to a new trial because of pervasive misconduct by plaintiff’s lead trial counsel that denied defendants a fair trial.” *Badalamenti v. Wm Beaumont Hosp.*, 237 Mich. App. 278, 289, 602 N.W. 2d 854 (1999), appeal denied, 463 Mich. 980 (2001).

In the broadcast, Fieger “declare[d] war” on the judges, calling them “jackasses” and inviting them to “kiss my ass.” He also suggested that he should place various items in the judges’ rectums, and compared them to infamous Nazis such as Adolf Hitler, Joseph Goebbels and Eva Braun.

The complaint before the Michigan Attorney Discipline Board alleged that the comments violated two provisions of the Michigan Rules of Professional Conduct: Rule 3.5(c), which prohibits “undignified or discourteous conduct toward the tribunal,” and Rule 6.5(a), which provides that “[a] lawyer shall treat with courtesy and respect all persons involved in the legal process.”

This was not the first time that Fieger had been cited for violations of these provisions. In 1994, he was cited for statements made to a newspaper alleging that a

prosecutor has engaged in a cover-up in investigating the hanging death of a prison inmate. The charges were eventually dismissed on the grounds that Fieger’s statements could be read as hyperbole. See *Grievance Administrator v. Fieger*, No. 94-186-GA (Mich. Atty. Discipline Bd. Sept. 30, 2002), available at <http://www.adbmich.org/download/94o-186c.pdf>.

Other disciplinary charges against Fieger for actions and comments both in and outside of court have been similarly dismissed. See *Geoffrey N. Fieger*, No. 97-83-GA (Mich. Atty. Discipline Bd. Tri-County Hearing Panel #79 dismissed May 25, 1999); *Geoffrey N. Fieger*, No. 97-83-GA (Mich. Atty. Discipline Bd. Tri-County Hearing Panel #69 dismissed Jan. 19, 2001); and *Geoffrey N. Fieger*, No. 97-82-RD (Mich. Atty. Discipline Bd. Tri-County Hearing Panel #79 dismissed April 7, 2001). These rulings are available through <http://68.250.147.182/research.htm>.

In the radio comments case, Fieger agreed to a reprimand by a hearing panel of the Attorney Discipline Board, on the condition that he be allowed to challenge the admonishment on constitutional grounds in an appeal to the entire Board. In his appeal, Fieger argued that the rules were not applicable to his radio comments, and that doing so would violate the First Amendment.

The Board’s majority opinion, signed by three of the board’s nine members, cited one of the board’s prior decisions in the previous case against Fieger to conclude that the rules’ language, which refer to a lawyer’s behavior “before a tribunal” (Rule 3.5(c)) and to “all persons involved in the legal process” (Rule 6.5(a)), makes them applicable only to courtroom behavior.

The majority opinion also noted that application of the rules to statements of opinion outside of the courtroom context would violate the First Amendment, and that the rules themselves may be unconstitutionally vague.

[A]s strongly as we disapprove of respondent’s methods and remarks, we are equally certain that the rules of professional conduct do not regulate

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Board Dismisses Attorney Discipline Charges Over “Revolting” Radio Comments

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the speech in this case. We must not let the respondent’s revolting language stir our passions and warp our interpretation of the rules. Accordingly, we vacate the order of reprimand and dismiss the formal complaint.

Two board members concurred in part and dissented in part, stating that while they thought that the rules applied to Fieger’s extra-judicial statements, his comments were protected by the First Amendment. Three other board members dissented, saying that the rules applied, that such application did not violate the First Amendment, and that the rules were not vague.

The remaining board member recused himself from the decision.

Fieger was represented by Norman L. Lippitt of Hyman Lippitt, P.C. in Birmingham, Mich.; F. Philip Colista of Grosse Pointe Park, Mich. (now deceased); Kenneth M. Mogill of Mogill, Posner & Cohen in Lake Orion, Mich.; Mayer Morganroth of Morganroth & Morganroth in Southfield, Mich.; and Michael Alan Schwartz of Schwartz, Kelly & Oltarz-Schwartz in Farmington Hills, Mich. The Attorney Grievance Commission was represented by Robert E. Edick.

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Reporters Near Bottom on List of Most Honest and Ethical Professionals

Television reporters beat their counterparts in the newspaper industry by a hair but still trailed far behind nurses, doctors, and clergy in the Gallup Organization's 2004 poll ranking the honesty and ethical standards of various professionals.

The poll, which was conducted by phone from November 19-21, recorded the responses of 1,105 adults age 18 or over. Participants were asked to rate the honesty and ethical standards of the 20 professions.

The list of professionals participants ranked as "very high" or "high" was as follows:

- Nurses (79 percent)
- Druggists, pharmacists (72 percent)
- Military officers (72 percent)
- Medical doctors (67 percent)
- Police officers (60 percent)
- Clergy (56 percent)
- Judges (53 percent)
- Day care providers (49 percent)
- Bankers (36 percent)
- Auto mechanics (26 percent)
- Local officeholders (26 percent)
- Nursing home operators (24 percent)
- State officeholders (24 percent)
- TV reporters (23 percent)
- Newspaper reporters (21 percent)
- Business executives (20 percent)
- Lawyers (18 percent)

- Congressmen (10 percent)
- Advertising practitioners (10 percent)
- Car salesmen (9 percent)

This year's poll found that 5% of those polled gave newspaper reporters very high marks for honesty, 16% ranked them as high, 50% as average, and 28% as low or very low. Newspaper reporters last appeared on the survey in 2000, when they achieved a 16% positive honesty ranking.

Gallup reported that throughout the 1990s, the average positive ranking for the profession was 21%, with an all-time high of 30% reached in 1981.

Nurses, who topped this year's list, have finished first in the poll for five out of the six years they have been surveyed, with firefighters holding the No. 1 spot in 2001. Pharmacists and state officeholders both obtained their highest rankings to date this year, with 72% and 24% respectively.

Car salesmen, who received a 9% positive rating in this year's poll, have held the lowliest position on the list for almost every year since making their debut in the poll in 1977.

Gallup began polling the public on this issue in 1976, and over the years has ranked 57 professions. A rotating list of approximately 20 professions is employed annually, and a core group of 11 professions, including nurses, pharmacists, lawyers, car salesmen, and business executives, are ranked each year.

Local Television Is Most Popular News Source

A separate Gallup poll released this month surveyed Americans' use of 10 different daily news sources and 3 weekly news sources. This is the sixth time since 1995 that Gallup has conducted a poll on the subject and it shows some interesting trends.

According to the December poll, local television is still the most popular news source for Americans. Fifty-one percent of those polled said they watched local television news every day and another 19% said they watched local news several times a week. The combined total is consistent with earlier polls in 2002 (73%), 1999 (72%) and 1995 (73%).

On the other hand, nightly network news on ABC, CBS and NBC has experienced a large drop, according to the poll. According to the recent survey 36% of Americans watch one of these news shows daily and another 16% watch several times a week, a combined total of 52%. The combined totals in past surveys was: 2002 (56%); 1999 (70%); 1998 (75%); and 1995 (82%). Also notable, in 1995 3% said they never watched one of these programs, a figure which has risen to 22% in the latest poll.

Cable news, radio talk shows and the Internet all showed significant gains as news sources since 1995.

Appeals Court Rejects Criminal Libel Request

Friends of Ramseys Sought Prosecution For Coverage of JonBenet's Murder

The Colorado Court of appeals has rejected an effort to force prosecutors to indict the Boulder, Colorado *Daily Camera* for criminal libel over its coverage of the Jon Benet Ramsey case. *White v. Smith*, No. 03CA0652, 2004 WL 2822307 (Colo. Ct. App. Dec. 7, 2004) (unpublished).

Background

In August 2000, Priscilla and Fleet White, Jr. asked Boulder police to investigate *The Daily Camera* for violating Colorado's criminal libel statute by publishing an article on Feb. 25, 2000 in which a California woman theorized that Jon Benet had been killed during a child sex and porno party. The woman claimed that she had been the victim of such activity as a girl. The article led Boulder police to investigate the woman's claims, but they were found to have no merit.

The Whites sought prosecution of the newspapers that published the story, the reporters that wrote the stories, and individuals who discussed the story on various web sites, claiming that the articles implicated them in the death. Fleet White was with Jon Benet's father when he discovered her body.

The White's complaint led to an investigation by police and the Boulder County District Attorney's office. In Sept. 2000, the office, citing a conflict of interest because of D.A. Alex Hunter's initial statements endorsing the California woman's story, requested that a special prosecutor be appointed.

A special prosecutor was assigned, but the case was eventually dismissed. But it was revived in November 2000 when Boulder County District Court Chief Judge Roxanne Bailin appointed a new special prosecutor: El Paso County District Attorney Jeanne Smith.

DA Sued

The Whites filed suit against District Attorney Smith in February 2003, demanding action in the investigation. The suit was filed in anticipation of the expiration of the three-year statute of limitations for criminal libel. *See White v. Smith*, No. 2003CV000207 (Colo. Dist. Ct.,

Boulder County filed Feb. 2, 2003); *see also* Colo. Rev. Stat. § 16-5-401 (statute of limitations).

Smith concluded there was insufficient evidence for a prosecution, and cited potential problems with Colorado's criminal libel statute, Colo. Rev. Stat. § 18-13-105. In 1991, the Colorado Supreme Court held that the statute would be unconstitutional if applied to statements about public officials or public figures on matters of public concern. *See People v. Ryan*, 806 P.2d 935, 19 Media L. Rep. 1074 (Colo. 1991), *cert. denied*, 502 U.S. 860 (1991).

The Whites then asked Judge Bailin to force the prosecution to proceed, but she dismissed the case. *See White v. Smith*, No. 2003CV000207 (Colo. Dist. Ct., Boulder County dismissed). The Colorado Court of Appeals upheld the dismissal without comment, presumably putting an end to the matter.

Newspaper Publisher Not Liable for Burglary of Plaintiffs' Home

A North Carolina appeals court affirmed dismissal of a claim seeking to hold a newspaper publisher liable for a home burglary. *Lambeth v. Media General, Inc.*, No. COA04-401, 2004 WL 2792010 (N.C. App. Dec. 7, 2004).

Plaintiffs, subscribers to the *The Winston Salem Journal*, asked that home delivery be stopped during their vacation. While delivery was stopped, plaintiffs alleged that the newspaper negligently failed to treat the "stop delivery" request as confidential, and that the request was essentially left on the curb with the newspaper carrier, thereby making their home a target for a break-in.

Affirming that plaintiffs failed to state a cause of action, the court held that defendants owed plaintiffs no duty to treat the stop delivery request in confidence and the court "declined to invent one." Moreover, even if the newspaper should have treated the stop delivery request more securely the failure to do so was not the proximate cause of the burglary. "The break-in was not a foreseeable consequence of defendant's system of communicating the stop notices to its carrier."

MLRC Annual Meeting Nov. 17, 2004, Copacabana, New York

The annual meeting of the media members of the MLRC took place on Nov. 17, 2004 in New York City. The meeting was called to order by Harold W. Fuson, Jr., Chairman of the MLRC Board of Directors.

Election of Directors

The first order of business was the election of Directors. Mr. Fuson noted that Katherine Hatton, formerly of Philadelphia Newspapers, Inc., had stepped down from the Board after taking on the position of General Counsel of the Robert Wood Johnson Foundation. Mr. Fuson reported that Marc Lawrence-Apfelbaum of Time Warner Cable had been nominated by the Board of Directors to fill out the remainder of Ms. Hatton's term.

Mr. Fuson then read the slate of Directors who had been nominated for reelection, which included himself, Ralph Huber, Ken Richieri, Elisa Rivlin, and Susan Weiner. The members voted by voice to elect Mr. Lawrence-Apfelbaum to the Board and to re-elect the slate of Directors presented by Mr. Fuson.

DCS Executive Committee President's Report

Bruce Johnson reported that the DCS was actively expanding into Canada, and looked forward to establishing a presence similar to that which has been cultivated in London over the years. MLRC and Ad Idem (the Canadian media lawyers association) are co-sponsoring a conference examining cross-border legal issue to be held in Toronto on May 12-13, 2005.

Bruce also noted the upcoming conference co-sponsored by MLRC and Southwestern Law School on Key Issues in Entertainment and Media Law, to be held January 27, 2005 in Los Angeles. He also reported that a California listserv had been established for members interested in receiving updates on legal developments there.

Bruce was also pleased to inform the membership that the DCS has been doing very well financially, and that the website was receiving inquiries from firms about membership.

Mr. Fuson thanked the DCS for both its hard work and financial contributions over the year, and stated that

the MLRC continues to remain dedicated to improving the services available to its members.

MLRC Executive Director's Report

Sandy Baron began by thanking all of the media members for their attendance and support, and thanked the Directors for the time they have devoted to shaping the projects and policies of the MLRC over the past year.

Sandy thanked Hal Fuson, whose term as Chairman will end in January, for all of his hard work, and informed the membership that the Board had elected Henry Hoberman as the incoming Chairman. Ms. Baron also thanked Mr. Lawrence-Apfelbaum for agreeing to become a Director.

Sandy informed the members that the MLRC website (www.medialaw.org) was online and had entered into its final testing period. She thanked Jonathan Hart and Elisa Rosen of Dow, Lohnes & Albertson for their help in drafting a contract and overseeing other issues pertaining to the website, as well as Thomas Kavalier of Cahill Gordon & Reindel for helping MLRC strategize on how to settle disputes with the website designers amicably.

Sandy also recognized the efforts of David Schultz and Bob Penchina and their former colleagues at Clifford Chance for their work in obtaining MLRC's trademarks.

Sandy reported that virtually all of the resources published by the MLRC would be available online, with the exception of the 50-state surveys, and that members could utilize a word searchable index of publications.

MLRC Committees also have their own pages and forums set up on the website. Members were encouraged to use their passwords to test out the site over the next month, and to begin uploading briefs onto the website for incorporation into the brief bank.

She further reported that the former MLRC website, www.ldrc.com, would remain online and would direct visitors to the new website, and that MLRC staff members would be receiving new e-mail addresses @medialaw.org.

Sandy also highlighted other important developments at the MLRC over the course of the year, including the

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MLRC Annual Meeting

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advent of the MediaLawDaily e-mail, which provides MLRC media members with Internet links to relevant media stories from around the world. She also encouraged members to submit stories to the MLRC for inclusion in the Daily.

Over 300 people attended this fall's NAA/NAB/MLRC conference in Virginia. The new co-chairs for the 2006 conference, Slade Metcalf and Mary Ellen Roy, will be assisted by Dan Waggoner who has ably co-chaired the conference for many years. In addition, former Conference Committee Co-Chair Peter Canfield of Dow, Lohnes had been nominated for the DCS Executive Committee.

Sandy also reported on the upcoming MLRC – Southwestern Conference in Los Angeles and the MLRC – Ad IDEM Conference in Toronto on cross-border legal issues. Preparation is also underway for the London Conference in September 2005, which it is hoped will be as intellectually interesting and generate the same excitement as the 2003 conference.

Sandy encouraged members to review the MLRC's yearly publication list, and recognized the enormous number of productive committees and projects over the year – including the effort of the ALI Taskforce in drafting a substitute Reporters' Note on enforcement of foreign judgments involving First Amendment rights.

She also discussed the MLRC task force that had recently been put into place to create a model federal reporter's shield law, and weigh in on the proposed federal shield law proposed by Senator Dodd.

Sandy next focused on MLRC's Annual Report, and explained the manner in which the MLRC maintains its financial records. Finally, Ms. Baron reported that the MLRC had hired a new attorney, Maherin Gangat, and introduced and thanked the rest of the MLRC staff.

New Business

The meeting then turned to the topic of New Business. Incoming Chair, Henry Hoberman took the opportunity to thank Hal Fuson and discuss many of the accomplishments that took place at the MLRC under his stewardship, including the expansion of the MLRC into

Canada and California, the evolution of the website, and the continuation of the first-rate publications generated by the MLRC.

Hal Fuson graciously accepted the thanks of the board and paid his compliments to his predecessors. In addition, he highlighted the MLRC's international activities, which included the evening's presentation of the Brennan Award to Ted Turner in recognition of his contributions to the internationalization of the media. He concluded by thanking the Board for giving him the opportunity to serve as Chairman.

MLRC MediaLawLetter Committee

David Bralow (Co-Chair)

Bruce Rosen (Co-Chair)

Robert Balin

Jim Borelli

Jay Ward Brown

Peter Canfield

Thomas Clyde

Robert Dreps

Judy Endejan

Jon Epstein

Charles Glasser, Jr.

Richard M. Goehler

Karlene Goller

Steven D. Hardin

S. Russell Headrick

Russell Hickey

David Hooper

Jonathan Katz

Debora Kristensen

Eric Lieberman

Daniel Mach

John Paterson

Deborah H. Patterson

Mark J. Prak

William Robinson

Charles D. Tobin

Paul Watler

Defense Counsel Section Annual Meeting Nov. 19, 2004, Reuters Building, New York

President's Report

The Annual Defense Counsel Section Meeting was called to order by Bruce Johnson, President of the DCS Executive Committee.

Bruce Johnson highlighted a number of MLRC's recent initiatives, including the implementation of the MediaLawDaily, a daily e-mail service that helps disseminate relevant news to enhanced MLRC members. Members were also encouraged to begin using the passwords they had received to test the MLRC's new website (www.medialaw.org).

Mr. Johnson went on to discuss the outreach taking place in two "foreign" jurisdictions: Canada and California. Members were invited to attend the May 12-13, 2005 MLRC – Ad Idem Conference in Toronto, focusing on cross-border legal issues.

He also noted the establishment of the California listserv, which provides members with information on California legal developments; and reminded members of the upcoming MLRC – Southwestern Law School Conference on Key Entertainment and Media Law Issues on January 27, 2005.

DCS attendees then acknowledged and thanked Hal Fuson, the outgoing Chairman of the MLRC Board of Directors.

Election of Treasurer

The DCS Executive Committee nominated Peter Canfield of Dow, Lohnes & Albertson to serve as the new Treasurer. A motion to elect Mr. Canfield was made, seconded, and unanimously adopted.

Executive Director's Report

Sandra Baron thanked everyone for coming and for their support of the organization over the past year, as well as over the past 25 years. She gave special thanks to the DCS Executive Committee for their dedication and initiatives, and recognized them as the "most extraordinary sounding board an Executive Director could hope to have."

She praised Bruce Johnson for his leadership as President as his term comes to an end in January. Starting in January 2005, James Stewart will take over as DCS Presi-

dent, Joyce Meyers as Vice President, Kurt Wimmer as Secretary, Peter Canfield as Treasurer, and Bruce Johnson as President Emeritus.

The MLRC website has finally entered its testing phase. Members were encouraged to help MLRC test the site, which features all MLRC materials except for the 50-state Surveys. Members were also encouraged to upload briefs onto the website, and to help ensure the site remains password protected.

Sandy also thanked a number of people for their help with the website, including Jonathan Hart and Elisa Rosen of Dow, Lohnes & Albertson, who served as the MLRC lawyers in contract issues with the web designers; Thomas Kavalier of Cahill Gordon & Reindel, who advised Sandy on settling issues with the web designers without resort to litigation; and David Schultz and Bob Penchina and their former colleagues at Clifford Chance who completed MLRC's trademark work. Ms. Baron also thanked the MLRC staff, particularly Eric Robinson, who has been instrumental in the website's development.

Ms. Baron further encouraged members to submit stories and articles of interest for inclusion in the MLRC MediaLawDaily; requested members who attended this year's NAA/NAB/MLRC conference in Virginia to send feedback; touched upon the relevant topics for the upcoming Southwestern, Canada, and London conferences; and encouraged members to view the MLRC Publications List made available at the meeting, which includes an article by Jeff Blum and his colleagues at Davis, Wright, Tremaine

Ms. Baron encouraged basic DCS members to consider upgrading their members to enhanced members, and explained the website resources available to basic members.

Ms. Baron concluded by expressing her gratitude to the members of the DCS, and thanked the MLRC staff.

MLRC Task Force and Committee Reports

- **ALI Task Force:** Thomas Leatherbury reported that the task force had been monitoring the ALI's work on the International Jurisdiction and Judgments Project. Particularly, the task force has been concerned about a Reporters' Note making it easier to enforce foreign

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Defense Counsel Section Annual Meeting

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libel judgments that would be unconstitutional under American standards. The ALI project is moving toward a final vote at the ALI meeting in May, and the reporters are considering a substitute Reporters' Note drafted by the task force, which is included in the November MediaLawLetter. Mr. Leatherbury said work would continue on reaching an agreement with reporters on acceptable language. Mr. Leatherbury would appreciate any comments from DCS members on the Reporters' Note, as well as help from any members of their firms who are also members of ALI.

- **Reporter's Privilege Task Force: Nathan Siegel** informed members that over the last few weeks an ad hoc task force had come together to draft and coordinate work on the ultimate passage of a proposed federal shield law, and that the task force hopes to provide the substantive expertise to support whatever broader media lobbying effort is likely to emerge to encourage the passage of the law. Members have been generating ideas and looking at model and alternative versions of a federal shield law, and will try to act as a type of "Grand Central Station" to coordinate entities interested in the issue. Mr. Siegel reported that the task force was also able to learn about and provide comments on the federal shield law proposed by Senator Dodd, and hoped to continue similar work in the future.
- **Advisory Committee on New Legal Developments: Nathan Siegel** reported that the next MLRC Bulletin will cover access issues that have come out of selected trials, and that the committee will continue the tradition of roundtables and brainstorming sessions on relevant access issues. Mr. Siegel also highlighted the academic session that took place at the Virginia conference.
- **Advertising & Commercial Speech Committee: Richard Goehler** discussed the committee's goal of encouraging committee members to sign on and to be on the look out for new developments to write

about for the MediaLawLetter. Mr. Goehler provided a summary of issues the committee was looking at, including the involvement of right of publicity cases, proposed legislation on right of publicity, new developments and cases concerning definitions of commercial speech, and legislation involving topics such as CANSPAM. The committee has also tried to organize roundtable conference calls to discuss cases and issues and to get relevant topics out through the MediaLawLetter. **Joshua Koltun** and **Peter Raymond** will be replacing Mr. Goehler and **Steven Brody** as Co-Chairs.

- **Conference & Education Committee: Dan Waggoner** reported that the Virginia Media Law Conference was a success, and encouraged members to provide as much feedback as possible. An informal feedback session has already been held, and a lunch is scheduled for this time next year, which members are encouraged to attend in order to provide their ideas for the 2006 conference. **Peter Canfield** will be stepping down as Co-Chair as he assumes the position of Treasurer of the DCS Executive Committee, and **Slade Metcalf** and **Mary Ellen Roy** will be joining the committee as Co-Chairs.
- **Cyberspace Committee: Sandra Baron** gave the report for **Jonathan Hart** and **Tom Burke**, who were not in attendance. The committee is looking forward to utilizing the forum function of the website or creating a listserv to share relevant articles on cyber issues that are more pointed or esoteric than what is covered in the MediaLawDaily. Sandy also encouraged members interested in cyber law to become a part of the committee.
- **Employment Law Committee: Sandra Baron** gave the report for **Sanford Bohrer**, who not in attendance. Sandy reported that a new chair is being sought for the committee once Mr. Bohrer steps down next year. Ms. Baron recognized that many members do not do a lot of employment law in their daily practice, and encouraged members to identify

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Defense Counsel Section Annual Meeting

(Continued from page 66)

people in their firms who would like to become involved with projects such as keeping the outline for the Employment Libel & Privacy Survey current.

- **Ethics Committee: Bob Bernius** reported that the Ethics Committee has been successful in accomplishing its goal of bringing ethics articles tailored to the membership each month through the MediaLawLetter. Mr. Bernius encouraged members to take advantage of the website to access and read previous articles in order to remain cognizant of ethical risks relevant to both in-house counsel and law firm members. **Lucien Pera** will be taking over the role of Chair of the Ethics Committee.
- **International Media Law Committee, Tom Kelley** thanked outgoing co-chair **Jim Borelli** for all his work and his contacts overseas, and welcomed **Jan Constantine** as Co-Chair and **David McGraw** as Vice Chair. Mr. Kelley talked about new projects the committee has underway, specifically the formation of subcommittees to follow developments in particular subdivisions of the world, including the UK, Europe, Canada, Asia, Latin America, the Pacific Rim and Australia. The committee is looking at projects in the former Soviet Union, the Middle East, and Africa. The committee is looking for people to follow developments and keep a sort of “blog” on the website concerning relevant developments and to start establishing contacts and resources overseas. **John Borger** then spoke about the MLRC – Ad Idem Conference in Toronto May 12-13 2005, which will cover the issues of jurisdiction, libel, fair trial/free press, and broadcasting and privacy law issues.
- **Jury Debriefing Project: Nancy Hamilton** reported the committee is continuing a project on debriefing jurors and defense counsel. The project has been productive, but the committee has at times been hindered by local rules, statutes, or judges that prevent the committee from interviewing jurors after a trial. Ms. Hamilton encouraged members to

inform the committee about upcoming trials, and thanked Eric Robinson for his work on the project.

- **Legislative Affairs Committee, Kurt Wimmer** gave the report for **Kevin Goldberg**, who was unavailable. Mr. Wimmer informed members about three tasks the committee has planned for the next year, including the continuation of monthly reports for the MediaLawLetter on federal and state legislation important to the media. The committee also plans to use the website to make available Mr. Goldberg’s index of all pending legislation (complete with Internet links). Finally, the committee plans to work with the task force on the federal shield law project to aid in drafting as well as provide resources if lobbying is required. The committee is also looking for new members and members should contact Kevin Goldberg if interested.
- **MediaLawLetter Committee: Sandra Baron** gave the report for **David Bralow** and Vice Chair **Bruce Rosen**. **David Tomlin** will be the new co-chair of the committee after Mr. Bralow, who is term-limited, rotates off. The committee works closely with Dave Heller, who is now editor of the MediaLawLetter, and members are encouraged to pass along ideas for the newsletter. The committee has been trying to find an “editor” for each state to keep abreast of relevant issues in the jurisdiction, and interested members should let the committee or the MLRC know. Sandy also encouraged members to read Kevin Goldberg’s monthly columns, which reports on pending legislation and also provides an “action plan” for members and their clients.
- **Membership Committee: Susan Grogan Faller** expressed appreciation for the efforts made by insurance companies and in-house counsel in encouraging new members. The committee’s current project is to identify media lawyers in those states with few or no members – Montana, Nevada, North Dakota, Wyoming, Alaska, Delaware, Iowa, Nebraska, Puerto Rico, South Carolina, and Vermont. Susan encouraged members who know media lawyers in

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Defense Counsel Section Annual Meeting

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those states to let the committee know. The committee will also be contacting insurance companies and in-house counsel for leads in these states, and asked DCS members for referrals and creative recruitment ideas. Sandy Baron added that membership had increased to over 220 DCS members and continues to grow each year.

- **Newsgathering Committee: Patricia Wallace** gave the report on behalf of incoming chair **Thomas Julin** and co-chair **Dean Ringel**. The committee completed a model brief on jury access issues, and expects to come up with a model brief on privacy issues within the next few months. The HIPAA report is also being updated, and Ms. Wallace and Mr. Julin requested that members inform them about any cases dealing with HIPAA and access issues. The committee is also looking for bail bondsmen and criminal attorneys in each state for reporters. Finally, the committee has been monitoring post 9-11 issues, including access to courts, access to dockets, and embedded journalists.
- **Pre-Publication/ Pre-Broadcast Committee: Jack Greiner** reported that he and **Robert Bertsche** are outgoing Co-Chairs, and that **Samuel Fifer** and **Jerry Fritz** are incoming Chairs. He discussed the committee's focus over the years, which has included publishing papers, articles in the MediaLawLetter and practice guides on broad topics concerning issues pre-pub issues.
- **Pre-trial Committee: Joyce Meyers** gave the report on behalf of **Henry Abrams**. The committee has had a productive year, updating the summary judgment review checklist and creating a "discovery roadmap" on how to take discovery and prepare a case for a summary judgment motion. The committee has also put together a sample discovery request, and is currently looking for new projects and ideas.
- **Post-Gutnick Task Force: Sandy Baron** reported that the task force deals with the questions raised by the Gutnick decision as well as its predecessor UK

jurisdiction cases. The task force issued a report over the summer confronting the issue of jurisdiction in foreign countries over American publications that may be viewed or downloaded over the Internet. The group will be meeting again over the next month concerning new assignments that went to contact European colleagues concerning proposals in existence in Europe on choice of law. Sandy also discussed the topic of possible lobbying concerning international jurisdiction and attendant issues.

- **Trial Committee: Bob Nelson** reported that the former Trial Techniques and Jury Committees had merged into one Trial Committee, and that the committee is soliciting members who served on either of the previous committees. **Michael Sullivan**, the other incoming Co-Chair, reported that the committee has two projects coming up this year: a final argument project that will summarize copies of arguments provided by the members into a word-searchable database, as well as a jury instruction manual project for which the committee is soliciting jury instructions for the members. **Rob Harvey** will be Vice-Chair.

Conclusion

Bruce Johnson encouraged DCS members to become involved in committees that interested them. He was thanked on behalf of the Executive Committee for all of his work, as well as his wonderful sense of humor during DCS meetings. There being no further business the meeting was adjourned.

DID YOU GO TO TRIAL RECENTLY?

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

LEGISLATIVE UPDATE

Reporter's Privilege, International Press & Open Government

By Kevin Goldberg

The 108th Congress went out with more of a bang than a whimper as far as press issues were concerned, with the introduction of a federal reporter's shield law during the November portion of the "lame duck" session and the passage of an international broadcasting bill that had been originally introduced as a free-standing measure but finally included in the intelligence reform bill. In addition, major rewrites of the Freedom of Information Act are still being contemplated.

S 3020 (Free Speech Protection Act)

- Introduced on November 19, 2004 by Senator Dodd (D-CT), this is the first reporter's shield law that has been introduced in Congress since 1987.
- After an earlier draft was floated among interested groups, this version is the product of negotiations between the Senator's staff and many MLRC members and staff. It is based primarily on the laws already in place in the District of Columbia and Maryland
- It can be summarized as follows:
 - The bill does not attempt to define a "journalist," instead providing protection to a "covered person" who is one who:
 - Engages in the gathering of news or information and
 - has the intent, at the beginning of the process of gathering news or information, to disseminate the news or information to the public, with the term "news or information" defined very broadly in an attempt to cover as many media outlets as possible
 - The bill specifically lists 7 types of news media that are covered:
 - newspapers
 - magazines
 - journals or other periodicals
 - radio
 - television
 - any means of disseminating news or information gathered by press associations, news agencies or wire services

- any printed, photographic, mechanical or electronic means of disseminating news or information to the public
- It creates an absolute privilege for confidential sources, which applies to the reporter's supervisors and assistants, rendering the information inadmissible in any proceeding or hearing before any branch of the federal government
- There is a qualified privilege for:
 - notes
 - outtakes
 - photographs or negatives
 - video or sound tapes
 - film
 - other data that is not communicated in the news media
- This qualified privilege can only be overcome through clear and convincing evidence that:
 - the news or information is critical and necessary to the resolution of a significant legal issue before an entity of the federal government;
 - the news or information could not be obtained by alternative means; and
 - there is an overriding public interest in the disclosure
- The bill is going to be reintroduced in the 109th Congress, where we hope for bipartisan support in both houses. Representatives of both media companies and associations are working to obtain as many sponsors as possible before Congress reconvenes in January.

International Free Press and Open Media Act of 2004

- On February 23, 2004, Sen. Richard Lugar (R-IN) introduced S 2096. This bill adds the media to the list of businesses that will benefit from grants made by the National Endowment for Democracy. The bill as passed does not state the amount to be granted to media activities – a departure from the 10 percent of the amounts made available to the Endowment during that originally would go to programs to promote freedom of the press and other media, nor are the specific programs supported by these

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funds defined. Instead, the bill provides that sums are to be appropriated “as necessary” to carry out activities related to 3 international broadcasting bills:

- The United States Information and Educational Exchange Act of 1948 (22 USC 1431)
- The United States International Broadcasting Act (22 USC 6201)
- Foreign Affairs Reform and Restructuring Act of 1998 (22 USC 6501)
- Sen. Lugar’s statement supporting the bill upon introduction offered a strong endorsement for the role of a free press in a burgeoning democracy. His remarks included the following: “There is a strong desire by our finest journalism schools, newspapers, broadcasters, and marketing and advertising enterprises to help build free press and open media in the world. We also need to engage all the new media, like Internet companies and wireless forms of communications. To better organize and focus these efforts, this legislation directs the Secretary of State to provide funding to the National Endowment for Democracy for the work a free press institute.”
- After months of inactivity, the bill was slipped into the omnibus intelligence reform bill that was passed at the very end of the 108th Congress. Whether the bill actually has an impact on international free speech remains to be seen.

HR 5073 (Restore Open Government Act of 2004)

- Introduced on September 14, 2004 by Rep. Waxman (D-CA), this bill follows up on the extensive report issued by the congressman in his role as ranking minority member of the Government Reform Committee entitled “Secrecy in the Bush Administration”
- It would effect six major changes to the current state of access to government information, many of which have been sought for several months:
 - Enact into law the “Restore FOIA Act” which sought to reinstate the “compromise language” which was to be passed into law as the Critical Infrastructure Information Act of 2002 but at the last minute passed over for much more stringent language

- Overturn both the “Ashcroft Memo” and “Card Memo” stating Administration policy on FOIA, in favor of a standard used by Attorney General Janet Reno, who said the Department of Justice would only defend a FOIA denial in federal court if foreseeable harm was likely to result from disclosure of the records at issue
- Overturn President Bush’s Executive Order relating to Presidential records in favor of the previously existing standard enunciated by President Reagan
- It essentially overturns the Supreme Court’s ruling that the records of the energy task force headed by Vice President Cheney are not subject to disclosure via the Federal Advisory Committee Act
- It seeks to reduce excessive classification of information by creating more Congressional oversight of the classification process
- It institutes “fee shifting” whereby a plaintiff seeking records from a federal agency can recover attorneys’ fees upon receiving the records, even if the case was not officially resolved through a court order, as long as the commencement of litigation provided the substantial impetus for release of the records.
- The bill is expected mainly to be a “placeholder”, not receiving much attention in this session of Congress, but working as a starting point for similar legislation when the 109th Congress commences in January.
- In addition, Senator John Cornyn (R-TX) has been soliciting ideas from members of the press and the FOIA requestor community as to possible FOIA fixes through James Ho, Chief Counsel to the Constitution, Civil Rights and Property Rights Subcommittee to the Senate Judiciary Committee. Mr. Ho will continue to work on this through the break and interested parties can contact him through the Senate Judiciary Committee.

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

ETHICS CORNER

Uninvited E-mails Making Unwanted Inquiries

Len Niehoff

Maybe you practice with a firm. Various online profiles reflect your education, your expertise in the field of First Amendment and media law, and your e-mail address. Or maybe you practice as in-house counsel. Your company's website includes a biographical sketch and e-mail information for you and everyone else in the law department. In either event, all this data floats around in cyberspace, bringing welcome inquiries to your doorstep. Unfortunately, it brings other inquiries as well.

E-mail Asks for Advice

We have all had the experience. You open an e-mail and begin reading, only to discover that it comes from someone you do not know seeking legal advice you cannot give. Often the e-mail comes from someone who believes they have been libeled, slandered, or otherwise molested by a newspaper or broadcast entity that you represent.

This leaves you with two questions. Whether you can provide the requested legal advice is usually the easy one. Whether you can share the contents of the inquiry with your media clients is often tougher.

With respect to the in-house lawyer, the issue seems relatively straightforward. No outsider who communicates with a company's in-house lawyer has any reasonable expectation of creating an attorney-client relationship with them or securing legal advice from them. Of course, in-house counsel must comply with Rule 4.3, which helps ensure that an unrepresented individual does not mistakenly believe that opposing counsel is disinterested or, worse, on their side. Beyond this, however, the risks for in-house counsel are probably limited.

The risks for outside counsel are greater, and they stem from a fundamental ambiguity inherent in the relationship. On one hand, no attorney-client relationship exists with the inquirer and so it seems disproportionate to impose full-scale obligations of confidentiality upon the lawyer under these circumstances. On the other hand, it seems similarly

unfair to deprive all protection to an individual making a reasonable and good faith inquiry about the possibility of representation.

Enter Model Rule 1.18, incorporated into the Model Rules in February, 2002, and still under consideration in many states. In essence, Rule 1.18 states that a lawyer should maintain confidentiality with respect to matters learned from such initial inquiries. Further, the Rule states that a lawyer can acquire so much information in the course of such discussions as to disqualify them from subsequently taking action adverse to that potential client.

Still, the Rule appears to provide a safe harbor by stating that a lawyer who has received such disqualifying information can still proceed with the adverse representation if he or she took reasonable measures to avoid learning any more than

was necessary to determine whether to represent the prospective client.

Attorneys need to review their websites and other electronic communications carefully to ensure they do not create expectations we cannot meet and impose duties we do not want.

Who is a Prospective Client?

All of this assumes, however, that the inquirer qualifies as a "prospective client" within the meaning of the Rule. The commentary to Rule 1.18 states that "a person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a 'prospective client.'" This substantiates the reasoning set forth above with respect to in-house lawyers.

But how do we determine "reasonable expectations" with respect to outside lawyers? In an article printed in the *ABA Journal*, Kathleen Maher—a lawyer with the ABA Center for Professional Responsibility—attempts to glean an answer from the authorities available, which are limited in number and pre-date Rule 1.18. See K. Maher, "Uncertain Duty," *ABA Journal*, June 2003.

In her article, Maher points to Arizona Opinion 02-04. That Opinion concludes that no duty of confidentiality exists between a lawyer who uses e-mail (but does not main-

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tain a website or advertise on the internet) and someone who sends them an unsolicited email inquiry.

What about those of us who do maintain a website? “The use of appropriate disclaimers may be essential to prevent unsolicited e-mail from being treated as confidential,” the Opinion said. Maher also points to a 2001 Opinion by the Association of the Bar of the City of New York. That Opinion suggests that such inquiries must be treated as confidential unless a website disclaimer “specifically and conspicuously” warns prospective clients not to send such unsolicited information.

Media attorneys probably get more than the 15 minutes of fame Andy Warhol promised us. We serve high-profile

clients, and this tends to raise our own public profile. Sometimes this brings us wonderful new clients and exciting new cases. But, at least just as often, it brings inquiries from people we can’t represent about matters we shouldn’t handle.

All attorneys, and particularly those of us who practice in the media law field, need to review their websites and other electronic communications carefully to ensure they do not create expectations we cannot meet and impose duties we do not want.

Len Niehoff is a partner with Butzel Long in Ann Arbor, Michigan.

**Los Angeles
January 27, 2005**

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