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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through December 30, 2005

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LIBEL & PRIVACY

MLRC Calendar

January 26, 2006

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Media Creativity in a Changing Legal and Regulatory Environment
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Entertainment & Media Law Institute
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February 28, 2006

International Libel & Privacy: Navigating the Minefield
Bloomberg News
731 Lexington Avenue (58th Street)
Reception at 6:00 p.m.
Panel discussion at 7:00 p.m. with
Stephen Fuzesi, Jr. (Newsweek), Charles J. Glasser, Jr. (Bloomberg News),
Elisa Rivlin (Simon & Schuster) and Kurt Wimmer (Covington & Burling),
moderated by David Tomlin (AP).
Co-sponsored by MLRC, AAP Freedom to Read Committee
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New York, New York

Prosecutor Wins $75,000 Libel Award Against Weekly Newspaper

A Virginia prosecutor won $75,000 in libel damages over a newspaper's publication of a letter from a prisoner who accused plaintiff of bringing trumped up murder charges against him. *Ziglar v. Media Six, Inc.*, No. CL02000132-00 (Va. Cir. Ct., Roanoke City jury verdict Dec. 15, 2005). The jury found that the newspaper was reckless in publishing the charges without any investigation.

Letter Led to Suit

The plaintiff, Joan Ziglar, is the Commonwealth's Attorney (prosecutor) in Martinsville, Virginia. On November 9, 2001 a local newspaper called the "*Buzz"* published a letter from Zakee P.J.Tahlib. Tablib was already serving a lengthy drug sentence and had been charged by Ziglar's office on new charges of murder. In his letter, Tahlib admitted that he was a drug dealer, but claimed he was "charged for something [he] had nothing to do with." That Ziglar had "trumped up" the murder charges against him because he had a relationship with Ziglar's sister; and made a deal with a witness "to lie at the Grand Jury and to implicate me even more."

Ziglar sued Tahlib, the *Buzz* (which ceased publishing in 2002), reporter Errol "Kip" Wallace, Media Six Inc., and its owner Charles B. Roark. Media Six published local tabloid-style papers and operates a local cable station. Roark had been described as wanting to be the next Ted Turner. After the suit was filed, Roark told the local *Martinsville Bulletin:* "We don't follow established ethics…. Ethics are ways to cover up people's doings. You have to follow what's in your heart."

Pre-Trial Wrangling

In July 2002, plaintiff dismissed her claims against the prisoner, and the remaining defendants filed a motion to dismiss. In February 2003, Circuit Judge Clifford Weckstein denied the motion, holding that the letter contained statements of fact that were capable of being proved false. *Ziglar v. Media Six, Inc*., 61 Va. Cir. 173, 2003 WL 549977 (Va. Cir. Feb. 18, 2003).

At the end of 2003, as discovery was proceeding, Media Six filed for Chapter 11 bankruptcy for unrelated reasons. Last year a bankruptcy court ruled the libel suit could proceed. *In re Media Six, Inc.*, Bankr. No. 03-05184 (Bankr. W.D. Va. order Aug. 23, 2004). (The bankruptcy filing was dismissed at the request of Media Six on Feb. 3, 2005.)

The Trial Begins

The libel trial began on December 12, 2005. At the start of the proceedings, the plaintiff dropped "Kip" Wallace as a defendant, and he was later called as plaintiff's first witness.

Plaintiff's lawyer, Robert Morrison, said during his opening argument that Buzz was "at best tabloid journalism."

After the eight-member jury was selected, plaintiff's lawyer, Robert Morrison, said during his opening argument that *Buzz* was "at best tabloid journalism," and that Roark "didn't care whether it was true or not. All he cared about was his bottom line." Defendant's attorney Perry Harold stated that there was a basis for many of the claims in the letter, and that the wide margin of Ziglar's re-election in November 2004 showed that her reputation had not been harmed by anything that the newspaper published. "We don't think it hurt Ms. Ziglar at all," he said. "She's still respected."

"Kip" Wallace was called as the first witness and testified that he sent the letter to be typeset without verifying the contents because it seemed legitimate. He added that he did not call Ziglar because she had refused to talk to the paper in the past.

Plaintiff then called Ziglar's assistant prosecutor and the Patrick County Commonwealth's Attorney. (That office prosecuted Tahlib after Ziglar withdrew from the case. The murder charges were eventually dropped, but Tahlib was convicted of conspiracy. His co-defendant in this case submitted a letter supporting charges in the libel case). Both prosecutors testified that the publication of the letter had lessened their respect for Ziglar.

Next was the plaintiff's expert witness: Edward Wasserman, the Knight Professor of Journalism Ethics at Washington and Lee University and a columnist on me-

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Prosecutor Wins $75,000 Libel Award Against Weekly Newspaper

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dia issues for the *Miami Herald*. He testified that the allegations in the letter were too important to be placed on the letters page; they should have been investigated by a reporter and, if true, covered by the paper as news. Asked about running the latter without checking on the allegations, he said, "it's reckless. It's thoughtless. It's deplorable."

The first day of trial ended with testimony from Ziglar's sister, who testified that she once worked with Tahlib for about a month, but they never had a personal relationship.

Plaintiff's Testimony

Plaintiff was the primary witness on the second day. She testified that *Buzz* and Media Six's cable channel had been persistent critics of her, especially after she prosecuted a Media Six employee, Bob Sharpe, for welfare fraud.

She testified that "there was this air of suspicion created because of the letter," that cast her integrity as a prosecutor in doubt. "They have no idea what they've done to me and my family." She said she was not contacted before publication. And at one point during her testimony, the court took a recess after she broke down in tears on the stand.

Under cross-examination, Ziglar said that while she expected criticism as an elected official, "when you start accusing me of crimes, you're going too far." When defense attorney Harold asked whether anyone had told her that they believed the allegations in the letter, she said that no one had. Finally, plaintiff introduced depositions in which publisher Roark had said that he had not attempted to verify the allegations in the letter.

At the close of plaintiff's evidence, a defense motion for summary judgment for lack of proof of actual malice was denied.

The Defense Case

The defense began its case with the testimony of several public officials, including the Martinsville police chief and the Henry County sheriff, who both testified that the letter had not affected their high opinion of Ziglar, although one said that television coverage of the letter had effected one of his neighbors.

Randy Smith, a prosecutor in Henry County, who Ziglar defeated in November to win re-election, testified that the letter to the newspaper was not credible. Bob Sharpe, the Media Six employee prosecuted for welfare fraud testified that he did hold the prosecution against Ziglar, and that he was on a leave of absence when the letter was published.

The final day of the trial featured the testimony of publisher Charles Roark, who began crying when he was asked why *Buzz* printed Tahlib's letter. "I think people like him need to have a voice," he said, adding that the capital murder charges against Tahlib were dropped after the letter was published. "I think that letter saved his life," Roark said.

Roark also testified that no one on the Media Six staff had formal journalism training, and there was no policy in place for dealing with accusatory letters. "I'll say to Miss Ziglar that I'm sorry I hurt her," he added.

The defense case ended with a recording of deposition testimony by Tahlib and his co-defendant from the murder prosecution. Tahlib repeated the allegations in his letter – saying he had an affair with Ziglar's sister, and that Ziglar had got witnesses to lie before the grand jury. "Maybe I'm wrong, maybe I'm right," Tahlib said in the deposition. "But that's my opinion." He denied accusing Ziglar of procuring perjury. "I never wrote that in no letter," he said. He also said that the letter led to the murder charge against him being dropped. "I think that letter saved my life," he said.

Closings and Verdict

Plaintiff's attorney began his closing argument by reducing the amount Ziglar was seeking from $3 million to $250,000. He attacked the credibility of Tahlib. "Who are you going to believe?," he asked the jurors. "Are you going to believe the lady who drug herself up from the tobacco fields of Henry County," or "those merchants of death," referring to Tahlib and his co-defendant.

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Prosecutor Wins $75,000 Libel Award Against Weekly Newspaper

(Continued from page 6)

In his closing, defendants' attorney defended Tahlib and his fellow inmate. "I know they are criminals," he said. "But I submit to you that does not make them less good than any other person." He also said that the plaintiff had not established that defendants acted with reckless disregard for the truth, since they did not have serious doubts about the truth of the statements in the letter. The defense returned to Ziglar's reelection on November 8 with 70 percent of the vote, citing it as evidence that her reputation remains untarnished.

After four-and-a-half hours of deliberation, the jury came back with a $75,000 verdict for Ziglar. The defendants lawyer said that he would file post-trial motions to get the award reduced.

Plaintiff was represented at trial by Robert Morrison of Watson & Morrison, P.C. in Halifax, Virginia and Mark Williams. Defendants were represented by Perry H. Harrold a sole practitioner in Martinsville, Virginia. Statements from the trial are taken from the coverage in the case by the *Martinsville Bulletin*.

Media Trials in 2005

Plaintiff Wins Over the Past Year

- *Aficial v. Mantra Films*, (Va. Cir. Ct., Virginia Beach jury verdict June 29, 2005). The jury awarded the young woman plaintiff $150 in compensatory damages and $60,000 in punitive damages on a misappropriation claim against the makers of the "Girls Gone Wild" video series. Plaintiff was filmed kissing a girlfriend and the scene was included in a DVD from the series.
- *Bohl v. Hesperia Resorter*, No. SCV SS68052 (Cal. Super. Ct., San Bernardino Co default Nov.'04). A California judge awarded more than $3 million in default damages against a California newspaper publisher who refused to reveal the source(s) for allegedly libelous articles that stated that plaintiff, owner of a police counseling service, passed on confidential patient information to police supervisors.
- *Mann v. Abel*, No. 14180/2003 (N.Y. Sup. Ct., Westchester Co. jury verdict Oct. 20, 2005). The jury awarded a local town official $75,000 in compensatory damages and $30,000 in punitive damages over a critical newspaper column that alleged plaintiff covered up "political favors" and "pulled strings" in town.
- *Murphy v. Boston Herald*, Civil No. 02-2424B (Mass. Super. Ct., Suffolk Co verdict Feb. 18, 2005). The jury awarded the plaintiff, a sitting judge, $2.09 million in damages, based on statements in various *Boston Herald* articles and television interviews by a reporter that plaintiff told a teenage rape victim to "get over it."
- *Price v. Blair,* No. 04–4194-E (Tex. Co Ct. at Law No. 5 default judgment Nov. 14, 2005). A Texas judge awarded a local elected official $852,000 damages against a weekly newspaper that criticized plaintiff after the newspaper refused to comply with discovery orders
- *Reilly v. Boston Herald,* Civil No. 98-294 (Mass. Super. Ct. jury verdict Nov. 4, 2005). The jury awarded $225,000 in damages to a veterinarian on a libel claim against the Boston Herald for publishing pet owners' allegation that plaintiff failed to properly treat their dog and covered up the records.

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- *Wiggins v. Mallard*, No. (Ala. Cir. Ct., Escambia County jury verdict Oct. 27, 2005). The jury awarded one dollar in libel damages award to a father and son over a newspaper's erroneous arrest report. (Damages were split between the newspaper and the police chief source for the article).

- *Ziglar v. Media Six, Inc.*, No. CL02000132-00 (Va. Cir. Ct., Roanoke City jury verdict Dec. 15, 2005). Jury award of $75,000 to a prosecutor over a letter to the editor from a convict published in a local newspaper. The letter accused plaintiff of trumping up criminal charges against the convict.

Defense Wins Over the Past Year

- *Columbus v. Globe Newspaper Co, Inc.*, Civil Action No. 00-724 (Mass. Super. Ct., Middlesex County, jury verdict Feb. 2, 2005). Jury verdict for the *Boston Globe* in a libel suit over an articles about alleged corruption, conflicts of interest, and favoritism in a vocational high school home building program.

- *Davis v. Marion Star***,** No. 1998-CP-3300372 (S.C. Cir. Ct., Marion County directed verdict May 3, 2005). Directed verdict for the defense for lack of actual malice on a public official's libel claim against a local newspaper for its coverage of plaintiff's statements at a town council meeting.

- *Divita v. Ziegler*, Civil No. 03-9214 (Ky. Cir. Ct. jury verdict May 24, 2005). Jury verdict for a radio talk show host and distributor over on-air comments made about the host's personal relationship with plaintiff, also a radio show host.

- *Jarosak v. Bloyer*, (Ind. Super. Ct., Porter County directed verdict entered Jan. 25, 2005). Directed verdict for the host of a cable television show for lack of evidence of actual malice over statements that plaintiff, a retired police chief, was found in the back seat of his police car with a teenage girl, and that he had pointed a gun at his ex-wife's head.

- *Knight v. Chicago Tribune Co.*, No. 2000-L-004988 (Ill. Cir. Ct. jury verdict May 20, 2005). Jury verdict for a reporter and newspaper on a libel claim by a former prosecutor over coverage of a criminal trial in which the plaintiff and other government officials were accused of framing a criminal defendant for murder.

- *Pitts Sales, Inc. v. King World Productions, Inc.*, (S.D. Fla. bench verdict July 29, 2005). Bench verdict rejecting plaintiff's claim for trespass (for nominal damages) over hidden camera filming at plaintiff's magazine subscription sales business by a producer working as an employee at the company.

- *Thermal Engineering Corp. v. Boston Common Press, Ltd.*, (S.C.Ct.C.P directed verdict June, 2005). Directed verdict for defendant for lack of actual malice on a libel claim over a *Cook's Illustrated* magazine article that rated plaintiff's grill "not recommended."

A full report on these cases and the year's results will be published in 2006 in MLRC's Report on Trials & Damages.

If you know of cases not included in this list contact MLRC.

Massachusetts Judge Apologizes for Letters to *Herald* Seeking to Deter Newspaper's Appeal

Victorious Trial Plaintiff Sent Letters on Court Stationery

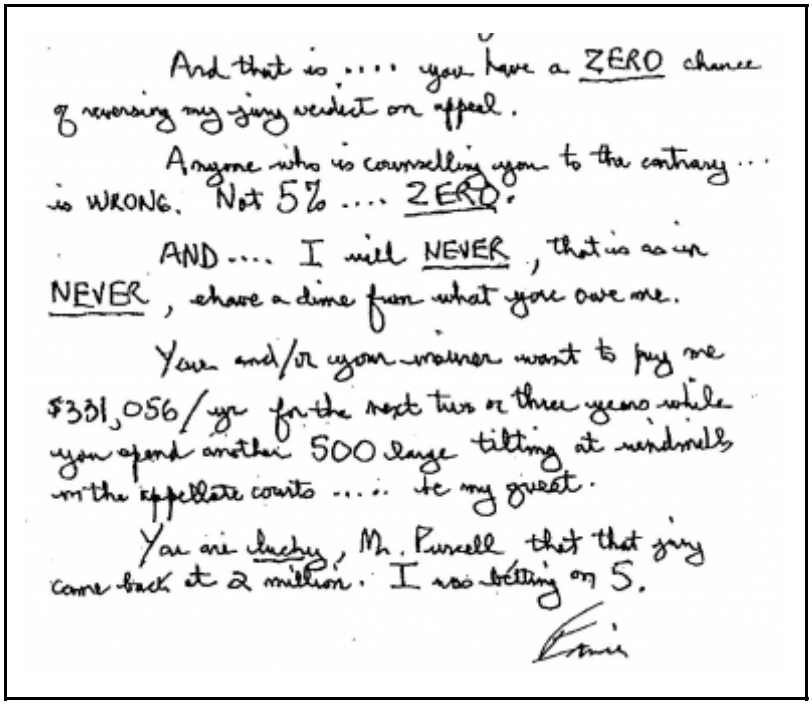
Massachusetts Superior Court Justice Ernest B. Murphy, who earlier this year won a libel trial against the *Boston Herald*, this month apologized for writing letters on court stationary telling the newspaper it had "zero chance" of reversing the $2,090,000 verdict and demanding an additional $1.25 million to settle the case.

The apology came one day after the *Herald* revealed the letters, and cited them as part of a "campaign to attempt to intimidate" the newspaper into relinquishing its constitutionally-protected rights of appeal. The *Herald* asked the trial court for a motion to vacate the judgment and dismiss the judge's complaint under Mass. R. Civ. Pro. 60 (which is equivalent to its federal counterpart).

The Libel Trial

The verdict, which was announced by a Massachusetts Superior Court jury on February 18, compensated Justice Murphy for 22 statements in articles in the *Herald* and by reporter David Wedge on the Fox News program "The O'Reilly Factor" about the judge's allegedly lenient treatment of criminal defendants, including making an insensitive comment to a teenage rape victim. *See MLRC MediaLawLetter* Feb. 2005 at 19.

On October 19, the trial court mostly denied a defense motion for judgment notwithstanding the verdict in the case, granting the motion only as to two of the 22 statements, reducing the award by $80,000. *See Murphy v. Boston Herald*, No. 02-2424B (Mass. Super. Ct. ruling Oct. 19, 2005); *see also MLRC MediaLawLetter* Oct. 2005 at 20.



And that is .... you have a ZERO chance of reversing my jury verdict on appeal.

Anyone who is counselling you to the contrary ... is WRONG. Not 5% .... ZERO.

AND .... I will NEVER, that is as in NEVER, chase a dime from what you owe me.

You and/or your insurer want to pay me $331,056/yr for the next two or three years while you spend another 500 large tilting at windmills in the appellate courts .... be my guest.

You are lucky, Mr. Purcell that that jury came back at 2 million. I was betting on 5.

Ernie

The Judge's Post-Trial Letters

On Feb. 20, two days after the trial verdict, Murphy wrote a hand-written letter on court stationary to *Herald* publisher Patrick J. Purcell. After expressing his hope that Purcell "continue ... to honor the privacy of an (sic) personal communication in the nature of what is generically referred to as 'settlement discussions' in my business," Murphy proposed that he and his attorney meet with Purcell, with the publisher allowed to bring one other person to the meeting; Murphy suggested "a *highly* (sic) honorable and sophisticated lawyer from your insurer."

Murphy also warned against involving the *Herald*'s trial counsel. "Under *NO* circumstances should you involve Brown, Rudnick in the meeting," he wrote. "Or notify the firm that such a meeting is to take place. ... That meeting will be AB-SO-LUTE-LY confidential and 'off-the-record,' between four honorable men."

He continued:

> *You will bring to that meeting a cashier's check, payable to me, in the sum of $3,260,000. [$1.25 million, or 62.2 percent, above the final trial verdict.] No check, no meeting.*
>
> *You will give me that check and I shall put it in my pocket.*
>
> *I will say to you, if, at the end of this meeting, you can stand before the God of your understanding, and as a man of honor, ask for the return of that check, I'll flip it back to you.*

In a post-script, also on court stationery and incongruently dated Feb-

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Judge Murphy Apologizes for Letters to *Herald* Seeking to Deter Newspaper's Appeal

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ruary 19 (the day before the date on the letter to which it was attached), Murphy asked Purcell to destroy the letter if he did not agree to the meeting.

> *I consider it private settlement discussion between principals to a transaction, and I assure you it provides you with no (sic) tactical or strategic advantage in the case. ...*
>
> *It would be a mistake, Pat, to show this letter to anyone other than the gentlemen whose authorized signature will be affixed to the check in question.*
>
> *In fact, a BIG mistake. Please do not make that mistake.*

After Purcell did not respond, Murphy sent a second letter dated March 18. The letter, which was on plain paper, referred to stories in the *Boston Globe* and other newspapers about financial problems at the *Herald*.

> *I'm going to once again, principal to principal, as 'settlement negotiations' – of the record – just between you and me – tell you something which may help you in your decision-making. Something for nothing.*
>
> *And that is ... (sic) you have ZERO chance of reversing my jury verdict on appeal.*
>
> *Anyone who is counseling you to the contrary ... (sic) is WRONG. Not 5 % ... (sic) ZERO. ...*
>
> *You and/or your insurer want to pay me $331,056 / yr for the next two or three years while you spend another 500 large tilting at windmills in the appellate courts ... (sic) be my guest.*

Again, the *Herald* did not respond. Claiming that the *Herald* faced financial problems, Murphy filed a motion with the court asking for post-judgment security. In response, the *Herald* filed a motion in opposition to the request for security and filed a related cross-motion to vacate the judgment and dismiss the complaint.

The *Herald's* opposition stated that sworn testimony from the publisher during the case said the newspaper was "profitable" and that the newspaper was not facing any challenges other than those confronting the newspaper industry generally. In fact, its modest circulation declines were less than those of the *Boston Globe*.

The *Herald's* lawyer on appeal, Bruce W. Sanford, announced the motions at a press conference at which he also revealed the letters that Murphy had sent. "The judge's letters are a stark and sad attempt to bully the Herald into abandoning its constitutional rights and give him more money than he was awarded at trial," Sanford said at the press conference.

Although Murphy's attorney responded by initially defending the judge's use of court stationary, the next day Judge Murphy apologized in a letter to the *Boston Globe*. In the letter, Murphy said that he was unaware that Massachusetts law and the Code of Judicial Conduct prohibited use of court letterhead for personal correspondence. See Mass. Code Jud. Conduct, Canon 2 (B), Commentary, ¶ 1, cl. 5. "I hereby publically (sic) and unqualifiedly apologize for the use of my Superior Court stationary (sic) to have written a personal letter ...," he wrote.

But Murphy's counsel, Howard Cooper, continued to insist that the letters were not inappropriate, and that the *Herald* violated confidential settlement negotiations by revealing them. Cooper said that Murphy and Purcell had met twice prior to trial in an effort to settle the case, and that the letters were a continuation of that dialogue.

The *Herald*'s complaints about the letters, he said, were an attempt to "divert the public's attention from the fact that a jury of Mr. Purcell's peers found his newspaper repeatedly and with malice libeled Judge Murphy."

A hearing on the motion to attach assets has been set for January 19, 2006. The Massachusetts Commission on Judicial Conduct would not comment to reporters on whether it was investigating the case.

The *Herald*'s appellate attorney, Bruce W. Sanford, is with Baker & Hostetler in Washington, D.C. At trial the newspaper was represented by M. Robert Dushman, Elizabeth A. Ritvo and Jeffrey P. Hermes of Brown Rudnick Berlack Israels LLP in Boston. Judge Murphy is represented by Howard Cooper and David Rich of Todd & Weld LLP in Boston.

Media Appeals from Trials in 2005

- *Anderson v. The Augusta Chronicle, Morris Communications*, No.26031, 2004 WL 3486868 (S.C. Aug 22, 2005). The South Carolina Supreme Court held that a directed verdict in favor of a newspaper was error because the plaintiff had presented sufficient evidence of actual malice at trial for the case to have gone to the jury.

- *Ayash v. Dana Farber Cancer Institute*, 822 N.E. 2d 667 (Mass. 2005), *cert. denied,* 126 S.Ct. 397 (U.S.). The Massachusetts Supreme Judicial Court affirmed a $2.1 million default judgment against the *Boston Globe* for its refusal to disclose the identity of confidential source(s) for a series of stories about a fatal medical overdose at a Boston hospital.

- *Carey v. Shepard*, No. 83 A 01-0403-CV-00097 (Ind. Ct. App. Oct. 28, 2005) (memorandum). The Indiana Court of Appeals summarily affirmed a $235,000 jury award to the mayor of Clinton, Ind. for a political advertisement published in *The Daily Clintonian* which alleged that he abused his office. Defendant refused to identify the sponsor(s) of the ad during the two-day trial, other than to deny that it was him.

- *Century Martial Art Supply, Inc. v. National Association of Professional Martial Artists*, 129 Fed. Appx. 421 (10th Cir. 2005). The Tenth Circuit affirmed a damage award for libel and related claims against a martial arts trade magazine, holding that "vague objections" to the verdict were not properly preserved for appeal. "Incanting a generic argument that there was insufficient evidence to support any of [plaintiff's] claims … failed to provide guidance to the district court or the opposing counsel regarding how Century's evidence fell short as a matter of law."

- *Franklin Prescriptions, Inc. v. New York Times Co.*, 424 F.3d 336, 33 Media L. Rep. 2254 (3d Cir. 2005). The Third Circuit affirmed a jury verdict in favor of the *Times* in a defamation action over the use of a picture of plaintiff's website in an article on risky online drug sellers. The jury found that the article falsely implied plaintiff engaged in such practices and was published negligently, but that the publication caused no actual harm to the plaintiff. The Third Circuit affirmed, ruling that the trial court did not err in failing to charge the jury that damages could be presumed.

- *Jensen v. Sawyers*, 2005 UT 81 (November 15, 2005). The Utah Supreme Court significantly reduced a $3.2 million damage award based on a hidden camera news report at a doctor's office, but let stand over $500,000 in damages for libel, false light, intrusion and eavesdropping.

- *Kentucky Kingdom Amusement Co. v. Belo Kentucky, Inc.,* 2005 WL 2043633, 33 Media L. Rep. 2350 (Ky. Aug. 25, 2005). The Kentucky Supreme Court reinstated a $2.97 million verdict over a series of television broadcasts concerning an accident at plaintiff's amusement park, finding sufficient evidence of actual malice to support the award.

- *Stewart v. Oklahoma Pub. Co*., No. 100,099 (Okla. Ct. Civ. App. 2005) (unpublished). The Oklahoma Court of Appeals reversed a $3.7 million jury award for libel and false light, holding that defendants' online republication of the state's sex offender registry was immune under § 230 of the Communications Decency Act

- *West v. Media General Operations, Inc.,*120 Fed. Appx. 601, 33 Media L. Rep. 1321 (6th Cir. 2005). The Sixth Circuit reversed a $310,000 damage award, holding it was an error to give the jury a general verdict form on upwards of 14 alleged defamatory statements. A special verdict form, the court noted, "provides a useful check not only against misconstruction of the actual malice standard, but also against a misunderstanding of Plaintiffs' allegations themselves."

Updates on appeals from trials will be included in MLRC's forthcoming 2006 Report on Trials & Damages.

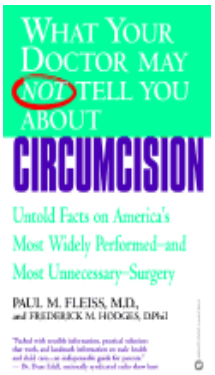
If you know of cases not included in this list contact MLRC.

Second Circuit Affirms Dismissal of Complaint Over Book Review on Amazon.com

The Second Circuit this month summarily affirmed dismissal of a libel complaint over a book review posted on Amazon.com. *Fleiss v. Wiswell*, No. 05-01610CV, 2005 WL 3310014 (2d Cir. Dec. 7, 2005) (Walker, Winter, Jacobs, JJ).

Looking at the "content of the whole communication, its tone and apparent purpose" the Court affirmed that the complained of statements were all matters of opinion.

The plaintiffs, a medical doctor and researcher, are the authors of a book called "What Your Doctor May NOT Tell You About Circumcision: Untold Facts on America's Most Widely Performed-and Most Unnecessary-Surgery" published in 1992. As can be gleaned from the title, the authors oppose the practice.



The defendant is a doctor at Stony Brook University hospital in New York and a proponent of the medical benefits of circumcision. He posted a review on Amazon that stated, among other things, that plaintiffs' "untold facts" are "untold because they are lies and diatribe"; that their conclusions "are as far from the truth as any author can get"; and that the authors had not "done any medical research in the area."

Last fall the district court dismissed the complaint, finding that in the context of a review the imprecise and evaluative statements were all protected opinion. *See* 04-CV-0964 (E.D.N.Y. Nov. 15, 2004) (Seybert, J.).

Arkansas Appeals Court Affirms Punitive Damage Award

In an interesting non-media case, the Arkansas appeals court affirmed a punitive damage award, holding that a $175,00 defamation award and a $210,000 promissory estoppel award could be combined as the "denominator" for purposes of a $3.08 million dollar punitive damage award on the defamation claim. *Superior Federal Bank v. Jones & Mackey Construction*, 2005 WL 3307074 (Ark App. Dec. 7, 2005).

This created an 8 to 1 ratio of compensatory damages to punitives, in line with the Supreme Court's guidelines in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003). In *State Farm*, the Supreme Court noted that "few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process" although the Court refused to adopt this as a bright line rule.

Indeed, the Arkansas court suggested it would have upheld the punitive award based solely on the defamation award (a 17 to 1 ratio). The court found the defendant's conduct in breaching a construction finance agreement and its related statements about plaintiff were particularly reprehensible. A bank officer had accused plaintiff of "check kiting," told businesses that the bank was no longer doing business with plaintiff and stated that plaintiff was a "big, fat, damn slob" and a "big, black gorilla" who was "fucking up." The appeals court had previously affirmed defamation liability as to all these statements.

Private Facts Suit Over Newsworthy Article Survives Motion to Dismiss

In one of the strangest rulings of the year, a Texas federal district court held that a private facts claim over a newsworthy publication could survive a motion to dismiss where plaintiff alleged the information came from sealed documents covered by a protective order. *Lowe v. Hearst Communications*, No. SA-05-CA-554-OG, 2005 WL 3348941 (W.D.Tex. Dec. 7, 2005) (Garcia, J.).

The court reasoned that under such circumstances the newspaper might have acquired the information illegally and its publication therefore would not receive First Amendment protection. In effect, the court recognized a novel cause of action against the press over the publication of allegedly leaked information.

Background

The private facts claim is based on an article published last year in the *San Antonio Express-News* headlined, "Sex, lawyers, secrets at heart of sealed legal case." The article described how Ted Roberts and his wife Mary, prominent local lawyers, had blackmailed several men out of tens of thousands of dollars.

According to the article, Mary ran a personal ad on the Internet seeking "erotic and intellectual" relationships with men. Her husband Ted would later present draft complaints to his wife's sex partners, naming them as potential defendants and threatening them with legal action that would publically expose their affairs. As many as five men entered into "settlement agreements." And Ted Roberts collected from $75,000 to $155,000.

The article's reference to a "sealed legal case" referred to an action filed by a former law associate against the Robertses over their management of an investment trust. The plaintiff in that action allegedly discovered on a law firm computer the draft complaints and settlement agreements from the Robertses sexual escapades. The court granted the Roberts' motion for a protective order to seal those documents – referred to as the "202 Documents." The newspaper unsuccessfully tried to have the "202 Documents" unsealed.

After the *San Antonio Express-News* article appeared the Robertses declared bankruptcy. The private facts action was brought by John Patrick Lowe, a bankruptcy trustee in the Western District of Texas. In his complaint, he alleged that the newspaper obtained the facts for its article from the sealed "202 Documents." The newspaper claimed it obtained the information from other sources.

Was Information "Illegally Acquired"?

In ruling on the newspaper's motion to dismiss, the court first noted that "without question, the facts depicted in the article are matters of legitimate public concern." The court added that: "The public is legitimately interested in and entitled to know that two local lawyers ... are using the processes of the law in such a legally and morally questionable manner."

But the court then went on to conclude that the allegation that the newspaper obtained the information from the sealed documents presented a fact question that precluded dismissal. According to the court, if the newspaper obtained the sealed documents in contravention of the protective order and published them, it has done so "illegally" by violating a court order of which it had notice. The court cited *Bartnicki v. Vopper*, 532 U.S. 514 (2001), for the proposition that the press could be liable publishing information it obtains unlawfully, but it did not explain how the protective order binding the parties in the investment trust litigation could apply to the press to make its alleged receipt of leaked information "illegal" or thereby satisfy the elements of a private facts claim.

Emotional Distress Claim Dismissed

The court did dismiss a claim for intentional infliction of emotional distress, holding that the publication of truthful, albeit embarrassing, information cannot constitute extreme and outrageous conduct under Texas law.

Hearst has filed a motion for reconsideration.

Hearst was represented by in-house counsel Jonathan R. Donnellan and Kristina E Findikyan and Charles Babcock of Jackson Walker LLP in Texas. Plaintiff was represented by Broadus Autry of Spivey, Spivey & Ainsworth, P.C., Austin, Texas.

Dallas Morning News Wins "Pet Psychic" Libel Case

By Paul C. Watler and Brandy Wingate

A newspaper's report about an animal shelter's claim that it used "pet psychics" to discover the names of lost dogs was protected against a libel claim by the fair comment privilege, according to a ruling this month by the 5th District Texas Court of Appeals. *Humane Society. v. Dallas Morning News*, No. 05-05-00036-CV, 2005 WL 3387758 (Dec. 13, 2005) (Justice Whittington, Wright and Mazzant).

Lost Dog Article

The article by *Dallas Morning News* columnist Steve Blow recounted Jason Park's efforts to recover his family's lost dog Sunshine. The family located the dog in the possession of the Humane Society of Dallas County. The shelter was holding the dog out for adoption under the name of "Sunshine."

The headline of "Nothing humane about this story" – told of the family's frustration in attempting to recover their dog Sunshine.

The dog had been wearing a collar and tags when it escaped the family's fenced yard but the owners were not called by the shelter when the animal was found. When the Park family asked how the shelter knew the dog's name was Sunshine, Park said the shelter manager replied that "they sometimes bring in psychics to determine the animals' names."

The Park family presented proof of ownership, including a digital photograph and grooming records from the pet store where the shelter was conducting the adoption event. The family was told that its proof of ownership was not sufficient and that they would have to apply to adopt their own dog back. If the application was approved, Sunshine would be returned.

Frustrated by the treatment at the hands of the shelter, Jason Park contacted Mr. Blow at *The News*. Blow interviewed Park and a neighbor who was an eye-witness to the psychic remark. He also interviewed a member of the shelter's board of directors.

Blow's column – under the headline of "Nothing humane about this story" – told of the family's frustration in attempting to recover their dog Sunshine.

The lead posed the question "When does an animal rescue become a kidnapping? Or in this case, a dognapping?" The column was critical of the shelter's unreasonable delay in returning Sunshine, the shelter's refusal to accept the family's proof of ownership and that the shelter required the family to adopt their own dog back.

Blow commented that this "seems to be another case where good intentions went overboard" and that if Sunshine had gone home from the no-kill shelter when first claimed by the dog's owners perhaps another animal could have been "saved from death."

Humane Society Sued

Shortly before the one-year limitations period expired, The Humane Society of Dallas County filed suit against the newspaper and Blow for libel, business disparagement, and tortious interference.

The News moved for summary judgment on all the Humane Society's claims. *The News* asserted that (i) the column was not reasonably capable of defamatory meaning; (ii) the column was true or substantially true; (iii) the column was non-actionable opinion and was protected as fair comment or criticism under section 73.002 (b)(2) of the Texas Civil Practice and Remedies Code; (iv) the Humane Society was a public figure, and *The News* did not act with malice; or (v) if the Humane Society is not a public figure, there was no evidence of negligence.

The trial court granted summary judgment for *The News* without stating a specific ground for its decision.

When a trial court renders summary judgment without stating the basis for its decision, the appellant must challenge all possible grounds for the judgment. On appeal, however, the appellate court found that the Humane Society had failed to challenge *The News'* proof and argument that the column was privileged as fair comment.

Therefore, without reaching the other issues raised in the appeal, in an opinion dated December 13, 2005, the Dallas Court of Appeals affirmed summary judgment for *The News* on the bases of the fair comment privilege.

Paul C. Watler, a shareholder in the Dallas office of Jenkens & Gilchrist, P.C., was lead counsel for The News. Brandy Wingate, an associate in the firm, assisted in the appeal.

Judge Dismisses $100 Million Libel Suit Against Colorado Newspaper

Reports Were Substantially True & Privileged

By Steven D. Zansberg

On December 9, 2005, a Colorado state court judge granted summary judgment to *The Windsor Tribune* newspaper, dismissing the final two counts in an original five-count libel complaint brought by a former mayoral candidate. *Larson v. Greeley Publishing,* (No. 2004 CV 539, Colo. D. Ct Dec. 9, 2005) (Klein, J.)

The lawsuit, originally filed in mid-2004, sought $100 million in damages against the newspaper on the basis of four news articles and an editorial opinion. The court found that the newspapers's reports were substantially true, protected by the fair report and fair comment privilege and protected by the incremental harm doctrine.

Background

The plaintiff, John Larson, was the owner of a coffee shop franchising company, and mayoral aspirant in Windsor, Colorado. He lost a trademark infringement action over the name of the coffee shops. When Larson's company notified its franchisees that they would need to switch the name of their coffee shops, a dispute arose between the franchisees and the franchising company which garnered press attention in *The Windsor Tribune*, and other Colorado newspapers, including *The Denver Post*, *The Rocky Mountain News*, *The Fort Collins Coloradoan*, and *The Northern Colorado Business Journal*.

The Windsor Tribune reported, among other things, that Larson's franchisees had threatened to sue him, and were in the process of negotiating a settlement of their dispute that would allow the franchisees to be released from their franchising agreements in exchange for their releasing all claims against Larson; in addition, it was reported, that the parties were then negotiating a settlement agreement that would prohibit Larson from opening any competing coffee storefront within a certain geographic distance of each franchisee's location.

John Larson also announced his candidacy to serve as mayor of the Town of Windsor. In one article in *The Windsor Tribune*, it was reported that Larson, speaking at a candidates forum said he had voted in the past town election, when in fact he had not. (This was true of two other candidates who spoke at the forum.)

At the bottom of this article, the newspaper asked, under its reader solicitation headline "Your Two Cents," how the readership felt about candidates lying to them. Shortly thereafter, *The Windsor Tribune* ran a masthead editorial urging its readers not to vote for John Larson for mayor, in which the newspaper stated that "his business practices at Capri Coffee Break violated federal laws."

The newspaper asked how the readership felt about candidates lying to them.

Larson Files Suit

In mid-2004, John Larson, proceeding *pro se*, filed a single-count complaint against *The Windsor Tribune*, alleging libel on the basis of four news articles concerning his business dealings and the one editorial opposing his candidacy for mayor. Subsequently, Mr. Larson was represented (for a period of time) by an attorney who filed a first amended complaint adding claims for false light invasion of privacy and negligence.

These latter claims were dismissed in response to a motion to dismiss, on grounds that Colorado does not recognize the tort of false light invasion of privacy or negligence with respect to publications on matters of public concern. Larson's counsel was also ordered to re-plead his single claim for libel as five separate counts, one for each publication, and to set forth with specificity the statements in each publication that served as the basis for his libel claims.

Motion to Dismiss

In March 2005, Judge Roger Klein of the Weld County District Court granted *The Windsor Tribune*'s motion to dismiss three of the five libel claims asserted by Larson on grounds that they failed to state a claim upon which relief could be granted. The articles that discussed Larson's business dispute with his franchisees were found to be either not defamatory or not defamatory

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Judge Dismisses $100 Million Libel Suit Against Colorado Newspaper

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per se, and the court found that Larson had failed to adequately plead his claim for special damages with requisite specificity.

Notably, Judge Klein declined to take judicial notice of the U.S. District Court in Seattle's pleadings (including its summary judgment ruling) that would prove the substantial truth of other statements challenged in the two remaining claims, and similarly refused to take judicial notice of a videotape of the Chamber of Commerce candidates' forum at which John Larson stated that he had voted in the previous Town of Windsor election (an allegation that Larson denied, even after his counsel was provided with a copy of the videotape).

The judge also found, in its March 2005 ruling, that the question posed at the bottom of the article concerning the candidates' forum, which asked readers to share their views about "how do you feel about candidates lying?" was not a fair comment or a statement of opinion.

Thus, after dismissing three of Larson's libel claims, Judge Klein allowed the case to proceed on two claims involving the article concerning the candidates' forum, and the editorial which stated that "his business practices at Capri Coffee Break violated federal laws." Judge Klein found that both statements were sufficiently factual in nature to serve as the basis for libel claims, and, if false, were defamatory *per se* requiring no pleading or proof of special damages.

Summary Judgment Granted

The Windsor Tribune then filed a motion for summary judgment directed at the two remaining claims and asked Judge Klein to now consider the record evidence extraneous to the complaint (the Seattle U.S. District Court's ruling, and the videotape of the candidates' forum) under the auspices of Rule 56 summary judgment procedure. *The Windsor Tribune* also succeeded in obtaining a stay of all discovery against *The Windsor Tribune* until after its pending motion was resolved.

Shortly after *The Windsor Tribune* filed its motion for summary judgment, Mr. Larson's counsel withdrew from further representation. Mr. Larson thereafter sought an indefinite extension of time in which to respond to the summary judgment motion. Judge Klein set a date certain (August 13, 2005) in which Mr. Larson must respond to the motion for summary judgment. Mr. Larson never filed a response, but subsequently relocated to Chicago, Illinois.

In its ruling of December 9, 2005, the court granted *The Windsor Tribune*'s motion for summary judgment, and dismissed the remaining two counts of Larson's libel complaint. With respect to the statement in the masthead editorial that Larson's business practices had violated federal laws, Judge Klein referred to the rulings of the U.S. District Court in Seattle and found that that court's findings of trademark infringement and false designation of origin rendered the published statement substantially true.

The judge also reviewed the videotape of John Larson's comments at the candidates' forum, as well as the registrar of voter's records indicating Larson had not voted in the past Town of Windsor election, and found that the article setting forth those facts was also substantially true.

Judge Klein found that the summary of the statements made at a candidates' forum was subject to the "fair report" privilege and that Larson's having repeated this remark to the reporter subsequent to the candidates' forum did not cause any "incremental harm" to his reputation; thus, the latter statement was also not actionable under the "incremental harm" doctrine.

Interestingly, the judge corrected his prior conclusion set forth in its March 2005 ruling, and found that the question posed to readers at the bottom of this article, "how do you feel about candidates lying to you?" was a fair comment based upon the facts fully set forth in the article above, and was therefore not actionable. As a result, Larson's entire five-count complaint against *The Windsor Tribune* has been dismissed. No appeal is anticipated of Judge Klein's ruling.

Steven Zansberg, Faegre & Benson, Denver, Colorado, represented the defendant in this case..

Radio Show Host Wins Dismissal of Lawsuit Under Oregon's Anti-SLAPP Statute

Statements Were Protected Opinion

Oregon's federal district court this month granted an anti-SLAPP motion to strike libel and related claims against a radio talk show host, his distributor and a station owner, finding that the host's comments about a consumer complaint were all protected opinion. *Gardner v. Martino,* 05-CV-769-HU (D. Or. Dec. 13, 2005) (Brown, J.) (adopting magistrate's recommendation available at 33 Media L. Rep. 2541 (D. Or. Sept. 19, 2005) (Hubel, J.).

Defendant Tom Martino is the Denver-based host of a nationally syndicated radio talk show that deals with consumer complaints. Known as "The Troubleshooter," Martino "blasts liars and cheaters, exposes rip-offs and investigates consumer complaints live on the air." *See* www.troubleshooter.com.

The libel case was based on several statements Martino made during an on-air discussion about a consumer's problems with a jet ski bought from Mt. Hood Polaris. During the call the consumer gave a detailed recitation of her repair and return problems. At one point Martino replied "they're just lying to you." He later asked rhetorically "will they admit to us, that they went back on their word?" And later commented, "Polaris sucks" and gave out the business's and manufacturer's telephone numbers.

Mt. Hood Polaris and its owners sued Martino, syndicator Westwood One, and Portland radio station owner Clear Channel for libel, false light and interference with contract.

Oregon's Anti-SLAPP Statute

Oregon's anti-SLAPP statute, enacted in 2001, is based on California's robust anti-SLAPP statute. The Oregon law provides in relevant part that a special motion to strike may be made against any claim in a civil action that arises out:

> Any oral statement made, or written statement or other document presented in a place open to the public or a public forum in connection with an issue of public interest.
>
> Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

O.R.S. 31.50 (2) (c), (d).

Once the defendant shows that his or her speech is within the scope of the statute, the burden shifts to plaintiff to establish a probability of success based on "substantial evidence to support a prima facie case."

Magistrate's Decision

The magistrate first found that the defendants' speech and conduct were clearly within the scope of the anti-SLAPP statute, citing as persuasive California case law that "statements about the quality of consumer goods and services are matters of public interest."

Turning to the merits, the magistrate concluded that all the complained of statements were protected opinion. The magistrate first observed that "the average person would understand that a fair amount of opinion is likely to be expressed on a talk radio show, and that some of it would be hyperbolic, exaggerated, and self-serving," but noted that listeners might expect less of this loose talk on a "consumer-oriented problem solving show."

But here the context showed that Martino's statements were opinions "given that the statements came after a long recitation of facts disclosed by" the consumer-caller.

Plaintiffs' false light claim failed for the same reason. And the magistrate recommended dismissal of the remaining interference with contract claims, citing with approval case law stating that the constitutional requirements for defamation must equally be met in interference with contract claims, otherwise a plaintiff can avoid the First Amendment merely by the use of creative pleading.

This month the federal district court dismissed, finding no error in the Magistrate's Judge's findings and recommendation.

Tom Martino and Westwood One were represented by Charles Hinkle and Brad Daniels of Stoel Rives in Portland, OR. Clear Channel was represented by Duane Bosworth and Kevin Kono of Davis Wright Tremaine in Portland. Plaintiffs were represented by Linda Marshall, Lake Oswego, OR.

$1 Million Libel, False Light Suit Dismissed

Law Student's Case Thrown Out as Legally Insufficient

By Scott B. Sievers

An Illinois trial judge threw out a million dollar lawsuit in November against a suburban Chicago newspaper and its staff brought by a law student who claimed he was injured by a story that barely mentioned him. *Silverman v. Wednesday Journal*, No. 05 L 9005 (Cir. Ct. Nov. 28, 2005).

Background

Charles Silverman, a third-year DePaul University College of Law student, filed a defamation and false light invasion of privacy suit in August against the Wednesday Journal, Inc. of Oak Park and River Forest, Ill.; Publisher and Editor Dan Haley; Online Editor Sandi Pedersen; and Staff Writer Drew Carter. Silverman asked the court to order the defendants to print a retraction and to award him $250,000 in compensatory and $1 million in punitive damages.

The litigation arose from a July story published both in the newspaper's print and online editions about a treasurer's effort to properly dispose of old public records. The story mentioned that the Cicero Township Trustees of Schools board had discussed finding a law student to go through the records and try to dispose of them, that the treasurer's office had hired a law student so only the correct documents would be thrown out, and that Silverman had been hired for $15 an hour to assist in the task.

Silverman, though, argued that statements in the story implied he had performed his job incompetently. He claimed the story would come back to haunt him once he was applying for jobs at law firms because they would run Silverman's name through online search engine Google and the story's "false and misleading statements will reflect badly" on him and that "the firms will simply toss Plaintiff's resume."

The defendants filed a motion to dismiss the lawsuit as substantially insufficient in law, specifically arguing that Silverman's suit failed to sufficiently plead that the statements he claimed as damaging were false and concerned him.

Complaint Dismissed

Cook County Associate Judge Abishi C. Cunningham released his ruling to the parties Nov. 28 in his chambers at the Richard J. Daley Center in Chicago.

"The Plaintiff . . . does not make a cogent argument as to how the statements taken as a whole defame him personally," Cunningham wrote of one group of statements. Of another group Cunningham wrote, "Even if the statements are false, there is no reasonable inference that the statements attacked the Plaintiff, his competence as the Treasurer's employee or his future fitness to practice law.... Plaintiff has not and cannot sufficiently allege that the statements complained of were 'of and concerning' him."

In dismissing the lawsuit, Cunningham saw no hope that Silverman could fix its shortcomings by amending it.

"Even when viewed in the light most favorable to the Plaintiff, the Complaint and the underlying article cannot support claims for defamation or false light invasion of privacy," Cunningham wrote. "As the Court sees no potential for the Plaintiff to sufficiently allege a claim based on the article, there is no reason to grant leave to replead."

Silverman has until December 28 to decide whether to appeal the decision to the Appellate Court of Illinois, First District, in Chicago.

Scott B. Sievers of Donald M. Craven, P.C. in Springfield, Illinois represented the defendants in this matter. Plaintiff represented himself.

Update: Publisher's Civil Rights Claims Over Threatened Criminal Libel Prosecution Dismissed

Following a decision in May upholding the constitutionality of Kansas' criminal libel law, the Kansas federal district court this month granted summary judgment dismissing the remaining portions of civil rights suit over a threatened criminal libel prosecution. *How v. Baxter Springs*, No. 04-2256, 04-2257, 2005 WL 3447702 (D. Kan. Dec. 15, 2005) (Lungstrum, J.).

The court found that the city clerk who filed criminal complaints against plaintiffs was not acting under color of law for purposes of a § 1983 action; the city attorney who vowed to pursue the charges was immune from suit; and plaintiffs had suffered no deprivation of constitutional rights.

Background

In March 2003, Baxter Springs City Clerk Donna Wixon went to the local city attorney, Richard Myers, and filed a criminal libel complaint against Larry Hiatt, publisher of the weekly *Baxter Springs News*, newspaper columnist Ron Thomas, and city council candidate Charles How, Jr.

The charges were triggered by a column and political advertisement criticizing Wixon over her official duties.

The charges were triggered by a column and political advertisement criticizing Wixon over her official duties. The newspaper column stated that if mayoral candidate Art Roberts is elected, Donna Wixon would run the city. "Those Roberts for mayor signs should be taken down and to (sic) read 'Wixon for Mayor." The political advertisement by Charles How, Jr., apparently in support of the incumbent Mayor John Murray, said, "For mayor? Art Roberts voted to hire Donna Wixon and almost doubled her salary over the previous clerks pay in three years – plus bonuses. Palzy walzy with defeated council member Bob St. Clair. You folks want two more years of this hateful city clerk?"

In her statement to the city prosecutor justifying her allegation of criminal defamation Wixon not only identified these specific statements, but also said the publisher and columnist had criminally defamed her on "numerous dates prior."

How and Thomas were never arrested, but they were served with notices to appear in municipal court, where they appeared and pled not guilty.

The prosecutions were eventually dismissed without prejudice when the city attorney Richard Myers recused himself and a special prosecutor could not be found. Myers publicly vowed to pursue the charges, but never followed through on his threat.

Thomas and How then sued for civil rights claims, malicious prosecution and abuse of process. They also sought a declaration that the ordinance was unconstitutional. *See MLRC MediaLawLetter* June 2004 at 15.

Criminal Libel Constitutional

In May the district court granted defendants' motion to dismiss, in part, sweeping aside the constitutional challenge. The court held that the actual malice requirement of the law was sufficient to overcome arguments that the statute was vague and overbroad. *How v. Baxter Springs*, No. 04-2256, 2005 WL 1119789 (D. Kan. May 10, 2005), *Thomas v. Baxter Springs,* No. 04-2257, 2005 WL 1119788 (D. Kan. May 10, 2005).

The Baxter Springs ordinance provides in relevant part:

> *Criminal defamation is communicating to a person orally, in writing, or by any other means, information, knowing the information to be false and with actual malice, tending to expose another living person to public hatred, contempt or ridicule; tending to deprive such person of the benefits of public confidence and social acceptance; or tending to degrade and vilify the memory of one who is dead and to scandalize or provoke surviving relatives and friends.*

The ordinance is identical to the state criminal libel statute, K.S.A. 21-4004.

Plaintiffs had argued that being threatened with prosecutions for engaging in core political speech is unconstitutional – notwithstanding the actual malice requirement –

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Update: Publisher's Civil Rights Claims Over Threatened Criminal Libel Prosecution Dismissed

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because the statute is vague and overbroad. Indeed, the fact that plaintiffs were threatened with criminal prosecutions for criticizing a public official is powerful evidence that the statute is vague and arbitrarily enforced.

The district court, however, disagreed, simply concluding that the statute provides sufficient guidance to law enforcement – though that conclusion begs the question of what, if anything, the statute's words mean in the criminal context.

No Civil Rights Claims

This month Judge Lungstrum granted summary judgment to defendants on the remaining claims. He first ruled that Wixon was not acting "under color of law" when she initiated the criminal libel charges against plaintiffs. Instead he characterized the complaint as "the functional equivalent of filing a civil claim for defamation against the plaintiffs in state court" – ignoring the fact that the criminal libel statute provides for punishment of up to one year in jail. The City Attorney was entitled to qualified immunity because "he acted in his administrative role as City Attorney at every stage of the case." His public vow to pursue the charges was simply "hollow statements to a reporter, which is not the same as filing charges and prosecuting the case."

Finally, even if the vow to pursue the charges amounted to a constitutional violation of rights – those rights were not clearly established in 2003.

Conclusion

Plaintiffs are considering filing an appeal to the Tenth Circuit. Next month that court is scheduled to hear argument in *Mink v. Dominguez*, No. 04-1496 (10th Cir. appeal filed Nov. 26, 2004), a civil suit challenging the constitutionality of Colorado's criminal libel statute. Last year the Colorado federal district court dismissed a civil and declaratory judgment lawsuit brought by a college student who had been threatened with a felony criminal libel prosecution for statements and pictures on his website that ridiculed a college professor. *Mink v. Salazar,* 344 F.Supp.2d 1231 (D. Colo. 2004). Granting a motion to dismiss, the court held that the student had no standing to sue for damages (or apparently seek a declaratory judgment) because no criminal charges were actually pending and the district attorney stated that no charges would be filed.

The Associated Press, Bloomberg News, the Colorado Press Association and MLRC filed an amicus brief in the case arguing that plaintiff has standing and that the Tenth Circuit should address the merits of the constitutional challenge.

Plaintiffs were represented by Sam L. Colville, Holman Hansen & Colville, PC, Kansas City, MO, and Kate Bohon McKinney and Thomas S. Busch, Holman Hansen & Colville PC, Overland Park, KS. Defendants were represented by James J. Rosenthal, David R. Cooper, Terelle A. Carlgren, Fisher, Patterson, Sayler & Smith, Topeka, KS, and Richard W. James, Edward L. Keeley, McDonald, Tinker, Skaer, Quinn & Herrington, PA, Wichita, KS.

Update: Skirmishing Continues in Illinois Supreme Court Chief Justice Defamation Suit

By Steven P. Mandell, Steven L. Baron, Brendan J. Healey and Natalie A. Harris

As reported in the October MLRC *MediaLawLetter,* a battle of the privileges erupted in a defamation lawsuit brought by the Chief Justice of the Illinois Supreme Court against a suburban Chicago newspaper. *See Thomas v. Page, et. al., No. 2-05-0348, 2005 WL 2746327 (Ill. App. Oct. 20, 2005) (Hoffman, Cahill, O'Brien, JJ.).* That tussle has grown even more heated in the past two months, in the appellate courts and the trial court.

At issue are editorial columns published in the *Kane County Chronicle* that suggested that Illinois Supreme Court Justice Robert R. Thomas may have been influenced by political calculations when deciding an attorney disciplinary case. In October the Illinois Court of Appeals affirmed the lower court recognition of a common-law judicial deliberation privilege shielding Thomas colleagues and clerks on the bench from having to disclose intra-court communications about the case.

The tussle has grown even more heated in the past two months.

At the appellate level, defendants filed a Petition for Leave to Appeal the judicial deliberation privilege decision to the Illinois Supreme Court and simultaneously moved to disqualify the Supreme Court Justices. Defendants also asked the Appellate Court to direct the Supreme Court to hear the appeal. At the same time, Defendants asked the trial court to dismiss the case or compel all of the Justices to testify regarding their judicial deliberations.

Appellate Motions

On November 29, defendants filed a Petition for Leave to Appeal to the Illinois Supreme Court. In the Petition, defendants noted that the Appellate Court opinion marked the first time that an Illinois court had ever recognized a judicial deliberation privilege and the first time that any court in the country had deemed the privilege absolute. Furthermore, the Petition suggested that the Appellate Court erred in recognizing a new privilege where Illinois Supreme Court precedent reflects that privileges are strongly discouraged and that their creation is better left to the legislature.

In conjunction with the Petition for Leave Appeal, defendants filed a motion to disqualify the Justices of the Illinois Supreme Court from hearing the Petition or any other aspects of the appeal. Because Illinois Supreme Court Chief Justice Robert R. Thomas is the plaintiff in the underlying defamation lawsuit, and five of the other six Illinois Supreme Court Justices are witnesses in the case and parties to the recently decided interlocutory appeal, defendants argued that all of the Justices must disqualify themselves. The Illinois Supreme Court has not yet issued a ruling on either the Motion to Disqualify or the Petition for Leave to Appeal.

On November 29, defendants also filed an Application for Certificate of Importance with the Appellate Court, requesting that the Appellate Court deem the questions involved sufficiently important questions that the Supreme Court had to hear the appeal. On December 19, the Appellate Court denied the Application without explanation.

Trial Court Motions

Based upon the Appellate Court recognition of a judicial deliberation privilege, defendants filed two dispositive motions in the trial court on December 1. In their Motion to Strike Certain Allegations of the Complaint and for a Judgment on the Pleadings, defendants alleged that the existence of an absolute judicial deliberation privilege prohibits Justice Thomas from making allegations in his complaint which are based upon or relate to privileged judicial deliberations.

Accordingly, defendants requested that the trial court strike all of the allegations in the complaint pertaining to judicial deliberations. In the absence of those allegations, the remaining allegations fail to state a claim upon which relief may be granted. Defendants therefore requested judgment on the pleadings.

Alternatively, defendants argued that, when Chief Justice Thomas put judicial deliberations at issue, he waived any privilege for all of the Justices. Defendants asked the trial court to compel the other Justices to testify.

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Update: Skirmishing Continues in Illinois Supreme Court Chief Justice Defamation Suit

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In their Motion to Dismiss, defendants argued that if a judicial body asserts an absolute privilege against the disclosure of information about judicial deliberations, a corresponding absolute privilege should protect news reports and commentary on those deliberations. Because the non-party justices of the Illinois Supreme Court refused to waive their judicial deliberation privilege, defendants contend Chief Justice Thomas should be prohibited from pursuing a cause of action against the media for comments about those secret deliberations.

Just as Illinois civil plaintiffs cannot invoke the Fifth Amendment and pursue a lawsuit, it would be unjust to permit Justice Thomas to prosecute his cause of action while his colleagues foreclose an important avenue to potentially probative testimony.

Notwithstanding the filing of these dispositive motions, the trial court set an expedited schedule for the remaining discovery. Under the Court schedule, briefing on the dispositive motions would occur concurrently with discovery.

Faced with conducting discovery and disclosing *all* witnesses prior to the resolution of dispositive motions, defendants brought an emergency motion to reconsider. Defendants directed the Court attention to various cases encouraging the use of summary procedures in First Amendment cases and also reminded the Court that an appellate order staying discovery of Supreme Court personnel was still in effect. The Court relented on its schedule and stayed discovery pending resolution of the dispositive motions.

Steven P. Mandell, Steven L. Baron, Brendan J. Healey, Suzanne M. Scheuing, and Natalie A. Harris of Mandell Menkes LLC in Chicago represent defendants. Joseph A. Power, Jr. of Power Rogers & Smith, P.C. of Chicago represents plaintiff. The Illinois Attorney General represents the non-party Supreme Court Justices.

Summary Judgment Denied in Photo Misidentification Case

A New York appeals court his month affirmed denial of summary judgment to a local newspaper that misidentified plaintiff as a "convicted sex offender." *Thomas v. Journal Register Co. & Saratogian LLC*, 2005 N.Y. Slip Op. 09600, 2005 WL 3434592 (NY App. 3d Dept. Dec. 15, 2005)(Cardona, Mugglin, Rose and Kane, JJ.).

The error arose from a local newspaper's reports about a family with multiple sex offenders. The paper first published an article about plaintiff's brother, Kevin Thomas, a convicted sex offender. A family photograph accompanied the article and plaintiff was accurately identified in the photograph as James Thomas.

But publication of the article led to an anonymous tip that another sex offender in the family, brother Robert Thomas, had failed to properly register as required under New York's sex offender law. Moreover, the tipster told the newspaper that "James Thomas" in the photograph was really sex offender brother "Robert Thomas." The newspaper published a follow up article headlined "Brother a Sex Offender, Too" with a photograph of plaintiff identified as "Robert" and a statement that he had misidentified himself in the first article.

In a short opinion, the appeals court first rejected defendants argument that it did not intend to identify plaintiff as a sex offender. "While plaintiff may not have been the intended subject of the article, the headline, with plaintiff's photograph and the statement that he previously misidentified himself, raises an issue of fact as to whether the article suggests to any reasonable reader that plaintiff is indeed a sex offender who failed to properly register, when he is not."

The court also rejected the newspaper's argument that it was not grossly irresponsible – New York's intermediate fault standard in private figure cases involving matters of public concern. Although the reporter followed normal procedures in preparing the articles, the court indicated that the apparent unreliability of sources imposed "a duty to inquire further to confirm and verify the accuracy of the information."

The Saratogian was represented by Michael E. Ginsberg of Pattison, Sampson, Ginsberg & Griffin, P.C., Troy, NY. Plaintiff was represented by Michele Anderson, L.L.C., Saratoga Springs, NY.

"Intelligent Design" Trial Raises Reporters Privileges Issues

Both Sides Sought Testimony from Reporters

By Niles S. Benn and Terence J. Barna

On December 14, 2004 eleven residents of Dover, Pennsylvania filed a federal lawsuit in the United States District Court for the Middle District of Pennsylvania against the Dover Area School District and Dover Area School District Board of Directors.

At issue was a resolution passed by the School Board two months earlier mandating that "Students will be made aware of gaps/problems in Darwin's theory and of other theories of evolution, including, but not limited to, intelligent design. Note: Origins of Life will not be taught."

Additionally, it was determined by the School District that the following statement was to be read to the students in biology class at the beginning of the "evolution unit":

> "The Pennsylvania Academic Standards require students to learn about Darwin's theory of evolution and eventually to take a standardized test of which evolution is a part."
>
> "Because Darwin's theory is a theory, it continues to be tested as new evidence is discovered. The theory is not a fact. Gaps in the theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations."
>
> "Intelligent design is an explanation of the origin of life that differs from Darwin's view. The reference book, 'Of Pandas and People,' is available for students who might be interested in gaining an understanding of what intelligent design actually involves."
>
> "With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the origins of life to individual students and their families. As a standards-driven district, class instruction focuses upon preparing students to achieve proficiency on standards-based assessments."

The federal district court this month ruled in favor of plaintiffs, finding that teaching "intelligent design" violated the First Amendment because it was really just creationism in disguise. In the background of this high-profile trial over the First Amendment's religion clauses, were interesting reporters privilege issues that were litigated outside the spotlight.

Background

In early May of 2005, one of plaintiffs' attorneys communicated with Joseph Maldonado, a freelance correspondent for the *York Daily Record/York Sunday News*, about testifying at the expected trial. Maldonado referred the attorney to the Sunday Editor who properly suggested that the plaintiffs could secure any information they needed from other individuals who attended the Dover Area School Board Meetings.

However, counsel indicated the "special merit" of hearing a reporter testify who had taken notes. Thereafter, the Sunday Editor suggested that an affidavit be submitted, in lieu of testimony, which would assert the accuracy of the reporter's articles.

On May 4, 2005, a Subpoena was issued commanding Maldonado to appear at a deposition scheduled for June 8, 2005. The Sunday Editor was advised by plaintiffs' counsel that the scope of the inquiry would focus on three areas: 1) the veracity of Maldonado's stories; 2) other unpublished statements heard at the meetings; and 3) whether Maldonado was aware of any written or verbal requests to change or retract any portion of his stories.

Additionally, plaintiffs' counsel also served a deposition subpoena on Heidi Bernhard-Bupp, a freelance correspondent for the *York Dispatch*. Bernhard-Bupp was also scheduled to appear at a Deposition on June 8, 2005.

The reporters' counsel filed motions to quash. Thereafter, the defendants in the federal case issued four subpoenas for the production of documents directed to the reporters and the newspapers.

Reporters Assert Privilege

Counsel for the reporters and newspapers advised both parties of the assertion of the First Amendment reporter's privilege. However, in an attempt to resolve the matter in

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"Intelligent Design" Trial Raises Reporters Privileges Issues

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an amicable fashion, the reporters and newspapers submitted affidavits stating that the articles were true and accurate and that no requests had been made for corrections or retractions. Additionally, a written objection to the defendants' records subpoenas pursuant to Federal Rule of Civil Procedure 45 (c)(2)(B) was also provided, effectively staying the subpoenas until the filing of a motion to compel as it related to the production of documents.

While plaintiffs' counsel verbally agreed to accept the affidavits (with the addition of referencing one (1) additional article by Maldonado) the defendants took the position that the affidavits precluded their ability to establish bias of the correspondents and the newspapers as it related to the published articles.

In a conference call which included the Honorable John E. Jones, III, Judge, counsel for Plaintiffs, Defendants and the BennLawFirm, it was agreed that the plaintiffs would withdraw their subpoenas served upon the reporters. However, plaintiffs reserved their right to call them at trial; the reporters likewise reserved their right to object to testifying at trial when, and if, the matter would arise again.

During that telephone conference, defense counsel advised that they intended to serve deposition notices on the reporters and move to compel production of the documents as it was their intent to secure the oral testimony of the reporters and review their notes and e-mails as well as any documentation of the newspapers.

Hearing Over Privilege

On July 14, 2005, oral argument was held and the defendants took the position that the reporters and newspapers were biased in their reporting and, therefore, produced inaccurate articles. The defendants further argued that the First Amendment reporter's privilege did not apply when a reporter is subpoenaed to testify as a "fact witness" to public comments and observations. They cited cases in the Fourth Circuit and Seventh Circuit, but did not cite any cases in the Third Circuit. The defendants maintained that they had the right to cross-examine the reporters regarding the truth and veracity of the articles and to probe as to issues of credibility, bias, motive and prejudice. Additionally, the plaintiffs took the position that the newspaper articles provided an "historical record" that could only be supported through the reporters' testimony.

The reporters and newspapers argued that a party issuing a subpoena must establish that it cannot obtain the desired information from alternative, non-journalistic sources. This position has been supported by *McMenamin v. Tartaglione*, 590 A.2d 802, *aff'd per curiam*, 590 A.2d 753 (1991). The statements at issue in *McMenamin* were made at a press conference and the court ruled that "While there appears to be no dispute that the information sought was material, relevant, necessary and perhaps crucial, there is nothing to show that *McMenamin* could not have obtained the information from other persons present. . ." at the public press conference.

The defendants further argued that the First Amendment reporter's privilege did not apply when a reporter is subpoenaed to testify as a "fact witness" to public comments and observations.

While recognizing that *McMenamin* was not binding upon the federal court, the reporters argued that Judge Jones could look to state law where, as here, the federal rule is unsettled.

The reporters also cited *Parsons v. Watson*, 778 F. Supp. 214 (D. De. 1991) for the proposition that a reporter should not be obligated to testify when witnessing statements made by others in a public environment. In *Parsons*, the Plaintiff in a civil suit argued that statements attributed to him and published in the *Wilmington News Journal* were reported inaccurately. The alleged remarks were made during a conversation between the plaintiff and three (3) others who worked in the same department. The court held that the First Amendment reporter's privilege applied even though the material sought was *not confidential*. The court held that the plaintiff failed to establish that the information sought could not have been gleaned from the other individuals present when the conversation took place. The Court

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concluded that '[w]hen there is a clear alternative source for the information sought, the journalist may invoke the privilege to avoid compelled testimony."

Judge Holds Privilege Does Not Apply

On August 2, 2005, Judge Jones handed down a 21-page decision holding that the reporter's privilege does not apply when a reporter is being questioned about a public incident or event to which he or she was a witness. The court reasoned there was no intrusion into newsgathering or special functions of the press under such circumstances. Essentially, the ruling could be interpreted to mean that the reporters were to be viewed as "fact witnesses" whenever they attended public meetings regardless of how many other individuals "witnessed" the same events.

The reporters recognized that if they refused to testify at depositions or trial they could be subject to fine, imprisonment or both.

It should be noted that the reporters had argued that there were up to 100 persons present at the various Dover School Board Meetings referred to in the articles in issue. The court determined that the reporter's privilege did not apply and noted that the defendants should not be burdened with a requirement that would obligate them to depose or otherwise call every other person in the room to verify what had been written.

However, the court did limit the questioning to what the reporters "perceived, saw and heard." Additionally, the reporters were not obligated to reveal any confidential sources. (It should be noted that it had been the practice of the school board to destroy any tape recordings of its meetings after minutes had been prepared. Therefore, there were no tape recordings of the meetings.)

The court further denied the defendants' motion to compel production of documents, holding that the requested e-mails and notes were not relevant and that the reporter's privilege applied to the reporters' e-mails, notes and drafts. The court conducted an *in camera* review of these materials and concluded that there was no evidence of bias.

Motion for Reconsideration

Due to the broad nature of the court's order, and the implications of its ruling, a motion for reconsideration was filed. The York Daily Record/Sunday News and the York Dispatch have reporters present at approximately 80 different public meetings on a monthly basis. Allowing them to be questioned as "fact witnesses" about what they "perceive," would have a chilling effect on newsgathering and was, therefore, grossly unacceptable.

On August 17, 2005, a conference call of all counsel and Judge Jones was held to discuss the issues raised in the motion for reconsideration. During that telephone conversation, it was acknowledged that the Order left open various interpretations. Judge Jones acknowledged that it was not his intent to allow any questions that would, otherwise, relate to the issue of bias. Nevertheless, the defendants desired to brief the issues. And the reporters preserved an appeal to the Third Circuit.

A Memorandum and Amended Order was issued on September 12, 2005. In that Order the court deleted the word "perceived." The court further clarified that an examination of the reporters' motivation(s), bias, mental impressions or other inquiry which involves matters extrinsic to what the correspondents saw and heard at the Dover School Board Meetings would not be permitted.

"The Reporters may be deposed strictly with regard to what they saw and heard at the public Board meetings." The Court reasoned that the "relatively unfettered questioning of fact witnesses which would normally be allowed in discovery must here be tempered in recognition of the reporter's privilege."

The Amended Order continued to describe the reporters as fact witnesses, subject to questioning as to what they "saw and heard" at the School Board Meetings. Because there appeared to be no other limitations on the testimony of the correspondents, it was believed that questions could be posed as they related to unpublished matters. Specifically, the Amended Order would have allowed the reporters to be questioned on matters that they did not report on in their newspaper articles, but, nevertheless, "saw and heard" when they were present at the School Board Meetings. Because of the exposure to such questions, it was the position of the corre-

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spondents that they were being placed in an untenable position which was not acceptable.

If unchallenged, the Amended Order would, in the view of counsel for the reporters, open a pandora's box that flew in the face of the First Amendment. Although confidential sources were not to be provided, such a precedent of allowing reporters to testify as to matters that did not appear in their articles would diminish the independence and freedom of the press.

As some courts have properly recognized, although "no confidential source or information is involved, this distinction is irrelevant to the chilling effect enforcement of [a] subpoena would have on the flow of information to the press and public." *United States v. Blanton*, 534 F. Supp. 295, 297 (S.D. Fla 1982), *aff'd*, 730 F.2d 1425 (11th Cir. 1984).

However, standing in the way of an appeal was well established Third Circuit precedent holding that discovery matters are generally not reviewable until after final judgment. Although it was believed that the circumstances of this case could be distinguished due to the important First Amendment interests, the courts have held that non-party witnesses such as newspaper reporters could appeal, but only after the witness stood in contempt of the court's discovery order.

While Joseph Maldonado and Heidi Bernhard-Bupp garnered far less publicity than Judith Miller and Matt Cooper, they must be applauded for their courage and determination and for their will to protect the principles upon which the First Amendment stands.

Another Attempt to Resolve

On or about September 15, 2005, a conference call was held involving all counsel. At that time, the defendants indicated their willingness to allow, by stipulation, the matter to proceed to the appellate level as it related to the issue of the reporters' testimony.

The plaintiffs, however, were strongly opposed to any appeal that might otherwise interfere with the trial. It was suggested that the trial begin and the privilege issue revisited as necessary. In the alternative, it was thought that the trial could proceed but it would not be closed until such time as the appellate court determined the privilege issue.

On September 15, 2005, the plaintiffs issued trial subpoenas commanding the reporters to testify at trial. Those subpoenas were received on September 20, 2005 and, thereafter, a Motion to Quash the Plaintiffs' Subpoenas was filed on September 22, 2005. Additionally, a Joint Contempt Motion was filed by the Defendants and the reporters on September 21, 2005, asking that the reporters be held in contempt and fined at the nominal rate of $1.00 so as to allow the appeal to proceed to the Third Circuit. The reporters recognized that if they refused to testify at depositions or trial they could be subject to fine, imprisonment or both.

The Motion to Quash the Plaintiffs' Trial Subpoenas and the Joint Contempt Motion were denied by the Court on September 22, 2005. As a result, the defendants forwarded deposition notices for Tuesday, September 27, 2005, the second day of trial.

Additionally, plaintiffs' counsel indicated that the reporters would be called to testify at trial on September 28, 2005. It was at this time that the reporters evaluated their exposure. They believed that it was necessary to stand on First Amendment principles and, even though, they were not employees of the respective newspapers, that the reporter's privilege be protected.

Maldonado maintains a small deli stand in a local farmer's market and home schools his youngest son. Bernhard-Bupp is the mother of two young children. Nevertheless, both individuals, recognizing the possibility that they would be held in contempt and potentially go to jail, believed in the position that they had taken.

Reporters Invoke Privilege

On Tuesday, September 27, 2005, the reporters appeared separately at the scheduled depositions called for by the defendants' Subpoenas. At those depositions, they invoked the First Amendment Reporter's Privilege and refused to testify. On September 28, 2005, they appeared at

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"Intelligent Design" Trial Raises Reporters Privileges Issues

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the federal courthouse in Harrisburg, Pennsylvania, prepared to again invoke the privilege and refuse to testify at trial.

On the evening prior to their appearance at trial, the reporters' counsel prepared a portion of a proposed Order, providing that where affidavits have been provided in lieu of testimony to support a newspaper article or articles, reporters could be obligated to testify as to the facts set forth therein, i.e. what was seen and heard**,** as related in such articles.

By doing so, the reporters would be verbalizing the contents of the affidavits by testifying as to what appeared in the newspaper articles unless such affidavits would be accepted by all parties as validating or authenticating the contents of those articles. Additionally, no testimony would relate to unpublished material or information or to motivations, biases, mental impressions or other extrinsic information as to what the reporters would have seen or heard and the reporters, likewise, would not be obligated to reveal any confidential sources.

The proposed Order was presented to Judge Jones in chambers with all counsel present. Counsel for the reporters advised the court that they would not be testifying at trial and would be invoking their rights under the First Amendment reporter's privilege. However, counsel further informed the court that while the law had been argued ad nauseam both at oral argument, telephone conferences and briefs, it was believed that the suggested language would provide balance for which the reporters would offer testimony as it related to authenticating their articles. The proposed Order sought to avoid the risk of proceeding with an appeal that might succeed *or,* in the alternative, adversely affect the entire Third Circuit. Under the proposed Order, the reporters would provide testimony not beyond that which they set forth in their affidavits and cause this case to be distinguished from future cases in that the language provided a basis of adopting this ruling wherein affidavits are provided.

Judge Jones agreed with the reporters' position. Over the objections of the defendants he entered a Second Amended Order containing the proposed language that greatly restricted the testimony that could be sought at depositions and trial. The correspondents were sufficiently protected from a broad range of questioning and could, simply, verbalize their affidavits and verify the accuracy of their work without compromising the First Amendment. Their depositions and trial testimony finally came and went without much fanfare.

While Joseph Maldonado and Heidi Bernhard-Bupp garnered far less publicity than Judith Miller and Matt Cooper, they must be applauded for their courage and determination and for their will to protect the principles upon which the First Amendment stands.

Niles S. Benn and Terence J. Barna are with the Benn Law Firm in York, Pennsylvania. They represented the reporters and newspapers in this matter.

Reporter's Privilege Issues Arise in Criminal Investigations and Trials

There were a number of matters this month involving journalists in criminal investigations and proceedings.

Arizona – United States v. Coronado, et. al.

Federal prosecutors used audio tapes seized from an *Esquire* journalist to win the conviction earlier this month of two men accused of disrupting a mountain lion hunt organized by the Arizona Game and Fish Department in Tucson's Sabino Canyon.

The journalist, John H. Richardson, dictated notes to himself on audio tapes as he accompanied two members of the activist group Earth First!, for a planned magazine article. The tapes narrate the actions of activists Rodney Coronado and Matthew Crozier as they attended a rally protesting the hunt and a press conference explaining the need for it, and entered Sabino Canyon after it had been closed off.

Richardson's tapes show that the activists sought to disrupt the hunt by pulling up snares built to capture the mountain lions and by using mountain lion urine to throw off tracking dogs. The tapes were seized when Richardson and Coronado were taken into custody in March 2004 after being seen allegedly digging up a snare. Crozier was later apprehended.

District Court Judge David C. Bury deemed the recordings on the tapes to be "utterances of a co-conspirator." Lawyers for Coronado and Crozier unsuccessfully argued that the tapes were the notes of a journalist and ought to be excluded as Richardson was not present at Coronado and Crozier's trial to verify or explain them.

Journalist John H. Richardson faces misdemeanor charges of interfering with a Forest Service officer and his trial is scheduled to begin on January 11, 2006. Coronado and Crozier were convicted of conspiring to impede or injure a U.S. Forest Service Officer, a felony, and of interfering with a Forest Service officer and damaging government property, both misdemeanors.

Illinois – United States v. Marzook, et. al.

Judith Miller has been drawn into the trial of an Illinois man accused of laundering funds for the terrorist organization, Hamas. At issue are incriminating statements and confessions made by the defendant, Muhammad Salah, to Israeli authorities during an interrogation in 1993.

In a court filing seeking to suppress the statements and confessions as evidence at trial, attorneys for Salah claim they were the result of torture, e.g, being beaten, forced to sit in a painful position while handcuffed and threatened with rape by Israeli authorities.

In reply, the government claims the statements and confessions were voluntary and, in a footnote, point to a reporter's "own observations" of the "interrogation session." Though the government does not name the reporter, the defense responded by saying it is Miller and in their filing describe her as "the infamous Judith Miller, who recently left her position at the New York Times amidst a swirl of controversy and claims of highly unprofessional and politically motivated conduct."

In her book, *God Has Ninety-Nine Names*, published in 1996, Miller wrote that she was present at Salah's interrogation. She also wrote about his interrogation in a February 17, 1993 article in the *New York Times*, but does not mention that she was present at the interrogation and attributes her reporting to "Israeli officials and to notes of the interrogations provided by them."

According to court filings, Prime Minister Yitzhak Rabin arranged for Miller to have access to the interrogation. Attorneys for Salah have written a letter to Miller asking for information about the interrogation, but say she has not been forthcoming. They have also asked the government to produce documents related to the interrogation witnessed by Miller.

A hearing to determine whether the statements and confessions may be used at Salah's trial is scheduled for March 2006.

Arizona – State v. Grant

The *Eastern Arizona Courier* agreed – without challenge – to hand over materials subpoenaed by the defense in a murder trial. The defendant, Doug Grant, faces first degree murder charges for killing his wife in 2001.

The materials, which relate to articles published in the *Courier* in September and October 2005, consist of notes and audio tapes of reporter Alysa Phillips' interviews

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Reporter's Privilege Issues Arise in Criminal Investigations and Trials

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with a key prosecution witness and former friend of the defendant, Jim McElyea.

In complying with the subpoena, the paper's publisher wrote that "normally we'd object to releasing this information under the Arizona Shield Law, but in this case we feel a judge would rule all or one of the following: The information is unavailable from other sources; the information is relevant to the underlying litigation; and the information is of critical importance." The publisher also pointed out that Phillips never promised confidentiality to McElyea.

Grant was arrested in July after police recorded McElyea telling the victim's sister that Grant told him the day after his wife's death that he had given her a capsule with sleeping medication and subsequently drowned her in a bathtub as she slept.

Police also recorded McElyea telling the victim's sister that Grant told him a week later that the story had been a dream and that his wife had committed suicide. The victim's sister notified the police after McElyea offered her the information in exchange for $10,000. The defense has already reviewed the subpoenaed materials and says that they conflict with McElyea's story recorded by the police. In a September 21 article in the *Courier*, Phillips wrote that "McElyea said he didn't think Grant was guilty of murder until the sister helped fill in the blanks."

Grant's lawyer has until January 2, 2006 to file a motion requesting that the case be sent back to a grand jury to determine if there is sufficient evidence to charge Grant.

The *Courier* is the defendant's lawyer for the costs of labor and materials used to comply with the subpoena.

Texas – KPRC-TV

KPRC-TV, a television station in Houston, appeared in court this month to challenge two subpoenas it received from a prosecutor. One subpoena seeks video tapes from a story on home loans that never aired. The second subpoena seeks outtakes from a story on a dog consignment business that aired earlier in the year.

Before deciding KPRC-TV's motions to quash, state District Judge Mark Kent Ellis asked to review the materials being subpoenaed and for the prosecutor to submit a written response to KPRC-TV's motions. The prosecutor, chief of the Harris County District Attorney's consumer fraud division, claims that the subpoenaed footage includes interviews with a potential suspect and victims in two cases being investigated by the division.

KPRC-TV provided prosecutors with a copy of the story that aired and allowed them to view outtakes. An attorney representing KPRC-TV said the station also offered prosecutors the opportunity to view the tapes of the unaired story on home loans and take notes, provided it does not have to later produce the video, but they turned down the offer.

Prosecutors issued the subpoena seeking the raw footage shot for the unaired story after KPRC-TV reporter Amy Davis approached the consumer fraud division for information while researching a story on predatory home loans.

Judge Ellis continued the hearing on KPRC-TV's motions to quash until January 10, 2006.

Senator Rodney Ellis (D-Houston) introduced a proposal for a state shield law in April 2005, but subsequently pulled the bill from consideration after it was amended to weaken the protections for journalists.

New York – Poughkeepsie Journal

A Duchess County, New York judge has ordered a reporter with the *Poughkeepsie Journal* to testify before a grand jury investigating alleged forgeries on the nominating petitions of two men who sought local office.

In an order dated December 5, 2005, Judge Thomas J. Dolan ordered the reporter, Dan Shapley, to appear before the grand jury and answer questions relating to an interview he conducted with one of the men, Candis Saint Angel, on November 5 for an article that appeared in the paper the following day. Saint Angel was a candidate for town highway superintendent.

The Assistant District Attorney claimed his office had been unsuccessful in getting information on the petition-gathering from Saint Angel and others. Judge Dolan found that the DA's office had met its burden of the balancing test.

Saint Angel is under investigation together with his son, who was a candidate for town supervisor. Saint Angel failed in his bid for town highway superintendent, while his son pulled out from the race.

The *Poughkeepsie Journal* has filed an appeal.

Speakers Bureau on the Reporter's Privilege

The MLRC Institute is currently building a network of media lawyers, reporters, editors, and others whose work involves the reporter's privilege to help educate the public about the privilege.

Through this network of speakers nationwide, we are facilitating presentations explaining the privilege and its history, with the heart of the presentation focusing on why this privilege should matter to the public. We have prepared a "turn-key" set of materials for speakers to use, including, a PowerPoint presentation and written handout materials.

We are looking for speakers to join this network and conduct presentations at conferences, libraries, bookstores, colleges, high schools and city clubs and before groups like chambers of commerce, rotary clubs and other civic organizations.

The MLRC Institute, a not-for-profit educational organization focused on the media and the First Amendment, has received a grant from the McCormick Tribune Foundation to develop and administer the speakers bureau on the reporter's privilege.

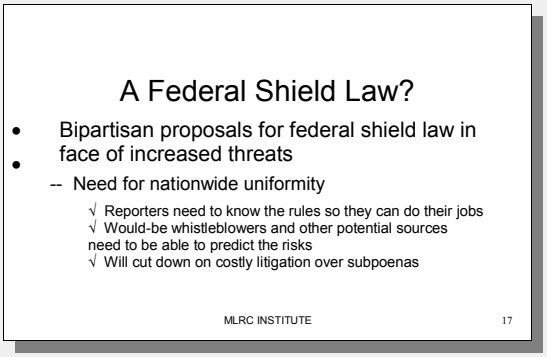
We hope to expand this project so that the reporter's privilege is the first in a number of topics addressed by the speakers bureau.

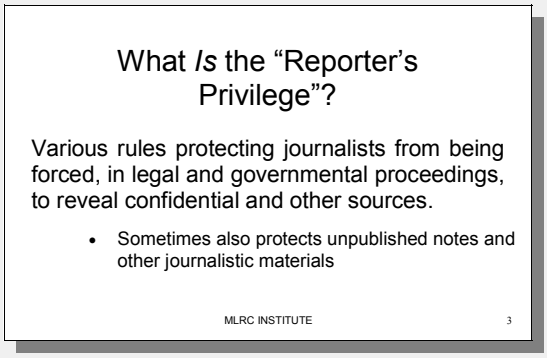
If you are interested in joining the speakers bureau or in helping to organize a presentation in your area, please contact:

Maherin Gangat
Staff Attorney
Media Law Resource Center
(212) 337-0200, ext. 214
mgangat@medialaw.org

Suggestion for background reading: Custodians of Conscience by James S. Ettema and Theodore Glasser. Great source re: nature of investigative journalism and its role in society as force for moral and social inquiry.

Presentation note: During the weeks leading up to your presentation, consider pulling articles from local papers quoting anonymous sources -- circle the references to these sources as an illustration for the audience of how valuable they are for reporters.





Awaken The Litigation Within

Tony Robbins Wins a Mixed Victory in Canadian Libel Trial

By David Crerar

Colorful cases are not rare in defamation but the recent decision of *Robbins v. Pacific Newspaper Group Inc.* 2005 BCSC 1634 provides an extraordinary read. The trial judge, the Honorable Mr. Justice Williamson, opens his decision by quoting the initial email tip leading to the stories: "you couldn't make this stuff up…"; the trial judge noted that these words were prescient. *Robbins* also reiterates some important law, as well as useful strategic considerations.

Background

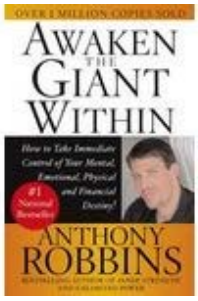
The plaintiff is the prominent motivational speaker Tony Robbins, described in one of the impugned television broadcasts as "he of the ubiquitous infomercials, perfectly coiffed hair and toothy smile."

With respect to the first and main allegation that Robbins "stole" Lynch's wife, Justice Williamson found that "this inferential meaning is so devoid of reason that I fail to see how it could possibly be defamatory."

The newspaper articles in question alleged that Mr. Robbins "stole" the wife of British Columbia businessman John Lynch, the president of a company called "Instant Bedrooms." In 1999 the former Mrs. Lynch and present Mrs. Robbins traveled to Hawaii to attend one of Mr. Robbins's motivational seminars. In 2000 she separated from Mr. Lynch. She has since married Tony Robbins and has doubly changed her name from "Bonnie-Pearl Lynch" to "Sage Robbins."

The Lynches lived in the bedroom and farming community of Langley, British Columbia, leading to local British Columbia media interest in the story, and the assumption of jurisdiction over the dispute by the British Columbia Supreme Court, the superior trial court in this province.

The main publication sued upon was a front-page article published by the *Vancouver Sun* on June 7, 2001. The article was republished in slightly different versions in two other newspapers in the same media group. Two days later, the *Sun* published a sardonic article contrasting Mr. Robbins's actions with passages from Mr. Robbins's books extolling the importance of relationships.



The article also formed the basis of an exclusive television broadcast by a related television station. Given this broad republication, it is not surprising that the list of defendants was lengthy: it included not only the reporter and editor, but also the two television anchor persons and Lord Conrad Black, the chairman and publisher of one the newspapers. The defendants also included the ex-husband John Lynch, and Lynch's non-lawyer yet self-proclaimed legal advisor, Gary Sir John Carlsen III, both of whom were the initial sources of the story.

Allegedly Defamatory Statements

By trial, the parties agreed that the publications contained three inferential meanings, although they disagreed as to whether the meaning were defamatory:

(a) Tony Robbins stole John Lynch's wife;
(b) John Lynch attempted suicide because Robbins stole his wife;
(c) Tony Robbins is a hypocrite.

With respect to the first and main allegation that Robbins "stole" Lynch's wife, Justice Williamson found that "this inferential meaning is so devoid of reason that I fail to see how it could possibly be defamatory." The Court questioned how in modern society one could be accused of "stealing" another's spouse: this claimed assertion ignores the accepted fact of marital breakdown and assumes a lack of will or consent on the part of the "stolen" spouse.

This conclusion in turn led to the finding that the second statement was not defamatory: if it is not defamatory to say that a person stole another person's

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spouse, it cannot be defamatory to allege that the aggrieved spouse attempted suicide as a result. The Court concluded that the alleged suicide attempt "says more about [Lynch] than it does Robbins," and dismissed this aspect of the claim.

The Court found only the third inferential meaning, that Robbins was a hypocrite, to have been defamatory. The media defendants sought to justify the allegation, claiming that Robbins's divorce and subsequent remarriage showed that he did not practice what he preached about spousal relationships. The Court dismissed this defense, finding no inconsistency between Robbins's writings and actions. The Court found that Mr. Robbins's "motivational message," while trite, did not evidence hypocrisy: one should not stay in a troubled relationship at all costs, and if "one finds oneself in an unhappy situation, one should reach inside and find the inner strength to do something about it."

The Court found only the third inferential meaning, that Robbins was a hypocrite, to have been defamatory.

The Court also found in Mr. Robbins's favor on an inferential meaning the meaning of which was disputed by the media defendants. The article had contained the line "Robbins's wife Becky even alleged, when seeking a restraining order during their divorce, that her husband paid $18,000 U.S. for his new girlfriend's breast implants." The Court found that to suggest that a man's conduct is such that his wife needs the protection of a court restraining order to be defamatory.

In response to the entire claim, the media defendants pointed to two quotations in the impugned article, from Robbins's spokesman, and from Sage Robbins's mother, that they claimed balanced the article. The quotations, it was argued, serves as an antidote to the overall bane of the defamatory content. The Court rejected this contention: the articles omitted the critical fact that the Lynches had separated several times before Mr. Robbins came on the scene, and thus created the misleading impression that Mr. Robbins disrupted an otherwise stable marriage.

Damages

Having concluding that some aspects of the publications had defamed Mr. Robbins, the Court applied the decision of *Leenen v. Canadian Broadcasting Corp.* (2000), 48 O.R. (3d) 656 (S.C.J.), aff'd (2001) 54 O.R. (3d) 612 (C.A.) a much-cited case providing a useful judicial checklist of considerations for assessing damages in Canadian defamation claims.

This article will highlight some of the more salient considerations. The allegations were serious. The publications were widely distributed. Although some efforts were made towards balance, the critical omission of past Lynch marital troubles skewed the article. The media defendants promoted the celebrity-gossip aspects of the story to increase sales. The defendants failed to heed warnings, including an advance letter issued by Robbins's attorney, that the sources Carlsen and Lynch were unreliable and biased.

A major factor in assessing damages is the willingness or refusal of the defendant to retract or print an apology. In the present case, the media defendants did not issue an apology despite a demand for same. The court found that this was not an aggravating factor. The court noted that Robbins's counsel had forwarded to the *Vancouver Sun* not a conventional apology and retraction, but a proposed news story.

The draft story set out the alleged facts from Robbins's perspective and raised new allegations against Carlsen and Lynch. In an important finding, the Court accepted that a newspaper's lawyer would not and could not agree or guarantee to publish such a document.

Thus the Court found that the *Vancouver Sun* had fallen afoul of several of the *Leenen* factors set out above. But ultimately, these factors paled in importance to the fact that Tony Robbins himself did not testify at the trial. The Court cited respected authority, including a text authored by Mr. Robbins's British Columbia attorney, that an award of substantial damages is not justified where the plaintiff does not himself testify at trial:

> "the purpose of an action for defamation is the protection of one's reputation. While damages are presumed, the plaintiff's failure to take the witness stand and to testify about his feelings and

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(Continued from page 32)

> the impact of the defamation upon his reputation leaves the Court somewhat in the dark about these matters."

There was other evidence that the plaintiff only suffered slight actual damages. The Court noted among the evidence a videotape of Mr. Robbins announcing at one of his seminars that he was planning to marry. The event occurred after the *Vancouver Sun* publication. Rather than opprobrium, the seminar attendees reacted with encouragement and adulation: "the participants hardly behaved as if Robbins's reputation had been lowered in their estimation because of his relationship with the former Mrs. Lynch."

The Court awarded damages in the amount of CAN$20,000 (approximately US$17,265) jointly and severally against all of the media defendants. As Gary Sir John Carlsen III had issued an apology, the Court order nominal damages against him: CAN$500 (approximately US$432).

Seminar attendees hardly behaved as if Robbins's reputation had been lowered.

The Court also granted the plaintiff's application for a permanent injunction requiring the media defendants to remove the impugned articles from an internet-based news article database.

Conclusion

At the end of the day, Robbins was thus successful, but it was something of an economically pyrrhic victory. The action lasted four years and the trial lasted five weeks. The plaintiff's cost to bring the action to its CAN $20,500 conclusion was probably in the range of half-a-million dollars. But the plaintiff was not likely perturbed: as was noted in the judgment, there was "no challenge to the statement in Lee's story that Robbins is reportedly worth $400 million."

Roger McConchie and R. Alan McConchie of McConchie Law Corporation, West Vancouver, represented the plaintiff Anthony Robbins. Robert S. Anderson, Scott A. Dawson, and Judy Jansen of Farris, Vancouver, represented all of the defendants except for John Lynch, who was represented by David F. Sutherland and Travis W. Brine of David F. Sutherland & Associates, Vancouver, and the defendant, Gary Sir John Carlsen III who appeared on his own behalf.

David Crerar practices corporate and commercial litigation in the Vancouver office of the national law firm of Borden Ladner Gervais LLP, and is an adjunct professor at the University of British Columbia Faculty of Law. In addition to media and defamation law, Mr. Crerar practices and has published in the areas of banking litigation, injunctions, class proceedings, and protection of trade secrets.

Canadian Libel Law: A Primer

Defamation law in Canada, with the obvious exception of Quebec, a civil law jurisdiction, is patterned after the English common law, which in many instances has been codified in provincial legislation. Generally speaking, Canadian libel law is similar to that of England and other former British possessions. Libel is a strict liability tort, with falsity and damages presumed. These ancient presumptions survive, notwithstanding the protections of free speech and free press available in Canada's Charter of Rights and Freedoms. *See Pressler v. Lethbridge* [1997] B.C.J. No. 2352 (S.C.); [2000] B.C.J. No. 2335 (C.A.).

Thus, in all Canadian provinces and territories except Quebec, the libel claimant's burden of proof consists only of the following: (1) that the statement has defamatory meaning by lowering "the reputation of the "person defamed in the estimation of the reasonable person"; (2) that it identified the plaintiff; and (3) that it was published to a third party. The plaintiff, by showing that the statement is defamatory in accordance with (1) above, then may invoke the presumptions that the statement is false, that it was published with malice, and that it resulted in compensatory damages.

In response, the defendant may offer – and must prove, by a "balance of probabilities" – the defenses of truth (justification), consent, fair comment, or privilege. In that regard, the defendant may also seek to prove that the publication is governed by either an absolute or a conditional privilege.

As in England, the award of costs (which encompasses the plaintiff's attorneys' fees, unlike the United States) is a major element of the successful plaintiff's award, and a major risk for libel defendants. Some Canadian provinces have statutes that recognize mitigation of damages where statements were made without malice or gross negligence, and a full retraction and apology was made.

Thus far, Canada has specifically rejected the American qualified privilege available for publications involving public officials and public figures (*New York Times v. Sullivan*, 376 U.S. 254 (1964)). In *Hill v. Scientology* [1995], 2 S.C.R. 1130, the Court criticized the *Sullivan* rule, at least on the facts presented – a very unattractive non-media libel case. Moreover, there is no clear indication whether and to what extent the Canadian courts will adopt the qualified privilege – essentially, a defense of good journalism – which was recognized in English law in *Reynolds v. Times Newspapers, Ltd*. [1999] 3 WLR. 1010 (Oct. 28, 1999).

Finally, at least until the *Hill* case, the damages awarded in Canadian libel actions have generally been very modest. In recent years, Canadian libel lawyers have noted a gradual upswing in damages awards.

Check the DCS International Committee Web Page at www.medialaw.org for the complete primer on Canadian libel law and other international updates.

Australia Nearing Uniformity In Defamation Law

By Peter Bartlett and Chris Sibree

After over 100 years of fragmented and disparate defamation laws across Australia's States and Territories, the long push for uniform Australian defamation law looks set to come to fruition on January 1, 2006.

Background

For many years the States and Territories have retained their own laws relating to defamation. Some States and Territories have retained the common law while others have enacted legislation. This legal patchwork has had serious implications for the Australian media which is required to negotiate eight sets of defamation laws, particularly in the modern environment of national publication and online news services.

At the commencement of the new year, new uniform defamation legislation will commence operation in all six Australian States. While at this stage, the Australian Capital Territory has introduced (but not yet passed) uniform defamation legislation and the Northern Territory lags behind, this is a significant achievement that should be embraced by the media.

As reported a few months ago, the impetus for uniform defamation legislation arose a few years ago. *MLRC MediaLawLetter* Sept. 2005 at 40 *"Victoria's push for uniform defamation laws in Australia*." Australian Attorney-General Phillip Ruddock, keen to reconcile the disparate law in the area, threatened to introduce federal legislation.

States Adopted Uniform Laws

This spurred the States and Territories into framing their proposal for uniform defamation statutes. Aside from having national consistency, amongst the most important changes that will be brought about by the uniform laws are a cap on non-economic damages of $250,000, the barring of nearly all corporations from commencing action for defamation and a limitation of time in which defamation actions must be started to one year from publication. Judges will determine damages awards, which would likely have seen a reduction in payouts in any event regardless of the cap on damages.

Furthermore, the uniform legislation sets out codified defences to defamation claims and institutes an offer of amends procedure, similar to that found in the United Kingdom. The proposed procedure is beneficial to publishers, particularly as rejection of a reasonable offer provides a publisher with a defence to any defamation claim and can have costs implications. The only issue that is not uniform relates to a deceased person's right to sue and be sued in Tasmania (which has allowed such suits).

One concern that remains for the media is the codified qualified privilege defence, which has been difficult for publishers to prove due to its onerous requirements of proving "reasonableness." It remains to be seen whether the court's will continue to interpret this requirement in the same, restrictive manner as had already been evidenced in New South Wales. However, regardless of this drawback, the benefits of general national consistency are manifest.

What now remains to be seen is whether Mr Ruddock will push through federal legislation that provides corporations with the right to sue, a power that the federal government ostensibly has under the Australian Constitution.

Regardless, the current situation is to be applauded as a sensible and hard fought victory to unify Australian defamation laws, provide consistency and clarity to the media and ensure that common-sense reigns.

This is especially so given the jurisdictional issues facing publishers and broadcasters who produce material, both in hardcopy and online form, for dissemination across the nation. Considering it has taken a century and has often faced resistance at a state and federal level, uniformity is the holy grail that is now in reach.

Peter Bartlett and Chris Sibree are lawyers with Minter Ellison in Australia.

MLRC Calendar

January 26, 2006

Register Now!
Media Creativity in a Changing Legal and Regulatory Environment
co-sponsored by MLRC and the Donald E. Biederman
Entertainment & Media Law Institute
2:00 p.m. - 7:45 p.m., Reception to follow
Southwestern Law School, Los Angeles, California
Link to registration materials from the home page of www.medialaw.org

February 28, 2006

International Libel & Privacy: Navigating the Minefield
Bloomberg News
731 Lexington Avenue (58th Street)
Reception at 6:00 p.m.
Panel discussion at 7:00 p.m. with
Stephen Fuzesi, Jr. (Newsweek), Charles J. Glasser, Jr. (Bloomberg News),
Elisa Rivlin (Simon & Schuster) and Kurt Wimmer (Covington & Burling),
moderated by David Tomlin (AP).
Co-sponsored by MLRC, AAP Freedom to Read Committee
and Bloomberg News
RSVP to kchew@medialaw.org

September 27-29, 2006

NAA/NAB/MLRC Media Law Conference
Alexandria, Virginia

November 8, 2006

MLRC Annual Dinner
New York, New York

Conditional Fees: How the UK Courts Will Restrict Claimant's Costs

Musa King Costs Decision May Reign in Costs

By David Hooper

With libel damages generally capped at £200,000, the largest element of fiercely contested libel cases tends to be legal costs. By entering into a no win, no fee conditional fee agreement, a Claimant's solicitor can recover a success fee which may double the already substantial legal fees which can hit $1,500 per hour.

The House of Lords recent decision in *Campbell -v- MGN* (No. 2) 2005 UKHL 61 made it clear that the reform of conditional fees was a matter for Parliament. Currently the operation of conditional fees in libel cases is being reviewed by a parliamentary committee. *See MLRC MediaLawLetter* Nov. 2005 at 39.

What is clear is that as things stand at present the award of double fees is possible under the conditional fees scheme, even where a wealthy Claimant can afford to pay in the normal way. Lord Hoffman in the House of Lords warned of the "blackmailing effect of such litigation." Cases are likely not to be defended because of the potentially enormous irrecoverable legal costs which may be run up by free-spending lawyers who are accountable only to themselves and not the discipline of the paying client, who on the whole prefers to pay for an 8 paragraph letter rather than an 8 page letter.

Musa King Costs Decision

The recent decision in *Musa King -v- Telegraph Group Ltd,* 2 December 2005 by Senior Costs Judge Hurst in the Supreme Court Costs Office shows how the courts will approach the award of legal costs in cases where there is a conditional fee agreement. In a nutshell, the approach is to reduce the allowable base (or basic) costs to the minimum, bearing in mind that there is little the courts can do regarding the additional or success fee costs which in effect may, in a fiercely contested libel case, double the base costs.

Musa King's case had been to the Court of Appeal in May 2004 where the costs run up by the well-known Claimant firm Peter Carter Ruck had been the subject of eviscerating criticism by Lord Justice Brooke. They had, however, in the meantime won the case for Musa King who received £50,000 damages in a settlement reached shortly before trial and a Statement in Open Court vindicating his reputation. His complaint concerned two articles in the Sunday Telegraph in 2001 linking him with the Gaddafi regime in Libya.

In the face of Brooke LJ's criticisms, Carter Ruck trimmed no less than 127 hours of partner time and 177 hours of assistant time from the bill, an axing of £94,530 on which presumably they would otherwise have sought a 100% uplift. Nevertheless, it appears that the base fees they still sought amounted to £317,523 on which they wanted a success fee of £294.903, a total of £617,426.

In a nutshell, the approach is to reduce the allowable base (or basic) costs to the minimum.

The case before Judge Hurst was to decide the principles to be applied. The final recovery figure for Carter Ruck is still to be determined. It is worth noting in passing that the costs of their opponent firm Farrer & Co, a very experienced libel practice, were 52% lower.

Plaintiffs and Defendants incessantly argue whether it is more time-consuming to defend than to sue. For what it is worth, my personal view is that where you have a defense of justification (as here) one would, if anything, expect the defense costs to be higher.

The Claimant after all knows he did not do it, whereas the Defendant is trying to prove he did. In any event the letter of claim ran to 8 pages and Musa King's statement clocked in at 114 pages.

Lord Justice – speaking in general terms about libel litigation in the Court of Appeal – expressed concerns about matters which were wholly incompatible with the philosophy of the Civil Procedure Rules. He invited the costs judge, if he felt it appropriate, to take an axe to certain elements of the charges if the case went to an assessment of costs.

That was the role of Judge Hurst. He had to work within the constraints of the fact that Musa King's case

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Conditional Fees: How the UK Courts Will Restrict Claimant's Costs

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did have a high risk element and was a 50/50 case attracting a 100% success fee. Equally Section 11 of the Costs Practice Direction makes it clear that the court has to consider whether or not the base and additional costs are reasonable and proportionate, but it *cannot* disallow a proportionate success fee simply because that produces a total which might be considered disproportionate.

Judge Hurst's starting point was that he had no hesitation in ruling under the test laid down in *Lownds v. Home Office* 2002 EWCA CA Civ 365 that the Claimant's costs on a global view *did* appear disproportionate having regard to all the circumstances.

Libel, he accepted, is not just about money, there is an element of vindication of reputation. Accordingly, he was prepared to treat these settled claims as having a potential value of £130,000. The Claimant's base costs were however disproportionate. He proposed a test of proportionality of whether a paying litigant would have been prepared to pay these sums out of his own pocket. If not, under the Lownds test, the Claimant had to show that the particular item claimed was both necessary and reasonable.

The bad news from a defense perspective was that the success fee was set at 100%, although Judge Hurst seemed to leave open the question of whether there could be different success fees according to the rate of risk prevailing at different stages of the action. Certainly Carter Ruck have moved towards staged success fee rates for conditional fees and that may well be one of the things to emerge from the current review of libel conditional fees.

What is however good news for Defendants is that the Judge sought to reduce the level of the recoverable base fee costs. Carter Ruck sought hourly rates of £375 for a Grade A partner and £265 for a Grade B solicitor (one with 4 to 8 years experience): the Judge allowed £325 and £210 respectively. Most importantly he ruled that libel should *not* be viewed as "city work" thus justifying the higher rates appropriate for heavy commercial or corporate work. Most of the work should be done by Grade B solicitors and not at top partner rates. Nor should the Claimant be able to recover for routine use of more than one barrister.

Conclusion

The Musa King case highlighted the chilling effect of conditional fee agreements in libel cases. Those problems certainly remain but the case does show that the courts will now act vigorously to cut back on Claimant costs in conditional fee cases.

Defense lawyers need to consider at an early stage whether in future they can get a cost capping order against Claimants. The size of recoverable costs will still have a deterrent effect on fighting claims. One of the less charming features of conditional fees is that the more you resist the claim, the more weight you give to the Claimant's argument that it is a high risk case and his lawyers should be paid double.

The real battle in the UK over conditional fees will now move to the legislative field to produce overall fees in conditional fee cases which would be viewed as proportionate.

David Hooper is a partner at Reynolds Porter Chamberlain. In Musa King v Telegraph the Claimant was represented by Justin Rushbrooke (instructed by Carter Ruck). The Defendant was represented by Jeremy Morgan QC (instructed by Farrer & Co).

U.N. Panel Declares Criminal Libel Prosecution Violates Rights Treaty

Human Rights Committee Ruling Comes in Case From Serbia and Montenegro

Ruling in a case from the nation of Serbia and Montenegro, the United Nations Human Rights Committee ruled on November 3, 2005 that the conviction of journalist and magazine editor Zeljko Bodrožic for criminal defamation was a violation of Article 19 of the International Covenant on Civil and Political Rights.

Biljana Kovacevic-Vuco, president of the Serbian Human Rights Committee, was quoted as calling the ruling "the first decision of the [United Nations Human Rights Committee] that recognizes violations of the right to freedom of expression for a journalist who commented, on the basis of widely known and notorious facts, on the behavior of a public official."

Criticism of Party Official

The case involved the conviction of journalist Zeljko Bodrožic for criminal defamation over statements criticizing factory manager Dmitar Segrt, formerly a prominent member of the Serbian Socialist Party and a close associate of former Yugoslav president Slobodan Milosevic.

Bodrožic, editor-in-chief of the newspaper *Kikindske Novine*, published a story in the January 11, 2002 edition stating that Segrt had squandered funds a head of the Socialist Party, then had "decided to 'give his party the finger' and become 'the great advocate' of reforms."

Segrt filed criminal libel and insult charges with the Kikinda Municipal Court, which convicted Bodrožic in May 2002 of insult under Article 93 of the Criminal Code of the Republic of Serbia, but acquitted him of libel under Article 92 of the Code. (For the text and analysis of these provisions, see Int'l Press Inst., Articles in Bad Faith: Criminal Defamation Laws in Serbia (March 26, 2001), available at http://www.freemedia.at/r_serbialegislation01.htm).

Justice Smilja Saric-Radic found that Bodrožic's statements about Segrt in the article were "truly malicious" and caused damage to Segrt's "honor and reputation," and imposed a fine of 10,000 Serbian dinars, equivalent to about US $136.

While leaving court after his conviction, Bodrožic was attacked by workers from Segrt's factory, and suffered a neck injury.

The District Court in Zrenjanin affirmed the conviction in May 2003, finding that the article was, indeed, insulting to Segrt.

This was not the first time that Bodrožic has been found guilty of criminal defamation charges. In 2000, he was found guilty and fined in three other cases involving statements about another Serbian Socialist Party official, Rajko Popovic. While Yugoslavia under Milosevic was internationally condemned for repression of the press, in 2005 Reporters Without Borders ranked Serbia and Montenegro as 67th of 167 nations and territories in degree of press freedom. (The United States was ranked 44th.)

UN Human Rights Committee

Less than two weeks after his conviction was affirmed, Bodrožic presented his case to the United Nations Human Rights Committee. The Committee was created as an outgrowth of the International Covenant on Civil and Political Rights, which went into force in 1976. In addition to ratifying the Covenant itself, they may also ratify the First Optional Protocol to the Covenant, subjecting them to the jurisdiction of the U.N. Committee on Human Rights to enforce the Covenant based on complaints from both other nations and individuals.

Serbia and Montenegro affirmed its conformance with the Covenant in March 2001, as a successor to the former Yugoslavia, which had ratified the Covenant in 1971. Serbia and Montenegro ratified the First Optional Protocol to the Covenant in Sept. 2001. (The United States ratified the Covenant with reservations in June 1992, and has recognized the competence of the Committee to consider complaints only by one nation against another.)

Article 19 of the Covenant provides that

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in

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U.N. Panel Declares Criminal Libel Prosecution Violates Rights Treaty

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writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

   (a) For respect of the rights or reputations of others;
   (b) For the protection of national security or of public order (ordre public), or of public health or morals.

In his submissions to the committee, Bodrožic argued that his prosecution violated this provision. He supported this argument with precedents from the European Court of Human Rights, the Inter-American Commission on Human Rights, and the U.S. Supreme Court decision in, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964). The nation of Serbia and Montenegro responded by arguing that the conviction was the result of a legally valid process.

Committee Rules for Journalist

In its decision, the Human Rights Committee ruled that the prosecution of Bodrožic was a breach of the right to free expression guaranteed by paragraph 2 of the article, and was not justified under paragraph 3.

> Given the factual elements found by the Court concerning the article on Mr. Segrt, then a prominent public and political figure, it is difficult for the Committee to discern how the expression of opinion by the author, in the manner he did, as to the import of these facts amounted to an unjustified infringement of Mr. Segrt's rights and reputation, much less one calling for the application of criminal sanction.

Bodrožic v. Serbia and Montenegro, Communication No. 1180/2003 (U.N. Comm. on Human Rts., Nov. 3, 2005), slip op. at 6 (*available at* http://www.yucom.org.yu/EnglishVersion/Attach/UN_Human_Rights_Committee.doc).

The committee ordered Serbia and Montenegro to quash the conviction, repay Bodrožic's fines and court costs, and compensate him for the breach of his rights. It also ordered the country to publicize its decision. The country has 90 days to report back that it has taken these measures. The committee has no mechanism to enforce its rulings, except by public and international publicity and pressure. It is also unclear whether the committee's ruling in the *Bodrožic* case could be applied more generally to criminal defamation prosecutions.

Bodrožic was represented in the Serbian courts by Dusan Ignjatovic of the Public Interest Law Initiative (PILI), a program based at Columbia University that advances human rights in developing countries by fostering the development of a public interest law infrastructure. The case was presented to the U.N. committee by Biljana Kovacevic Vuco, president of the Lawyers Committee for Human Rights in Serbia & Montenegro.

Seventh Circuit Affirms Summary Judgment Against File Sharer Not Fair Use to Retain Songs on Hard Drive

A unanimous Seventh Circuit panel this month upheld a $22,500 statutory damage award for BMG Music and several other recording companies against a woman who downloaded over a thousand songs from the Internet. *BMG Music v. Gonzalez*, 2005 WL 3336532 (7th Cir. 2005) (Easterbrook, Evans, Williams, JJ.)

The defendant, Cecilia Gonzalez, conceded that she had downloaded over 1,370 songs through the KaZaA file sharing network. She argued that she had merely previewed songs and had gone on to purchase more than a thousand of them, thus her downloading constituted fair use. Furthermore, she maintained that her activities had not harmed the plaintiff's economic interest in the songs, but had actually helped them by encouraging her future purchases of CDs. For purposes of the motion, plaintiffs sought damage for only 30 songs which Gonzalez conceded she never purchased.

The Court rejected defendant's fair use contentions, stressing that she had not erased the files after she had listened to them. Citing the Supreme Court's opinion is *MGM Studios, Inc. v. Grokster*, Ltd., 125 S. Ct. 2764 (2005), the Court noted that there had been a 30% decline in the sale of recorded music in the last four years, which is "likely related" to online downloading.

Judge Easterbrook commented that previews of songs are available from various fee-charging and free websites, as well as radio. Each of these sources, he says, shares the feature of "evanescence," a virtue not possessed by Gonzalez's hard drive storage. According to Judge Easterbrook:

> *"With all of these means available to consumers who want to choose where to spend their money, downloading full copies of copyrighted material without compensation to authors cannot be deemed 'fair use.'"*

The Court also affirmed an injunction against defendant ordering her to refrain from further copyright infringements. Defendant had asked that the injunction be lifted because she "learned her lesson" and "dropped her broadband access to the Internet," but, the Court noted that "an injunction remains appropriate to ensure that the misconduct does not recur as soon as the case ends."

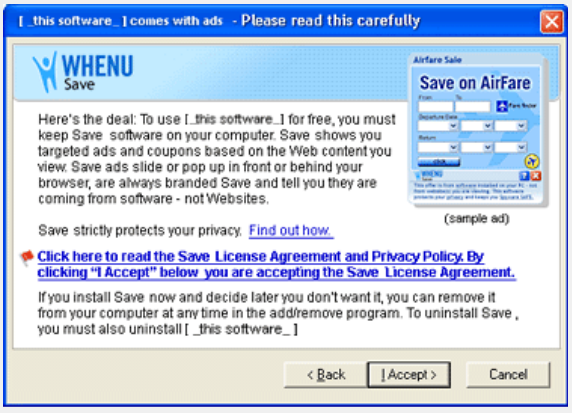
Plaintiffs were represented by B. Trent Webb of Shook, Hardy & Bacon, Kansas City, MO and Steven P. Mandell, Mandell, Menkes & Surdyk, Chicago, IL. Defendant was represented by Geoffrey A. Baker, Dowell Baker, Oak Park, IL.

Supreme Court Denies Cert. in Pop Up Ad Case

The Supreme Court late last month declined to hear an appeal from a Second Circuit decision dismissing trademark claims over "key word" triggered web ads. *1-800 Contacts, Inc. v. WhenU.com, Inc.*, 2005 WL 1524515 (2d Cir. 2005), *cert. denied*, (U.S. Nov. 28, 2005).

The plaintiff in the case sued over the use of its trademark to generate "pop up" and other web ads for competing companies. The Second Circuit held that the use of plaintiff's mark to generate web ads was not "use" of a trademark within the meaning of the Lanham Act, 15 U.S.C. § 1127.

Significantly, the Court found that the Lanham Act does not forbid the side-by-side juxtaposition of marks on a computer screen – even if the effect is to capitalize on the name recognition of the better known mark – any more than a drugstore would be forbidden from displaying a generic product next to a brand name product on its shelves.



Michigan Supreme Court Dismisses Libel Action on Limitations Grounds

In a unanimous decision, the Michigan Supreme Court granted summary judgment to an on air source, holding that the libel claim against her was untimely as measured by the date of the face-to-face interview as opposed to the date of the news broadcast. *Mitan v. Campbell*, 474 Mich. 21, 2004 WL 3252350 (Dec. 6, 2005), *reversing*, 2004 WL 1124031 (Mich. App. May 20, 2004).

Last year the Court of Appeals had reinstated the claim, reasoning the television broadcast could have been the natural and probable result of the interview. The Michigan Supreme Court held this was error because the state's one year statute of limitations for libel claims "does not contemplate extending the accrual of the claim on the basis of republication, regardless of whether the republication was intended by the speaker."

Background

Defendant Maura Campbell, a state public affairs official, was interviewed on February 22, 2000 by a television reporter for WXYZ-TV regarding wage claims being made by employees of plaintiff. Defendant called plaintiff a "bad egg," a statement that plaintiff claimed was defamatory

The interview was broadcast on February 25, 2000. And plaintiff filed his complaint on February 26, 2001 (February 25 was a Sunday) – more than a year after defendant made her statement but within a year from the date it was broadcast.

The trial court dismissed the complaint as untimely. Reinstating the claim, the Court of Appeals cited the general rule "that one who publishes a defamatory statement is liable for the injurious consequences of its repetition where the repetition is the natural and probable result of the original publication." Quoting *Tumbarella v. Kroger Co*, 271 NW2d 284 (Mich. App. 1978).

The court concluded that dismissal was inappropriate because an issue of fact existed whether the broadcast was the "natural and probable result" of the defendant's interview.

Michigan Supreme Court Decision

Reversing the Supreme Court held that the one year statute of limitations "clearly provide[s] that a defamation claim must be filed within one year from the date the claim first accrued." M.C.L.A. §§ 600.5805(1, 9), 600.5827. "The statute does not contemplate extending the accrual of the claim on the basis of republication, regardless of whether the republication was intended by the speaker."

In conclusion the Court noted that the appeals court misinterpreted *Tumbarella v. Kroger.* That case "held merely that the original publisher was liable for the natural and probable consequences of his remarks" but it did not stand for extending the period of limitations.

Florida Court Upholds Right of Access to Crime Scene Photos

By Gregg D. Thomas and Rachel E. Fugate

An order prohibiting access to crime scene photographs admitted into evidence in a capital murder case in Florida violates the right of access to a public trial, the Florida Second District Court of Appeal ruled. *Sarasota Herald-Tribune v. State*, Case No. 2D05-5408, 2005 WL 3112545 (Fla. 2d DCA Nov. 22, 2005). The opinion was authored by Judge Altenbernd. The two other Judges on the panel, Villanti and Casanueva, concurred, with the latter also writing separately.

The appellate court implemented a less restrictive alternative and ruled that the media petitioners be allowed to inspect the photographs admitted into evidence.

The Carlie Brucia Murder

On the evening of Superbowl Sunday, February 1, 2004, Carlie Brucia was abducted from a local car wash in Sarasota, Florida as she walked home from a slumber party at a friend's house. Carlie's abduction was recorded on the car wash's surveillance tape. The next day, a nationwide Amber Alert issued and the videotape of Carlie's abduction was released to the media in an effort to find the missing child.

The disappearance of Carlie came to a tragic end when law enforcement found her body in the early morning hours on February 5, and Joseph Smith was subsequently arrested on charges of murder, sexual assault and kidnapping. Rarely is the commission of a crime caught on tape and the haunting image of Carlie's abduction caught the attention of the Nation. Naturally, the prosecution of Smith sparked intense public interest.

During the trial, several photographs and a videotape of the crime scene were admitted into evidence. The presiding judge, the Honorable Andrew D. Owens, Jr., determined that the press and the public would not be permitted to view this evidence. *The Sarasota Herald-Tribune*, *Tampa Tribune*, WFLA-TV News Channel 8, and *The Herald* objected to this decision and requested the ability to inspect the evidence. The trial court subsequently entered an order finding that state statutes precluded public access to the crime scene and autopsy photographs and videotape.

Smith was ultimately convicted and sentenced to death for the kidnapping, sexual assault and murder of Carlie Brucia. *State v. Joseph P. Smith*, Case No. 2004 CF 2129 NC (Fla. 12th Cir. Ct.).

The photographs of the crime scene proved to be crucial in the jury's deliberations and imposition of the ultimate sentence. *See* Mike Saewitz, *Many jurors scarred by trials*, Sarasota Herald-Trib. (Dec. 4, 2005).

The Media's Appeal

The Sarasota Herald-Tribune, *Tampa Tribune*, WFLA-TV News Channel 8, and *The Herald* filed an emergency appeal with Florida's Second District Court of Appeal challenging Judge Owens' ruling. (In a separate appeal in the *State v. Smith* case, the *Sarasota Herald-Tribune*, *Tampa Tribune*, WFLA-TV News Channel 8 challenged a prior restraint entered by Judge Owens in an attempt to protect the privacy of the jury. The Second District Court of appeal quashed the prior restraint. *Sarasota Herald-Tribune v. State*, Case No. 2D05-5337, 2005 WL 3072915 (Nov. 17, 2005).

The media argued that in sealing the evidence, the trial court disregarded well-settled law by failing to address less restrictive alternatives to closure and by entering an overly broad order.

The media argued that in sealing the evidence, the trial court disregarded well-settled law by failing to address less restrictive alternatives to closure and by entering an overly broad order. The media suggested that the appellate court adopt the procedure established in *State v. Rolling,* wherein the trial court permitted the press and public to inspect photographs admitted into evidence, but prohibited any copying of the photographs. *See* 22 Media L. Rep. 2264 (Fla. Cir. 1994) (involving access to crime scene photographs admitted into evidence in the prosecution of serial murderer Danny Rolling). Such an order would have satisfied any legitimate privacy concerns while simultaneously permitting the press and public to monitor critical evidence introduced in the criminal trial.

The media also argued that the state statutes relied upon by the trial court did not apply to evidence introduced during a criminal proceeding. More importantly, however, even if the statutes were applicable, they operated as a blanket ban on access. As such, the statutes could not trump the constitutional right of access to evidence used during a criminal trial.

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Fla. Court Upholds Right of Access to Crime Scene Photos

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Appellate Decision

The Second District Court of Appeal began its analysis with the "broadest issue" in the case: "whether the State can rely upon secret evidence to obtain a conviction for a capital offense." The court stressed that the evidence at issue was sealed by a trial court in a case where the State, on behalf of the people, was using its power to exact the most extreme penalty.

> Allowing the public access to all aspects of a criminal trial "enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole." When the media attends a trial and reports on the proceedings, a larger segment of the public is afforded this important access.

Although the trial court's order "raise[d] these important constitutional questions," the court ultimately based its decision on state law grounds. Instead the court looked to the statutes the State contended precluded disclosure.

First, the court discussed Section 406.135, which was enacted to protect the autopsy photographs of Dale Earnhardt from disclosure pursuant to Florida's Public Records Act. On its face the statute applies to photographs and video in the custody of a medical examiner.

The photographs at issue in the Smith trial, however, were in the custody of clerk of court as evidence in the prosecution. Moreover, the statute expressly exempts criminal proceedings from its application. Therefore, the court concluded that Section 406.135 did not render the court exhibits confidential.

Second, the court analyzed the criminal investigative exemptions found in Florida's Public Records Act, Chapter 119, Florida Statutes. For the purposes of the decision, the court "assum[ed] without deciding" that the evidence could constitute active criminal investigative information. Section 119.07(6), specifically provides, however, that such information contained in a court file may only be closed if it reveals the identify of a person who is a victim of a sexual offense. The court determined that "[a]t this point no public record can be held secret because it might reveal the well-known fact that Carlie Brucia was the victim of a sexual offense." (The court cited *Stanton v. McMillan*, 597 So. 2d 940 (Fla. 1st DCA 1992), for the proposition that exemptions from disclosure under the Public Records Act "do not apply if information has already been made public.") Thus, no statutory exemption precluded access to the evidence.

Finally, if any lawful basis existed for sealing the evidence, the court determined it had to come from Florida Rule of Judicial Administration 2.051. Rule 2.051 allows courts to close records to, among other things, avoid substantial injury to innocent third parties. "The exemption, however, must be implemented with significant procedural safeguards to protect the constitutional rights discussed in section I of [the court's] opinion."

Namely, any closure order must be no broader than necessary and the court must consider less restrictive alternatives. The Second District Court of Appeal found that less restrictive alternatives were available to protect the privacy interests of Carlie's surviving family members while also protecting the rights that accompany a public trial.

Specifically, the appellate court ruled that the trial court must allow one professional journalist from each media entity involved in the appeal to view the exhibits.

In so holding, the court stressed that it was not finding that the media was entitled to copies of the evidence because "the Media has not sought that relief and does not suggest that it has any interest in seeking that relief." (In a concurrence, Judge Casanueva considered the trial court's order to be a prior and permanent restraint on publication. Because the media only petitioned for access to inspect the

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Fla. Court Upholds Right of Access to Crime Scene Photos

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evidence, but not copy, Judge Casanueva left the issue "for another day.")

The relief was limited to the parties before the appellate court and only to evidence admitted during trial. Essentially, the appellate court approved the compromise reached in *State v. Rolling*, that allowed access to crime scene photos admitted in evidence to preserve the public's right to oversee the trial, but prohibit copying of the evidence to protect the surviving family from being confronted with the dissemination of graphic photographs of Carlie.

Post-Decision Activity

The Second District Court of Appeal entered a temporary stay for several days to allow the State to seek a further stay in the Florida Supreme Court. The State then petitioned the court for rehearing and also requested that the court certify the question to the Florida Supreme Court as being one of great public importance. The Second District Court of Appeal certified the following question to the Florida Supreme Court:

> In order to protect the privacy of the victim's family, does a trail court have legal authority to bar all members of the media from viewing photographs of a murder victim that have been introduced into evidence during a public trial at which the state seeks the death penalty.

Sarasota Herald-Tribune v. State, Case No. 2D05-5408, 2005 WL 3117377 (Fla. 2d DCA Nov. 23, 2005).

The Florida Supreme Court declined to invoke its jurisdiction and denied the State's request for a stay.

The State immediately filed an emergency request for a stay from the United States Supreme Court. The same day the request was filed, Justice Kennedy denied the stay. Shortly thereafter, in accordance with the decision from the Second District Court of Appeal, the trial court allowed media representatives to view the photographs.

The journalists who viewed the photographs agreed that access was important because it shed light on the jury's determination. The photos revealed the ferocity of the crime and that the defendant had a plan to conceal the body – both were factors the jury considered in voting to recommend the death penalty for Smith.

Even though media representatives had viewed the photographs, the fight was not over. The State subsequently filed a petition seeking full review in the United States Supreme Court. Weeks after filing the petition, the State did an about face and voluntarily withdrew the petition claiming the prospects of winning were slim.

Thus, despite the legal maneuvering subsequent to the Second District Court of Appeal decision, the opinion now stands as a solid reaffirmation of Florida's commitment to open government.

The journalists who viewed the photographs agreed that access was important because it shed light on the jury's determination.

Conclusion

In the face of ever increasing sensitivity to privacy rights, recent years have witnessed the erosion in rights of access. In the context of criminal proceedings – especially capital trials where the state seeks the death penalty – transparency is needed both to protect the rights of the accused and to allow the public to scrutinize the process and serve as a check on the system. Indeed, openness, provides public confidence in the outcome of criminal trials.

The Second District Court of Appeal's decision reconfirms the fundamental right of access for the press and the public to monitor trials. As the court opined:

> Secret evidence is the hallmark of an oppressive regime; it is not a policy generally acceptable in a free society with courts that must be open to the people to assure the legitimacy of those courts and the fairness of the proceedings that occur therein.

Simply put, the decision is a major victory not just for the public's right of access, but the justice system as well.

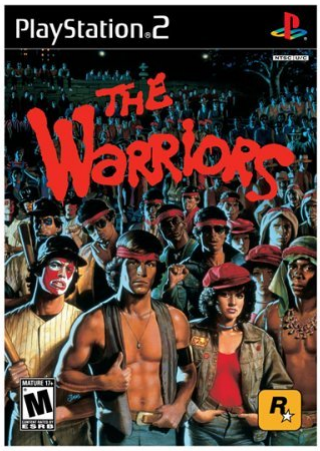
Gregg D. Thomas is the head of the media law department at Holland & Knight LLP. Rachel E. Fugate is a senior associate in the media law department at Holland & Knight LLP. Gregg and Rachel, along with James McGuire and James Lake, represented The Sarasota Herald-Tribune, Tampa Tribune, WFLA-TV News Channel 8, and The Herald.

Video Game Laws Enjoined By Three Federal Courts

By Katherine Fallow, Paul Smith, and Matthew Hellman

In a trio of recent rulings, federal district courts in Illinois, Michigan, and California enjoined newly-enacted and widely publicized state statutes restricting the sale or rental of "violent" or "sexually explicit" video games to minors. *See Entertainment Software Ass'n v. Blagojevich*, No. 05C4265, 2005 WL 3447810 (N.D. Ill., Dec. 2, 2005); *Entertainment Software Ass'n v. Granholm*, No. 05-CV-73634, 2005 WL 3008584 (E.D. Mich. Nov. 9, 2005); *Video Software Dealers v. Schwarzenegger*, No. 05-04188 (N.D. Cal. Dec. 21, 2005).

Associations representing video game makers and retailers brought the suits alleging that the statutes violated the First Amendment and were unconstitutionally vague. In Illinois, the district court permanently enjoined the state statute on these grounds in a comprehensive 53-page opinion.



In Michigan and California, the district courts entered preliminary injunctions pending further proceedings. Several conclusions were common to all three decisions, including that video games are protected speech and that evidence showing that violent video games harm minors is weak.

The rulings extend the unbroken streak of decisions enjoining similar restrictions on video games. In Illinois, Governor Blagojevich has vowed to appeal the Illinois ruling. The plaintiff associations are now seeking to permanently enjoin the Michigan and California laws.

Illinois Lawsuit

On July 25, 2005, the Illinois Act was signed by Governor Blagojevich, who championed the law as "mak[ing] Illinois the first state in the nation to ban the sale and rental to children of violent and sexually explicit video games." The law was to take effect on January 1, 2006. It imposed criminal penalties for selling or renting "violent video games" to minors and failing to label such games with a two-inch by two-inch label stating "18."

The Act defined "violent video games" as those that include "depictions of . . . human-on-human violence in which the player kills or otherwise causes serious physical harm to another human." The Act also provided for criminal penalties for selling or renting "sexually explicit games" to minors, defined as games that, among other criteria, are "designed to appeal . . . to the prurient interest and depict . . . in a manner patently offensive . . . to minors, an actual or simulated sexual act or sexual contact."

Importantly, the Act's definition of "sexually explicit" video games omitted the critical third prong from the Supreme Court's definition of obscenity (as to adults or minors) – that the games lack serious literary, artistic, social, or scientific value.

Concerned about the significant burdens placed on the speech of their members and video game consumers, and the law's inherently vague terms, trade associations representing video game creators, publishers, and retailers filed suit in the Northern District of Illinois shortly after the law was signed and sought a preliminary injunction to prevent the law from taking effect on January 1.

The district court consolidated the preliminary injunction hearings with a trial in a two-day hearing in November. During the hearing, Judge Matthew Kennelly heard from state experts Dr. Craig Anderson, whose research had been presented in previous similar cases, and from Dr. William Kronenberger, whose research was cited by the State as showing that video games have a deleterious effect on minors' brain activity. The court also heard from Plaintiffs' experts, who testified that the science did not come close to demonstrating conclusively that video games cause minors to behave aggressively or are otherwise "harmful".

On December 2, Judge Kennelly issued an opinion striking down the Act's restrictions on the sale and rental of "violent" and "sexually explicit" video games. *Entertainment Software Ass'n v. Blagojevich*, No. 05C4265, 2005 WL 3447810 (N.D. Ill., Dec. 2, 2005).

In his findings of fact, Judge Kennelly rejected the state's expert testimony purporting to show that violent video games make children more aggressive. After reviewing the State's evidence, the court concluded that

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there is no "solid causal link between violent video game exposure and aggressive thinking and behavior" and that even "if one were to accept the proposition that playing violent video games increases aggressive thoughts or behavior, there is no evidence that this effect is at all significant." *Id*. at *8

The Court found even less compelling Dr. Kronenberger's neurocognitive studies allegedly demonstrating that violent video games negatively affect adolescent brain activity, and deemed them inconclusive. *Id*. at *12-13.

In his legal findings, Judge Kennelly concluded that the Act imposed a content-based regulation on protected speech, and therefore was subject to strict scrutiny. The court began by considering whether the Act furthered a compelling state interest. Noting that the interest in curbing aggressive and violent behavior in minors may be compelling in principle, the court concluded that the Act came "nowhere near" satisfying *Brandenburg v. Ohio*'s test for restricting speech on violence-prevention grounds. 399 U.S. 444 (1969).

In a strong reaffirmation of First Amendment principles, the court held that "the State lacks the authority to ban protected speech on the ground that it affects the listener's or observer's thoughts and attitudes."

Under *Brandenburg*, only speech that is intended and likely to incite immediate violence can be restricted. The court noted that there was no evidence that video games were intended to incite violence, and that, in any case, there was no substantial evidence showing that video games caused increased aggression in minors. *Blagojevich*, at *20.

Quoting an earlier Sixth Circuit case, *James v. Meow Media, Inc.*, 300 F.3d 683 (6th Cir. 2002), that refused to hold video game manufacturers liable in tort, the court found that "glacial process of personality development that violent video games allegedly effect is far from the temporal imminence that we have required to satisfy the *Brandenburg* test." *Id*..

The court also rejected the State's claim that the Act could be justified as preventing "developmental or psychological harm to minors." In a strong reaffirmation of First Amendment principles, the court held that "the State lacks the authority to ban protected speech on the ground that it affects the listener's or observer's thoughts and attitudes," and thus the State could not engage in "thought control" to protect minors. *Id*. at *21.

Nor did the court accept the State's claim that the Act was necessary to help parents limit their children's access to video games. The court cited a Federal Trade Commission Study showing that parents were already involved in a large fraction of video game purchases for their children, and that the video game industry performed better than other segments of the entertainment industry in ensuring that unaccompanied minors are unable to purchase explicit material. *Id*.

Moreover, the court pointed to the underinclusiveness of the statute, which prevented minors from buying violent video games, but at the same time allowed them to purchase violent movies and music. *Id.*

The court also found that the Act's ambiguous terms were unconstitutionally vague. It concluded that "the vagueness of the [Act's] definition of violent video games makes it highly probable that game makers and sellers will self-censor or otherwise restrict access to games that have any hint of violence, thus impairing the First Amendment rights of both adults and minors." *Id*. at *22. Emphasizing the Act's restriction on depictions of "human[s]" being "kill[ed] or suffering "serious physical harm," the court held that in the "fanciful context" of video games, the Act's language was too vague to provide guidance to game makers and retailers. *Id*. at *23.

The court also struck down the Act's restrictions on sexually explicit games as going further than the Supreme Court has allowed under its decision in *Ginsberg v. New York*, 390 U.S. 629 (1968). The court concluded that the Act did not qualify for deferential review under *Ginsberg* because the definition of "sexually explicit video game" did not meet the standard approved in *Ginsberg*. Finding instead that strict scrutiny applied, the court concluded that the Act regulated an "unconstitutionally vague amount of speech," and was not narrowly tailored. *Blagojevich*, at *25.

Finally, the court invalidated the provisions of the Act that required retailers to label "violent" and "sexually ex-

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plicit" video games, concluding that the requirements amounted to compelled speech that could not satisfy strict scrutiny. *Id.* at *28.

Michigan Lawsuit

The Michigan Act was signed by Governor Granholm on September 14, 2005, and was set to go into effect on December 1, 2005. It imposes civil liability on individuals who "knowingly disseminate . . . ultra-violent explicit video game[s]" to minors, as well as the possibility of criminal liability against store managers who permit a minor to "play or view the playing" of a restricted game.

The Act defines an "ultra-violent explicit video game" as "harmful to minors" – and therefore subject to the Michigan law's restrictions – if it "appeals to the morbid interest in asocial, aggressive behavior of minors," and meets certain other criteria. The Act's stated purposes included "safeguarding both the physical and psychological well-being of minors," and "preventing violent, aggressive and asocial behavior from manifesting itself in minors."

The associations representing video game publishers and retailers filed a complaint and motion for a preliminary injunction in the Eastern District of Michigan shortly after the bill was enacted. In a November 9, 2005 ruling, Judge George Steeh granted the preliminary injunction, finding that "the [state] defendants are unlikely to succeed on the merits." *Entertainment Software Ass'n v. Granholm*, No. 05-CV-73634, 2005 WL 3008584 (E.D. Mich. Nov. 9, 2005).

The court's ruling recognized that video games are protected speech, and that the Act's content-based regulations were subject to strict scrutiny. *Id.* at *2. The court found that Michigan was unlikely to satisfy any of strict scrutiny's requirements. *Id.* at *3-4. It noted that the social science evidence that Michigan presented did not demonstrate that the state had a compelling interest in regulating violent video games for minors. *Id.* at *3.

It also found, similar to the Illinois opinion, that the ambiguous terms of the Act prevented it from being narrowly-tailored, and that the Act was instead likely unconstitutionally vague. *Id.* The court discounted the state's suggestion that there was no vagueness problem because store owners could always call a lawyer before choosing to sell or rent a particular game.

California Lawsuit

The California Act was signed into law by Governor Schwarzenegger on October 7, 2005. As in the other cases, the associations representing video game publishers and retailers filed suit shortly thereafter and sought to preliminarily enjoin the Act prior to its effective date of January 1, 2006. The Act imposes a civil penalty of up to $1,000 on any person who "sell[s] or rent[s] a video game that has been labeled as a violent video game to a minor." "Violent" games are defined as those "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being."

On December 21, 2005, Judge Ronald Whyte of the U.S. District Court for the Northern District of California entered a preliminary injunction against the enforcement of the Act. *Video Software Dealers v. Schwarzenegger*, No. 05-04188 (N.D. Cal. Dec. 21, 2005).

Although the court determined the Act was likely not ambiguous enough to be unconstitutionally vague, *id.* at 8, it preliminarily enjoined the Act because "plaintiffs have shown they are likely to succeed on the merits of their claim that the Act violates the First Amendment." *Id.* at 14.

The court rejected the defendants' contention that any standard other than strict scrutiny should apply, *id.* at 12, and went on to conclude that the Act was unlikely to survive such scrutiny. In particular, the court noted that California was presenting the same evidence that *Blagojevich* rejected and found that California would "face similar problems proving the California legislature made reasonable inferences based on substantial evidence." *Id.* at 12.

In granting preliminary relief, the court also emphasized the irreparable First Amendment harm that plaintiffs would suffer if the Act were to go into effect. *Id.* at 14-15.

Illinois Governor Blagojevich has vowed to appeal the district court's ruling. The Michigan and California plaintiffs are now seeking permanent injunctions of the statutes in those states.

Katherine Fallow and Paul Smith are partners, and Matthew Hellman is an associate, at the Washington D.C. office of Jenner & Block. They represent the plaintiffs in the three lawsuits.

Third Circuit Rules That Federal Obscenity Laws Are Constitutional – At Least For Now

Challenge Based On Lawrence v. Texas Rebuffed

The Third Circuit this month reversed a controversial district court decision that held that federal obscenity laws are generally unconstitutional in light of the Supreme Court's recent decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding anti-sodomy laws unconstitutional). *See U.S. v. Extreme Associates, Inc.*, No. 05-1555, 2005 WL 3312634 (3rd Cir. Dec. 8, 2005), *reversing,* 352 F.Supp.2d 578 (W.D.Pa. 2005).

The Third Circuit's unanimous opinion written by Judge Smith and joined by Judges Stapleton and Nygaard, was not prepared to go that far. The Court held that the district court overstepped its authority by disregarding the Supreme Court's direct precedents in obscenity cases. According to the Third Circuit, any uncertainty over the continued authority of those cases is to be resolved by the Supreme Court and "*Lawrence v. Texas* represents no such definitive step by the Court."

Indictment Dismissed

The defendants, Extreme Associates Inc., and its owners, produce and sell pornographic videos by mail and via the Internet through a website. A law enforcement agent posing as a customer paid to join the website and downloaded several allegedly obscene videos. Defendants were charged with distributing obscene materials in violation of 18 U.S.C. §§ 1461 and 1465.

Judge Gary Lancaster, in the Western District of Pennsylvania, granted a defense motion to dismiss the indictment. In a lengthy opinion Judge Lancaster recognized that the Supreme Court has never recognized a First Amendment right to distribute obscene material. But "the fact that obscenity statutes have been upheld under one constitutional provision does not mean that they are immune from all constitutional attack." 352 F. Supp.2d at 589.

Citing a line of substantive due process privacy cases from *Roe v. Wade*, 410 U.S. 113 (1973) to *Lawrence v. Texas*, 539 U.S. 558 (2003), he held the federal obscenity statutes unconstitutional as applied to defendants' Internet distribution. Under *Lawrence* "the government can no longer rely on the advancement of a moral code, i.e., preventing consenting adults from entertaining lewd or lascivious thoughts, as a legitimate, let alone a compelling, state interest."

The district court's provocative conclusion was not entirely without support. Justice Scalia predicted as much in his dissent in *Lawrence*, where he said the Court's decision "effectively decrees the end of all morals legislation." *Lawrence* at 599 (joined by Chief Justice Rehnquist and Justice Thomas).

Judge Lancaster also cited leading constitutional scholars who assessed the impact of *Lawrence.* In a law review article published last year constitutional scholar Laurence Tribe stated that "the Court's holding in *Lawrence* is hard to reconcile with retaining the state's authority to ban the distribution to adults of sexually explicit materials ...." *Lawrence v. Texas: The "Fundamental Right" that Dare not Speak its Name*, 117 Harv. L. Rev. 1893, 1945 (2004).

Third Circuit Decision

The Third Circuit first ruled that the district court overstepped its authority, noting that the Supreme Court "explicitly admonished lower courts that 'if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls leaving to this Court the prerogative of overruling its own decisions." *Quoting Rodriquez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989).

It moreover found that several Supreme Court decisions on obscenity had, in fact, considered to some extent privacy interests, albeit without expressly using the phrase "substantive due process." Thus the district court erred in dismissing the indictment "based on speculation" that pivotal obscenity cases "appear to rest on reasons rejected in *Lawrence."*

Defendants were represented by H. Louis Sirkin and Jennifer M. Kinsley of Sirkin, Penales, Schwartz, Cincinnati, OH. US Attorney Mary Beth Buchanan argued on behalf of the Government.

ETHICS CORNER

Multi-Jurisdictional Practice And The In-House Lawyer

The Finish Line May Be In Sight

By Roberta R. Brackman

In September 2002, many attendees at the MLRC Libel Conference were shocked (some might admit to actual panic) upon learning in the ethics breakout sessions that they may be engaging in the unauthorized practice of law.

At the time, we were all enlightened to the potential risks of offering advice to clients located outside of one's jurisdiction of Bar admission. For in-house and firm counsel alike, however, this is, was and continues to be our practice, and thus a risk taken on a daily basis, knowingly or unknowingly, when advising stations, newspapers, magazines and web sites all over the country. And the corollary concern expressed by many in-house counsel was – am I engaging in the unauthorized practice of law if I am admitted in one jurisdiction but not the jurisdiction in which my office is now located?

After a slow and not very encouraging start, as we near the end of 2005 the finish line may be coming into sight -- most states have now adopted Model Rule 5.5 or some equivalent provision.

At the time, the answer to both of these questions was "yes" in most jurisdictions. After a slow start, the winds of change are finally blowing.

ABA Model Rule 5.5

Relief had been in the offing since August 12, 2002, when the American Bar Association amended the Model Rules for Professional Conduct, and in particular adopted ABA Model Rule 5.5, which recognized the reality of multi-jurisdictional practice for both in-house and firm counsel and recognized that in-house counsel are often hired to work at corporate headquarters and in offices located outside their jurisdiction of Bar admission, thus permitting lawyers to provide legal services, under prescribed circumstances, in jurisdictions in which they are not admitted.

After a slow and not very encouraging start, as we near the end of 2005 the finish line may be coming into sight -- most states have now adopted Model Rule 5.5 or some equivalent provision providing ease of admission and comfort for in-house counsel.

The in-house counsel provision in ABA Model Rule 5.5 provides in pertinent part:

> (a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so....
>
> (d) A lawyer admitted in another Unites States jurisdiction, and not disbarred or suspended from the practice in any jurisdiction, may provide legal services in this jurisdiction that:
>
> (1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission....

This Rule permits in-house counsel admitted in one jurisdiction to maintain an office and to practice in another jurisdiction under a registration process that avoids the requirements of formal Bar admission in the other jurisdiction. This Rule allows in-house practice as long as that practice is limited to representation of and counsel to the employer and affiliates (defined as owned by or under the control of the employer).

Legal counsel and advice can, under this Rule, be given to the employer throughout the United States, thus recognizing that contemporary legal practice has grown increasingly national and even international.

The underlying basis for the Rule is that permitting practice for the employer by in-house counsel "serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work." *See* American Bar Association Report of the Commission on Multijurisdictional Practice, Comment 16 to Proposed Amendment to Rule 5.5 of the ABA Model Rules for Professional Conduct, August 2002.

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ETHICS CORNER

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The adoption of ABA Model Rule 5.5 or a similar rule providing for ease of in-house counsel licensing can significantly reduce the burden for in-house counsel hired into a state in which they are not a member of the Bar. By my count, and as of this writing, 37 jurisdictions have adopted provisions identical or similar to ABA Model Rule 5.5, have adopted other rules providing a mechanism for in-house counsel to practice by registration or special license without fear of engaging in the unauthorized practice of law or have adopted policy or issued opinions finding that in-house practice is not the unauthorized practice of law. In each case, counsel must be admitted to the Bar and in good standing in another jurisdiction.*

Whether by adoption of Model Rule 5.5 or other rule, almost every jurisdiction that permits practice by in-house counsel by registration or some form of limited license prohibits appearances in court or before administrative tribunals for which pro hac vice admission is still required. In-house counsel admitted under one of these rules is also prohibited from representing employees, officers or directors of their employers in personal matters.

Most impose registration and/or application requirements, and while some require a single registration, others require annual or biannual registration, and many have strict deadlines. Most of these jurisdictions also impose compliance with all CLE requirements, payment of all fees required to be paid by attorneys admitted in that jurisdiction and submission to the disciplinary authority in that jurisdiction.

In addition, some jurisdictions also require the employer to submit an affidavit confirming employment and to advise upon termination of employment. The requirements, filing deadlines and other conditions of such authorization differ from one jurisdiction to another, and thus the law, requirements and nuances of your particular jurisdiction must be consulted.

14 States Still Require Bar Admission

Fourteen states, including Alaska, Connecticut, Hawaii, Maine, Massachusetts, Mississippi, Montana, New York, Tennessee, Texas, Vermont, West Virginia, Wisconsin and Wyoming, have no special provision for in-house counsel and thus still require Bar admission for in-house attorneys under traditional means, either through reciprocity and required length of admission and practice in the jurisdiction of Bar admission or by examination. **

Efforts must continue in those states that have not yet adopted Model Rule 5.5 or some other mechanism for in-house counsel practice. Having said that, and while there may still be hope in Alaska, Massachusetts, New York and possibly Wisconsin, which are still considering the rule change, Connecticut has considered and rejected Model Rule 5.5 and the issue is not even under consideration at this time in Alabama, Hawaii, Maine, Montana, Mississippi, Tennessee, Texas, Vermont, West Virginia and Wyoming.

There is still work to be done and we still need to be careful out there.

Roberta R. Brackman is a member of the DCS, a member of the Ethics Committee and practices in Minneapolis, Minnesota.

* States providing for limited admission, registration or other permission for in-house counsel practice under a rule identical or similar to Model Rule 5.5 include Arizona, Arkansas, California, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Missouri, Nebraska, New Hampshire, New Mexico, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Virginia and Washington. In New Jersey, in-house practice by an employed lawyer has been permitted by opinion since 1975 (N.J. Comm. On Unauthorized Practice of Law, Formal Op. 14 (May 1, 1975). Minnesota provides by court rule that in-house counsel not admitted in Minnesota may be issued a temporary license to practice in the state for up to one year, Minn. Sup. Ct. Admission Rule 9, and Florida provides by Bar Rule for special registration without examination for in-house counsel not admitted in Florida. Fla. Bar R Chapter 17. The Texas Board of Law Examiners issued a Policy statement on April 16, 2004 declaring that in-house practice of law by one not admitted in Texas constitutes the lawful practice of law and by opinion, Alabama has found that in-house counsel not admitted in Alabama is permitted to advise corporate employers in that state. Alabama Ethics Opinion R0-86-52.

**A handful of states and the District of Columbia do not require in-house attorneys to be admitted in the jurisdiction, or presumably in any jurisdiction, because they do not consider in-house practice to be the "practice of law". While some of us might find this a bit insulting, the premise is not that the attorneys are not providing legal advice, but that they are not providing that advice to "another". For example, in North Carolina the Practice of Law is defined as: "…. performing any legal service for any *other* person, firm or corporation, with or without compensation," (underlining added for emphasis). North Carolina General Statutes, Chapter 84-2.1. Similar provisions can be found in Alabama, Connecticut, the District of Columbia, Georgia and Wisconsin. In-house counsel practices under such provisions at her peril, however. The Connecticut rule has been seriously questioned in a formal opinion by the Connecticut Bar Association Committee for the Unauthorized Practice of Law. In-house counsel in that state not admitted to the Connecticut Bar may well be engaging in the unauthorized practice of law.

Author's Note: Charts outlining state rules, statutes and opinions on multijurisdictional practice for firm and in-house counsel can be found at www.americanbarassociation.org and www.acca.com. While the ACCA chart is more accurate, complete and up to date than that offered by the American Bar Association site, neither is a substitute for consulting the underlying rules, statutes and opinions in your state of interest.

MLRC Calendar

January 26, 2006

Register Now!
Media Creativity in a Changing Legal and Regulatory Environment
co-sponsored by MLRC and the Donald E. Biederman
Entertainment & Media Law Institute
2:00 p.m. - 7:45 p.m., Reception to follow
Southwestern Law School, Los Angeles, California
Link to registration materials from the home page of www.medialaw.org

February 28, 2006

International Libel & Privacy: Navigating the Minefield
Bloomberg News
731 Lexington Avenue (58th Street)
Reception at 6:00 p.m.
Panel discussion at 7:00 p.m. with
Stephen Fuzesi, Jr. (Newsweek), Charles J. Glasser, Jr. (Bloomberg News),
Elisa Rivlin (Simon & Schuster) and Kurt Wimmer (Covington & Burling),
moderated by David Tomlin (AP).
Co-sponsored by MLRC, AAP Freedom to Read Committee
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September 27-29, 2006

NAA/NAB/MLRC Media Law Conference
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November 8, 2006

MLRC Annual Dinner
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