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MEDIA LAW LETTER

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Jury Awards Chief Justice of Illinois Supreme Court \$7 Million

By Steven P. Mandell and Brendan J. Healey

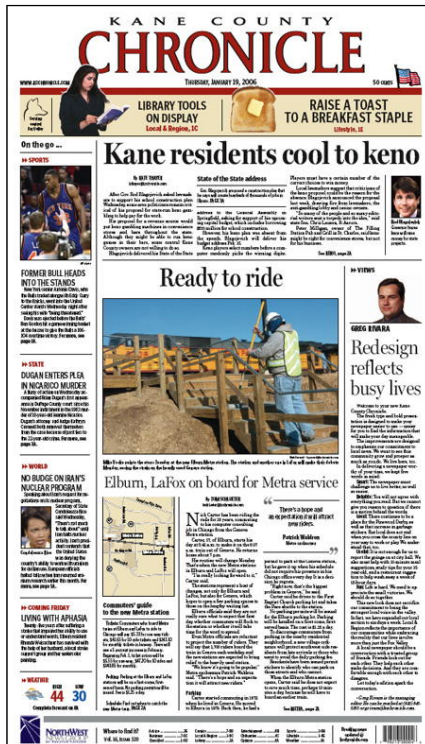
The recent trial in the Illinois Chief Justice’s defamation and false light lawsuit against a small, suburban newspaper was unusual in several regards but was perhaps most notable for those witnesses who did testify as well as for those witnesses who did not testify. *Thomas v. Page*, No. 04 LK 013 (Ill. Cir. Ct. jury verdict Nov. 14, 2006).

Testifying witnesses included a perhaps unprecedented lineup of individuals from the Illinois court system as well as other public figures of note:

- Plaintiff Robert Thomas, the Chief Justice of the Illinois Supreme Court
- Four other sitting Illinois Supreme Court Justices
- The former Chief Justice of the Illinois Supreme Court
- Two Illinois trial court judges
- Two former Illinois judges
- A sitting State Senator
- The chief counsel for the Illinois Attorney Registration and Disciplinary Commission.

accurately reflected what the sources told him, and that, in response to certain questions, he believed those sources were in a position to know the information they conveyed to him. This also mooted Plaintiff’s pending motion in limine to bar all references to sources at the trial.

For his part, Mr. Page was not allowed to boost the credibility of his sources. By the same token, plaintiff was not allowed (with certain limited exceptions) to cross examine Mr. Page regarding the veracity of his sources. In addition, plaintiff agreed to dismiss defendant Greg Rivara, managing editor of the *Kane County Chronicle*, from the lawsuit.



Other Pre-Trial Rulings

Although the confidential source issue was by far the most significant development of the pretrial period, the Court issued several other rulings that greatly affected the development of evidence at trial. First, as was previously reported in the MediaLawLetter, the appellate court affirmed the trial court’s finding of an absolute judicial deliberation privilege. See MediaLawLetter Oct. 2005 at 5; Dec. 2005 at 21.

Confidential Source Issues

Most notable among those who did not testify were the confidential sources upon whom columnist Bill Page relied in writing the columns that led Chief Justice Thomas to file his lawsuit against Mr. Page and his paper *The Kane County Chronicle*.

The confidential source issue was heavily litigated. It came to a head shortly before the trial when the judge granted plaintiff’s petition to divest the reporter’s privilege. Mr. Page was not willing to reveal his sources, and at that point, defendants were prepared to take a contempt and interlocutory appeal. Plaintiff, on the other hand, was eager to preserve the trial date.

After a few days of negotiations, the parties reached an agreement regarding the use of confidential sources. Plaintiff agreed to withdraw his petition to divest and allow defendants to state that Mr. Page had sources, that his columns

Few courts nationwide have found a judicial deliberation privilege, and no court has ever determined that such a privilege is absolute. That finding had negative ramifications for Defendants at a trial where five of the seven sitting Illinois Supreme Court Justices testified.

The trial court also determined in pre-trial arguments that the columns at issue were not, as a matter of law, opinion and defendants could not mention the word “opinion” to the jury. This led to, among other things, a situation where defendants presented demonstratives of the pages on which the columns ran but had to place white tape over the word “Opinion” at the top of the page. Relatedly, the court dramatically limited testimony regarding what a columnist does and how that differs from news reporting.

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Jury Awards Chief Justice of Illinois Supreme Court \$7M

(Continued from page 3)

In addition, the Court ruled that defendants could not explore at trial certain political donations and actions that provided circumstantial evidence of one of the hypotheses Mr. Page set forth in one of his columns.

The Columns at Issue

The case concerned columns that ran in the *Kane County Chronicle* on May 20, 2003 and November 25, 2003. Mr. Page was a columnist for the *Chronicle* who focused on local issues and human interest stories. In the May 20 column, Mr. Page discussed the case of Meg Gorecki, the State's Attorney in Kane County. Ms. Gorecki was subject to an attorney disciplinary proceeding because she had left messages on a friend's telephone answering machine suggesting that a county job could be had in exchange for a bribe to a county official. That proceeding went to the Illinois Supreme Court. Mr. Page stated that, because of Kane County political issues, Justice Thomas was out to get Ms. Gorecki and that Justice Thomas should recuse himself.

On November 19, the Illinois Supreme Court issued a decision in the Gorecki matter and levied a penalty that was less harsh than Mr. Page had suggested Justice Thomas was advocating. Mr. Page then wrote that Justice Thomas agreed to a lighter punishment for Ms. Gorecki in return for some Gorecki supporters swinging their support to a candidate Justice Thomas favored in a Kane County judicial race. Justice Thomas sued shortly thereafter.

The Trial

The trial lasted slightly more than three weeks. The parties took most of two days to pick a jury. The venire was fairly "middle class" and relatively educated – Kane County is a Chicago collar county with above average household incomes. Probably the most interesting aspect of *voir dire* from a media perspective was the shockingly low rate of media consumption – particularly print media. Few potential jurors subscribed to a newspaper, and even fewer actually read a newspaper.

Without going into a day-by-day description of the trial, certain moments stand out. Relatively early in the trial, plaintiff indicated that he would seek to introduce

an editorial principles statement taken from the *Kane County Chronicle* website. Defendants successfully moved *in limine* to exclude the document on relevance grounds. This success proved fleeting because plaintiff induced Mr. Rivara, the *Kane County Chronicle's* managing editor, to testify regarding the Society of Professional Journalists' standards.

An Illinois appellate court decision released midway through the trial provided the basis for a successful attack on one of plaintiff's damages theories. See *Maag v. Illinois Coalition for Jobs, Growth & Prosperity*, 2006 WL 3232023 (Ill. App. Nov. 2, 2006). In the *Maag* case, which also involved a judge suing for defamation, the appellate court discussed the speculative nature of alleging that a defamatory statement would affect the outcome of an election. Based on *Maag*, the trial judge found speculative plaintiff's contention that the columns would damage his likelihood of success in a retention election.

Plaintiff closed his case with his own testimony. On direct, plaintiff testified at length (over objection) about his long career as a kicker for Notre Dame and in the NFL. Plaintiff testified regarding a game-winning kick for the Bears against the Giants on an icy field to put the Bears into the playoffs. Not surprisingly, plaintiff managed to slip the names of Walter Payton and Mike Ditka into his testimony.

On cross examination, the court severely limited defendants' ability to question plaintiff regarding his political activities and favoritism. For example, plaintiff appointed a judge whose husband's law firm had made tens of thousands of dollars of donations to plaintiff's Supreme Court race, but the court prevented defendants from asking about the level of these donations. The Court also limited defendants' questioning into plaintiff's advertisement of his pro-life agenda in his Supreme Court campaign. These issues were important to Mr. Page's state of mind because he wrote his columns with knowledge of plaintiff's penchant for playing politics.

During closing arguments, Plaintiff's counsel asked the jury for approximately \$17 million – \$7-plus million for economic harm, \$7-plus million for damage to reputation and \$2-plus million for emotional harm. Plaintiff's counsel also suggested that plaintiff might give his award to his church or another charity.

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Jury Awards Chief Justice of Illinois Supreme Court \$7M

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Jury Awards \$7 Million

Evidence elicited throughout the trial indicated that Chief Justice Thomas had suffered no reputational harm whatsoever. In fact, after the publication of the columns at issue, plaintiff's colleagues elevated him to Chief Justice. In addition, plaintiff testified that the state's Republican leadership asked plaintiff to consider running as the Republican candidate for the United States Senate, and that, shortly after the completion of the trial, roughly three dozen Illinois bar associations were scheduled to honor him at a Chicago reception. This obviously contradicted plaintiff's testimony that the columns made him feel as if a "Justice For Sale" sign had been hung around his neck. Nevertheless, the jury awarded plaintiff \$5 million for damage to reputation.

The jury also awarded plaintiff \$1 million for emotional harm. Plaintiff elicited scant evidence in this regard. Plaintiff had difficulty adducing any evidence of emotional harm. He stated that he thought about the columns when he went to bed at night and woke up in the morning, but admitted that he had never seen a doctor of any kind regarding any physical or emotional distress he suffered.

Finally, the jury awarded plaintiff \$1 million in economic harm. Plaintiff presented two damages models to the jury. Plaintiff claimed that the columns prevented him from gaining an equity partnership position at a major Chicago law firm and that they precluded him from ascending to a seat on the federal bench.

With regard to a law firm position, neither of plaintiff's damages experts testified that they believed he could obtain an equity partner position at a major Chicago law firm. Defendants' expert – noted legal consultant Joel Henning – testified that, given plaintiff's lack of business and meager prospects for establishing a book of business, it was highly unlikely that plaintiff would gain a position as an equity partner at a major Chicago law firm.

With regard to a seat on the federal bench, defendants' expert – Eleanor Acheson, former Assistant Attorney General for eight years in the Clinton administration – testified that the columns would have minimal adverse effect on a potential federal court nomination.

Tearful Embraces

Chief Justice Thomas waited outside the jury room as the jury members filed out following the reading of the verdict, and he hugged them as they exited. Some jurors were reportedly crying, as was Chief Justice Thomas.

Trial Aftermath

Shortly after the trial, plaintiff offered to settle for \$6 million and a retraction. Defendants did not accept this offer. Post-trial motions are due January 12, 2007. Defendants anticipate filing a motion for a new trial, motion for judgment notwithstanding the verdict, and remittitur.

If the case thereafter goes up on appeal, it is not clear what appellate district will hear the appeal. In Illinois, Supreme Court Justices are elected from geographic districts. Plaintiff represents the Second District where the case is pending. All of the judges of the Second District sitting under plaintiff recused themselves from a prior interlocutory appeal in this matter, and a panel from the First District (Cook County) heard that first appeal.

Presumably, the Second District will once again recuse itself, but this appeal will present tricky issues of judicial independence and oversight. For example, if the appeal goes back to the First District, that panel will have to rule on a proceeding in which two First District Justices and former First District Justice testified. Judges on such a panel will be placed in the uncomfortable position of ruling on a case in which their superiors testified as witnesses.

Steve Mandell, Steve Rosenfeld, Steve Baron and Brendan Healey of Mandell Menkes LLC represented the defendants. Joseph A. Power, Jr. and Todd A. Smith of Power Rogers & Smith, P.C. represented plaintiff.

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MLRC Calendar

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Illinois Supreme Court Reinstates Lawyer's Libel Claim Over Reference in Mob Book

Court Declines Invitation to Abandon Innocent Construction Rule

At press time, the Illinois Supreme Court reinstated libel and false light claims brought by a prominent Chicago criminal defense lawyer against the authors and publisher of a nonfiction book about organized crime. *Tuite v. Corbitt*, No. 101054, 2006 WL 3742112 (Ill. Dec. 21, 2006). Illinois Supreme Court Justice Robert Thomas did not participate in the decision.



The trial court had dismissed plaintiff's claims under the Illinois' innocent construction rule and last year a divided appeals court affirmed. Reversing, the Illinois Supreme Court held that although the book did not actually accuse plaintiff of any misconduct, in context it could not be innocently construed. Instead, the book could only be read to imply that plaintiff was hired to bribe judicial officials to gain the acquittal of his mafia clients.

Plaintiff had also asked the court to repudiate the innocent construction doctrine in its entirety. The court, with one justice dissenting, declined to do so. The court affirmed that the "rationale underlying the rule remains valid" and there was no compelling reason for the court to depart from stare decisis and abandon it.

Background

At issue in the case is a book entitled "Double Deal – The Inside Story of Murder, Unbridled Corruption, and the Cop Who Was A Mobster." The book is the story of Michael Corbitt, who had a decades long career as a corrupt policeman and member of organized crime.

One part of the book discusses plaintiff's involvement in defending alleged Chicago mafia boss Joey Aiuppa against criminal charges in 1985. The book reported that plaintiff's mafia clients believed that by hiring a "big shot" lawyer with a one million dollar retainer their acquittals

were "a done deal" and plaintiff "had it all handled." Indeed, even though the evidence against the defendants was overwhelming "after Tuite was on the case, all the guys were sort of semijubilant. Everybody figured Tuite had it all handled. To Aiuppa and his codefendants, it was like it was a done deal, like they were all going to be acquitted."

Plaintiff alleged these statements were euphemisms for "bribery" and "corruption." Plaintiff alleged this interpretation was supported by Corbitt's "surprise" that plaintiff was not "whacked" by his clients after they were convicted.

The divided intermediate court of appeals held that in context the statements could be innocently construed to mean that plaintiff's clients simply wanted "better representation" from "a high-priced and experienced attorney." See 830 N.E.2d 779, 33 Media L. Rep. 1967 (Ill. App. June 7, 2005). The dissent, though, in reasoning largely tracked by the Supreme Court argued that there was no reason to discuss plaintiff in "a book about 'unbridled corruption'" unless it

"[T]he innocent construction rule advances the constitutional interests of free speech and free press and encourages the robust discussion of daily affairs."

was to describe him as corrupt. *Id.* at 790 ("[t]he clear message is that Tuite was ready and able to fix the case, that he was paid to fix it, and that he did not deliver, something that should have caused a premature end to his life. It takes more than a 'strain' to apply an innocent meaning to the offending words. It takes a gyration of Olympian proportion.").

Supreme Court Decision

The court first conducted a lengthy analysis of the innocent construction rule under Illinois law. Plaintiff had asked the court to adopt a "reasonable construction" rule, *i.e.*, if the court finds that a statement is reasonably capable of a defamatory construction, the jury decides whether it was intended or understood to be defamatory. Plaintiff argued that this is the rule followed in the overwhelming majority of states and that there is no longer any need for the innocent construction rule in the post-*Sullivan* legal landscape.

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Illinois Supreme Court Reinstates Lawyer's Libel Claim Over Reference in Mob Book

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The court, by a 4 - 1 majority found no reason to abandon the rule. “[T]he innocent construction rule advances the constitutional interests of free speech and free press and encourages the robust discussion of daily affairs.”

But the court unanimously agreed that the rule was misapplied here. “In the context of this book about crime and widespread corruption, these statements naturally indicate that Tuite was expected to engage in bribery or payoffs to secure the acquittals.” The court agreed with

the dissenting judge below that “[t]he clear message is that Tuite was ready and able to fix the case, that he was paid to fix it, and that he did not deliver, something that should have caused a premature end to his life.”

Plaintiff was represented by Paul Levy, Phillip J. Zisook, and Brian D. Saucier of Deutsch, Levy & Engel, Chartered, in Chicago. Defendants were represented by Slade R. Metcalf of Hogan & Hartson L.L.P. in New York City, and David P. Sanders of Jenner & Block, LLP in Chicago.

Supreme Court Grants Cert. In Student Speech Case

The U.S. Supreme Court this month granted certiorari in a student speech case to determine whether a high school principal violated a student's free speech rights by suspending him for displaying outside of school a banner that read “Bong Hits 4 Jesus.” *Frederick v. Morse*, 439 F.3d 1114 (9th Cir. 2006), *cert. granted*, 127 S.Ct. 722 (U.S. Dec 1, 2006) (No. 06-278).

Originally, the federal district court in Alaska granted summary judgment to the school defendants. Last year the Ninth Circuit reversed, holding that the school principal violated the student's clearly established First Amendment rights under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Therefore the school defendants were not entitled to immunity.

The questions presented in the [school defendants' petition for certiorari](#) are:

- 1) Whether the First Amendment allows public schools to prohibit students from displaying messages promoting the use of illegal substances at school-sponsored, faculty supervised events.
- 2) Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public high school principal was liable in a damages lawsuit under 42 U.S.C. § 1983 when, pursuant to the school district's policy against displaying messages promoting illegal substances, she disciplined a student for displaying a large banner with a slang marijuana reference at a school-sponsored, faculty supervised event.

The school defendants are represented on appeal by Kenneth Starr, Kirkland & Ellis, Los Angeles.

Another Appeals Court Asks Florida Supreme Court to Decide Whether False Light Invasion of Privacy Is Valid

By Timothy J. Conner and Charles D. Tobin

For the second time in a little over a month, a Florida appeals court has expressed skepticism about the viability of the false light cause of action and has asked the state supreme court to definitively decide if the Sunshine State will recognize that claim.

In the latest decision, *Rapp v. Jews for Jesus, Inc.*, 2006 WL 3422062 (Fla. 4th DCA November 29, 2006), the Florida Fourth District Court of Appeal said that “[w]ere we writing on a blank slate, we would be inclined to side with those courts rejecting the false light cause of action.” The court nonetheless held that, in light of precedent in that appellate district – and *dicta* from Florida Supreme Court decisions describing the cause of action – it was bound to permit a false light plaintiff’s claim to move forward.

As with the late-October decision of another appellate district in Florida that reversed a large verdict against a Gannett newspaper, the Fourth DCA in *Rapp v. Jews for Jesus* certified a question to the Florida Supreme Court as one of “great public importance.” The intermediate appeals court framed the question: “Does Florida recognize the tort of false light invasion of privacy, and if so, are the elements of the tort set forth in section 652E of Restatement (Second) of Torts?” The state supreme court may now accept or decline to exercise jurisdiction and hear the case.

Background

Rapp v. Jews for Jesus, Inc. arose out of statements published on the website and in the newsletter of the Jews for Jesus organization. Plaintiff Edith Rapp is the stepmother of an employee of the organization. In an article about visiting his father before that man’s death, Rapp’s stepson wrote:

On this visit, whenever I talked to my father, my stepmother, Edie (also Jewish), was always close by, listening quietly. Finally, one morning Edie began to ask me questions about Jesus. I explained how G-d gave us Y’Shua (Jesus) as the

final sacrifice for our atonement, and showed her the parallels with the Passover Lamb. She began to cry, and when I asked her if she would like to ask G-d for forgiveness for her sins and receive Y’Shua she said yes! My stepmother repeated the sinner’s prayer with me – praise G-d! Pray for Edie’s faith to grow and be strengthened. And please pray for my father Marty’s salvation.

Edith Rapp denied the events described in the article took place. Her lawsuit, brought under claims of false light, defamation, and intentional infliction of emotional distress, alleged that Jews for Jesus falsely portrayed her as a convert from Judaism. The trial court in Palm Beach County dismissed the complaint for failure to state a cause of action.

On appeal, Florida’s Fourth District Court of Appeal upheld the dismissal with respect to defamation and intentional infliction of emotional distress. The article was not defamatory, the court held, because the intended audience – Jews for Jesus members – “would have viewed the information in a positive light” and the message therefore was “neither derogatory nor hateful.” The court declined to follow a comment in the *Restatement* that would hold a statement is defamatory if it would cause disrespect among a “substantial and respectable minority” of the community.

The emotional distress claims likewise failed because, the appeals court found, the statement “occurred in a praise report primarily intended for the eyes of like-minded individuals who would view the subject matter in a positive light.”

False Light Analysis

The Fourth District, however, reversed the trial and reinstated plaintiff’s false light invasion of privacy claim. The court cited to Florida Supreme Court decisions describing the four categories of invasion of privacy – appropriate, intrusion, public disclosure of private facts, and false light – recognized in Dean Prosser’s treatise *Law of Torts* and in the *Restatement*. Noting that the Florida Supreme Court “has never expressly held that a cause of action for false light invasion of privacy is cognizable in

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Another Appeals Court Asks Florida Supreme Court to Decide Whether False Light Invasion of Privacy Is Valid

(Continued from page 9)

Florida courts,” the Fourth District held that both the state supreme court and its own prior decisions have “tacitly recognized this cause of action.”

The appeals court noted the “scholarly review” given by another Florida intermediate appeals court, the First District, in that court's October 20 decision overturning an \$18 million false light verdict against the *Pensacola News Journal*. In that case, *Gannett Co., Inc. v. Anderson*, 2006 WL 2986459 (Fla. 1st DCA October 20, 2006), the First District concluded that the plaintiff's false light claim was no different from a libel action, and it applied Florida's two-year libel statute of limitations to hold that the false light claim was time-barred. The First District also expressed doubts about the existence of a cause of action for invasion of privacy based on a false light theory, and – as with the Fourth District's decision in *Rapp* – certified the question to the Florida Supreme Court.

Finding that it was bound by precedent, the Fourth District applied the traditional false light elements to *Rapp*'s claim, noting that a false light claim may be premised on a statement that is not defamatory. The court recited an illustration in the *Re-*

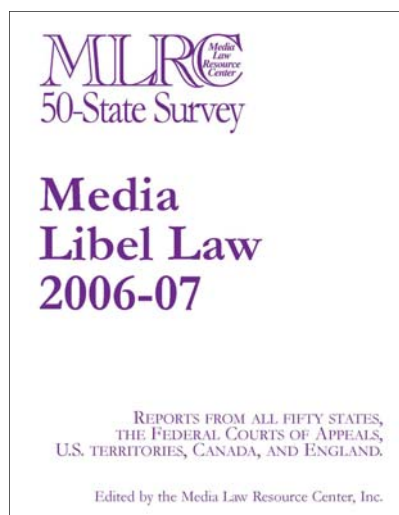
statement that suggests misrepresenting another person as a Republican where they are a Democrat would present a viable false light claim. The court concluded: “Difference of religion causes at least as many quarrels than difference of politics; therefore public misrepresentation of a person's religious beliefs, involving conduct more extreme [that misrepresenting political affiliation] falls within the Restatement's definition of the tort.” The court remanded the *Rapp v. Jews for Jesus* false light claim for further proceedings in the trial court.

In light of two Florida appellate courts asking the Florida Supreme Court to review these issues – and a third decision, in 2001 in Florida's Second District Court of Appeal, that allowed a false light claim against CBS's “60 Minutes” show after expiration of the defamation statute of limitations – it would seem likely that the Florida Supreme Court will take up the certified questions sometime next year.

Timothy J. Conner and Charles D. Tobin are with Holland & Knight LLP in the firm's Jacksonville, FL and Washington D.C. offices, respectively.



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Georgia Supreme Court Cuts Back Protections of State Anti-SLAPP Statute

By Michael Kovaka

The scope of Georgia's anti-SLAPP statute has been severely restricted by a state Supreme Court ruling limiting its protections to statements made either in or in connection with official proceedings. A forceful three-judge dissent to the November ruling decried the majority opinion for protecting only the right to petition government while it "effectively writes out of the statute the references to the right of free speech." *Berryhill v. Georgia Community Support and Solutions, Inc.*, No. S06G0038 (Ga. Sup. Ct. Nov. 28, 2006) (Carley, J.)

Abuse Complaints Trigger Suit

The defendant in the case is Shirley Berryhill, the mother of an adult son, Robert, who suffers from mental retardation. The lawsuit arose from complaints Berryhill made about alleged abuse Robert suffered after she placed him in the custody of Georgia Community Support and Solutions (GCSS), an independently-contracted home caregiver.

On July 15, 2002, Ms. Berryhill posted a message on an Internet website for families of disabled adults complaining that her son had been "dumped" at a house and then mistreated. The message stated that Ms. Berryhill initially could not find her son and that GCSS would not tell her where he was. She reported that she eventually found him in a "converted single basement garage, with bars on the inner windows." According to the message, her son was not allowed in the house, had no clothes and no bed, was left in the yard all day as punishment, and was fed chicken bones.

On February 12, 2003, Berryhill sent an e-mail to about 40 people, including one who worked for The Atlanta Journal-Constitution and one who worked for the Georgia Department of Human Resources. The e-mail stated that it had taken Berryhill two and a half months to find her son while was under the care of GCSS, and that when she located him, she learned he had been kept in a backyard shed and beaten.

GCSS sent Berryhill a letter demanding a retraction of her statements and an apology. When Berryhill failed to comply, GCSS sued her for libel and tortious interference

with business relationships. After filing suit, GCSS attempted to comply with Georgia's anti-SLAPP statute, O.C.G.A. 9-11-11.1.

Judge SLAPPs Plaintiff Down -- Court of Appeals Lifts Plaintiff Up

The Georgia anti-SLAPP statute states that is intended to encourage citizens to participate "in matters of public significance through the exercise of their constitutional rights of freedom of speech and the right to petition government for redress of grievances." For claims falling within the statute, both the plaintiff and the plaintiff's attorney must file written verifications under oath certifying, among other things, that the claim: (1) is well grounded in fact, (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, (3) is not based on a privileged communication made in good faith as part of an act in furtherance of the right of free speech or the right to petition government, and (4) is not interposed for any improper purpose.

GCSS submitted the required verifications along with affidavits to support its allegations that Berryhill's statements were false. In response, Berryhill filed her own affidavit stating she had made the statements in a good-faith belief that they were true and that she had hoped "the Atlanta Journal-Constitution, the Department of Human Resources, and other private individuals might be able to investigate the nature of my concerns about my son's treatment and care, and to remedy such concerns, if possible."

Following a hearing, the trial court granted Berryhill's motion to dismiss under the anti-SLAPP statute. According to the court, the GCSS verifications failed because, among other things, GCSS had sued Berryhill for the improper purpose of preventing her "from bringing the plight of her son under the care of GCSS to the attention of the media, the government and the public at large."

GCSS appealed and the Georgia Court of Appeals reversed, finding that "[t]he anti-SLAPP statute does not encompass all statements that touch upon matters of public concern." Rather, the court held that the statute applies only to statements made in government proceedings and statements made "in connection with an issue under consideration or review by, a legislative, executive, or judicial body, or any other official proceeding authorized by law."

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Georgia Supreme Court Cuts Back Protections of State Anti-SLAPP Statute

(Continued from page 11)

Georgia Supreme Court: “Includes” Is a Term of Exclusion

The Georgia Supreme Court accepted certiorari and affirmed the Court of Appeals based on an interpretation of statutory language the high court found ambiguous. The Georgia anti-SLAPP statute states that it applies to any claim arising from an act “which could reasonably be construed as an act in furtherance of the right of free speech or the right to petition government for a redress of grievances . . . in connection with an issue of public interest or concern” The language that troubled the Supreme Court goes on to clarify that such an act:

includes any written or oral statement, writing or petition made before or to a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, or an written or oral statement, writing, or petition made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any proceeding authorized by law.

Attorneys for Berryhill argued that the word “includes” should be construed as illustrative, pointing to non-exclusive examples of the types of speech covered by the broader definition. The Supreme Court dissenters agreed, arguing that both the common definition and legal definition of the word supported this reading. As an example, the dissenters pointed to *Black’s Law Dictionary*, which states: “The participle ‘including’ typically indicates a partial list”

Nonetheless, the six-justice majority found the legislature intended the term “includes” to denote an exclusive list. According to the majority reasoning, if the enumerated categories of protected speech introduced by the word “includes” were simply illustrative, their inclusion would have been “superfluous.” Defending its finding that the term “includes” was used as one of limitation, the majority held that the term was “totally necessary . . . if the legislature intended thereby to place some reasonable limitation on the scope of the anti-SLAPP statute.”

The silver lining of the decision, such as it is, comes in the majority’s recognition that the protections of the anti-

SLAPP statute extend beyond the participants in official proceedings. The majority opinion concedes that a protected statement still may simply “relate to an official proceeding instigated by someone else.” Additionally, the opinion suggests that a clear statement calling for initiation of official proceedings also might fall within the statute.

Michael Kovaka is a member of Dow Lohnes PLLC in Atlanta. Appellant was represented by Torin D. Togut, Lawrenceville, GA. Appellee was represented by Richard E. Witterman Jr., The Witterman Law Firm P.C., Roswell, GA. Gerald Richard Weber Jr., Elizabeth Lynn Littrell and Margaret Fletcher Garrett of the American Civil Liberties Union, Atlanta, GA, filed an amicus brief in support of Appellant.

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North Dakota Federal Court Applies Single Publication Rule to Online Speech

Libel Claim Barred by Statute of Limitations

Last month, the federal district court in North Dakota joined the growing number of courts, nationwide, to apply the single publication rule to online publications. *Atkinson v. McLaughlin*, No. 1:03-cv-091, 2006 WL 3409130 (D. N.D. Nov. 28, 2006) (Hovland, J).

The court held that North Dakota would likely follow the “nearly unanimous” decisions of other state courts to apply the single publication rule. The court also discussed the concept of “republication” as it applies to websites, ultimately finding that defendants had not modified their website so as to restart the statute of limitations.

Background

Plaintiff Patrick Atkinson, is the executive director of a North Dakota-based volunteer organization called God’s Child Project, that organizes volunteers to provide health and education services to children in Guatemala. The defendants, James and Roberta McLaughlin, had volunteered for God’s Child Project for about eight months, until they were “suspended and ultimately terminated from their volunteer positions.”

Not long after their termination, the defendants approached authorities in North Dakota and Guatemala, where they had been volunteering, alleging that plaintiff had, among other things, sexually abused a number of boys in Guatemala. The defendants also complained about plaintiff to board members and supporters of the organization, and to the press.

The defendants also created a website, www.guatemalanchildren.org, where they detailed some of their complaints about plaintiff. By the time plaintiff brought his defamation claim, the website had been in existence for over four years. In North Dakota, a defamation claim must be brought within two years. N.D. Cent. Code § 28-01-18(1). Plaintiff attempted to argue that his claim was timely because the defendants had changed their website during its four year existence.

District Court Decision

Judge Hovland declined to adopt this argument. Citing the reasoning of the New York Court of Appeals in *Firth v. New York*, 775 N.E. 2d 463 (N.Y. 2002), and the New Jersey appellate decision *Churchill v. New Jersey*, 876 A.2d 311, 316 (N.J. Super. Ct. App. Div. 2005), Judge Hovland was “convinced that, if presented with the issue the North Dakota Supreme Court would adhere to the majority rule and hold that the single publication rule applies to defamation actions arising out of internet publications.”

Furthermore, defendants made no changes to the website sufficient to constitute “republication.” They admittedly made one change to their website, three years after it launched – updating the list of the God’s Child Project’s Board of Directors. But the court determined that updating a list of the board of directors was not enough of a modification to be considered republication.

Looking again to the New York and New Jersey cases, the

court noted that a republication would not occur where one simply added “unrelated material” to a website. *Firth*, 775 N.E. 2d at 466. Nor would a modification be a republication where it was “not reasonably inferable that the addition was made either with the intent or the result of communicating the earlier and separate defamatory information to a new audience.”

Judge Hovland also distinguished *Davis v. Davis*, 334 B.R. 874, 884 (W.D. Ky. 2005), which held that a defendant “republished” his website when he updated by adding a “Breaking News” section, which had pictures and links to documents. The *Davis* court had held that the new section held substantive information and was enough to be a republication. *Id.* at 879.

The defendants’ updating of the list of directors “[w]hile ... arguably more than a technical change to the web-



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**North Dakota Federal Court Applies
Single Publication Rule to Online Speech**

(Continued from page 13)

site, [] clearly does not rise to the level of a substantive change such as the changes that occurred in *Davis v. Davis*.” Instead, the change “consisted of unrelated material which did not materially or substantially alter the substance or content of the website so as to cause its republication.”

Nor could defendants be considered to have “implicitly republished” the information on their website by declining

to remove the offending material when they updated the list of directors: Plaintiff “provided no support for the proposition that implicit endorsement constitutes republication.”

Plaintiff was represented by Monte Lane Rogneby and Sidney J. Spaeth, Vogel Law Firm, Bismarck, ND. Defendants were represented by Kraig A. Wilson, Michael J. Morley, Morley Law Firm, Grand Forks, ND.

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Illinois Right of Publicity Statute Supplants Common Law Claims Continuing Injury and Discovery Rule Addressed

By **Blaine Kimrey and Meghan Norton**

In December, the Illinois Court of Appeals addressed for the first time whether the Illinois Right of Publicity Act (“IRPA”), 765 ILCS 1075/1, *et seq.*, entirely supplants common law appropriation of name or likeness and found that it indeed does (apparently regardless of whether the claim is more akin to an invasion of privacy or right of publicity cause of action). *Blair v. Nevada Landing P’ship, RBG, LP*, No. 2-06-0328, 2006 WL 3594284 (Ill. App. Dec. 8, 2006).

In addition, the court addressed for the first time the IRPA statute of limitations, the effect of the continuing injury rule under the IRPA, and the impact of the discovery rule on IRPA claims, finding that a one-year statute of limitations applies, the continuing injury rule did not apply under the facts and circumstances of the case, and the discovery rule does not apply in IRPA cases involving mass publication.

Background

Plaintiff John Blair, a former restaurant and casino employee, sued his previous employer for its use of his photograph for promotional purposes. The photograph of Blair transpired from a 1994 photo shoot in which he participated shortly after he began working for the restaurant and casino. At the time of the shoot, Blair admittedly did not have any objection to participating as a model.

This single photograph of Blair posing as a restaurant diner appeared on a seven-foot-tall and five-foot-wide billboard, brochures, menus, calendars, signs, postcards, and the company’s Web site between 1995 and 2004. After several years, Blair complained to various colleagues about the use of his photograph in such promotions. His complaint was ultimately addressed by the human resources department in 2004, which removed his picture from all of the promotional materials.

Blair originally filed a one-count complaint in 2004 alleging common-law appropriation of name or likeness. Nearly a year later, he amended the complaint to add a second count under the IRPA. The defendants followed with a summary judgment motion that argued, among other things, that Blair’s complaint was barred by the statute of limitations.

The trial court granted the defendants’ motion based on the statute of limitations, holding that both counts were untimely.

The appellate court subsequently upheld the dismissal of both of Blair’s claims.

IRPA Supplants Common Law

The court began with a description of the history of common law appropriation of name or likeness. It then noted that the common law claim “ceased to exist” with the passage of the IRPA, effective January 1, 1999, which “completely replaced” it.

Although the court relied solely on the IRPA itself to hold that the statutory rights and remedies completely supplanted those of the common law, at least two federal opinions in the Northern District of Illinois have come to the same conclusion. In *Villa v. Brady Publishing*, the court held that the plaintiff was barred from bringing a common law claim for appropriation of name or likeness because the claim was completely replaced by the IRPA. 2002 WL 1400345, at *3 (N.D. Ill. Jun. 27, 2002).

Six months later, another Northern District court relied on *Villa* to note the supplanting effect of the IRPA. *Villalovos v. Sundance Assoc., Inc.*, 2003 WL 115243, at *3 (N.D. Ill. Jan. 13, 2003).

IRPA Statute of Limitations

The *Blair* court also held that because the statutory right supplanted the common law, the one-year limitations period prescribed by the common law applies to claims under the IRPA. This opinion is in contrast with *Toney v. L’Oreal USA, Inc.*, 2002 WL 31455975, at *3 (N.D. Ill. 2002), in which the federal court applied the five-year statute of limitations provided in 735 ILCS 5/13-205 to the plaintiff’s IRPA claims.

Notably, the Illinois Supreme Court has not opined on what statute of limitations applies to IRPA claims.

Continuing Violation & Discovery Rule

The court next considered whether Blair’s claims were preserved by the continuing violation rule. Because the court believed that Blair’s picture constituted an unaltered single photograph used for a single purpose aimed at the same audience and promoting the same product, it held that his claim

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Illinois Right of Publicity Statute Supplants Common Law Claims Continuing Injury and Discovery Rule Addressed

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was not subject to the continuing violation rule even though the photo appeared in various mediums over various dates.

The court also noted the policy implications of holding otherwise, stating that a contrary holding would cause endless tolling and a potential multiplicity of lawsuits. Finally, the court noted that its determination was consistent with the Uniform Single Publication Act, 740 ILCS 165/1, and various decisions in other jurisdictions.

The court also refused to apply the discovery rule to Blair's claims because his photograph was not hidden, was easily discovered, and was provided to a large part of the public. Noting the inherent conflict between the discovery rule and the single-publication rule and the extent to which the former undermined the latter, the court stated that the discovery rule would therefore never apply "unless the publication was hidden, inherently undiscoverable, or inherently unknowable."

In essence, the court affirmed the *dicta* from a previous Illinois Supreme Court case that noted the difference between ap-

plying the discovery rule to a mass media publication as opposed to a credit reporting agency. *Tom Olesker's Exciting World of Fashion, Inc. v. Dun & Bradstreet, Inc.*, 61 Ill.2d 129, 137-37 (Ill. 1975).

The court concluded by holding that because Blair's common law claim accrued in 1995 and his statutory claim accrued in 1999, at the latest, his claims were barred by the one-year statute of limitations.

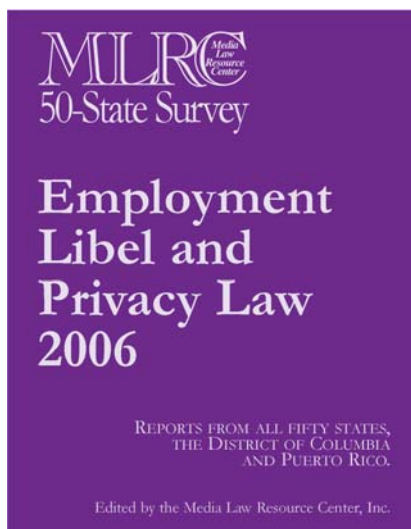
Conclusion

As the first Illinois state appellate court opinion to address these important issues under the IRPA, the *Blair* decision should prove quite significant as state and federal courts applying Illinois law grapple with how the Illinois Supreme Court would reason if faced with these topics.

Blaine Kimrey is a partner and Meghan Norton is an associate with the media defense team at Sonnenschein Nath & Rosenthal LLP in Chicago.



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Pennsylvania Court Affirms Dismissal of Former Basketball Star's Defamation Suit

No Actual Malice in Story About Plaintiff's Drug Problems

By Amy B. Ginensky and Kristin Hynd Jones

On November 30, 2006, the Pennsylvania Superior Court affirmed the dismissal of a defamation action brought by a former basketball star Nate Blackwell. *Blackwell v. Eskin*, No. 02098, *affirming*, 2006 WL 678577 (Pa. Com. Pl. March 14, 2006).

Background

The ruling was a victory for Howard Eskin, an NBC sports broadcaster, the network, its Philadelphia affiliate and related entities. The broadcast that led to the suit occurred after Nate Blackwell, an ex-NBA player and assistant basketball coach at Temple University, was placed on indefinite suspension from his employment after missing scheduled games in March of 2003. Unknown to the public, his absences were due to a cocaine problem.

On a Sunday night sports round-up show, Eskin reported the suspension, its relation to a substance abuse problem and then stated that Blackwell's problem had become "so bad Blackwell was involved in a theft problem last year in the team's locker room." Blackwell sued.

As he admitted his drug problem, the theft reference provided the sole basis for Blackwell's claims for defamation, false light, invasion of privacy and interference with prospective contractual relations. In an opinion that reaffirms the difficult burden a public figure defamation plaintiff faces in establishing actual malice by clear and convincing evidence, the Superior Court affirmed the trial court's entry of summary judgment in favor of the defendants.

Eskin had learned of the theft problem during the course of several conversations with a Temple University police officer of more than thirty years who had been assigned to the men's basketball team. Eskin believed the police officer to be trustworthy and, as a provider of security for the basketball team, privy to such information. In addition, Temple University's athletic director was evasive when questioned about Blackwell's problem. The police officer had voiced to Eskin his own belief that Blackwell's drug use was being covered up by Temple University.

On March 8, 2003, after Temple lost that day's basketball game, Temple announced that Blackwell was suspended indefinitely for violating team rules. Coach Chaney was quoted as

saying, "he wasn't at the game the other night, so I did what I had to do," but Temple offered no further explanation. When Eskin learned that Temple had suspended Blackwell, but that Temple was still not disclosing the real issue, he decided to come forward with the information that he had learned from the police officer during their discussions. Eskin reported the following story on a program aired on WCAU-TV, Channel 10, on Sunday, March 9, 2003, beginning at 11:35 p.m.:

My next item is one that is really hard to tell. It involves a former local hero who is in real trouble. He currently is the assistant basketball coach at Temple. Nate Blackwell had some terrific playing days at Temple and at one time thought to be the successor to John Chaney, but now he is nowhere ... literally.

Blackwell was suspended on Saturday for violating team rules, but it is far worse than that. Blackwell has missed work most of the week, was nowhere to be found on Thursday night for the Owls game with La Salle and, as of this morning, the people at Temple still don't know where Nate Blackwell is. And the problem – I'm told Nate Blackwell has a substance abuse problem. The sad part of this story is that Nate Blackwell has had a substance abuse problem for at least a year and Temple has been covering this up.

Last year Temple told us Blackwell missed the Louisville game to take care of his kid. That was a cover up. He went to rehab. The head coach John Chaney has saved Blackwell many times – going to the University president to save his job. But things got so bad Blackwell was involved in a theft problem last year in the team's locker room. Now these problems are not new. Temple has been covering up for Blackwell for a while and now it's likely that Nate Blackwell is done at Temple and it is really sad because if he did the right things he probably would have been the successor to John Chaney.

In bringing suit, Blackwell advanced claims that the theft reference accused him of performing an illegal act and was a deliberate, knowing falsehood, intended to portray him as preying on college students to support his cocaine habit.

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Pennsylvania Court Affirms Dismissal of Former Basketball Star's Defamation Suit

(Continued from page 17)

Claims Rejected

By an Order dated November 1, 2005, supported by an Opinion dated March 14, 2006, the Honorable Lisa M. Rau of the Philadelphia County Court of Common Pleas granted summary judgment “on the defamation and false light claims in accord with constitutional decisions by the United States Supreme Court and the Pennsylvania Courts applying the actual malice requirement.”

Judge Rau also granted summary judgment on Blackwell's tortious interference claim because “Plaintiff failed to produce evidence of a contract that was compromised by Defendant's broadcast or any actual damages.” Blackwell appealed to the Pennsylvania Superior Court and the case was heard by Justices Klein, Bowes and Kelly.

On appeal, Blackwell argued that he had adduced sufficient evidence of actual malice. He argued that Eskin purposefully avoided the truth by deliberately failing to investigate the accuracy of the theft allegation, and thus broadcasting rumor. As the Superior Court summarized, the Appellee also “dispute[d] the legitimacy of both the form and content of [the police officer's] information, as well as impugn[ed] his character and mental health; attempt[ed] to disassociate drug abuse from theft; and recount[ed] the putative effects of the theft reference.”

Actual Malice Analysis

In affirming Judge Rau's opinion, the Superior Court began by making clear that the actual malice standard imposes a “substantial” burden of proof on a public figure defamation plaintiff, who must prove by clear and convincing evidence that “the defendant in fact entertained serious doubts about the truth of his publication.” The Superior Court emphasized that the subjective actual malice standard “goes so far as to forbid imposition of liability even in those instances where the defendant negligently publishes false, defamatory statements about a public figure or public official” and that “negligence alone is simply insufficient to maintain a cause of action for defamation.”

Applying this standard, the Superior Court rejected Blackwell's evidence of actual malice. With respect to Blackwell's main argument that the police officer was not the original source of the information about the theft problem and, therefore, Eskin was conveying nothing more than a “second-hand rumor,” the Superior Court found that “even were Appellee to be deemed negligent for failure to investigate, either by obtaining independ-

ent confirmation of his information or consulting other, possibly more reliable sources, that finding would be insufficient to demonstrate actual malice.” The Superior Court clarified that, “[i]n other words, Appellee's merits as a journalist are irrelevant.”

The Superior Court also rejected Blackwell's argument that the police officer was so inherently unreliable because of personal problems that Eskin “knew or should have known that confirmation from some other source was required.” The Superior Court agreed with judge Rau's observation that, “there has been no evidence presented to suggest that Appellee knew of any reason to question [the police officer's] credibility or reliability.” Further, the Superior Court rejected Blackwell's argument that, in providing the information to Eskin, the police officer was “motivated by a grudge against Temple” because “evidence of ill will or a defendant's desire to harm the plaintiff's reputation, although probative of the defendant's state of mind, without more, does not establish actual malice.”

Finally, the Superior Court rejected Blackwell's attempt to separate the issue of his drug use from the theft because the theft reference Blackwell was characterizing as defamatory “was integral to Appellee's much longer commentary on Blackwell's substance abuse problem and its direct result, that is, his absences from games.” In so doing, the Superior Court endorsed the following conclusion reached by Judge Rau:

It does not strain credulity to think that an assistant coach who engages in an illegal drug habit and who was so out of control that he was missing games and risking his job, might also engage in other illegal behavior like theft to support his cocaine habit. The criminal courts abound with cases of individuals who have taken this unfortunate path. The issue is not whether the statement is true but whether [Appellee] knew that the statement was false or probably false.

The opinion was categorized “non precedential;” defendants have requested that it be recategorized as precedential. As of the date of this article, Appellant has not filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court.

Amy B. Ginensky and Kristin Hynd Jones of Dechert LLP., and Susan Weiner, Executive Vice President and Deputy General Counsel, National Broadcasting Company, Inc. represented the defendants. Plaintiff was represented by James E. Beasley, Jr., M.D., Esquire.

Pa. Court Affirms Summary Judgment for Philadelphia Newspapers Police Advisory Commission Member Held to Be a Public Official

By Nory Miller

The Pennsylvania Superior Court affirmed dismissal of a libel action against Philadelphia Newspapers over its publication of scathing quotes about a former member of Philadelphia's Police Advisory Commission. *Savitt v. Fraternal Order of Police, Lodge # 5 and Richard Costello, Philadelphia Newspapers, Inc., and Mark McDonald*, No. 3087 EDA 2005 (Pa. Super. Ct. Nov. 15, 2006).

Background

The article quoted several scathing comments by a past president of the local Fraternal Order of Police lodge, Richard Costello, who had a long history of objecting to the Police Advisory Commission and its decisions. One of the Commissioners, Judith Savitt, wife of a retired state judge, sued the paper, the reporter and Costello. The comments to which she objected were:

“‘They’re not an august judicial body but a collection of drunken misfits,’ said Costello who has fought against the very existence of the commission since the early 90s. ‘In any other city, they’d be a target of a federal grand jury.’”

The trial court granted summary judgment to the defendants holding that Mrs. Savitt was a public official and there was no evidence of actual malice.

Plaintiff a Public Official

On appeal, plaintiff argued that she was not a public official because she was not paid a salary for participating on the citizen advisory board that investigated complaints of police misconduct and because the board did not have the power to impose discipline on police officers but only made recommendations to the police commissioner. Therefore, she argued, the actual malice standard should not have been applied.

She also argued that the actual malice standard was nonetheless met by the reporter's testimony that he was aware of Costello's long history of insulting the Police Advisory Commission and its decisions and that he regarded

Costello's comments as typical of his bombastic style rather than accurate statements of fact.

The newspaper and reporter pointed out to the court that the citizen advisory board was created by the Philadelphia government, was a “unit” of the Philadelphia Managing Director's Office, enjoyed specified government powers, and controlled the use of almost \$400,000 a year of public money.

They also pointed out that the Commissioners exercised their role as public officials by controlling the conduct and budget of the Commission itself, which is a public agency. Defendants compared the Commissioners inability to control whether the Police Commissioner implemented their recommendations to Colin Powell's inability to control whether President Bush implemented his.

In response to plaintiff's assertion that she had established actual malice, the newspaper and reporter pointed out to the court that the alleged defamation here was by implication and therefore the actual malice required clear and convincing evidence that the publisher actually understood and intended the defamatory implication.

The reporter's testimony, on which the plaintiff relied, demonstrated that the opposite was true. He said he had not known Costello to lie, but did know him to speak with drama and hyperbole, and had understood Costello's remarks to express anger at the Commission itself, not as statements of fact about anyone.

The Superior Court ruled that the plaintiff was a public official and that she had failed to establish actual malice, and affirmed the trial court's dismissal of the complaint.

Nory Miller, Amy B. Ginensky and Michael E. Baughman, of Dechert LLP, represented Philadelphia Newspapers, Inc. and reporter Mark McDonald.

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Arizona Appeals Court Affirms \$600,000 Jury Verdict Against Environmental Group

The Arizona Court of Appeals this month affirmed a \$600,000 libel damage award against an environmental group and several individual members who had criticized the land management practices of a rancher, finding there was sufficient evidence of actual malice and that the statements were not otherwise privileged. *Chilton v. Center for Center for Biological Diversity*, No. 2005-0115, 2006 WL 3500987 (Ariz. App. Dec. 6, 2006) (Brammer, Espinosa, Howard, JJ.).

Background

At issue was a July 2002 news advisory posted on the website of the Center for Biological Diversity (CBD). The advisory was created in connection with CBD's opposition to plaintiff's application to renew a federal cattle grazing permit. CBD alleged that plaintiff mismanaged a 21,500 allotment of grazing land. The news advisory linked to a series of photographs taken by the defendants, many of which showed barren patches of land that had purportedly been over grazed by cattle.

Plaintiff alleged that the claims of mismanagement were false and that the photographs were intentionally misleading. Plaintiff was deemed to be a public figure due to his prominence as a rancher and his wife's position as Chair of the Arizona Game and Fish Commission. The two-week trial was reportedly an "ode to the ranching lifestyle, plus dry testimony on the labyrinth of public-lands policymaking." See *MLRC MediaLawLetter* Jan. 2005 at 17.

The defendants argued, among other things, that all the statements in their advisory were true or conclusions

of opinion and that the photos were not misleading because they depicted actual "hot spots." Moreover, even if some of the photographs depicted land outside of plaintiff's allotment it was an honest mistake.

The jury deliberated for 2 ½ hours before rendering a 10-1 verdict in favor of plaintiff and awarding \$100,000 in compensatory and \$500,000 in punitive damages.

Appeals Court Ruling

The Arizona Court of Appeals first rejected the defendants argument that their publication was privileged under federal law or Arizona common law. The defendants sought to argue that the publication was protected petitioning activity under the *Noerr-Pennington* doctrine. The argument, though, was not properly preserved for appeal.

The court also rejected the argument that the publication was privileged under Arizona common law since it was not made in connection to any legislative or judicial proceeding. And it found that the jury's finding of falsity was not an abuse of discretion.

Finally, the court found clear and convincing evidence of actual malice where evidence at trial showed that defendants were aware that some of the land depicted in the photographs had been damaged during a large May Day festival. In fact, the defendant photographer testified that he attended the festival. Thus the jury could find that the photographs and text were deliberately or recklessly false.

Plaintiff was represented by Kraig Marton of Jaburg & Wilk, P.C. in Phoenix, AZ. Defendants were represented by Gregory Fisher, Birch, Horton, Bittner and Cherot in Anchorage, Alaska.

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Indiana Libel Plaintiff Sanctioned – And Counsel Recommended for Discipline – For Hiding Her Criminal Record

By Charles D. Tobin

A federal magistrate has recommended sanctions against an Indiana libel plaintiff – and bar disciplinary proceedings against her lawyer – for hiding her criminal past in discovery, then refusing to answer questions when confronted with the record. *Filippo v. Lee Publications, Inc.*, Case No. 2:05 cv 64 (N.D. Ind. December 11, 2006).

Background

Plaintiff Lita Filippo sued *The Times*, the Lee Enterprises newspaper that serves the Northwest Indiana community, based on a series of articles, editorials, and cartoons about her 2003 arrest for DUI.

At the time, Filippo was an officer and director of the Partnership for a Drug-Free Lake County, the group responsible for awarding public grants to support the region's anti-drug and alcohol efforts. The newspaper reported that the arresting officer called her “the most obnoxious drunken female” he had ever arrested after Filippo had threatened his job during the arrest.

Filippo was acquitted of the DUI charge in 2004 after a jury trial. She filed suit against the newspaper a year later.

Plaintiff's Libel Suit

Throughout discovery, the newspaper repeatedly asked Filippo if she had a prior criminal record. When asked in interrogatories for any other arrests or convictions, she replied, “None for the past 10 year[s].” In response to a document request related to any criminal charges or convictions, she referred the newspaper to the public record of her 2003 DUI charge.

When shown during her deposition a sworn pleading she had filed in connection with that DUI charge, in which sought reinstatement of her driver's license and representing to the court that she had no previous DUI record, Filippo reaffirmed its accuracy. And when asked outright in the deposition if she has previously been accused or convicted of a crime, she said, “No.”

Following the deposition, *The Times* uncovered a handwritten notation in storage in the local state court, and a microfiche file in another court clerk's office, reflecting that Filippo had been arrested twice in 1989 – once for DUI, and the second time for disorderly conduct, criminal trespass, public intoxication, and intimidation after threatening a police officer in a bar. Filippo pleaded guilty to criminal trespass a year later and received a suspended jail sentence, according to these records.

The records showed that in each of these prior arrests, Filippo had been represented by the same lawyer who represents her in the libel lawsuit.

Filippo had agreed to sit for a second deposition in the libel case on the issue of damages. After concluding that examination, the newspaper's counsel confronted Filippo with the criminal records. She refused to answer any questions. When the

newspaper pressed her lawyer about why he had not come forward with the information, he said that he had forgotten about the incidents, and that all of her old records had been left at his prior law firm.

The Times brought a motion to compel further testimony and for monetary sanctions against Filippo and her lawyer. In opposing the motion, Filippo accused the newspaper of violating the agreed scope of the second deposition, unfairly surprising her with the documents, and seeking to punish her for a failed memory.

Magistrate Judge Andrew P. Rodovich rejected Filippo's and her counsel's protests. In his December 11 Report and Recommendation, he said:

- “The [newspaper's] deviation from the purported subject matter at the second deposition is a distraction from the issue placed squarely before the court, specifically the plaintiff's failure to disclose this information in the first instance.”
- “The court will not entertain the notion that the plaintiff was ‘surprised’ by knowledge of her own plea agreement.”

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“The court does not accept the suggestion by the plaintiff and her attorney that the passage of time erased all recollection of being charged with four crimes.”

Indiana Libel Plaintiff Sanctioned – And Counsel Recommended for Discipline – For Hiding Her Criminal Record

(Continued from page 21)

- “The court does not accept the suggestion by the plaintiff and her attorney that the passage of time erased all recollection of being charged with four crimes, pleading guilty to one of them, and being sentenced and fined.”

He also turned aside Filippo’s argument that her prior criminal record is irrelevant in litigation over coverage of her 2003 DUI charge. “Her argument, made without citation to any legal authority, does not explain the logical basis for arguing that evidence of reputation, in a defamation claim, can be regarded as irrelevant.”

The ruling came down in the midst of summary judgment briefing. The magistrate judge held that, if summary judgment is denied, Filippo should sit for another deposi-

tion to “include any matter considered relevant under the Federal Rules.” He also recommended that the newspaper receive its legal fees. Finally, he recommended that the district court certify the matter to the Indiana Supreme Court Disciplinary Committee “for their consideration of possible action” against Filippo’s lawyer.

As of press time, the time for Filippo to file an objection to the magistrate judge’s report and recommendation had not yet expired.

Charles D. Tobin, Eric Dorkin, and Christina LaRosa, of Holland & Knight's Washington D.C. and Chicago offices, represent The Times. Mark Van Der Molen, of Merrillville, IN, represents the plaintiff in this lawsuit.

Dallas Morning News Wins Summary Judgment

A Dallas County district court recently granted summary judgment to *The Dallas Morning News* on claims brought by the Unified Housing Foundation, Inc. (“UHF”) and its President, Ted Stokely, over an investigation for an unpublished new story into affordable housing tax exemptions. *Unified Housing Foundation, Inc., et al. v. The Dallas Morning News, L.P.*, Case No. 05-0736 (Tx. Dist. Ct. December 12, 2006).

Background

In 2004, reporter Kevin Krause of *The News* began investigating certain low-income housing transactions that resulted in hundreds of millions of dollars being taken off the property tax rolls. The reporter examined a flurry of purchases by non-profits in late 2003 immediately before a new law went into effect aimed at limiting the property tax exemptions. In late January 2004, the reporter also contacted Ted Stokely to set up an interview. Soon after the interview began, Stokely became angry and walked out. The lawsuit followed in July 2005.

The plaintiffs claimed that *The News* committed business disparagement, defamation, invasion of privacy,

fraud, and tortious interference with prospective contract in its newsgathering activities. The district court rejected all of plaintiffs’ claims, finding they had produced no evidence to support any cause of action.

Summary Judgment Ruling

In October 2006, *The News* filed a motion for summary judgment asking the Court to dismiss all of plaintiffs’ claims. The motion was based on a provision of the Texas Rules of Civil Procedure providing for “no evidence” summary judgments after “adequate time” for discovery. Plaintiffs opposed the motion and sought a continuance on the basis that reporter had not been deposed.

The News contended that the Plaintiffs had not been diligent in discovery. At a hearing on December 12th, Judge Jay Patterson of the 101st District Court denied Plaintiffs’ continuance motion and granted a take nothing judgment to *The News*.

The News was represented by Paul C. Watler of Jenkins & Gilchrist, Dallas, Texas.

Diet Book Protected By First Amendment

In an interesting decision, a federal court in New York dismissed products liability and related claims against the popular diet book *Dr. Atkins' New Diet Revolution*. *Gorran v. Atkins Nutritionals Inc.*, 05 Civ. 10679, (S.D.N.Y. Dec. 11, 2006) (Chin, J.). Dismissing all claims, the court held that the book was noncommercial speech entitled to full First Amendment protection.

Background

The plaintiff, a 53-year old businessman, went on the popular low-carbohydrate Atkins Diet in the spring of 2001. After just two months on the diet his cholesterol level shot up from 146 to 230. But he stayed on the diet for over two more years until he had an angioplasty – to unclog one of his coronary arteries.

Plaintiff sued Atkins Nutritionals, Inc., and the estate of its founder Dr. Atkins, for products liability, negligent misrepresentation and deceptive conduct under Florida law. Plaintiff alleged the diet's high-fat, high-protein, low-carbohydrate regimen was dangerous. And he alleged that the diet book and the company's related food products were "defective and unreasonably dangerous."

The claim was originally brought in Florida where plaintiff resides, but was transferred to New York in connection with Atkins Nutritionals' bankruptcy. Defendants moved under Rule 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings dismissing the complaint.

District Court Ruling

Granting the motion, Judge Denny Chin described plaintiff's claims as "meritless."

Defendants' books and food products are not defective or dangerous products within the meaning of products liability law. Pastrami and cheesecake – large amounts of which Gorran admittedly consumed – may present risks, but these are risks of which consumers are aware. The average consumer surely anticipates that these and other high-fat or high-protein foods may increase cholesterol levels

and the risk of heart disease. Moreover, the Diet consists of advice and ideas. The concepts may be controversial and the subject of criticism, but they are protected by the First Amendment.

The products liability claim failed because the diet book was not a "product." Furthermore assuming that Atkins food products could even be considered unreasonably dangerous over an extended period of time, plaintiff only consumed \$25 worth of protein bars, pancake mix, and pancake syrup. This was not sufficient, as a matter of law, to have caused his heart disease.

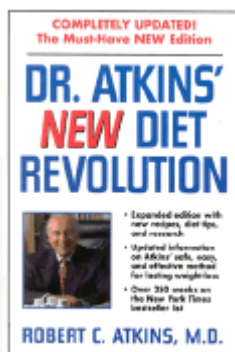
Plaintiff's negligent misrepresentation claim failed because defendants owed no duty of care to plaintiff under traditional negligence law. In addition, the claim failed because the diet book is noncommercial speech entitled to full First Amendment protection even though it recommends the company's own food products. The book discusses, among other things, how the diet works, why weight loss occurs, general nutritional guidelines, and disease prevention.

This same rationale barred plaintiff's claim against defendants for similar information on the company's website. Even though the website contained significant advertisements for defendants' products, "plaintiff's complaints relate solely to the non-commercial aspects of the Website – speech that is afforded full First Amendment protection."

Finally, the court dismissed plaintiff's statutory deceptive trade practices claim brought under Fla. Stat. §501.204 (1) (2006). The court noted that claims for personal injury are not compensable under the Florida statute which only recognizes "economic damages related solely to a product or service purchased in a consumer transaction."

In a footnote, Judge Chin noted that he "had success with its own, much simpler diet, which can be described in four words: 'Run more, eat less.'"

Plaintiff was represented by Daniel Kinburn, Physicians Committee for Responsible Medicine. Defendant Atkins Nutritionals was represented by Bruce Daniel Ainbinder, Wilson, Elser, Moskowitz, Edelman & Dicker LLP in New York.



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.

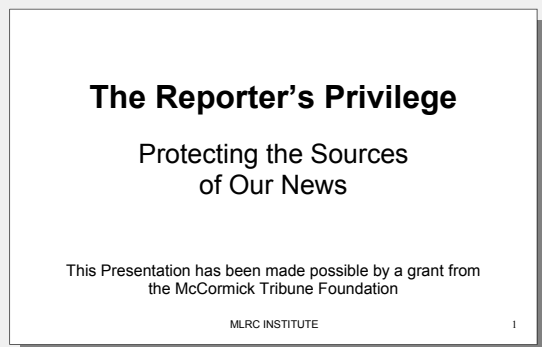
We are looking for speakers to join this network and conduct presentations at conferences, libraries, bookstores, colleges, high schools and city clubs and before groups like chambers of commerce, rotary clubs and other civic organizations.

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.

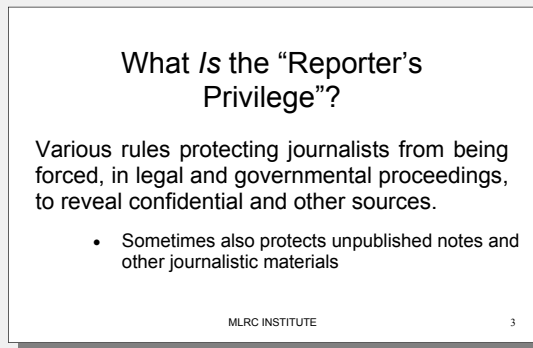
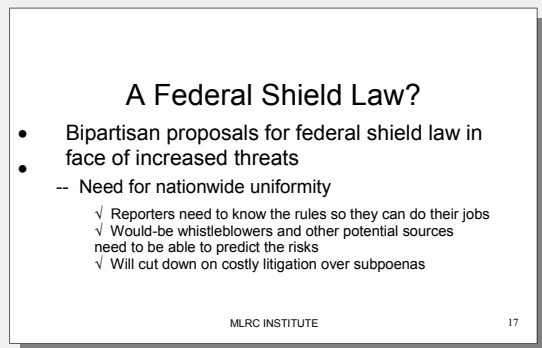
If you are interested in joining the speakers bureau or in helping to organize a presentation in your area, please contact:

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.



UK & EUROPEAN LAW UPDATE

The Other Side of the Pond

By David Hooper

Privacy

The UK law of privacy continues to take shape. Arguments were heard last month in the *Douglas v- Hello!* appeal to the House of Lords. Michael Douglas and Catherine Zeta-Jones are no longer in the case, but still at issue are the respective rights between rival celebrity magazines. The Lords decision is likely to define a number of conflicting decisions about the law of privacy and to rule on the extent to which celebrity magazines can prevent spoilers by their competitors.

Also in Her Majesty's courts – this time the Court of Appeal – with a panel of three judges which included the Lord Chief Justice and the Master of the Rolls (the top Judge of the Court of Appeal) was Her Majesty's son seeking to uphold the ruling by Mr Justice Blackburne against the *Mail on Sunday* which had published extracts from the Prince's journal which referred to the handover of Hong Kong about the British to the Chinese as “the great Chinese takeaway” and referred to the Chinese leadership as “appalling old wax-works.”

At press time, the Court of Appeal issued its judgment affirming that the newspaper's publication of the Prince's journal, which was leaked by one of the Prince's employees, was a breach of privacy. *Associated Newspapers Ltd v Prince of Wales* [2006] EWCA Civ 1776 (21 December 2006). As stated in the judgment:

The information at issue in this case is private information, public disclosure of which constituted an interference with Prince Charles' Article 8 rights. As heir the throne, Prince Charles is an important public figure. In respect of such persons the public takes an interest in information about them that is relatively trivial. For this reason public disclosure of such information can be particularly intrusive. The [trial court] judge rightly had regard to this factor when he said at paragraph 133:

“Not the least of the considerations that must be weighed in the scales is the claimant's countervailing claim to what was described in argument as ‘his private space’: the right to be able to commit his private

thoughts to writing and keep them private, the more so as he is inescapably a public figure who is subject to constant and intense media interest. The fact that the contents of the Hong Kong Journal are not at the most intimate end of the privacy spectrum does not, to my mind, lessen the force of this countervailing claim. The claimant is as much entitled to enjoy confidentiality for his private thoughts as an aspect of his own ‘human autonomy and dignity’ as is any other.”

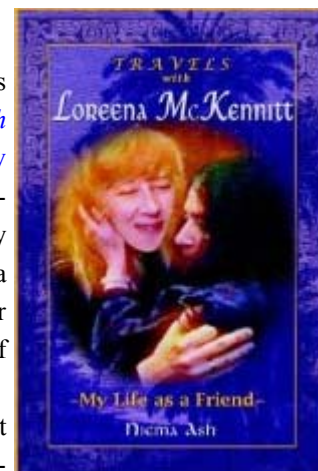
The information in the Journal was disclosed to the Newspaper by Ms Goodall. She was employed in Prince Charles' Private Office in circumstances and under a contract that placed her under a duty to keep the contents of the Journal confidential. [The Prince's barrister] Mr Tomlinson emphasised in his submissions to the judge the strong public interest in preserving the confidentiality of private journals and communications within private offices. He was right to do so. There is an important public interest in employees in the position of Ms Goodall respecting the obligations of confidence that they have assumed. Both the nature of the information and of the relationship of confidence under which it was received weigh heavily in the balance in favour of Prince Charles.

[2006] EWCA Civ 1776 ¶¶ 70-71.

Unauthorized Biographies

The Court of Appeal this month also gave judgment in *Ash v McKennitt* [2006] EWCA Civ 1714 (14 December 2006), affirming that an unauthorized biography of Canadian folk singer Loreena McKennitt written by a former friend Niema Ash was a breach of privacy.

The Court of Appeal judgment is also notable for the strong support given to the trial court ruling by Mr Justice Eady (2005) EWHC 3003 (QB) – no doubt a welcome relief after his mauling by Lord Hoffman in the *Jameel* case.



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Ash had written a book about McKennitt called with no obvious irony *Travels with Loreena McKennitt – My Life as a Friend*. The last part of the title seemed singularly inappropriate. The book contained, among other things, information about McKennitt's personal relationships, her home, her feelings after the death of her fiancé, her health and diet, her emotional vulnerability and a property dispute with Ash which had been settled on confidential terms. See also *MLRC MediaLawLetter* Feb. 2006 at 35.

Relying on the European Court of Human Rights' decision in *Von Hannover v Germany* Mr. Justice Eady undertook a balancing test looking at the public interest in the disclosures. He found the disclosures by Ms Ash particularly distasteful and a very wide range of information was viewed as private information including serious matters such as details of Ms McKennitt's health and of her emotions following a tragic bereavement, as well as seemingly quite anodyne incidents on their travels, details of a recording contract and the details of Ms McKennitt's home.

The Court of Appeal firmly upheld Eady's approach. Where there is an apparent conflict between Article 8 and Article 10 of the European Convention of Human Rights the approach of the court will be that neither article has precedence over the other, an intense focus is necessary upon the comparative importance of the specific rights claimed in the individual case where a conflict arises between the values under Articles 8 and 10, the court must take into account the justification for interfering with or restricting each right and the proportionality test must be applied to each.

What emerges from the judgment is that if an author makes claims, as had Ash, about information "having been confided to" her or her "friend revealing her innermost self to me," she is digging a pit for herself in terms of privacy. The courts will uphold the misuse of private information whether what is said is true or false. If a balancing exercise is carried out by the Judge correctly and the Court of Appeal certainly felt it had been by Mr Justice Eady, the Court of Appeal is most unlikely to interfere.

What is also clear is that the fact that a celebrity may have talked about a particular zone of their private life will not necessarily entitle others to publish more information

about it. Furthermore the public interest defence will be a high hurdle to surmount, evidence of hypocrisy alone may not be sufficient to defeat a claim for privacy. A claimant will not have to reveal whether the information is true or false. The question in a case of misuse of private information was whether the information is private, not whether it was true or false.

Privacy for Adulterers

The specter of *Von Hannover v Germany* struck again in the decision of Mr Justice Eady in *CC v AB* [2006] EWHC 3083 (QB) (04 December 2006). CC's identity is apparently widely known in the world of sport. This particular sportsman has apparently been scoring not on the field of play but with someone's else's wife (Mrs AB). AB had seemingly embarked on a campaign of harassment against CC and had plans to sell his story to a tabloid newspaper and spilling the beans.

AB was enjoined from the harassment and from being able to tell his story raising questions as to whether this could be the end of kiss and tell stories. CC seems to have persuaded the Judge that the revelation of his affair would harm his wife (Mrs CC) and young children, matters which one suspects were not at the forefront of CC's mind when he reached for his zipper.

The decision is in marked contrast of the case involving another footballer called Gary Flitcroft which was originally known as *A -v- B* [2002] EWCA Civ 337. There may well have been aspects of the wronged husband's (AB) behavior which required to be restrained but as in the *McKennitt* case, discreditable behavior on the part of the defendant does seem to have resulted in an alarming extension of the law of privacy.

Mr Justice Eady acknowledged that it was a "striking proposition that a spouse whose partner had committed adultery owed a duty of confidence to the third party adulterer to keep quiet about it – even without any voluntary assumption of such an obligation." He felt, however, there was:

"a powerful argument that the conduct of an intimate or sexual relationship is a matter in respect of which there is a reasonable or legitimate expectation of privacy. Accordingly, anyone who obtains such information would be expected to recognise that either

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from the nature of the information itself or from the circumstances in which it was imparted. If that is so for journalists or for scandalmongers in general, it is a matter for consideration whether, and to what extent a 'cuckolded' husband is under a lesser obligation."

The Judge contrasted the conflicting European Convention rights applying "both careful scrutiny and an intense focus to the evidence" and on balance he felt it was right to "restrain the sale of celebrity tittle-tattle in which there was no real public interest", although he recognized that AB should be entitled to discuss it with relatives, friends, doctors or counselors with whom he might wish to discuss his marital breakdown.

Even an adulterous relationship may attract a legitimate expectation of privacy, the Judge felt, and he was of the view that the European Convention did not require adulterers to be condemned and to have this reasonable expectation of privacy removed from them.

Other Developments in Privacy Law

An interesting example of the tactics of claimant's lawyers is to be found in the case of X and Y and the persons who provided information about the status of the claimant's marriage. *X & Y v Persons Unknown* [2006] EWHC 2783 (QB) (08 November 2006).

This was another decision of Mr Justice Eady. One of quite a large group of a celebrity's friends had given the press information about the state of the celebrity's marriage. The unidentified couple got a John Doe injunction on the basis that this was private information with a reasonable expectation of privacy.

The claimants however wanted the papers to serve the injunction upon their actual source rather than the claimants having to give notice of the injunction to all their friends who might have supplied the information to the press. which he wished not to have to do himself as this would have raised this confidential issue with a number of his friends who had no involvement whatsoever in tipping off the press. Mr Justice Eady was reluctant to make such an Order.

Newsgathering

The *News of the World* royal editor faces a jail sentence after admitting plotting to intercept voicemails of the Royal

Family, politicians and a mish-mash of footballers and celebrities. He faces a jail sentence of up to two years.

Simultaneously the Information Commissioner Richard Thomas has urged a greater use of prison for personal information dealers. Ironically some investigators called Anderson and Clifford who had been convicted of impersonating the people whose information they sought to obtain such things as unlisted telephone numbers and bank account details very recently received relatively mild community penalties including a 150 hours of community service.

At the same time, changes to the Computer Misuse Act 1990 have tightened up the law relating to hacking in a way which arguably could catch legitimate IT developers. This is under the Police and Justice Act 2006 <http://www.rpc.co.uk/Default.aspx?sID=1097&IID=0>

Contempt of Court

Abu-Hamza had been convicted in February 2006 of 11 charges of incitement to murder and race-hate offences. *R -v- Abu-Hamza* [2006] EWCA Crim 2918. He had been the subject of extensive prejudicial pre-trial publicity but the Lord Chief Justice was of the view that the Judge had correctly appreciated the prejudicial effect of such publicity but that he had taken appropriate steps to neutralize the effect of those matters and that the trial had accordingly been fair.

There are currently 34 alleged terrorist cases before the courts involving 99 UK defendants. Cases are taking up to 2 years to come to court and can last up to 12 months. The Court of Appeal in the *Barot* case [2006] EWCA 2692 held that the details of his involvement in a bomb plot should be published when he received a 40 year jail sentence, even though this might affect other trials. Increasingly the courts rely on the good sense of juries to exclude prejudicial material and on the fact that the memory of such details fades over time.

Access to Court Documents

The Department of Constitutional Affairs has settled the case brought against it by the Law Society in respect of the change effected by Rule 5.4 of the Civil Procedure Rules giving greater access to court documents. The Law Society filed a challenge in September arguing that the new rule giving wider access to pleadings could not be applied retrospectively.

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The DCA is paying the Law Society's costs and has in effect agreed that the rules which came into effect on 2 October 2006 shall not apply retrospectively.

Newspaper groups plus the BBC, Bloomberg and the Australian Broadcasting Corporation had intervened in the case agreed to meet their own legal costs. The case was notable for the puzzling feature of the Law Society intervening in such a dispute in which many lawyers may have wondered whether their money could have been better spent by their regulatory body. The DCA was also left with a certain amount of egg on its face not handling this subordinate legislation properly.

Open Justice

The retired judge Lady Butler-Sloss in charge of the inquest into the death of Princess Diana has now reversed her original decision that the preliminary hearings scheduled for 8 and 9 January 2007 should be held in private. Not only is this a victory for open justice but it may help change the minds of at least some who have bought into the lunatic conspiracy theories that surround this tragic accident.

Copyright

On 27 November [the report of the Committee](#) chaired by Andrew Gowers, a former Editor of the Financial Times into the operation of the copyright law in the face of technological advances was published.

The extent to which the UK can change its copyright law in the light of its EU obligations is limited but a number of proposals are made for the strengthening of the enforcement of IP rights by clamping down on piracy and the trade in counterfeit goods, reducing the costs of registering and litigating IP rights for businesses large and small and improving the balance and flexibility of IP rights to allow individual businesses and institutions to use content in ways consistent with the digital age.

There are 54 recommendations in the 141 pages and the recommendations have been widely welcomed by bodies such as the Publishers Association although not by musicians who were lobbying unsuccessfully for copyright protection for sound recordings to be increased from 50 to 95 years.

Other Developments in the UK

On 12 October 2006 ICSTIS the Premium Service Regulator announced that it was to carry out a review of the quiz TV sector and this has operated in connection with the House of Commons Select Committee Inquiry. This is a fast-growing sector where smooth-talking presenters chosen for their looks rather than their brains put up beguilingly simple questions which gullible members of the public are invited to dial in on premium rate lines to answer. They get to generate enormous phone bills but receive no chance to answer the questions.

Link Law

An interesting point came up in the case of *Hamer and Hughes -v- Hopkins* in the Bristol Mercantile Court on 24 November 2006. If you purchase domain names to divert enquiries to your business, can you be in breach of anti-competition covenants regulating what the new business can do?

Yes said the judge Sir Mark Havelock-Allan QC when granting an interim injunction restraining Wendy Hopkins from using the relevant domain names when she had set up a rival law practice using her own name in competition with the Wendy Hopkins Family Law Practice which she had left. The case had started somewhat inauspiciously when the learned Judge told the parties that he did not have Google on his computer, he only had Yahoo!

Denmark: National Security

On 4 December 2006 three journalists at the Danish newspaper *Berlingske Tidende* including the Chief Editor were acquitted of charges of endangering national security. They had published leaked Danish intelligence reports that there was no evidence that Iraq had weapons of mass destruction at the time of the US-led invasion.

The Intelligence Officer who had unlawfully leaked this embarrassingly truthful information had been jailed for four months. Four month prison sentences had also been sought against the journalists but the Copenhagen City Court ruled that they had acted in the public interest.

Judge Peter Lind Larsen ruled that the considerable public interest in the information outweighed the govern-

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ment's concerns that its intelligence gathering operation were jeopardized. Prior to the invasion the Danish Prime Minister had told Parliament that he was convinced that Saddam Hussein had weapons of mass destruction. The case was understandably hailed as a victory freedom of the press.

EU Internet

There is an interesting report by the European Parliament's Culture and Education Committee which was adopted on 28 November 2006. This aims to give effect to the Safer Internet Action Plan (<http://ec.europa.eu/saferinternet>). It aims to protect minors against harmful content on the internet and to create a new Kid.eu domain with content specifically aimed at children. The proposal also provides for the establishment at European level of minimum principles for exercising the right to respond for the internet and mobile telephones.

Other Developments in Europe

The International Chamber of Commerce has established a consolidated and expanded version of its advertising and marketing codes in its ICC consolidated code for advertising and marketing communication practice. This attempts to bring the previous separate ICC codes - sales promotion,

sponsorship, director marketing, use of electronic media and the environment under one roof and to update in the light of the development of new media.

The Audio-Visual Services Directive

On 13 November 2006 the European Parliament's Culture and Education Committee adopted a report on the draft directive drawn up by Ruth Hieronymi. The Council of Ministers have also adopted the proposal put forward by Finland which currently holds the EU presidency and the opinion of the European Parliament is expected in December 2006.

ECHR

The European Court of Human Rights held that the Article 10 rights of the Austrian Broadcasting Corporation had been infringed when an injunction had been granted by the Vienna Commercial Court in 1999 against it under Section 78 Copyright Act for publishing a photograph of a convicted neo-Nazi upon his release from prison. [*Osterreichischer Rundfunk -v- Austria - 7 December 2006*](#) Application No, 35841/02.

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

Ash v McKennitt [2006] EWCA Civ 1714 (14 December 2006)

One of the most interesting portions of the Court of Appeal's Judgment is its discussion of whether the author of the unauthorized biography was entitled to write about her "shared experiences" with the claimant.

28. Ms Ash argued that all of the matters set out above were not merely Ms McKennitt's experience, but her own experience as well. That gave her a property in the information that should not be subordinated, or at least should not be readily subordinated, to that of Ms McKennitt. This argument is of relevance to Ms Ash's claim under article 10, that she is entitled to tell her own story that includes her various experiences with Ms McKennitt, but as I understood it the contention is also relied on to say that the information was not confidential in the first place.

29. Some support was sought from passages in the judgment of this court in *A v B plc* [2003] QB 195. We shall have to return to that case in more detail when addressing article 10. It is sufficient here to say that it concerned a married professional footballer [A] who sought to prevent publication by a newspaper [B] of his casual sexual relations with two women [C and

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D]. C and D had sold their story to B. In the course of a wide-ranging review of how a court should handle such a claim, this court said that the right of protection of one party to a bilateral relationship might be affected by the attitude of the other party, and continued, at its § 43(iii):

Although we would not go so far as to say there can be no confidentiality where one party to a relationship does not want confidentiality, the fact that C and D chose to disclose their relationships to B does affect A's right to protection of the information. For the position to be otherwise would not acknowledge C and D's own right to freedom of expression.

By the same token, it was suggested, Ms Ash's decision that her shared relationship with Ms McKennitt should not be treated as confidential undermined Ms McKennitt's contention that it was confidential.

30. On the facts of our case, as found by the Judge, that argument was wholly misconceived. First, the relationship between Ms McKennitt and Ms Ash, testified to in many places, and not least in the Judge's citations from the book set out in §17 above, was miles away from the relationship between A and C and D. In the preceding paragraph I deliberately and not merely conventionally described the latter as a relationship of casual sex. A could not have thought, and did not say, that when he picked the women up they realised that they were entering into a relationship of confidence with him. Small wonder that Lord Woolf said, *A v B* at §45:

Relationships of the sort which A had with C and D are not the categories of relationships which the court should be astute to protect when the other parties to the relationships do not want them to remain confidential.

Lord Woolf would have been unlikely to say the same about the relationship between Ms McKennitt and Ms Ash.

31. Second, [Mr. Justice Eady] made a series of factual findings about the relationship that completely destroy this argument. While Ms Ash had been involved in some of the matters revealed, and (which is rather different) a spectator of many others, the book, which is what this case is concerned with, is not in any real sense about her at all. She gives vent to many complaints about Ms McKennitt; but the interest of those is that they are complaints about Ms McKennitt, and not at all that the complaints are made by Ms Ash. The Judge made that clear in two passages, in §§ 68 and 89 of the judgment:

68. It would appear that the fundamental purpose of the book, which Ms Ash has described on its cover as "a must for every Loreena McKennitt fan", was to provide information to her admirers which would not otherwise be available. Much of the content of the book would be of no interest to anyone, I imagine, but for the fact that Ms McKennitt is the central character.

89. As I have already suggested, whatever Ms Ash's true appreciation of the situation may be, from her perspective, it is difficult for an outsider to understand how the book would be of any interest to the general reader if it were not for the fact that Ms Ash is giving an account of her intimate dealings with a person who is known to many millions of people, throughout the world, interested in folk music and her music in particular. Returning to the Boswell/Johnson analogy, one may characterise the exercise to that extent as largely parasitic. It is the central role of Ms McKennitt, and the revelations about her, which provide the main reason for people to acquire the book. It is, I have no doubt, why her name appears in the title.

32. Those conclusions, which were neither challenged nor could have been, confirm that the matters related in the book were specifically experiences of and the property of Ms McKennitt. Ms Ash cannot undermine their confidential nature by the paradox of calling in aid the confidential relationship that gave her access to the information in the first place.

Plaintiff was represented by Carter-Ruck and barristers Desmond Browne QC and David Sherborne of 5RB. Defendant was represented by David Price and Korieh Duodu of David Price & Associates.

Court Denies FOIA Request of Photos of Guantanamo Prisoners *Request Barred by National Security*

Citing a strong national security interest, a New York federal district court granted the Department of Defense's ("DOD") summary judgment motion to withhold photographs of prisoners held in detention at Guantanamo Bay, Cuba. *Associated Press v. U.S. Department of Defense*, 2006 U.S. Dist. LEXIS 85430 (S.D.N.Y. November 27, 2006) (Rakoff, J). But the judge denied a second element of the DOD motion, agreeing with The Associated Press ("AP") that detainees' height and weight information should be released.

Background

This is the latest decision in a series of Freedom of Information Act suits filed by the AP against the DOD to obtain information about the identities and treatment of prisoners held at Guantanamo Bay. To date the DOD has produced most or all of the names, citizenship information, and dates and places of birth of the prisoners, but it refused to release photographs and information related to each detainee's weight and height, resulting in this suit.

National Security Interests

Denying the request for photographs, the district court first addressed the DOD's argument that disclosure could result in serious damage to national security. The DOD primarily relied on FOIA exemption 1, 5 U.S.C. § 552(b) (1), which exempts from disclosure records that are "to be kept secret in the interest of national defense" as long as those records are properly classified.

The court agreed that the photographs were properly classified, accepting DOD arguments that there is a strong national security interest in not disclosing prisoner photographs, since the photographs would identify prisoners, increase the risk of retaliation against them, and reduce the likelihood that prisoners would cooperate in intelligence-gathering efforts.

The court then turned to disclosure of the height and weight information contained in the prisoners' medical records. Using FOIA Exemption 6, 5 U.S.C. § 552(b)(6), which exempts disclosure of personnel and medical files that would violate a personal privacy interest, the court

balanced the privacy interest of the prisoners against the "basic policy of opening agency action to the light of public scrutiny."

The court stated that the DOD failed to prove that disclosure of any of the personal information of the prisoners would lead to retaliation and further found that disclosure of this information is clearly in the public interest, since it allows the public to assess the DOD's care and feeding of the detainees.

Additionally, the court emphasized that public disclosure of the information fulfills the purpose of FOIA, since the information contributes to public understanding of the operation or activities of the government.

The AP was represented by David A. Schulz, of Levine, Sullivan, Koch & Schulz, LLP. The DOD was represented by Sarah Sheive Normand of the U.S. Attorney's Office, Southern District of New York.

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African Journalist Wins the Right to FOIA Discovery from U.S. Army

By Lawrence R. Liebesman, Christopher Nugent and Amy S. Mushahwar

In a rare decision granting discovery in a FOIA action, a U.S. District Court in Washington D.C. stayed summary judgment proceedings to permit the plaintiff to take discovery of government officials. *Bangoura v. U.S. Dep't of the Army*, Case No. 1:05 cv 00311 DAR (D.D.C. December 8, 2006).

The FOIA action resulted from the false arrest of a freelance African journalist by the Military Police at a U.S. State Department credit union in Washington. The journalist, Alseny Ben Bangoura, believes that he was the subject of racial profiling. His companion at the time of the arrest overheard the credit union staff remark that "two Muslim-looking men are acting suspiciously." Bangoura is a citizen of the Republic of Guinea in West Africa.

Bangoura was never charged, but he was held for over four hours under interrogation by military police. Bangoura's employer, the Office of Broadcast Reports, a component of the U.S. State Department, subsequently apologized for his arrest.

Bangoura filed a FOIA action seeking any and all documents related to his arrest, following the government's failure to respond to a letter request for six months. The government finally began its search after the litigation was filed, but what came next raised more questions than answers -- as described in his pleadings, the government response was like a "trail of breadcrumbs, leading nowhere." Several times in nearly two years of litigation, the government provided a small amount of records with a response representing that "no further documents exist."

Following one of these responses, Bangoura's counsel sent a letter seeking records of his allegedly fraudulent checks, which were the subject of his arrest, and other documentation. The government sent some documents and again represented that their production was complete. Bangoura's counsel corresponded with the government again asking why some basic military forms typically associated with arrests like these had not been provided. As a result, the government located and provided those forms.

Adding further complications, when Bangoura received documents from the government they were heavily redacted, with no corresponding *Vaughan* index, the privi-

lege log that the law requires the government to furnish with redacted records. Thus, Bangoura was left to contest privilege with no means to do so.

After certifying that it had finally and fully responded to the FOIA request, the government moved for summary judgment seeking dismissal of the litigation. Faced with responding to summary judgment, Bangoura moved to stay the proceedings and conduct discovery. Discovery is almost never allowed in FOIA litigation, and the party seeking discovery has to meet a high burden.

In his motion, Bangoura acknowledged that FOIA discovery was "rare," but that it is appropriate where the government: 1) exhibits bad faith or 2) fails to meet its burden of a good faith search reasonably calculated to reveal documents relevant to the FOIA request.

Magistrate Judge Deborah A. Robinson found that the facts in this case merit discovery as the government has not shown that it searched "in all locations likely to contain documents responsive to the FOIA request." Robinson did not rule upon whether the government's actions amounted to bad faith.

In particular, Judge Robinson found the following facts persuasive:

- Government FOIA professionals stated their knowledge of standard search procedures without stating what those procedures would be in a similar case.
- Duplicative searches were conducted with dissimilar results and no explanation was provided.
- The government found documents after telling the plaintiff that "no further documents exist," again, without any explanation.

The ruling permits limited discovery of 10 interrogatories and one deposition. After discovery, Bangoura will defend against summary judgment.

Because discovery in these cases is so rare, this ruling helpful precedent for future FOIA battles.

Lawrence R. Liebesman, Christopher Nugent and Amy S. Mushahwar of Holland & Knight's Washington, D.C. offices represent the plaintiff, Alseny Ben Bangoura. Kevin K. Robitaille of the U.S. Attorneys Office in Washington, D.C. represents the defendant, the United States Army.

Montana Supreme Court Upholds Order Releasing Teacher Records

By Leita Walker

The Montana Supreme Court on December 12 upheld a district court order requiring a school district to release to the local newspaper the employment records of two high school teachers. *Billings High School District No. 2 v. Billings Gazette*, No. 05-406 (Mont. Dec. 12, 2006).

The supreme court did not address the substance of the district court's holding – namely that the teachers had no reasonable expectation of privacy in their conduct as public employees and that even if they did, the policies behind public disclosure should prevail. Instead, the supreme court held that because the documents had already been released, the issue was moot and the “capable of repetition yet evading review” exception to the mootness doctrine did not apply.

Background

The *Billings Gazette* requested copies of the employment records at issue in September 2004 after the school district suspended the teachers without public explanation. Allegedly, the district suspended the teachers after learning that a student had walked into an unlocked room at the high school and caught the teachers with their pants down – quite literally: one was on top of the other, and the bare buttocks of one were showing.

The school district notified the teachers and their union, the Billings Education Association, of the request. The BEA then stated in a letter to the district that the teachers believed they had privacy interests in their own records and that they would not authorize the release of any information, except their dates of hire, salary history, and teaching and coaching assignments. In October 2004, the district filed a declaratory action that named the *Gazette*, the BEA, and the two teachers as respondents, and that asked the district court to review the documents in camera to determine whether their release to the *Gazette* was required by Article II, Section 9 of the Montana Constitution, commonly referred to as the “right to know” provision.

The district court ultimately held that the teachers occupied positions of public trust and that their conduct during the time period at issue reflected directly upon their ability

to perform their duties. Therefore, the court concluded, the teachers did not have a reasonable expectation of privacy in their employment records. The court went on to hold that even if they did have a reasonable expectation of privacy, that expectation was outweighed by the merits of public disclosure, and that the school district must release twelve entire documents and one document with a specified redaction. Because some documents had not yet been submitted to the court, the court declined to rule with regard to those documents and reserved ruling on the *Gazette*'s request for attorney fees.

The BEA and the teachers moved for and obtained a stay, and appealed the district court's order (meanwhile submitting additional documents for in camera review). However, the supreme court dismissed the original appeal as interlocutory and premature, and when the *Gazette* moved to dissolve the stay, the teachers conceded there was no legal basis for its continuance. The court then entered an order requiring release of documents to the *Gazette* by the following day, and the school district complied with the order. (The district court subsequently denied the *Gazette*'s request for attorney fees, a decision upheld on appeal.)

Supreme Court Decision

On appeal, the teachers contended that the district court erred in concluding that they had no reasonable expectation of privacy and that it therefore erred in ordering the release of documents. The *Gazette* argued that the release of the documents rendered the issue moot, and, in an opinion authored by Chief Justice Karla M. Gray, the court agreed.

The court first determined that the issue was, in fact, moot. It acknowledged that it could reverse the district court's decision and even order destruction of the documents released to the *Gazette*. However, the court held that it could not “negate the *Gazette*'s knowledge of the contents or retrieve any public dissemination made of the information in the documents. Consequently, we cannot restore the parties to their original positions.”

The court then addressed the applicability of the exception to the mootness doctrine for those questions that are capable

[T]he teachers occupied positions of public trust and that their conduct during the time period at issue reflected directly upon their ability to perform their duties.

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Montana Supreme Court Upholds Order Releasing Teacher Records

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of repetition but evade effective review. The court set forth the familiar test that the party seeking to invoke the exception must show both (1) that the challenged action is so fleeting that it cannot be fully litigated before becoming moot and (2) that there is a reasonable expectation that the same complaining party would be subject to the same action again.

In the supreme court's view, the teachers failed both prongs of this test. The court rejected as speculative their assertion that future cases involving disclosure of documents relating to teacher disciplinary actions would be of short duration. It then held that the mere assertion that "other school districts, other labor organizations and other individuals teachers may become involved in 'right to know' litigation over access to documents [did] not establish that 'the same complaining party'—namely, these Teachers—an reasonably expect to be subject to a similar action in the future."

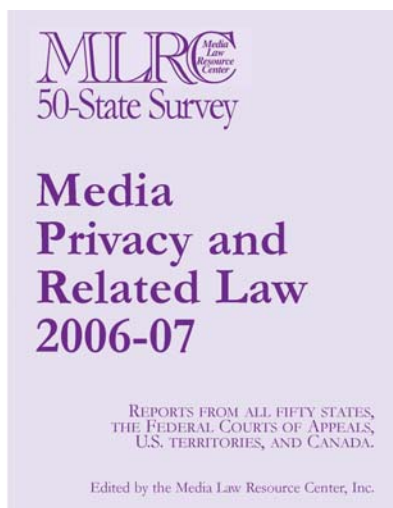
Finally, the court held that the teachers' own failure to seek a stay precluded them from relying on the exception. The supreme court stated that the teachers could have requested that the district court designate its order for release of the documents as a final order for purposes of appeal, notwithstanding the unresolved fees issue. The teachers could then have requested a stay of that judgment. However, because the teachers failed to take such steps to preserve the status quo, the issue was moot and no exception applied.

Leita Walker is an associated at Faegre & Benson LLP in Minneapolis, Minnesota. Richard A. Larson of Harlen, Chronister, Parish & Larson represented the teachers and their union; Martha Sheehy of Sheehy Law Firm represented The Billings Gazette; Laurence R. Martin and Mary E. Duncan of Felt, Martin, Frazier, Jacobs & Rapkoch represented the school district.



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CYBER LAW ROUNDUP

The Perils of Blogging

Harassment Law, Prior Restraints Applied to Fringe Bloggers

Katherine M. Voegelé

Although courts have recognized that First Amendment protection extends to speech on the Internet, there have been recent cases applying harassment and intimidation laws to bloggers – with harsh results.

A new federal bill signed into law this year even makes it a crime to anonymously transmit communications by the Internet with the “intent to annoy, abuse, threaten, or harass any person.” With little consideration for the First Amendment in some recent cases, courts have ordered the removal of these Internet-based publications and, in some cases, even jailed the proprietors of the websites.

This article is an end of the year overview of some of the most notable cases; for a more comprehensive review of lawsuits against bloggers, readers should see the MLRC’s website, www.medialaw.org.

Ohio v. Baumgartner

One such convoluted case found its way to trial recently in state court in Cuyahoga County, Ohio. Elsebeth Baumgartner’s saga began in 1999, when the attorney, pharmacist, and mother of two began speaking out against what she perceived to be a corrupt public school board by leveling accusations at public meetings and by filing lawsuits accusing board members of corruption, racketeering, and drug trafficking.

Numerous members of the school board sued for defamation, and those trials were presided over by retired Judge Richard Markus. Judge Markus had been appointed to her cases after the first four judges had recused themselves, allegedly because Baumgartner had sent them e-mails that criticized their decisions and accused them of corruption.

Baumgartner began sending e-mails to Judge Markus (as well as his business associates, such as executives at companies where Markus served on the board of trustees) alleging that Markus was incompetent and corrupt; she also filed law suits in various jurisdictions accusing Markus of corruption.

By the middle of 2004, Baumgartner met Bryan DuBois, a 29-year-old webmaster, and the two of them began “reporting” on her cases and investigations on a blog, ErieVoices.com. In

June 2005, Markus testified before a secret grand jury and complained about these e-mails, lawsuits, and blog posts. The grand jury indicted Baumgartner on fourteen counts, charging her with intimidation, retaliation, and possession of criminal tools: her computer.

She was taken into custody and jailed almost immediately; bond was set at \$360,000. She was indicted twice more for similar charges, all stemming from her e-mails or blog postings while out on bail. Her residence was searched in February 2006; the search warrant stated that she was in unlawful possession of “documents relating to ErieVoices.com stories and comments,” as well as writings or other forms of written communication.” The search warrant and resulting inventory sheet shows that one box of “Erie Voices Paperwork” was seized, as were four computers. The search warrant is available online at: <http://www.ottawacountysheriff.org/documents/Baumgartner%20Search%20Warrant,%20February%201,%202006.pdf>

Baumgartner has been in and out of jail and psychiatric facilities since her first indictment. After a number of continuances her trial began in November 2006, and she pled guilty to eleven counts of intimidation and four counts of retaliation shortly thereafter.

On December 18, Baumgartner was sentenced to 8 years in jail and a \$500 fine.

An unofficial transcript of the first grand jury hearing was recently made available at <http://www.northcountrygazette.org/articles/110806GrandJury.html> (published November 8, 2006). Disturbingly, at the hearing the assistant prosecuting attorney told the grand jury that jailing people for their criticisms of local officials is a fairly common practice in Ohio, stating that together Judge Markus and he have dealt with “roughly 40 of these people” and noted that “once they go to prison ... they’re not writing anymore.”

Mitchell v. Trummel

In another case, Paul Trummel published a newsletter and website that criticized the administrators of a low-income senior citizens’ residence in Seattle. As a result of these publications, Judge James Doerty issued an anti-harassment order in

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The Perils of Blogging

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April 2001 ordering Trummel to removal all personal identifying information regarding Council House staff and residents from his web site.

Although Trummel initially complied, he began posting such information again, and in October 2001 Judge Doerty held that the posting of names and addresses, “coupled with repeated inflammatory rhetoric connecting them with concepts like Islamic terrorism and racism [is] a violation of the antiharassment order ... in that it causes the victims to reasonably feel under surveillance by Mr. Trummel.”

When Trummel refused to remove the information, Judge Doerty ordered him jailed for contempt. After serving 111 days in jail (including 25 in solitary confinement), Judge Doerty conditionally released Trummel so as to give him an opportunity to purge his contempt by removing the private information, which he eventually did. Trummel challenged his convictions for contempt.

The intermediate appeals court upheld the trial judge’s orders, noting that the court “appropriately concluded that the public posting of personal information violated the no-surveillance provision of the order,” and applauded Judge Doerty for focusing on Trummel’s conduct rather than his speech.

Sitting en banc, the Washington Supreme Court reversed, holding that the contempt conviction was an abuse of discretion by “adding content restrictions” to the original antiharassment order. *See Trummel v. Mitchell*, 156 Wash. 2d 653, 131 P.3d 305 (2006) (en banc), *rev’g* 121 Wash. App. 1078 (Wash. Ct. App. 2004) (unpublished).

Haberman v. Rhoad

In a third variation on this theme, a Family Court judge in Florida ordered Kristen Rhoad to remove all web postings about her ex-husband, Phil Haberman, who accused Rhoad of cyberstalking. While filling out a typical form for a restraining order, the judge handwrote an injunction ordering Rhoad to “remove, or cause to remove, all blogs, e-mails or other web-based communications to [Haberman] or third parties that refer to [Haberman], and which are posted, or caused to be posted, by [Rhoad].”

The September 2006 order was issued despite the fact, apparently, that there are no official cyberstalking charges

pending against Rhoad under Fla. Stat. § 784.048. Rhoad’s blog postings revolved around her belief that Haberman is a sociopath and con-artist who misrepresented himself as a member of the Special Forces and recipient of the Purple Heart award in order to marry her and thus receive more military benefits.

Numerous others have accused Haberman of impersonating higher-ranking officers and lying about receiving a Purple Heart, and articles leveling such accusations have run in the Dallas Observer and on other websites. The family court judge apparently made no attempt to determine the truth or falsity of Rhoad’s accusations before enjoining her. Rhoad has refused to take down her blog and is attempting to appeal the order.

Hargrave Military Academy v. Guyles

In a similar case, harassment was not a claim, but a judge still enjoined website owners before determining whether the claims therein were defamatory. In *Hargrave Military Academy v. Guyles*, a West Virginia school sued for libel and tortious interference with contract after two parents launched an incendiary web site, HargraveHasProblems.com, to register their discontent after their son was expelled from the school.

In May 2006, the school requested a preliminary injunction to shut down the site; the federal judge granted it over objections from the ACLU and the parents that the order constituted a prior restraint. As alleged in the complaint, the parents had threatened to build in metatags to enable the parents’ website and the school’s website to be “conjoined twins.” The school was also threatened that Mr. Guyles could pay to have an advertisement for his website pop up whenever someone searched for the actual Hargrave website. The dispute was resolved confidentially in August 2006 and the case was dismissed under Rule 41.

New Federal Law

In addition to these disturbing cases, a new federal law criminalizes anonymous bloggers and Internet commenters who “intend to annoy.” In January 2006, President Bush signed H.R. 3402, the “Violence Against Women and Department of Justice Reauthorization Act of 2005.” In Section 113, “Preventing Cyberstalking,” the bill amends the Communications Decency Act of 1934 (47 U.S.C. § 223(h)(1)).

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The Perils of Blogging

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The CDA now provides that “whoever ... utilizes any device or software that can be used to originate telecommunications or other types of communications that are transmitted, in whole or in part, by the Internet ... without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person ... who receives the communications ... shall be fined under title 18 or imprisoned not more than two years, or both.”

Previously the law specifically exempted “interactive computer services;” a federal court also recently held that the older version of the law did not create a private right of action and, even if it did, would not create liability for a non-anonymous blogger allowing others to anonymously post comments intending to annoy. *See Dimeo v. Max*, 433 F. Supp. 2d 523 (E.D. Pa. 2006).

In February, proprietors of a website that allows people send anonymous e-mail for a fee, TheAnonymousEmail.com, challenged the new law on First Amendment grounds. *See* “Lawsuit challenges new ‘e-annoyance’ law,” http://news.com.com/2100-1028_3-6037439.html (published Feb. 9, 2006).

Conclusion

Because the majority of these cases are not published and involve fringe defendants, it is questionable how much legal precedent the actions of these judges will have. The fact remains, however, that the legal landscape is perilous for the nonprofessional blogger or amateur journalist. Exercising what they believe to be their right to unrestricted critical speech can result in serious consequences.

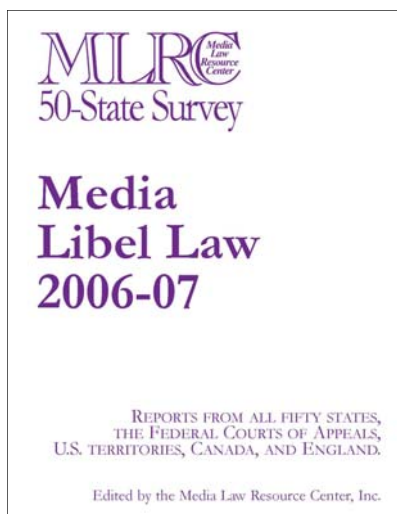
Ten years ago, courts seemed awestruck by the free speech potential of the Internet; one court called it “the most participatory form of mass speech yet developed” and concluded “the Internet deserves the highest protection from governmental intrusion.” *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996) (Dalzell, J., concurring).

It is clear that, as the bloom has come off the rose, some courts seem to be losing their sense of reverence and viewing the Internet more as a means of harassment.

Katherine M. Vogele is an associate at Cahill Gordon & Reindell LLP in New York.



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CYBER LAW ROUNDUP

2006 Decisions on Discovering the Identity of Anonymous Speakers in Internet Defamation Claims

During 2006, courts have continued to consider what standard to apply when libel plaintiffs seek to discover the identity of anonymous internet speakers. It was just over a year ago that the Delaware Supreme Court in *Doe v. Cahill*, 884 A.2d 451, 460-61 (Del. 2005), ruled that a plaintiff in such a case “must support his defamation claim with facts sufficient to defeat a summary judgment motion.”

In reaching this decision, the Delaware Supreme Court reviewed several approaches, including the ones used by the Virginia Circuit Court in *In re subpoena duces tecum to America Online, Inc.*, and the New Jersey Appellate Division in *Dendrite Int'l, Inc. v. Doe, No. 3*.

The Virginia court had adopted a “good faith” standard, requiring the plaintiff to show that it had “a legitimate, good faith basis” for its claim and that the defendants’ identities were “centrally needed to advance that claim.” *In re subpoena duces tecum to Am. Online, Inc.*, No 40570, 2000 WL 1210372, at *8 (Va. Cir. Ct. 2000).

By contrast, the New Jersey standard was more protective of the anonymous defendant, requiring that the plaintiff (1) notify the anonymous defendant of the complaint, (2) identify and reproduce verbatim the allegedly defamatory statements, (3) set forth a case that can withstand a motion to dismiss and offers “sufficient evidence supporting each element of its cause of action, on a prima facie basis.” *Dendrite Int'l, Inc. v. Doe, No. 3*, 342 N.J. Super. 134, 141 (N.J. Super. Ct. App. Div. 2001). The court would then balance the plaintiff’s prima facie case with the defendants’ First Amendment protections.

The Delaware Supreme Court essentially adopted a simplified *Dendrite* standard. The libel plaintiff must make efforts to notify the anonymous defendant. In the Internet context, the plaintiff must “post a message notifying the anonymous defendant of the plaintiff’s discovery request on the same message board where the allegedly defamatory statement was originally posted.” And the plaintiff must satisfy the summary judgment standard. The court reasoned that the other *Dendrite* prongs were fully subsumed in these two requirements.

As a practical matter, to obtain discovery of an anonymous libel defendant’s identity under the *Cahill v. Doe* standard the plaintiff must introduce evidence creating a genuine issue of

material fact for all elements of a defamation claim *within the plaintiff’s control* – including defamatory meaning, falsity and actual malice. As to actual malice, the court recognized without discovery of the defendant’s identity, satisfying the actual malice element might be difficult. It therefore explained that “we do NOT hold that the public figure defamation plaintiff is required to produce evidence on this element of the claim.” Instead, the plaintiff can submit a verified complaint or affidavit to substantiate the actual malice element.

2006 Developments

During 2006, both federal and state courts continued to examine this issue. Here, in chronological order, is a summary of the year’s decisions:

Pennsylvania

Shortly after Delaware delivered the *Cahill* decision, Pennsylvania’s Court of Common Pleas adopted a comparatively weak standard in *Klehr, Harrison, Harvey, Branzburg & Ellers, LLP v. JPA Dev., Inc.*, No. 0425, 2006 WL 37020, at *8-9 (Pa. Ct. Pleas Jan. 4. 2006).

In *Klehr*, the court relied upon existing state rules of evidence to decide that anonymous internet posters earned no special protection in libel discovery. *Klehr* involved a defamation claim brought by a law firm, which was the subject of extensive commentary by anonymous sources on two websites. The postings, which included accusations of law breaking and ethical violations by members of the plaintiff firm, were determined to be defamatory *per se*.

When defendants sought a protective order on First Amendment grounds, the court chose to rely heavily upon a theory set forth by Professor Michael S. Vogel, who was plaintiffs’ counsel in *Dendrite*. *Klehr*, 2006 WL 37020, at *8 (citing Vogel, *supra* note 4, 83 Or. L. Rev. at 801).

Professor Vogel argued, and the *Klehr* court agreed, that “though well intentioned, the rush to apply new standards should be slowed ... the new standards offer little real protection for anonymous speech beyond what the courts can provide under existing rules.”

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2006 Decisions on Discovering the Identity of Anonymous Speakers in Internet Defamation Claims

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The court applied the ordinary discovery rules under Pennsylvania Rule of Evidence 4011, which looks for bad faith of the plaintiff and balances it against the burden caused to defendant. Klehr was not acting in bad faith, and any possible burden posed to defendants' First Amendment rights was outweighed by the fact that the statements at issue were defamatory *per se*.

Incidentally, the Pennsylvania Supreme Court had addressed the discovery of an anonymous internet poster in 2003 in *Melvin v. Doe*, 836 A.2d 42, 43-44 (2003), when it vacated a lower court denial of a request for a protective order. That request had been made by a number of John Does who had posted a statement about a Pennsylvania state judge on a site sponsored by AOL. The Pennsylvania Supreme Court's decision stemmed from principles of the collateral review doctrine, but it ordered the lower court to address the defendants' First Amendment rights on remand.

The Pennsylvania Supreme Court's discussion of First Amendment principles in *Melvin* led some to believe that the court would adopt a strict standard, like the ones articulated in *Dendrite* and *Cahill*, when the discovery issue ultimately came before it. See *Klehr*, 2006 WL 37020 at *8 ("Defendants. . . suggest[] that [*Melvin*] 'foreshadows an adoption of the *Dendrite* standard.'"); See also Michael S. Vogel, *Unmasking "John Doe" Defendants: The Case Against Excessive Hand-Wringing Over Legal Standards*, 83 Or. L. Rev. 795, 812 (2004) ("[T]he *Melvin* majority gave a further hint of its views when it stated that resolution of the discovery issue did not require 'consideration of the merits of the underlying defamation action.' Rather, the court held that the relevant question was 'strictly a legal one' of 'what threshold requirements must be imposed as a prerequisite to discovery in an anonymous defamation case' an 'inquiry ... plainly separable from the defamation action.'")

Whether or not Pennsylvania will adopt the more protective standard suggested in *Melvin* remains to be seen.

Arizona

In July, the Federal District Court in Arizona cited *Cahill*, and applied a summary judgment standard of review to this issue. *Best Western Int'l v. Doe*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695 (D.C. Ariz. July 25, 2006)

Plaintiff Best Western had sought to compel discovery of the identities of John Doe defendants who had posted comments on a website that Best Western had set up for its members and board of governors. The district court noted that were it to apply a "good faith" standard, such as the one articulated by the Virginia Circuit Court and described above, Best Western would easily win the discovery motion since its claim was made in good faith and met the standards of modern notice pleading.

Adopting the reasoning of *Doe v. Cahill*, the Arizona court agreed that anonymous speech is protected by the First Amendment and therefore a libel plaintiff must do more than state a claim to be entitled to discovery. Here plaintiff's bare bones complaint, the court said, "provides an example of why the standard is appropriate" since nothing in the complaint provided a factual basis to limit defendants' First Amendment rights.

The court allowed Best Western the option of renewing its motion to meet the announced summary judgment standard. It required that the plaintiffs provide notice to the anonymous defendants and asked the parties to address "the John Doe Defendants' expectation of privacy" in the further briefing.

District of Columbia

A District of Columbia trial court considered the issue in *Solers, Inc. v. Doe*, No. 05-3779 (D.C. Super. Ct. Aug 16, 2006) (Blackburne-Rigsby, J.).

Plaintiff Solers, Inc. sought the identity of a John Doe who posted an allegedly defamatory statement on a website maintained by the anti-piracy division of a watch-dog, trade association. The D.C. Superior Court refused to compel discovery, noting that "under any of the tests articulated, a motion to dismiss or any heightened motion to dismiss standard, Solers has not made a claim of relief for its defamation allegation." Solers had not showed actual harm stemming from the allegedly defamatory posting, nor could it show that there was a risk of harm. Furthermore, Solers "failed to demonstrate that it exhausted alternative methods of obtaining Doe's identity." Thus, the court granted the trade association's motion to quash.

Massachusetts

Finally, the Federal District Court in Massachusetts considered the issue in *McMann v. Doe*, No. 06-11825-JLT, 2006 WL 3102986 (D. Mass. Oct. 31, 2006)

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2006 Decisions on Discovering the Identity of Anonymous Speakers in Internet Defamation Claims

(Continued from page 39)

Plaintiff McMann, a real estate developer, brought libel, privacy and related claims against a John Doe defendant for creating a website using his name. The website, www.paulmcmann.com contained a photograph of plaintiff, with the statement that he “turned lives upside down,” and a suggestion to “be afraid, be very afraid.” The website announced it will soon be updated with specific evidence of plaintiff’s misdeeds.

Plaintiff sought permission to subpoena the website’s hosting company to learn the identity of its creator. The court first concluded that the complaint failed to plead sufficient facts to warrant diversity jurisdiction. But it then went on to examine in detail the issue of protecting anonymous speech in the context of Internet libel suits. The district court agreed that anonymous speech is entitled to First Amendment protection but it questioned whether the standard employed in *Cahill* and *Best Western* struck the right balance.

Under *Cahill*, a public figure could unmask an anonymous critic without a showing of actual malice. *Cahill* only required plaintiff to produce evidence in its control to “substantiate the actual malice element.” On the other hand, “requiring a preliminary showing of fault would mean no subpoenas would ever issue, and character assassins would be free to trumpet hurtful lies from all corners of the internet.”

Regardless, the court held that “it is reasonable to apply some sort of a screen to the plaintiff’s claim before authorizing the subpoena.” Here the court concluded that plaintiff met neither the summary judgment nor the motion to dismiss standards. The statements alleged to be defamatory were opinion, and “plaintiff’s affidavit merely contains an assertion that the statement is not true.” As the court noted: “bare assertions in an affidavit are not adequate to defeat summary judgment.”

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Fewer Libel Lawsuits, More Awareness of Libel

A recent study of newspaper editors reached the conclusion that while newspapers are being sued less often than in the past, the level of threatened suits has not changed, and editors are more conscious of the threat of libel suits.

These issues are discussed in a paper published this summer by two journalism professors – Roy L. Moore of Georgia College and State University and Elizabeth K. Hansen of Eastern Kentucky University. The paper – “Is the Chill Gone? A Follow-up Study of Newspaper Editors regarding Libel,” is available online at: <http://list.msu.edu/cgi-bin/wa?A2=ind0610d&L=aejmc&T=0&P=6857>.

The paper compares the results of survey of newspaper editors done in 2004 to one done in 1992. The 2004 study questioned 180 newspaper editors, chosen randomly from the *Editor & Publisher Yearbook*, by telephone, and compared the results to a similar study of 304 editors in 1992.

The surveys of editors also asked questions about legal fees, libel insurance and prepublication review and the paper looks for correlations between editors’ responses on these questions and their identification of a “chilling effect” in the newsroom.

Slightly more than a quarter of editors in the 2004 study – 26.1 percent – reported that their newspapers had been sued for libel within the past five years. In 1992 almost a third – 32.6 percent – reported that their papers had actually been sued. But the number who said that their papers were threatened with libel suits within the past five years was virtually constant: 78 percent in 1992; 78.3 percent in 2004.

The paper concludes that 2004 respondents “seemed to be more risk-averse than their counterparts 12 years earlier.” In

2004, slightly more than half of the editors – 51.7 percent – said that their newspapers had published a story knowing that it risked a libel lawsuit. In 1992, 70 percent of the editors said their papers had done so.

Editors were also asked how conscious they were of libel in their daily work. Roughly equal shares agreed with the statement, “I think about libel every day:” 49 percent in 2004, up slightly from 46 percent in 1992. The share of editors disagreeing with this statement fell from 54 percent in 1992 to 44 percent in 2004.

In both studies about 80 percent of the editors surveyed thought that the possibility of being sued for libel made them a better editor, although the share strongly agreeing with this rose from 9.5 percent in 1992 to 41.1 percent in 2004.

Chilling Effect

The professors concluded that their findings seem to indicate a connection between the monetary cost of libel and a chilling effect.

“Because the actual number of libel suits is down, those costs and the related chill appear to be coming from costs associated with avoiding libel suits through prepublication review and perhaps dealing with those who threaten libel suits so that a lawsuit is never filed. The pressure to make a profit many newspaper editors and publishers face these days may also be contributing to an overall chill.”

The accompanying table summarizes the results of the surveys.

	1992 *	2004 *
sued for libel within past 5 years	32.6 %	26.1 %
libel suit threatened within past 5 years	78.0 %	78.3 %
Paper has libel insurance		
Yes	66 %	44 %
No	17 %	6 %
Do not know	17 %	50 %
Paper has policy for handling accuracy complaints		
Yes	90.1 %	87 %

Policy is in writing	1992	2004
Yes	42.4 %	48.3 %
Attorneys review articles more often than 5 years ago		
Yes	38 %	25 %
Investigative stories likely to reviewed by attorneys		
Yes	76 %	85.8 %
Amount spent on legal fees annually		
Don't know	--	50 %
\$0	--	6 %
\$1 - \$ 1,000	--	16 %
\$1,001 - \$10,000	--	18 %
\$10,001 - \$50,000	--	8 %
\$50,001 - \$100,000	--	1 %
More than \$100,000	--	1 %
Newspaper has published story knowing it risked libel suit		
Yes	70 %	51.7 %
Libel suit was actually filed		
Yes	18 %	18 %
Knowledge of libel law		
Very knowledgeable	32.2 %	26.7 %
Somewhat knowledgeable	64.5 %	71.7 %
Not very knowledgeable	3 %	1.7 %
Confident of ability to recognize libelous material		
Very confident	66.8 %	62.8 %
Somewhat confident	32.6 %	36.7 %
Not very confident	< 1 %	0 %
Keep informed on libel law using...		
Internet	--	65.9 %

“I think about libel every day”	1992	2004
Agree	46 %	49 %
Strongly Agree	(5 %)	(22 %)
Disagree	54 %	44 %
Strongly Disagree	(5 %)	(17 %)
Avoiding libel suits is...		
very much a concern	69 %	56 %
somewhat of a concern	26 %	36 %
“The possibility of being sued for libel makes me a better editor.”		
Agree	79.2 %	80.0 %
Strongly agree	(9.5 %)	(41.1 %)
“The possibility of being sued for libel has a ‘chilling effect’ on a newspaper the size of mine.”		
Agree	54.3 %	42.8 %
Strongly agree	(9.9 %)	(13.9 %)
Agree	(44.4 %)	(28.9 %)
Newspaper ownership		
Individual or family	33.6 %	23.9 %
Local corporation	7.6 %	8.9 %
Regional chain	10.5 %	17.2 %
National chain	43.8 %	45.6 %
Other	4.5 %	4.4 %
“Meeting the profit expectations of your newspaper’s owners or stockholders” is...		
Very much a concern	--	30.6 %
Somewhat a concern	--	36.7 %
Not very much a concern	--	19.4 %
Not at all a concern	--	10.6 %
Gender		
Female	13 %	25 %

* Percentage figures in this table that do not have tenths of a percent are rounded to the nearest whole percent, as they are in the academic paper on which this article is based.

ETHICS CORNER

Is it Ethical for Opposing Counsel to Communicate Directly with Inside Counsel Regarding a Matter When the Company Is Already Represented in the Matter by Outside Counsel?

By Timothy J. Conner

You are outside counsel defending a longtime client, XYZ Media, Inc., in a defamation action that has been actively litigated for a couple of years. The case did not settle at a recent mediation, and trial is just around the corner.

Your phone rings, and it's the general counsel, who says she has just received a letter from plaintiff's counsel regarding possible settlement. She sends it over. The letter outlines the settlement demand, and then goes on to make threats about what may happen if the case is allowed to proceed to trial and plaintiff prevails.

Along the way, it makes disparaging statements about how you have been handling the case, clearly attempting to drive a wedge between you and your client. The general counsel is furious that this communication is directed to her and that you knew nothing about it, and she wants to know what you plan to do about it. You immediately react that the communication is obviously unethical.

Everyone knows that opposing counsel cannot communicate directly with a party that is represented by counsel; they are duty bound to communicate only with counsel representing the party. You tell the general counsel you will immediately bring it to the Court's attention and seek appropriate sanctions for this egregious ethical breach.

You may want to think again.

Model Rule 4.2

On August 5, 2006, The American Bar Association published its Formal Ethics Opinion 06-443, addressing this very situation. The Opinion dealt with whether Model Rule of Professional Conduct 4.2 prohibits contact by an opposing lawyer with inside counsel of an organization regarding a matter when the organization is represented in that matter by outside counsel. The ABA concluded that such contact did not violate Rule 4.2.

"We conclude that an inside lawyer, unless that lawyer is in fact a party in the matter and represented by the same

counsel as the organization, is not a part of the 'represented person' within the meaning of Rule 4.2. Accordingly, contact with inside counsel by the lawyer for another party regarding the matter is not prohibited. Inside counsel are free to avoid such contact by referring the opposing lawyer to other inside counsel or to outside counsel."

Model Rule 4.2 provides:

"In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

According to the ABA, Rule 4.2 "presumes generally that the client is not legally sophisticated and should not be put by an opposing lawyer in the position of making uninformed decisions or statements or inadvertent disclosures harmful to the organization." Comment 7 to Rule 4.2 indicates that, as to an organization, this purpose is carried out by prohibiting communications with a constituent of the organization who "supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."

This comment, and Rule 4.2, have previously been the subject of much discussion regarding the ethical ability of opposing counsel to contact current or former employees of an organization with respect to a matter.

With respect to inside counsel for an organization, however, Ethics Opinion 06-443 states that the protections provided by Rule 4.2 are not necessary when the constituent of an organization is a lawyer employee who is acting as a lawyer for that organization, even where outside counsel has been retained and is handling the case.

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The basis for this reasoning is that, in the view of the ABA, where communications are lawyer-to-lawyer, it is unlikely that inside counsel would inadvertently make harmful disclosures. Indeed, the stated purpose behind the anti-contact rule is to prevent a skilled advocate from taking advantage of a non-lawyer who may not understand the legal system and its workings.

The ABA's Opinion recognizes that there will be times when in-house counsel is in fact part of the constituent group of the organization. For example, if the inside lawyer participated in providing business advice, or in making decisions which are in dispute in the case, the inside counsel may be considered off limits.

The ABA's opinion follows on the heels of a similar decision taken by the District of Columbia Bar in its Ethics Opinion 331, "Contact With In-House Counsel of a Represented Entity." The District of Columbia had adopted ABA Model Rule 4.2, but also added more detailed language. Subparagraph (c) of the D. C. Bar Rule defines an organization "party" as including "any person, including an employee of a party organization, who has the authority to bind a party organization as to the representation to which the communication relates."

Although inside counsel ordinarily have the ability to bind the company, the D. C. Bar found the point unpersuasive as a reason to prohibit contact with inside counsel. Essentially, according to the D. C. Bar, inside counsel is in fact representing the company, and there should therefore be no prohibition on direct contact by opposing counsel. D. C. Bar Ethics Opinion 331 states:

"It is not possible to discern any sensible policy that would support a reading of subparagraph (c) as forbidding communication with house counsel while allowing it for outside counsel. The fact that in-house counsel may have the power to bind the party does not distinguish in-house counsel from outside counsel: as the Restatement [(Third) of the Law Governing Lawyers] shows, any lawyer representing a party, whether in-house or not, will have at least some power to speak for, or bind, that party within the scope of a representation."

"In sum, we conclude that a lawyer who is also an employee of a client organization represents that client; the in-house counsel is not also the 'party' within the mean-

ing of D. C. Rule 4.2(c). The fact that in-house counsel represent their client in a matter does not mean that Rule 4.2 prohibits opposing counsel from communicating with them, even when the client has also retained outside counsel on the same matter."

The North Carolina State Bar, and the Philadelphia Bar Association Professional Guidance Committee, however, have issued opinions that are contrary to those of the ABA and District of Columbia Bar on this issue. In Revised RPC 128, published in 1993, the North Carolina State Bar issued an opinion that an attorney acted improperly in directly contacting inside counsel for an insurance company in an effort to settle a case subsequent to a trial where the inside attorney appeared at the trial on behalf of the company as a person having "managerial responsibility on behalf of the defendant."

The inside attorney did not appear as counsel of record in the litigation, and was not licensed in the State of North Carolina. Opposing counsel had called trial counsel for the insurance company, only to be told that he was on vacation. Opposing counsel then called the general counsel's office for the defendant insurance company, and spoke directly with the attorney who had attended the trial. An agreement to settle the lawsuit was reached between opposing counsel and inside counsel. The North Carolina Bar's opinion stated that this was an improper contact.

In the opinion issued by the Philadelphia Bar Association Professional Guidance Committee, Opinion #2000-11, published in January 2001, the Committee was faced with a question under Pennsylvania Rule of Professional Conduct 4.2. Opposing counsel wished to contact the general counsel for what was described as a "quasi-governmental agency" under circumstances where the general counsel had represented the quasi-governmental agency during administrative proceedings, but once the matter proceeded to litigation the agency had retained outside counsel. The Opinion says that generally the rule prohibits communications with inside counsel. In reaching that conclusion, the Committee's Opinion stated:

"At a minimum, it appears that the General Counsel is a 'person having managerial responsibility on behalf of the organization.' Managerial responsibility includes responsibility for guiding litigation on behalf of an organization, and settlement discussions are a key component of litigation. Presumably, litigation is one of the

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General Counsel's primary areas of responsibility. Indeed, the inquirer appears to be interested in contacting the General Counsel precisely because of her perceived role within the Agency with respect to litigation."

The Committee stated that there are limited instances where direct contact with inside counsel may be appropriate. The Committee's Opinion cautioned, however, that simply because opposing counsel believes the inside counsel would be interested in settlement, and has reason to believe that the outside counsel has failed to pass along a settlement communication, is an insufficient basis on which to directly contact the inside counsel. The Committee further cautioned that sending a letter to both the inside counsel and outside counsel simultaneously would not constitute the necessary consent for direct communication. *See also*, Rhode Island Eth. Adv. Panel, Op. 94-81 (Feb. 9, 1995) (Rule 4.2 prohibits a lawyer from direct contact with inside counsel for opposing party absent consent, even where lawyer suspects outside counsel has not fully communicated a settlement offer).

Published case law seems to support the positions taken by the ABA and the D. C. Bar. One of the more significant reported decisions is *In re Finkelstein*, 901 F.2d 1560 (11th Cir. 1990). There had been a trial in the federal district court for the Middle District of Georgia on liability arising out of allegations of racial discrimination at a plant owned by Procter & Gamble in Georgia. The liability phase had concluded, and the judge had encouraged the parties to discuss settlement.

Apparently the litigation had been acrimonious, and rather than communicate with outside counsel, plaintiff's counsel wrote directly to the general counsel, who had not been in attendance at trial. A copy of the letter is appended to the decision of the district court found at 706 F. Supp. 1573 (M.D. Ga. 1989). The letter outlined a settlement demand, dealt with a lengthy description of the evidence at trial, and then contained a list of reasons that Procter & Gamble should consider settlement.

Procter & Gamble's general counsel responded by sending a copy of the letter to the district court judge. An order to show cause was entered directing plaintiff's counsel to show cause why he should not be disbarred from practicing in the federal

court. At the show cause hearing, the district court held that plaintiff's counsel's contact warranted a six-month suspension.

Plaintiff's counsel appealed, and the Eleventh Circuit reversed the suspension, holding that plaintiff's counsel could not have been on notice that his conduct would be condemned by the district court. In reaching this conclusion, the Eleventh Circuit stated:

"In examining the district court's order of suspension, the relevant inquiry is whether the attorney can be deemed to have been on notice that the courts would condemn the conduct for which he was sanctioned. . . .

This would necessarily include behavior which responsible attorneys would recognize as improper for a member of the profession It cannot be said that the

behavior for which Finkelstein was sanctioned falls into this category."

The Eleventh Circuit shared the district court's disapproval of the letter, and stated that it "exhibited an unprofessional rudeness" as well as "displayed a gross misunderstanding of true professionalism." The Court held, however, that responsible attorneys might find

that there was nothing improper about such conduct, and therefore, plaintiff's counsel could not have been on notice that his conduct would lead to a suspension from the practice of law.

The United States District Court for the District of Connecticut recently addressed a similar situation in *In re Grievance Proceeding No. 3:01 GP6(SRU)*, 2002 WL 31106389 (D. Conn.). In that case, plaintiff's counsel sent a letter directly to inside counsel for the defendant corporation which stated:

"Once again, it has been several weeks since I have been able to get in touch with your client's attorney. Please advise if the firm still represents your client. If so, I would appreciate some response either on settlement or discovery. Thank you."

Prior to that letter, outside counsel had written to plaintiff's counsel stating that all communications concerning the case be directed to outside counsel, and not directly to the corporation or any of its employees. Outside counsel filed a grievance with the Court over the direct communication. The Grievance

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***Direct communication
between inside counsel and
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be gained from it.***

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Committee found no ethical violation, and recommended that the complaint be dismissed.

Judge Underhill reviewed the grievance and concluded that the direct communication by plaintiff's counsel with inside counsel did not violate Rule 4.2 of the Rules of Professional Conduct of the Connecticut Bar Association. In finding that there had not been a violation of the anti-contact rule, the Court stated in its opinion:

“A general counsel, however, does not fall within the plain meaning of ‘party’ for purposes of Rule 4.2. The extent to which a general counsel has managerial responsibility or power to commit the corporation is ordinarily attributable to his or her authority as counsel for the corporation. . . . Hiring an outside counsel changes neither the source nor the nature of the general counsel's authority and, therefore, generally will not transform the general counsel from attorney to party for purposes of Rule 4.2 analysis.”

Of course, in-house counsel can always cut the communication off and advise opposing counsel to communicate with the outside counsel retained for a particular matter. ABA Ethics Opinion 06-443 notes that under circumstances where opposing counsel has been advised that they should only contact outside counsel, and should not contact inside counsel, doing so may constitute a violation of Model Rule 4.4. That Rule provides that “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”

In my discussions with various in-house attorneys, I am told that direct communication between inside counsel and opposing counsel is a very slippery slope. There is ordinarily no true benefit to be gained from it. As one former inside counsel told me, “opposing counsel is not calling to help you as in-house counsel.”

The efforts to communicate with inside counsel directly, as evidenced by the case law, and as reported to me by in-house counsel I have spoken with, are almost always aimed at attempting to drive a wedge between inside counsel and outside counsel. Of course, there may be situations where outside counsel has failed to communicate information nec-

essary for the handling of the case to inside counsel, but it seems that those instances would be rare.

Indeed, how would opposing counsel know whether information had been communicated by the corporation's outside counsel to its inside counsel at all? The circumstances in which it is in the best interests of a corporation to allow opposing counsel to communicate directly with inside counsel where it is already represented by outside counsel seem extremely limited at best.

Nonetheless, for purposes of ethics, the trend seems to be that opposing counsel may contact inside counsel directly without fear of ethical repercussions. ABA Formal Ethics Opinion 06-443, however, is not controlling. Instead, the laws, court rules, and other professional regulations promulgated by a given jurisdiction are controlling. Thus, as always, know the rules and their interpretations in your jurisdiction before acting.

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