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MEDIALAWLETTER

Reporting Developments Through February 28, 2006

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Fourth Circuit Upholds Maryland Governor's Boycott of Two Journalists

Court Finds No Actionable Retaliation

By Charles D. Tobin

Because "government officials frequently and without liability evaluate reporters and reward them with advantages of access," Maryland's governor did not violate two Baltimore journalists' First Amendment rights by banning all executive state officials from speaking to them, according to a new decision by the U.S. Fourth Circuit Court of Appeals. *The Baltimore Sun Co. v. Ehrlich*, 2006 WL 335900 (4th Cir. February 15, 2006) (Niemeyer, Luttig, Traxler, JJ.).

In an unfortunate ruling that can only fuel the increasingly adversarial nature of the relationship between officials and the press, the panel held that – instead of the courtroom – "the 'rough and tumble' political arena" is where disputes like this should be resolved.

The court ignored entirely the argument made by an amicus coalition of newspapers and news associations that smaller news outlets without resources to contest or report around reporter boycotts could be forced to alter coverage.

Background

The court's decision upheld a lower court ruling that Maryland Governor Robert L. Ehrlich did not commit an unconstitutional First Amendment retaliation by banning officials from providing any comment to reporter David Nitkin and columnist Michael Olesker of *The Sun*. The Fourth Circuit decision came in the first of two very similar appeals, the other pending in the Sixth Circuit, arising out of official boycotts of journalists.

In November 2004, Governor Ehrlich's press aides in an e-mail instructed all employees in the state "executive department or agencies" from speaking with the journalists, saying that his administration "feels that currently both are failing to objectively report on any issue dealing with the Ehrlich-Steele Administration."

The journalists filed affidavits in the lawsuit attesting that previously informative state officers, in the days after the ban, refused to give them any oral information or to return phone calls. Additionally, Nitkin attested that, while he was still able to attend press conferences that were open to larger groups of reporters, he was denied access to the smaller press briefings in the governor's conference room, which the governor said were invitation-only events.

In February 2005, a federal judge in Baltimore dismissed the journalists' and *The Sun's* lawsuit that claimed the selective exclusion of the journalists violated their First Amendment rights under 42 U.S.C. §1983 because it constituted an unlawful government retaliation for speech. The court also denied the journalists' request for an injunction. *See* 2005 WL 352596 (D. Md. Feb. 14, 2005) (Quarles, J.). *See also MLRC MediaLawLetter* Feb. 2005 at 43.

Fourth Circuit Decision

The 3-0 decision of the Fourth Circuit panel, written by Judge Paul V. Niemeyer, relied almost entirely the court's unwillingness to distinguish between the granting of exclusive interviews on the one hand, and the targeted and wholesale exclusion of select journalists on the other.

The court cited what it termed the "common knowledge" that "reporting is highly competitive, and reporters cultivate access – sometimes exclusive access – to sources, including government officials." The court wrote that officials "regularly subject all reporters to some form of differential treatment based on whether they approve of the reporters' expression." To the court, both the situation where a governor favors certain journalists with preferred access to information, and the boycott of the Sun journalists:

> "present instances in which government officials disadvantage some reporters because of their reporting and simultaneously advantage others by granting them unequal access to nonpublic information. Thus, whether the disfavored reporters number two or two million, they are still denied

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Fourth Circuit Upholds Maryland Governor's Boycott of Two Journalists

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access to discretionarily afforded information on account of their reporting."

Finding preferential and selectively punitive treatment of journalists "materially indistinguishable" – and the "challenged government response … so pervasive a feature of journalism and the journalists' interaction with government" – the Fourth Circuit held:

> "[N]o actionable retaliation claim arises when a government official denies a reporter access to discretionarily afforded information or refuses to answer questions."

The court specifically rejected the journalists' argument, which was based on previously prevailing First Amendment precedent in this and other jurisdictions, that a government action is unconstitutional where it would chill "a person of ordinary firmness" in the exercise of their free speech rights. Instead, the court fashioned a test that measured the conduct by the reaction of "a reporter of ordinary firmness," finding that:

> "It would be inconsistent with the journalist's accepted role in the 'rough and tumble' political arena to accept that a reporter of ordinary firmness can be chilled by a politician's refusal to comment or answer questions on account of the reporter's previous reporting."

The court also held that the journalists had not demonstrated that they actually were "chilled from expressing themselves." The panel cited to evidence put in by the governor that each journalist had written the same amount of stories or columns about state government in an equal time period before and after the ban.

The court, however, ignored entirely the argument made by an amicus coalition of newspapers and news associations that smaller news outlets without resources to contest or report around reporter boycotts could be forced to alter coverage. The court also did not address the journalists' and amici's argument that in addition to First Amendment retaliation, the boycott constituted viewpoint-based discrimination.

As for the authority to issue the ban, the court held that the governor "himself need not talk to reporters," and that – despite the unbounded language in the ban – his "internal directive … extended only to the official conduct and speech of others in the executive branch."

In a footnote the court seemed to suggest that government employees themselves may have a claim to the extent the order "chills employees' constitutionally permissible speech," but said that the question was not before it.

Citing the upcoming election season in which it will cover Governor Ehrlich's re-election bid, *The Sun* reported in the newspaper that it will not seek further review of this decision.

The Ehrlich lawsuit was one of two nearly identical cases working their way through the appeals courts. The other, *Youngstown Publishing Co. v. McKelvey*, involves a ban on an Ohio newspaper by the mayor of Youngstown. *See MLRC MediaLawLetter* May 2005 at 5; Aug. 2005 at 19.

The Sixth Circuit will hear an appeal in that case after the district court last year dismissed the newspaper's lawsuit.

Charles D. Tobin, Judith F. Bonilla and Rachel E. Fugate of Holland & Knight LLP in Washington D.C. represented the Baltimore Sun. Amici counsel in support of the journalists were Kevin T. Baine, Adam L. Perlman and Zoe C. Scharff of Williams & Connolly in Washington D.C. Maryland Governor Robert L. Ehrlich was represented by Margaret Ann Nolan, Cynthia G. Peltzman and William F. Brockman, of the Maryland Attorney General's Office.

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CLOSING ARGUMENTS

A collection of closing argument transcripts from recent media trials is now available on the MLRC website at

http://www.medialaw.org/Litigation Resources/ClosingArguments

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MLRC Report on Trials and Damages

Review of 2005 Trials and Long Term Trends

MLRC's annual REPORT ON TRIALS AND DAMAGES was published this month. There were 14 trials this past year involving media defendants on libel, privacy and related claims based on the gathering and publication of information to the public.

The REPORT is an ongoing study of trials with libel, privacy and related claims against media defendants. What began as a report on 54 trials from 1980 through 1982, now includes data on over 500 trials from 1980 to the present, showing the results and trends in this area of litigation.

Trials in 2005

Media defendants won seven trials in 2005, and lost seven trials. Among the high-profile trials of the year was the *Chicago Tribune's* trial win in a libel lawsuit filed by a former prosecutor – *Knight v. Chicago Tribune*; and the Boston Herald's loss in a libel suit brought by a sitting judge – *Murphy v. Boston Herald.* The full list of the year's trials appears on page 7.

The 2005 REPORT includes new statistics on media defendants' success following post-trial motions and appeals.

The 14 trials over the year are consistent with the steady long-term trend of fewer media trials per year. In the 1980s – when then-LDRC first began monitoring trials – there were an average of 27 trials per year. That dropped to 18.8 trials per year in the 1990s. So far this decade this has further declined to an average of only 13.8 trials a year.

The damage awards in 2005 were relatively modest – an average of $369,000; and a median of $75,000. The highest award came in the *Murphy* trial, $2.09 million. The six other plaintiff awards were all under $250,000.

Media Trials 1980 to 2005

The 2005 REPORT analyzes 541 trials since 1980, which led to 531 verdicts. Media defendants have won 214 of 531 trial verdicts (40.3 percent). Plaintiffs' average damage award was $2.9 million.

The 2005 REPORT includes new statistics on media defendants' success following post-trial motions and appeals. The data shows that media defendants ultimately won 51.4 percent of the cases that went to trial and verdict.

In contrast, plaintiffs won and got to keep the entire award from trial in 18.7 percent of the cases that went to trial and verdict.

The average damage award at trial, $2.9 million, drops to an average final award of $1.4 million after post-trial motions and appeals, excluding cases that settled. The median drops from $278,000 to $90,500.

Trends

Several notable trends are apparent from the data in MLRC's REPORT.

- Media defendants are winning more trial verdicts. The win rate has gone up decade by decade: from 36.3 percent in the 1980s, to 40.2 percent in the 1990s; to 53.8 percent so far this decade.
- There is an upward trend in damage awards. In the 1980s, 21.8 percent of awards were over $1 million; in the 1990s, 30.0 percent of awards reached this threshold. So far this decade, the share of awards is 37.8 percent.
- There has been a large decrease in the percentage that punitive damages contribute to awards. In the 1980s, 61 percent of damage dollars awarded were punitive. That declined to 51.2 percent in the 1990s with the exceptional verdict in *MMAR v. Dow Jones* excluded. And so far this decade punitive awards have been only 7.3 percent of total awards.

Other Findings in MLRC's 2005 Report

Defamation is most frequently litigated claim. Defamation claims were litigated in 87.6 percent of trials, and in 73.8 percent of the trials it was the only claim litigated. False light is the second most common claim (9.1 percent of trials); followed by general invasion of privacy (5.7 percent of trials) and intentional infliction of emotional distress (4.3 percent of trials).

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MLRC Report on Trials and Damages

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Public vs. Private Figure Plaintiffs. Public officials and figures were plaintiffs in 247 trials (51.8 percent of trials with known plaintiffs); private figures, in 230 (48.2 percent). Defendants win slightly more trials involving public plaintiffs, 40.9 percent, than trials involving private figure plaintiffs, 38.7 percent.

Print Media Defendants. The vast majority of trials (68.6 percent) involved print media defendants, primarily newspaper defendants. In the 1980s, print defendants won 34.6 percent of their trials; rising to 37.5 percent in the 1990s and 44.2 percent this decade. The number of print media trials has declined each decade, comprising most of the overall decline in the number of trials each year.

Audio-Visual Media Defendants. There have been 158 trials involving audio-visual media defendants, primarily broadcast television (119 trials). These defendants have fared better than print media defendants throughout the study. Overall, audio-visual defendants have won 48.7 percent of their trials (77 of 158 trials); compared to print media defendants' win rate of 36.7 percent (136 wins in 371 trials). While the average number of print media trials each year has declined from decade-to-decade, the number of a-v trials has remained virtually constant throughout the study.

Defense Win Rate Improving in Jury Trials

The overwhelming majority of trial verdicts have been decided by juries (442 out of 531), and defendants have won 33.5 percent of these trials. This percentage has steadily increased : in the 1980s, defendants won only 28.7 percent of trials decided by juries. That increased to 34.6 percent in the 1990s, and even further to 47.0 percent this decade.

In 2005, juries decided nine of the year's 14 trials, and rendered verdicts for defendants in three (33.3 percent). This is the lowest win rate before juries so far in the decade, and bucks the long term general trend of an increasing defense victory rate in this category.

Damage Awards

In the 1980s, the average damage award was over $1.5 million. In the 1990s that rose to almost $5 million – largely due to a $222.7 million award in *MMAR v. Dow Jones.* Excluding *MMAR*, the average award in the 1990s was $3.0 million, close to the 2000s average of $2.8 million.

The median damage award has increased from decade to decade: from $200,000 in the 1980s, to $373,000 in the '90s, to $626,000 in the current decade.

Post-Trial & Appellate Results

Defendants' Post-trial Motions. Defendants' success in post-trial motions has been roughly consistent. In the 1980s, 26.5 percent of plaintiffs' awards were modified by post-trial motions; in the 1990s, 19.1 percent were modified. So far in the 2000s, defendants' post-trial motions have resulted in modifications of 27.0 percent of jury awards. Overall, 76 of the 316 awards to plaintiffs since 1980, or 24.0 percent, have been modified by defendant's post-trial motions.

Plaintiffs' Post-trial Motions. Plaintiffs, on the other hand, have had little success with their post-trial motions. Plaintiffs have succeeded only three post-trial JNOV motions, and only three plaintiffs' motions for a new trial following a defense verdict were successful. In the end, only 2.3 percent of defense victories have been modified on plaintiffs' post-trial motions

Appellate Results. After excluding awards in trials that were settled, the average final award in the 1980s was $421,000 and the median was $75,000. The average final award in the 1990s was a bit higher, $451,000, while the median dropped to $63,000. So far in the 2000s, the average final award has jumped to $634,000, but the median has leapt up more than six-fold, to $395,000.

Final Results of Trials. Overall, defendants ultimately won 51.4 percent of the cases with trial verdicts, while plaintiffs wholly or partially won 32.6 percent. There were post-verdict settlements of 12.4 percent of cases that went to trial.

The MLRC REPORT is mailed to all Media and DCS members, and is available to Media and Enhanced DCS members on MLRC's web site, www.medialaw.org. Additional print copies are available for $35 by calling (212) 337-0200.

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Media Trials in 2005

Plaintiff Wins Over the Past Year

- *Aficial v. Mantra Films*, (Va. Cir. Ct., Virginia Beach jury verdict June 29, 2005).

The jury awarded the young women plaintiff $150 in compensatory damages and $60,000 in punitive damages on a misappropriation claim against the makers of the "Girls Gone Wild" video series. Plaintiff was filmed kissing a girlfriend and the scene was included in a DVD from the series.

- *Mann v. Abel*, No. 14180/2003 (N.Y. Sup. Ct., Westchester Co. jury verdict Oct. 20, 2005).

The jury awarded a local town official $75,000 in compensatory damages and $30,000 in punitive damages over a critical newspaper column that alleged plaintiff covered up "political favors" and "pulled strings" in town.

- *Murphy v. Boston Herald*, Civil No. 02-2424B (Mass. Super. Ct., Suffolk Co verdict Feb. 18, 2005).

The jury awarded the plaintiff, a sitting judge, $2.09 million in damages, based on statements in various *Boston Herald* articles and television interviews by a reporter that plaintiff told a teenage rape victim to "get over it."

- *Price v. Blair,* No. 04–4194-E (Tex. Co Ct. at Law No. 5 default judgment Nov. 14, 2005).

A Texas judge awarded a local elected official $852,000 damages against a weekly newspaper that criticized plaintiff after the newspaper refused to comply with discovery orders

- *Reilly v. Boston Herald,* Civil No. 98-294 (Mass. Super. Ct. jury verdict Nov. 4, 2005).

The jury awarded $225,000 in damages to a veterinarian on a libel claim against the Boston Herald for publishing pet owners' allegation that plaintiff failed to properly treat their dog and covered up the records.

- *Wiggins v. Mallard*, No. (Ala. Cir. Ct., Escambia County jury verdict Oct. 27, 2005).

The jury awarded one dollar in libel damages award to a father and son over a newspaper's erroneous arrest report. (Damages were split between the newspaper and the police chief source for the article).

- *Ziglar v. Media Six, Inc.*, No. CL02000132-00 (Va. Cir. Ct., Roanoke City jury verdict Dec. 15, 2005).

Jury award of $75,000 to a prosecutor over a letter to the editor from a convict published in a local newspaper. The letter accused plaintiff of trumping up criminal charges against the convict.

Defense Wins Over the Past Year

- *Columbus v. Globe Newspaper Co, Inc.*, Civil Action No. 00-724 (Mass. Super. Ct., Middlesex County, jury verdict Feb. 2, 2005).

Jury verdict for the *Boston Globe* in a libel suit over an articles about alleged corruption, conflicts of interest, and favoritism in a vocational high school home building program.

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- *Davis v. Marion Star*, No. 1998-CP-3300372 (S.C. Cir. Ct., Marion County directed verdict May 3, 2005).

Directed verdict for the defense for lack of actual malice on a public official's libel claim against a local newspaper for its coverage of plaintiff's statements at a town council meeting.

- *Divita v. Ziegler*, Civil No. 03-9214 (Ky. Cir. Ct. jury verdict May 24, 2005).

Jury verdict for a radio talk show host and distributor over on-air comments made about the host's personal relationship with plaintiff, also a radio show host.

- *Jarosak v. Bloyer*, (Ind. Super. Ct., Porter County directed verdict entered Jan. 25, 2005).

Directed verdict for the host of a cable television show for lack of evidence of actual malice over statements that plaintiff, a retired police chief, was found in the back seat of his police car with a teenage girl, and that he had pointed a gun at his ex-wife's head.

- *Knight v. Chicago Tribune Co.*, No. 2000-L-004988 (Ill. Cir. Ct. jury verdict May 20, 2005).

Jury verdict for a reporter and newspaper on a libel claim by a former prosecutor over coverage of a criminal trial in which the plaintiff and other government officials were accused of framing a criminal defendant for murder.

- *Pitts Sales, Inc. v. King World Productions, Inc.*, (S.D. Fla. bench verdict July 29, 2005).

Bench verdict rejecting plaintiff's claim for trespass (for nominal damages) over hidden camera filming at plaintiff's magazine subscription sales business by a producer working as an employee at the company.

- *Thermal Engineering Corp. v. Boston Common Press, Ltd.*, (S.C.Ct.C.P directed verdict June, 2005).

Directed verdict for defendant for lack of actual malice on a libel claim over a *Cook's Illustrated* magazine article that rated plaintiff's grill "not recommended."

A full report on these cases and the year's results are analyzed in MLRC's 2005 Report on Trials & Damages.

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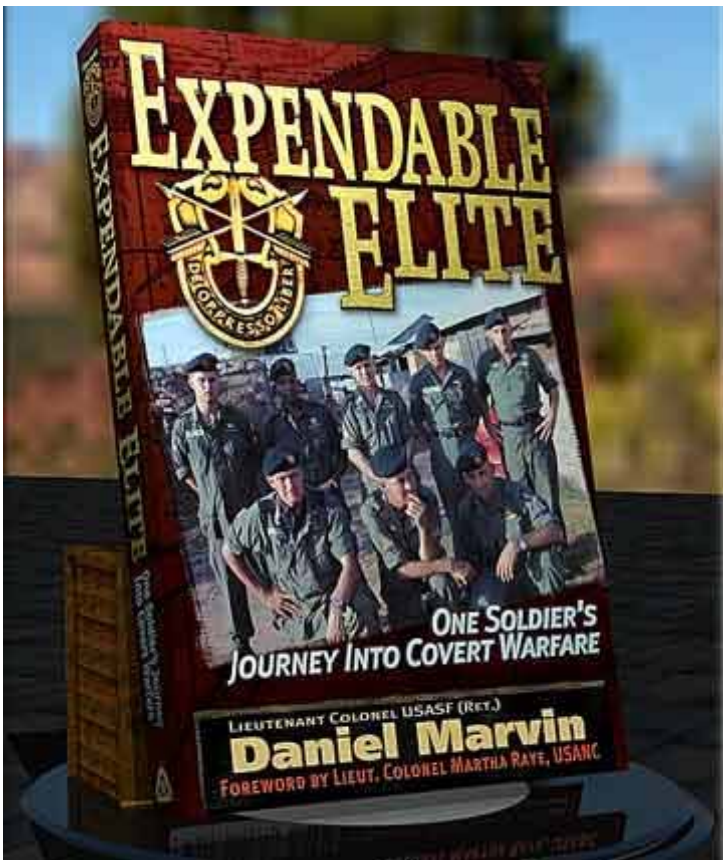
South Carolina Jury Finds Vietnam Memoir Not Libelous

Retired Colonel and Publisher Win Negligence Trial – Libel Counterclaim Also Rejected

At the end of January, a jury in federal district court in Charleston, South Carolina returned a verdict in favor of Daniel Marvin, a retired lieutenant colonel, and Trine Day, a small Oregon-based publisher specializing in conspiracy theory books, in a libel suit brought by seven Vietnam-era Green Berets who accused Marvin of writing a fictionalized and defamatory account of their activities in the war. *Tuttle, et al. v. Marvin*, No. 04-00948 (D. S.C. jury verdict Jan. 30, 2005) (Norton, J.).

After only two hours of deliberations, the jury found that plaintiffs had not proven "each of the elements of defamation" against the defendants. The jury also rejected a libel counterclaim filed by defendants against plaintiffs for calling the book "100 percent lies" – a result leading to numerous news articles describing the result as "a draw."



Background

Defendant Daniel Marvin is a retired special forces officer who served in Korea and Vietnam. He wrote a book entitled "Expendable Elite: One Soldier's Journey Into Covert Warfare." The book purports to tell the story of a secret CIA mission in the mid 1960's to assassinate Cambodian Crown Prince Nordum Sihanouk, how Marvin aborted the mission, evaded the CIA's effort to kill him and his team for foiling the plot, culminating in a dramatic rescue of American Green Berets and hundreds of South Vietnamese.

The book begins with Marvin's commanding officer giving him a top secret mission:

> "Dan, if you take command ... and accept this TOP SECRET mission, you'll be on your own. When you leave this room, it will be as if we never met. We can't and won't stand behind you if you are caught doing what I am about to tell you to do. Got it, Captain?"

The book was apparently shopped to over a hundred publishers before it was accepted in 2003 by Trine Day, based in Walterville, Oregon Trine Day was started in 2002 and has published just eight books, all exploring various conspiracy theories. Among its other offerings are "America's Secret Establishment: An Introduction to the Order of Skull & Bones," "Ambushed: Secrets of the Bush Family, the Stolen Presidency, 9-11, and 2004," and "Welcome to Terrorland Mohamed Atta & the 9-11 Cover-up in Florida."

The lead plaintiff in the case was South Carolina resident William Tuttle, Marvin's commanding officer in Vietnam, who according to the book sent Marvin on the top secret mission. Tuttle was joined in the suit by six former special forces soldiers who served under Marvin. They filed suit against Marvin, Trine Day, and book distributor Chicago Review Press in March 2004.

The complaint did not cite any specific passages from the book. Instead it more generally alleged that the book was "fabricated" and a "fantasy" and was defama-

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South Carolina Jury Finds Vietnam Memoir Not Libelous

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tory because it had plaintiffs participating in violations of international law and the Uniform Code of Military Justice, such as attempting to assassinate Prince Sihanouk and ultimately defying military orders.

Several of the plaintiffs later acknowledged that they had cooperated with Marvin by supplying him with recollections of events from Vietnam – but did so with the understanding that Marvin was writing a work of fiction. Indeed, some later testified that they received a copy of the book prior to publication and still believed it was a work of fiction.

In addition to this book, Marvin claims to be working on a book that will reveal the "true" killer of President John F. Kennedy.

Pretrial Rulings

The case was assigned to Judge David C. Norton who issued a number of unpublished orders. Among the significant rulings, Judge Norton granted a summary judgment motion brought by the book distributor Chicago Review Press, dismissing it from the case. (Marvin and Trine Day apparently did not move for summary judgment.)

Judge Norton ruled that plaintiffs were private figures and that plaintiffs would have to prove negligence to recover actual damages; and actual malice to recover punitive damages. Marvin and Trine Day were deemed limited purpose public figures for their libel claim against the plaintiffs for stating that the book was "100 percent lies." The defendants also brought a claim for abuse of process which was dismissed after trial and not presented to the jury.

Jury selection was held on January 4, 2006 and an eight person jury of four men and four women were selected. Prior to trial, Judge Norton gave the parties draft jury instructions.

The Judge's cover note stated that:

> "Defamation law is uniquely convoluted, and the counterclaims and various standards involved in this case only further complicate the instructions. A jury will have a difficult time parsing it all out."

Judge Norton proposed giving jurors 35 verdict forms to answer all the claims in the case. That was ultimately reduced by 14 when he dismissed the abuse of process claim.

Trial Testimony

The trial began on January 23rd. According to news reports plaintiffs attempted to prove that the book's account of a secret mission into Cambodia was false. Defendants attempted to prove their version true and that the book was not defamatory of the individual plaintiffs.

Plaintiff Tuttle was deemed too ill to testify, but other plaintiffs testified at trial that the book's account of a secret mission to Cambodia was false. One plaintiff, for example, read from the book and stated that descriptions of firefights and combat were "fantasized." Another testified that the book was an exaggerated version of their individual stories.

Plaintiffs also proposed calling a host of expert witnesses, including a person who would testify that the author of the introduction to the book is illiterate. That witness was apparently excluded.

Marvin testified about the material and tapes he received from plaintiffs. He also reportedly introduced the deposition of a Vietnamese translator to verify his accounts.

Verdict Form

Jurors were given separate special verdict forms for both sides' libel claims. The first question on each form asked whether "each of the elements of defamation" was proven by a preponderance of evidence. Jurors answered "no" to this question on all forms and did not answer any of the additional questions about fault and damages.

Defendants Daniel Martin and Trine Day were represented by Christopher Ogiba of Nexsen Pruet Jacobs Pollard and Robinson in Charleston, S.C. and Barry A Bachrach of Bowditch and Dewey in Worchester, Mass. Plaintiffs were represented by David Collins, Mt. Pleasant, SC; William Mark Koontz, Smith Collins Newton & Koontz, Charleston, SC; and Benjamin Deaver and Bobby Deaver of Deaver & Deaver, Wilmington, NC.

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Texas Court Reconsiders Private Facts Suit

Dismisses Claim Over Newsworthy Article

By Jonathan Donnellan and Kristina E. Findikyan

The Western District of Texas has corrected what the MLRC in December called "one of the strangest rulings of the year," vacating its earlier ruling that a private facts claim arising from a newsworthy *San Antonio Express-News* article could survive a motion to dismiss, and holding on reconsideration that because plaintiff could not establish an essential element of the invasion of privacy claim, the complaint was dismissed. *Lowe v. Hearst Communications, Inc. and Hearst Newspapers Partnership, L.P.*, No. SA-05-CA-554-OG, 2006 WL 335690 (W.D. Tex. Feb. 6, 2006) (Garcia, J.).

The Article

In June 2004, the *San Antonio Express-News* published a front-page investigative article entitled "Sex, lawyers, secrets at heart of sealed legal case," which described a blackmail scheme carried out by two prominent (and married) San Antonio lawyers who bilked several men out of tens of thousands of dollars.

The article reported that upon discovering that his wife Mary had engaged in a number of extramarital affairs with men she had met on the Internet, attorney Ted Roberts prepared and delivered to Mary's lovers draft legal papers threatening litigation and draft "settlement" agreements.

The draft petitions invoked Rule 202.1(b) of the Texas Rules of Civil Procedure, which allowed Roberts to investigate potential legal grounds for a lawsuit through depositions. Claiming that he needed to investigate legal claims ranging from deviant sexual intercourse to insider trading, Roberts named the lovers' wives and business colleagues as deponents. As many as five of the men entered into settlement agreements, resulting in payments between $75,000 to $155,000.

The underlying documents, described as the "202 Documents," were under seal in a Texas trial court presiding over a business dispute between Ted Roberts and a former law colleague. Roberts' adversary submitted the 202 Documents to the court in connection with his case, characterizing them as "part of a blackmail scheme."

The *Express-News* intervened in the matter to obtain access to the 202 Documents. After a series of trial court orders unsealing and resealing the 202 Documents, the Texas Court of Appeals issued an opinion and order denying the *Express-News* access to the 202 Documents and stating that the 202 Documents and "the information contained therein are protected from release to the public, not just the parties and their agents." The Texas Supreme Court denied the *Express-News'* petition for review.

Independent of the discovery process, the Express-News obtained the 202 Documents from a confidential source and thereafter published the article at issue. The Robertses subsequently declared bankruptcy.

The Lawsuits

In March 2005, Ted and Mary Roberts and their law office filed an unverified motion for contempt and sanctions in Bexar County against the *Express-News*, contending that the publication of the article violated the orders of the Texas Court of Appeals. To date, no steps have been taken to prosecute the motion.

A few months later, in June 2005, the bankruptcy trustee for the Roberts' estates initiated a federal court action against Hearst Communications, Inc. and Hearst Newspapers Partnership L.P., alleging claims for the publication of private facts and intentional infliction of emotional distress. Central to the plaintiff's claims was the allegation that the *Express-News* had published the article in direct contravention of court orders.

Hearst moved to dismiss the complaint, highlighting, among other things, the newsworthiness of the article and the absence of any extreme and outrageous conduct by the *Express-News*. Although not relevant to the claims alleged in the complaint, Hearst informed the federal court that the *Express-News* had not published the article in contravention of any court order.

Hearst contended that consistent with *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984), and its progeny, the order

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Texas Court Reconsiders Private Facts Suit

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of the Texas Court of Appeals was limited to those documents obtained through the discovery process. Any interpretation of the appellate order as extending to documents obtained independent of court process, Hearst argued, would transform the appellate order into an unintended unconstitutional prior restraint.

The First Opinion

As reported in the December 2005 *MLRC Media Law Letter*, on December 7, 2005, the Court issued an opinion and order granting in part and denying in part Hearst's motion to dismiss. The court dismissed the plaintiff's intentional infliction of emotional distress claim, finding the "gap-filler tort" precluded under Texas law because plaintiff's action was grounded on an invasion of privacy which itself provides damages for emotional distress. The court also found that under Texas law the publication of truthful, albeit embarrassing, information is not extreme and outrageous conduct.

In light of the article newsworthiness, the plaintiff was unable to establish a prima facie claim for publication of private facts.

With respect to the private facts claim, the Court was clear that the article reported on a matter of great public import:

> "Without question, the facts depicted in the article are matters of legitimate public concern. The article described an alleged blackmail scheme by lawyers who were willing to bend if not break the law to procure money from Mary's unsuspecting paramours. The public is legitimately interested in and entitled to know that two local lawyers are using the processes of the law in such a legally and morally questionable manner."

Nevertheless, the Court denied the motion to dismiss, finding whether the *Express-News* obtained the 202 Documents "in contravention of state court orders, or whether it obtained the information from independent sources" was a factual question outside the scope of a 12(b)(6) motion.

Specifically, the Court conducted an analysis under *Smith v. Daily Mail Publishing Co*., 443 U.S. 97 (1979), and its progeny and found that if the *Express-News* obtained the sealed 202 Documents "in contravention of the sealing order and published them, it … [did] so 'illegally' in the sense that it violated a lawful court order of which it had notice. And plaintiff has stated a potential cause of action for invasion of privacy."

Motion for Reconsideration

Hearst promptly moved for reconsideration of the privacy ruling, noting that in light of the Court's finding of newsworthiness, the plaintiff was unable to establish his prima facie private facts claim. Although the facts would show that the *Express-News'* newsgathering was entirely appropriate and lawful, Hearst argued, the Court's *sua sponte Daily Mail* analysis was unwarranted in the absence of a prima facie case.

The Court agreed. On February 6, 2006, the Court filed an amended opinion and order withdrawing its earlier opinion and substituting in its place an opinion and order that found, among other things, that in light of the article's newsworthiness, the plaintiff was unable to establish a prima facie claim for publication of private facts. The Court dismissed the complaint with prejudice.

The Plaintiff has filed a notice of appeal to the Fifth Circuit.

As a sidenote, in August 2005, a Texas grand jury returned an indictment against Ted and Mary Roberts for conduct arising out of the blackmail scheme. The Robertses were each charged with three felony counts of theft by coercion. Their trial is scheduled to begin in March.

Hearst is represented by in-house counsel Jonathan R. Donnellan and Kristina E. Findikyan, with the Texas firm of Jackson Walker LLP contributing to the briefs. Before the district court, Plaintiff was represented by Broadus A. Spivey of Austin, Texas. Deborah A. Pearce of Powell & Pearce, Austin, Texas, filed the Notice of Appeal on behalf of the Plaintiff.

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Oklahoma Federal Court Grants Summary Judgment on Private Facts Claim

TV Station Aired Excerpt of Allegedly Videotaped Rape

By Michael Berry

A federal court in Oklahoma granted summary judgment in favor of a television station and its reporter on a publication of private facts claim arising from a news report containing brief excerpts from videotape evidence of plaintiff's alleged rape. *Anderson v. Blake*, No. CIV-05-0729, 2006 WL 314447 (W.D. Okla. Feb. 9, 2006).

Judge Joe Heaton of the Western District of Oklahoma ruled that the broadcast was not actionable because it did not identify plaintiff in any way and the videotape excerpts were logically connected to a newsworthy event. In the same ruling, Judge Heaton denied the plaintiff's motion for leave to amend her complaint to add tortious interference and contract claims because both claims sought redress for the same injury as the privacy claim and impermissibly attempted to end-run the constitutional standards for establishing such a claim.

The broadcast was not actionable because it did not identify plaintiff in any way and the videotape excerpts were logically connected to a newsworthy event.

Procedural History

According to the complaint, plaintiff while unconscious was raped by a local attorney who already was facing two other rape charges. Plaintiff apparently first learned she had been raped several weeks later when she found a videotape of the alleged rape. She reported the rape to the Norman police and turned the tape over to Detective Don Blake.

Detective Blake subsequently permitted KOCO-TV to record the tape in its entirety. During KOCO-TV's evening news program on July 3, 2003, one of its reporters, Kimberly Lohman, reported on the new rape allegation against the attorney. The report included brief excerpts of the tape, which did not include any explicit images and did not identify the plaintiff.

Plaintiff's complaint originally asserted three causes of action against Lohman and Ohio/Oklahoma Hearst-Argyle Television, Inc., which owns KOCO-TV: (1) a federal civil rights claim alleging that they and Detective Blake violated plaintiff's constitutional right to privacy, (2) a state-law intrusion claim alleging that the defendants had intruded on her privacy by viewing the tape, and (3) a state-law claim for publication of private facts alleging that defendants invaded her privacy by disclosing the contents of the tape.

On October 21, 2005, the court granted the KOCO defendants' motion to dismiss the civil rights and intrusion claims, but denied the motion to dismiss the publication of private facts claim, ruling that the news report itself was not properly before the court on a motion to dismiss. *See MLRC MediaLawLetter* November 2005 at 25.

KOCO then simultaneously answered the complaint and moved for summary judgment on the remaining claim. With the KOCO defendants' motion pending, plaintiff moved to amend her complaint to add two new claims: (1) a breach of contract claim based on the theory that plaintiff was an intended third-party beneficiary of an alleged contract between the KOCO defendants and Detective Blake to broadcast only a headshot of the alleged attacker, and (2) a tortious interference with contract claim alleging that the KOCO defendants induced the detective to breach his agreement with plaintiff to keep the tape confidential.

Summary Judgment Granted

On February 9, 2006, Judge Heaton granted the KOCO defendants' motion for summary judgment and denied plaintiff's request for leave to amend. The court ruled that plaintiff's public disclosure of private facts claim could not succeed for two reasons. First, the broadcast did "not reveal any publicly identifiable facts about plaintiff." In reaching this conclusion, Judge Heaton explained that even if plaintiff's identity became known when charges subsequently were filed against the attor-

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Oklahoma Federal Court Grants Summary Judgment on Private Facts Claim

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ney, that fact did not negate that "at the time the story aired, no such identifiable facts were disclosed."

Second, the court held that the broadcast of the videotape was protected by the First Amendment. Plaintiff's alleged rape was admittedly newsworthy, and "[p]art of the newsworthiness involved the fact that the alleged rapist had videotaped the incident." Broadcasting portions of the videotape heightened the "impact and credibility" of the news report and was logically connected to a matter of public concern. Judge Heaton emphasized that although he might have "made a different editorial decision," courts should not engage in after-the-fact "blue-penciling" that might chill the freedom of the press.

Leave to Amend Denied

In the same opinion, the court denied the plaintiff's motion for leave to amend. The court explained that, in contrast to the promissory estoppel claim at issue in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), plaintiff's proposed tortious interference and third-party beneficiary claims were based on the same state-of-mind injury as her privacy claim. The court ruled that plaintiff could not use other causes of action "to avoid the constitutional standards applicable to her invasion of privacy claim or to establish injury to her reputation or state of mind."

Ohio/Oklahoma Hearst-Argyle Television, Inc. and Kimberly Lohman are represented by David A. Schulz and Michael Berry of Levine Sullivan Koch & Schulz, L.L.P.; Robert D. Nelon and Jon Epstein of Hall, Estill, Hardwick, Gable, Golden & Nelon; and Jonathan Donnellan and Kristina Findickyan of Hearst Corporation. The plaintiff is represented by Michael Salem.

Privacy Claim Over Documentary Survives Motion to Dismiss

In an interesting ruling, a New York trial court last month held that a woman stated a claim for statutory invasion of privacy under New York law where she alleged she was filmed standing on a Manhattan street, and the brief footage was later used as part of a documentary-style reality show that included "crude comments" about her. *Nieves v. HBO et al.,* No. 100966/05 (NY Sup. Ct. Jan. 10, 2006) (James, J.) (denying motion to dismiss for failure to state a claim).

Plaintiff, according to her complaint, is an aspiring singer and actress. She sued HBO, Time Warner, a production company, and several individual defendants who produced and distributed the HBO-aired show "Family Bonds," which profiled a family of bounty hunters.

During filming on the streets of New York, two family members noticed and commented on plaintiff standing on the public street. The footage appeared in the series. According to the decision, they "directly commented on [plaintiff's] image in a derogatory and degrading manner utilizing what can best be described as scatological terminology."

Plaintiff alleged the use violated sections 50, 51 of New York's Civil Rights Law, which creates a cause of action in favor of "any person whose name, portrait or picture is used within the state for advertising purposes or for the purpose of trade."

Under New York law, a picture illustrating an article on a matter of public interest is not actionable unless the picture has no real relationship to the article or the article is an advertisement in disguise.

Denying the motion to dismiss, the court stated that additional fact finding would be necessary to determine whether there was a "real relationship" between plaintiff's image and its use in the documentary.

Laura R. Handman and Wendy W. Tannenbaum of Davis Wright Tremaine represent the defendants. Plaintiff is represented by Daniel N. Arshack of Arshack & Hajek in New York.

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Media Company Wins Sanctions Against Plaintiffs' Lawyer!

Lawyer Sanctioned for Frivolous Libel Suit

By Adolfo E. Jiménez

How would you feel if your client faces legal expenses to defend something that it never even said? If your instinct ever told you to push hard to make the other side pay, now you have some encouragement to go after the frivolous plaintiff – *and it's lawyer*.

A Florida district court this month awarded the bulk of CNN's and the other defendants' fees, *and ordered the award to be paid by plaintiffs' counsel*. *Universal Communications Systems v. Turner Broadcasting, et al.,* No. 05-20047 (S.D. Fla. Feb. 10, 2006) (Jordan, J.).

Background

In-house counsel at Cable News Network (CNN) faced this issue on January 6, 2005, when they received a letter and a telephone call from an attorney representing a public company. He provided them with 24 hours to stop someone from using the screen name *wolfblitzer0* from further postings, to a web site hosted by Lycos, of material that his client found objectionable. They included the following:

- *Call the jewish anti-defamation league on this zwebner crook, always hiding behind israeli president moshe katzav and using israeli army for fraud now!!! He won't even be welcome in israel at this rate. [sic]*
- *Salcorptx, zwebner used moshe katzav, predident of israel, for tout fraud as well, what's your point? He used the u.s military in iraq for tout fraud as well. So what's your point? [sic]*
- *Zwebner uses dead american soldiers and lie of delivery of airwater fraud machines to iraq to defraud americans and launder money overseas. [sic]*

These were some of the postings on a Lycos web site during the first week of January 2005 that prompted the attorney's call.

"I do not issue Rule 11 sanctions lightly…. But this is a case where they are warranted."

There was no basis for the demand against CNN. Neither CNN nor any affiliated entity have any ownership relationship in Lycos, and CNN journalist Wolf Blitzer had no connection to the postings. They had no knowledge of these postings or that screen name, and they did not know the identity of the author of the postings. To make matters worse, these facts all were known to the attorney, who contacted CNN on behalf of Universal Communications Systems, Inc., a holding company involved in various businesses including broadband wireless internet.

Counsel for Universal Communications and its CEO, Michael J. Zwebner, did not wait the 24 hours. The next morning, they filed a defamation action against Turner Broadcasting System, Cable News Network, and Wolf Blitzer for defamation in the U.S. District Court for the Southern District of Florida.

It seemed elementary that a party cannot be liable for defamation for something it did not publish. It was readily apparent that there was no merit to plaintiffs' lawsuit. CNN would soon learn that plaintiffs had filed at least five other lawsuits relating to postings on Lycos' web sites.

Counsel for Universal Communications sent a letter on January 31, 2005 suggesting that CNN cooperate in discovering the identity of the author of the postings, but it refused to dismiss the complaint. CNN sent a Rule 11 letter, demanding that plaintiffs dismiss the complaint. When the letter proved unavailing, the defendants filed a motion to dismiss and for sanctions.

Universal Communications opposed the motion on grounds that defendants "ratified" the posting because it did not, under plaintiffs' theory, pursue a legal duty to protect the "Wolf Blitzer" name. Plaintiff further asserted that a defamation may arise where one fails to protect one's marks and others make libelous statements using another's mark. The defendants countered that, regardless of its interest in protecting its intellectual property, they are not subject to liability for statements made by others under a false name.

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Media Company Wins Sanctions Against Plaintiffs' Lawyer!

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Rule 11 Sanctions

District Court Judge Adalberto Jordan on March 18, 2005 dismissed the complaint based on lack of subject matter jurisdiction and for failure to state a claim under Federal Rule 12(b)(6). Undaunted, Universal Communications and Michael J. Zwebner appealed the dismissal to the Eleventh Circuit Court of Appeals. The defendants moved to dismiss the appeal and also requested an award of fees in the appellate proceedings.

On August 29, 2005, the district court granted the defense motion for Rule 11 sanctions. The court stated: "Rule 11 sanctions are even more appropriate here, however, because there is evidence that the plaintiffs filed their amended complaint in bad faith or for improper purposes."

The court quoted from the initial letter sent to CNN's in-house counsel, which said, "my clients believe there are both political and business pressures that can be brought to bear by CNN/AOL upon Lycos to cause them to exercise responsible internet community citizenship..." The court stated in its order that

> "this statement evinces that the plaintiffs filed their complaint in federal court for the sole underlying purpose of exerting 'political and business pressures' upon a defendant in another lawsuit, and to obtain discovery it had been denied in the other cases."

The district court found plaintiffs' failure to make a reasonable inquiry concerning the merits of the claim coupled with the statements in the letter provides sufficient grounds to find counsel liable under Rule 11. Plaintiffs continued to pursue its appeal on the merits, launching its own sanctions request against the defense attorneys.

On February 10, 2006, the district court awarded the bulk of CNN's and the other defendants' fees, *and ordered the award to be paid by plaintiffs' counsel*. The court made no bones about its dismay at counsel's conduct, writing that "a relatively heavy monetary sanction is necessary" to deter the lawyer "from pursuing frivolous suits like this one."

Judge Jordan noted counsel admitted in court papers that he filed the lawsuit for "tactical" reasons in an effort to force the media defendants to help the plaintiffs remove the postings. "Even more astounding," the court wrote "is that he is convinced that this was a legitimate reason for filing the suit."

The judge concluded:

> "I do not issue Rule 11 sanctions lightly. In my 6 years on the bench, I have only awarded Rule 11 sanctions once or twice. But this is a case where they are warranted."

The Eleventh Circuit apparently shares Judge Jordan's dim view of the litigation. Four days after the Rule 11 award, the appeals court issued a decision affirming dismissal of the case on the merits, and awarding the defendants double costs and fees in defending the appeal under Federal Rule 38. *Universal Communications Systems v. Turner Broadcasting, et al.,* No. 05-12698 (11th Cir. Feb. 14, 2006) (Anderson, Marcus, Wilson, JJ.) (per curium, unpublished).

Adolfo E. Jiménez and Deanna K. Shullman of Holland & Knight, LLP, Miami, FL represented Turner Broadcasting System, CNN, and Wolf in this matter. Plaintiffs were represented by John Faro of Faro & Associates, Miami, FL.

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First Circuit Reinstates Libel-by-Juxtaposition Claim

Photo in Teen Sex Article Could Be Defamatory

The First Circuit this month reversed a motion to dismiss granted in favor of *Boston* magazine in a libel suit brought by a teenager whose photograph was used to illustrate a magazine article on teen sexuality. *Stanton v. Metro Corp.,* 2006 WL 416265 (1st Cir. Feb. 23, 2006) (Torruella, Lipez, DiClerico, JJ.).

Last year Massachusetts District Judge F. Dennis Saylor IV dismissed the claim, reasoning that while the magazine article about casual and promiscuous sex among high school students was capable of a defamatory meaning, the magazine publisher was saved by a disclaimer that "directly contradict[ed] the otherwise-defamatory connection between the photograph and the text." *Stanton v. Metro Corp.*, 357 F. Supp. 2d 369 (D. Mass. 2005). *See also MLRC MediaLawLetter* March 2005 at 23.

The disclaimer stated:

> "The photos on these pages are from an award-winning five-year project on teen sexuality taken by photojournalist Dan Habib. The individuals pictured are unrelated to the people or events described in this story. The names of the teenagers interviewed for this story have been changed."

Thus notwithstanding considerable sympathy for the plaintiff and displeasure with the magazine article, Judge Saylor concluded that, "The exercise of dubious judgment [by the magazine] ... is not the same as the commission of the tort of defamation."

First Circuit Decision

The First Circuit agreed with the district court's analysis that the use of plaintiff's photo in the article could create the defamatory impression that she engaged in at least some of the sexual activities described in it. But the unanimous panel disagreed about the impact of the disclaimer. "[T]he presence of the disclaimer," the court wrote, "does not permit the conclusion, as a matter of law, that the article is not of and concerning Stanton."

Looking at the physical layout of the article in some detail, the court found that a reasonable reader could easily ignore the disclaimer, and thus be left with the false impression – "incorrect, but not unreasonable" – that plaintiff was the subject of the unflattering statements set forth in its text.

The First Circuit noted that "the disclaimer occupies the field between the body of the story and the byline, making it easy enough to overlook between the larger fonts of both." And that "a reader might take the first sentence of the disclaimer, which states that '[t]he photos on these pages are from an award-winning five-year project on teen sexuality by photojournalist Dan Habib,' as a satisfactory explanation of the photographs and therefore stop reading the disclaimer before the second sentence. Such a reader would thus remain under the impression that the teenagers depicted in the photograph have some connection to the accompanying story."

The Court added that it did not mean "to suggest that language in the nature of a disclaimer can never serve to render a statement incapable of conveying a defamatory meaning." But in analyzing a disclaimer for purposes of a libel suit it emphasized that "context matters."

Robert A. Bertsche, Prince, Lobel, Glovsky & Tye LLP, in Boston, represented the defendant, Metro Corp. Plaintiff was represented by John P. Donohue, Fuller, Rosenberg, Palmer & Beliveau, LLP, Worcester, MA.

Save the Date
November 8, 2006
MLRC Annual Dinner
New York, New York

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Maryland Appeals Court Affirms Dismissal for Failure to Plead Fault

Fault Is Essential Element of a Prima Facie Claim

The Maryland Court of Appeals this month affirmed dismissal of a libel suit for failure to state a claim where the plaintiff failed to allege any fault against the defendants. *Mirabile v. Bierman*, No.274 (Feb. 3, 2006) (Kenney, Eyler, Krauser, JJ.) (unpublished).

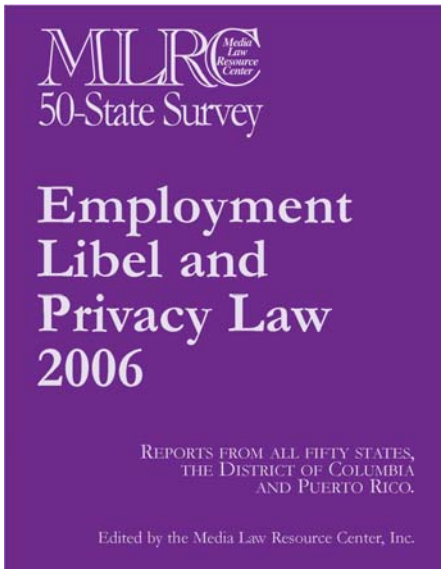
The plaintiff sued over a letter to the editor published in the *East County Times* a Baltimore area newspaper. Plaintiff named the letter writer and the newspaper as defendants in a brief six paragraph complaint that alleged they made "false allegations of criminal acts" against plaintiff.

Among the objections raised in the motion to dismiss was that plaintiff failed to allege fault or plead any of the actual words published by the defendants.

Affirming dismissal, the court of appeals held that the former doomed the complaint because harm is an element of a prima facie claim of defamation.

In dicta the court also noted that the latter objection had merit as well. Maryland's adoption of notice pleading in 1984 "did not dispense with a plaintiff's obligation to plead the facts comprising the cause of action with 'sufficient specificity." Pleading that defendants published "false and defamatory statements" about "criminal acts" stated legal "conclusions, not facts."

50-STATE SURVEYS



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Gannett Wins Summary Judgment In Taser Libel Suit

By David J. Bodney and Peter S. Kozinets

Last month an Arizona trial court summarily dismissed a defamation lawsuit filed by Taser International, Inc. ("Taser"), the stun-gun manufacturer, against Gannett Co., Inc. and Gannett Pacific Publications, Inc. ("Gannett"). *Taser Int'l, Inc. v. Gannett Co., Inc., et al.*, CV 2005-010723 (Ariz. Super. Ct., Maricopa County, Jan. 20, 2006) (McMurdie, J.).

Taser sued over *USA Today*'s publication of a graphic sidebar that substantially overstated the average current of the Taser and inaccurately contrasted its electrical output with other common emitters of electricity.

Gannett moved for summary judgment before discovery commenced. Rather than seek leave to conduct discovery under Rule 56(f), Taser filed a cross-motion for partial summary judgment and asserted that actual malice should be inferred from the record. After briefing and oral argument, the court granted Gannett's motion and denied Taser's cross-motion.

Background

On June 3, 2005, *USA Today* published an article about schools that had restricted the use of stun guns on campus. The front-page story referred readers to a sidebar on page 13A. The sidebar, "Taser packs potent but brief punch of electricity," included four pictures and a short article comparing the Taser to other emitters of electricity.

The sidebar listed the average electrical output of each pictured item as follows: the Taser — 2,100 to 3,600 amps; a lightning strike — 10,000 to 100,000 amps; the electric chair — 6 to 20 amps; and the third rail of the New York City subway — 4,000 to 9,000 amps. Taser contacted *USA Today* on the day of publication and demanded a correction.

USA Today published a correction on its next publication day. It noted the mathematical error in the sidebar and reported that the correct amperage numbers for the Taser are .0021 to .0036 amperes. Unsatisfied, Taser sued Gannett in Arizona state court, alleging claims for false light invasion of privacy, defamation, tortious interference with business relations and injurious falsehood.

Under Rule 12(b)(6), Gannett promptly moved to dismiss Taser's false light claim, arguing that under settled law, both in Arizona and across the country, corporations are precluded from suing for false light because that tort remedies injured feelings only — interests a corporation cannot vindicate. The trial court agreed and granted Gannett's motion from the bench.

Gannett next moved for summary judgment on the heart of the lawsuit — Taser's claim that the computational error in the sidebar was actionable as defamation. Gannett argued that Taser is a "public figure" that could not adduce clear and convincing of "actual malice."

Public Figure

Arizona Superior Court Judge Paul J. McMurdie recognized that "[t]he first amendment has been interpreted since *New York Times v. Sullivan*, 376 U.S. 254 (1964) to extend to journalists a wider margin of error in reporting about public figures that in reporting about private figures." He easily found that Taser is a "public figure."

The court observed that Taser markets its weapons as an alternative instrument of force for use by police departments and the military, and that "[n]early 98-99 percent of [Taser's] business" involves sales to these entities.

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Gannett Wins Summary Judgment In Taser Libel Suit

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Moreover, the record contained ample evidence of Taser's access to the news media — including scores of articles published by newspapers across the country featuring statements from Taser's top corporate officers. "Given the large expenditures of public monies by law enforcement for [Taser's] products, the fact that [Taser] is probably the only provider of such equipment, that [Taser] has more than adequate access to the media, and that law enforcement and the military are subject to public attention and scrutiny," the court found "that [Taser] qualifies as a public figure."

Actual Malice

Following "the process of summary judgment screening for actual malice in a constitutional defamation case" in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), Judge McMurdie framed the issue of actual malice as follows: "Has [Taser] met [its] burden by coming forward with sufficient evidence to show the court that reasonable jurors could conclude by clear and convincing evidence that Defendants acted with actual malice?"

Based on his careful review of the record, Judge McMurdie found that "no jury applying the 'clear and convincing' evidentiary standard could reasonably find actual malice from the evidence presented to the court."

Gannett submitted declarations from the reporter and editor who worked on the sidebar. Both averred that they lacked knowledge of the falsity of the information before it was published. The reporter interviewed a professor of electrical engineering, who told her to obtain the amperage of the emitters of electricity she sought to compare. The reporter checked Taser's website, which listed the amperage of the Taser as 2.1 to 3.6 "milliamps." When attempting to convert the figures into uniform units, she misread "milliamps" as "million amps" and entered the wrong figures into an online conversion calculator.

The reporter called the engineering professor a second time to discuss the figures that she obtained from the conversion calculator. He did not detect any error, and rather told her that the Taser was still relatively safe because of the short period during which it transmitted current to the human body.

Gannett submitted a declaration from the professor, who confirmed the reporter's account and stated: "I would not characterize [the reporter's] error as egregious or willful.... I detected absolutely nothing to suggest that she intended to misstate any information about, or lessen the reputation of, Taser."

Based on these facts — and *USA Today*'s publication of a correction as soon as the error was brought to its attention — Judge McMurdie concluded that Taser had failed to present "significant probative evidence" to support a jury finding of actual malice.

The court rejected Taser's assertion that actual malice should be inferred because others at *USA Today* possessed correct amperage figures. Taser had presented no evidence showing that the two employees responsible for the publication had the correct information. Moreover, Judge McMurdie observed that "courts that have addressed imputed knowledge or agency claims under a defamation analysis have rejected it." Citing *Holbrook v. Harman Auto., Inc.*, 58 F.3d 222, 225 (6th Cir. 1995).

The court also rejected Taser's attempt to bootstrap into the lawsuit several stories from *The Arizona Republic* and *USA Today* regarding the number of deaths that have followed Taser shocks. Judge McMurdie found that the articles did not support any inference of actual malice.

Because Taser failed to meet the First Amendment actual malice test, the court granted summary judgment in Gannett's favor on all of Taser's claims.

David J. Bodney, Peter S. Kozinets and Karen J. Hartman of the Phoenix office of Steptoe & Johnson LLP represented Gannet Co., Inc. and Gannett Pacific Publications, Inc. in this matter. Barry D. Halpern, Andrew F. Halaby and Todd Feltus of the Phoenix office of Snell & Wilmer LLP represented Taser International, Inc.

November 10, 2006

MLRC DCS Annual Breakfast

New York, New York

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New York Court Dismisses Libel and Negligence Claims By Disgruntled Source

But Claim Stated For Alleged Breach Of Embargo

By Jonathan Donnellan And Justin Peacock

An attorney who was an active source for the *Albany Times Union* brought suit against the paper after growing unhappy with its coverage. John Aretakis, a controversial lawyer whose aggressive tactics have led to numerous disciplinary complaints, alleged two claims each of defamation and negligence, as well as one claim for breach of contract.

Ruling on a threshold motion to dismiss all five causes of action, the Court dismissed the defamation and negligence claims while finding that questions of fact existed on the breach of contract claim. *Aretakis v. Hearst*, No. 101982/05 (N.Y. Sup. Ct. January 18, 2006) (Kornreich, J.).

Background

Aretakis became well-known and controversial for his tactics in representing alleged victims of clergy sexual abuse, mostly in the Albany area. Both in legal proceedings and in public statements, Aretakis routinely made highly inflammatory allegations of criminal and immoral conduct against numerous members of the clergy, including the Bishop of the Albany Diocese, as well as those whom he considered to be acting as "agents" of the Church.

The latter has included the District Attorney's office, local judges (one of whom ultimately sanctioned Aretakis $7,500 for "repeated acts of frivolous conduct"), and, ultimately, the *Times Union*.

The first article Aretakis alleged to be libelous was one reporting on the numerous disciplinary complaints (approximately 15) that were pending against Aretakis as a result of his tactics. Ironically, Aretakis himself had been the primary source of this article.

Nevertheless, while acknowledging the many pending complaints against him, Aretakis took issue with the article's characterization that he was "fighting disbarment." Shortly after publication of this article, Aretakis publicly denied that he had ever said that he was facing disbarment.

Aretakis' two negligence claims were not lodged against any particular article, but rather took issue with the general tenor of the *Times Union's* reporting on matters relating to clergy sexual abuse. In essence, Aretakis alleged that the paper's reporting was categorically biased in favor of the Church, and claimed that this constituted an actionable breach of its journalistic obligations.

The breach of contract claim arose out of a purported embargo agreement between Aretakis and the same reporter who had written the "disbarment" story. According to the complaint, Aretakis had given the reporter tape recordings he had made of his conversations with the mediator in charge of a Diocese program to resolve clergy abuse claims, with an understanding that the tapes were embargoed so that he could share them with other reporters. The *Times Union* subsequently published an article based on that reporter's independent interview with the mediator – an article which contained no reference whatsoever to Aretakis' tapes.

According to the complaint, Aretakis had given the reporter tape recordings with an understanding that the tapes were embargoed

In the immediate wake of Aretakis' filing suit, articles discussing the lawsuit appeared in the *New York Observer* and the *Times Union* itself. Both articles contained statements by the *Times Union's* Editor, Rex Smith, denying Aretakis' allegations. Aretakis subsequently amended his complaint to allege that these statements had also defamed him.

Defendant moved to dismiss all claims and counterclaimed under New York's anti-SLAPP law, arguing that the underlying thrust of Aretakis' retaliatory suit was his attempt to prevent – if he could not control – the *Times Union's* reporting on matters related to his license to practice law.

Trial Court's Decision

The trial court began its legal analysis with the defamation claims. First, the court found that Aretakis' concession that he faced numerous disciplinary proceedings and that

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New York Court Dismisses Libel and Negligence Claims By Disgruntled Source

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disbarment was a potential consequence of those proceedings was fatal to his first libel claim. The court found that the essence of the story was true and that any alleged falsity was too minor to support a claim for defamation.

Next, the court dismissed the new defamation claims contained in the amended complaint, finding that the statements in question were "merely denials of allegations … and/or statements of defendant's legal position." Because such statements would not be understood by a reader as factual assertions, they were not subject to a libel claim.

The court also made short work of plaintiff's negligence claims, which it found to be "generally incoherent and lacking in merit." The court found that Aretakis could not establish that the *Times Union* owed a cognizable duty to him with regards to the general fairness of its reporting as a matter of law.

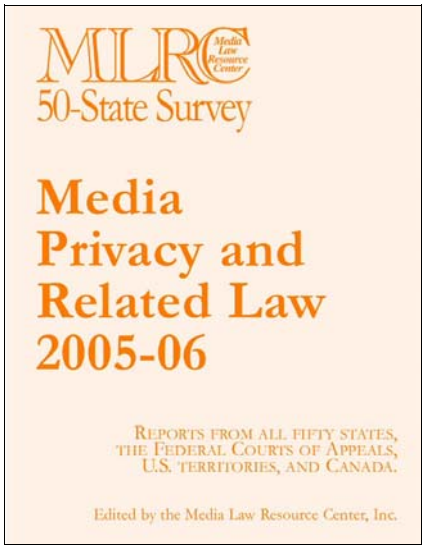
The court consigned defendant's SLAPP argument to a footnote, refusing to find that New York's anti-SLAPP law applied because the *Times Union* was not directly challenging Aretakis' law license by way of its reporting.

Breach of Contract Claim

Lastly, the court held that Aretakis had pled a breach of contract claim sufficient to withstand a motion to dismiss. The Court found discovery was necessary as to (1) the terms of the purported embargo, and (2) whether the *Times Union's* article was based on independent reporting.

Hearst is represented by in-house counsel Jonathan Donnellan and Justin Peacock. Plaintiff John Aretakis is appearing pro se.

50-STATE SURVEYS



MEDIA PRIVACY AND RELATED LAW

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D.C. Circuit Affirms Dismissal of Lawyer's Libel Complaint Against Noisy Students

Court Relies on "Self-Defense" Privilege

In an interesting non-media decision, the D.C. Circuit Court of Appeals affirmed summary judgment dismissing a lawyer's libel and false light suit against his neighbors, finding that the statements at issue were protected by a common law self-defense privilege. *Washburn v Lavoie, et al.*, No. 03cv00869, 2006 WL 305504 (D.C. Cir. Feb. 10, 2006) (Garland, Henderson, Sentelle, JJ.).

Background

The lawsuit was the culmination of a lengthy and vitriolic noise dispute between the plaintiff, Alan Washburn, a 69 year old Washington D.C. lawyer, and four Georgetown University students who lived next door. Plaintiff had complained that his neighbors were too noisy and sent letters of complaint to the students' landlord and to university administrators. In his letters, plaintiff also claimed he documented the excessive noise by recording it on his dictaphone.

The students responded with a letter of their own to university administrators suggesting that Washburn might have violated their rights by "illegally recording sounds from their residence" in violation of the federal wiretap statute. They attached a copy of the federal wiretap statute to their letter.

Washburn sued the students for libel and false light over that statement, alleging the students falsely accused him of "violat[ing] a federal felony law." Washburn sought $1.5 million in compensatory and $6 million in punitive damages.

The district court granted summary judgment to the defendants. *See* 357 F.Supp.2d 210 (D.D.C.2004) (Leon, J.). The district court held that disputed issues of fact barred the students' self-defense privilege claim where plaintiff alleged the students repeated their claim about illegal recording to another neighbor.

Nevertheless, the district court, noting that "this is a matter that does not belong in this Court" sua sponte entered summary judgment in favor of the students on the ground that the defendants' statements were not capable of a defamatory meaning and did not place Washburn in a highly offensive light as a matter of law.

Appeals Court Decision

Beginning by quoting from Robert Frost's classic poem *Mending Wall* that "something there is that doesn't love a wall" the Court noted that only a very "thick wall" might have forestalled this dispute.

Plaintiff argued that the district court erred by granting summary judgment on grounds that were not briefed and argued. The D.C. Circuit Court found that it could avoid this objection because it could affirm summary judgment on the self-defense privilege.

The District of Columbia recognizes the common-law qualified privilege of self-defense as a complete defense to a claim of libel or slander. *See, e.g., Novecon Ltd. v. Bulgarian-American Enter. Fund*, 190 F.3d 556, 566 (D.C. Cir.1999). The privilege applies "if the circumstances induce a correct or reasonable belief that (a) there is information that affects a sufficiently important interest of the publisher, and (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest." *Restatement (Second) of Torts* § 594 (1977).

Here the court found "no doubt that the students' interests in avoiding discipline from Georgetown University, averting eviction by their landlord, and guarding against becoming defendants in a threatened common-law nuisance lawsuit were 'sufficiently important' to implicate the privilege" in face of "the missives fired off by Washburn." The students therefore "had the right to repel the attack."

Finally the Court concluded their was no malice or excessive publication to defeat the privilege. Reasonable readers "would have viewed the defendants' accusations to be what they were: statements by highly frustrated students who [were] cleverly, but not expertly, reacting to an attorney's threat of litigation." And repeating their allegation of illegal taping to another neighbor was not excessive publication because that neighbor was himself a relevant witness to the ongoing noise dispute.

Plaintiff represented himself in this case. Defendants were represented by Keisha A. Gary, Woody N. Peterson and Peter J. Kadzik of Dickstein Shapiro Morin & Oshinsky LLP in Washington, D.C.

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MLRC Calendar

September 27-29, 2006

NAA/NAB/MLRC Media Law Conference
Alexandria, Virginia

November 8, 2006

MLRC Annual Dinner
New York, New York

November 10, 2006

MLRC Defense Counsel Section Annual Breakfast
New York, New York

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Cert. Petition Filed in Wen Ho Lee Case

Journalists Seek Supreme Court Review on Scope of Reporter's Privilege

By Chad Bowman

Three nonparty journalists in contempt of court for protecting their confidential news sources in a civil lawsuit, *Lee v. Department of Justice*, filed a petition for certiorari on January 31, 2006 in the U.S. Supreme Court.

Bob Drogin of *The Los Angeles Times*, H. Josef Hebert of The Associated Press, and James Risen of *The New York Times* seek review of a D.C. Circuit decision affirming their contempt orders. 413 F.3d 53 (D. C. Cir. 2005), *reh'g en banc denied* 428 F.3d 299 (D.C. Cir. 2005). *See* MLRC Media Law Letter November 2005 at 9; MLRC Media Law Letter July 2005 at 5.

A fourth journalist — Pierre Thomas, formerly of CNN and now with ABC — has received an extension to March 2 file a petition. A response to both petitions is due in early April.

Separately, another reporter in the underlying action, Walter Pincus of the *Washington Post*, has been held in contempt of court for refusing to disclose his confidential source(s). *Lee v. Department of Justice*, 401 F. Supp. 2d 123 (D.D.C. 2005); *see also* MLRC Media Law Letter November 2005 at 9. Pincus is expected to seek review by the U.S. Court of Appeals for the D.C. Circuit.

Procedural History

The award-winning reporters are nonparties to a civil lawsuit under the Privacy Act brought by former nuclear scientist Dr. Wen Ho Lee against the Department of Justice, the FBI, and the Department of Energy for allegedly leaking personal information about him to the press.

Dr. Lee was fired from the Los Alamos National Laboratory in March 1999 and publicly identified by news reports as the target of a federal espionage probe into possible loss of nuclear secrets to China. He was later charged with multiple felony counts of mishandling classified information. Dr. Lee ultimately pleaded guilty to just one count, was sentenced to time served, and received a lengthy apology from the bench in which the presiding judge harshly criticized the government's handling of the case and its treatment of Dr. Lee.

After completing discovery from the government in Dr. Lee's civil case, plaintiff's counsel served deposition subpoenas on the press. Five reporters — Drogin, Hebert, Risen and Thomas, along with Risen's colleague at the *New York Times*, Jeff Gerth — moved to quash the subpoenas pursuant to a First Amendment or federal common law reporter's privilege.

In October 2003, Judge Thomas Penfield Jackson of the U.S. District Court for the District of Columbia denied the motions and ordered the reporters to testify and to identify those confidential sources who provided information directly about Dr. Lee. *Lee v. Department of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003). In so doing, Judge Jackson narrowly read the conditional reporter's privilege in the D.C. Circuit as a two-part test for centrality to a litigant's case and exhaustion of reasonable alternative sources, without any broader balancing consideration in light of First Amendment interests.

Holding that the reporters were central to a leaks case and that Dr. Lee's discovery efforts vis-à-vis the government were sufficient, Judge Jackson found that plaintiff overcame the privilege. The decision treated the reporters *en masse*, applying the privilege to Risen — the lead author of a seminal *New York Times* article on the federal investigation — and mentioning the other journalists only in a footnote.

Each of the reporters then sat for a deposition in early 2004, and all but one asserted a reporter's privilege to varying degrees in response to specific questions. The notable exception was Gerth, who explained that he did not know the identity of the relevant sources for the stories he co-authored. He asserted a reporter's privilege just once, in response to a broad question he interpreted as including confidential sources beyond those providing information about the investigation of Dr. Lee.

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Cert. Petition Filed in Wen Ho Lee Case

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Following briefing and argument, Judge Jackson in August 2004 cited all five reporters for contempt of court and ordered sanctions of $500 per day until compliance, stayed pending appeal, and deferred consideration of additional compensatory sanctions. *Lee v. Department of Justice*, 327 F. Supp. 2d 26 (D.D.C. 2004).

In finding contempt, Judge Jackson declined to consider the reporter's privilege — even as he narrowly defined it — with regard to the specific assertions by each reporter. Rather, the "sole issue" on the contempt motions was whether the reporters had complied with the court's order. In that regard, Judge Jackson found Gerth's explanation that he did not know his co-author's sources to be "not credible."

A unanimous D.C. Circuit panel affirmed as to all but Gerth. The panel first decided that it reviews application of the reporter's privilege only for abuse of discretion, splitting with other circuits on this point. The court then agreed with Judge Jackson that the appropriate standard for overcoming a conditional reporter's privilege under *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1918), is a two-part test for centrality and exhaustion, reading broader language in that case as *dicta*.

Under this rubric, the panel found it not an abuse of discretion to find that the privilege was overcome as to all reporters as a general matter. Like the district court, the panel declined to review the privilege with regard to specific questions for which a privilege was asserted, or even to specific reporters.

Turning to whether each reporter violated the court's order, the panel affirmed as to Drogin, Hebert, Risen, and Thomas. The court reversed the contempt citation against Gerth as abuse of discretion because he "never refused to answer questions directly covered by the Discovery Order and consistently professed ignorance of the identity of sources who provided information directly about Lee."

The reporters petitioned for reconsideration. The D.C. Circuit denied rehearing *en banc* in a 4-4 vote with two abstentions and three strong dissents — including a dissent by Judge Rogers, who was part of the panel. Judge Rogers recognized that the petitions "present significant issues ... regarding both the standard for appellate review and comprehensiveness of the necessary balancing analysis."

The petition argues that the circuits are fractured over the appropriate scope of protection afforded to confidential news sources under the First Amendment in civil cases, an issue with "far-reaching implications for the ability of journalists to inform the public about the operations of its government and misconduct in the private sector."

Judges Tatel and Garland urged a broader balancing test beyond simple need and exhaustion, arguing that "the panel's arid two-factor test allows the exigencies of even the most trivial litigation to trump core First Amendment values." Indeed, Judge Garland argued that, at least in Privacy Act cases, "if the reporter's privilege is limited to those requirements, it is effectively no privilege at all."

Petition for Certiorari

Following the denial of rehearing or rehearing *en banc*, Drogin, Hebert, and Risen petitioned for certiorari, presenting the following questions to the Court:

1. Does the First Amendment require that a federal court balance the public's interest in confidential newsgathering with a civil litigant's interest in compelled disclosure before ordering a journalist to identify confidential sources in response to the litigant's subpoena?
2. Does federal common law recognize a reporter's privilege that requires a federal court to balance the public's interest in confidential newsgathering with a civil litigant's interest in compelled disclosure before ordering a journalist to identify confi-

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Cert. Petition Filed in Wen Ho Lee Case

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dential sources in response to the litigant's subpoena?

3. Is an appellate court obliged to review *de novo* a district court's determination that a journalist's assertion of a reporter's privilege has been overcome?

The petition argues that the circuits are fractured over the appropriate scope of protection afforded to confidential news sources under the First Amendment in civil cases, an issue with "far-reaching implications for the ability of journalists to inform the public about the operations of its government and misconduct in the private sector." Several circuits apply a broader balancing test, several look simply to need and exhaustion, and at least one has indicated that it would afford no protection at all.

The petition further argues that this conflicting body of authority on a First Amendment privilege has been thrown into even greater disarray by the Supreme Court's decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996), a case that recognized a therapist's privilege and outlined considerations for the recognition of new federal common law privileges.

Under these standards, the reporters argued that there is a compelling case for recognition of a common law reporter's privilege, given the First Amendment interests served and the fact that 49 states and the District of Columbia protect confidential sources. (The vast majority of these states would afford protection for nonparties in a civil case that is stronger than a need-exhaustion test.) The three federal circuits to consider this issue have reached three different results: The Third Circuit recognizes a common law privilege, the Ninth Circuit has rejected it, and a the D.C. Circuit panel split three ways between a judge who would recognize the privilege, one who would not, and a third who found it unnecessary to reach the question. *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005).

Finally, the petition argues that the D.C. Circuit's holding that appellate courts review the application of the reporter's privilege only for abuse of discretion creates a conflict in the circuits and finds no support in Supreme Court case law.

Moreover, because the reporters raised serious arguments below as to whether the news reports in question even violated the Privacy Act and whether the plaintiff sufficiently exhausted alternative sources of information for specific information at issue, the standard of review could alter the outcome of the case even under a narrow two-part test.

Bob Drogin and H. Josef Hebert are represented by inhouse counsel Karlene W. Goller and David H. Tomlin, respectively, and by Lee Levine, David Schulz, Nathan E. Seigel, and Chad Bowman, of Levine Sullivan Koch & Schulz, L.L.P. Jeff Gerth and James Risen are represented by inhouse counsel George Freeman and by Floyd Abrams and Joel Kurtzburg, of Cahill Gordon & Reindel LLP. Mr. Thomas was represented in the D.C. Circuit by Charles D. Tobin and Deanna K. Shullman, of Holland & Knight LLP. Dr. Lee was represented by Brian A. Sun, Betsy A. Miller, Christopher Lovrien, David J. Schenck, and David L. Horan, of Jones Day.

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MLRC BULLETIN 2005

WHEN GOVERNMENT SHUTS OUT CRITICAL PRESS:
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with

2005 REPORT ON SIGNIFICANT DEVELOPMENTS
WITH AN UPDATE ON CRIMINAL LIBEL DEVELOPMENTS

(Bulletin 2005:4 part A)

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Speakers Bureau on the Reporter's Privilege

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

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

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

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

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

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

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The Reporter's Privilege

Protecting the Sources
of Our News

This Presentation has been made possible by a grant from the McCormick Tribune Foundation

MLRC INSTITUTE 1

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

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

A Federal Shield Law?

- Bipartisan proposals for federal shield law in face of increased threats
- -- Need for nationwide uniformity
  - √ Reporters need to know the rules so they can do their jobs
  - √ Would-be whistleblowers and other potential sources need to be able to predict the risks
  - √ Will cut down on costly litigation over subpoenas

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What *Is* the "Reporter's Privilege"?

Various rules protecting journalists from being forced, in legal and governmental proceedings, to reveal confidential and other sources.

- Sometimes also protects unpublished notes and other journalistic materials

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MLRC Creates Model Shield Law

With an increasing number of states seeking to enact state shield law legislation, MLRC has drafted a model shield law that provides absolute protection for confidential sources and information received in confidence.

The model shield law is the product of many conference calls and hours of discussion among our working group – Stephanie Abrutyn, Robin Bierstedt, Liz Ritvo, Nathan Siegel, Chuck Tobin and Kurt Wimmer. We cannot thank them enough for the amount of time and effort they expended in creating the model.

The model has also been vetted by a coalition of over 60 media representatives and media lawyers who have been meeting regularly (via conference call) on the federal shield law. We thank them, as well, for their time and feedback on the model.

MODEL SHIELD LAW

SECTION 1. COMPELLED DISCLOSURE PROHIBITED.

Except as provided in Section 2, no judicial, legislative, administrative, or other body with the power to issue a subpoena or other compulsory process may compel the news media to testify, produce or otherwise disclose:

(a) the confidential source of any news or information or any information that would tend to identify the confidential source, or any news or information obtained or prepared in confidence by the news media in its capacity in gathering, receiving or processing news or information for potential communication to the public, including, but not limited to, any notes, drafts, outtakes, photographs, video or sound tapes, film or other data of whatever sort in any medium now known or hereafter devised; or

(b) any source, news or information not otherwise described in Section 1(a) obtained or prepared by the news media in its capacity in gathering, receiving or processing news or information for potential communication to the public, including, but not limited to, any notes, drafts, outtakes, photographs, video or sound tapes, film or other data of whatever sort in any medium now known or hereafter devised.

SECTION 2. CONDITIONS FOR COMPELLED DISCLOSURE.

A court may compel disclosure of the identity of a source, news or information described in Section 1(b) if the court finds, after notice to and an opportunity to be heard by the news media, that the party seeking the identity of such source or such news or information established by clear and convincing evidence –

(a) in a criminal investigation or prosecution, based on information obtained from other than the news media, that there are reasonable grounds to believe that a crime has occurred; or

(b) in a civil action or proceeding, based on information obtained from other than the news media, that there is a prima facie cause of action; and

(c) in all matters, whether criminal or civil, that:

  (1) the identity of the source or the news or information is highly material and relevant;

  (2) the identity of the source or the news or information is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto;

  (3) the identity of the source or the news or information is not obtainable from any alternative source; and

  (4) there is an overriding public interest in the disclosure.

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SECTION 3. COMPELLED DISCLOSURE FROM THIRD PARTIES.

The protection from compelled disclosure contained in Section 1 shall also apply to any subpoena issued to, or other compulsory process against, a third party that seeks records, information or other communications relating to business transactions between such third party and the news media for the purpose of discovering the identity of a source or obtaining news or information described in Section 1. Whenever a subpoena is issued to, or other compulsory process is initiated against, a third party that seeks records, information or other communications on business transactions with the news media, the affected news media shall be given reasonable and timely notice of the subpoena or compulsory process before it is executed or initiated, as the case may be, and an opportunity to be heard. In the event that the subpoena to, or other compulsory process against, the third party is in connection with a criminal investigation in which the news media is the express target, and advance notice as provided in this section would pose a clear and substantial threat to the integrity of the investigation, the governmental authority shall so certify to such a threat in court and notification of the subpoena or compulsory process shall be given to the affected news media as soon thereafter as it is determined that such notification will no longer pose a clear and substantial threat to the integrity of the investigation.

SECTION 4. NON-WAIVER.

Publication or dissemination by the news media of news or information described in Section 1, or a portion thereof, shall not constitute a waiver of the protection from compelled disclosure that is contained in Section 1.

SECTION 5. INADMISSIBILITY.

The source of any news or information or any news or information obtained in violation of the provisions hereunder shall be inadmissible in any action, proceeding, or hearing before any judicial, legislative, administrative or other body.

SECTION 6. DEFINITIONS.[1]

The term "news media" means:

(a) any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite or other transmission system or carrier, or channel or programming service for such station, network, system or carrier, or audio or audiovisual production company that disseminates news or information to the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, electronic or other means now known or hereafter devised;

(b) any person or entity who is or has been engaged in gathering, preparing or disseminating news or information to the public for any of the entities listed in subsection (a) above or any other person supervising or assisting such a person or entity with gathering, preparing or disseminating news or information; or

(c) any parent, subsidiary, division or affiliate of the entities listed in subsections (a) or (b) above to the extent the subpoena or other compulsory process seeks the identity of a source or the news or information described in Section 1.

[1] We recommend that you review the law in your state to see if any of the terms listed in the definition of "news media" have prescribed meanings under the laws of your state.

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California Court Quashes Press Subpoena in Murder Case

Rejects Claim That Privilege Was Waived

By James Chadwick and Katherine Keating

The trial judge in a California murder case recently quashed a defense subpoena seeking testimony and materials from a reporter who claimed never to have received the materials in the first place. *People v. Joseph Morrow*, No. SC-54954 (San Mateo Sup. Ct. Jan. 5, 2006).

In a hearing last month, Judge Craig Parsons of the San Mateo County Superior Court found that not only had the defendant failed to identify information that would materially assist in his defense, but that the availability of the materials in question from an alternate source was itself a sufficient basis for quashing the subpoena.

The court also found that the reporter's filing of a declaration stating that she had never received the materials sought did not waive any shield law rights. Finally, the court rejected the defendant's contention that the court should conduct an *in camera* hearing to question the reporter as to whether she might have any other exonerating evidence, concluding that such an examination "would serve no useful purpose."

A declaration given ... pursuant to a subpoena is not a waiver.

Background

The defendant in *People v. Joseph Morrow*, is on trial for the murder of his wife Donna Ann Morrow, who disappeared from her Menlo Park home in 1991 and whose body was found 12 years later in the Santa Cruz Mountains. *San Jose Mercury News* reporter Sara Wykes had reported on the investigation into Ms. Morrow's disappearance and the subsequent prosecution of Mr. Morrow for her murder.

Mr. Morrow claimed that in the years following his wife's disappearance, a neighbor had investigated the property on which Ms. Morrow's body was eventually found. This neighbor allegedly prepared a map and diagrams of soil composition of the area and sent these materials to Menlo Park police and to Ms. Wykes at the *San Jose Mercury News*.

Mr. Morrow sought these materials from Ms. Wykes by subpoena, contending that her receipt of them in the early 1990's would establish that he had been prejudiced by the delay in investigating and charging him with the murder.

Although Ms. Wykes told Mr. Morrow that she had never received any of the materials he sought, he refused to withdraw the subpoena and insisted that he should be able to question her in court. After attempts to resolve the matter informally were unsuccessful, Ms. Wykes filed a motion to quash the subpoena on the grounds that Mr. Morrow failed to show a reasonable possibility that the information sought would materially assist his defense, as required under *Delaney v. Superior Court*, 50 Cal. 3d 785 (1990), and that the information sought was readily available from an alternate source — the Menlo Police department, which had acknowledged receiving the materials in question.

Citing California Evidence Code Section 912, Mr. Morrow contended that Ms. Wykes had waived the protections of the California reporter's shield by submitting a declaration with her motion to quash in which she stated that she had never received the materials described in the subpoena.

Ms. Wykes argued that not only is Evidence Code Section 912 clearly inapplicable to the shield law but that California Code of Civil Procedure 1986.1 explicitly provides that "no testimony or other evidence given by a journalist under subpoena in a civil or criminal proceeding may be construed as a waiver of the immunity rights provided by subdivision (b) of Section 2 of Article I of the California Constitution [the shield law]." Ms. Wykes also argued that in stating that she had never received the materials at issue, she had not disclosed any part of a protected communication.

Subpoena Quashed

The court agreed with Ms. Wykes: "Evidence Code Section 912 simply does not apply to this situation, and

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California Court Quashes Press Subpoena in Murder Case

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testimony in the form of a declaration given ... pursuant to a subpoena is not a waiver either." Based on Ms. Wykes' unequivocal statement that she had never received the materials sought, the court found that Mr. Morrow had failed to identify information that would materially assist his defense.

Moreover, the court cited the availability of the materials from an alternate source as being itself a sufficient basis for granting the motion to quash the subpoena. Finally, the court rejected as "purely speculative" Mr. Morrow's argument that his Sixth Amendment right to cross-examination and confrontation required, at a minimum, an *in camera* questioning of Ms. Wykes.

Judge Parsons responded to defense counsel's assertion that he should be able to cross-examine Ms. Wykes in order to test her presumptive protection under the shield law by noting that "the only way you would ever know that is to breach the shield law and ask questions." Finding that the defense had "failed to show relevance" with respect to the testimony sought from Ms. Wykes, the court granted the motion to quash the subpoena.

James Chadwick and Katherine Keating of DLA Piper Rudnick Gray Cary US LLP represented the reporter in this case.

Seventh Circuit Rebukes Trial Court for Sealing Opinions in Trade Secrets Case

On appeal of a decision in a trade secrets case between business competitors, the Seventh Circuit rebuked a magistrate judge for sealing her decisions in the case. *Hicklin Engineering, L.C. v. R.J. Bartell LLC,* No. 00-C-1516 (7th Cir. 2006 Feb. 22, 2006) (Easterbrook, Flaum, Manion JJ.).

At issue was a fairly ordinary business claim by a company that makes auto transmission testing equipment against a former consultant who established a competing business. Magistrate Judge Patricia J. Gorence in the Eastern District of Wisconsin granted summary judgment to defendant, but had without explanation filed her substantive opinions under seal because portions of the decisions presumably discussed trade secrets.

Writing for the Seventh Circuit Judge Easterbrook stated that "what happens in the federal courts is presumptively open to public scrutiny." Noting that public opinions issued in a case dealing with the construction plans of a hydrogen bomb, he found it "impossible to see any justification for issuing off-the-record opinions in a dispute about drawings of transmission testing equipment." Concluding: "We hope never to encounter another sealed opinion."

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Arkansas Supreme Court Ends Year Long Prior Restraint

Newspaper Was Ordered Not to Report on Allegations of Judicial Misconduct

The Arkansas Supreme Court this month dissolved an injunction that for more than a year had barred a newspaper from reporting on allegations of judicial misconduct made in open court. *Helena Daily World v. Honorable L.T. Simes,* No. 05-146, 2006 WL 348327 (Ark. Feb. 16, 2006) (Dickey, J.)

Background

The unusual prior restraint arose out of a high profile dispute between Helena, Arkansas Mayor Johnny Weaver and the local city council over Weaver's attempt to oust the city's chief of police. That dispute was assigned to be heard by Philips County Circuit Judge L.T. Simes.

Mayor Weaver filed a motion asking Judge Simes to recuse himself which was heard on January 6, 2005. At the hearing, Mayor Weaver without warning testified that Judge Simes had initiated an improper ex parte conversation with him, in which Judge Simes asked Weaver to deal leniently with the police chief. Weaver also testified that Judge Simes had an interest in a radio station that broadcast the city council meetings, and that Weaver had filed a complaint with the Judicial Discipline and Disability Commission based on these allegations.

All of these accusations were made in open court in the presence of a reporter from the *Helena Daily World.* Shortly after Weaver's testimony, Judge Simes closed the hearing and the meeting was adjourned to his chambers.

Judge Simes then issued a restraining order prohibiting the *Daily World* from reporting the statements made at the hearing. The order enjoined:

> "(A)ny and all persons and parties to the proceeding and the entities known as the Daily World and any and all attorneys and any and all persons present at the hearing on said date from communicating in any fashion whatsoever, i.e. speaking, writing, printing, distributing, or disseminating any information heard or received at the said hearing relating to the Arkansas Judicial Discipline and Disability Commission."

The underlying court file was also sealed.

The newspaper appealed the injunction to the Arkansas Supreme Court. The Court quickly granted certiorari, but declined to address the merits because the underlying order and records were under seal and not attached to the newspapers petition for certiorari. *Daily World v. Phillips County Circuit Court*, 2005 WL 552097 (Ark. Mar 10, 2005).

The Supreme Court noted that "once the ordered documents are filed with our court, we shall consider setting a briefing schedule on the *Daily World's* prior-restraint argument." In July 2005, the Court issued an order instructing the state and newspaper to file their briefs on the merits under seal. *See* 2005 WL 1606899 (Ark. July 1, 2005).

Arkansas Supreme Court Decision

In support of the restraint, Judge Simes and the state advanced three arguments. 1) That Arkansas law imposes a duty of confidentiality on pending judicial misconduct proceedings; 2) that Judge Simes reputation could be irreparably damaged by false allegations of misconduct; and 3) that the allegedly false allegations of misconduct undermined public confidence in the judicial system.

The Court rejected all three of these grounds. While finding it "regrettable" that Mayor Weaver did not give advance warning of his charges against Judge Simes, thus violating the "spirit" of the state disciplinary rules, the allegations were made in open court and had to made available to the public.

The Court concluded "the restraining order constitutes a plain, manifest, clear and gross abuse of discretion" but it offered no explanation for letting it stay in place for more than one year.

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European Court of Human Rights to Hear Russian Libel Appeal

The European Court of Human Rights this fall agreed to hear an appeal in an important Russian libel case that raises significant Article 10 issues, including whether government officials can sue over criticism of government actions. *Romanenko v. Russia*, Application No. 11751/03.

Background

The applicants, Tatyana Romanenko, Irina Grebneva and Vladimir Trubitsyn, are the founders of an independent weekly newspaper in Primorsky in southeastern Russia. In January 2002, Romanenko wrote an article about an on-going regional conference about unlawful logging. The article quoted from a conference letter stating that:

> "irregularities have been clearly on the rise since the town police department ... and the courts' administration department ... became forest operators."

The newspaper did not name any specific courts or public officials. And the letter itself was signed by seventeen people, including several local government officials, and it was sent to regional government officials.

Two separate but closely related civil defamation suits were commenced against the journalists for quoting from the letter. The first case was brought by a public authority, namely the local courts' administration department. The second case was brought by the regional director of the courts' administration department in his individual capacity.

In both cases Russian national courts granted standing to the claimants, found liability, and awarded monetary damages. The Russian courts found, moreover, that the journalists had failed to prove truth at trial and had failed, prior to publication, to verify the truth of the statement in the official document before they quoted from it in their newspaper.

Amicus Effort

The International Senior Lawyers Project coordinated an amicus brief supporting the journalists' petition for admissibility to the ECHR. The amicus brief urged the ECHR to hear the case to correct three fundamental violations of Article 10 by the Russian courts.

First, citing to *New York Times v. Sullivan* and ECHR rulings, amici argued that government entities cannot sue the media for defamation.

Second, relying on the same authority, amici argued that Article 10 does not permit public officials to sue for defamation over statements that do not name, identify or refer to them, i.e., the familiar "of and concerning" requirement.

Third, amici argued that Article 10 must protect journalists when they fairly and accurately report the contents of non-confidential official government documents, i.e., a fair report privilege.

In its decision granting the journalists' petition, the ECHR cited the amici brief and each of these three arguments as the grounds to hear the appeal. The court discussed the amici's argument that "many established jurisdictions barred public authorities from suing in defamation because of the public interest in uninhibited public criticism"; that "Article 10 would be hollowed out if public officials could substitute themselves for their respective bodies in taking legal action." And finally that "journalists have a right to publish accurately statements from a non-confidential document without being liable for the content of such statements."

The case will be an important opportunity for the ECHR to address each of these doctrinal issues in the contest of the increasingly harsh media climate in Russia.

Professor Peter Krug, David Bodney, Steptoe & Johnson; David Heller, MLRC; Kurt Wimmer, Covington & Burling; and Richard Winfield, International Senior Lawyers Project, wrote the amici brief on behalf of the Open Society Justice Initiative and the Moscow Media Law and Policy Institute.

September 27-29, 2006

NAA/NAB/MLRC Media Law Conference

Alexandria, Virginia

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UK Court Holds Biography Violates Right of Privacy

An End to Unauthorized Biographies?

By David Hooper

A recent decision of Mr Justice Eady has extended the law of privacy to apply to unauthorized biographies. *McKennitt v. Ash [2005] EWHC 3003* (Dec. 21, 2005). The law of privacy had hitherto been largely applied to intrusion by the tabloid press.

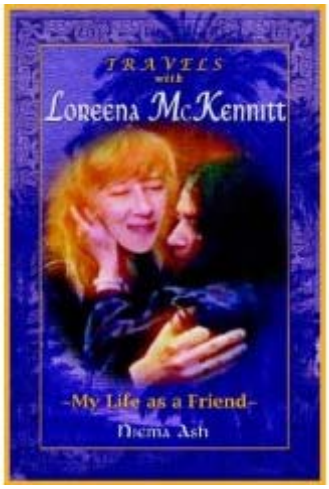
Background

The case was born of the bitterness that had grown up between the Canadian folk singer Loreena McKennitt and her former friend Niema Ash. Ash wrote a privately published book about the singer, somewhat ironically entitled *Travels with Loreena McKennitt, My Life as a Friend.*

Understandably Ash refused to let McKennitt see the book before it was published. McKennitt who was said to protect her privacy with "the iron safeguard of a chastity belt" sued for breach of privacy basing her claim on the European Court of Human Rights' decision in *Von Hannover v Germany, 50 EHHR 1,* a German case arising out of the taking of photos and general harassment of Princess Caroline by the tabloid press.

Mr Justice Eady had no doubt that the passages which crossed the threshold of privacy should be restrained by injunction.

In *McKennitt*, Mr Justice Eady had no doubt that the *Von Hannover* principles did apply to unauthorized biographies, that the passages which crossed the threshold of privacy should be restrained by injunction and that McKennitt should recover £5,000 damages.



Only 350 copies had been published by a company set up for the purpose but tellingly 140 copies had been circulated for review. The judge recognized the tension between the freedom of speech provisions of Article 10 and the right to respect for one's private and family life, one's home and correspondence under Article 8 of the European Convention of Human Rights.

Neither right automatically prevailed over the other. The conflict was largely to be resolved by the principle of proportionality. The question was whether Ash could be stopped from publishing materials about McKennitt's personal relationships, her feelings after the death of her fiancé, her health and diet, he emotional vulnerability and a property dispute with Ash which had been settled on confidential terms.

The threshold was whether this was private information and whether the complainant could be said to have a reasonable expectation of privacy if the answer to both questions was yes, the issue then arose as to whether there was any limiting principle or legal justification for publishing such private information.

What is Private?

The way Mr Justice Eady suggests that this quandary should be resolved is by inquiring and adopting the *Von Hannover* test: whether the intrusion contributed to a debate of general interest in a democratic society.

This threshold might be met in the case of public officials or politicians exercising their public functions but it seems unlikely to be met when reporting details of the private life of an individual who exercises no official functions. Indeed in the *McKennitt* case one of the defenses raised by the defendant was one of hypocrisy. Ash claimed McKennitt had not lived up to the standards McKennitt had listed on her website. The argument was given short shrift by the judge.

While there is a defense of public interest involving the exposure of wrongdoing or iniquity, it is clear that the threshold for this defense is a high one and the tendency of the court will be to protect private information where there is a reasonable expectation of privacy.

Trivial matters or shortcomings would not be sufficient to justify exposing everyday foibles or peccadil-

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UK Court Holds Biography Violates Right of Privacy

(Continued from page 35)

loes on the part of celebrities. There was stated to be a wide difference in the role of celebrity between what it was interesting to the public to know as opposed to what can be shown to be a public interest to be made known.

Where the private information relates to the performance by a public official of his duties public interest will be that much easier to establish. In the case of people with no public position it will be necessary — even in the case of celebrities — to produce some evidence that the revelation of such private information adds to the debate of matters of public interest — a high threshold to surmount.

Mr Justice Eady doubted the correctness of the Court of Appeal decision in *Woodward v. Hutchins [1977] 1WLR 760*. There an employee had been allowed to publish an account of the singer, Tom Jones's private antics on an airplane on the basis that it was in the public interest to have a counterbalance to the output of Tom Jones's public relations people.

Henceforward a lot will depend on the taste of and exercise of discretion by the trial judge. In the *McKennitt* case the judge felt that her expectation of privacy was infringed by the publication of private and intimate conversations with the author and of details of McKennitt's relationship with her dead fiancé, her feelings about her bereavement, details about her home and an incident in a hotel room and a property dispute between McKennitt and the author.

The judge's decision that any part of the publication which crosses the line of reasonable expectation of privacy can be enjoined is alarming for publishers. It depends largely on the judge's subjective view.

Whereas in libel cases the offending words are published with the result that lawyers can advise their clients what phrases to avoid, in privacy cases, such as McKennitt, the Judge for understandable reasons does not publish the words he finds to be covered by a reasonable expectation of privacy. Instead one reads simply of the offending topic.

It will however make it that much more difficult for publishers' lawyers to advise what is likely to fall on the wrong side of the line. The pressure on publishers to show the potentially offending passages to complainants before publication will be considerable and is another worrying aspect of the decision in terms of freedom of speech.

The fact that the courts will not enjoin the disclosure of private information that is anodyne or trivial or in the public domain is scant consolation. Public domain is likely to be interpreted in a more restricted sense in the UK than in the USA. A limited publication to a small group may not, for example, justify publication to the world at large.

The judge's decision that any part of the publication which crosses the line of reasonable expectation of privacy can be enjoined is alarming for publishers.

It was further made clear in *McKennitt* that a reasonable expectation of privacy could extend to false information so that a claimant no longer has the potential embarrassment of having to say whether a particular allegation is true or false and, if false, of being able only to sue for libel.

Article 8 (privacy) and Article 10 (freedom of speech) rights are meant to be balanced but in *McKennitt* there is little doubt which prevailed. The defendants who were not represented by lawyers at the trial have now appointed a lawyer who is seeking permission to appeal.

There is an interesting argument to be had whether a judge exercising his subjective view should be disposed to enjoin what he feels crosses the line or whether in the interest of freedom of speech the underlying presumption should be in favor of publication in the absence of a clear breach of confidence.

David Hooper is a partner with Reynolds Porter Chamberlain in London. The claimant was represented by barristers Desmond Browne QC and David Sherborne of 5RB; and solicitors firm Carter-Ruck. Defendant represented herself in this matter and is represented by David Price Solicitors and Advocates on appeal.

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From Mr. Justice Eady's decision in *McKennitt v. Ash [2005] EWHC 3003* (Dec. 21, 2005).

133. [Regarding] the coverage of Ms McKennitt's relationship with her fiancé and his death in 1998. It seems to me that there is a clear distinction to be drawn between general background, much of which would be anodyne or already in the public domain, and the details of her emotional reaction to bereavement. That is remarkably intrusive and insensitive....

135 [Regarding] Ms McKennitt's Irish cottage. It is not her only house, but it is nevertheless a home. That is one of the matters expressly addressed in Article 8(1) of the Convention as entitled to "respect." Correspondingly, there would be an obligation of confidence. Even relatively trivial details would fall within this protection simply because of the traditional sanctity accorded to hearth and home. To describe a person's home, the décor, the layout, the state of cleanliness, or how the occupiers behave inside it, is generally regarded as unacceptable. To convey such details, without permission, to the general public is almost as objectionable as spying into the home with a long distance lens and publishing the resulting photographs….

137. The fact that the work on the cottage was part of Ms Ash's own life does not mean that she is excused from "respecting" Ms McKennitt's entitlement to privacy. Likewise, it seems to me that the right to "respect" for one's privacy at home would cover not merely the physical descriptions of the building or contents but also conversations, communications or disagreements taking place in the home environment. People feel, and are entitled to feel, free in their homes to speak unguardedly and with less inhibition than in public places. Accordingly, it will be rare indeed that the public interest will justify encroaching upon such goings on. Naturally if criminal acts are committed, such as child abuse or the cultivation of illegal drugs, there would be a public interest to override the normal protection, but nothing of the sort is alleged here.

138. For obvious reasons I am not going to regurgitate the minute details to be found in the book about what was under the lino, the sanitary arrangements, or how many bunk beds were put up when visitors came to stay; suffice to say, it is intrusive and distressing for Ms McKennitt's household minutiae to be exposed to curious eyes and it is utterly devoid of any legitimate public interest. Applying, therefore, the "intense focus" to the parties' respective rights, I have no hesitation in concluding that the complaint is well founded and that the detail rehearsed on pages 55, 56, 59, 231, 233, 234-239, 243-244, 246-251 should not have been published.

139. Item 10 deals with the shopping trip in Italy. There is reference on page 226 to buying furniture and other household items for Ms McKennitt but the description is in very general terms. It does not seem to me to be intrusive. It is trivial and of no consequence, and unlike relatively trivial but intrusive descriptions of a person's home, there is no need for the law to step in and offer protection. Nor is it likely to cause significant distress or other harm to say, of a celebrity or anyone else, that a friend accompanied her on a shopping trip and managed to bargain with vendors to save money. It is anodyne, and not such as to attract any obligation of confidence. I do not even need to ask whether there is any public interest — although, of course, there is not....

143. [Regarding] the aftermath of Ms McKennitt's bereavement and ... dealing with, again, Ms McKennitt's fragile state at that time and details of a visit to Tuscany. This is intimate information gained from communications made at that time by Ms McKennitt because she trusted Ms Ash not to take advantage of her. This section also includes the rather intimate conversation to which I have referred in connection with item 4 above. As has been pointed out by Mr Browne, the section as a whole would be capable of being rewritten more shortly, so as to refer merely to the fact that there had been a visit to Tuscany and what, in general terms, they did there. I would uphold the complaint, however, about the intimate conversations and Ms McKennitt's fragility.

144. [Regarding] a contract Ms McKennitt entered into with Canadian Warner for her "next three albums." There is a general discussion on page 26 of the contractual terms and of concessions made. Even though it is general, it seems to me that Ms McKennitt is entitled to a reasonable expectation of privacy as to her contractual terms. They are certainly not for Ms Ash to reveal.

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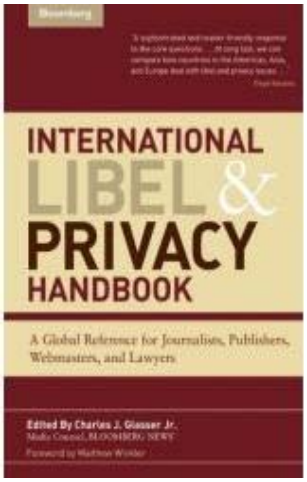

Just Published

International Libel & Privacy Handbook:

A Global Reference for Journalists, Publishers, Webmasters, and Lawyers (Bloomberg 2006) Edited by Charles J. Glasser, Jr.

Published this month, the *International Libel & Privacy Handbook* outlines libel and privacy law in 18 jurisdictions: Australia, Belgium, Brazil, Canada, China, England, France, Germany, India, Italy, Japan, Korea, Netherlands, Russia, Singapore, Spain, Switzerland and the United States.

Country outlines answer key questions about media libel and privacy law in each jurisdiction, including: the elements of libel, fault standards, protection for reporting on official documents, risks in reporting about ongoing investigations and trials, recognition and contours of privacy rights, taping and protection of confidential sources.

The book also contains articles on issues of interest to global publishers, including "International Media Law and the Internet," "Special Issues for Book Publishers," "Enforcing Foreign Judgments in the United States and Europe: When Publishers Should Defend," "Fair Use: It Stops at the Border" and The Emergence of Privacy as a Claim in the UK: Theory and Guidelines."

British Peer Withdraws Appeal in Claim Against U.S. Intelligence Source

Suit Was Barred by Statute of Limitations

Michael Ashcroft, a British businessman and member of the House of Lords, has withdrawn his appeal of a decision dismissing his lawsuit against former Atlanta Drug Enforcement Administration intelligence analyst Jonathan Randel. *Ashcroft v. Randel*, No. 05-15998-AA (11th Cir., Feb. 1, 2006). The district court had dismissed Ashcroft's lawsuit on statute of limitations grounds. *Ashcroft v. Randel*, No. 1:03-cv-3645 (N.D. Ga., Sept. 30, 2005) (Story, J.). *See MLRC MediaLawLetter* Oct. 2005 at 49.

Randel had leaked DEA documents mentioning Ashcroft to *The Times* of London, leading to a series of legal actions, including a libel writ in London, a criminal prosecution in Atlanta and this civil lawsuit, alleging the leak violated the Computer Fraud and Abuse Act, as well as Ashcroft's Fourth and Fifth Amendment rights. *See MLRC MediaLawLetter* Jan. 2003 at 3; Dec. 2003 at 34; Oct. 2005 at 49.

Ashcroft waited until November 2003 to file suit against Randel and replied to Randel's motion to dismiss on limitations grounds by arguing that the limitations clock did not begin running until June 2002, when Randel pleaded guilty to conveying records in violation of 18 U.S.C. § 641.

The district court rejected that argument, noting that "a person with a reasonably prudent regard for his rights ... would have known that [Randel] was the cause of his injury" long before the guilty plea. In so holding, the district court noted that Ashcroft knew that the allegedly libelous articles published by the *Times* had been based on leaked documents, that Randel was a suspect in the DEA's investigation into that leak and that Randel had in fact been indicted, in July 2001, for leaking the precise kind of documents involved in the *Times* story at the same time as the publication of the *Times* articles.

The district court determined that Ashcroft's claims accrued, for limitations purposes, no later than the July 2001 indictment and that the lawsuit, filed over two years later, was untimely.

Lord Ashcroft was represented by Kellogg, Huber, Hansen Todd & Evans, P.L.L.C., Washington, D.C., and Alston & Bird LLP, Atlanta, Georgia. Jonathan Randel was represented by former Georgia Governor Roy E. Barnes and the Barnes Law Group, Marietta, Georgia. Peter Canfield and Dow, Lohnes & Albertson, Atlanta, Georgia, assisted *The Times*.

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English High Court Rules Reporter Can Protect Confidential Sources

Journalist Need Not Disclose Source of Medical Records

By David Hooper

One has to look quite hard for areas where UK press law is more liberal than the US but the protection of journalists' sources may be one. On this side of the pond one is bemused by the succession of journalists in the USA threatened with jail, often, but of course not always, in cases where journalists may simply have done their work too well and to someone's obvious inconvenience.

Over here six years of litigation starting under the name of *Ashworth Hospital v. MGN Ltd [2002] 1WLR 2002* and ending with *Mersey Care NHS Trust v. Ackroyd [2006] EHWC 107* (Feb. 7, 2006), eventually produced a decision this month that freelance journalist Robin Ackroyd need not disclose his source at Ashworth high security hospital who had disclosed medical records about the notorious child-killer Ian Brady which formed the basis of an article in the *Mirror* in December 1999.

Background

In *Ashworth Hospital v. MGN*, the *Mirror* had been ordered to disclose the identity of Robin Ackroyd who had written the article under a pseudonym. The hospital then sought an order that Ackroyd disclose how he came into possession of Brady's medical records and identifying his source against whom the hospital wanted to take disciplinary action.

As Brady had been on hunger strike and was not above manipulating the press for his own ends and as there were allegations of mistreatment at the controversially run Ashworth Hospital, the Court of Appeal ordered a full trial to examine the public interest issues. This trial took place last month before Mr Justice Tugendhat.

Protection of Sources

Journalists' sources are protected by Section 10 Contempt of Court Act 1981 which was reviewed by the European Court of Human Rights in *Goodwin -v- United Kingdom [1966] 22 EHRR 123.*

Journalists' sources are to be protected "unless it is established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime." Here the hospital said that they needed to identify the disloyal mole in the interests of justice, so they could take action against him and remove the suspicion of guilt from their loyal employees.

Too readily in the past the courts have swallowed this argument which rendered the protection of Section 10 distinctly weaker if not actually illusory. Indeed the first judge to review the Ackroyd case, Mr Justice Rougler, had in April 2000 ordered disclosure of Ackroyd's source.

Mr Justice Tugendhat after hearing all the evidence and noting particularly that there was no evidence of these files having been bought by the paper, while there was evidence of a responsible attitude by the journalist towards the sensitive treatment of the medical data and of the public interest issues, took a different view.

The court must, he noted, have regard to the freedom of expression provisions embodied in Section 12(4) Human Rights Act 2000 and to the potentially chilling effect on press freedom of journalists having to disclose their sources. An order for disclosure was not simply a matter of judicial discretion, it was a hard-edged judgment as to whether the conditions in Section 10 Contempt of Court Act 1981 existed.

The burden of proving the wrongdoing in respect of which it wished to take action was on the hospital and, on the facts, Mr Justice Tugendhat felt that the hospital had not discharged the burden. The hospital had to prove that disclosure was necessary for the fulfilment of one of the legitimate aims but the court had to be satisfied that disclosure was proportionate to achieving the aim in question.

At this point the concept of responsible journalism, so beloved by English judges, may cut in. How has the information been used, in what circumstances was it ob-

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English High Court Rules Reporter Can Protect Confidential Sources

(Continued from page 39)

tained and is further wrongful use likely to be made of the information? While the court starts from the basis that prima facie it is contrary to the public interest that journalists' sources should be disclosed, ultimately the court's decision as to whether or not it is satisfied that there is a pressing social need for the source to be identified may well be influenced by the view it takes of the journalist's behavior and of how highly the journalist would score under the responsible journalism tests propounded by Lord Nicholls in the Reynolds case.

As a footnote it is worth observing that Mr Justice Tugendhat's decision in favor of the journalist was not altered by the fact that he decided that the journalist had made a number of errors of fact and had to some extent been influenced by a misguided attempt to act in the public interest.

David Hooper is a partner with Reynolds Porter Chamberlain in London. Barristers Gavin Millar QC and Anthony Hudson of Doughty Street Chambers and solicitors firm Thompsons represented the reporter in this trial. The hospital was represented by barristers Vincent Nelson QC and Jonathan Bellamy and solicitors firm Capsticks.

Mersey Care NHS Trust v. Ackroyd [2006] EHWC 107 (Feb. 7, 2006) (Tugendhat, J.)

"As Lord Keynes said: 'When the facts change, I change my mind.' Important facts that have changed are mentioned above. They include that the hospital no longer contends that the source acted for money, with the result that I have had to find afresh what the purpose of the source was, and to re-assess the risk of further disclosures now, in the light of that fact, and in the light of the absence of any similar disclosures since 1999. The extent of the disclosure by the source was more limited than was previously understood to be the case. I have not found that the source was one of a number of people limited to 200, but that it is impossible to say how large the group is. I have not found that the source was probably an employee, although he or she may have been, and even if it was an employee, the numbers who have left the hospital since 1999 represent about a third of those who worked there in 1999. So the likelihood of the hospital being able to obtain the redress it seeks against the source is correspondingly diminished.... Finally, unlike the courts in the MGN action, I have heard the evidence of Mr Ackroyd and have concluded that he was a responsible journalist whose purpose was to act in the public interest."

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Setback for Press in "Rome II" Choice of Law Negotiations

EU Commission Decides to Withdraw Press-Friendly Rule

The European Union's ongoing legislative process to enact choice-of-law rules in cross-border tort claims took another turn this month when the EU Commission announced it would recommend withdrawing defamation and privacy claims from the scope of the treaty.

At one time that would have been good news. In 2003, the initial draft of Rome II proposed "the country or countries in which the harmful event occurred" as the primary choice of law rule in defamation and privacy cases.

Numerous press organizations objected to this proposal. MLRC, for example, submitted comments arguing that the proposal would codify an impractical and unworkable approach by subjecting publishers to a maze of potential liability under the different defamation and privacy laws of each EU member state.

MLRC recommended adopting a country of origin principle, coupled with single point of publication rule to ensure fairness and predictability. Alternatively, MLRC recommended removing defamation and privacy from the scope of Rome II rather than lock in a very unfavorable, but potentially influential, framework.

This past July, the European Parliament unexpectedly modified the working draft of Rome II. Several European Parliament members inserted new language so that choice of law in defamation and privacy cases would turn on the location of the *target audience* and, if that is not readily ascertainable, then, the place in which *editorial control* is exercised. *See MLRC MediaLawLetter* July 2005 at 49.

Publishers welcomed the change since it puts them in a far better position to anticipate the substantive law that would apply to potential claims.

But the change faced resistance in the Council of the European Union – which shares authority with the European Parliament on the proposal. Council Vice President Franco Frattini, for example, found that the new proposal did not sufficiently address the rights of the victims of defamation and privacy torts.

The Council found it very difficult to find a consensus on an acceptable solution to balance the interests of the press and the concern for victims. Thus the entire article addressing the matter was withdrawn "for the time being."

Rome II now goes back to the European Parliament for a second reading. Members of Parliament can again introduce language to address the issue. And MEP Diana Wallis, the rapporteur for the treaty, has expressed interest in reinserting language addressing defamation and privacy claims.

In the event of continued disagreement between the European Parliament and the Council the issue may be submitted to a conciliation procedure. Conciliation is the third and final phase of the legislative procedures of the European Union. It applies if the Council does not approve all the amendments of the European Parliament adopted at a second reading of a proposal. The Conciliation Committee is made up of twenty-five Members of the Council or their representatives and an equal number of representatives from Parliament who make up the EP delegation.

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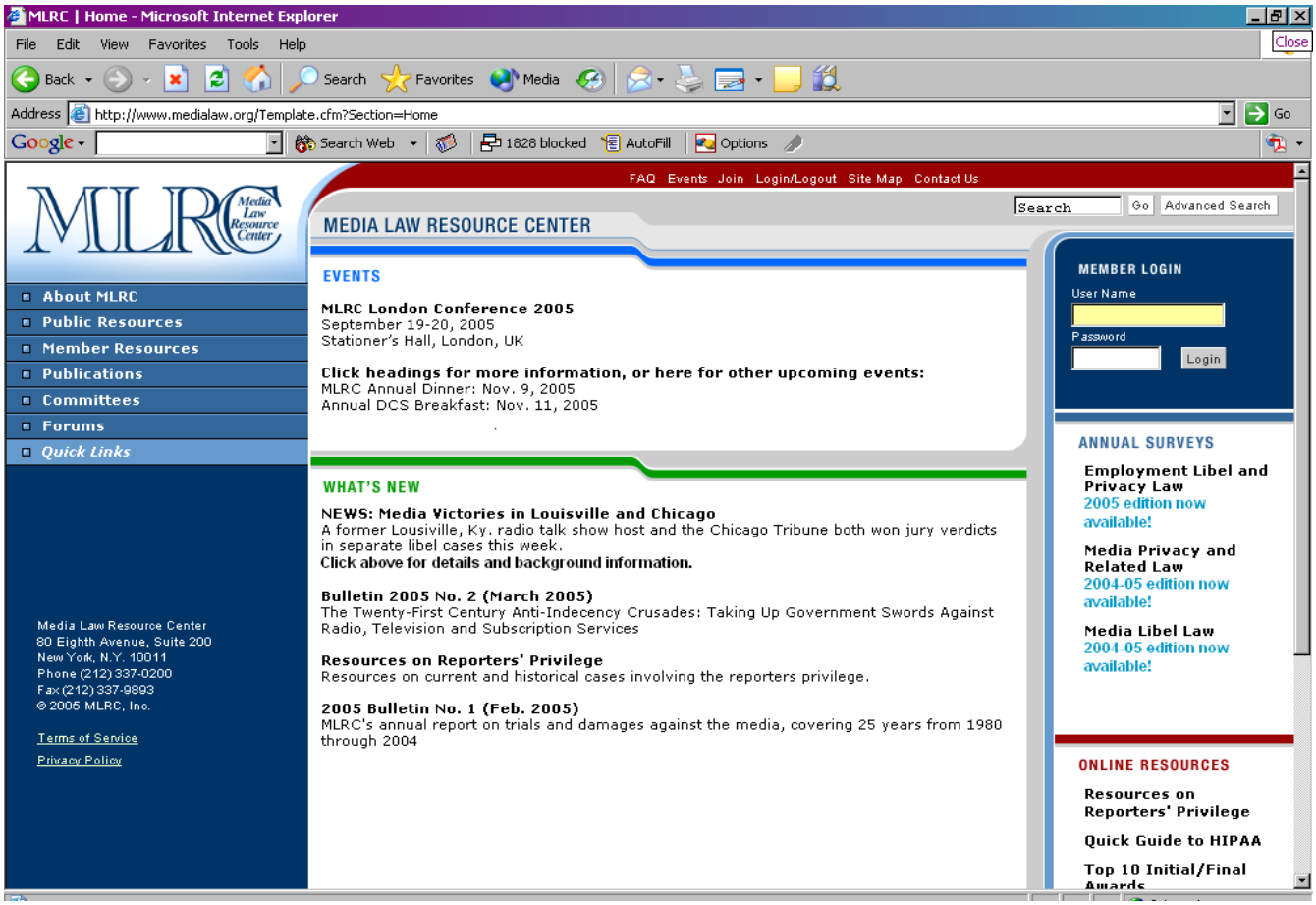

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Contact Debby Seiden, dseiden@medialaw.org, for details.

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Majority of Expanded Adult Industry Record-Keeping Law Upheld

Challenge to General Burdensomeness Rejected

By Michael A. Bamberger

In December, upheld in large part the constitutionality of 18 U.S.C. §2257 which imposes record-keeping obligations on producers of adult content. *Free Speech Coalition v. Gonzalez*, 406 F. Supp.2d 1196 (D. Colo. 2005). The Court granted a preliminary injunction in part, but denied relief with respect to the more general challenges to the burdensome requirements of the law.

This case has a history of over seventeen years of off and on litigation. Even though for most of that period the statute was in force and not enjoined, during that seventeen year period the Justice Department apparently commenced no investigations or enforcement under the statute.

Background

In November 1988, Congress enacted the Child Protection and Obscenity Enforcement Act, ostensibly to improve federal prosecutions of child pornography. Section 2257 created substantial record-keeping requirements on "producers" of books, magazines, films, etc. that contain visual depictions of actual sexually explicit conduct – a phrase defined more broadly than dictionary definitions might lead one to believe. Failure to keep the required records raised a rebuttable presumption that the pictured person was a minor for child pornography purposes.

The American Library Association led a challenge to the Act. Ultimately, §2257 was held unconstitutional in *American Library Association v. Thornburgh*, 713 F. Supp. 469 (D.D.C. 1989).

In response, Congress amended §2257 to remove "lascivious exhibition of the genitals" from the definition of "sexually explicit conduct" and to limit the "producers" required to keep the records to those who hire, contract for, manage or otherwise arrange for the participation of the model, i.e., those who have direct contact with the model. Despite that amendment, in 1992 the Justice Department issued regulations under the statute, which arguably nullified Congress' prior narrowing of the "producer" definition.

Challenged again in federal court, §2257 and its regulations were again found unconstitutional by the D.C. District Court. *American Library Ass'n v. Barr*, 794 F. Supp. 412 (D.D.C. 1992). However, the D.C. Circuit (2-1) reversed and upheld most of the amended statute. *American Library Ass'n v. Reno*, 33 F.3d 78 (D.D. Cir. 1994). *Accord, Connection Distributing Co. v. Reno*, 154 F.3d 281 (6th Cir. 1998).

The next chapter in this saga occurred four years later when the Tenth Circuit held that the expansion of the producer definition in the 1992 regulations was beyond the scope of the statute and therefore unenforceable. *Sundance Assocs., Inc. v. Reno*, 139 F.3d 804 (10th Cir. 1998). The government did not seek Supreme Court review.

For five years nothing happened. Then, in 2003, Congress amended §2257 to include within the covered class of producers those who created digital and computer-generated images. (It is hard to see how such record-keeping could assist in the enforcement of child pornography law – the claimed purpose of §2257 – since in the prior year, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), the Supreme Court had held such depictions are not child pornography.)

One year later, in 2005, the DOJ issued amended regulations. Among other things, the new regulations amended many definitions to include digital images and websites, and provided more detailed and onerous rules regarding how records must be kept and when inspections must be allowed. In addition, the new regulations retained the broad definition of "producers" previously invalidated by the *Sundance* court, though they also retained provisions permitting "secondary producers" to rely on records maintained by "primary producers."

Latest Challenge

The amended regulations were challenged in federal court in Denver in *Free Speech Coalition v. Gonzalez.* Plaintiffs raised three general arguments: (1) the new regulations are *ultra vires* under the rationale of *Sundance*, because they define the term "secondary producer" to include activities explicitly excluded by §2257; (2) the statute and regulations violate their rights under the First

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Majority of Expanded Adult Industry Record-Keeping Law Upheld

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Amendment by chilling, if not effectively banning, their dissemination of constitutionally protected expression particularly in light of the undue burden of the record-keeping requirements; and (3) the statute and regulations violate their rights to privacy.

As to the first challenge, the District Court found itself bound by the Tenth's Circuit's *Sundance* decision and granted relief.

As to the First Amendment claims, the Court first found that the record-keeping requirements were not so burdensome that they constituted a "prior restraint."

Before considering the argument that the regulations were overbroad content-based restrictions and failed to advance the asserted governmental interest, the Court first had to decide whether to apply strict or intermediate scrutiny. Relying on the analysis by the Sixth and D.C. Circuits in the prior §2257 cases, the Court held that the restrictions were not content-based, so that intermediate scrutiny was appropriate. Applying that standard, the Court found that the regulations advance a legitimate governmental interest, were narrowly tailored, and therefore did not violate the First Amendment.

Plaintiffs had particularly challenged the requirement that producers keep a copy of each depiction on the ground that it was unduly burdensome. The Court rejected that claim, with two exceptions.

Plaintiffs had particularly challenged the requirement that producers keep a copy of each depiction on the ground that it was unduly burdensome. The Court rejected that claim, with two exceptions. The first exception applied to live Internet chat rooms. These involve a performer on the Internet who engages in printed or telephonic dialogue with a customer while a simultaneous video image of the performer is transmitted.

A primary producer may operate scores of different rooms or channels 24 hours on every day of the year. Plaintiffs asserted that to maintain copies of all depictions transmitted during these chats would involve extraordinary computer capacity which could cost as much as $15 million dollars annually. The Court found this requirement unduly burdensome.

The second exception related to the provision that the amended regulations required producers to keep a copy of any URL (or other identifying reference) associated with a depiction originally published by them on the Internet and subsequently published on the Internet by another, regardless of whether the producer has control over the subsequent website which posts the depiction. As to this provision, the Court found it was an undue burden to maintain records as to URLs which the producer does not control.

Finally, the Court rejected plaintiff's privacy claims.

Conclusion

There is one particularly troubling aspect of the case which was not discussed by the Court, namely the scope of relief. The action was a facial challenge to the regulations. The relief sought in the complaint was a declaration of unconstitutionality and an injunction on enforcement generally.

On the motion for preliminary injunction, the Court found that the Tenth Circuit already had held part of the regulations unconstitutional and found substantial likelihood of unconstitutionality of two other applications of the Act. Nevertheless, the injunctive relief granted was limited to barring enforcement against plaintiffs or their members.(This paralleled the initial stay negotiated by the parties, which was limited to plaintiffs and their members, requiring non-members which sought the benefit of the stay to join plaintiff's association.)

The order leaves non-members subject to enforcement and to the financial burdens and chilling effect of the possibility of enforcement, despite the Court's ruling. Nor is enforcement totally out of the question – the DOJ never has accepted the Tenth Circuit's *Sundance* decision, as evidenced by its disregard in the 2005 amended regulations.

Both plaintiffs and the government have filed notices of appeal.

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Eleventh Circuit Strikes Down Sign Ordinance

By Cynthia L. Hain

The Eleventh Circuit decided this month not to rehear its decision striking down a Florida municipality's sign ordinance as an unconstitutional content-based restriction and prior restraint on speech. *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005)) (Marcus, Fay, Siler, JJ.), *reh'g denied,* (Feb. 2006).

The suit was brought by Solantic, LLC, an emergency medical facility, after the City of Neptune Beach imposed fines for the operation of an electronic variable message center sign, known as an "EVMC sign."

Background

After the EVMC sign was installed, Neptune Beach sent Solantic notices that the sign violated provisions of the city's ordinances prohibiting signs:

- with visible movement by electrical means except for barber poles
- with illusions of movement, and signs with lights
- that blink, flash, move, rotate, scintillate, flicker or vary in intensity, except for time-temperature signs.

After a challenge in the city's code enforcement board, Solantic continued operation of its EVMC sign under a limited permit that required the company to change the sign=s copy no more than once a day; modify the illumination of the sign to eliminate any blink, flash or scroll; and control the sign on-site. The city later disputed Solantic's compliance with the permit's strictures, and fines began to mount. Solantic unsuccessfully pursued administrative appeals.

Solantic in January 2004 sued the city in state court, alleging violations of its First Amendment rights through unconstitutional content-based restriction and a prior restraint on speech. The city removed the case to federal court and Solantic's bid for a preliminary injunction was denied.

The district court found that the sign code was a constitutional, content-neutral time, place, and manner restriction that did not place unbridled discretion in the hands of licensing officials. Although the district court noted that there were content-based restrictions in the sign code, such as the exception for time-temperature signs, it concluded that the restrictions were not significant enough to offend the First Amendment. Solantic filed an interlocutory appeal to the Eleventh Circuit.

Eleventh Circuit's Decision

On appeal, Solantic asserted that the district court abused its discretion in denying its motion for a preliminary injunction because the sign code was facially an unconstitutional, content-based restriction on speech; the permit requirement was an unlawful prior restraint; and the code restrictions were vague, as applied to Solantic.

The Eleventh Circuit reversed the district court based on the first two challenges, not reaching the vagueness issue. The Court found that although the sign code had numerous content-neutral restrictions regarding the form that signs take, the messages that were exempt from these restrictions, and from the permitting process, rendered the code a content-based regulation that could not survive strict scrutiny.

For example, the ordinance would permit, through its exemptions, a fully operational EVMC sign of the government, such as a ten-foot tall sign identifying city hall in blinking lights. Religious displays, including signs with movable parts and flashing lights, were allowed year round without a permit. Under the sign code, a property owner would be allowed to display indefinitely a directional sign guiding traffic that has a flashing neon arrow, but would not be allowed to post a "Re-Elect Mayor Smith" sign for more than sixteen days.

Moreover, political messages unrelated to electioneering activities were subject to the permitting process and all other restrictions in the code, while signs guiding traffic and parking were exempt. Holiday lights and decorations, such as a giant illuminated Santa Claus, were allowed to be displayed freely, but not a political figure. A memorial plague could be freely erected, while a sign reading "The Brown Family" could be displayed only after obtaining a permit.

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Eleventh Circuit Strikes Down Sign Ordinance

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Applying the strict scrutiny standard to this content-based regulation, the Eleventh Circuit found that the city's stated interests in aesthetics and public safety were insufficient justifications for making distinctions between messages conveyed and that the regulation was not narrowly tailored to achieve these goals. Significantly, the Eleventh Circuit noted that, even assuming the code was narrowly tailored, interests in aesthetics and traffic safety constitute merely substantial, not compelling, government interests and therefore, are insufficient to justify the content-based distinctions in the code.

Even assuming the code was narrowly tailored, aesthetics and traffic safety constitute merely substantial, not compelling, government interests.

The Eleventh Circuit *sua sponte* refused to sever the exemptions as a means of curing its deficiencies. The Court had no difficulty finding that the exemptions in the sign code were discrete provisions that could be separated from the ordinance and that the legislative purpose could still be served without the exemptions.

Rather, the sticking point for the court was that the general regulations and exemptions were not so inseparable in substance that it would be clear the city would have enacted the ordinance without the exemptions. Consequently, the ordinance had to fall in its entirety.

Having found that the city's regulation of signs was an unconstitutional, content-based restriction on speech, the Eleventh Circuit turned to the issue of whether it was also an unconstitutional prior restraint. The Neptune Beach sign code contained no time limits for making permitting decisions. The absence of any time limits in the permitting process vested in the licensing official unbridled discretion and thus violated First Amendment, prior restraint principles.

Finding that the Neptune Beach sign ordinance violated the First Amendment, the Eleventh Circuit reversed and remanded the case to the district court solely to reconsider Solantic's requests for permanent injunctive relief and for a declaration that it is not liable for accrued fines. The Eleventh Circuit, citing judicial economy, decided the final merits of the case rather than limiting itself to the "likelihood of success on the merits" standard, normally applied in the context of a preliminary injunction.

The city filed motions for rehearing and rehearing *en banc* in the Eleventh Circuit, challenging Solantic's standing to facially challenge the ordinance, and questioning the panel's interpretation of the ordinance, its refusal to sever the offending provisions in an effort to save the ordinance, and its decision to finally decide the matter on appeal. Neptune Beach's motions were denied.

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ETHICS CORNER

Ethical Issues Concerning Metadata

By Timothy J. Conner

You just received an e-mail from opposing counsel attaching a letter that makes a settlement offer. After reviewing its text (and lowball offer) you discuss it with a smart and technically savvy younger lawyer at your firm who says you should mine the document for "metadata."

While you are loathe to ever admit you don't know something – or to give the slightest hint that you are as un-hip as your reputation around the firm suggests – you find that you cannot avoid asking: "Meta *What*?" Your bemused colleague patiently explains that metadata is like a series of electronic fingerprints that shows hidden information your opponent may not realize he sent to you.

The two of you decide to take a peak at the letter's metadata. You find written embedded "comments" made by the opposing party indicating the top dollar they are willing to pay to settle, but instructing their counsel to start the negotiation at a much lower number, and obviously to settle on the "best possible terms."

Is it unethical for a lawyer to mine metadata from an electronic document received from another party? Does an attorney has an affirmative duty to take reasonable precautions to ensure that sensitive metadata is removed?

Have you just done something unethical? Has your opposing counsel committed an ethical breach by sending an electronic document that contains such metadata?

In a bitterly contested lawsuit, whether you win or lose comes down to the meaning of a particular clause in a contract. Since the terms are ambiguous you have to get at evidence to show intent. Would you want to look at the wording of all drafts, who the authors were, any comments made, when the drafts or comments were made, if a template was used, etc.? Do you have a duty to ask for metadata in your request for the production of electronically stored documents, and is there an ethical duty to preserve and/or produce electronic documentation that can be mined for its metadata? Metadata can reveal information that may be critical to your ultimate success, and the truth finding function of our adversary system.

The Florida Bar Board of Governors, at its meeting in December 2005, discussed the ethics of mining for metadata. Most of the Board members admitted they had never heard of metadata. After hearing about a horror story involving an inadvertent disclosure of metadata to an opposing counsel, who purposefully mined a Word document that had been sent by e-mail (an appellate brief), one Board member reportedly said that "I have no doubt that anyone who receives a document and mines it … is unethical, unprofessional, and un-everything else."

The Board referred two basic questions to the Florida Bar's Professional Ethics Committee. First, is it unethical for a lawyer to mine metadata from an electronic document received from another party? Second, does an attorney has an affirmative duty to take reasonable precautions to ensure that sensitive metadata is removed from an electronic document before it is transmitted?

That Committee has referred to a Subcommittee the tasks of considering the issues surrounding metadata, and whether a formal ethics opinion needs to be issued. A decision is expected later this year.

Understanding Metadata

In order to understand the ethics surrounding these issues, we first need some understanding of what metadata is. Metadata can be information embedded in electronic documents, or stored externally and used by the computer's file system to create a means of organizing and managing documents. It has been described as data about data, and as hidden information.

There are reportedly at least 80 accessible application and system metadata fields utilized for each Microsoft Office document created. Metadata exist in documents created using Word, WordPerfect, Excel, Powerpoint, and even PDF files, and is created with every ac-

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tive file stored on a computer. It seems to be everywhere. Some of it is benign, but some of it carries what could be attorney-client and work product information. Here are a few examples:

- authorship;
- the firm or organization name;
- the name of your computer;
- the name of the network server or hard drive where the document is saved;
- when the document was created, how many times it has been viewed, printed and to which printer;
- track changes, which show document revisions, including deleted text;
- document versions;
- whether a template was used;
- comments.

In today's world of knowledge management and the need to efficiently store and retrieve documents, metadata is vital. Searching capabilities are enabled by having metadata, which allows documents to be properly classified and stored. It allows organizations to track who may have rights to access and copy stored information so as to prevent unauthorized use.

Some metadata is accessible by simply reviewing a document's "Properties" dialog box. Other metadata requires the use of software that can allow it to be viewed.

As a simple test, open the last Word document you created on your computer. Click on "File" on your toolbar, and then "Properties." Click on the various tabs like "Summary" or "Statistics."

It should show a variety of information like who created the document, the name of the company where the document was created, when it was created, modified, accessed, printed, and how much time was spent editing it.

It does not take much imagination to understand how metadata could be embarrassing, or worse, prejudicial to your client, in certain contexts, and in others critical to efforts to learn the truth of what happened and when.

The Ethics Depend on Context

Florida is not the first state to consider the ethical issues surrounding metadata. The New York State Bar Association has addressed metadata in two formal ethics opinions. In Opinion 749 (12/14/2001) the Committee on Professional Ethics concluded that "[a] lawyer may not make use of computer software applications to surreptitiously 'get behind' visible documents or to trace e-mail."

The Committee reasoned that the strong public policies in favor of protecting attorney-client confidentiality, and the work product doctrine, compelled their conclusion that viewing metadata "would violate the letter and spirit" of Disciplinary Rules 1-102(A)(4) prohibiting a lawyer from engaging in conduct "involving dishonesty, fraud, deceit or misrepresentation," and 1-102 (A)(5) prohibiting "conduct that is prejudicial to the administration of justice."

Three years later, in Opinion 782 (12/08/2004), the same Committee concluded that a lawyer must exercise "reasonable care" to prevent disclosure of confidences and secrets contained in metadata in documents transmitted electronically to opposing counsel or other third parties.

This time the Committee focused on the duty of a lawyer to take reasonable precautions against the disclosure of client confidences to third parties. In issuing its opinion, the Committee reiterated that a lawyer-recipient has an obligation not to exploit an inadvertent or unauthorized transmission of client confidences or secrets.

The American Bar Association has not adopted a model rule on metadata. The ABA's Model Rule 4.4(b) provides that "[a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender."

Comment 2 makes it clear that whether the lawyer is required to take any additional steps is a matter of law beyond the scope of the Rules. Model Rule 1.6 requires a lawyer to act competently to preserve confidentiality. Comment 17 to that Rule imposes an obligation on the lawyer to take reasonable precautions to prevent information from getting into the hands of unintended recipi-

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ents, but goes on to state that the duty "does not require the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy." These Rules do not provide clear guidance on the current ethical issues concerning metadata.

What about metadata in the context of discovery? Depending on the circumstances of your case, metadata may be crucial, or it may be wholly irrelevant. Rule 34, Fed.R. Civ.P., does not directly address metadata, and there is substantial debate about whether metadata is part of the definition of a "document."

The proposed amendments to the Federal Rules of Civil Procedure, which are scheduled to take effect December 1, 2006, do not directly address metadata either. Proposed Rules 16 and 26 encourage early discussion of issues regarding electronic discovery, and provide that any issues regarding disclosure or discovery of electronically stored information should be included in the scheduling order.

Part of the problem is that many lawyers do not even know this issue is out there.

This would seem like a logical time to be thinking about whether metadata may be relevant to your case. The proposed amendments to Rule 34 provide that absent a court order or agreement of counsel to the contrary, "a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable."

The only reported federal case to have discussed metadata in detail in the discovery context is *Williams v. Sprint/United Management Company*, 230 F.R.D. 640 (D. Kan. 2005), which held that, as a general proposition, when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, then the documents should be produced with their metadata intact, absent a timely objection to such production, agreement of the parties, or in light of a request for a protective order.

The *Williams* Court found persuasive several publications by The Sedona Conference Working Group regarding principles and practices concerning electronic document discovery. The Sedona Conference has published 14 "Principles for Electronic Document Production."

Principle 12 states that "[u]nless it is material to resolving the dispute, there is no obligation to preserve and produce metadata absent agreement of the parties or order of the court." In *Williams*, the Court specifically found that the metadata in Excel spreadsheets being produced by the defense was relevant and likely to lead to the discovery of admissible evidence. The Court chastised defense counsel for "scrubbing" metadata from documents produced, but stopped short of imposing sanctions.

Removing Metadata?

What steps can you take to make sure you do not transmit potentially embarrassing metadata to your adversary? You could send a facsimile, or hard copy by mail of the document. That is not always practical, or efficient, however.

Depending on your system, you can access tools on your computer that allow you to turn off the functions that create the metadata to begin with. While converting files to a PDF format supposedly strips out most metadata, this may not be foolproof. You can print out a hard copy, scan the document into a PDF file, and then e-mail it. You can also "scrub" metadata from an electronic document, which seems to be the safest approach. There are various software programs available for this purpose. Sometimes these are called metadata "washers."

Conclusion

As this is an evolving area of law, answers are not yet clear. The key to dealing with ethical questions concerning metadata, however, would appear to depend upon the context you find yourself in.

Outside the context of discovery, if you receive a document from opposing counsel that contains metadata prejudicial to that opposing party, and it would appear that its inclusion was inadvertent, it may be unethical in many jurisdictions to exploit that information.

If you are the sending lawyer, you clearly have a duty to exercise "reasonable care" not to disclose metadata that may be prejudicial to your client. At the moment, part of the problem is that many lawyers do not even know this issue is out there. As lawyers become aware of it though,

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it seems evident that taking steps to eliminate potentially prejudicial metadata from electronic transmissions is the reasonable thing to do, and therefore, ethically required.

With respect to metadata in the discovery context, you must first determine whether it may be relevant to the issues in the case. If so, you should make clear your intention to seek it. If you are faced with an order requiring production of electronic documents "as they are maintained in the ordinary course of business" then you will most likely be ethically bound to produce metadata unless you make a clear objection, obtain a protective order, or get your opponent to agree that it is not included within the scope of the order. The lesson here is to be aware of the issue, and raise it early on.

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