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MEDIA LAW LETTER

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Thank you, Ralph Huber!!

Ralph Huber is stepping down at the end of the year as Chair of the MLRC Board of Directors. His leadership of this organization has been stellar! Of course, anyone who knows and has worked with Ralph – and I know that is true for many of you – know that Ralph has the ideal combination of traits for leadership. Most notably, he has the ideal leadership skills for an organization made up of highly individual and opinionated institutions and people.

Ralph is not merely an intelligent, experienced and knowledgeable media lawyer – although he clearly is all of that. Ralph is a genuinely good man, who always brings warmth and decency to the table and inspires it in others. While driven to achieve excellence in his and our endeavors, his style is low key. While creative and energetic in pursuit of his vision for MLRC, he is also a great listener. As a result, during his tenure MLRC has promoted new projects and programs under his Chairmanship that are decidedly oriented towards our future needs and interests.

The good news for MLRC is that Ralph will continue on the Board of Directors as a director, while turning the Chair post over to Ken Richieri. I have no doubt that I, other directors, and many of you will continue to seek out Ralph's views and counsel on a wide variety of issues and projects.

Thank you, Ralph!!!

Sandy Baron,
MLRC Executive Director



Thank you to outgoing DCS President Dean Ringel

On behalf of all of us, I want to extend my gratitude to Dean Ringel for serving in 2008 as President of the Defense Counsel Section. His leadership has been exceptional. Dean has been simply terrific in the management of the Executive Committee meetings and the oversight of MLRC Committees and Task Forces, all of which is critically important to our service to the membership. But Dean is also a font of challenging ideas and concepts. He is brilliant at generating ideas that themselves generate ideas. And he is willing and able to jump in and take them straight on to actual, substantive programs. In doing this, Dean represents MLRC at its best – taking an issue that has relevance to our membership and generating substantively valuable programming out of it.

As many of you know, I have known Dean for decades now – back to our shared time at Cahill Gordon & Reindel. He has always been one of those intellects who kept the rest of us on our toes. He has not changed at all over the years, thank goodness. Even better, he will remain on our DCS Executive Committee as emeritus and, I hope, active in MLRC forever. This organization thrives because of members like Dean. I cannot thank him enough for his valuable service.

Sandy Baron,
MLRC Executive Director

Supreme Court Denies Cert. in *Hatfill v. New York Times*

The Supreme Court this month denied Stephen Hatfill's petition for certiorari, bringing an end to his libel suit against The New York Times over a series of op-ed columns discussing suspicions that Hatfill was responsible for the Anthrax murders in 2001. *Hatfill v. The New York Times Co.*, 532 F.3d 312 (4th Cir.), cert. denied, 2008 WL 4579754 (U.S. Dec 15, 2008) (No. 08-483).

Earlier this year, the Fourth Circuit held that Hatfill, a bio-weapons scientist, was a limited purpose public figure for purposes of his libel suit. Hatfill had argued that he had not participated in any controversy surrounding suspicions that he was the anthrax murderer. But the court took a broader view, finding that Hatfill "voluntarily thrust himself into the controversy surrounding the threat of bioterrorism and the nation's lack of preparedness for a bioterrorism attack." Among other things, the court noted that Hatfill had given lectures, briefings, and public speeches on the subject and therefore had sufficient access to channels of communication to be deemed a public figure on the subject.

As to actual malice, the Fourth Circuit reasoned that Hatfill had to show by clear and convincing evidence that the Times' columnist, Nicholas Kristof, either knew that Hatfill did not commit the anthrax murders, or had a "high degree of awareness" that he did not commit the anthrax murders. Looking at the record, the court found substantial evidence that Kristof *actually believed* that Hatfill was the prime suspect. Among other things, Kristof knew from several sources that Hatfill fit the FBI profile; had been interviewed by the FBI; failed a lie detector test and had access to labs where anthrax was stored. "With these undisputed facts, no reasonable jury could find that Kristof had a "high degree of awareness" that Dr. Hatfill was *not* the anthrax mailer."

Questions Presented in Hatfill's Petition: 1) Did the Court of Appeals err by declining to identify the "particular controversy giving rise to the defamation" of petitioner, as required by *Gertz v. Robert Welch, Inc.*, and instead finding that petitioner is a "limited purpose public figure" because he has some expertise relating to broader issues discussed in the defamatory articles? 2) Did the Court of Appeals err by holding that petitioner must show that the defamatory

articles were completely fabricated to demonstrate actual malice even though the evidence revealed that some of the articles' allegations were fabricated and other statements made in the articles were embellished to support allegation that petitioner was the anthrax murderer?

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Pennsylvania Federal Court Denies Motion to Compel Newspaper to Unmask Anonymous Online Speakers

By Katharine Larsen

On December 11, 2008, Judge A. Richard Caputo of the United States District Court for the Middle District of Pennsylvania denied a motion to compel a Pennsylvania newspaper to disclose the identities of eight individuals who used pseudonyms to post comments on the newspaper's website. *Enterline v. Pocono Medical Center*, 08-cv-1934-ARC, 2008 WL 5192386 (M.D. Pa. Dec. 11, 2008). The Court expressly held that the newspaper had standing to assert the First Amendment right to anonymity held by the speakers and further concluded that enforcement of the subpoena would violate that right.

This decision represents a significant development in this fast-evolving area of law because it appears to be the first to squarely hold that a newspaper can assert the First Amendment rights of its online commentators. While a similar conclusion has been reached with regard to Internet service providers and their subscribers, *see In re Subpoena Duces Tecum to Am. Online, Inc.*, 52 Va. Cir. 26, 2000 WL 1210372, at *5 (Va. Cir. Ct. 2000); *see also America Online, Inc. v. Nam Tai Elecs., Inc.*, 571 S.E.2d 128 (Va. 2002), the Court's ruling now extends this rationale to include media entities.

Background

Plaintiff Brenda Enterline filed suit against the Pocono Medical Center, alleging that she was subjected to a hostile work environment through an ongoing pattern of sexual harassment by a physician and that the Center retaliated against her after she complained about the harassment. The local newspaper, *The Pocono Record*, published an article about the lawsuit, and in response, several people, using pseudonyms, posted comments in which they opined on the parties and the facts underlying the case.

The Subpoena, Objections, and Motion to Compel

Just after filing suit, and before any discovery plan had been agreed to, Plaintiff subpoenaed *The Pocono Record* for identifying information about eight of the speakers. Objec-

tions were served, and plaintiff moved to compel. In response, *The Pocono Record* argued that (1) the subpoena was premature and otherwise unduly burdensome; (2) enforcement of the subpoena would violate the First Amendment rights of the pseudonymous posters; (3) contrary to plaintiff's assertions, the newspaper had standing to assert this right; and (4) the federal qualified reporter's privilege protects the newspaper from compelled disclosure of the information sought.

The District Court's Opinion

In its decision, the court immediately turned to the question of standing and unequivocally held that "*The Pocono Record* has third-party standing to assert the First Amendment rights of individuals posting to the Newspaper's online forums." 08-cv-1934-ARC, at 7. The court found that the three-pronged test for third-party standing established in *Craig v. Boren*, 429 U.S. 190, 193-194 (1976) and applied in *Secretary of Maryland v. Joseph H. Munson Co.*, 497 U.S. 947, 956 (1984), had been satisfied.

First, the court found that the speakers face practical obstacles to asserting their own rights. To do so, the court reasoned, the speakers would need to come before the court, which would risk loss of anonymity, "the very harm that [*The Pocono Record*] seeks to prevent." 08-cv-1934-ARC, at 5. Second, the court determined that *The Pocono Record* established sufficient injury-in-fact based on the threat to the existence of the online forum posed by unmasking participants. *Id.* at 6-7. Last, the court found that "*The Pocono Record* will zealously argue and frame the issues before the Court." *Id.* at 7.

Next, the court turned to the issue whether the disclosure of the information sought by the subpoena was proper under the First Amendment. After noting that "[t]here is no direct authority concerning this question in the Third Circuit, or any other circuit for that matter," the court elected to apply one of the more lenient of the possible tests crafted by the courts to resolve issues related to anonymous online speech, a test that had been advocated by plaintiff. The court explained that, in doing so, it would "resolve the present issue

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Pennsylvania Federal Court Denies Motion to Compel Newspaper to Unmask Anonymous Online Speakers

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on narrow grounds” and avoid the need to “determine the full extent of the First Amendment right to anonymity.” *Id.* at 8.

The court applied the standard articulated in *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001), which borrows from protections created in the context of the federal qualified reporter’s privilege. Specifically, this standard requires a court to

consider four factors in determining whether the subpoena should issue. These are whether: (1) the subpoena seeking the information was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source.

140 F. Supp. 2d at 1095. Additionally, the *2TheMart* court held that “non-party disclosure is only appropriate in the exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker.” *Id.* at 1097.

Although the court found the first three factors of the test had been satisfied, it determined that plaintiff had not “demonstrated that the information required to prove her

claims . . . [is] unavailable from other sources.” *Id.* at 11. Specifically, the court reasoned that, because “many of these individuals identify themselves as employees [of the department in the Center where Plaintiff worked], as formerly filing complaints against [the physician], or otherwise being closely associated with the Plaintiff or Defendant . . . much of the information [Plaintiff] hopes to uncover [through the subpoena] is information that will be obtained through normal, anticipated forms of discovery, including depositions.” *Id.*

Acknowledging that the information sought “would certainly be helpful” to plaintiff, the court nevertheless did “not believe that this is an exceptional case where the compelling need for the discovery sought outweighs the First Amendment rights of the anonymous speaker.” *Id.*

On December 12, 2008, the day after the decision was issued, plaintiff filed a notice of appeal, in which she characterizes the ruling as a collateral order.

Ottaway Newspapers, Inc., publisher of The Pocono Record, is represented by Gail Gove of Dow Jones & Company in New York and Gayle C. Sproul and Katharine Larsen of Levine Sullivan Koch & Schulz, L.L.P. in Philadelphia. Plaintiff Brenda Enterline is represented by Rufus A. Jennings of Timothy M. Kolman and Associates in Langhorne, Pennsylvania. Defendant Pocono Medical Center is represented by Gerald J. Hanchulak of O’Malley, Harris, Durkin & Perry, P.C. in Scranton, Pennsylvania.



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Maryland's High Court Considers Protection For Anonymous Online Speech

Newspaper Urges Court to Adopt Dendrite Standards

Courts around the country have continued to grapple with how to protect anonymous online speech in the context of defamation claims. On December 8, the Court of Special Appeals of Maryland, the state's highest court, heard oral argument in a case that will decide what if any showing a libel plaintiff must make to obtain the identity of an online poster in a defamation suit. *Independent Newspapers, Inc. v. Zebulon J. Brodie*, No. 0054 (Md. 2008).

At issue in the case are allegedly defamatory postings to a community bulletin board operated by Independent Newspapers, Inc. ("INI"), the publisher of community newspapers in Maryland and other states. In a web forum about local news in Centreville, Maryland, a person writing under the screen name "CorsicaRiver" criticized plaintiff, a local businessman and property owner, for selling his house to developers and operating a dirty Dunkin Donuts franchise.

In the posts at issue, "CorsicaRiver" wrote "Shame on you, Mr. Brodie!" in a discussion thread about the sale of his house to developers who then allegedly burned the house down. As to plaintiff's fast food business, "CorsicaRiver" wrote: "I wouldn't go to that Dunkin' Donuts of Brodie's anyway . . . have you taken a close look at it lately? One of the most dirty and unsanitary-looking food-service places I have seen . . . I bought coffee [a] couple of times but quickly lost my appetite."

The plaintiff sued INI and three posters for libel. On November 21, 2006, the trial court dismissed the claims against Independent Newspapers under Section 230 of the Communications Decency Act. However, the trial court went on to uphold a subpoena to INI, stating that:

none of this means that the original, culpable parties who posted the defamatory statements escape accountability if their statements were indeed defamatory. Therefore, it is incumbent upon INI to provide identifying information for the three registered users also named in the present suit.

INI moved for reconsideration of its request for a protective order, citing *Doe v. Cahill*, 884 A.2d 451 (Del. 2005) and *Dendrite Int'l v. Doe*, 775 A.2d 756 (N.J. App. 2001), to argue that the plaintiff must make a legal and evidentiary

showing of a valid cause of action before impinging on the anonymous posters' right to speak anonymously.

On March 12, 2007, the court agreed that the First Amendment protects lawful anonymous speech, but ruled that plaintiff had stated "a valid claim" for defamation over the comments about his fast food franchise because they refer negatively to his business. Thus, "Plaintiff may enforce a subpoena regarding the identity of individuals" who made those statements. The trial court later granted the plaintiff's request for discovery of the identities of other anonymous posters who participated in the message threads about plaintiff's house and business.

On appeal, INI argued that:

there is a developing consensus that a court faced with a demand for discovery to identify an anonymous Internet speaker so that she may be served with process should: (1) provide notice to the potential defendant and an opportunity to defend her anonymity; (2) require the plaintiff to specify the statements that allegedly violate her rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; (4) require the plaintiff to produce evidence supporting each element of her claims; and (5) balance the equities, weighing the potential harm to the plaintiff from being unable to proceed against the harm to the defendant from losing her right to remain anonymous, in light of the strength of the plaintiff's evidence of wrongdoing. The court can thus ensure that a plaintiff does not obtain an important form of relief – identifying her anonymous critics – and that the defendant is not denied important First Amendment rights unless the plaintiff has a realistic chance of success on the merits.

INI is represented in this case by Paul Alan Levy of Public Citizen Litigation Group in Washington, D.C.; and Bruce Sanford, Mark Bailen and Laurie Babinski of Baker Hostetler in Washington, D.C.

Update: Case Law Since 2006 on Protection for Anonymous Speech

California

Feb. 6, 2008: *Krinsky v. Doe* 6, 159 Cal.App.4th 1154 (2008)

A California appellate court held that Internet users have a First Amendment right to engage in anonymous speech, but this right must be balanced against a plaintiff's legitimate interest in pursuing a valid legal claim based on constitutionally unprotected speech, such as defamation.

The test the court adopted requires that a plaintiff make a "prima facie showing" that he or she has a valid legal claim against the anonymous speaker before allowing disclosure of the speaker's identity.

In this case, the court found that the plaintiff could not make a prima facie showing and that an anonymous Internet poster on a Yahoo message board does not have to reveal his identity after being sued for "scathing verbal attacks." The court found that Doe 6's messages, "viewed in context, cannot be interpreted as asserting or implying objective facts," and were instead nonactionable expressions of scorn, contempt and satire that are protected by the First Amendment.

Connecticut

June 13, 2008: *Doe I v. Individuals*, 561 F.Supp.2d 249 (D. Conn. 2008)

Two women law students at Yale University brought libel, invasion of privacy, and emotional distress claims against anonymous posters to the website autoadmit.com. The postings made under 39 different screen names made sexually insulting and derogatory comments about the students and allegedly interfered with their job search efforts. An anonymous poster moved to quash a subpoena issued to an Internet service provider for informa-

tion relating to his identity and moved for permission to proceed anonymously in litigation.

The test the court adopted was whether "the plaintiff [can show] sufficient evidence supporting a prima facie case for libel, and thus [satisfy] the balancing test of the plaintiff's interest in pursuing discovery" against the defendant's First Amendment right to speak anonymously.

In this case, the court found that the plaintiff was able to satisfy the burden and denied defendant's motions to quash and to proceed anonymously.

Illinois

Sept. 29, 2008: *In re Grand Jury Subpoena Directed to the Alton Telegraph*, No. 08-MR-548 (Ill. Cir. Ct. 2008)

The Alton Telegraph is fighting a request by a grand jury and the Madison County state's attorney to turn over identifying information about posters to its website. The newspaper argues that it is protected under the state Reporters' Privilege Statute because the posters' identity is unpublished information obtained in the course of newsgathering.

The case is pending.

Kansas

Dec. 10, 2007: *In re Lawrence Journal-World*

A Douglas County District Judge issued a search warrant against the Lawrence Journal-World, a newspaper in Lawrence, Kan., demanding access to the newspaper's computer servers to discover information about the identity of an individual who had posted anonymous comments on the newspaper's website, LJWorld.com.

Court does not indicate what test was used to come to this result.

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Maryland's High Court Considers Protection For Anonymous Online Speech

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Maryland

March 12, 2007: *Broadie v. Independent Newspapers, Inc.*, No. 0054 (Md. Dist.)

A Maryland trial court denied a newspaper publisher's motion for protective order to block discovery of the identities of three anonymous posters to a community bulletin board operated by the newspaper. The court agreed that the First Amendment protects lawful anonymous speech, but ruled that plaintiff had stated "a valid claim" for defamation.

The case is now on appeal to the Court of Special Appeals of Maryland, the state's highest court.

Montana

Sept. 3, 2008: *Doty v. Molinar*, No. DV 07-022 (Mont. Dist. Ct.)

A Montana District Court judge found that the state shield law that protects reporters from disclosing anonymous sources – the Media Confidentiality Act – also protects the identity of anonymous posters on the Billings Gazette newspaper's website. The act protects from forced disclosure "any information obtained or prepared" by a news agency.

Dec. 21, 2007: *Township of Manalapan v. Stuart Moskovitz*, Docket No. MON-L2893-07 (N.J. Super. 2007)

Monmouth County officials subpoenaed Google to discover the identity of an anonymous blogger critical of local government. A New Jersey Superior Court judge quashed the subpoena and called the request "an unjust infringement on the blogger's First Amendment rights."

Court does not indicate what test was used to come to this result.

New York

July 8, 2008: *Ottinger v. The Journal News*, No. 08-03892 (N.Y. Sup. 2008)

A Westchester County Court judge held that, after former Congressman Richard Ottinger and his wife notified an online poster of the right to intervene anonymously and stated a prima facie case of defamation over the posting, the couple had satisfied the standard necessary to obtain the identity of the poster from The Journal News.

The court based its decision on the *Dendrite* criteria for disclosing the identity of an anonymous poster.

Oct. 23, 2007: *Matter of Greenbaum v Google, Inc.*, 2007 NY Slip Op 27448 (N.Y. Sup. 2007)

A New York trial court ruled that the First Amendment protected the right of an blogger to remain anonymous. The court used a balancing test that weighs a bloggers's First Amendment rights to post anonymously with the plaintiff's right to pursue a valid cause of action for defamation.

Oregon

Sept. 30, 2008: *Beard v. Doe*, No. CV08030693 (Or. Cir. Ct. 2008)

A local businessman filed a defamation suit in response to an anonymous comment made on a newspaper's website regarding a municipal election campaign. The Portland Mercury and Willamette Week, another newspaper, objected to the request.

The Clackamas County Circuit Court ruled that the identity of an anonymous commenter on the Portland Mercury's website is protected under the Oregon Shield Law, which protects "the source of any published or unpublished information ob-

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Maryland's High Court Considers Protection For Anonymous Online Speech

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tained by the person in the course of gathering, receiving, or processing information for any medium of communication to the public.”

Texas

Dec. 12, 2007: *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007).

A Texas hospital, sued several John Doe defendants for libel and related claims over a series of anonymous web postings. The trial court ordered an Internet service provider to disclose the identity of one of the defendants. The appellate court held this was an abuse of discretion. The court reviewed the constitutional protection for lawful

anonymous speech, and the various approaches to anonymous online libel claims, and concluded that a summary judgment standard should be applied before the identity of an anonymous poster is disclosed. Explaining how this should be applied, the court stated that “the trial court should view the matter as if Doe 1 had filed a traditional motion for summary judgment establishing its defense by alleging that his identity was protected from disclosure by virtue of the First Amendment right of free speech. To obtain the requested discovery, the Hospital would then be required to produce evidence which would be sufficient to preclude the granting of a summary judgment.”

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Newspaper and Author Win Libel Case Brought in California Small Claims Court

Newspaper Published Commentary About Community Association

A small claims court judge ruled in favor of a local newspaper and guest commentator, in a case stemming from disputes within a community association. *Donnell v. Lake County Record-Bee*, (Cal. Super., Small Cl. Ct., Lake County bench verdict Dec. 3, 2008). California is one of several states that allows libel claims to be brought in small claims court.

Background

Throughout 2008, the *Lake County (Cal.) Record-Bee* published several articles, letters and commentaries on controversy surrounding the board of directors of the Clear Lake Riviera Community Association, which manages a 2,800-home community in Kelseyville, in northern California. Many of the letters and comments were written by Clear Lake Riviera resident Darrell Watkins, including a commentary published on June 20, 2008 that accused the association board of breaking its bylaws, adopting new bylaws improperly, and fining homeowners without a proper hearing process.

Board member Sid Donnell sent a letter to the newspaper rebutting Watkins' charges. *Record-Bee* editor Gary Dickson apparently initially told Donnell that he would publish the letter. Although there was conflicting testimony on what happened with the letter, the end result was that the rebuttal letter was never published. "Good legal advice might have been to print it," Superior Court Judge Vincent T. Lechowick observed during trial.

Donnell and two other board members then sued the newspaper and Watkins for libel in small claims court, seeking \$7,500 each in damages.

According to articles in the *Lake County News*, a two-hour trial was held on November 6. The trial began with the judge questioning Watkins about another letter he had written, which had appeared in the *Lake County News* the Saturday before the trial. The letter referenced the libel suit, and analogized the pending hearing to a Western shoot out:

It won't be high noon, nor will it be the OK Corral. Guns will disseminate fiery flames in the Lake County Courthouse. Crackling sounds of gunfire will be heard and clouds of gun smoke will fill the room on Nov. 6 at 9 a.m.

Judge Lechowick asked Watkins whether the letter was a "threat to the court or a physical threat [to the defendants]," noting

that he had requested an extra bailiff to be on duty for the case. Watkins, who like the other parties represented himself, objected to the judge's question, saying that it was prejudicial.

The Judge then questioned *Record-Bee* editor Gary Dickson about the newspaper's failure to publish Donnell's rebuttal letter. The editor said he was planning to publish the letter until the lawsuit was filed, when a corporate attorney advised him not to. The Judge questioned why the editor published Watkins' commentary without consulting his attorneys, but did not publish the rebuttal.

Judge Lechowick then turned to the plaintiffs, asking what damages they had suffered. Defendant Alan Seigel, who is a teacher and was named a California Teacher of the Year in 2005, said that the steady stream of offers for him to serve on education boards and panels stopped after the letters were published. Plaintiff Donnell said that the statements had stopped him from volunteering in the community, and plaintiff Sandra Orchid said that people had approached her asking why she was breaking the law.

Plaintiff Donnell also complained about the *Record-Bee's* overall coverage of the disputes within the Clear Lake Riviera Community Association. "They showed absolutely no interest in determining the truth of Mr. Watkins' allegations," he said, adding that the newspaper's failure to investigate the claims showed "reckless disregard for the truth."

In response to further questioning by Judge Lechowick, editor Dickson said that by publishing the letters the newspaper was fulfilling its role as a public forum, and said that it may stop publishing letters if it lost the case. The specific letter at issue, he argued, was protected opinion, and was substantially true. "We were only conducting business as usual," he said.

On his own behalf, defendant Watkins called as witnesses two Clear Lake Riviera residents who had been fined by the community association for brush on their properties, arguing that the fines were excessive and thus violated the state requirement that such fines be reasonable.

The trial ended with Judge Vincent Lechowick taking the case under advisement. A month later, on December 3, he ruled for the defendants. Judge Lechowick did not issue an opinion or any reasoning for his decision; he simply checked boxes on a form indicating that the newspaper and Watkins were not liable for any damages.

Since attorneys are not permitted in California small claims court, the parties represented themselves *pro se*.

Massachusetts Judge Reprimanded For Demanding Payment in Libel Case

Judge Received Public Reprimand; Previously Decided to Step Down from Bench

Judge Ernest Murphy, who successfully sued the *Boston Herald* for libel in 2005, was publicly reprimanded this month by the Supreme Judicial Court of Massachusetts for writing threatening letters to the newspaper's publisher after the verdict demanding payment of libel damages. *In the Matter of Ernest B. Murphy, SJC-10179* (Mass. Dec. 18, 2008).

The Judicial Commission had charged Judge Murphy with engaging in willful misconduct bringing the judiciary into disrepute, as well as conduct prejudicial to the administration of justice and conduct unbecoming a judicial officer. Judge Murphy could have faced removal from office. However, earlier this year in a separate proceeding the court accepted Judge Murphy's application that he was permanently disabled – in part because of the stress of the libel case – and he agreed to permanently step down as a judge. In light of this, the court found that a public reprimand and costs (to be recommended by a hearing officer) was an appropriate sanction.

Background

In 2002, Judge Murphy filed a libel suit against the *Boston Herald* over articles published that same year criticizing him for his lenient sentencing of criminal defendants and reporting that he had made an extremely insensitive comment to a young rape victim – telling her to “get over it.” The case was tried in February 2005 and the jury returned an award of \$2.1 million to the judge. The Massachusetts Supreme Judicial Court later affirmed the verdict, finding that the jury could have found that the reporter knowingly altered statements to “heighten the dramatic impact of his story.” *Murphy v. Boston Herald*, 865 N.E.2d 746 (2007). See also “Supreme Judicial Court Affirms Verdict Against Boston Herald,” *MLRC MediaLawLetter* May 2007 at 3.

At issue now before the court were letters Judge Murphy wrote to publisher Pat Purcell within days of the trial verdict. On Feb. 20, two days after the trial verdict, Murphy wrote a letter on court stationary to the Herald's publisher, asking for a meeting at which:

You will bring to that meeting a cashier's check, payable to me, in the sum of \$3,260,000. [\$1.25 million, or 62.2 percent, above the final trial verdict.] No check, no meeting... You will give me that check and I shall put it in my pocket...

I will say to you, if, at the end of this meeting, you can stand before the God of your understanding, and as a man of honor, ask for the return of that check, I'll flip it back to you.

Judge Murphy also wrote that this was a private settlement discussion and that:

It would be a mistake, Pat, to show this letter to anyone other than the gentlemen whose authorized signature will be affixed to the check in question. In fact, a BIG mistake. Please do not make that mistake.

The Boston Herald did not respond and on March 18 Murphy sent a second letter stating in part:

you have ZERO chance of reversing my jury verdict on appeal. Anyone who is counseling you to the contrary ... is WRONG. Not 5 % ... ZERO. ... You and/or your insurer want to pay me \$331,056 / yr for the next two or three years while you spend another 500 large tilting at windmills in the appellate courts ... be my guest.

The Boston Herald disclosed the letters on a motion for post-trial relief and later raised the letters on appeal. The Supreme Judicial Court, however, dismissed concerns that the letters interfered with the trial, finding that “Any appearance of impropriety connected to the two letters could not possibly have tainted the trial, because the letters were sent after the trial ended. Whether there has been a violation of applicable ethical rules is a matter for determination by

(Continued on page 14)

Massachusetts Judge Reprimanded For Demanding Payment in Libel Case

(Continued from page 13)

the Commission on Judicial Conduct.” 865 N.E.2d at 766. The Boston Herald paid the libel judgment following the Supreme Judicial Court’s denial of a motion for rehearing.

Ethics Charges

The Commission on Judicial Conduct filed a complaint against Judge Murphy on January 10, 2006. The Boston Herald filed a separate complaint on February 17, 2006. On June 26, 2007, the Commission charged Judge Murphy with violating the Code of Judicial Conduct.

This month the Supreme Judicial Court agreed that Judge Murphy violated Canon 1(A), Canon 2, and Canon 2(A) and (B) of the Code of Judicial Conduct.

Canon 1(A) provides: “An independent and honorable judiciary is indispensable to justice in our society. A judge shall participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards, so that the integrity and independence of the judiciary will be preserved.”

Canon 2 provides: “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”

Canon 2(A) provides: “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

Canon 2(B) provides: “A judge shall not allow family, social, political, or other relationships to influence the judge’s judicial conduct or judgment.

A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness in an adjudicatory proceeding.”

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

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

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

You and/or your insurer want to pay me \$301,056/yr for the next two or three years while you spend another 500 large tilting at windmills in the appellate courts at my guest.

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

Ernie

Explaining its decision the court wrote: “In sending the letters, Judge Murphy failed to uphold high standards of conduct so that the integrity of the judiciary may be preserved; failed to avoid impropriety and the appearance of impropriety; failed to act in a manner that promoted public confidence in the integrity and impartiality of the judiciary; and lent the prestige of judicial office for the advancement of the private interests of the judge, in violation of the canons just referenced. It is beyond serious dispute that the letters sent by Judge Murphy do not promote public confidence in the judiciary.”

Michael E. Mone, Sr., represented Judge Ernest B. Murphy. Howard V. Neff, III, represented the Commission on Judicial Conduct.

California Supreme Court: “Public Interest” Exemption to Anti-SLAPP Is Narrow

Exemption Does Not Apply if Any Part Complaint Seeks Relief to Directly Benefit Plaintiff

By Thomas R. Burke and Rochelle L. Wilcox

The California Supreme Court issued its opinion in *Club Members for an Honest Election v. Sierra Club*, No. S143087, 2008 WL 5205640 on Dec. 15, 2008, narrowly construing the “public interest” exemption to the anti-SLAPP statute, California's powerful law that provides substantive and procedural protections for individuals sued for engaging in free speech and petitioning activities protected by the First Amendment.

In a unanimous opinion authored by Justice Carol A. Corrigan, the Court ruled that the “public interest” exemption to the anti-SLAPP statute – Code of Civil Procedure Section 425.17(b) – is only available to a plaintiff invoking that exemption (and thereby seeking to avoid satisfying the rigors of the anti-SLAPP statute) if the plaintiff’s “entire action is brought in the public interest.”

The Court’s narrow interpretation of the exemption makes public interest claims much more difficult to use in cases that include private relief. The decision strengthens the anti-SLAPP statute, further enhancing its protection of First Amendment rights.

Plaintiffs' Lawsuit

The Supreme Court's opinion arose in the context of events involving the Sierra Club's 2004 national board of directors' election. Plaintiff Robert van de Hoek, a candidate running in the Club's election, and a group of Club members supporting his candidacy sued the Sierra Club, objecting to its distribution of certain election materials. The operative complaint analyzed by the Court was filed after the Club's election was complete and plaintiff van de Hoek had lost the election.

Among other relief, the plaintiffs' complaint sought the removal of five elected or appointed board members, an order barring certain candidates in the Sierra Club's election from ever running for the board in their lifetimes, and the installation of van de Hoek and four other unsuccessful candidates to the Sierra Club's board. The plaintiffs also

asked the court to require the Sierra Club to publish future election materials written exclusively by the plaintiffs at the Club's expense.

Sierra Club's anti-SLAPP Motion

The Sierra Club brought an anti-SLAPP motion under Code of Civil Procedure Section 425.16, which provides that causes of action based on a defendant's free speech and petitioning activities protected by the U.S. Constitution may be dismissed as a strategic lawsuit against public participation (SLAPP) unless the plaintiffs establish that there is a probability that they will prevail on the claim.

In response, the plaintiffs invoked Section 425.17(b), which exempts from the anti-SLAPP statute “any action brought solely in the public interest or on behalf of the general public” if, among other things, the plaintiff does “not seek any relief greater than or different from the relief sought for the general public or a class of which plaintiff is a member.” Section 425.17(b) was enacted by the California Legislature in 2003 and the Supreme Court's decision was its first interpretation of this exemption.

Trial and Appeal Court Decisions

Upholding the legitimacy of the Sierra Club's 2004 election activities, the San Francisco Superior Court twice granted anti-SLAPP motions filed by the Club and ultimately also granted summary judgment for the Sierra Club on the merits of the plaintiffs' claims. On appeal, the plaintiffs did not challenge the Club's success on the merits, but sought to avoid application of the anti-SLAPP statute to their complaint.

Notwithstanding the Court of Appeal's observation that there was “no doubt” that portions of the plaintiffs' prayer in the complaint “were calculated to give plaintiffs and their allies an advantage in intra-club politics,” and overlooking the express language of Section 425.17(b), the Court of Appeal ruled that some of the plaintiffs' claims were exempt

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California Supreme Court: “Public Interest” Exemption to Anti-SLAPP Is Narrow

(Continued from page 15)

from the anti-SLAPP statute under Section 425.17(b) because the “principal thrust or gravamen” of the plaintiffs’ election claims were brought in the “public interest.”

California Supreme Court Decision

Concerned with the appellate court’s expansive interpretation of the “public interest” exemption (and notwithstanding its win on

the merits) the Sierra Club petitioned the California Supreme Court for review to ensure that the state’s anti-SLAPP statute would be available to defendants faced with future meritless election challenges seeking to chill speech – and potentially in every other situation in which a plaintiff might unfairly claim their lawsuit was filed “in the public interest” yet still seek private relief for themselves.

California Attorney General Bill Lockyer joined the Sierra Club to urge the Supreme Court to grant review, which it did in the summer of 2006. (Sierra Club’s interpretation of Section 425.17(b) was supported in the Supreme Court by an amici brief filed by California State Senator Sheila Kuehl (who authored the legislation that became Section 425.17(b)) and Oakland attorney James Wheaton (who was involved in the drafting of the legislation)).

On review, the California Supreme Court strictly interpreted the language of Section 425.17(b), squarely rejecting

the expansive interpretation of the “public interest” exemption that had been adopted by the Court of Appeal, which construed the exemption as being nearly as broad as the anti-SLAPP statute itself.

Under the Supreme Court’s interpretation of Section 425.17(b), if “any part of [the plaintiff’s] complaint seeks relief to directly benefit the plaintiff,” the lawsuit is not exempt as a lawsuit filed in the “public interest” and must

instead satisfy the rigorous protections provided by the anti-SLAPP statute. The Court implicitly

if “any part of [the plaintiff’s] complaint seeks relief to directly benefit the plaintiff,” the lawsuit ... must instead satisfy the rigorous protections provided by the anti-SLAPP statute.

determined that unlike the anti-SLAPP statute itself – which may be applied on a cause of action by cause of action basis – the “public interest” exemption either applies – or doesn’t – to the entirety of a plaintiff’s complaint. In its analysis of the exemption, the Court also rejected the plaintiffs’ and Court of Appeal’s reliance on case law interpreting California’s private attorney general statute, finding that the two statutes are functionally different.

Thomas R. Burke is a partner in the San Francisco office of Davis Wright Tremaine LLP; Rochelle L. Wilcox is a partner in firm’s Los Angeles office. Mr. Burke represented Sierra Club and its individual directors throughout this five-year litigation; Ms. Wilcox assisted with the briefings in the California Supreme Court. Plaintiffs were represented by the Law Office of Ian B. Kelley, San Francisco, and the Law Office of Jeff D. Hoffman, San Francisco.

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Summary Judgment for Ohio Newspaper Affirmed on Appeal

Public Figure Plaintiffs Failed to Show Actual Malice

An Ohio appeals court affirmed summary judgment in favor of the *Cleveland Plain Dealer* over two articles about alleged overpayments of brokerage fees by the state workers' compensation fund. *Great Lakes Capital Partners Ltd. v. Plain Dealer Publishing Co.*, No. 91215, 2008 WL 5182819 (Ohio App. Dec. 11, 2008) (Cooney, Calabrese, McMonagle, JJ.).

A brokerage company and its principal sued the newspaper for libel and tortious interference, claiming the articles were false and caused the company to go out of business. The appeals court affirmed that plaintiffs were public figures and that the articles were protected as fair reports of government reports or published without actual malice.

Background

At issue were two articles published in 2005. The first was entitled "Workers' Comp Ignored Warning About Brokers' Fees." The second was entitled "BWC Brokers Turn Up in New Hampshire

The court then reviewed each of the statements at issue, finding that they were either protected reports of government documents, published without actual malice or not about plaintiffs. One of the statements at issue was drawn from a Securities Exchange Commission letter to the Ohio workers' compensation fund. The newspaper stated: "The brokers were overpaid 'without performing any real responsibilities or incurring any costs other than clearing fees for executing trades,' the SEC said." The court held this was a fair summary of the SEC letter, notwithstanding its disclaimer that it was based on the "staff's examination and are not findings or conclusions of the Commission."

Another statement at issue claimed that the workers' compensation fund allowed brokers like plaintiff "to designate their own commissions." The newspaper conceded that this was not true because investment managers – not the brokers – set the commissions. However, the court found there was no evidence of actual malice, citing to a reporter's statement suggesting it was an unintentional error. Moreover, the court reaffirmed the principal that a failure to

investigate is by itself insufficient evidence of actual malice.

The court also held that only statements that specifically

The plaintiffs voluntary business activity with these state agencies... "placed them in the midst of significant public controversy and subjected them to scrutiny from the public and press as well."

Scandal." The articles were published following the disclosure that the workers' compensation fund had lost over \$200 million in a high-risk hedge fund investment. The articles detailed allegations that the Ohio workers' compensation fund had been charged excessive fees by three brokerage firms, including the plaintiff, and that these firms "were no stranger to scandal."

Court of Appeals Decision

In affirming summary judgment, the court first held that plaintiffs were public figures for purposes of the lawsuit because of their active solicitation of business from public agencies and public retirement funds, including the workers' compensation fund. The plaintiffs voluntary business activity with these state agencies, and the fund in particular, "placed them in the midst of significant public controversy and subjected them to scrutiny from the public and press as well."

referred to plaintiff were potentially actionable. Thus, any general references to "brokers" was not even "of and concerning" plaintiffs.

Finally, the court affirmed dismissal of plaintiffs' tortious interference claim, holding that the allegation that the newspaper knew the articles were false and defamatory was insufficient to prove intent to interfere with a contract. The court stated: "a review of the record reveals that the plaintiffs did not present any evidence that The Plain Dealer intentionally procured the contract's breach. Without such evidence, the plaintiffs have failed to establish a claim for tortious interference with business and contractual relationships."

Plain Dealer Publishing Co. was represented by Louis A. Colombo, Melissa A. Degaetano, Michael K. Farrell, of Baker Hostetler, Cleveland. Plaintiffs were represented by Leslie E. Wargo, McCarthy, Lebit, Crystal, & Liffman Co.; and Dennis M. Coyne Co., L.P.A., Cleveland.

Pennsylvania Court Refuses to Apply Single Publication Rule to Employee Screening Database

Employee Database More Like a Credit Agency Report

In an interesting employment libel decision, a Pennsylvania federal district court refused to apply the single publication rule to information in an employee screening database available only to subscribers. *Pendergrass v. ChoicePoint, Inc.*, No. 08-188 (E.D. Pa. Dec. 9, 2008) (Kaufman, J.). Distinguishing media cases that have extended the single publication rule to online publications, the court reasoned that the employee database was more like a consumer credit report and thus every publication of the allegedly false report could be actionable.

Background

The plaintiff in the case had been a supervisor at a Rite Aid store in Philadelphia. In January 2006, he was fired for “unexplained merchandise losses, fraudulent transactions, and other related infractions.” Plaintiff interviewed at several other retail stores and was told a “bad report” about his employment history prevented his hiring. According to his complaint, after his firing Rite Aid published a report to ChoicePoint. One of ChoicePoint’s services is Esteem, an employment screening database. Subscribers to Esteem can access the database to check the background of job applicants. Rite Aid had filed a report about plaintiff accusing him of “cash register fraud and theft of merchandise.”

Rite Aid sought to dismiss plaintiff’s libel claim under Pennsylvania’s one-year statute of limitations for libel. Its report about plaintiff was published to the Esteem database in January 2006 and plaintiff filed suit in January 2008.

Single Publication Rule

The district court noted that courts have generally applied the single publication rule to Internet-based defamation cases where the publication is available to the public. However, in cases where the publication is only available to subscribers the rationale for the rule does not apply with equal force. The court cited to one of the first decisions in

the area, *Swafford v. Memphis Individual Practice Ass’n*, No. 02A01-9612-CV-00311, 1998 WL 281935 (Tenn. App. June 2, 1998).

In *Swafford*, a Tennessee appellate court refused to apply the single publication rule to an allegedly false report about a doctor contained in the National Practitioner Data Bank, a confidential electronic data bank that contains reports of professional review actions taken against doctors. The *Swafford* court analogized the data bank to a consumer credit report and found that the rationale of the single publication rule did not apply under the circumstances.

The Pennsylvania court in the instant action adopted and endorsed this reasoning. “In cases where, as here, the allegedly defamatory electronic report was not made available to the public but only to subscribing members of a database, the risks of an infinite limitations period and multiple suits are reduced significantly.” *Pendergrass* at p. 7.

The court went on to cite a list of cases holding that the single publication rule does not apply to Fair Credit Reporting Act claims over allegedly false consumer credit reports. *See, e.g., Lawrence v. Trans Union*, 296 F. Supp. 2d 582, 587 (E.D. Pa. 2003) (“Each transmission of the same credit report is a separate and distinct tort and a separate statute of limitations applies.”). The court noted that these cases were not in the defamation context, but found they were “persuasive” in highlighting the reasons why a report made to an employment screening company is not a “mass publication” for purposes of the single publication rule.

The court found that the Esteem database was not a “mass publication” for a general audience. Instead, it was like a credit report, “viewed on separate, distinct occasions by subscribing members.”

Plaintiff is represented by Irv Ackelsberg, Langer & Grogan PC, Philadelphia. Rite Aid is represented by Marc Sheiner and Jonathan Wetchler, Wolf Block Schorr & Solis-Cohen LLP, Philadelphia. ChoicePoint is represented by Pamela Devata, Seyfarth Shaw LLP, Chicago; and William Connor, Billet & Connor, Philadelphia.

Court Applies Single Publication Rule to Bulletin Board Posts “Bump” Messages Not a Republication of Other Postings in Thread

A New York state trial court ruled that a “bump message,” a reply message on a bulletin board allegedly posted to keep a message thread prominently displayed, is not a republication of all the other postings contained in the message thread. *Admission Consultants, Inc. v. Google*, No. 115190/07 (N.Y. Sup. Dec. 1, 2008).

Justice Herman Cahn of the New York Supreme Court in Manhattan, citing *Firth v. State*, 98 N.Y. 2d 365, 370, held that “[s]ubjecting a single modification of an Internet website, such as a bump message, to the definition of a republication of defamation would have a ‘seriously inhibitory effect’ on this form of communication.”

Background

Admission Consultants, Inc., provides consulting services to students seeking admission to prestigious colleges and graduate schools. Admission Consultants alleged that, beginning on April 7, 2007, 12 anonymous and defamatory message board posts appeared in *Business Week* magazine’s online forum concerning business schools, called “B-Schools.” The alleged defamatory statements were posted as part of a message thread called “Do not use www.admissionconsultants.com.”

Admission Consultants sought pre-action discovery from McGraw Hill Publishing Company, the publisher of *Business Week*, seeking the identities of the posters of the alleged defamatory messages. See *Admission Consultants, Inc. v. McGraw Hill Publishing Co.* (N.Y. County Index No. 111503-2007). On Oct. 3, 2007, Justice Paul Feinman of the New York Supreme Court ordered McGraw Hill to provide Admission Consultants with the names and e-mail addresses of the posters.

McGraw Hill followed the court’s order and provided Admission Consultants with the requested information. Two individuals, posting under the screen names “diverdavis” and “globalup,” had Google e-mail accounts, and allegedly posted “bump messages” to the forum – messages posted to keep a message thread prominent on a bulletin board.

Among the statements at issue, “Globalup” wrote that he was surprised by Admission Consultant’s response to com-

plaints on the bulletin board, said he wouldn’t use the company, and agreed with prior posts that the company wasn’t “legitimate” and hoped to see it “go bust.” “Diverdavis” wrote that the company sounded like “complete crooks.”

Admission Consultants sought pre-action discovery from Google to obtain any identifying information about the posters using the screen names globalup and diverdavis, including names, email addresses, Internet Protocol (“IP”) addresses, cellular telephone numbers or any other identifying information. In addition to claiming the posts were defamatory, Admission Consultants argued that the messages constituted a republication of every other message in the thread.

Single Publication Rule

To obtain pre-action discovery, Justice Cahn wrote citing *Liberty Imports, Inc. v. Bourguet, et al.*, 146 A.D. 2d 535, 536 (1989), the movant must show that it “has a meritorious cause of action and that the information being sought is material and necessary to the actionable wrong.” The elements of libel are: “(1) a false and defamatory statement of fact; (2) regarding the plaintiff; (3) which is published to a third party, and which (4) results in an injury to plaintiff.” *Penn Warranty Corp. v. DiGiovanni*, 10 Misc. 3d 998, 1002 (N.Y. Sup. 2005).

Here, the court found that the messages posted by “globalup” and “diverdavis” failed to satisfy the first element of a libel claim. Justice Cahn wrote that the messages that “globalup” and “diverdavis” posted “merely express their personal opinions about Petitioner,” which would not qualify as a statement of fact.

Regarding whether a bump message constitutes a republication of defamation, the court likened the analysis to the single publication rule applicable to newspapers and magazines articulated in *Gregoire v. Putnam’s Sons*, 298 N.Y. 119 (1948). Under the single publication rule, the publication of a defamatory statement in one specific issue of a printed publication constitutes only one cause of action, regardless of the number of copies disseminated. The court cited a concern raised in *Firth v. State*, 98 N.Y. 2d 365,

(Continued on page 20)

Court Applies Single Publication Rule to Bulletin Board Posts

(Continued from page 19)

369-70, that allowing a multiple publication rule for Internet postings “would implicate an even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants.”

The court wrote that subjecting a single modification of a website, such as by posting a message to a message board, would seriously inhibit the free dissemination of information via the Internet. Thus, the court ruled that Admission

Consultants had failed to show that it had a meritorious cause of action to warrant pre-action discovery as to further information regarding “globalup” and “diverdavis” from Google.

Admission Consultants, Inc., was represented by Gary Port of Port & Sava in Floral Park, N.Y. Google was represented by Tonia Ouellette Klausner of Wilson Sonsini Goodrich & Rosati in New York.

UPCOMING EVENTS

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
31 dec.	1	2	3	4	5	6
2009 Southwestern Conference <i>Fast Times in Hollywood:</i> Keeping Up With Cutting Edge Issues in Entertainment and Media Law <i>January 15, 2009</i>						
7	8	9	10	11	12	13
Legal Frontiers in Digital Media @ Stanford University, Stanford, California <i>May 14 & 15, 2009</i>						
14	15	16	17	18	19	20
MLRC London Conference International Developments in Libel, Privacy Newsgathering and New Media Law <i>October 1-2, 2009</i>						
21	22	23	24	25	26	27
MLRC Annual Dinner <i>November 11, 2009</i>						
28	29	30	31	1 feb.	2	3
First Amendment Speakers Bureau Upcoming MLRC Institute Events						
notes: _____ Feel free to e-mail us with any questions regarding MLRC’s upcoming events @ MediaLaw@MediaLaw.org						

Law Firm's Trademark Suit Against Real Estate Website Survives Motion to Dismiss

Law Firm Sued Over Use of Name and Links to Firm's Website

An Illinois district court denied a motion to dismiss a trademark lawsuit filed by the Jones Day law firm against Blockshopper.com, a website that publishes short articles on residential real estate transactions. *Jones Day v. Blockshopper LLC*, No. 08 CV 4572, 2008 WL 4925644 (N.D.Ill. Nov. 13, 2008). (Darrah, J.).

The law firm alleged that the use of its name in headlines reporting on purchases by two of its Chicago lawyers, as well as the use of the lawyers' pictures and links to their biographies on the firm's website, created the false impression that the law firm was affiliated with and/or endorsed Blockshopper. The district held that plaintiff had sufficiently pled trademark claims to withstand a motion to dismiss.

Several Internet advocacy groups sought leave to file an amicus brief in the case, but their request was denied.

Background

Blockshopper was founded in 2006 by Brian Timpone, a newspaper publisher and former reporter, and Edward Weinhaus, a real estate investor. The website compiles and publishes information about residential real estate transactions in a number of cities and regions across America. The website describes itself as "a local news and market data service for current and aspiring homeowners, home buyers and home sellers. In short, we're one part community newspaper, one part ultimate hyper-local real estate research tool. Read our daily news stories and learn who's buying and who's selling in your neighborhood."

The website's reports on real estate sales typically include identifying information about the purchaser and hyperlinks to other websites containing information about the purchaser.

At issue in the case are reports about real estate purchases made by two associates in Jones Day's Chicago of-

fice. An April 23, 2008 article was headlined "New Jones Day lawyer spends \$760K on Sheffield." A July 7, 2008 article was headlined "Jones Day attorney spends \$463K on Buckingham Pl." Both articles described the properties purchased, and included photos of the buyers and biographical details taken from Jones Day's website. The lawyers' names in the articles contained an embedded hyperlink to their biography pages on the Jones Day website.

In August 2008, Jones Day filed suit against Blockshopper and its owners for false designation and dilution under the Lanham Act, as well as unfair business practices, infringement, and unfair competition under state law. The

firm claimed that the use of the name Jones Day, the links to the Jones Day website, and information from the website, was used to generate advertising revenue and created the false impression that Jones Day is "affiliated with and/or approves, sponsors or endorses Defendants' business, which it does not."

On August 19, the parties stipulated to a temporary restraining order and Blockshop-

per removed the articles from its website pending resolution of the case.

Motion to Dismiss

Blockshopper moved to dismiss arguing that it used the words "Jones Day" to identify the two lawyers and thus, as a matter of law, there could be no claims for false designation or dilution. It further argued that even if Jones Day's

(Continued on page 22)

JULY 7
Jones Day attorney spends \$463K on Buckingham Pl.
by Dan Fey

Dan Malone Jr. bought a two-bedroom, two bath condo at 859 W. Buckingham Place in Lake View for \$463,000 from Amy Bollinger on May 16.

Bollinger paid \$452,500 for Unit #2 in Aug. 2005. There are four units in the building.

[Malone](#) is an associate in the Chicago office of global law firm Jones Day. He specializes in general corporate law, with a focus on private equity transactions, leveraged buyouts as well as mergers and acquisitions.

He earned his J.D. from Boston College (2006) and his bachelor's from Fordham University in New York City ('03).



Mr. Malone

Law Firm's Trademark Suit Against Real Estate Website Survives Motion to Dismiss

(Continued from page 21)

stated a claim, its claim should be dismissed under the exemption for “news reporting and news commentary” and/or as “nominative fair use.”

The district court held that Jones Day sufficiently pled the elements of a trademark claim and that the defenses raised by Blockshopper “present legal and factual issues not appropriate for resolution at this motion to dismiss stage.”

Interestingly, Jones Day argued in opposition

to the motion to dismiss that trademark dilution can exist by hyperlinking. The links on the Blockshopper website to the lawyer biographies were “likely to create the false impression that Jones Day is affiliated with, sponsors, or endorses Blockshopper’s business.”

Blockshopper also argued that no plausible confusion could exist between Blockshopper’s business and Jones Day. However, the district court found that Jones Day sufficiently pled a claim by alleging that “Defendants’ use of the Jones Day Marks, in connection with their real estate advertisement scheme, is likely to deceive and cause confusion and mistake among customers as to the source of origin of the services provided or offered for sale by Defendants and the affiliation of Jones Day with those services and/or the sponsorship or endorsement of those services by Jones Day.”

Claims Against Website Owners

The district court dismissed all claims against the individual owners of Blockshopper. To hold an individual officer liable for the infringing acts of a corporation, a plaintiff

APRIL 23
New Jones Day lawyer spends \$760K on Sheffield
by James Trotter

Jacob C. Tiedt and his wife, Erin Shencopp, bought a three-bedroom, 2.1 bath at 2048 N. Sheffield Ave. in Lincoln Park for \$760,000 from the Cartus Financial Corporation on March 24.

Unit #1 is one of three in the building.

[Tiedt](#) is an associate in the Chicago office of international law firm Jones Day. He practices corporate law with a focus on capital markets transactions for the firm, which he joined earlier this year.

He previously spent three years as an attorney at Simpson, Thacher & Bartlett in New York City and two years with Baker & Hostetler in Columbus, Ohio.



Mr. Tiedt

must demonstrate that the individual “wilfully and deliberately induced, aided and abetted the past and continuing infringement.” Since Jones Day did not allege that Timpone and Weinhaus, the co-founders of Blockshopper, established their website for the purpose of committing infringing acts or ordered such infringing acts to be carried out, the court held that they could not be found liable. It said: “Even assuming the alleged conduct of blockshopper.com is ultimately found to constitute

illegal infringement, the Complaint does not contain sufficient allegations to plausibly state a claim of individual liability against Timpone and Weinhaus.”

Motion for Leave to File Amicus Brief

Finally, the court rejected a motion by the Electronic Frontier Foundation, Public Citizen, Public Knowledge, and Citizen Media Law Project for permission to file an amicus brief raising First Amendment concerns about Jones Day’s claims. Noting that permitting an amicus curiae brief is discretionary, the court stated that such a brief would not be helpful.

Blockshopper is represented by Martin B. Carroll, Adam A. Hachikian, Daniel S. Hefter, Tracy Katz Muhl, of Fox, Hefter, Swibel, Levin & Carroll in Chicago; and Paul Alan Levy, Public Citizen Litigation Group, Washington, DC. Jones Day is represented by Paul W. Schroeder, Brent P. Ray, and Irene Savanis Fiorentinos of the firm’s Chicago office.

Trade Libel, Tortious Interference and Misrepresentation Claims Dismissed Over Website Visitor Ranking

A New York federal district court dismissed a Spanish newspaper's claims for trade libel, tortious interference and negligent misrepresentation against The Nielsen Company over the measurement of the newspaper's online audience. *Diaro El Pais v. The Nielsen Company, (U.S.), Inc.*, No. 07CV11295, 2008 WL 4833012 (S.D.N.Y. Nov. 6, 2008) (Baer, J.).

Dismissing for failure to state a claim, the court found that plaintiffs' could not escape the terms of a contract by pleading tort claims. Moreover, even if the tort claims were not barred by contract, plaintiffs failed to plead facts to support the tort claims.

Background

The plaintiff, El Pais, is the owner and publisher of the Spanish newspaper *El Pais*, Spain's largest circulation newspaper. Plaintiff Prisma operates the digital version of the newspaper. The Nielsen Company provides audience measurement services. A subsidiary, Nielsen Net Ratings (NNR), provides estimates of online audiences in Spain.

NNR had ranked the online version of the newspaper, www.elpais.com, as the number one media website in Spain. NNR later revised its estimates and ranked elpais.com as the number three media website in Spain. Plaintiffs complained about the estimate and defendant reviewed and affirmed the results. The plaintiffs then sued alleging the ranking was incorrect and published to advertising agencies causing a decline in advertising revenues for the online version of the newspaper.

District Court Decision

The district court held that the claims were barred by a contract which, among other things, denied any warranty that NNR's estimates were an accurate statement of web usage and denied liability for damages such as loss of ad-

vertising. Instead, the contract simply warranted that the estimates would be generated in accordance with NNR's own methodologies. The court found that the contract encompassed the fundamental subject matter of all of plaintiffs' tort claims and was therefore barred.

However, even if not encompassed by the contract, plaintiff failed to plead sufficient facts to support its tort claims. As to the trade libel claim, the court found that plaintiffs' allegations that defendant knew its estimate was wrong was insufficient to meet the pleading requirement for actual malice. Moreover, from the pled facts the court found it clear that defendant tried to ensure that its estimate was accurate in accordance with its methodology and thus there could be no "reckless disregard" under the circumstances.

Defendants had also argued that its estimates were protected under the First Amendment and New York State Constitution as opinions, but the court found no need to reach these constitutional issues.

On the tortious interference claim, the court noted that the claim has "an extremely high pleading standard." This requires specific factual allegations that "but for" defendant's conduct plaintiff would have entered into a specific contract – and that defendant had an "intent to interfere with plaintiffs' business. Here plaintiffs failed to plead any specific advertising relationships or improper means.

Finally, plaintiffs' negligent misrepresentation claim failed because of the arms-length dealings of the parties and plaintiffs' failure to plead any facts to show that defendant had a specific intent to defraud. This was particularly clear where plaintiff pled that defendant reviewed its ranking to ensure it was generated in accord with its own methodology.

Plaintiffs were represented by William Purcell K&L Gates LLP, New York. Defendants were represented by William James Taylor, Jr. and Aidan John Synnott, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York.

First Circuit Holds State Can Ban Use of Physician-Specific Information In Pharmaceutical Marketing

By Eric M. Stahl

The First Circuit Court of Appeals has held that a New Hampshire statute prohibiting pharmaceutical sales representatives from using physician-specific information for marketing purposes does not violate the First Amendment. *IMS*

Health Inc. v. Ayotte,

No. 07-1945, 2008 WL 4911262 (1st Cir. Nov. 18, 2008) (Selya, Lipez, Siler, JJ.).

A concurring judge sharply criticized the majority opinion for taking a self-contradictory and unduly crabbed view of the speech restricted by the statute, but still joined in reversing a district court opinion that had found the statute was an unconstitutional limit on commercial speech.

The decision is notable in part because the court excused the state from coming forward with hard evidence that the statute effectively furthered its asserted goal of curbing health-care costs. The First Circuit concluded that such an evidentiary burden would be too steep because the statute was an untested and innovative response to the supposedly novel problem of targeted marketing to physicians. This “novelty exception” appears to be at odds with Supreme Court precedent requiring the state to prove that a commercial speech restriction in fact directly and materially advances an important state interest.

Background

The statute at issue was a response to a drug marketing practice known as “detailing.” Detailers promote prescription drugs in one-on-one interactions with physicians, providing research information, promotional material, gifts and free drug samples. According to the First Circuit opinion, brand-name drug manufacturers spend over \$4 billion a year on detailing.

Detailers make use of information, available from data mining companies, regarding individual physicians’ prescribing histories. Such information enables detailers to tailor their presentations to a particular doctor’s practices.

Concerned that this practice encourages physicians to pre-

scribe brand-name drugs in lieu of less expensive generic alternatives, New Hampshire in 2006 passed a law that prohibited the use or transfer of physician-specific prescription records for use in marketing “or any activity that could be used

Judge Selya, concluded that that the statute primarily regulates conduct, not speech, and alternatively held that even if the statute did restrict speech it was permissible under the First Amendment.

fluence or evaluate the prescribing behavior of an individual health care professional[.]” N.H. Rev. Stat. Ann. § 318:47-f. The statute prevents detailers from obtaining physician prescribing history.

Two data mining companies brought a constitutional challenge alleging, among other things, that the statute violated the First Amendment. After a four-day bench trial, the district court held that the statute was an unconstitutional abridgement on commercial speech. *See* 490 F. Supp.2d 163 (D.N.H. 2007).

First Circuit Decision

The First Circuit reversed. The majority opinion, written by Judge Selya, concluded that that the statute primarily regulates conduct, not speech, and alternatively held that even if the statute did restrict speech it was permissible under the First Amendment.

First, though, the majority considerably lowered the constitutional hurdles for the state by holding that the plaintiffs had standing to make only a very narrow attack on the statute. According to the majority, because the plaintiffs were not themselves pharmaceutical companies or physicians, they could not assert the rights of detailers to use or physicians to receive prescriber-specific information in face-to-face communications. The data company plaintiffs, the court held, could challenge the statute only to the extent it limited their own acquisition and sale of prescriber-specific data and other “upstream” transactions.

In light of the majority’s ostensible decision to exclude communications between detailers and doctors from its analy-

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First Circuit Holds State Can Ban Use of Physician-Specific Information In Pharmaceutical Marketing

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sis, it is perhaps not surprising that the majority proceeded to conclude that the statute “is a restriction on the conduct, not the speech, of the dataminers” and that its restrictions “principally regulate conduct because [they] serve only to restrict the ability of data miners to aggregate, compile, and transfer information destined for narrowly defined commercial ends.” 2008 WL 4911262, at *9. The court further supported its view by noting that the statute “is of scant societal value.” *Id.*

The majority further held that even if the statute fell within the scope of the First Amendment, its restrictions nevertheless were permissible under *Central Hudson Gas & Elec. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980), under which limits on non-misleading commercial speech are constitutional only if the state establishes that the restriction (1) serves a substantial governmental interest; (2) directly and materially advances that interest; and (3) is no more restrictive than necessary to further the interest.

New Hampshire asserted three interests served by the statute: protecting doctor and patient privacy, protecting the health of citizens from skewed prescribing practices, and cost containment. The First Circuit, “for simplicity’s sake,” limited its analysis to cost containment, and found this interest sufficient to satisfy the first prong of *Central Hudson*.

On the second prong, the majority conceded that the state’s evidence that the statute would lessen health care costs “was not overwhelming” and was supported by “no direct evidence,” but nevertheless concluded that the statute materially advanced the state’s interest in cost containment. *Id.* at *14. The majority accepted a chain of inferences that detailing increases the costs of prescription drugs; that use of prescribers’ histories enhances the success of detailing; and that detailing does not contribute to improved patients’ health. From these suppositions, the court accepted the state’s reasoning that depriving detailers of an effective marketing tool would reduce costs by increasing the use of generic drugs in lieu of more expensive, branded equivalents.

Notably, the First Circuit majority found that the state’s inability to offer hard proof that its detailing restrictions in fact reduced health care costs was justified in light of the “constraints under which states operate in formulating public policy on cutting-edge issues.” The opinion faults the district court for imposing too exacting a standard by requiring the state to actually prove that the statute would reduce costs and

thus further the state’s asserted interest. According to the First Circuit, “New Hampshire was the first state to deny detailers access to prescribing histories. Had other states been in the vanguard, it might be permissible to take New Hampshire to task for not presenting studies relative to the law’s effect on net health care costs. But to demand such evidence from the first state to refuse detailers access to prescribing histories is to demand too much: *that evidence simply does not exist.*” *Id.* at *15 (emphasis added).

The opinion cites no authority for the proposition that the alleged novelty of a speech restriction somehow reduces the state’s evidentiary burden in the face of a First Amendment challenge. The Supreme Court has made clear that actual evidence is required to meet the *Central Hudson* test, and that the government’s burden to show direct and material advancement

is not satisfied by mere speculation and conjecture; rather a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree. Without this requirement, a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression.

Edenfield v. Fane, 507 U.S. 761, 770-71 (1993); see also *Rubin v. Coors Brewing*, 514 U.S. 476, 487 (1995). The Supreme Court has never held that this burden is reduced simply because the restriction is embodied in a new type of statute. A finding that “evidence simply does not exist” to support the material advancement element of the *Central Hudson* test would seem to indicate that the state cannot meet this standard.

On the final *Central Hudson* element, the First Circuit majority held that the New Hampshire statute targeted no more speech than necessary to further its cost-containment aims. The panel rejected the three alternatives identified by the district court as serving the state’s goals while restricting less speech. The First Circuit found a ban on gifts from detailers to physicians would not further the state’s goal, on the tautological ground that the “legislature only saw such gift-giving as pernicious when it occurred within the context of a

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First Circuit Holds State Can Ban Use of Physician-Specific Information In Pharmaceutical Marketing

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high-intensity sales pitch made possible by a detailer's possession of a physician's prescribing history." 2008 WL 4911262 at *16.

The court found a second alternative, a state educational campaign to promote the use of generic drugs, was unlikely to succeed given the amount of money pharmaceutical companies spend on detailing. The court also found that requiring consultations with pharmacists before state insurance would pay for expensive, non-preferred drugs was impractical.

Judge Lipez concurred in the majority's First Amendment conclusion, but sharply criticized its reasoning. He primarily faulted the majority's standing analysis, finding that the statute plainly was "designed to limit the speech of detailers" and that the prudential standing doctrine permitted the court to fully consider the plaintiffs' attack on the statute. He also accused the majority of trying to "have it both ways" by purporting to limit the scope of their review to the data miners' activities and not the detailers' speech, but nevertheless upholding the statute based on the supposedly low value of the detailer's speech:

This inconsistency pervades the majority's decision. After making judgments about the nature of the detailing transaction and how it increases the likelihood that physicians will prescribe more expensive drugs, the majority asserts that "the legislature sought to level the playing field not by eliminating speech but, rather, by eliminating the detailers' ability to use a particular informational asset-prescribing histories-in a particular way." (Emphasis added.) Here the majority is characterizing the speech interest that is supposedly beyond the scope of its opinion, and characterizing it incorrectly. The very elimination of the detailers' ability to use "a particular informational asset" restricts the message they are allowed to disseminate and implicates the free speech concerns of the First Amendment.

Id. at *25. Judge Lipez found the First Amendment question "important and close." After a lengthy analysis of the record, he concluded that there was sufficient evidence that the statute furthered the state's interest in containing health care costs. Like the majority, he too recognized the lack of quantifiable

evidence supporting this conclusion, and found this lack of proof excusable based on the novelty of the statute.

Eric M. Stahl is a partner at Davis Wright Tremaine in Seattle. Thomas R. Julin, Patricia Acosta, and Michelle Milberg of Hunton & Williams LLP; James P. Bassett and Jeffrey C. Spear of Orr & Reno, P.A.; and Mark Ash, Smith Anderson Blount Dorsett Mitchell & Jernigan LLP represented plaintiffs.

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THE OTHER SIDE OF THE POND

Developments in UK and European Law

Justice Eady Reinstates Libel Action Against New York Times and IHT

By David Hooper

Online publication, Abuse of Process and Libel Tourism

On December 17, 2008 in [Mardas v New York Times and International Herald Tribune](#) (2008) EWHC 3135, Mr Justice Eady permitted an action brought by John Alexis Mardas, known as Magic Alex, to proceed, reversing the decision of Master Leslie to strike the case out as an abuse of process. The case shows that the courts are not willing to give a liberal interpretation of the abuse of process argument which succeeded in *Jameel v Dow Jones* (2005) EWCA Civ 75, where only five online hits could be proved.

Mardas, who had worked for the Beatles' Apple Company, complained that the article accused him of being a charlatan and a liar and having caused a rift between the guru Maharishi Yogi and the Beatles back in 1968. The Master had been horrified at the prospect of a libel action relating to the events of 40 years ago where there had been only very limited publication. Precisely what that publication amounted to was disputed by the claimant and Eady J indicated that it was very difficult for the court on such

the USA and France, Eady J made it clear that this was not in his view "libel tourism." Mardas had lived in the UK from 1963 to 1996 and he had two children with UK nationality and had a reputation in the UK.

Eady J did, however, comment on the unsatisfactory nature of the law pointing out that "it may well be that in due course international agreement will be reached as to the appropriate way of resolving claims out of internet publication." That, he said, is plainly desirable but for the time being the courts must apply the law as it is. His view was that this was not a trivial libel even though it related to the events of 40 years ago. He felt it was plainly desirable for the parties to reach an accommodation to avoid a time-consuming and expensive trial but he was not prepared to hold that this was an abuse of process. In short, libel plaintiffs will be encouraged by this decision.

Changes Afoot

The UK Justice Secretary, Jack Straw, plans to allow journalists into family courts from April 2009 subject to there being safeguards for the protection of children and the privacy of families. The anonymity of the professionals involved in the cases is likely to be removed. Interestingly, 100% of the media organisations con-

sulted by the Ministry of Justice supported the changes whereas 73% of the judges and 78% of the lawyers consulted opposed it.

On December 17, 2008 there was an adjournment debate in the House of Commons organised by the Select Committee on Culture, Media and Sport. Notorious plaintiffs such as Khalid bin Mahfouz and Nadhmi Auchi received a predictable amount of flack, as did the well-known law firm of Carter Ruck. Most significantly the Justice Minister Bridget Prentice said that the government would announce a

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Depressingly for foreign publishers Eady did indicate that "a few dozen hits could be enough to found a cause of action in England although damages would be likely to be modest".

strike-out applications to determine such disputes.

The NYT admitted 177 hard copies and 4 online hits; the IHT, 27 online hits and no hard copy. However, Eady J was not willing to lay down a minimum number of hits before publication could be substantial and he declined to get involved in what he termed "the numbers game."

Depressingly for foreign publishers he did indicate that "a few dozen hits could be enough to found a cause of action in England although damages would be likely to be modest." Although Mardas now lived in Greece and had declined to sue in respect of the much larger publication in

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consultation process on libel and the Internet and the disproportionate costs of defamation proceedings. There was considerable criticism of the working of conditional fee arrangements.

More controversial is proposed government legislation to prevent criminals making money from their memoirs, which was announced in the Queen's Speech in November. It sounds good on paper, but the concerns of the Publishers' Association is that these measures are disproportionate and unnecessary.

Pen and the Index on Censorship recently announced a proposed round-table discussion on the restrictive effect of libel laws on freedom of speech, which should take place in Spring 2009.

Privacy Damages

On November 25, 2008 there was an interesting decision in the European Court of Human Rights in the case of *Armonas v Lithuania* (applic no 36919/02). The largest Lithuanian newspaper had written about the complainant that he had contracted AIDS and it published his address. This had affected his health and his family. Under Lithuanian law there was a ceiling of 2,896 Euros for non-pecuniary damages. The European Court felt there had been an outrageous breach of privacy and stressed the need for *detering* the press from publishing such articles in breach of privacy. However, the Court only awarded 6,500 Euros, but the writing is on the wall for the European press.

Madonna has popped up in this context claiming £5 million damages for publication of eleven private photographs of her otherwise much-publicized wedding at Skibo Castle. It is alleged that these photos had been surreptitiously copied by an interior designer doing work on her Beverly Hills home. It was said in Court that the *Mail on Sunday*, which published the pictures on the front page and a double inside spread, paid the provider of the photos £5,000. How Madonna arrived at the staggering sum of £5 million remains to be discovered at the full hearing in 2009.

Legal Costs

On December 5, 2008 there was an interesting ruling by Mr Justice Arnold in a Blackberry patent dispute, *Research*

in Motion v. Visto. The background was that in an earlier case between the parties heard by Mr Justice Floyd in September 2008 the claimants' costs incurred by Allen & Overy on behalf of RIM clocked in at a tasty £5.18 million, which the judge perhaps not wholly surprisingly described as unnecessary for a five day hearing. The defense costs had only been £1 million and the judge had found the attempts by the lawyers to control costs to be inadequate and unsatisfactory. What was to happen in the new case was that both sets of lawyers, Allen & Overy and McDermott, Will & Emery were ordered to file estimates of the costs of the trial. The likelihood is that the court will expect those estimates to be complied with and this is yet another illustration which applies increasingly to all types of litigation of a more interventionist approach by the courts. That case comes up for trial in September 2009.

Significant Claimant Losses

For a wonderful musician Sir Elton John libels awful easy. The case of *Sir Elton John v. Guardian News & Media Ltd* (2008) EWHC3066 (QB) was a libel case too far and another triumph for the *Guardian*. As is well known, Elton John has raised millions of pounds through his Elton John AIDS Foundation. He is, however, extremely sensitive to any form of criticism and when Marina Hyde wrote a mock diary of Elton's White Tie & Tiara Ball in the *Guardian* weekend supplement entitled *Tantrums & Tiaras* Sir Elton reached for Carter Ruck.

He had, by this time, already recovered over £100,000 from two newspapers for suggesting somewhat arrogant behaviour on his behalf. "*Naturally everyone could afford just to hand over money if they gave a toss about his AIDS Foundation as could the organisers. We like to give guests a preposterously lavish evening because they are the kind of people who won't turn up for less*" Ms Hyde mocked by putting these words into Sir Elton's mouth. By the time his libel lawyers had got to work this had become an allegation that he was racked by insincerity and had seized the opportunity purely for self-promotion.

What Sir Elton seemed particularly unhappy about was the mocking suggestion that "*Once we've subtracted all these costs*" (seemingly his dresses and diamonds) "*the leftovers will go to my foundation.*" Mr Justice Tugendhat was

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not having any of this. This was a form of teasing which would not be taken seriously and it was a spoof diary in a weekend supplement rather than an expose and he struck the case out.

The same happened in a case brought by Tiscali against BT Broadband (2008) EWHC2927 (QB) and heard by Mr Justice Eady. BT had sent out opportunistic marketing material to try to attract Tiscali customers to BT. Tiscali's lawyers suggested that this had imputed a lack of honesty and candour on their part. Mr Justice Eady however struck this allegation out saying that it would be perverse for a jury to construe the material as suggesting that Tiscali was being dishonest or in breach of some duty to its customers. On these strike-out applications the claimants will get the benefit of any doubt, as it is an exercise in generosity rather than parsimony (*see Berezovsky v. Forbes* (2001) EMLR 1030). However the courts are willing to strike out over-ingenious pleadings.

Damien Green MP

Opposition Members of Parliament have traditionally relied on information about misconduct about the government being leaked to them so that the government may be held to account. Damien Green is the Shadow Home Secretary and a Conservative Member of Parliament and he seemingly had been receiving information about general incompetence in the Home Secretary's department about matters such as failing to implement and supervise immigration policies and on the futile attempts by the government to frighten the potential Labour MP rebels who – as it turned out – successfully voted down the extremely unwise attempt to permit 42 days detention without trial against terrorist suspects into supporting their government.

Nothing Mr Green did threatened national security, but it had everything to do with causing embarrassment to a political party that has the arrogance of a party that has been in power for too long. In 1989 Parliament had limited the operation of the Official Secrets Act to four specific types of information which damaged the national interest, including intelligence, criminal and defence issues. The information Mr Green had received clearly fell outside the Official Secrets Act 1989.

A dubious common law offence of aiding and abetting an official in public misconduct in their office was crafted to render this parliamentary activity allegedly criminal. Exactly who in the Watergate sense knew what and when still remains to be established. The claims by the relevant ministers to have been in total ignorance about what was happening in their departments has been met with widespread incredulity. Anyhow, Mr Green's home was raided by anti-terrorist officers in the early hours and a group of police officers illegally searched his parliamentary office without even obtaining a warrant. The buffoonish Speaker of the House of Commons failed to prevent this outrage and sought to place the blame on his female Serjeant at Arms, a Ms Jill Pay.

Mr Green was detained in a cell for nine hours and it seems that nothing of particular significance, certainly in terms of National Security and public interest was found. A spokesman for the Liberal Party described this as "*the most worrying development for many years*". Listening to government spokespersons trying to justify the unjustifiable makes one worry for civil liberties in this country.

France

Things are, however, worse in France. The former Editor in Chief of the newspaper *Liberation*, Vittorio de Filippis, had found himself on the receiving end of a number of criminal libel complaints from a businessman with Internet interests. The businessman had lost two previous libel claims against *Liberation*, but imagine his joy when the investigating magistrate took the view that Mr de Filippis had ignored a Court summons and ordered his arrest. In fact Mr de Filippis seems to have done nothing worse than forward it, in accordance with his practice, to his lawyers. He too had the police on his doorstep, but with the Gallic extras of handcuffing him in front of his children and later detaining him, strip searching him twice and conducting two rectal searches. The police apparently thought he had behaved arrogantly.

His treatment provoked general outrage and it appears that President Sarkozy has called for legal reform to consider decriminalizing defamation and a commission is to be chaired by Philippe Leger, Advocate General at the ECJ.

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Leger is charged with redefining criminal procedures in a way “*more respectful of peoples’ rights and dignities*”.

Readers of this column may also want an update on Mr Sarkozy’s voodoo doll litigation. It has now been settled. The dolls can be sold provided that they have a conspicuous warning that sticking pins into any part of Mr Sarkozy’s wax anatomy is an affront to his dignity. Mr Sarkozy’s attempt to block sales was rejected, but he *was* awarded one euro damages. All 20,000 dolls sold out within one day of the judgement.

Meanwhile his wife Carla Bruni was more successful in that she recovered 40,000 Euros damages against the distributors of bags which had a nude picture of her.

A freedom of expression convention called in December 2008 in France to mark the 60th anniversary of the Universal Declaration of Human Rights did highlight the pressure that was being brought to bear by the French government on the press resulting in journalists being sacked for upsetting the government and intriguingly in a newspaper (*Le Figaro*) airbrushing a 15,000 euros diamond ring from the hand of the Justice Minister as being inappropriate in these times of austerity.

Polanski

In England it is now possible, thanks to Roman Polanski, for fugitives from justice to bring libel actions. Flushed by this success, Polanski is reportedly making an application in California based on “*judicial and prosecutorial misconduct*” to have his conviction set aside. One hopes that the court hearing this application will have the opportunity of reading precisely what Polanski did to the 13 year old girl in the Grand Jury testimony helpfully posted on the *Smoking Gun* website and will recollect that the judge did offer to recuse himself before the sentencing.

Monica Lewinski

A ruling in Italy in the Court of Cassation has ruled on appeal that saying of a woman that she had a Lewinskian nature is capable of being defamatory and the matter should go for trial. This no doubt will be a case which law students will study with interest, just as English students were taught that there was a defamatory innuendo in saying that a

person was no George Washington, i.e., that he was in fact a liar.

Misery Memoirs – *Briscoe-Mitchell v. Briscoe*

Stories about success in the face of domestic adversity have proved popular and now also productive for libel lawyers. Hodder and Stoughton part of the Hachette Group, the publishers who had sold 400,000 copies of a book called *Ugly* (the taunt of the mother to her daughter) by a successful barrister and part-time judge, succeeded in having the claim by the author’s 74 year-old mother dismissed. She had complained about the accounts of her alleged abuse of her daughter in the book.

The publishers however settled a case by a father again alleging abuse of a daughter and damages were paid to charity in a well-crafted settlement where the father succeeded in his claim but the daughter stuck to her guns (Sanders v Hodder & Stoughton).

Contempt of Court

Attorney General v ITV Central Ltd (2008) EWHC 1984 was an interesting example of how the penalty could be relatively low where things had gone badly wrong. At the beginning of the trial, a regional news broadcast had prejudicially revealed that one of the defendants in a murder trial was already in prison for another murder. ITV admitted it was “*a serious aberrational error*” and that it was “*blindingly obvious that it should not have been broadcast*”. The producer had been away ill and no-one had thought about the implications. There was an immediate apology. The fine was £25,000 and ITV had also to pay the cost of the trial being adjourned (£37,000).

Online Libel

The case of *Brady v Norman* (2008) EWHC 2481 reinforced the ruling in *Amoudi v Brisard* (2007) 1 WLR 1113 that there was insufficient evidence to assume that anyone read the online version of the offending article who did not have a legitimate interest in doing so. In other words readership of the online publication has to be proved and will not necessarily be assumed.

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

Responsible Journalism Defense Applied in Canada

Large Jury Award Against Toronto Star is Overturned

By Paul Schabas

In the first appellate decision to apply the defence of responsible journalism in Canada, the Ontario Court of Appeal overturned a jury verdict against the *Toronto Star* that had awarded C\$1.475-million in damages to a northern Ontario businessman and his private corporation for libel. *Grant v. Toronto Star Newspapers*, 2008 ONCA 796 (Nov. 28, 2008).

Background

Peter Grant had sued the *Toronto Star* over an article written by investigative journalist Bill Schiller in June 2001, which detailed the concerns of Grant's neighbours regarding construction of his proposed personal private golf course on Crown land by a lake in northern Ontario. The article also discussed Grant's connections to the provincial Progressive Conservative Party and then premier Mike Harris.

Following a three-week jury trial in Grant's hometown, where he is also one of the largest employers, the judge refused to apply the *Reynolds* defence and sent the case to a jury which rejected the defences of truth and fair comment. Given the \$1,000,000 punitive damage award, the jury appeared to also find that there was malice in the publication.

Court of Appeal Decision

The Court of Appeal agreed with the *Toronto Star* that the trial judge erred in his analysis of the new defense of "public interest responsible journalism," as he had "improperly tried to combine the two defences of qualified privilege and responsible journalism, rather than treat the new defence as a separate evaluation where the emphasis is on allowing more free and open reports on matters of public interest, as long as the reports are researched and published in a fair and responsible manner."

On the facts of the case, the Court of Appeal was critical of the trial judge for taking a narrow view of "public interest," as he had limited it to those who lived in the area. This was wrong, as the article dealt with "the private acquisition of Crown lands by a person who had made large political contributions to the governing political party, as well as with cottagers' environmental concerns." The trial judge also overlooked many relevant facts showing that the journalist acted in a responsible and fair manner in preparing the story, such as his extensive research, interviews, documents obtained from many sources and reviewed by him, and his efforts to contact and obtain comment from Grant and his refusal to respond to Schiller's questions. As well, the trial judge failed to give any weight to the journalist's explanation of why some things were not included in the story.

However in an interesting development not argued at the appeal, instead of applying the *Reynolds* factors to dismiss the action the Court of Appeal directed a new trial. It did so on the basis that the meaning of the defamatory words needed to be resolved by a jury – a main issue of dispute in the case, as the plaintiffs alleged the article suggested improper influence while the defendants said it just outlined concerns people had.

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This, the Court said, is a question of fact for a jury, not a judge, and so a new trial was necessary. Although the new defense is a matter for the judge, the Court said that “without first having the jury decide whether the article had either of these meanings (or some other meaning), the trial judge was not in apposition to accurately and effectively weigh the factors for responsible journalism.”

This raises important questions about the role of a jury in determining factual issues that arise in responsible journalism cases. Of particular interest is the Court’s decision that prior to a judge determining the applicability of the defense, “the jury, having heard all the evidence, should have the opportunity to decide all relevant questions, regardless of the judge’s decision on the availability of the defence of public interest responsible journalism.” One wonders how this may affect the application of the defense where a jury might reject other defenses and even find malice and award large damages. Will a judge then have the courage to effectively overturn a jury verdict because in his or her view the responsible journalism defense should apply?

The Court also concluded that the trial judge erred in instructing the jury on a number of points. Most significantly, the judge incorrectly told the jury that the defense of fair comment turned on whether a “fair-minded” person could believe the comment. The judge’s charge misled the jury as the correct test is broader – whether a person could honestly hold the opinion on the facts proved. Although he stated it correctly at the outset, the trial judge went on to import a “fair mindedness” test, which he repeated several times.

In addition, the court held that a decades-old standard jury charge relied on by the trial judge regarding the issue of the meaning of allegedly defamatory words was wrong and misleading. As well, the trial judge made other errors, such as not making the test for malice clear, and failing to fairly summarize important evidence

The plaintiff is seeking leave to appeal to the Supreme Court of Canada. The defendants are seeking to cross-appeal on the issues relating to the role of the jury in order to have the action dismissed. As the Supreme Court is scheduled to consider the responsible journalism defense for the first time in February, in *Quan v. Cusson*, there is some hope that *Grant* may be heard and/or decided with it.

Paul Schabas, Simon Heeney and Erin Hault of Blake, Cassels & Graydon LLP in Toronto represented The Toronto Star. Plaintiffs were represented by Peter Downard and Catherine Wiley of Fasken Martineau DuMoulin LLP.

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U.S. District Court Orders Release of Search Warrant Materials Related to the “Amerithrax” Investigation

Public Has First Amendment Right of Access After Investigation Was Concluded

By Jeanette Melendez Bead

The United States District Court for the District of Columbia recently ordered the release of search warrant materials related to the “Amerithrax” investigation, finding that the public has a First Amendment right of access to search warrants and related materials after an investigation has concluded. *In the Matter of the Application of the New York Times Company for Access to Certain Sealed Court Records*, 2008 WL 4900605 (D.D.C. Nov. 17, 2008) (Lamberth, J.).

The Order, issued by Chief Judge Royce C. Lamberth, required the release of any search warrants, applications, supporting affidavits, orders, and returns relating to two individuals known to have been targeted in the Amerithrax investigation: Dr. Steven J. Hatfill and Dr. Hatfill’s girlfriend, Peck Chegne.

Background

The court records sought by *The New York Times* and the *Los Angeles Times* arose out of the massive federal investigation into the deaths of five persons, and the injury of dozens of others, that resulted from several anthrax-laced letters mailed to members of Congress and the news media in late 2001. This investigation, which the FBI dubbed “Amerithrax,” was among the highest priorities of the Department of Justice for the past seven years.

Dr. Hatfill, a researcher at the United States Army Military Research Institute of Infectious Diseases (“USAMRIID”), was publicly identified as a “person of interest” to the Amerithrax investigation in 2002, after the FBI conducted two highly publicized searches of his properties. For years, Dr. Hatfill was the subject of intense media and public scrutiny as a result of his status as a “person of interest” to the investigation.

In June, Dr. Hatfill reached a multimillion dollar settlement with the government to resolve a Privacy Act lawsuit he had filed in 2002 arising from allegedly improper press disclosures, and the government officially exonerated him

of guilt. Just six weeks after the settlement, the Justice Department announced at a press conference that Dr. Bruce Ivins, another USAMRIID researcher who had died from an apparent drug overdose one week earlier, was the “sole suspect in the case” and that the government was closing the investigation.

During the press conference, the Justice Department discussed in detail previously sealed search warrant materials relating to searches of property owned or used by Dr. Ivins, explaining that it was compelled to both seek the unsealing of some of the search warrant materials and explain their significance to the American public “because of the extraordinary and justified public interest in this investigation, as well as the significant public attention resulting from” Dr. Ivins’ death.

Of course, these events generated significant public interest in understanding and evaluating the manner in which the investigation was carried out and renewed the public’s interest in understanding the reasons why Dr. Hatfill was targeted in the first instance.

In September, *The New York Times* and the *Los Angeles Times* (the “Media Applicants”) sought the release of the previously sealed warrant materials relating to Drs. Ivins and Hatfill and Ms. Pegne. While the motion was pending, the government itself moved to unseal the remaining search warrant materials relating to Dr. Ivins; that motion was granted by the Court in September, and the released materials are available on the Court’s website at <http://www.dcd.uscourts.gov/Anthrax-Case-Info.html>.

The government, however, objected to the disclosure of materials relating to Dr. Hatfill, asserting that Dr. Hatfill’s right to “get on with his life” trumped the public’s right of access.

Rights of Access to the Search Warrant Materials

The court’s resolution of the motion for public access turned on the following question: whether the First Amendment “afford[s] the press and public a qualified right of ac-

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U.S. District Court Orders Release of Search Warrant Materials Related to the “Amerithrax” Investigation

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cess to inspect warrant materials following the close of an investigation.” Both the Fourth and Ninth Circuits have declined to recognize a First Amendment right of access to search warrant materials while an investigation is pending. Neither Circuit, however, has addressed the right of access to post-investigation materials where the criminal investigation is completed and the crime solved.

The Eighth Circuit, on the other hand, has recognized a qualified First Amendment right of access to search warrant materials even where an investigation is ongoing but has found that a compelling interest sufficient to defeat the right exists where disclosure would compromise an ongoing investigation. As Judge Lamberth observed, none of these cases is precisely on point. Thus, the court turned to its own analysis.

First, the court acknowledged that resolving the motion on constitutional grounds was “unusual,” “when the case can be resolved on common law grounds.” Nevertheless, as the Media Applicants had urged, the court followed the instructions of the D.C. Circuit in *Washington Post Co. v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991), to decide the access question on constitutional grounds “because of the different and heightened protections of access the first amendment provides over common law rights.”

Next, the court applied the “experience” and “logic” test articulated in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and its progeny. On the experience side, the court found that post-investigation warrant materials historically have been available to the public, noting that such materials are routinely filed with the clerk of court, and that the existence of a common law right of access to the materials, which the government conceded, “weighs strongly in favor of a First Amendment qualified right of access” On the logic side, the court noted that the general openness of judicial proceedings “helps ensure the appearance of fairness” and demonstrates to the public “that there is nothing to hide.”

The court observed that, with respect to search warrant proceedings in particular, which, as the Media Applicants noted, “are often used to adjudicate important [Fourth Amendment] rights,” “openness plays a significant positive role in the functioning of the criminal justice system,” because it “serves as a check on the judiciary” and allows the public to “ensure that judges are not merely serving as a rubber stamp for the police.”

Dr. Hatfill’s Privacy Interests

The court then considered whether Dr. Hatfill’s privacy interests were sufficiently compelling to outweigh the public’s qualified First Amendment right of access to the warrant materials. The court found the government’s assertion of a “generalized privacy right ‘to get on with [one’s] life’” unpersuasive, noting that both the fact that Dr. Hatfill was under investigation and the fact that he had been cleared of any wrongdoing were publicly known. Thus, in the court’s view, the unsealing of the materials would not disclose the identity of an innocent third party who had been the subject of the investigation. The court also observed that Dr. Hatfill himself had revealed certain details about the searches in the course of his lawsuit against the government.

Although the court found that protecting the identities of confidential informants constituted a compelling interest, it found, as the Media Applicants noted, that the identities of any such informants could be protected through redaction rather than wholesale sealing. With respect to Ms. Pegne, the court acknowledged that she is an innocent party but concluded that disclosure of materials relating to her was appropriate because: (1) certain of the details of the searches of her properties were already known as a result of Dr. Hatfill’s disclosures in the Privacy Act case; (2) the government did not assert her privacy interests as a basis for continuing to maintain the materials under seal; and (3) based on its own *in camera* review of the materials, the court was satisfied that “no highly intimate or personal details” relating to Ms. Chegne would be revealed if the materials were unsealed.

The court also concluded that the Media Applicants were entitled to the materials under the less exacting standard applicable to the public’s common law right of access, citing, among other things, the public’s strong need for access to the materials, the government’s concession that release of the materials would not jeopardize an ongoing investigation, and the government’s failure to demonstrate a legally cognizable privacy right “to get on with one’s life.”

The Media Applicants were represented by David McCraw, Vice President and Assistant General Counsel of The New York Times Company; Karlene Goller, Vice President, Legal and Deputy General Counsel of the Los Angeles Times; and David C. Schulz and Jeanette Melendez Bead of Levine Sullivan Koch & Schulz, L.L.P.

Nebraska Supreme Court To Decide Public Records Lawsuit Seeking Public Access for Historic Burial Records

By Thomas R. Burke

The [Nebraska Supreme Court](#) – the state's highest court – announced December 1, 2008 that it will decide an appeal that involves public access to records that identify 975 individuals buried in the state's largest mental health cemetery.

Using Nebraska's Public Records statutes, the Adams County Historical Society ("ACHS"), a non-profit organization dedicated to the history of Adams County (located in South Central Nebraska), was denied access to records that identify the names, dates of death, and burial location for 957 former mental health patients – or "inmates" as they were called at the time – who were buried between 1889 and 1957 in a small cemetery on the grounds of the Hastings Regional Center in Hastings, Nebraska. The Hastings Regional Center is a state-run institution operated by the Nebraska Department of Health and Human Services.

Asserting that state and federal patient privacy laws prevent disclosure of the burial record information, Nancy Kinyoun, the facility's custodian of records, denied ACHS's public records act request in the Spring of 2007. ACHS informally appealed the denial to the Nebraska Attorney General's Office (using an ombudsman-type process uniquely provided by Nebraska law), but the Attorney General nevertheless affirmed Kinyoun's decision. (Ironically, burial records identifying those buried in the state's three other mental health cemeteries in have long been public.)

In August, 2007, ACHS filed a writ petition in District Court in Hastings. Following a one-day trial, Adams County District Court Judge Terri S. Harder early this year denied ACHS's writ, holding that Kinyoun's denial of access to the records was appropriate under the Federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and its regulations, specifically, 45 C.F.R. § 160.103.

On appeal, ACHS argues that the District Court erred because the federal HIPAA law does not itself provide an independent basis for withholding public records that are to be disclosed under Nebraska's public records statutes. If

records are required to be disclosed under a state's public records law, HIPAA and its regulations do not provide an independent legal basis for denying public access to the record. *See, e.g., Abbott v. Texas Dept. of Mental Health*, 212 S.W.3d 648 (Tex. App. 2006); *Cincinnati Enquirer v. Daniels*, 844 N.E.2d 1181 (Ohio 2006); Neb. Op. Attorney Gen. No. 04018, 2004 Neb. AG LEXIS 11 (2004); 45 C.F.R. § 164.512.

Because the District Court made no finding that the burial records are protected from public disclosure under any exemptions to Nebraska's Public Records statutes, it abused its discretion when it solely relied on HIPAA to deny access to the records. ACHS asserts that the District Court's ruling is contrary to every published decision that has interpreted HIPAA's public records exemption and condones the Nebraska Department of Health & Human Services's perpetuation of a social stigma against those who suffer from mental illnesses.

The parties completed their appellate briefing in the Court of Appeals – Nebraska's intermediate appellate court – and were awaiting oral argument before that Court when the Nebraska Supreme Court, on its own initiative, announced on December 1, 2008, that it had transferred the case to its docket and would hear the matter. ACHS's public records act appeal is a rarity in Nebraska – there have been less than a handful of appeals under Nebraska's public records statutes. The Nebraska Supreme Court will hear oral argument in the case in Lincoln, during the first week of February, 2009, and is expected to issue its ruling this Spring.

Thomas R. Burke is a partner in the San Francisco office of Davis Wright Tremaine LLP. Thomas R. Burke (who was born and raised in Hastings, Nebraska) and Ambika Doran (an associate in the firm's Seattle office) and Shawn D. Renner a partner with Cline, Williams, Wright Johnson & Oldfather in Lincoln, Nebraska are pro bono counsel to the Adams County Historical Society.

MLRC's Projects and Finances Reviewed at 2008 Annual Meeting

The Annual Meeting of the Media Law Resource Center, Inc. ("MLRC") was held on November 12, 2008, at the Grand Hyatt in New York. The meeting was called to order by Ralph Huber, Chairman of the MLRC Board of Directors. Ralph welcomed everyone to the meeting, calling attention to the successful conferences in Virginia and California and MLRC's other projects.

Director Elections

Ralph explained that, due to the staggered terms of the directors, all individuals on the slate are returning directors who are up for re-election: Dale Cohen of Cox Enterprises, Inc.; Ralph P. Huber of Advance Publications, Inc.; Karole Morgan-Prager of The McClatchy Company; Elisa Rivlin of Simon & Schuster; and Susan E. Weiner of NBC Universal, Inc.

Ralph made a motion to approve the re-election of the entire slate, and Jim Borelli seconded the motion. All present voted in favor and MLRC's Executive Director Sandy Baron voted the 51 proxies (that had been retained and were brought to the meeting) in favor. Ralph announced that Kenneth Richieri has agreed to be the new Chairman of the Board for the next two years.

Financial Report

Ralph introduced Ken Richieri, Chair of the Finance Committee, to provide the Finance Committee's report. Ken began by explaining that in his report, he would be supplementing the August 31, 2008, statement that was provided to meeting attendees and prepared in accordance with New York state nonprofit law with a more informative reporting on MLRC's finances based on the September 31, 2008, statement of financial condition.

He reported that MLRC is, and continues to be, soundly run from a financial point of view and that the organization's net cash balances are in the \$1.4 million range. In addition he stated that, as a result, the poor economic condition of the economy at large should not affect MLRC's provision of services, and the organization has the ability to expand those services if the board wishes to do so. He also reported that MLRC's assets are kept in Treasury bills and are secured against the volatile economy.

Comparing this year's income statements to last year's, Ken stated that there was \$910,000 total income last year and \$800,000 this year. If, however, one discounts the income from the biennial MLRC London Conference in 2007 and the receipt in 2007 of the net income payout from the 2006 NAA/NAB/MLRC biennial Conference, the income comparison is \$785,000 last year to \$795,000 this year, which indicates a very steady state in terms of income. Total payroll expenditures were \$510,000 last year and \$515,000 this year.

Ken next reported on year-to-date net income. This year, net income was in the \$55,000 range, while it was in the \$150,000 range last year; however, without the two extraordinary income items of last year that Ken mentioned previously, net income this year is \$55,000 compared to \$45,000 last year. He said that this year's budget projects a net income of \$20,000.

Executive Director's Report

Ralph next introduced Sandy's Executive Director's report. Sandy began her report by thanking MLRC office administrator Debby Seiden for her hard work on the administrative side of MLRC's operations; that without Debby's extraordinary efforts, MLRC's financial condition would not be as stable and positive. She also thanked all the MLRC Directors for all of the efforts that they put in on behalf of MLRC during the course of the year.

Sandy reported on the robust and growing Media Membership, which increased from 102 in 2007 to 107 in 2008. In order to sustain and grow the DCS membership, Sandy said that MLRC plans to reach out more aggressively to firms in California and especially firms that represent the digital community.

Next, Sandy introduced David Bralow to report on the 2008 NAA/NAB/MLRC Conference in Chantilly, Va. David reported that there was substantial attendance with no significant drop from the previous Conference. He noted that the Conference

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materials were more comprehensive than in previous years. This year, David said, the materials were provided to attendees on DVD to be “green,” but they will try to offer the DVD beforehand next time so people can better prepare for the sessions.

David reported that MLRC honored Hal Fuson of Copley Press with the MLRC First Amendment Leadership Award. He thanked Laura Handman for the successful politics and Internet panel on Wednesday night of the Conference and Hiscox for the reception and dinner party at the Smithsonian Air & Space Museum on Thursday night. David anticipated that planning for the 2010 NAA/NAB/MLRC Conference will start about this time next year.

Next, Sandy introduced Dave Heller to report on the 2009 London Conference. Dave reported that the committee has already begun planning the event, which will take place October 1-2, 2008, at Stationers Hall. The planning committee includes Dave Schulz, David McCraw, Slade Metcalf and Jay Brown on the U.S. side; and Nuala Cosgrove, Gill Phillips, Rosalind McInness, David Hooper and Mark Stephens on the UK side.

Sandy then presented on the Southwestern Law School / MLRC Conference scheduled for January 15, 2009. The conference will consist of three sessions: reality programming, covering celebrities, and the issues raised by the intermixing of commercial and noncommercial speech.

In May 2009, MLRC will again organize a conference on digital publishing issues at and with two programs at Stanford University.. Sandy said that information on the May conference at Stanford would be posted on the Stanford website in the next two weeks to 30 days.

Following Sandy, Dean Ringel reported on the First Amendment for the Future discussion sessions held in New York and Virginia which discussed how the changing face of media may or may not change First Amendment doctrinal approaches.

Legislative Issues

Next, Ralph introduced MLRC Staff Attorney Maherin Gangat who reported on legislative issues. On the right of publicity front, Maherin reported that New York, New Jersey, Michigan, Illinois and Washington state had introduced right of publicity bills in 2008. She anticipated that problems regarding the New York bill will resurface in 2009. While she said that the newest amendment improves it, the bill still has problems.

Sandy said that right of publicity, especially descendible right of publicity, should be on members' radar. She reported that, thanks to Maherin's efforts, MLRC now has a connection with the MPAA. MPAA, which has an extensive lobbying reach on this issue, is currently using language written by the MLRC coalition that attempts to exempt the wide range of media from the application right of publicity statutes. While MLRC cannot possibly engage on every right of publicity legislative matter, the MPAA generally does so and, at the least, may be offering a position that would protect to a large degree many of the important speech and press uses.. Sandy reported that MLRC's goal in the future is to get a better grip on legislation across the country, possibly by forging better relations with state press associations.

Continuing her report on legislative issues, Maherin reported that three states – Hawaii, Maine and Utah (which recently put into place an evidentiary rule that allows for a qualified privilege) – legislated shield laws. In addition, six or seven states will consider shield laws this year, and the federal bill passed the House and MLRC hopes it will pass the Senate, as well.

Ralph thanked Sandy and Maherin for their tangible legislative results that have had a positive impact on the MLRC membership. He next introduced Dean Ringel to report on the Defense Counsel Section.

Dean reported that DCS has had a very active year and that DCS membership increased to 217 in 2008. He noted the many useful publications that DCS members have produced, including the monthly Ethics Corner articles in the MediaLawLetter, the Practically Pocket-Sized Internet Guide, the 50-State Fair Report Survey, the checklist for sting stories and the model brief on newsgathering. Dean said that DCS wants to make an effort to bring digital media professionals into the membership.

Next, Ralph introduced Sandy to report on the MLRC Institute. Sandy said that the Institute was successful this year in part to MLRC Institute fellow Jennifer Liebman's work. She explained that the MLRC Institute is a 501(c)(3) education-oriented entity and that it is able to operate the First Amendment Speakers' Bureau with a grant from the McCormick Foundation.. The program has held talks on topics such as reporters' privilege and Internet publishing issues and there are over 30 upcoming talks scheduled. However, the McCormick Foundation will not continue its funding past February 2009. Sandy said that MLRC Institute needs \$35,000 to fund the program for another year.

To bring the annual meeting to an end, Ralph thanked the MLRC staff and closed the meeting.

Defense Counsel Section Reviews Projects and Goals at 2008 Annual Meeting

Kelli Sager Incoming DCS President; Elizabeth Ritvo Joins as Treasurer

The Defense Counsel Section's Annual Meeting was held on November 13, 2008, in New York at Carmine's Restaurant. DCS Executive Committee President Dean Ringel called the Annual Meeting to order, welcomed everyone to the lunch and thanked them for attending.

Dean Ringel commended the Conference Committee on its great work on September's 2008 NAA/NAB/MLRC Conference in Chantilly, Va., especially for the new venue and the dinner programs. He also discussed the First Amendment for the Future discussion sessions, which tackled the issues of the role of the First Amendment and how it might be applied differently as a result of new media. The DCS plans to pursue the subject both on a theoretical and a practical level over the next year.

President's Report & Election of Treasurer

The first order of business was the succession of DCS Executive Committee officers. In 2009, Kelli L. Sager will be DCS President; Robert D. Nelson, will be Vice President; and Nathan Siegel, Secretary. Next, Dean reported that the Executive Committee had nominated Elizabeth Ritvo of Brown Rudnick Berlack Israels in Boston, to be Treasurer. No other nominees for the Executive Committee had been received and, by a voice vote, the membership approved by acclamation Elizabeth Ritvo as Treasurer. Dean Ringel then explained that he would be joining former DCS President Peter Canfield in emeritus status.

Executive Director's Report

Sandy Baron began her report by thanking everyone for coming to the meeting and for all of the members' service to the organization during the past year. She noted that MLRC thrives on the participation of its membership and hopes members continue their support. Sandy gave a special thanks to the DCS Executive and Conference Committees for the time they have put in.

Conferences & Programs

Sandy started by reporting that the NAA/NAB/MLRC Conference went well this year, with some of the most suc-

cessful breakout sessions and boutiques they have ever had. She noted that distributing the conference materials on DVD was new for this year, but they will try to send it out in advance for the next conference. She also mentioned that Hal Fuson received the MLRC First Amendment Leadership Award on the Wednesday evening of the conference, followed by a terrific panel thanks to Laura Handman. Sandy also thanked Hiscox for the beautiful dinner reception at the Smithsonian Air and Space Museum and encouraged them to plan another event for the 2010 conference.

Next, Sandy reported that MLRC has started planning the London conference, which will take place October 1-2, 2009, at Stationers Hall, which is a Thursday and Friday.

Sandy discussed the next conference, the MLRC/ Southwestern Law School Media and Entertainment Law Conference in Los Angeles on January 15, 2009. The Conference will have three sessions on issues related to reality programming, covering celebrities, and problems that arise when one mixes commercial and noncommercial speech. Brochures for the conference have been mailed to members.

She also reported on the Digital Publishing Conference, jointly produced with Stanford Law School's Center for Internet & Society and Stanford Professional Publishing Courses, at Stanford University on May 14-15, 2009. The conference is still in the planning phase, but details should appear on the MLRC and Stanford websites shortly. Sandy noted the success of last year's program.

Sandy then thanked Kenneth Richieri for setting up the Forum on Digital Technologies held on November 12, 2008, and also thanked Michael Zimbalist of the New York Times for his participation. She asked members to keep submitting their ideas for MLRC projects and events and thanked everyone for what they've done this year for the organization.

Committee Reports

Dean then asked for the reports from the committees.

Advertising & Commercial Speech Committee

In Nancy Felsten's absence, Dean reported that one of the committee's projects last year dealt with Internet gam-

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Defense Counsel Section Reviews Projects and Goals at 2008 Annual Meeting

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bling. Going forward, the committee plans this year to address embedded advertising and FTC revisions on green advertising.

ALI Task Force Committee

Tom Leatherbury reported that nothing new has arisen on the enforcement of foreign judgments front, but he anticipates that ALI will move forward on its privacy project.

California Chapter

Kelli Sager reported that the California Chapter has conquered the challenge of assembling committee members by scheduling convenient meetings at Southwestern Law School. She stated that recent meeting topics have included prior restraints, SLAPP motions and how to best position a case in order to get fees awarded. Kelli encouraged all California members in the Los Angeles area to attend the meetings and for those outside the region to call into the meetings.

Entertainment Law Committee

Katherine Bolger reported that the committee meets every six weeks to discuss new developments in entertainment law. She also noted that the committee put out a report in December 2007 on "Copyright Infringement: The Standards in Your Circuit."

Ethics Committee

Timothy Conner reported that the committee has been publishing regular columns in the *MediaLawLetter* and is working on future columns. He also commended the individuals who organized and implemented the ethics session at the NAA/NAB/MLRC Conference this year.

International Media Law Committee

Kevin Goering thanked co-chairs Jan Constantine and David McCraw for their committee work. He reported on the success of the international media law panels at September's Virginia conference. He also reported that next year, for the first time, the committee will have a truly international vice-chair— Brian MacLeod Rogers of Toronto, who

set up the first MLRC-like organization outside the U.S., Ad Idem. Kevin noted that over the coming year the committee will be working on improving the MLRC website's international committee page with additional updates and information on international developments. Kevin also noted that planning has commenced for the MLRC's next conference in London scheduled for October 1-2, 2009. He thanked committee members Peter Bartlett of Australia and Mark Stephens of England for keeping MLRC apprised of international developments by submitting articles and recent cases.

Internet Law Committee

Mark Sableman reported that the committee published this year the "Practically Pocket-Sized Internet Law Treatise." Committee members contributed 21 short articles on a variety of Internet law issues. Mark said the committee plans to update the guide every 6 months and wants to continue to add articles about legal issues related to new technology.

Legislative Affairs Committee

Laurie Babinski spoke for the committee, noting that there will be a new Congress this year and that the committee plans to address libel tourism developments and issues of sports credentialing.

MediaLawLetter Committee

David Tomlin commended David Heller and the MLRC staff on the production of the *MediaLawLetter* every month. He reported that the committee is working with MLRC on plans to put the *MediaLawLetter* in a digital format and that Dave Heller and Phil Heijmans have produced a digital prototype.. Dave Heller added that MLRC will try to issue the *MediaLawLetter* in digital format beginning in January, but requests everyone's feedback on the look and functionality of the new design.

Membership Committee

In committee chair Guylyn Cummins's absence, Sandy reported that the Membership Committee is putting a special emphasis on California right now. The DCS has a great

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Defense Counsel Section Reviews Projects and Goals at 2008 Annual Meeting

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membership right now and does not feel a compelling need to bring in law firms just to boost numbers, but she noted, MLRC still wants lawyers and law firms who work in this area in the DCS. Sandy urged people to make the committee aware of firms that are not members currently but should be.

Model Shield Law Task Force

Chuck Tobin reported that the committee is continuing its efforts with the NAA and NAB. He noted that the committee's newest project is to catalog media-related subpoenas that have resulted in decisions by very fact-specific categories.

New Legal Developments

David Sternlicht reported that the committee continues to focus on broader trends. During the past year, he noted, the committee provided the impetus for an upcoming publication of an MLRC survey on the efforts by various states to adopt shield laws across the country and an MLRC Bulletin on right of publicity. David said the committee is also considering various approaches to the MLRC damages survey for libel and privacy cases.

Newsgathering Committee

Steve Zansberg reported that the committee has 28 members, but not all participate in bimonthly meetings, so new members are welcome to discuss prior restraint, access and claims for newsgathering activities, among other relevant issues. He noted that the committee recently published a 2008 Model Brief on Newsgathering Claims, which is a companion to the [MLRC Model Trial Brief on Libel and Privacy Claims](#). Steve said the committee also distributed the 2008 update to the [2006 Panic Book](#) and published a short memo on managing materials that was published in the *MediaLawLetter* and used at the 2008 NAA/NAB/MLRC Conference. He said that the committee plans to address costs associated with FOIA at the federal level and protocols for high-publicity media circus cases and the judiciary.

Pre-Publication/Pre-Broadcast Committee

Kai Falkenberg noted the committee's list of publications, including a Pre-publication / Pre-broadcast Check List on "Sting Stories." She also reported on a number of other projects that are in the works, including one on reality programming, a checklist for advertising issues and a blogging guideline report. Kai also mentioned that the committee, on its conference calls, discusses online comments, corrections, video and other cases of interest in the field of pre-publication and pre-broadcast review.

Pre-Trial Committee

Dan Kelly reported that the Pre-Trial Committee has had a very busy year. He noted that the committee has published four papers: 1) Reporter's Privilege: Can it be Perserved in a Civil Lawsuit Against the Press?; 2) Prevailing on Summary Judgment under a Negligence Standard; 3) Excluding Expert Witnesses in Actual Malice Cases; and 4) Motion To Stay Discovery Pending Resolution of a Dispositive Motion. Dan encouraged members to submit new ideas for papers and to join the committee. He noted that Bob Clothier will be joining the committee as co-chair for the coming year.

Trial Committee

Rob Harvey reported that the committee is following up on the update to the [Model Trial Brief](#). He noted that the committee has two projects planned for this year: one on special verdict forms – collected by Dave Sanders and Michael Sullivan – and an update of the jury instruction project, thanks to Eric Robinson and Jim Hemphill. He said the committee plans to provide the materials in a searchable format and welcomes suggestions.

Report on the MLRC Institute

Maherin Gangat began her report on the Institute by discussing its main project, the [First Amendment Speakers Bureau](#). Under the program, speakers are placed at public forums such as universities, libraries and bookstores with an outline and background materials in order to talk about matters related to the reporters privilege and to online publish-

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Defense Counsel Section Reviews Projects and Goals at 2008 Annual Meeting

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ing. Maherin said the publishing online talk deals with how the Internet has changed journalism, and the basics of privacy law, copyright and defamation. She noted that the Institute is in the process of taking on a third topic, censorship, and has completed about 50 talks this year, thanks to MLRC Institute fellow Jennifer Liebman. Maherin also reported that the Institute plans to create a presence online and welcomes ideas on how to do so.

Robert Clothier spoke briefly about his experiences participating in the MLRC Speaker's Bureau project, recommending the project to members as a useful and enjoyable experience.

MLRC Legislative Issues

Maherin reported on the status of the federal shield law, which she said MLRC has been engaged with since before its first introduction in Congress. She reported that a version of the shield law passed the House in October 2007 by an extraordinary margin. While our understanding is that it is unlikely that the bill will be up for vote in the Senate this term, there is hope that the shield law will be passed in both Houses of Congress in the next term. Maherin said that bill proponents are hopeful about its passage because President-Elect Barack Obama is a supporter of the bill.

On the state level, Maherin noted that MLRC will be publishing a report on recent efforts to pass state shield laws, and that six or seven states plan to introduce shield law bills this year.

Maherin next addressed right of publicity bills. The effort to enact a descendibility provision in New York has calmed down this Fall, but will probably pick up again in January. She noted that right of publicity bills and/or efforts to enact descendibility provisions, have also come to the forefront in Michigan, New Jersey (where it was withdrawn) and Connecticut.

New Business

Dean thanked again Sandy and the MLRC staff: Eric Robinson, Debby Seiden, Phil Heijmans, Maherin Gangat, Dave Heller, Jennifer Liebman and Stefanie Shaffer. There being no new business, the meeting was adjour

MLRC's 2008 Articles and Reports

[Motion To Stay Discovery Pending Resolution Of A Dispositive Motion](#)

(Pre-Trial Committee, Nov. 2008)

[Excluding Expert Witness in Actual Malice Cases](#)

(Pre-Trial Committee, Nov. 2008)

[Panic Book: The Fastest Possible Answers in an Emergency](#)

(Newsgathering Committee, Nov. 2008)

[Prevailing on Summary Judgment under a Negligence Standard](#)

(Oct. 2008)

[MLRC's Practically Pocket-Sized Internet Law Treatise](#)

(Sept. 2008)

[Fair Report Privilege: State by State Guide](#)

(Oct. 2008)

[Managing Materials: What Some News Organizations Have Done](#)

(Newsgathering Committee, April 2008)

[Sting Stories Checklist](#)

(Pre-Publication / Pre-Broadcast Review Committee, April 2008)

[Reporter's Privilege: Can it be Perserved in a Civil Lawsuit Against the Press?](#)

(Pre-trial Committee, April 2008)

[Religious Discrimination in the Workplace: An Outline of Issues](#)

(Employment Law Committee, March 2008)

[Basic Guide to Independent Contractor Law for Media Companies](#)

(Employment Law Committee, 2008)

[2008 Model Brief on Newsgathering Claims](#)

(Newsgathering Committee, April 2008)

2007 MLRC Dinner Transcript: "Witnesses to our Time: Independent Voices of the Documentary"

[Copyright Infringement: The Standards in Your Circuit](#)

(Entertainment Law Committee)

ETHICS CORNER

Inadvertent Disclosure of Privileged Matter Under New Federal Rule of Evidence 502

By Gary L. Bostwick

A new federal rule of evidence relieves litigating attorneys from a great many burdens and anxieties surrounding the inadvertent disclosure of information to opponents. It is designed to save time and money and streamline discovery proceedings that have become bogged down because of the justifiable fear that attorneys have that privileged communications will be revealed among the conceivably millions of communications electronically stored or otherwise.

In this era of eDiscovery and even considering the “clawback” procedures of Fed. R. Civ. Proc. 26(b)(5)(B)¹ already in place, this rule was sorely needed and sought after by attorneys of all stripes and species. But, as is so often the case, when it comes to new rules, the Judicial Conference giveth and the Judicial Conference taketh away. We all need to know how the new rule works, what new duties it imposes, some with ethical or malpractice implications, and what it will not do for us.

Fed. R. Evid. 502

On September 19, 2008, the new Federal Rule of Evidence, Fed. R. Evid. 502, was signed into law “to address a growing problem that is adding inordinate and unnecessary burden, expense, uncertainty, and inefficiency to litigation. The new [rule 502](#) reaffirms and reinforces the attorney-client privilege and work product protection by clarifying how they are affected by, and withstand, inadvertent disclosure in discovery.” (Congressional Record, House, Sept. 8, 2008, H7817) (emphases added).

The Judicial Conference concluded that the current law on waivers of privilege and work product is largely responsible for the rising costs of discovery, especially discovery of electronic information. The reason is that if a protected communication is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document, but to other cases and documents as well. The fear of waiver also leads to extravagant claims of privilege. (Congressional Record, House, Sept. 8, 2008, H7819). Rule 502 operates to avoid waiver as long as

reasonable precautions to avoid disclosure and prompt response to discovery of disclosure can be shown.

However, as a warning, we all must bear in mind the limited purpose and focus of the rule. The rule addresses only the effect of disclosure, under specified circumstances, of a communication that is otherwise protected by attorney-client privilege or of information that is protected by work-product protection, on whether the disclosure itself operates as a waiver of the privilege or protection for purposes of admissibility of evidence in a federal or state judicial or administrative proceeding. The rule does nothing to change the rules regarding whether a communication is privileged or qualifies as work-product.

The rule also does not alter the substantive law regarding when a party’s strategic use in litigation of otherwise privileged information obliges that party to waive the privilege regarding other information concerning the same subject matter, so that the information being used can be fairly considered in context.² The party using an attorney-client communication to its advantage in litigation intentionally waives the privilege as to other communications concerning the same subject matter, regardless of the circumstances in which the communication being so used was initially disclosed. Thus, FRE 502 has no application to such analyses.

With the above caveats in mind, we can proceed to the new protections provided by Rule 502. Section (b) of the new Rule is the crux of the matter.

(b) Inadvertent disclosure.--When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5) (B). Fed. R. Evid. 502(b).

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The standard set forth in the rule has been the majority rule in federal courts. Now it is uniform across the nation. To benefit from its salutary protections, a litigator must do two things: 1) take reasonable precautions to prevent disclosure, and 2) use reasonably prompt methods to get inadvertently disclosed materials back. Of course, one can immediately perceive that the meaning of “reasonable” is of crucial importance here. One of the first applications of the subdivision to actual facts is discussed below (the *Rhoads* matter), and, as would be expected, it relies upon former law in coming to the conclusion as to what is reasonable under the circumstances.

If subdivision (b) is the crux of the new Rule, subdivision (d) creates a mechanism for broad protection beyond its sister subdivision, constituting simultaneously a handy tool and a burden to add to litigators’ checklists.

(d) Controlling effect of a court order.--A

Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other Federal or State proceeding. Fed. R. Evid. 502(d).

A federal court order that the attorney-client privilege or work product protection is not waived as a result of disclosure in connection with the litigation pending before the court *governs all persons or entities in all state or federal proceedings, whether or not they were parties to the matter before the court.*

The new burden imposed by the rule is that *one must always consider obtaining an early court order under subdivision (b) in any Federal action.* Otherwise, waiver in other jurisdictions, courts or agencies or as to other parties will not be governed by Rule 502. An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order. Fed. R. Evid. 502(e).

Subdivision (d) is powerful protection indeed, but it will not come about automatically. The subdivision is designed to enable a court to enter an order, whether on motion of one or more parties or on its own motion, that will allow the parties to conduct and respond to discovery expeditiously,

without the need for exhaustive pre-production privilege reviews, while still preserving each party’s right to assert the privilege to preclude use in litigation of information disclosed in such discovery.

Subdivision (e) also allows for “party agreements” on the effects of disclosure. Although the agreement might be the first, quick line of defense, deciding not to turn the agreement into a court order should be rare. This subdivision makes clear that while parties to a case may agree among themselves regarding the effect of disclosures between each other in a federal proceeding, *it is not binding on others unless it is incorporated into a court order.* If a court order is entered, the disclosure is not considered a waiver in any other Federal or State proceeding.

Rhoads Industries v. Building Materials Corp.

Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am., 2008 WL 4916026 (E.D. Pa. Nov. 14, 2008), is a paradigmatic case that illustrates the step-by-step difficulties that arise with inadvertent discovery in this age of electronically stored information. In a breach of contract case, plaintiff Rhoads Industries inadvertently produced over eight hundred privileged, electronic documents.

Months before it filed its complaint, Rhoads began preparing for the litigation and retained consulting experts, something that is now almost *de rigueur* in eDiscovery matters.³ Rhoads directed its IT consultant to research various software programs. He purchased a computer program called Sherpa to perform the necessary electronic searches. The IT team began identifying mailboxes and e-mail addresses of persons that would have relevant information to Rhoads’s project with GAF. The team reasonably believed that the computer program would screen out all privileged materials.

Rhoads filed its complaint on November 13, 2007. Rhoads’s counsel met to discuss the scope of discovery and the search terms to be used. The IT consultant then identified a large volume of potentially responsive documents. During January and February 2008, using the search terms he received from Rhoads’s attorneys, the IT consultant initially identified 210,635 unique e-mail messages as being responsive to defendants’ discovery requests. In order to filter out privileged e-mails, he ran certain searches for sev-

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eral words in the address line of all emails and thus designated 2,000 e-mails as privileged; these e-mails were removed from the folder and ultimately produced to defendants. The documents identified by the search *were not* placed on any privilege log, a fact that resulted in eventual waiver.

Due to the large number of e-mails remaining (208,635), Rhoads's counsel revised the keyword search to arrive at 78,000 e-mail messages it believed to be responsive and non-privileged. Rhoads then conducted a separate manual review of e-mails from specific e-mail mailboxes and also reviewed twenty-two boxes of non-electronic documents for privilege. Rhoads produced to defendants three hard drives containing the responsive electronic documents, including the 78,000 e-mails identified by the Sherpa search.

Defense counsel then notified Rhoads's counsel that Rhoads had produced what appeared to be privileged documents. Rhoads asserted that the production was inadvertent and that no privilege had been waived. Ultimately, these assertions were tested in hearings held by the district court.

The court found that the disclosure had been inadvertent and then applied the following criteria, drawing upon established law before the enactment of Rule 502, to determine whether efforts by Rhoads to avoid inadvertent disclosure had been "reasonable." It considered:

- (1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production.
- (2) The number of inadvertent disclosures.
- (3) The extent of the disclosure.
- (4) Any delay and measures taken to rectify the disclosure.
- (5) Whether the overriding interests of justice would or would not be served by relieving the party of its errors.

The fact that Rhoads retained a consultant who recommended and used a fairly sophisticated screening device worked in its favor because of an Explanatory Note to Rule 502:

A party that uses advanced analytical software applications and linguistic tools in screening for

privilege and work product may be found to have taken "reasonable steps" to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant.

Fed.R.Evid. 502 advisory committee's note.

The court ruled as follows with respect to the documents Rhoads has produced by not logged as privileged. "Concerning the privileged documents produced by Rhoads which were not listed on any of the logs served by June 30, 2008, the obligation to log privileged documents is mandatory under the specific terms of Rule 26(b)(5). Despite Rhoads's attempts to justify, explain and minimize its failure to log all of its inadvertently privileged documents by June 30, 2008, the Court finds that the delay in doing so until November 12, 2008 is too long and inexcusable." *Rhoads Industries, supra*, 2008 WL 4916026.

Then, as to the inadvertent disclosure the court balanced the facts in a typical manner and found that no waiver had occurred. In this case, there was no dispute that the production of the privileged documents was inadvertent; the dispute was over whether the steps taken by Rhoads were "reasonable."

"Consistent with the Committee Note to Rule 502, I conclude that once the producing party has shown at least minimal compliance with the three factors in Rule 502, but 'reasonableness' is in dispute, the court should proceed to the traditional five-factor test discussed above." *Id.* The court helpfully remarked that no matter what methods an attorney employed, an after-the-fact critique can always conclude that a better job could have been done. *Id.*

"Although Rhoads took steps to prevent disclosure and to rectify the error, its efforts were, to some extent, not reasonable. As to the five-factor balancing test, reviewed in the context of the evidence summarized above, I find that the first four factors favor Defendants. The most significant factor . . . is that Rhoads failed to prepare for the segregation and review of privileged documents sufficiently far in advance of the inevitable production of a large volume of documents. Once this lawsuit seeking millions of dollars in damages

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was filed, Rhoads was under an obligation to put adequate resources to the task of preparing the documents, which was completely within Rhoads's control. An understandable desire to minimize costs of litigation and to be frugal in spending a client's money cannot be an after-the-fact excuse for a failed screening of privileged documents . . .

"I find that the fifth factor, the interest of justice, strongly favors Rhoads. Loss of the attorney-client privilege in a high-stakes, hard-fought litigation is a severe sanction and can lead to serious prejudice. Although I have little knowledge of the content of Rhoads's privileged documents, I assume they contain candid assessments of the facts and strategy in this case, as to which Rhoads understandably has a high degree of proprietary interest.

"On the other hand, denying these documents to Defendants is not prejudicial to Defendants be-

cause, in the first place, they have no right or expectation to any of Rhoads's privileged communications, and further, because of my ruling on the

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privileged documents not logged by June 30, 2008, the Defendants will receive a significant number of privileged documents. . . ." *Id.*

Applying all of the above, the court found that the defendants did not meet their burden of proof as to the privileged documents logged by June 30, 2008. *Id.* No waiver occurred.

The case illustrates many of the elements of a typical eDiscovery matter and how the potential damage due to waiver of privilege and work-product protections can be avoided. Litigation attorneys must still proceed with caution, but the angst caused by potential waiver in cases of error or inadvertence has been greatly diminished in federal proceedings.

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¹ *"Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved." Fed. R. Civ. Proc. 26(b)(5)(B).

² Fed. R. Evid. 502(a) Scope of waiver. In federal proceedings, the waiver by disclosure of an attorney-client privilege or work product protection extends to an undisclosed communication or information concerning the same subject matter only if that undisclosed communication or information ought in fairness to be considered with the disclosed communication or information.

³ See the Explanatory Note to Rule 502 below regarding "advanced analytical software applications and linguistic tools in screening" providing almost a presumption of reasonable efforts. Computer consultants around the world must have cheered in unison when the Rule was enacted with this Explanatory Note.