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LDRC Libel Defense Resource Center

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In This Issue . . .

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3RD CIR. PROTECTS MEDIA FROM DAMAGES FOR DISCLOSURE OF INTERCEPTED PHONE COMMUNICATIONS
P. 7

NEW YORK COURT OF APPEALS REAFFIRMS PRESS PROTECTIVE STANDARD IN PRIVATE PERSON LIBEL CASES
P.15

D.C. CIR. ON ACCESS TO GRAND JURY PROCEEDINGS
A NEW DECISION AND HISTORICAL REVIEW
P. 39

9th Circuit Revives Privacy Invasion Case Against Japan Pubcaster

Raises Questions About Interviewing Techniques & Viability of Deteresa

By Douglas E. Mirell and Paul L. Hoffman

Relying upon a recent decision of the California Supreme Court and ignoring its own precedent, the Ninth Circuit Court of Appeals late last year reversed the dismissal of a privacy invasion claim based upon a videotaped interview voluntarily given to a television news reporter who twice identified himself to his subject, but who did not inform the subject that the interview was being recorded. *Alpha Therapeutic Corporation v. Nippon Hoso Kyokai*, No. 98-55642, __ F.3d __ (9th Cir., Dec. 28, 1999). Though the ruling is based only upon a generous reading of the plaintiff's complaint and leaves the trial court to decide whether the reporter's conduct was "highly offensive," the circuit court's decision concludes that the interview subject can maintain an intrusion claim because California law protects against privacy invasions by means of electronic recording even though there is no reasonable expectation of confidentiality in the communication's contents. Citing the Cali-

(Continued on page 2)

Thank you Tom Leatherbury . . .

Tom Leatherbury is stepping down as President of the Defense Counsel Section, turning the post over to Tom Kelley. Tom Leatherbury will remain on the DCS Executive Committee in 2000 as emeritus. On behalf of the membership, and surely on my own behalf, I want to thank Tom Leatherbury for his extraordinary service on the Executive Committee of the Defense Counsel Section and as its President in 1999.

Many of you know Tom. And for you what I have to say here will be old hat. For those of you who may not know Tom, such is the pity. Remedy that! He is a truly grand man, first-rate lawyer, first-rate thinker, organizer and nudge, with a measure of gravitas, but only when needed. We like to think that we put all of his skills to test in this past year as President of the DCS.

Thanks to Tom, we had an **LDRC BULLETIN** on the Texas interlocutory appeal statute – one of the most important legal developments in First Amendment litigation in that state. Tom, however, was involved in and committed to all of LDRC's projects and services. He lent energy and enthusiasm and great smarts to all that we did. In addition, we all had a great time in the doing.

It is hard to adequately express the appreciation we all feel for Tom. Suffice to say, we never say goodbye in this organization, and plan to draw upon his skills in the future. Thank you, Tom Leatherbury!

—— *Sandy Baron*

9th Cir. Revives Privacy Invasion Case

(Continued from page 1)

fornia Supreme Court's June 1999 opinion in *Sanders v. American Broadcasting Companies,* 20 Cal.4th 907, 915 (1999), the Ninth Circuit's decision poses serious questions about the continuing viability of both the circuit's own opinion in *Deteresa v. American Broadcasting Companies*, 121 F.3d 460 (9th Cir. 1997), *cert. denied*, 523 U. S. 1137, *reh'g denied*, 524 U.S. 968 (1998), and this standard technique of investigative journalism.

Foreign Sovereign Immunities Act

The sole defendant in this case is Japan's national broadcaster, the Japan Broadcasting Corporation or Nippon Hoso Kyokai ("NHK"). According to the district court's 41-page unpublished opinion (which the Ninth Circuit partially affirmed and partially reversed), "Though the analogy is not perfect, NHK occupies a position similar to that of the Canadian Broadcasting Corporation or the British Broadcasting Company."

In the course of its opinion, the circuit court agreed with the district court's finding that NHK is entitled to immunity under the Foreign Sovereign Immunities Act ("FSIA") as an "agency or instrumentality" of Japan (28 U.S.C. § 1603(a)-(b)) because "Japan has considerable control over the content of NHK's programming, budget, and operations. Considering the totality of the circumstances, the fact that NHK maintains some autonomy from the Japanese government is inconsequential."

Though this finding means there will be no jury trial of any remaining claims and that NHK will not be subjected to any punitive damage awards, the Ninth Circuit's decision nevertheless allows the case to proceed as to two claims after all four of the claims initially brought against NHK had been dismissed by U.S. District Judge Stephen V. Wilson in March of 1998.

Two Programs on Tainted Plasma

The claims against NHK were filed by Alpha Therapeutic Corporation ("Alpha") and Alpha's former medical director, Dr. Clyde McAuley ("McAuley"). In their March 1997 complaint, Alpha and McAuley contended that NHK defamed them in connection with an hour-long special (the "Hour Long Program") that NHK broadcast, discussing Alpha's provision of HIV-tainted blood plasma products to Alpha's then-parent corporation, Green Cross, for use in Japan. According to the district court's opinion, "Green Cross's provision of tainted plasma products to hemophiliacs in Japan has been the basis of a sustained national controversy in that country." Indeed, as of the time of the district court's opinion, approximately 1,800 of Japan's 4,500 hemophiliacs had been infected with tainted blood products supplied by various manufacturers; of these, approximately 450 had died.

The Hour Long Program aired only in Japan, and only in the Japanese language. Its airing in Japan was

(Continued on page 3)

9th Cir. Revives Privacy Invasion Case

(Continued from page 2)

preceded by a four-minute-long segment that discussed only limited aspects of the Hour Long Program and was shown as part of NHK's regular daily Japanese language "Good Morning Japan" program. A limited number of U.S. cable television subscribers subsequently saw this "Good Morning Japan" broadcast after it was retransmitted, per usual practice, for later broadcast in America. According to the district court's opinion, the "Good Morning Japan" program, while not mentioning McAuley, "did capture the basic thrust of the Hour Long Program, that is, that Alpha supplied plasma that it knew was likely contaminated with HIV."

A Reporter at the Door

The Hour Long Program contained brief excerpts of an interview with McAuley where his face cannot be seen. That interview was conducted in the early evening hours of December 27, 1996, by an NHK reporter who went to McAuley's home in Arcadia, California, after finding the address from publicly available sources. Together with a translator, the NHK reporter walked from the street to McAuley's front door. Meanwhile, an NHK cameraman and sound technician were recording the interview while sitting in a van parked on the public street immediately in front of McAuley's home. The reporter, wearing a microphone on his tie, rang McAuley's doorbell and knocked on the front door. Without asking who was at his front door, McAuley turned on his front yard and porch lights, and opened the door.

McAuley stood just inside his front door, while the NHK representatives at all times remained outside of the house on the front porch. When McAuley opened the door and confirmed his identity, NHK's reporter immediately identified himself as "Hiroshi Iwamoto from NHK Japan" and began asking questions about certain Alpha documents in NHK's possession.

After responding to Iwamoto's sixth question, McAuley again inquired into the reporter's identity. Iwamoto's translator responded that they represented "NHK, Japanese public television." Thereafter, the interview resumed.

After responding to approximately 30 more questions, McAuley said he did not want to answer any more inquiries. He asked the NHK representatives to leave, and they immediately did so. The entire McAuley interview lasted approximately six minutes. At no time was there any understanding between the parties that the conversation was "off the record."

9th Circuit Reverses on Privacy

In addition to defamation claims based upon both the Hour Long Program and the "Good Morning Japan" teaser, Alpha sued for conversion based upon NHK's copying of documents it obtained in Japan that Alpha asserted were covered by a U.S. protective order. The complaint also contained an intrusion claim brought by McAuley based upon the interview by Iwamoto and his translator. The district court dismissed all four claims on FSIA and/or *forum non conveniens* grounds. The Ninth Circuit, however, reinstated Alpha's defamation claim, but only as to the "Good Morning Japan" program; it also reinstated McAuley's intrusion claim.

The Ninth Circuit's treatment of McAuley's invasion of privacy claim is both cursory and troublesome for several reasons.

The Ninth Circuit's treatment of McAuley's invasion of privacy claim is both cursory and troublesome for several reasons.

Ignores Deteresa

First, the Ninth Circuit's opinion totally ignores its own *Deteresa* precedent, a decision the district court expressly relied upon and found dispositive. In an opinion written by Judge Diarmuid F. O'Scannlain (one of the judges on the *NHK* panel), the Ninth Circuit held in *Deteresa* that the surreptitious audio recording and videotaping of a conversation by a reporter did not amount to an invasion of privacy. Like McAuley, the plaintiff in *Deteresa* (one of the attendants on O.J. Simpson's flight to Chicago on the night of the Nicole

(Continued on page 4)

9th Cir. Revives Privacy Invasion Case

(Continued from page 3)

Brown Simpson and Ron Goldman murders) knew that she was speaking to a media representative and no intimate details of the plaintiff's life were recorded.

Second, the Ninth Circuit's opinion relies primarily upon *Sanders*, a California Supreme Court decision rendered after the conclusion of all briefing in the *Alpha v. NHK* appeal. In particular, the appeals court's decision quotes from *Sanders* in concluding that McAuley "can still state a claim for invasion of privacy because 'a person may reasonably expect privacy against the electronic recording of a communication, even though he or she had no reasonable expectation as to the confidentiality of the communication's contents.'" *Alpha v. NHK,* quoting *Sanders*, 20 Cal.4th at 915.

Entirely absent from the Ninth Circuit's opinion is any discussion of the enormous factual differences between the interview voluntarily given by McAuley to NHK's self-identified reporter and the "hat cam"-captured workplace conversations of employees in a non-public telepsychic boiler room recorded by a media representative who never identified herself to any of her co-workers in *Sanders*. These significant factual discrepancies are ignored despite the *Alpha* court's own acknowledgment that "each case must be taken on its facts."

Sanders Misused

Also missing from the Ninth Circuit's decision is any hint of the context of the language quoted from *Sanders*. The California Supreme Court's *Sanders* decision was built upon the foundation of that court's earlier opinion in *Shulman v. Group W Productions*, 18 Cal.4th 200 (1998). The language from *Sanders*, quoted and relied upon by the Ninth Circuit in *Alpha v. NHK*, merely summarizes hypothetical *dicta* from *Shulman*. The *Sanders* court was simply recapitulating certain conclusions it said were "suggested" and "implied" — but not actually reached — in *Shulman*.

In particular, the sentence from *Sanders* that is partially quoted by the *Alpha* court in reaching its decisional rule reads, in its entirety:

> *Shulman*'s discussion of ***possible bases*** for a reasonable expectation of privacy on the patient's part also ***suggests*** that a person may reasonably expect privacy against the electronic recording of a communication, even though he or she had no reasonable expectation as to the confidentiality of the communication's contents.

Sanders, 20 Cal.4th at 915 (emphasis added).

Thus, in truth, the *Sanders* court went no further than *Shulman* toward finally concluding that California law separately protects against the unannounced electronic recording of a communication that is not reasonably expected to remain confidential.

Upon returning to *Shulman*, it is obvious from the Supreme Court's modification of footnote 15 of its own opinion that this issue was expressly left unresolved:

> Neither in *Ribas* [*v. Clark*, 38 Cal.3d 355, 360-361 (1985)] nor in any other case have we had occasion to decide whether a communication may be deemed confidential under Penal Code section 632, subdivision(c) when a party reasonably expects and desires that the conversation itself will not be directly overheard by a nonparticipant or recorded by any person, participant or nonparticipant, but does not reasonably expect that the contents of the communication will remain confidential as to the parties. . . . We need not resolve that issue here, because under either interpretation of section 632, subdivision (c) triable issues exist whether Ruth had a reasonable expectation of privacy in her communications to medical personnel."

Shulman, 18 Cal.4th 1034a, 1034b-1034c (1998) (discussing, but not resolving, split of authority between *Deteresa* and *O'Laskey v. Sortino*, 224 Cal. App. 3d 241, 248 (1990), on the one hand, and *Coulter v. Bank of America*, 28 Cal. App. 4th 923, 929 (1994) and *Frio v. Superior Court*, 203 Cal. App. 3d 1480, 1488-1490 (1988), on the other hand).

Ignores Other Post-Sanders Decisions

Third, following *Sanders*, the California Supreme Court depublished *Marich v. QRZ Media*, 73 Cal. App. 4th 299 (1999), a Court of Appeal decision that purported to resolve the issue left open by *Shulman* by concluding that California privacy law does protect against surreptitious recording of even non-confidential com-

(Continued on page 5)

9th Cir. Revives Privacy Invasion Case

(Continued from page 4)

munications. *See Marich v. QRZ Media*, 1999 Daily Journal D.A.R. 10823 (Ct. App., Oct. 22, 1999).

Finally, in *Flanagan v. Flanagan*, 1999 Cal. App. LEXIS 1120, __ Cal. App. 4th __ (Ct. App., Dec. 27, 1999), another California Court of Appeal carefully analyzed these conflicting lines of authority after concluding that the California Supreme Court "had not yet decided the issue." *Id.* at *12. Upon completing its examination, the *Flanagan* court found the Ninth Circuit's reasoning in *Deteresa* "to be persuasive and adopt it for our own. We note also that the legislature clearly intended a confidential communication to mean something more than any communication made in circumstances not reasonably expected to be overheard or recorded." *Id.* at *17-18. Issued within a day of *Alpha v. NHK*, the Ninth Circuit clearly did not consider the *Flanagan* court's holding.

For all of these reasons, and in light of the draconian impact this decision could have upon standard interviewing techniques of electronic journalists, NHK is presently planning to file a petition for rehearing and a suggestion for rehearing *en banc* in *Alpha v. NHK*. Intrusion claims such as those of McAuley should be dismissed at the earliest possible time — hopefully at the pleadings stage, and certainly without requiring a full trial, whether by judge or jury.

Douglas E. Mirell of Loeb & Loeb LLP and Paul L. Hoffman of Schonbrun, De Simone, Seplow, Harris & Hoffman LLP are co-counsel for NHK in the pending appellate and district court proceedings in this case.

U P D A T E

Supreme Court Will Not Revisit *Sussman* Tele-psychic Boiler Room Litigation *Sanders* Damage Award Affirmed But Attorneys' Fees Rejected

The U.S. Supreme Court has declined to review the Ninth Circuit's decision in *Sussman v. American Broadcasting Companies, Inc.*, the federal suit involving a *PrimeTime Live* news report on employees of a psychic hotline. No. 99-840 (Jan. 18, 1999). A reporter had obtained employment at the Psychic Marketing Group, and used a hidden camera to record conversations with her coworkers some excerpts of which appeared on the program. Much litigation devolved from the broadcast, including a claim brought by some of the employees under the federal wiretap law.

The statute provides a right of action where one party to a conversation consents to the recording, but only where the interception is made for a tortious or criminal purpose. In August, the Ninth Circuit affirmed the dismissal of the suit, finding it irrelevant whether or not the act of interception violated some other law (such as a state law claim for invasion of privacy). Rather it held that, in order to support a claim under the statute, the intended use of the intercepted material must be criminal or tortious. *See LDRC LibelLetter*, September 1999, at 5.

Meanwhile, litigation has continued in *Sanders v. American Broadcasting Companies, Inc.*, an invasion of privacy action which one of the tele-psychics brought in state court (The plaintiff raised other claims as well, all of which the trial court dismissed). The

(Continued on page 6)

Supreme Court Will Not Revisit *Sussman* . . .

(Continued from page 5)

California Court of Appeal originally dismissed Mark Sanders' "intrusion on seclusion" claim after a jury awarded him over $600,000 in damages; the court held that the plaintiff had no reasonable expectation of privacy in workplace interactions with coworkers.

Last summer, the California Supreme Court reversed, finding that the plaintiff could have a reasonable expectation of privacy specifically against covert videotaping, violation of which could found an intrusion claim. *See LDRC LibelLetter*, July 1999, at 1. The Supreme Court remanded the case to the Court of Appeal, expressing no opinion as to the damages awarded by the jury at trial, to the attorney's fees awarded by the trial court, or to other procedural issues raised by the parties.

In an unpublished opinion issued in December, the Court of Appeal affirmed the jury award. The defendants had claimed in their cross-appeal from the original judgment that the damages were excessive because they erroneously included broadcast-based damages for a non-broadcast tort (intrusion). The court upheld the award, including the broadcast-based damages, because "the damages from the intrusion were increased by the fact that the intrusion was broadcast." The court noted, however, that this was an issue not reached by the California Supreme Court in its decision in the case.

The defendants also had claimed that the trial court erred in awarding Sanders' attorney, Neville Johnson, over $500,000 in attorney fees under California's private attorney general statute, and on this issue the Court of Appeal reversed. The California Code of Civil Procedure allows a court to award attorney fees to a successful party "in any action which has resulted in the enforcement of an important right affecting the public interest," depending on the benefit conferred on the public and the financial burden incurred by the party. The Court of Appeal held that as the rights Sanders vindicated were personal, and he had been able to an engage Johnson on a contingency-fee basis, the trial court abused its discretion in awarding the fees.

Sanders complained that the trial court abused its discretion in refusing to grant equitable relief, such as enjoining ABC from using similar investigative techniques and requiring ABC to make an on-air apology. Finding that the legal remedy was quite sufficient, and that such relief would implicate First Amendment issues, the Court of Appeal affirmed the denial.

In a footnote, the court quickly disposed of ABC's claim that the trial judge's charge to the jury had misstated the offensiveness element of intrusion, an element, the media should take note, which takes on substantial import under the *Sanders* analysis. The defendants did not bring the challenge until after the initial appeal, so the court found it untimely and declined to address the issue.

Some other procedural challenges raised by the defendants were likewise dismissed: a claim regarding a piece of evidence not admitted by the trial court, and a claim that the trial court demonstrated bias by delaying the defendants' opening statement.

Third Circuit Protects Media from Damages for Disclosure of Intercepted Phone Communications
A Conflict With the D.C. Circuit?

By David Bodney

In one of its last decisions of the old millenium, the U. S. Court of Appeals for the Third Circuit decided an important issue of First Amendment law with profound implications for the new. In *Bartnicki v. Vopper*, the Third Circuit held that state and federal wiretap laws "may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception." 1999 WL 1257744, at *20 (3d Cir. Dec. 27, 1999).

The *Bartnicki* decision marks the second time that a federal appellate court has opined on the constitutionality of disclosing intercepted cellular phone conversations, and arguably creates a split among the circuits on the issue. Earlier last year, in a case that received greater notoriety, the U.S. Court of Appeals for the District of Columbia found that the liability provisions of the Electronic Communications Privacy Act and a related Florida statute did not abridge the free speech clause of the First Amendment. *Boehner v. McDermott*, 191 F. 3d 463 (D.C. Cir. 1999).

In *Boehner*, a Republican member of the House of Representatives, John A. Boehner, sued a Democratic congressman, James A. McDermott, for disseminating an intercepted cell phone conversation between then-Speaker of the House Newt Gingrich and other Republican party leaders. *Boehner* involved only the conduct of a non-media defendant who purportedly knew the interception at issue was unlawful.

Given the Third Circuit's analysis of the media's unique First Amendment interests in such cases, and its meditations on the D.C. Circuit's *Boehner* ruling earlier in the year, the *Bartnicki* decision merits close attention.

Union Officials Overheard

In brief, the case involved a May 1993 cell phone conversation between plaintiffs Gloria Bartnicki and Anthony F. Kane, Jr. At the time, a local school district was negotiating with a teachers' union over the terms of the teachers' new contract. Bartnicki acted as the chief negotiator for the teachers' union, and Kane served as president of the local union. Defendant Jack Yocum, who participated in the negotiations, served as president of an organization formed by local citizens to oppose the teachers' union's proposals.

In the May 1993 cell phone conversation, Bartnicki and Kane discussed whether the teachers would obtain a three-percent raise, as suggested by the school board, or a six-percent raise, as urged by the teachers' union. Among other statements in the cell phone conversation, Kane told Bartnicki:

> If they're not going to move for three percent, we're gonna have to go to their, their homes . . . to blow off their front porches, we'll have to do some work on some of those guys . . . .

An unknown person intercepted and recorded the Bartnicki-Kane conversation, and left a tape recording in Yocum's mailbox. Yocum played the tape and recognized the voices of Bartnicki and Kane. He then gave a copy of the tape to Fred Williams (also known as Frederick W. Vopper) of WILK Radio and Rob Neyhard of WARM Radio. Williams played portions of the tape on-air repeatedly as part of a radio news/public affairs talk show that was broadcast simultaneously on WILK Radio and WGBI-AM. In addition, local television stations aired the tape, and some newspapers published written transcripts.

U.S. and Penn Wiretap Claims

Bartnicki and Kane sued Yocum, Williams, WILK Radio and WGBI Radio under both federal and state law. They based their federal claims on 28 U.S.C. § 2510, *et seq*. (Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986). They premised their state claims on the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa.

(Continued on page 8)

Third Circuit Protects Media from Damages

(Continued from page 7)

Cons. Stat. § 5701, et seq. (collectively, the Wiretapping Acts). Plaintiffs sought more than $50,000 in actual damages, further statutory damages under 18 U.S. C. § 2520(c)(2), liquidated damages under state law, punitive damages, and their attorneys' fees and costs.

The case came to the Third Circuit by interlocutory appeal, after the district court held that imposing liability on these defendants — including the media defendants — would not violate the First Amendment. The district court had certified two questions as controlling questions of the law: whether imposing liability under the Wiretapping Acts (1) on the media defendants, solely for broadcasting a newsworthy tape, violates the First Amendment; and (2) on Yocum, solely for providing the anonymously intercepted and recorded tape to the media defendants, likewise violates the Constitution.

On February 26, 1998, the Third Circuit granted the media defendants' petition to appeal, and Yocum later joined in that effort. The Pennsylvania State Education Association participated as amicus curiae in support of Bartnicki and Kane, and the United States intervened as of right. All told, the Third Circuit took 22 months to issue its opinion.

Third Circuit Majority View

But it was worth the wait. Joined by Senior U.S. Circuit Judge Robert E. Cowen, Circuit Judge Delores K. Sloviter authored the 2-1 decision. Judge Sloviter began her analysis by recognizing that the case focused "exclusively" on those provisions of the Wiretapping Acts that create causes of action for civil damages against persons who "use or disclose intercepted communications and who had reason to know that the information was received through an illegal interception." 1999 WL 1257744, at *4. Neither the prohibitions against actual interception of wire communications nor any application of the Acts' criminal provisions were at issue in *Bartnicki*.

Initially, the Third Circuit rejected the media defendants' argument that the case was "controlled" by ample Supreme Court authority addressing the tension between privacy rights and the First Amendment. After lengthy citations to *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1965), *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), and *Smith v. Daily Mail Publ. Co.*, 443 U.S. 97 (1979), the appellate court viewed these cases as useful "background," but not dispositive. 1999 WL 1257744, *6.

> [T]he Supreme Court's practice of narrowly circumscribing its holdings in this area strongly suggest that a rule for undecided cases should not be derived by negative implications from its reported decisions." 1999 WL 1257744, *6.

Indeed, the Third Circuit recognized that the *Bartnicki* case involved one issue that the Supreme Court had specifically — albeit by footnote — declined to decide: namely, "whether, in cases where information has been acquired unlawfully by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well." *Id.* (citing *Florida Star v. B.J.F.*, 491 U.S. 524, 535 n. 8). Accordingly, the Court of Appeals resolved to decide *Bartnicki* "not by mechanically applying a test gleaned from *Cox* and its progeny, but by reviewing First Amendment principles in light of the unique facts and circumstances of this case." *Id.* at 7.

Cohen v. Cowles Not Key

The majority then considered the district court's reliance on *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). The lower court thought *Cohen* provided support for rejecting the media defendants' First Amendment claims because the Wiretapping Acts are merely laws of general applicability.

The appellate court, however, questioned whether the Acts could be properly characterized as generally applicable laws, and concluded that the district court had read *Cohen* "too broadly." *Id.* at *7. As the Third Circuit observed, *Cohen* recognized that "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Id.* at *8 (citing *Cohen*, 501 U.S. at 669).

In *Cohen*, the Supreme Court merely held that generally applicable laws that neither target nor dispropor-

(Continued on page 9)

Third Circuit Protects Media from Damages

(Continued from page 8)

tionately burden the press are enforceable against the media as fully as they are against non-media defendants. Still,

> [t]he question remains whether the damages provisions of the Wiretapping Acts may constitutionally be applied to penalize individuals or organizations for disclosing material they know or have reason to know was illegally intercepted who had no part in the interception. *Id.* at *8.

Government Urges Intermediate Scrutiny

The court then considered the government's argument that the federal Wiretapping Act should be subject only to intermediate scrutiny. The government based its contention that strict scrutiny should not apply on two related propositions: that (1) the Wiretapping Acts are general laws that impose only "incidental" burdens on expression, and (2) in any event, they restrict speech in a content-neutral fashion.

[T]he court declined to characterize the media defendants' actions as "expressive conduct" rather than speech.

Though it ultimately applied the intermediate scrutiny standard, the Third Circuit flatly rejected the government's argument that it should do so because the Wiretapping Acts impose only "incidental" burdens on expression. After an extended discussion of *United States v. O'Brien*, 391 U.S. 367 (1968), and its progeny, the court declined to characterize the media defendants' actions as "expressive conduct" rather than speech. After all, as the court noted, the plaintiffs had based their complaint on Yocum's intentional disclosure of a tape to the media, and on the media defendants' intentional publication of the entire contents of a private telephone conversation to the public.

> If the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct. *Id.* at *10.

(Conversely, posed with essentially the same question, the D.C. Circuit in *Boehner* asked rhetorically: Speech? "What speech?" 191 F.3d at 466.)

Speech v. Conduct

To upend the government's *O'Brien* argument, Judge Sloviter devoted a significant portion of her opinion to an analysis of statutes that regulate both speech and conduct. Here, the court recognized that one could easily characterize some portion of the media defendants' actionable behavior as "conduct." Indeed, "although it may be possible to find some kernel of conduct in almost every act of expression, such kernel of conduct does not take the defendants' speech activities outside the protection of the First Amendment." *Id.* at *10.

The court then chided the government for its failure to provide any support for the "surprising proposition" that a statute governing both speech and conduct merits less First Amendment scrutiny than one regulating speech alone. As the Third Circuit observed,

> [a] statute that prohibited the 'use' of evolution theory would surely violate the First Amendment if applied to prohibit the disclosure of Charles Darwin's writings, much as a law that directly prohibited the publication of those writings would surely violate that Amendment. *Id.*

Settling this debate, the Third Circuit found that "when a statute that regulates both speech and conduct is applied to an act of pure speech, that statute must meet the same degree of First Amendment scrutiny as a statute that regulates speech alone." *Id.* at *11.

Content Neutral

Nevertheless, the Third Circuit found the government's second argument — that intermediate scrutiny should apply because the wiretapping acts are content-neutral — "more persuasive." *Id.* Following the Supreme Court's reasoning in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1985), the court consid-

(Continued on page 10)

Third Circuit Protects Media from Damages

(Continued from page 9)

ered whether the wiretapping acts were truly "content-neutral" by analyzing the purposes of the acts.

For both the state and federal acts, the court identified the protection of privacy in one's wire and oral communications as the principal purpose. Indeed, the Third Circuit recognized a state's significant interest in protecting "the right not to have intimate facts concerning one's life disclosed without one's consent." *Id.* at *13.

At first, the Third Circuit seemed tempted to decide whether the wiretapping acts properly could be categorized as content-based if they were premised on a need to safeguard against the disclosure of private facts. Interestingly, the court went beyond the media defendants' position by finding "a not implausible argument that the injury associated with the disclosure of private facts stems from the communicative impact of speech that contains those facts, i.e. having others learn information about which one wishes they had remained ignorant." *Id.* at *13.

However, because the government had argued that the "fundamental purpose" of Title III was to preserve the confidentiality of wire, electronic and oral communications, the Third Circuit in the end found it unnecessary to complete its inquiry into the private facts justification. Maintaining the confidentiality of such communications was plainly content-neutral, and therefore the court adopted an intermediate scrutiny standard in the case.

While the intermediate scrutiny test "varies to some extent from context to context, and case to case," the Third Circuit sought to define the test, and observed that intermediate scrutiny "always encompasses some balancing of the state interest and the means used to effectuate that interest." *Id.* Moreover, the court cited a laundry list of cases applying the intermediate scrutiny test — from cases involving laws promoting transportation safety to prohibiting flag display — and noted that all such statutes were nonetheless invalidated as unconstitutional. In addition, the court underscored the importance, even in intermediate scrutiny cases, of establishing whether the regulation is "narrowly tailored" to serve a significant governmental interest, and provides "ample alternative channels for communication." *Id.* at *15 (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)).

For these reasons, the court focused on those portions of the acts that allow damages and attorneys' fees against persons who played no part in the interception. The government had argued that the wiretapping acts protect the confidentiality of communications in two ways: by (1) denying the wrongdoer the fruits of his labor, and (2) eliminating the demand for those fruits by third parties. The Third Circuit made short shrift of the government's first assertion insofar as the record was "devoid of any allegation that the defendants encouraged or participated in the interception in a way that would justify characterizing them as 'wrongdoers.'" *Id.* at *16. Given the parties' stipulation that the person who had intercepted the conversation was unknown (and not a defendant in the suit), the court noted that the government could never achieve its first objective in this case.

The Court of Appeals focused on the government's second contention — that the laws' damages provisions promote privacy by eliminating demand for intercepted materials by third parties. The court found that the connection between such provisions and the laws' prohibitions on the initial interception was "indirect at best." *Id.*

In support of that finding, the Third Circuit stated that nothing in the record proved that the imposition of statutory damages on these defendants would have any effect on the unknown party who had intercepted the Bartnicki-Kane conversation. Similarly, the court chided the government for failing to offer any evidence supporting its claim that the laws' damages provisions had ever deterred any other "would-be-interceptors." *Id.* Ultimately, the court concluded that the government's objectives could best be met by enforcing existing provisions of the wiretapping acts against actual interceptors, not by imposing damages against Yocum and the media defendants.

Deters More Speech Than Necessary

Importantly, the Third Circuit recognized that en-

(Continued on page 11)

Third Circuit Protects Media from Damages

(Continued from page 10)

forcement of the damages provisions of the wiretapping acts would deter significantly more speech than necessary to serve the government's avowed interest. "Reporters often will not know the precise origins of information they receive from witnesses and other sources," Judge Sloviter noted, "nor whether the information stems from a lawful source." *Id.* at *17. Some reporters, she observed, may be unable to determine whether material they are considering publishing has already been disclosed publicly. "Such uncertainty could lead a cautious reporter not to disclose information of public concern for fear of violating the Wiretapping Acts." *Id.*

Full Circle to Cox

Coming full circle to *Cox* and its progeny, the Third Circuit cited the Supreme Court's frequent concern about the "timidity and self-censorship" that may stem from punishing the media for publishing truthful information. *Id.* (citing *Florida Star* and *Cox*). Noting that the information contained in the intercepted conversation was "highly newsworthy and of public significance," the court underscored the Supreme Court's admonition in *Smith* that "state action to punish the publication of truthful information seldom can satisfy constitutional standards." *Id.* (citing *Smith*, 443 U.S. at 102).

Boehner Distinguished

The majority opinion rejected the dissent's view that *Bartnicki* involved the same issues as *Boehner*. Judge Sloviter noted that *Boehner*, too, was a split decision, albeit one that upheld the constitutionality of § 2511(1)(c). Nonetheless, "all three judges [in *Boehner*] emphasized in their separate opinions that there was no effort to impose civil damages on the newspapers . . . which had printed the details of a conversation that had been illegally intercepted." *Id.* at *19. Indeed, as the *Bartnicki* court pointed out, *Boehner* declined to concern itself at all with whether the Act would be constitutional if applied to the newspapers who published the initial stories about the illegally-intercepted conference call.

But the Third Circuit recognized that defendant Yocum in *Bartnicki* stood in the same position as James McDermott in *Boehner*, the Congressman from Washington who had caused a copy of the Gingrich tape to be given to the newspapers. Still, the Third Circuit detected "an indication in *Boehner* that McDermott was more than merely an innocent conduit." *Id.*, at *19. Unlike Yocum, McDermott knew who intercepted the conversation because he accepted the tape from the interceptors. Moreover, McDermott "not only sought to embarrass his political opponents with the tape but also promised the interceptors immunity for their illegal conduct." *Id.*

A Spirited Dissent

In a spirited dissent, Senior U.S. District Judge Louis H. Pollak identified the right of recovery against those who distribute illegally recorded conversations as an "important ingredient" in the effort to protect privacy. *Id.* at *24. Though Judge Pollak agreed with the majority's "careful analytic path . . . through the minefield of First Amendment precedents," he disagreed with the court's ultimate application of the law to the facts. Indeed, he identified a "widespread legislative consensus" for imposing civil liability on the publishers of illegally intercepted communications as an effective means of protecting protect privacy.

As Judge Pollak proclaimed, the majority decision

> not only invalidate[d] a portion of the federal statute and the counterpart portion of the Pennsylvania statute, it by necessary implication spells the demise of a portion of more than twenty other state statutes (and also a statute of the District of Columbia); in the two centuries of American constitutional law, I cannot recall a prior decision, whether of a federal court or of a state court, which in the exercise of the awesome power of judicial review, has cut so wide a swath. *Id.* at *24.

Dismissing such "hyperbole," Judge Sloviter underscored that the statutory scheme to prohibit and punish wiretapping remains "unimpaired." *Id.* at *19. Only the application of certain statutory provisions within that scheme — laws that would punish the media "who nei-

(Continued on page 12)

Third Circuit Protects Media from Damages

(Continued from page 11)

ther encouraged nor participated directly or indirectly in the interception" — was at issue in *Bartnicki*. *Id.*

Though the Third Circuit began *Bartnicki* by dismissing *Cox* and its progeny as anything but dispositive, it concluded its opinion with forceful references to those Supreme Court decisions. On at least four occasions, as Judge Sloviter observed, the Supreme Court has been asked to permit a state to penalize the publication of truthful information. Three of those four cases involved statutes designed to protect the privacy interests of such vulnerable individuals as juveniles and sexual assault victims. Nonetheless, despite the strong state interests involved, the Supreme Court found that those interests were insufficient to justify the restrictions on the media's First Amendment rights.

By reviewing *Bartnicki*'s unique facts and circumstances against the backdrop of pertinent Supreme Court rulings, the Third Circuit was amply able to decide the case in favor of the media's important First Amendment interests. At bottom, the court held that "the Wiretapping Acts fail the test of intermediate scrutiny and may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception." *Id.* at *20.

Other Jurisdictions, Other Cases

For all the persuasive force of the Third Circuit's ruling, the legal debate is far from over. The D.C. Circuit recently denied Rep. McDermott's petition for rehearing en banc, and he has moved to stay the issuance of the mandate in *Boehner* pending the filing of a petition for writ of certiorari in the United States Supreme Court. Moreover, a similar issue lurks in the Fifth Circuit, where the appellate court is considering whether to apply Title III of the Wiretapping Act to punish speech about official misconduct that results from lawful newsgathering. *Peavy v. WFAA-TV*, Nos. 99-10303; 99-10271.

While the U.S. Supreme Court declined to consider this issue recently in *Central Newspapers, Inc. v. Johnson*, No. 99-42 (Nov. 1, 1999), a case arising from the Louisiana Court of Appeal, *Bartnicki*, *Boehner* and *Peavy* make Supreme Court review seem inevitable. Perhaps, then, the open issue in footnote 8 of *Florida Star* will find its final answer, and the specter of media liability for the innocent republication of newsworthy information will be resolutely dispelled.

David J. Bodney is a partner in the Phoenix office of Steptoe & Johnson LLP, and chairs LDRC's Trial Techniques Committee. He is representing Central Newspapers, Inc. in Central Newspapers, Inc. v. Johnson, noted above.

U P D A T E

CERT. DENIED IN *WELLS v. LIDDY*

On January 18, the U.S. Supreme Court declined to review the Fourth Circuit decision holding that Ida Maxwell "Maxie" Wells is not a limited purpose public figure for purposes of her defamation suit against Watergate conspirator G. Gordon Liddy. Wells, who once worked as a secretary at the Democratic National Committee offices, sued Liddy after he endorsed, in speaking appearances and on the Internet, a theory that John Dean arranged the Watergate break-in in order to cover up his wife's involvement in a prostitution ring. According to the proposition, as developed in the book *Silent Coup* and taken up by Liddy, Wells helped make arrangements for clients of the call-girl business.

The District of Maryland granted summary judgment for Liddy, finding that Wells would have to meet an actual malice standard of fault; it reasoned that either Wells was an "involuntary limited purpose public figure," or that the law of Louisiana (Wells' domicile) applied, imposing an actual malice standard for any case involving a media defendant and a matter of public concern. The Court of Appeals held last year that Wells had neither actively played a role in the controversy surrounding Watergate, nor "assumed the risk of publicity" in order to become an involuntary public figure. *See LDRC LibelLetter*, October 1999, at 14.

Sixth Circuit Rejects Bid for Substantial Additional Damages in *Business Week* Newsgathering Case

By Janet A. Beer

On January 11, 2000, the Sixth Circuit affirmed the judgment of the U.S. District Court for the Southern District of Ohio awarding plaintiff W.D.I.A. Corporation damages of $4,010.52 plus prejudgment interest after having found McGraw-Hill, Inc. and reporter Jeffrey Rothfeder liable for breach of contract and fraud in connection with the newsgathering for a September 1989 *Business Week* article on the credit reporting industry. In a two-page unpublished *per curiam* opinion, the Court of Appeals concluded that the lower court had not erred in declining to award plaintiff its expenses arising from an FTC investigation that was not caused by any actions of the defendants and that the court had not abused its discretion in declining to award punitive damages.

W.D.I.A. had not appealed from the district court's ruling that damages could not be awarded for expenses stemming from the publication of the truthful article. Given the size of the judgment, the defendants chose not to pursue an appeal.

"Is Nothing Private"

The district court's largely favorable ruling — in particular, its denial of punitive damages — can be traced directly to the decisions *Business Week* made, after consultation with McGraw-Hill's legal department, as it was planning how to research and report the story. In particular:

- *Business Week* took particular care to protect the privacy of consumers whose credit reports it obtained in the course of its research.
- The magazine obtained permission before publishing information from the credit reports of then Vice-President Quayle and then Congressman Durbin.
- By design, Business Week did not publish or disclose that W.D.I.A. was a subject of its test of the credit reporting industry.

"Is Nothing Private?"

The case arose from an article entitled "Is Nothing Private?" which was published in the September 4, 1989 issue of *Business Week*. Written in principal part by reporter Jeffrey Rothfeder, the article described, *inter alia*, the ease with which detailed and supposedly private credit information concerning the lives of American consumers is routinely made publicly available. The article described a test of the credit reporting system that Rothfeder had conducted, including that he had "told one fib" in conducting the test, and explained how easily Rothfeder had been able to gain access to confidential consumer credit reports, including the credit reports of then-Vice President Dan Quayle and then-Congressman Richard J. Durbin.

One of the subjects of the article was the charge leveled by critics of the federal Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681u (1994) (the "FCRA") — and disputed by many in the credit reporting industry — that the FCRA was ineffective in protecting consumers' privacy and that credit reporting agencies called "superbureaus" were the primary source of the problem.[1] While researching the article, Rothfeder and his supervisor, then-Senior Editor Robert Arnold, decided that it was important to address for the magazine's readers the hotly disputed issue of whether current laws and industry procedures were sufficiently protective of consumers' privacy.

Reporting Required First-Hand Test

After concluding that the controversy could not be resolved by standard reporting techniques, and after consultation with higher-ranking news executives, Rothfeder and Arnold decided to conduct a first-hand test of the credit reporting industry's consumer privacy safeguards. They decided that Rothfeder would contact a number of superbureaus and attempt to gain access to consumer credit reports by telling the organizations that he was an

(Continued on page 14)

[1] The article reported that three national credit bureaus are automatically supplied every month with millions of detailed records on individuals, which they then repackage and sell for a wide variety of commercial uses. "Superbureaus" are the approximately 200 credit reporting companies that buy private consumer credit information from the national credit bureaus and resell it to clients seeking consumer credit reports. Plaintiff W.D.I.A. is a superbureau.

Sixth Cir. Rejects Bid for Additional Damages

(Continued from page 13)

editor at McGraw-Hill and that he sought access to reports for pre-employment screening, which is a permissible purpose under the FCRA.

The test was an exception to *Business Week*'s written "Statement of Values and Code of Ethics," which states:

> We do not practice surreptitious entry.*Business Week* reporters should not misrepresent themselves to gain access to information for a story. . . . Unusual reporting techniques should have the approval of the editor-in-chief and, if necessary, the McGraw-Hill legal department.

Neither *Business Week*, in its entire 75-year history, nor the two senior editors involved in the decision had ever used such techniques before.

After obtaining approval for the test, Rothfeder contacted a number of superbureaus. Some refused to grant him access, but he was able to obtain credit information from others. When he filled out W.D.I.A.'s subscriber application, Rothfeder deliberately introduced inconsistencies and omitted required information, raising obvious "red flags" that he believed would cause him to be detected if W.D.I.A. were rigorously protecting consumer privacy. After a perfunctory check on his credentials, and despite the fact that W.D.I.A. officers were aware of the gaps and inconsistencies in his application, Rothfeder was accepted as a W.D.I.A. subscriber. He then obtained from W.D.I.A. several confidential credit reports, including those of two *Business Week* colleagues and those of then-Vice President Dan Quayle and then-Congressman Richard J. Durban.

As part of his research for the article, Rothfeder interviewed the FTC official in charge of enforcing the FCRA. He did not disclose to her that he was conducting a test of the credit reporting industry. At no time — before or after the publication of the article — did Rothfeder disclose to the FTC — or, indeed, to anyone other than *Business Week*'s editors and counsel — that W.D.I.A. had allowed him to access consumer credit reports. The FTC official thus testified unequivocally that an FTC investigation of W.D.I.A. that was commenced in 1989 had not been caused by McGraw-Hill or Rothfeder or the publication of the article. The court credited the testimony and denied W.D.I.A.'s claim for damages for its expenses in responding to the FTC investigation and subsequent Consent Order.

As the district court noted, McGraw-Hill and Rothfeder took particular care to protect the privacy of the consumers whose credit reports were obtained. Rothfeder obtained his colleagues' permission before obtaining their credit reports, and their identity was not disclosed in the article. McGraw-Hill and Rothfeder took special care to protect the privacy of Vice President Quayle and Congressman Durbin. Prior to publication of the article, Rothfeder called the offices of both Quayle and Durbin. He told their aides that he had obtained the credit reports and read them what he had written about the reports for the article (which did not disclose any financial information or other significantly confidential information). He requested and obtained permission to publish what he had written and received a comment from Quayle's spokesman for publication in the article: "We find the invasion-of-privacy aspect of the credit situation disturbing. Further controls should be considered." *Business Week* had determined in advance that if Quayle or Durbin had not consented, it would not publish even the fact that it had obtained their credit reports.

The district court also noted that McGraw-Hill and Rothfeder took extraordinary care to protect W.D.I.A.'s identity as a subject of the test. The article, by design, did not name W.D.I.A. or identify it in any way, not even stating the part of the country in which it is located. It is highly unusual for *Business Week* not to use the name of a company it is writing about but, because Arnold and Rothfeder did not think W.D.I.A.'s conduct was unique, they did not want to expose W.D.I.A. individually to public criticism.

Defendants' ability to demonstrate that *Business Week* had taken pains to protect consumers and to protect W.D.I.A. itself led directly to the court's finding that the plaintiffs could not establish the existence of malice to justify an award of punitive damages. Moreover, because the only use defendants had made of any consumer's credit information was the publication of a truthful article that served to inform the public about inadequacies in the enforcement of a statute intended to protect just such information, the district court con-

(Continued on page 15)

Sixth Cir. Rejects Bid for Additional Damages

(Continued from page 14)

cluded that there was no need to deter future conduct by awarding punitive damages. The district court stated, and the Sixth Circuit affirmed:

> Defendants' test of the credit reporting system does not support an award of punitive damages in this case because it served to inform Congress and the general public about a matter of vital public interest and was done in such a way as to protect the identity of W.D.I.A. and the rights of the consumers." *W.D.I.A. v. McGraw-Hill et al.*, 34 F. Supp.2d 612, 628 (S.D. Ohio 1998).

Jan A. Beer is an associate at Cahill Gordon & Reinel. Floyd Abrams, Anne B. Carroll, and Ms. Beer represented McGraw-Hill and Jeffrey Rothfeder in the W.D.I.A. litigation.

New York Court of Appeals Reaffirms Press Protective Standard in Private Person Libel Cases

By Eve Burton

Last month New York State's highest court, the Court of Appeals, reaffirmed its commitment to fostering a robust and free press in New York State by directing lower courts to continue applying First Amendment protective standards in libel cases brought by private persons. The court, unanimously reversing the Appellate Division, held that three articles published in the *Daily News* about a celebrity couple, including the saga of their divorce and allegations of "black-on-black economic spousal abuse" were "arguably within the sphere of legitimate public concern" and should be tried under the more press-protective "gross irresponsibility" standard rather than simple negligence. *Huggins v. Melba Moore, the Daily News, et al.* 1999 N.Y. LEXIS 3930 (Ct. App. Dec. 20, 1999).

Facts and History of the Case

The three articles which appeared in Linda Stasi's column in the *Daily News* were about Tony-award winning singer Melba Moore and husband Charles Huggins. The articles recounted Moore's reactions to their contentious divorce proceedings and her views on how she and her daughter were treated by Huggins. One of the articles was entirely about what Moore labels "black-on-black economic spousal abuse" and her public speaking efforts to encourage black women to "stand up against their men."

Huggins is a prominent producer, who began a production company to promote Moore's career and then used the business to assist many well-known performers. For many years, Huggins handled all of Moore's affairs. According to Moore, Huggins secretly abused her trust, spent her money, falsified tax returns in her name and, finally, deceived her into signing divorce papers which allowed him to obtain a fraudulent Pennsylvania divorce against her.

Huggins commenced separate libel actions against at least four media entities, including this action against the *Daily News*, for reporting about his divorce with Moore and Moore's allegations about his behavior. The three other actions were dismissed. *See Huggins v. National Broadcasting Co., Inc.*, 1996 WL 763337 (N.Y. Sup., Feb. 7, 1996); *Huggins v. Whitney*, 4 Media L. Rep. 1088 (N.Y. Sup., Aug. 28, 1995).; *Huggins v. Povich*, 24 Media L. Rep. 2040 (N.Y. Sup., Apr. 19, 1996).

App. Div.: It Is a Private Affair

Huggins's case against the *Daily News* was likewise

(Continued on page 16)

N.Y. Ct. of Appeals Reaffirms Protective Standard in Private Libel Cases

(Continued from page 15)

dismissed in its entirety by the trial court on the grounds that all eighteen statements alleged to be defamatory were actually expressions of non-actionable opinion. (Wilk, J.) (Sup. Ct. New York Co. March 13, 1997). Huggins appealed that decision to the Appellate Division which affirmed as to twelve of the statements and reversed as to six statements.

In reinstating six of the statements after finding that they were not opinion, the Court went a step further and found that plaintiff was a private figure and that the couple's divorce was a "quintessentially private matter" outside the sphere of what can even "arguably" be considered legitimate public concern. The Appellate Division then stated the case should be tried on a simple negligence standard rather than a gross irresponsibility standard. *Huggins v. Melba Moore, the Daily News et. al.*, 689 N.Y.S.2d 21, 1999 N.Y. App. Div. LEXIS 3651, 27 Media L. Rep. 1691 (App. Div. 1st Dept. 1999).

In making this decision, the court relied on a case it had decided only months before, *Krauss v. Globe Int'l., Inc*., 674 N.Y.S. 2d 662 (App. Div. 1st Dept. 1998). In *Krauss*, the court, reversing 25 years of law, held that the spouse of a well-known celebrity is a private figure and allegations of his having slept with a prostitute are a matter of private concern and therefore subject to a negligence standard.

The *Daily News* applied to the Appellate Division for leave to appeal the decision to the Court of Appeals. The Appellate Division granted that leave. The Court of Appeals heard the case and issued its decision on December 20, 1999.

The Court of Appeals Decision

The New York Court of Appeals in *Huggins v. Melba Moore, the Daily News, et al.* 1999 N.Y. LEXIS 3930 (Ct. App. Dec. 20, 1999) reversed the Appellate Division, holding that the lower court did not accord the proper degree of deference to the *Daily News*'s editorial judgment that the articles would be of interest to readers. While the court did not define "public concern," citing to an affidavit by reporter Linda Stasi, it noted "Linda Stasi explained that she wrote the articles because she had believed that 'the personal saga (Moore) described, in which she had gone from stardom as a Tony Award winning singer and entertainer to the brink of poverty, would be of great interest to the (newspaper's) readers.'" The court continued, "Stasi 'also found her story compelling because it brought to light an important social issue: economic spousal abuse.'" *Id.*

Yet, in finding that the subject matter of these articles was a matter of public concern, the court was equally clear in stating that deference to editorial judgment is not automatic. As the court wrote, "the fact that the article has been published in a newspaper is not conclusive that its subject matter warrants public exposition." *Id*.

What Constitutes a Matter of Public Concern

In giving further guidance to lower courts as to what constitutes a matter of public concern, the Court of Appeals reaffirmed the holdings and strength of a trio of old cases that created and expanded New York State's press protective "gross irresponsibility" standard for libel cases involving private individuals. To make the determination of what content is "arguably within the sphere of legitimate public concern," the court directed that allegedly defamatory statements "be viewed in the context of the writing as a whole, and not as disembodied words, phrases or sentences." *Gaeta v. New York News, Inc.*, 62 N.Y.2d 340, 349 (1984); *Chapadeau v. Utica Observer-Dispatch* 38 N. Y.2d 196, 341 (1975); *Weiner v. Doubleday Co.*, 74 N.Y.2d 586 (1989).

The court also offered several new instructions. **First**, the court adopted a concept that had been urged by the seventeen major media organizations who filed an *amicus* brief, authored by Richard Winfield and David Schulz of Rogers & Wells in New York. The Court of Appeals held that lower level courts must examine the "content, form and context" of any alleged defamatory statements, citing to *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 761

(Continued on page 17)

N.Y. Ct. of Appeals Reaffirms Protective Standard in Private Libel Cases

(Continued from page 16)

(1985). *Daily News*, *supra*.

Second, the court made it clear that "[a] publication's subject is not a matter of public concern when it falls 'into the realm of mere gossip and prurient interest.'" *Daily News*, *supra*. This is arguably a departure from *Weiner*. In *Weiner* the plaintiff argued that an article describing the sexual relationship between two people is "a detour from legitimate public concern into the realm of mere gossip and prurient interest." *Weiner*, 74 N.Y.2d at 595. The court in *Weiner* rejected this argument, stating that "this is precisely the sort of line-drawing that, as we have made clear, is best left to the judgment of journalists and editors." *Id.* In the *Daily News* case, the court definitively states that "mere gossip and prurient interest" is not a matter of public concern. *Daily News*, *supra*.

Third, the court concludes that an article is a matter of public concern and no "abuse of editorial discretion" may be found so long as a published report can be 'fairly considered as relating to any matter of political, social, or other concern of the community.' (*Connick v. Myers*, *supra* at 146)." In the *Daily News* case, the court held that the discussion about black-on-black economic spousal abuse was clearly an issue of interest to the public. *Daily News*, *supra*.

Ignored Krauss

Interestingly, in this context, the court did not address *Krauss*, 674 N.Y.S. 2d at 662, which involved allegations by the *Globe* that Joan Lunden's husband was sleeping with a prostitute. Both Joan and her husband together owned a profitable company that produced and distributed videos and information that emphasized the importance of family values. Is the subject matter of this magazine article gossip because it involves a prostitute? Or is it a matter of public concern because a spouse who makes his living preaching family values is hypocritical? Since the case was settled before getting to the Court of Appeals and since the *Daily News* case has sufficiently different facts it is hard to predict with any precision which side of the line the *Krauss* case would fall.

There are two other significant facts in this case, of which the court took judicial notice of only one. As the court stated, there were dozens of news reports nationwide about the downfall of Melba Moore. The court reasoned that such coverage across the "entire spectrum of print and broadcast media" is an important indication that the subject matter of the *Daily News* articles was a matter of public concern.

The court made no reference to the fact that much of the information contained in the news reports nationwide came from at least four court proceedings, in both state and federal courts, across two states over a couple of years. Interestingly, the court did not discuss these facts and the important public interest in any case that involves judicial proceedings. The *amicus* brief had perceptively suggested that it would be an untenable result if reports on judicial proceedings were entirely protected by the fair report privilege recognized nationwide while statements by the parties to those proceedings made outside the courtroom were beyond the scope of legitimate public concern.

A Cautionary Note

The *Daily News* case is a victory for the *Daily News* and the press generally in New York, but the language in this decision is more sober than other well known First Amendment opinions issued by the New York Court of Appeals. Compare for example the language in *Daily News* with that in *Immuno v. Moor-Jankowski*, 77 N.Y.2d 235 (1991) and *O'Neill v. Oakgrove Constr., Inc.*, 71 N.Y.2d 521 (1988).

In *Immuno*, the Court of Appeals provides an opinion defense to press defendants that far exceeds the constitutional minimums outlined by federal case law. In making this decision, the court trumpets the First Amendment in glowing terms. Likewise, in *O'Neill*, the court protects the press against most types of subpoenas, in a decision that ultimately provided the impetus for the legal standard adopted by the legislature in New York's Shield Law.

While perhaps the difference in tone is irrelevant to the result, and mild in comparison to other opinions

(Continued on page 18)

N.Y. C t. of Appeals Reaffirms Protective Standard in Private Libel Cases

(Continued from page 17)

being issued against the media nationwide, it is nonetheless by one view an invitation to the press to proceed carefully and responsibly in the future.

The Court of Appeals vacated the *Daily News* case back to the trial court to apply the gross irresponsibility standard to the facts in this case and to hear summary judgment motions.

Eve Burton, who represented the Daily News and Linda Stasi, is Vice President and Deputy General Counsel of the Daily News.

Bumper Sticker Leads to Arrest

A 20-year old woman has sued Gilbert, Arizona authorities in state court in Phoenix, Arizona, after she was arrested by Gilbert police for displaying a bumper sticker that read: "If this music too loud, you're getting to (expletive) close."

According to Reuters news service, Amber Tyler is claiming that her First Amendment rights were violated when she refused to put tape over the expletive contained in the bumper sticker. Though arrested, she was never prosecuted. She now seeks $300,000 in compensatory and unspecified punitive damages.

MMAR Drops Suit Against *Wall Street Journal*

MMAR Group, Inc., a now-defunct investment firm, has lost its long fight against Dow Jones, Inc., publisher of the *Wall Street Journal*. After a 1997 verdict, which was the largest libel award in U.S. history, MMAR was exposed for serious misconduct in litigation, and the entire judgment was thrown out last April. *See LDRC LibelLetter*, April 1997, at 5. Now MMAR representatives have stated that the company simply lacks the funds to continue to a new trial.

MMAR sued Dow Jones and reporter Laura Jereski over a 1993 story in the *Journal* which accused the company of questionable handling of client portfolios. In its complaint, the company alleged that the newspaper story caused it to go out of business. The jury awarded a shocking $222.7 million to MMAR, $200 million of which consisted of punitive damages. Judge Ewing Werlein, Jr. for the Southern District of Texas reduced the award to $22.7 million in compensatory damages against Dow Jones; he also upheld a punitive damage award of $20 million against the reporter. Throughout the litigation, the defendants maintained that they had simply reported on MMAR's existing financial problems, not caused them.

After trial, the late William Fincher, a senior employee of MMAR, contacted Dow Jones to inform them of certain tape recorded conversations which tended to show the accuracy of Jereski's story. MMAR had failed to produce these recordings during discovery, but when Dow Jones presented them pursuant to a Rule 60(b) motion for a new trial, MMAR did not dispute their authenticity. Judge Werlein granted the motion, dismissed the prior judgment, and ordered a new trial, which now will not take place.

EMPLOYEE REFERENCE STATUTES: A Growing Trend

A Note From the LDRC 50-State Survey

The ***LDRC 50 State Survey 2000: Employment Libel and Privacy Law*** reveals that 24 states have enacted statutes which qualifiedly immunize employers from liability based on information provided in employee references. In eighteen other states, employers have a defense in a common law qualified privilege, while courts in the remainder of states and Puerto Rico have not yet addressed the issue.

Many of the statutes were enacted in 1995 or later. The most common formulation is a statute which immunizes from liability an employer who in good faith provides job performance information about a current or former employee at the request of a prospective employer of that employee.

Presumption of Good Faith

Typically there is a presumption of good faith on the employer's part, rebuttable by showing that the employer disclosed false or misleading information knowingly or with a malicious purpose. Several statutes, namely those in Arizona, Michigan, Oklahoma, North Dakota, Tennessee, Utah, and South Carolina, adopt an "actual malice" standard, so that reckless communication of false or misleading information can also defeat the privilege. In order to rebut the good-faith presumption in Florida, an employee-plaintiff must show "express malice or malice in fact," meaning essentially an intent to harm the employee.

In half of the states with a statutory privilege, the presumption of good faith can be rebutted only by a preponderance of the evidence. Five states require clear and convincing evidence, and the remainder of the statutes do not specify a burden.

Notable departures from the more common formulation include:

- Oklahoma's employee reference statute, which requires that the employee consent to the disclosure.

- In South Carolina, the information must be provided in writing in response to a written request for it.

- Kansas' statute likewise requires a written request and a written answer, but grants such communications absolute, rather than qualified, immunity.

Anti-Blackballing Statutes

In some cases, these newer employer-protective statutes signal a shift from law which favored employees, still existing in the form of "anti-blackballing" statutes. California, for example, has quite a broad statute which provides for criminal and treble civil penalties against anyone who makes a misrepresentation in preventing or attempting to prevent a former employee from obtaining employment; it also applies to employers who knowingly cause or permit such action, or who "fail to take all reasonable steps within their power" to prevent it.

(Continued on page 20)

EMPLOYERS IN THE FOLLOWING STATES ENJOY RELEVANT STATUTORY PROTECTIONS:

ALASKA	HAWAII	IOWA	MICHIGAN	OKLAHOMA	TENNESSEE
ARIZONA	IDAHO	KANSAS	NEVADA	OREGON	UTAH
CALIFORNIA	ILLINOIS	LOUISIANA	NEW MEXICO	RHODE ISLAND	WISCONSIN
FLORIDA	INDIANA	MAINE	NORTH DAKOTA	SOUTH CAROLINA	WYOMING

Employee Reference Statutes: *A Growing Trend*

(Continued from page 19)

Employers in Wisconsin can incur fines under a statute prohibiting blacklisting, though they cannot be fined for offering the reasons for an employee's discharge at the request of the employee or a prospective employer. In North Carolina, a statute provides a private cause of action for punitive damages for attempts to prevent, by word or in writing, any discharged employee from obtaining employment. However, truthful statements made about a former employee in response to a request from a prospective employer are privileged under this section. Montana has a similar statute to North Carolina's.

Maryland has a pertinent, though more limited, statutory provision. The state grants adult dependent care program employers a statutory presumption of good faith in disclosing information about the job performance or the reason for termination of any employee.

This is in addition to a common law qualified privilege enjoyed by all employers, the likes of which exist in many states which as yet have not enacted statutes affording a privilege for employment references. Most often, employment references provided to prospective employers fall under the pervasively recognized "common interest" privilege. The standard to defeat the privilege will match that for other qualified privileges, such as common law malice or actual malice.

STATE LEGISLATURES ARE BACK IN SESSION

Keep an eye out in your state for these important issues:

Agricultural Disparagement Laws
Right of Publicity
Video Voyeurism

And on the positive side:

Proposals to limit punitive damages

SECOND CIRCUIT EXTENDS CONSTITUTIONAL PROTECTIONS TO NON-MEDIA DEFENDANTS

BUT REVERSES DISMISSAL OF LIBEL CLAIMS ON OPINION ISSUE

By Laura Handman

What was expected to be a garden variety decision on an issue of opinion became a doctrinal advance in the law of libel involving non-media defendants in *Leonard N. Flamm v. American Association of University Women and The AAUW Legal Advocacy Fund*, No. 99-7085 (S.D.N.Y. Jan. 4, 2000). Senior Judge Meskill, joined by Judges Miner and Parker, reversed Judge Chin's grant of defendants' motion to dismiss, holding that the statements in issue, contained in an otherwise factual directory, were susceptible of being understood by a reasonable reader as a statement of fact.

But, in another example of judicial free-lancing, reminiscent of the court's recent detour in the area of reporter's privilege, the Second Circuit addressed an issue that was not necessary to nor raised by the appeal. Fortunately, the court reached a relatively good outcome, finding that the requirement that the plaintiff bear the burden of proving a false fact applies to claims brought against non-media defendants arising out of statements that were a matter of public concern, "at least in cases where the statements were directed towards a public audience with an interest in that concern."

The Directory

This libel action was brought by Leonard Flamm, a lawyer specializing in plaintiffs' employment claims, against the 100 year-old non-profit American Association of University Women (AAUW) and its Legal Action Fund (LAF), both dedicated to improving opportunities for women in higher education. LAF enlisted a network of lawyers specializing in gender discrimination cases to whom the LAF could refer women with such claims. The lawyers were listed in a Directory that was circulated to the 275 professionals listed.

In addition to identification, the Directory included information relating to areas of specialization and availability. Mr. Flamm's listing included the standard information, plus, in italics, "Note: At least one plaintiff has described Flamm as an 'ambulance chaser' with an interest only in 'slam dunk cases.'"

District Court Dismissal

While acknowledging it was a close question, Judge Chin granted defendants' pre-discovery motion to dismiss, applying the three-step analysis required by New York law to determine whether there is an actionable statement of fact. The court held that "ambulance chaser" was used as an epithet which, together with the phrase "with interest only in 'slam dunk cases,'" did not have a precise meaning. The "only reasonable impression that emerges" is that the comments were a subjective reaction of a woman referred to plaintiff and, as such, not susceptible of being proven true or false.

Second Circuit: Context is Key

The Second Circuit did not hold that "ambulance chaser" was an actionable statement of fact but only that it was susceptible of such interpretation and, thus, a question for the jury. The court also emphasized repeatedly that its holding was based on the context here, an otherwise factual directory where hyperbolic language is not typical and where this was the only negative comment. In other contexts, therefore, such language will still be found to be non-actionable hyperbole.

The court did not find that the modifier "with an interest only in 'slam dunk cases'" informed how the reasonable reader would understand the preceding phrase "ambulance chaser," notwithstanding that plaintiff had conceded on appeal that the "slam dunk" reference was not provable as true or false. In fact, Judge Meskill viewed them as separate phrases because they were set forth in separate quotation marks. Even read together, the court found that a reasonable reader could understand Flamm as engaging in unethical solicitation of "slam dunk" cases.

(Continued on page 22)

CONSTITUTIONAL PROTECTIONS EXTENDED TO NON-MEDIA DEFENDANTS

(Continued from page 21)

The court gave short shrift to the various signals that the Directory offered the reader to suggest that this was just a subjective reaction of someone referred to plaintiff — direct attribution to "at least one plaintiff," and the use of quotation marks and italics to set the comments off from the factual information. Instead, the court found that, by its inclusion in the Directory, the "imprimatur" of such a respected organization as AAUW suggested the comment was something more substantial. The court did not consider who the "reasonable reader" of this Directory was — namely, other professionals who recognize the reaction of anger and disappointment of a non-lawyer who has been told her claim is not as "slam dunk" as she thought. The court also did not consider the generalized tenor of this layman's one-sentence remark, making it still less likely that its sophisticated readers would understand it to be a statement of fact about illegal or unethical solicitation.

Burden of Falsity Addressed

"Because the issue involves a question of law that is likely to arise on remand," the court took up the entirely separate question of whether plaintiff or defendants would bear the burden of proving a false fact. The parties had both assumed that the distinctions between fact and opinion applied to a publication by non-media defendants and did not address the issue of burden of proof on falsity since that issue was not involved in this motion to dismiss.

The Supreme Court decided in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986), that the plaintiff bore the burden of proving falsity in a case brought against a media defendant. Although often glossed over, the *Hepps* holding itself refers only to claims, even as against media defendants, that involve matters of public concern. *Id.* at 776-77. In *Hepps*, *id*. at n.4, reiterated in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 n.6 (1990), the Court reserved whether the same burden would be imposed on a private figure suing a non-media defendant. The Second Circuit decided this appeal was the occasion to resolve that question.

Following the trend in *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985), the court concluded that the protections should turn not on the identity of the speaker but on the nature of the speech. Declining to extend the constitutional protections that have been accorded to media defendants "to every defamation action involving a matter of public concern," the court extended them to such suits involving matters of public concern brought by private plaintiffs against non-media defendants "at least where the statements were directed towards a public audience with an interest in that concern."

A Matter of Public Concern

Applying this standard to the Directory statements, the court had no problem finding that efforts to combat gender discrimination were matters of public concern. In addition, comments on "'persons who present themselves or their services or goods to the public'" such as the lawyers here are also matters of public concern. The Directory was distributed to other lawyers listed in the Directory, "a public audience with an interest in gender discrimination issues." Finally, the Directory could be viewed as "an attempt to influence public discourse and the public response to incidents of gender discrimination."

Related Issues in Private/Non-Media Suits

The court left undisturbed the protections for media defendants or for non-media defendants sued by public figures or officials. While the decision's references to *Milkovich* are sometimes confusing, the requirement still holds that, to be actionable, the statement in issue must be one of fact, not opinion, without regard to whether or not it is a matter of public concern.

This decision does not address the burdens on private plaintiffs who sue non-media defendants about purely private matters that do not involve matters of public concern, although the inference is clearly that these burdens will be less. The common interest privilege recognized at common law will, at a minimum, protect these statements when made to persons such as

(Continued on page 23)

CONSTITUTIONAL PROTECTIONS EXTENDED TO NON-MEDIA DEFENDANTS

(Continued from page 22)

employers and law enforcement who have an interest in the subject matter.

As for private plaintiffs suing non-media defendants, the decision offers a fairly broad interpretation of what will constitute matters of public concern. Even though the statements in issue did not involve gender discrimination, the general purpose of the publication and publisher did, and that was enough. The further conclusion that public concern included persons offering their services or goods to the public will be useful to media and non-media defendants, particularly publications like *Consumer Reports* which evaluate products or publications like *Martindale-Hubbell* which provide professional ratings.

By its references to "at least," the court suggests the factors of publication to an audience with an interest in the subject matter are not exclusive and even these factors were not narrowly circumscribed. The "public audience" factor was satisfied here by a publication of limited circulation (i.e., to its members) with no requirement of general circulation. The "interest" in the concern was satisfied by those practicing in the field, without requiring any specific interest in a specific controversy. The future will tell what other factors will be considered and to what other situations the factors here will be applied.

Laura R. Handman, along with Carolyn K. Foley, of Davis Wright Tremaine LLP, represented the defendants AAUW and LAF in both the district court and the Second Circuit.

Federal Court Finds Editing and Legal Vetting on Book Are Protected Against Disclosure

By Gerson A. Zweifach and Steven M. Farina

The United States District Court for the Southern District of New York recently held that the New York Shield Law, the common interest/attorney-client privilege, and the work product doctrine protected from disclosure certain documents and communications related to the editing and pre-publication legal review of an unauthorized biography. *Stewart v. National Enquirer, Inc., et al.*, No. M-8 (S.D.N.Y. Oct. 7, 1999). The decision, by Judge Loretta A. Preska, is significant for several reasons.

- First, the court held that the Shield Law (New York Civil Rights Law § 79-h) applied in the context of a book, rather than a newspaper or some other more traditional "news" medium.

- Second, the court held that the attorney-client privilege applied to communications between an author and his publisher's in-house attorney.

- Third, the court held that the work product doctrine applied to the pre-publication vetting of a book.

The discovery battle in the Southern District of New York was just one front in a two-year battle between lifestyle guru Martha Stewart and the *National Enquirer*, arising out of a September 1997 *Enquirer* article entitled "Experts Fear . . . Martha Stewart is Mentally Ill." The article presented the opinions of two mental health experts that Ms. Stewart had exhibited the symptoms of Borderline Personality Disorder. The experts explained that their conclusions were based entirely upon accounts of Ms. Stewart's behavior reported in three serialized excerpts from Jerry Oppenheimer's unauthorized biography, *Martha Stewart: Just Desserts*. William Morrow & Company published *Just Desserts*. *National Enquirer* published the three serialized excerpts and the challenged article. Mr. Oppen-

(Continued on page 24)

Fed. Ct. Finds Editing and Legal Vetting on Book Protected Against Disclosure

(Continued from page 23)

heimer, in addition to authoring *Just Desserts*, edited the *Enquirer* article.

Subpoena to Morrow

Ms. Stewart did not contest her pubic figure status, and undertook to meet her burden of proving actual malice. The *Enquirer* focused on the defense of truth. At the close of discovery, after depositions of the key *Enquirer* employees and various witnesses to the alleged incidents recounted in *Just Desserts*, Ms. Stewart served a third-party subpoena on Morrow seeking, among other things, documents pertaining to the editing and pre-publication legal review of the biography. Ms. Stewart also sought to depose the Morrow designee most knowledgeable about these subjects.

Morrow objected to the subpoena and Mr. Oppenheimer joined Morrow's objections. Morrow thereafter produced documents outside the scope of its objections and presented for depositions the editor of *Just Desserts* and the in-house attorney who vetted the biography. These witnesses refused, however, to disclose communications related to sources for, or the pre-publication legal review of, *Just Desserts*. Ms. Stewart then moved to compel.

Ms. Stewart challenged all of Morrow and Mr. Oppenheimer's objections. She argued that book publishers and authors may not invoke the Shield Law because they are not "professional journalists" publishing "news," as these terms are defined by the New York statute. *See* N.Y. CIV. RTS. LAW § 79-h(a) (McKinney 1992). Ms. Stewart also argued that, even were the Shield Law applicable, she had overcome the qualified privilege that it confers by demonstrating that the information sought "(i) is highly material and relevant; (ii) is critical or necessary to the maintenance of [her] claim . . . or proof of an issue material thereto; and (iii) is not obtainable from any alternative source." N.Y. CIV. RTS. LAW § 79-h(c).

Ms. Stewart asserted that discovery from Morrow might reveal that Mr. Oppenheimer, in the course of researching and writing *Just Desserts*, had learned information favorable to Ms. Stewart that would have neutralized the unfavorable information contained in the serialized excerpts. She claimed that such favorable information, if told to the mental health experts by *Enquirer* editor Jerry Oppenheimer, might have caused them to rethink their opinions that Ms. Stewart displayed symptoms of mental illness. Ms. Stewart argued that this hypothetical evidence would constitute proof of actual malice attributable to the *Enquirer* in her libel suit.

With regard to the attorney-client privilege, Ms. Stewart asserted that Morrow's in-house lawyer did not have an attorney-client relationship with Mr. Oppenheimer. She argued that Morrow and Mr. Oppenheimer could not assert a common interest/attorney-client privilege because their interests in the pre-publication legal review of *Just Desserts* were adverse rather than identical: Mr. Oppenheimer sought to publish the manuscript that he presented for review, while Morrow sought to strike material that might expose it to liability.

Finally, as to Morrow and Mr. Oppenheimer's invocation of the work product doctrine, Ms. Stewart argued that the pre-publication legal review of *Just Desserts* was part of the publisher's normal business practices rather than a response to any anticipated potential litigation.

Court Finds Shield Law Applies

The court rejected all of Ms. Stewart's arguments.

The court held that the New York Shield Law applied both to Mr. Oppenheimer and to Morrow. Transcript of Hearing, Oct. 7, 1999 ("Tr."), at 24. Mr. Oppenheimer had argued that *Just Desserts* contained substantial "news" about "matters of public concern or public interest" and that a biography is a legitimate "professional medium" for its reportage. *See* N.Y. CIV. RTS. LAW § 79-h(a)(8), (6). Mr. Oppenheimer also submitted a declaration stating that, in negotiating with Morrow his contract to write *Just Desserts*, he had retained first serialization rights to publish excerpts of the biography in a newspaper or magazine. From this evidence, Mr. Oppenheimer argued that he always intended for his reporting to be published in a

(Continued on page 25)

Fed. Ct. Finds Editing and Legal Vetting on Book Protected Against Disclosure

(Continued from page 24)

"professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public . . . ." N.Y. CIV. RTS. LAW § 79-h(a)(6).

It is unclear whether the Court found Mr. Oppenheimer's retention and exercise of first serialization rights to be determinative, or if it would have applied the Shield Law to *Just Desserts* even absent this fact. The court did specify, however, that the Shield Law extended to Morrow by virtue of its supervisory authority over Mr. Oppenheimer. *See* Tr. 24 (citing N. Y. CIV. RTS. LAW § 79-h(f)).

The court next held that Ms. Stewart had failed to overcome the qualified privilege conveyed by the Shield Law. *See* Tr. 25-29. Analyzing the evidence, claims, and defenses in the underlying case, the court determined that the information sought from Morrow could not constitute "highly material" or "critical" proof of the *Enquirer*'s actual malice. The deposition testimony of the quoted experts left little room for dispute that the serialized excerpts, standing alone, caused them to be concerned about Ms. Stewart's mental health. *See* Tr. 28. Hypothetical favorable information about her would not have dispelled the experts' concerns that the reported behaviors were "signs of mental illness." Tr. 28.

The court reasoned that the issue of actual malice turned on whether the *Enquirer* had subjectively intended to imply that the experts were definitively diagnosing Ms. Stewart with Borderline Personality Disorder (the *Enquirer* readily conceded that no diagnosis had been made), a question unlikely to be answered by a searching examination of Morrow's editorial process for *Just Desserts*. Tr. 29. The court's reasoning — and its ruling — might have been different had the accuracy of the serialized excerpts been in dispute, but they were not. *See* Tr. 29 ("plaintiff has not in any way disputed the accuracy of the reported behavioral symptoms either in the articles or in the 400-page book").

Common Interest/Attorney-Client Privilege

With regard to the common interest/attorney-client privilege, the court held that it applied to "'communications between counsel and parties with respect to legal advice in pending or reasonably anticipated litigation in which the joint consulting parties have a common legal interest.'" Tr. 30 (quoting *Aetna Cas. and Surety Co. v. Certain Underwriters at Lloyd's London*, 176 Misc.2d 605, 612, 676 N.Y.S.2d 727, 731 (Sup. Ct. N.Y. County 1988). The court found that Mr. Oppenheimer and Morrow possessed the same legal interest — "to avoid defamation and privacy litigation arising from the publication of Oppenheimer's work." Tr. 31. Persuasive to the court were declarations submitted by Mr. Oppenheimer and Morrow's in-house attorney, both of which attested to this common interest. Tr. 32.

Finally, the court held that the work product doctrine applied to documents generated or exchanged in the course of Morrow's pre-publication legal review of *Just Desserts*. The court explained that "the purpose of the vetting process relates to evaluating potential claims and certainly relates to sheltering the client from potential litigation." Tr. 34 (citing *United States v. Adlman*, 134 F.3d 1194, 1199 (2d Cir. 1998)). Again, the court relied upon the declaration submitted by Morrow's in-house counsel, who confirmed "the receipt of a letter from plaintiff's counsel which indicated to her that litigation against Morrow, Oppenheimer, or both might well be brought." Tr. 34.

Gerson A. Zweifach, of Williams & Connolly, argued for Mr. Oppenheimer; on the briefs were Steven M. Farina and Julie C. Hilden, also of Williams & Connolly. John C. Lankenau, of John C. Lankenau & Associates, argued for William Morrow & Company.

Texas Court Rejects Actual Malice Conclusion From Laundry List of Negligence

By Charles A. Daughtry

On November 30, 1999, the Texas Fourth Court of Appeals (San Antonio) issued an en banc opinion upholding a judgment notwithstanding the verdict (JNOV) issued by the trial court in a non-media actual malice case. *Scott v. Poindexter*, 1999 Tex. App. LEXIS 8910.

In the lawsuit, Barbara J. Scott, a practicing dentist, sued Zeb F. Poindexter, Jr., and Zeb F. Poindexter, III, two other practicing dentists, for allegedly libeling her before the Charles A. George Dental Society. Her allegations were based upon reports the Poindexters allegedly gave the Society concerning the delinquent status of a loan she had obtained that was guaranteed by the Society.

In her appeal, Dr. Scott did not contest that the Poindexters were acting under a qualified privilege when the statements in question were made. Indeed, one of the Poindexters was treasurer of the society. Therefore, she conceded that the "actual malice" standard applied.

In her appeal, Doctor Scott contended that the following evidence supported the Jury finding of actual malice:

- Testimony that Poindexter Jr. called him the day of the meeting and inquired about Scott's loan. Radford informed Poindexter that Scott had assured him that she had been paying her loan on a monthly basis and was not in default.

- The papers that the Poindexters circulated at the meeting did not refer to Scott by name, and ultimately were determined to contain information about the Society's loan, not Scott's.

- Prior to making the statements at the meeting, the Poindexters did not have any documents indicating that Scott was in default on her loan.

- Prior to making the statements, Poindexter Jr. telephoned Standard Savings & Loan, but discovered nothing about the loan being in default.

- The Poindexters did not talk to Scott about her loan prior to making the statements.

After considering the evidence presented by Doctor Scott in support of her "actual malice" claim, the Court of Appeals held:

> Even if all of these actions are true, they do not rise to the level of actual malice. A defendant's failure to investigate the truth or falsity of a statement before it is published has been held insufficient to show malice. *Schauer v. Memorial Care Systems,* 856 S.W.2d 437,450 (Tex. App. — Houston [1st Dist.] 1993, no writ); *Mayfield v. Gleichert;* 484 S.W.2d 619, 627 (Tex. Civ. App. — Tyler 1972, no writ). The failure to read relevant available information before making a defamatory statement is not evidence of actual malice. *See Dun & Bradstreet, Inc. v. O'Neil,* 456 S.W.2d 896, 901 (Tex. 1970) (failure to check information located in file on agent's desk). In short, actual malice is more than ill will; "it is the making of a statement with knowledge that it is false, or with reckless disregard of whether it is true." *Hagler v. Proctor & Gamble Mfg. Co.,* 884 S.W.2d 771, 772 (Tex. 1994). Although the record may support a finding that the Poindexters were careless or negligent, there is no evidence that they acted with actual malice. Accordingly, we overrule Scott's first issue. In light of this ruling, we need not reach Scott's issue regarding damages."

The en banc decision of the Fourth Court of Appeals has been ordered to be published.

Charles Daughtry is with Mieszkuc, Daughtry & Scott, P.C., Houston, Texas.

Oklahoma Appellate Court Drills Dentist's Defamation Claim

By Jon Epstein

Upholding application of privilege and the substantial truth doctrine, the Oklahoma Court of Civil Appeals affirmed the trial court's dismissal of a dentist's defamation and false light invasion of privacy claims against an Oklahoma City television station which reported about professional discipline imposed on the dentist by the Oklahoma Board of Dentistry. *Johnson v. KFOR-TV, a division of The New York Times Company, and Tammy Payne*, Case No. 93,061 (Okla. Ct. Civ. App. Dec. 28, 1999).

The subject story reported that one of the dentist's patients was upset about treatment she received and that dental board documents showed that the dentist walked out on her following root canal work. Viewers were told that the patient believed she had been left in unqualified hands and later sought treatment in an emergency room.

The dentist argued that the story was actionable because (1) the patient's complaint and dental board discipline occurred more than a year before the report was broadcast and were "stale" from the standpoint of public interest, (2) incorrect information in the dental board's records was reported, and (3) when the station reported the true fact that the patient "later sought" emergency room treatment, false impressions were created that the patient required such treatment *immediately* after she left the dentist's office.

The television station successfully argued to the trial court that its report was protected by common law and statutory privileges because it presented an accurate and balanced report about the proceedings involving the dentist before the Board of Dentistry as well as the Board's findings and conclusions, the patient's view of her experience, and the dentist's response that his work had been done in a professional manner. The trial court granted the motion to dismiss.

On appeal, the Court of Civil Appeals agreed with the trial court and held that the report was privileged as a matter of law. The court determined that the story was based on a disciplinary proceeding before the Board of Dentistry and that such proceeding, including witness testimony and the Board's action, is clearly a "proceeding authorized by law" covered by the statutory privilege. The court emphasized that while the dentist asserted that some of the information in the public record was incorrect, *he never alleged that the broadcast was an inaccurate version of the Board's proceedings*.

The court also relied upon Oklahoma common law and the *Restatement (Second) of Torts* and stated that it is unnecessary that a report be exact in every immaterial detail; rather, it is enough that it conveys to the persons who read it a substantially correct account of the proceeding. Thus, the news story is substantially accurate as long as the "gist" or "sting" of the entire story is both fair and true. The statutory absolute privilege is not lost simply because some of the information reported may have been unclear in meaning or susceptible to being interpreted adversely to the subject of the story. The court did not discuss the plaintiff's contention that the information reported was "stale" from the standpoint of public interest.

It is unknown whether the dentist will seek review of the decision by the Oklahoma Supreme Court.

Jon Epstein is a partner in the Oklahoma City office of Hall, Estill, Hardwick, Gable, Golden & Nelson. Epstein, his partner Robert D. Nelon, and Lorinda G. Holloway, represent defendants The New York Times Company (and its division KFOR-TV) and reporter Tammy Payne in the litigation.

NOTE: Two cases in one month brought by dentists are a reminder that professionals such as dentists, doctors and lawyers are well represented as libel plaintiffs. In the LDRC Complaint Survey, professionals are responsible for 5.5% to 7.2% of the complaints each year over the three years studied.

Russian Émigré Wins $33.5 Million "Symbolic Victory" From *Izvestia*

On December 13, 1999, an Arlington, Virginia jury returned a $33.5 million verdict in favor of former Russian citizen, Alexander Konanykhine, in his libel suit against the Moscow newspaper *Izvestia*. It took only nine minutes for the jury to reach its verdict, concluding a trial that involved allegations of international intrigue and corruption, and a defendant who did not even show up. *Konanykhine v. Izvestia Newspaper*, No. 97-1139 (Va. Circuit Ct. Dec. 13, 1999).

According to the plaintiff, his troubles began in the 1980's when as a student at the Moscow Institute of Physics and Technology he founded a construction company which ran afoul of the government's hardline against capitalistic endeavors. Following his expulsion from the Institute, and as perestroika swept the former Soviet Union, Konanykhine established the Russian Exchange Bank, one of the largest commercial banks in Russia, and took control of four additional financial institutions. At the age of 25, Konanykhine estimated his net worth at more than $300 million.

Following the fall of the communist system in 1991, Konanykhine alleged that organized crime organizations with close ties to former KGB and Communist Party officials began to threaten many companies doing business in Russia. Konanykhine said that he was kidnapped in 1992 during a business trip to Budapest by a criminal group with close ties to the KGB. While Konanykhine escaped, he claims the criminal group seized all of his businesses and properties in Russia, and that his attempts to have Russian and Hungarian authorities investigate the abduction resulted only in greater persecution. In September of 1992, Konanykhine and his wife fled for the United States.

Despite his flight, Konanykhine alleged that the Russian government, acting under the influence of organized crime, requested that United States government arrest and extradite Konanykhine for violations of immigration laws. Konanykhine was arrested by U.S. Immigration and Naturalization Services agents in 1996. For over a year, Konanykhine was jailed in different detention centers in Virginia while his exclusion proceedings were pending.

On July 23, 1997, a Virginia District Court judge released Konanykhine from detention following testimony that the arrest and detention were the result of a fraud perpetuated on the court by the KGB and U.S. Immigration and Naturalization Services officers. Konanykhine subsequently filed suit against the U.S. government for the arrest, and was granted political asylum in 1999.

Meanwhile in Russia, newspaper coverage of Konanykhine's legal troubles in the U.S. were less than flattering, and according to Konanykhine were part of a "character assassination" campaign conducted by the KGB and the Russian Mafia. Articles in *Izvestia* reported that Konanykhine was a money launderer and a thief who had stolen more than $8 million from the Russian Exchange Bank. The articles also stated that Konanykhine committed crimes of bribery, corruption and bigamy. In December, 1997, Konanykhine filed suit against the *Izvestia* and *Kommersant Daily*, a Russian business newspaper, in Arlington County Circuit Court. The claims against the two newspapers are being tried separately. *Izvestia* never responded to the suit and was not represented at trial.

Following the trial, which included the testimony of a former American spy on Konanykhine's behalf, and the jury's verdict, the sixth largest against a media defendant according to LDRC statistics, Konanykhine's counsel admitted that collecting the judgment was a long shot. According to reports, attorney J.P. Szymkowicz called the verdict a "symbolic victory" noting that from the defendant's perspective "When you don't have assets here, you have nothing to lose."

The suit against *Kommersant Daily* is scheduled to be tried in late January. While the *Kommersant Daily* did file a motion to dismiss based on lack of jurisdiction, the law firm representing the paper discontinued its representation after the motion was denied.

Libel Trial Ends in Humiliating Defeat for Ex-Tory MP Accused of Corruption

One of England's more sensational libel trials ended last month with a jury verdict for the defendant in a highly publicized case brought by former Conservative Member of Parliament Neil Hamilton against Mohamed Al Fayed. *Hamilton v. Al Fayed* (High Court Dec. 21, 1999). The jury, in essence, found as true charges that Hamilton corruptly demanded and accepted cash and gifts in return for asking questions in Parliament on behalf of Al Fayed. One English newspaper reported the verdict and its significance with the headline "Corrupt Hamilton Humiliated and Ruined" *Daily Telegraph* Dec. 22, 1999.

The specific statements at issue were made by Al Fayed in a 1997 Channel 4 news program. The same allegation of corruption was the basis of a prior libel action by Hamilton against the *Guardian* newspaper which reported the charges in a 1994 article. In fact, to sue the *Guardian*, Hamilton and his supporters amended the law of Parliamentary privilege, allowing MPs to waive their privilege for statements made in the course of their duties. Hamilton, however, abandoned this high-profile case on the eve of trial in 1996 in face of evidence against him. A subsequent Parliamentary investigation into the scandal also found against Hamilton. Nevertheless, Hamilton pursued a claim against Al Fayed, successfully arguing to the Court of Appeal that the Parliamentary findings did not preclude a libel action.

Al Fayed is the millionaire owner of Harrod's department store in London; but is, perhaps, now better known as the father of Dodi Al Fayed who was killed together with Princess Diana in 1997. In fact, Al Fayed testified at trial that Prince Phillip and the British Secret Service orchestrated the deaths of his son and Princess Diana. In what is undoubtedly a peculiarity of English law, the trial judge was able to refer to this testimony in his summation, calling the accusations "wild and unsubstantiated," and telling the jurors that Al Fayed has "a warped appreciation of what is fact and what is fiction."

Although the judge cautioned the jury that Al Fayed's testimony was not to be believed, the jury returned a verdict in his favor, relying on corroborating testimony from two of his former employees. Under England's loser pays system, Hamilton is now reported to be facing bankruptcy with legal bills totaling over £1 million.

In another twist to the case, Hamilton's supporters may be liable for these costs. To finance his libel action, Hamilton relied on anonymous contributions from friends, supporters and sympathetic politicians. Under English law these financial backers are now liable for costs and attorneys' fees; and after the verdict, the judge ordered Hamilton to identify the names of all those who contributed £5,000 or more as a first step in pursuing them for costs. The government will reportedly issue a consulation paper proposing reforms to the practice of third-party funding of libel claims.

Hamilton was represented at trial by Desmond Browne, QC; Al Fayed by George Carmen, QC.

LIBEL LAWSUIT SETTLED

The *Fulton County Daily Report* reported in December that a suit brought by a Savannah Georgia author, Rosemary Daniell, against Book-of-the-Month Club and Conari Press of California, was settled for $52,000. The statement at issue appeared in a book on Southern women entitled *Hell's Belles* and referred to Daniell as "a retired Atlanta hooker who runs a chat line for horny and lonely" people. It would appear that she is not.

Internet Fair Use: Upholding Use of Copyrighted Images for Visual Search Engine

In mid-December, the U.S. District Court for the Central District of California held that a visual search engine that displayed images instead of descriptive text in response to a search query met the requirements of fair use under the Copyright Act with respect to its use of those images. *Leslie A. Kelly v. Arriba Soft Corp.*, Case No. SA CV 99-560-GLT[JW]. The court also held that the failure of defendant to display the copyright management information along with the image did not violate the Digital Millennium Copyright Act.

The defendant's search engine functions by maintaining a database of approximately two million "thumbnail" images. These images are drawn from websites, turned into thumbnails and stored and indexed. Defendant's employees rank the most relevant and eliminate those they find inappropriate. Plaintiff, a photographer, maintains two websites with numerous images contained on them. Defendant's web crawler picked up and indexed 35 of those images, thus making them available in thumbnail form for its users. When notified of plaintiff's objections to the indexing and use of thumbnails of his photographs, defendant made an effort to remove them from its database, with some slip-ups occurring in the process.

Of particular note in the decision is the court's position in analyzing the first factor of the fair use test — purpose and character of the use — and finding that the use by defendant is, indeed, tranformative, not similar to that of the copyright owner or intended to supercede that of the copyright owner. The court urges caution in dealing with this new technology:

> Defendant's purposes were and are inherently tranformative, even if its realization of those purposes was at times imperfect. Where, as here, a new use and new technology are evolving, the broad transformative purpose of the use weighs more heavily than the inevitable flaws in its early stage of development. Slip op. at 11.

Wendt v. Host: Kozinski Dissents From Ninth Circuit Muddle of Right of Publicity

By Amy Hogue

Just before the New Year, Ninth Circuit Judge Alex Kozinski reprised his witty but appropriately scathing dissenting comments in *White v. Samsung*, issuing a new dissent for the denial of a petition for rehearing or rehearing en banc that is as provocative as the last. *Wendt v. Host International, Inc.*, 1999 Daily Journal D.A.R. 12897, 1999 WL 1256287 (9th Cir. 1999). In *White*, Judge Kozinski lamented the majority's expansion of common law publicity rights to protect "not just to the name, likeness, voice and signature of a famous person, but to anything at all that evokes that person's identity." *See White v. Samsung Elecs. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993); *see also* Kozinski, J. dissenting from denial of *reh'g en banc*, 989 F.2d 1512 (9th Cir. 1993). His concern was that the Ninth Circuit's expansion of publicity rights placed federal copyright protection for dramatic characters on a "collision course" with California's promotion of actors' publicity rights. *Id.*

Judge Kozinski's latest exigesis against expanding publicity rights comes in a case pitting the actors who portrayed "Norm" and "Cliff" in Paramount's copyrighted television series, *Cheers,* against Paramount and its licensee, Host International. Host licensed the right to position two animatronic figures under the *Cheers* logo in its airport bars. Although Host named the two figures "Bob" and "Hank" and styled their faces with features intended to disassociate them from the actors — indeed, the district court found "[t]here is [no] similarity at all . . . except that one of the robots, like one of the plaintiffs, is heavier than the other." — the Ninth Circuit relied on *White* to find triable issues on whether the figures "evoked their identities" so as to misappropriate the actors' publicity rights.

"Robots Again"

The dissenting opinion in rehearing en banc, joined by Judges Kleinfeld and Tashima, opens with the line, "Robots again," and closes:

> "As I noted in *White*, 'no California statute, no California court has actually tried to reach this far. It is ironic that it is we who plant this kudzu in the fertile soil of our federal system.' 989 F.2d at 1519. We pass up yet another opportunity to root out this weed. Instead, we feed it Miracle-Gro. I dissent." *Wendt*, 1999 Daily Journal D.A. R. at 12899.

Ninth Circuit History of Elevating Performer Over Copyright

There is, of course, a long tradition in the Ninth Circuit of reversing District Court decisions limiting California's common law right of publicity. The Ninth Circuit "discovered" that voice imitation violated common law publicity rights in *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988). Before *Midler*, a long line of cases refused to recognize "voice-alike" claims as actionable. It was the Ninth Circuit that reversed summary judgment for the defendants in *Abdul-Jabbar v. General Motors*, 85 F.3d 407 (9th Cir. 1996). And, of course, it was the Ninth Circuit that reversed the District Court's summary judgment for defendants in *White v. Samsung*, 971 F.2d 1395.

As the defendants argued, unsuccessfully, in *Midler* and *White*, certain copyrights cannot be exploited without "evoking the identity" of a particular performer. In *Midler*, Ford had licensed the copyright in Bette Midler's signature song, "Do You Want to Dance." Although Midler's former back up singer did her level best to imitate Midler's style, any female performer would have reminded listeners of Midler.

In stark contrast to the many reported copyright cases carefully denying protection for a performer's style, the Ninth Circuit in *Midler* and *Waits v. Frito-Lay* embraced the vocal styles of Bette Midler and gravelly-throated singer Tom Waits as protected property rights under the common law right of publicity. *See Midler*, 849 F.2d 460; *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).

At trial, the defendants in *White* likewise argued that the blonde-wigged robot in Samsung's print advertisement depicted a prototypical hostess in *Wheel of Fortune* — the dramatic role in a copyrighted program played by several blonde females — rather than any par-

(Continued on page 32)

Wendt v. Host: Kozinski Dissents

(Continued from page 31)

ticular actress. White's counter-argument, ironically buttressed with testimony from an executive with *Wheel of Fortune's* production company, was that White is not an actress and she simply "plays herself" on the show.

Producers Slow to See Danger

The *Wheel of Fortune* producers/copyright owners should have intervened against White rather than supported her cause. Producers have been remarkably slow to realize that actors' publicity rights are enforced at the expense of producers' copyrights. When Ben Stein complained that a boring teacher portrayed in the commercials of a California fast food chain, Carl's Junior, evoked his performance of the boring professor in *Ferris Beuhlers' Day Off*, Paramount declined to intervene. That case settled without an opinion. Not until its licensee was sued in *Wendt*, did Paramount come to grips with the conflict between its copyright interest in dramatic characters and the publicity rights of the actors playing the roles.

For Judge Kozinski, resolving the conflict between copyrights and publicity rights "is simple, at least insofar as the plaintiffs interfere with Paramount's right to exploit the Cheers characters. Section 301 of the Copyright Act preempts any state law 'legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of the copyright [.]' 17 U.S.C. Section 301(a). The copyright in C*heers* carries with it the right to make derivative works based on its characters." *Wendt*, Daily Journal D.A.R. at 12897. Although that conflict was echoed in defendants' petition for certiorari in *White*, the United States Supreme Court declined to hear the case.

Kozinski's dissent in *Wendt* gives the Supreme Court additional reasons to take on the issue. The dissent points out that the Ninth Circuit's expansion of publicity rights also places it in conflict with the Seventh Circuit's decision in *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663 (7th Cir. 1986). *Id.* at 12898. The dissent also notes that by enforcing California's rights of publicity against Host's airport displays nationwide, the Ninth Circuit placed California law in conflict with its sister states. *Id.* at 12898-99.

Media Take Note Here

California's continuing expansion of publicity rights is not good news for publishers and broadcasters. Based on dicta in *Eastwood v. Superior Court*, 149 Cal. App. 3d 409 (1983), celebrity plaintiffs routinely complain that allegedly libelous headlines, cover stories and advertising also misappropriate their identities and justify awards of compensatory damages, profits, punitive damages and attorneys fees as damages.

Ultimately, the copyright monopoly is circumscribed by First Amendment principles such as the doctrine of fair use, the lack of copyright protection for facts and history, and the unprotected nature of ideas. Erosion of these principles in favor of ever growing celebrity publicity rights will hurt the press in the long run.

Under *White*, *Eastwood*, and *Wendt*, celebrities can theoretically assert publicity claims based not only on the use of their names or likeness in advertisements, promos, and cover stories but also on language that simply "evokes" their "identities." If Host and Paramount petition the Supreme Court for a hearing, media defendants should seriously consider *amicus* support.

If the possibility of *amicus* support is not reason enough to read Judge Kozinski's dissent in *Wendt*, his insight on important dramatic characters like *Seinfeld's* Kramer and his footnoted quotations of Norm's and Cliff's lines should not be missed. *See, e.g., Wendt*, 1999 Daily Journal D.A.R. at 12899 n. 2, 3 ("It's a dog-eat-dog world and I'm wearing Bone underwear;" "There's no rule against postal workers not dating women, it just works out that way.").

Amy Hogue is a partner in Pillsbury Madison & Sutro, Los Angeles, and tried the Vanna White case on behalf of Samsung Electronics.

Is Private Investigators' Newsletter a Commercial Use?
Summary Judgment Denied in Colorado Privacy Suit

The Court of Appeals of Colorado, Division Three has reversed a grant of summary judgment to a private investigation firm that printed the name and likeness of a convicted thief in a firm newsletter. *Dittmar v. Joe Dickerson & Assocs.*, No. 98CA1228 (Ct. App. Colo., Div. 3 Dec. 23, 1999). In an opinion which adopts the *Restatement (Second) of Torts* doctrine of appropriation for the first time in a Colorado appellate court, the court found that material issues of fact remained as to whether the defendant firm had used the plaintiff's name and likeness for a commercial purpose.

After the defendant firm, Joe Dickerson & Associates, was engaged to investigate plaintiff Rosanne Dittmar in a child custody dispute, its investigators found that she was in possession of bearer bonds under questionable circumstances, and they reported this information to law enforcement authorities. Ultimately, Dittmar was convicted of theft of at least $15,000. A report of her conviction and the firm's investigation subsequently appeared in the firm newsletter, "The Dickerson Report," which is sent to attorneys, members of financial institutions, other investigators, and the like. Dittmar sued the firm for invasion of privacy, based on the invasion of privacy tort articulated in *Restatement* § 652C as "appropriation of another's name and likeness."

Noting that this particular type of privacy claim had not previously been addressed by a Colorado appellate court, the court here saw "no reason why a claim for appropriation of another's name or likeness should not be recognized in Colorado." The Colorado Supreme Court has acknowledged the popularity among state jurisdictions of recognizing the types of invasion of privacy listed in the *Restatement*, and claims for unreasonable publicity and intrusion upon seclusion have been recognized in Colorado courts.

In this case, the trial court rejected Dittmar's claim because it found that the purpose of the article was to report on the firm's role in uncovering Dittmar's criminal activity, not to take advantage of any value associated with the plaintiff's identity. The appellate court, looking at case law from other jurisdictions, agreed that "this tort is generally not applicable when a person's name or picture is used to illustrate a non-commercial, newsworthy article . . . Nor can a plaintiff recover if use of the name or likeness is merely incidental."

However, the court held that the purpose of the publication and the value defendant derives from the use of the plaintiff's name and likeness are issues of fact, not to be decided at the summary judgment phase. The opinion appears to presume that the "value" of the person's name and likeness should be determined from the defendant's perspective, not from extrinsic commercial value, such as a celebrity might carry for endorsements; citing *Staruski v. Continental Telephone Co.*, 154 Vt. 568, A.2d 266 (1990), it held that the "fame of a person whose identity is appropriated is not a prerequisite to recovery for invasion of privacy."

The plaintiff had alleged that "The Dickerson Report" was "a commercial publication . . . intended to promote defendant's commercial interests," a description which the court pointedly took up. Noting this, the court found that the prior publication of Dittmar's photograph and name, and the details of her trial, in a local newspaper did not foreclose a claim for appropriation of her name and likeness, though it might foreclose other types of privacy claims. No First Amendment considerations entered the discussion.

The case was remanded to the trial court for further proceedings.

NAA Contends Online Newspaper Presence Complements Print

E&P Reports Newspaper Executives Are Nervous About Online Impact

NAA, the Newspaper Association of America, released a report that, not surprisingly, showed that more than two-thirds of all U.S. newspapers have an Internet presence. Perhaps less obvious was the finding of the survey that online newspaper readers have a higher rate of print newspaper readership than the adult population at large.

The NAA reported that among the adults surveyed, only 57% read a daily paper, while 67% read a Sunday paper. Among those who read online newspapers, 67% read a daily paper and 78% read a Sunday paper — a substantially higher percentage. Among Internet users generally, 61% read daily papers and 74% read Sunday papers.

Young adult readers tend to read online papers somewhat more than print versions. Of those 25-34 in age, 25% read an online paper, compared to only 19% who read a printed daily. In the 35-44 age group, 28% read online while 25% read print. In the youngest category, 18-24, the percentage of readers, 14%, was the same for print and online.

NAA represents the newspaper industry, with a membership of more than two thousand newspapers in the United States and Canada, most of which are daily papers.

Editor & Publisher, a newspaper industry trade publication, also recently published a poll that touched upon newspapers and the Internet. In its January 3, 2000 issue, E&P reported on the poll it commissioned of 565 newspaper executives. It found that while 79% of the newspaper executives believed that their industry is very or somewhat healthy today, only 49% felt it would be healthy in 10 years. That is down from 77% two years ago who predicted long term health in the industry.

E&P found that the difference in long term optimism was the result of the Internet and the consequences of their online services. The poll reported that 54% of those responding felt that over the long term, online services would harm the future of traditional newspapers. That is up 10% from two years ago. 41% felt that online publications would help the traditional newspapers, down from 45% in 1997. Only 5% of the respondents felt that online services would have no impact on traditional newspapers, down from 11% two years ago. For better or for worse, newspaper executives are more likely to believe that their Internet operations (and perhaps those of others) are going to change the newspaper environment.

E&P found that not all of the downward trend in optimism was the result of the Internet. Some was just the concern that the economic boom cannot last forever and that they will suffer in any downturn.

Interesting and positive news from the E&P poll: 89% of those polled rated the overall quality of their newspaper as excellent or good and 60% felt that the reporting at their papers was better than five years ago (and only 10% thought it was worse). The upswing in quality seems to be the result of improved local coverage, according to those polled. Indeed, "increased local news" apparently is the leading trend in newspapers today, one that over 80% of the respondents called a "very important" change.

E&P reported, however, another "trend" in the relationship between newspapers and their local communities:

> The traditional role of newspapers is changing. Research shows a dramatic decrease in the percentage of adults in many communities who read the first or main news section of their local newspaper. One reason: they're already familiar with some of the stories, particularly world and national news, thanks to the proliferation of cable news networks and the Internet. E&P, 1/3/00 at p. 24.

Globe Editor Arrested After Colorado Court Denies Motion to Halt Bribery and Extortion Prosecution

On December 20, *Globe* editor Craig Lewis was arrested after a Colorado grand jury indicted him on extortion and bribery charges for his alleged newsgathering efforts related to the JonBenet Ramsey murder. Lewis is charged with bribery for offering $30,000 to a handwriting expert retained by John and Patsy Ramsey's defense counsel in order to procure a ransom note discovered shortly before the child was found murdered. The extortion charge is based on the allegation that Lewis attempted to garner an interview with police detective Steve Thomas by threatening to report that Thomas' mother had committed suicide. After turning himself in to law enforcement, Lewis was released on $5,000 bond.

Enjoining Indictment Rejected

Attorneys for Lewis and Globe Communications Corp. attempted to thwart the indictment by moving for an injunction in federal and state courts, arguing that application of the Colorado criminal bribery and extortion statutes to newsgathering activities would chill conduct protected by the First and Fourteenth Amendments. Both the United States District Court for the District of Colorado and a Jefferson County state court temporarily enjoined the grand jury investigation pending consideration of the motion.

In November, the federal court refused to extend the TRO, finding that it was required to abstain from deciding the matter under the doctrine of *Younger v. Harris*. *See LDRC LibelLetter*, November 1999 at 41. On December 14, the state court followed suit, concluding that Globe and Lewis had not met the requirements for an injunction. *Lewis v. Thomas*, No. 99CV2897 (Jefferson County Dist. Ct. Dec. 14, 1999).

In its opinion, the court began by noting that under Colorado law, an injunction prohibiting the enforcement of criminal laws requires a threshold showing that it is necessary to protect existing property rights or constitutional rights. In this case, the court found that Lewis and Globe, plaintiffs for the purposes of the motion, had failed to make such a showing, as the claimed protected activity had already occurred and there was no evidence that newsgathering activities would be chilled. It did not reach the issue of the statutes' constitutionality, the merits of which, the court held, could be argued at Lewis' criminal trial.

Not Routine Newsgathering

The plaintiffs argued that Colorado's Criminal Bribery statute, which makes it a crime to offer any benefit in an attempt to induce the offeree to "breach a duty of fidelity," would chill routine methods of newsgathering, such as offering confidentiality to a source in return for information. In failing to find merit in this argument, the court based its reasoning on expert witnesses who testified that $30,000 was not a "routine" amount for a newspaper to offer in return for information.

The court responded to the overbreadth challenge with the observation that "plaintiffs have not shown that any District Attorney has chosen to bring this charge against a newsperson" based on ordinary newsgathering activities such as promising confidentiality in exchange for information from a source under a duty not to divulge it.

The court went on to find that the statute's requirement that the benefit be offered in return for a "breach of duty of fidelity" "severely limit[ed] its sweep" in the newsgathering context to cases in which a source breaches such a duty by providing information. It also construed a requirement of knowledge on the part of the offeror that the offeree had a duty of fidelity and that the included conduct would constitute a breach of that duty.

As for the criminal extortion indictment, based upon Lewis' alleged threat to perform the predicate criminal act of criminal libel in the form of publicity "tending to blacken the memory of the dead," the

(Continued on page 36)

Globe Editor Arrested

(Continued from page 35)

court also found no evidence of its potential to chill newsgathering activities. It again took a narrow view of the newsgathering activity potentially threatened, in this case "threatening to publish an unfavorable news story about a deceased person," and concluded that "[t]here has been no showing that this kind of retaliatory journalism is a common practice among Colorado journalists."

The court did acknowledge that the threatened application of the extortion statute to threats of criminal libel, even as applied to Lewis, may be unconstitutional for failure to allow a defense of truth, but found there were insufficient threats to future newsgathering and reporting by Lewis and other journalists to support an injunction.

Thomas Kelley and Steven Zansberg of Faegre & Benson, Denver, Colorado represented Craig Lewis and Globe Communications Corp. in this matter.

Journalist Sues Town and Police in Minnesota

A journalist has filed suit in U.S. District Court for the District of Minnesota against the town of Maplewood, Minnesota, its Chief of Police and three Maplewood police officers, for violating his civil rights and the Privacy Protection Act in interfering with his ability to cover an event in the town. Plaintiff Robert Zick is the producer and co-host of a weekly cable television program titled "Insight/Newshour." He sought to cover a reception for outgoing Maplewood City Council members and former Mayor. He was evicted from the event, his wrist fractured, his tape confiscated and his cameraman and co-host of the program arrested at the event.

Invitations to this event were issued from "the City of Maplewood" to hundreds of individuals. The reception was held in a public building. One of the council members being feted had promised that he would have a statement to make at the event. Indeed, the incoming Mayor of the town had urged Zick and his co-host Kevin Berglund to attend the event.

All that being said, the police told the plaintiff and his colleague that the event was a "public private get-together" for which the attendees had paid $15 for a cash bar. After discussions ensued between the journalists and the police at the scene, they all agreed, it was believed, on various ground rules that would limit the plaintiff's access to the room. At some point, however, the a town official in charge of the event, it is contended, decided to evict the journalists altogether. Something of a tussle ensued, with the police seizing plaintiff's camera and the tape. At this juncture, the police still retain the original of the videotape, having given plaintiff what he contends is an incomplete copy.

The Maplewood Chief of Police was quoted in the local press as stating that "[b]asically, the person arrested was asked if he would pay at the door and he refused."

Zick has sued for damages under the Privacy Protection Act, 42 U.S.C. s.2000aa *et seq*. which, according to the complaint, "makes it unlawful for a government officer or employee, in connection with the investigation of a criminal offense, to search for or seize documentary materials or work product materials which are possessed by a person reasonably believed to have a purpose to disseminate to the public a broadcast or similar form of public communication."

Zick also has asserted a civil rights claim under 42 U.S.C. s.1983.

Zick is seeking damages, a return of the original videotape and all copies made by the Town, an order enjoining defendants from interfering with his exercise of constitutional rights "and establishing

(Continued on page 37)

Journalist Sues Town and Police in Minnesota

(Continued from page 36)

procedures to eliminate possible repetition" of events such as occurred, and attorneys fees.

It has been reported that Berglund is also considering filing a civil action against the town. Berglund was scheduled to appear in court on Wednesday, January 19, on trespassing, disorderly conduct and fifth degree assault charges in the incident.

Press and journalist organizations are expressing concern about a rash of such events in a town that previously saw no such incidents in recent memory between reporters and police. Police spokesmen were quoted by Editor & Publisher as saying that there has been no policy change within the Police Department regarding press access for newgathering purposes.

MILWAUKEE POLICE v. PRESS
Arrests May Provoke Civil Suits

A Milwaukee Journal Sentinal reporter has filed a notice of claim with the City for damages, a prerequisite to filing a claim for damages, following his arrest by Milwaukee police while conducting interviews at the scene of a spontaneous street party. The reporter, Jamaal Abdul-Alim, was charged with disorderly conduct when he allegedly failed to leave the area after police arrived on the scene and ordered him, and others, to leave the area. The charges were dismissed without prejudice when the arresting cop was unavailable at the preliminary hearing.

His arrest is only one of several arrests of reporters and photojournalists by the Milwaukee police in the last six months, creating significant concerns about the aggressive manner in which the police are handling local press at the scene of newsworthy events. In one other instance, Milwaukee Journal Sentinal photojournalist Jeffrey Phelps was arrested in early December when taking pictures of a hit-and-run accident. Charges against him were dismissed, but there are reports that he too is thinking of filing a claim against the City.

Cops to Fairfax, Virginia Crime Victims:
Don't Talk to the Press

The Freedom Forum Online last month reported that police Fairfax County Virginia are proposing to start this month giving crime victims, and witnesses in high profile cases, a card that advises them to talk to the police before talking to the press. The police contend that the instructions on the cards are intended to aid in protecting the integrity of investigations. They contend as well that they will not interfere with the press doing its job, a posture contested by press representatives. LDRC will ask Virginia members to advise it as to how the procedure actually works in practice.

Any Developments you think other LDRC members should know about?

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Tennessee Supreme Court Reverses Voir Dire Closure in *King* Case, *Affirms Access to Civil Trials*

By Lucian T. Pera

In a decision arising out of the recent wrongful death lawsuit by Coretta Scott King and her children concerning the assassination of Dr. Martin Luther King, Jr., the Tennessee Supreme Court has strongly condemned the trial court's closure of voir dire proceedings in that case and held for the first time that the constitutional right of access to court proceedings covers civil actions.

In a December 13, 1999 decision, in *Coretta Scott King v. Loyd Jowers*, Tennessee's high court expressly rejected the trial court's reliance on a special rule of court adopted to permit and regulate access by broadcast audio/video journalists and photographers to court proceedings, which the court found inapplicable by its express terms.

On the first day of trial, the trial court had closed voir dire proceedings to the press. When this decision was promptly challenged that morning by counsel for *The Commercial Appeal*, Memphis' daily E.W. Scripps Company newspaper, the trial court offered no rationale or factual findings to support its decision other than its desire to protect the jurors from "public scrutiny." The trial court relied upon the Tennessee court rule regulating access by broadcast media and photographers. The trial court subsequently denied *The Commercial Appeal*'s request for access to a transcript of the completed voir dire proceedings.

Within four days, *The Commercial Appeal* had taken an emergency appeal to Tennessee's intermediate appellate court and that court had denied an appeal, without assigning any procedural or substantive reason. The Tennessee Supreme Court, however, accepted a further emergency appeal. Within four weeks of the closure, and without awaiting any filings from the parties to the lawsuit, the Supreme Court issued its opinion. None of the parties to the lawsuit ever voiced any support for or objection to the trial court's decision, either in the trial court or on appeal.

Lucian T. Pera is a member of Armstrong Allen Prewitt Gentry Johnston & Holmes, PLLC, resident in Memphis, Tennessee, and represented The Commercial Appeal in the King v. Jowers appeal.

D.C. Circuit, for First Time, Recognizes a "Limited Right of Access" to Grand Jury Ancillary Proceedings

Efforts to obtain access to briefs, transcripts and other material relevant to the ancillary proceedings of the grand jury investigating the President spanned almost two years and is still on-going. Below is a review of the peaks of that litigation — a much-needed scorecard.

By Theodore J. Boutrous, Jr. and Jonathan K. Tycko

In one of the final legal chapters of Independent Counsel Kenneth Starr's investigation of the Monica Lewinsky matter, the D.C. Circuit recently held, for the first time, that the press and public have a "limited right of access" to grand jury ancillary proceedings. The case, *In re Sealed Case*, No. 99-3024, 1999 WL 1240913 (D.C. Cir. Jan. 4, 2000), dealt specifically with the issue whether the District Court in which the Starr grand jury was operating was required to maintain a public docket of proceedings and judicial records relating to the various legal disputes — such as disputes over executive privilege, secret service privilege, and the issue of alleged "leaks" by Office of the Independent Counsel staff — that arose in connection with the grand jury investigation.

The D.C. Circuit concluded that, where the press or public requests a public docket of matters relating to a particular grand jury, the District Court must "duly consider the request and, if it denies the request, offer some explanation" that "must bear some logical connection to the individual request" and that must rest on something more than "administrative burdens" or "an arguable possibility of leaks." *Id.* at *5.

This recent ruling — which interpreted the District Court's local rules to provide procedural and substantive rights similar to the common law right of access — represents the first time any federal court has recognized such a right. The ruling also represents the culmination of an access fight that lasted almost two years and that has established a new regime in the D.C. Circuit that should be of considerable help in future cases in which the press seeks access to grand jury ancillary proceedings.

The Access Battle Begins

During the course of the Lewinsky grand jury investigation, Chief Judge Norma Holloway Johnson of the federal district court in Washington conducted many ancillary proceedings, *i.e.*, proceedings held before the court itself that arose out of the grand jury investigations. These proceedings raised a whole host of important, interesting and highly newsworthy legal issues in the midst of a major national political and legal spectacle that blended sex, perjury, obstruction of justice, impeachment and the controversial independent counsel law into an unprecedented White House scandal.

FRCP Rule 6(e)

Pursuant to Rule 6(e)(2) of the Federal Rules of Criminal Procedure, individuals actually present in a grand jury room — with the exception of witnesses testifying before the grand jury — are, with some very limited exceptions, not permitted to "disclose matters occurring before the grand jury." In 1983, Rule 6(e) was amended to cover, for the first time, ancillary proceedings.

With respect to such proceedings the Rule currently states that "the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury." Fed. R. Civ. P. 6(e)(5); *see also* Fed. R. Civ. P. 6(e)(6) (records relating to ancillary proceedings "shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury").

As a result of the 1983 amendment to Rule 6(e), most federal district courts now routinely conduct ancillary proceedings in secret. The district court in Washington, D.C. has a specific rule — Local Criminal Rule 6.1 — that governs this issue. Pursuant to that local rule, any motion relating in any way to a "matter occurring before a grand jury" is automatically placed under

(Continued on page 40)

D.C. Cir . Recognizes "Limited Right of Access"

(Continued from page 39)

seal and all hearings on such motions are automatically closed to the public. But, "[p]apers, orders and transcripts of hearings" may be unsealed "by the court on its own motion or on motion of any person upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury."

From the outset of the Lewinsky investigation, the Chief Judge held all ancillary proceedings relating to that investigation in complete secrecy, without any notice to the public. If a motion, such as a motion to quash a grand jury subpoena or a motion to compel testimony before the grand jury, was filed, it would — pursuant to the local rule — be assigned a "miscellaneous" case number and would immediately and automatically be placed under seal. Although the District Court maintained an internal docket of these "miscellaneous" matters, that docket was not available to the public. Moreover, hearings and other judicial proceedings relating to these ancillary matters were held behind locked doors, with the windows to the courtrooms shrouded by brown paper, and guarded by a cadre of U.S. Marshals. Even press motions for access were immediately and automatically placed under seal by the Clerk's office.

Fourteen News Organizations Form Coalition

Shortly after the Lewinsky story broke on January 21, 1998, a coalition of news organizations formed, and commenced a battle to open up these important judicial proceedings to public scrutiny. Fourteen different news organizations ultimately joined forces in this effort: Dow Jones & Company, the *Los Angeles Times*, ABC, The Associated Press, CNN, CBS, Fox News Network, NBC, the New York Times Company, Time Inc., *USA Today*, Reuters and *The Washington Post*.

On February 9, 1999, the media sought access to the judicial records and hearings relating to President Clinton's motion to show cause, which asked the court to hold Independent Counsel Starr and his staff in contempt for allegedly leaking grand jury information in violation of Rule 6(e). Chief Judge Johnson granted the media's request that the President's motion and supporting brief and exhibits be released to the public, holding that the common law presumption of access applied and had not been rebutted.

Intense Secrecy

But this "era of openness" was extremely short lived. On February 26, 1999, after news broke that President Clinton was invoking Executive Privilege to block the grand jury testimony of his top aides, such as Bruce Lindsey and Sidney Blumenthal, the media filed a motion seeking access to any and all judicial records and proceedings relating to the executive privilege dispute. Chief Judge Johnson denied that motion in an order stating that "[t]he motion requests access to certain papers believed to have been filed with this Court. No such papers exist. Movants' request must be denied because it is not ripe." With respect to the request for public access to future hearings, Chief Judge Johnson ruled that the request was "premature" because she was "unable to find that continued sealing of a nonexistent matter is or is not 'necessary to prevent disclosure of matters occurring before the grand jury.'"

On March 4, 1998, Chief Judge Johnson held an unannounced closed-door hearing on a motion to quash a grand jury subpoena filed by Francis Carter, the attorney who had helped Ms. Lewinsky draft her affidavit in the Jones case. While that hearing was in progress — and with a throng of reporters waiting in the hall outside the courtroom — the media coalition submitted a hastily-prepared motion for access to the hearing. The court took no action on that motion while the hearing continued, and subsequently issued an order denying the media coalition's motion for access to the transcripts and other judicial records relating to that hearing.

Thus, at that point in time, the court had

(1) denied a motion for access to future pleadings and hearings on the grounds that such a motion was "premature" and not "ripe,"

(2) conducted unannounced closed-door hearings, and

(3) refused to consider the media's requests to

(Continued on page 41)

D.C. Cir . Recognizes "Limited Right of Access"

(Continued from page 40)

be heard on the issue of public access once those unannounced hearings commenced.

And, because the district court had no public docket of these pleadings or hearings, reporters were unable to determine (except, occasionally, through their own independent sources) when pleadings had been filed or when hearings would be held. The practical result of Chief Judge Johnson's rulings, actions, and the lack of a public docket was that the press had no reliable means of even *arguing* for public access to judicial records or judicial proceedings ancillary to the ongoing grand jury investigation.

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Coalition Sought Notice

To address this situation, the media coalition, on March 9, 1998, filed a Motion For Establishment Of Procedures Relating To Public Access To Judicial Proceedings And Records (the "Motion For Establishment Of Procedures"). That motion asked the District Court to, among other things, provide advance notice of ancillary proceedings relating to the Starr investigation and to provide a docket of pleadings relating to those proceedings, in some form that would not reveal matters occurring before the grand jury.

While the Motion For Establishment Of Procedures was pending, the District Court continued to hold unannounced closed hearings. For example, on March 11, 1998, the media coalition filed a motion seeking public access to hearings concerning the President's motion to show cause (the motion by way of which the President accused the Independent Counsel of "leaking" secret grand jury material in violation of Fed. R. Crim. P. 6 (e)).

The following day, the press learned (through their own sources) that such a hearing was scheduled for 2:00 p.m. that day. Counsel for the media coalition again appeared at the courthouse, and this time was admitted into the courtroom. Present in the courtroom were attorneys from the Office of the Independent Counsel (the "OIC"), and attorneys for the President and for Monica Lewinsky. The Chief Judge announced that she had received the media coalition's motion the day before, and then inquired whether either the OIC or the President had yet responded to that motion. Counsel for both the OIC and the President stated that they had not yet responded to the motion for access. The Chief Judge then stated that "[t]hey have not had time to respond to it, so your motion is just premature and we will be unable to let you remain." She refused to let counsel for the media coalition address the court, and instead ordered a U. S. Marshall to escort him out of the courtroom.

The Chief Judge then stated to those who remained in the courtroom, "I just don't know why counsel would do that: File something the day before a hearing and expect the Court to be in a position to rule on it before the hearing."[1] Thus, yet again, Chief Judge Johnson refused to consider or rule upon the merits of a motion for access because the motion was filed "too late," while at the same time continuing to conduct proceedings without any advance public notice.

On March 18, 1998, Chief Judge Johnson denied, for the first time, the Motion For Establishment Of Procedures and also issued orders denying the media's request for access to the leak proceedings and the Francis Carter proceedings. She reasoned, in essence, that the press had no First Amendment right of access to grand jury proceedings, and that even docketing or giving advance notice of ancillary proceedings would run the risk of disclosing matters occurring before the grand

(Continued on page 42)

[1] The transcript of the March 12, 1998 hearing was unsealed by Chief Judge Johnson in January of 1999, only after the media coalition filed a mandamus petition that asked the D.C. Circuit, *inter alia*, to order the District Court to rule upon a long-pending motion seeking access to all judicial records relating to the President's motion to show cause.

D.C. Cir . Recognizes "Limited Right of Access"

(Continued from page 41)

jury.

The First Appeal

The media immediately filed an expedited appeal. In the meantime, it was reported that several secret hearings were held regarding the President's assertions of executive privilege.

Ironically, the April 8, 1998 oral argument in the D. C. Circuit on the media's appeal was the first open hearing conducted by any court in relation to the Lewinsky grand jury matter. On May 5, 1998, the D.C. Circuit issued its ruling in that appeal. *In re Motions of Dow Jones & Co.*, 142 F.3d 496 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 60 (1998). The D.C. Circuit ruled in that case that the public does not have a First Amendment right of access to proceedings ancillary to grand jury investigations, but at the same time announced a new regime under Rule 6(e) and the local rules that provided a basis for permitting access to both judicial records and hearings ancillary to grand jury matters

Read Rule 6(e) Broadly

The Court interpreted Rule 6(e) expansively, stating that the Rule encompasses "not only what has occurred and what is occurring [before the grand jury], but also what is likely to occur," *id.* at 500, concluding that essentially all ancillary proceedings fall within Rule 6 (e)'s purview. But the Court also ruled that Rule 6(e) and the district court's Local Rule 302 (which is now Local Criminal Rule 6.1) provide a mechanism for at least seeking access to ancillary proceedings and to judicial records relating to those proceedings.

With respect to pleadings, transcripts and other judicial records, the Court held that the public was not automatically barred from access to such records if they did not reveal otherwise secret matters occurring before the grand jury. The Court interpreted Rule 6(e) and the District Court's local rule to mean that "[t]he press . . . is not, in any event, barred from receiving non-protected details about what transpired before the court." *Id.* at 504.

Indeed, the Court reasoned that, with respect to "pleadings and papers," the local rule provided to the press "the most it could expect from its constitutional claim," noting that the rule provided that such documents could be unsealed by "'the Court on its own motion or on motion of any person upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury.'" *Id.* at 500 (quoting Local Rule 302).

With respect to the ancillary proceedings themselves, the Court held that if public access can be provided "without risking disclosure of grand jury matters," then "Rule 6(e) contemplates that this shall be done." *Id.* at 502. The court was careful, however, not to phrase its discussion of access to ancillary proceedings in terms of a "right." The opinion nowhere states that the public or a press had any "right" to access to such proceedings.

Troubled By Secret Docket

The court then noted that "[a] problem remains." *Id.* at 504. "If the press is given no access to the fact that some sort of ancillary proceeding has taken place, or will take place, it may be unable to invoke Rule 302." *Id*. The court was troubled by the secrecy of the docket:

> We can understand why a descriptive caption on a case might reveal grand jury matters, but we cannot understand why a designation such as "In re Grand Jury Proceedings," followed by a miscellaneous case number would have that consequence. The Chief Judge, in her memorandum opinion, did not explain why, in light of Rule 302, there has been such a blanket sealing of the docket. As to this subject, we will therefore remand the case for reconsideration.

Id. The court, therefore, remanded the docketing issue back to the district court.

The court also remanded to the district court on the issue of unsealing the transcripts and other records relating to the Francis Carter motion to quash. In so doing, the court recognized an important principle: that Rule 6 (e) ceases to protect judicial records relating to grand jury proceedings once the "secret" matters to which

(Continued on page 43)

D.C. Cir . Recognizes "Limited Right of Access"

(Continued from page 42)

Rule 6(e) otherwise would apply have become public knowledge. The court noted that, at the time Chief Judge Johnson denied access to the transcripts of the Carter hearing, "it was no longer a secret that the grand jury had subpoenaed Carter" because Carter's attorney had "virtually proclaimed from the rooftops that his client had been subpoenaed[.]" *Id.* at 505. The court concluded, therefore, that if Chief Judge Johnson had denied the media's motion in order to protect the secrecy of Carter's identity as a grand jury witness, she had erred.

The Veil Temporarily Lifts

The D.C. Circuit's ruling in *In re Motions of Dow Jones* almost immediately sparked a wave of greater access to the ancillary proceedings that continued to swirl around the Lewinsky investigation. For example, Chief Judge Johnson — for the first time — actually conducted a *public* ancillary proceeding requested by the media coalition, namely, a hearing on the issue whether a "protective service privilege" could be invoked by Secret Service agents subpoenaed by the grand jury.

Chief Judge Johnson also released to the public the pleadings relating to the Secret Service and executive privilege issue, and issued public rulings on both of those issues. In addition, the D.C. Circuit — relying on its own ruling in *In re Motions of Dow Jones* — unsealed the transcripts and pleadings relating to the Francis Carter motion to quash, which had come before it in the form of the appellate record in Mr. Carter's appeal.

But this second "era of openness" also soon came to an end. As the media coalition continued to file motions seeking access to various ancillary proceedings, Chief Judge Johnson adopted a new approach that avoided public disclosure: she simply left the media's motions pending for long periods of time without ruling on them, thereby effectively denying access. Though the media coalition repeatedly requested a new ruling on the Motion For Establishment Of Procedures, pursuant to the D.C. Circuit's remand of that issue, Chief Judge Johnson never acted. In addition, Chief Judge Johnson simply never ruled on other pending motions, including motions seeking access to additional pleadings relating to the President's motion to show cause, and seeking access to pleadings relating to Monica Lewinsky's motion seeking "immunity" from prosecution under an alleged immunity agreement with Independent Counsel Starr.

The Mandamus Proceedings

In an attempt to break this logjam of pending motions, the media coalition on December 16, 1998 filed a mandamus petition seeking an order from the D.C. Circuit requiring Chief Judge Johnson to rule on those motions. On December 22, 1998, this D.C. Circuit, apparently troubled by Chief Judge Johnson's failure to rule upon the media coalition's requests, took the unusual step of requiring the District court to respond to the mandamus petition within 30 days.

That order from the D.C. Circuit prompted a series of rulings by Chief Judge Johnson, in which she unsealed significant quantities of judicial records relating, among other things, to the "leaks" issue and to the Lewinsky "immunity" request. In addition, during this period of time, Chief Judge Johnson granted the media's motion to unseal judicial records relating to Ms. Lewinsky's motion seeking permission from the court to do her now-famous interview with Barbara Walters.

The Docketing Ruling

Finally, on January 20, 1999 — in response to the D.C. Circuit's order requiring a response to the mandamus petition — Chief Judge Johnson issued a Memorandum Order reconsidering her March 18, 1998 Order on the issue of docketing, and again refusing to provide a public docket of the ancillary proceedings relating to the Starr investigation. She issued that ruling *under seal*, despite the fact that it contained absolutely no secret grand jury material, but rather simply constituted the court's ruling on a significant legal issue.

In the Memorandum Order, Chief Judge Johnson

(Continued on page 44)

D.C. Cir . Recognizes "Limited Right of Access"

(Continued from page 43)

once again relied primarily upon the generalized need for grand jury secrecy. She reasoned that, to protect grand jury secrecy, any public docket of ancillary proceedings would need to be so non-descriptive and generic as to render the docket of little utility to the press and public. She also concluded that maintaining such a generic docket in all grand jury matters would be unduly burdensome on the district court.[2]

The district court's ruling did not appear on any public docket, and the public was not otherwise given any notice of the existence of that ruling. The media coalition appealed that ruling to the D.C. Circuit.

The D.C. Circuit Revisits Rule 6(e)

While that appeal was pending, but before it was argued, the D.C. Circuit issued its opinion in *In re Sealed Case (Office of Independent Counsel Contempt Proceedings)*, 192 F.3d 995 (1999), in which it backed away from the broad interpretation of the scope of Rule 6(e) that it had espoused in *In re Motions of Dow Jones*, and adopted in large part the narrower interpretation of Rule 6(e) that the media coalition had urged in its earlier appeal.

At issue was whether the OIC had violated Rule 6 (e) in connection with the front page article published in the New York Times on January 31, 1999 — in the midst of the Senate trial — reporting that Independent Counsel Starr and his team were considering indicting President Clinton. The Court noted the "seemingly broad nature of the statements" it had made in *In re Motions of Dow Jones*, *id*. at 1001, but cautioned that it had "never read Rule 6(e) to require that a 'veil of secrecy be drawn over all matters occurring in the world that happen to be investigated by a grand jury,'" *id.* at 1002 (quoting *SEC v. Dresser Indus., Inc.*, 682 F.2d 1368, 1382 (D.C. Cir. 1980) (en banc)).

The court emphasized the limited scope of the plain language of Rule 6(e), which protects only matters occurring before the grand jury. The Court went on to draw a distinction between a prosecutor's "own investigation" and a "grand jury's investigation," concluding that a prosecutor's statements about his or her own investigation implicate Rule 6(e) "only when they directly reveal grand jury matters." *Id.* The court stated that "a court may not use Rule 6(e) to generally regulate prosecutorial statements to the press."

The court also went on to reaffirm its holding in *In re Motions of Dow Jones* that "widespread public knowledge" of a fact deprives that fact of Rule 6(e) protection. *Id.* at 1004 (noting that President Clinton's status as a witness before the grand jury was well-known, given that "the President himself went on national television the day of his testimony to reveal this fact").

The D.C. Circuit's Ruling On The Docketing Issue

The D.C. Circuit, in its latest January 4, 2000 ruling, began by affirming Chief Judge Johnson's refusal to establish public dockets of *all* grand jury proceedings as a matter of general District Court practice. *In re Sealed Case*, 1999 WL 1240913 at *3-4. Although the media coalition had never made a request to the district court for public dockets relating to any matter other than the Starr investigation, Chief Judge Johnson's Memorandum Opinion had treated the media coalition's motion as just such a request. Accordingly, on appeal, the briefing and argument had focused to some extent on that issue, and the media coalition had indeed argued (at least on appeal) that the district court should have public redacted dockets of *all* grand jury ancillary proceedings.

The D.C. Circuit noted the "strong presumption of secrecy" that attaches to "grand jury proceedings and related matters," *id.* at * 4, and, viewing the issue as essentially involving an interpretation of the district court's local rules, concluded that it had "no good reason to second-guess the District Court's interpretation of its own rule, especially since we review the district court's decision for abuse of discretion," *id.* That conclusion was not surprising, given that no court had ever previously recognized any rule *requiring* docketing of grand jury ancillary proceedings as a general

(Continued on page 45)

[2]There was much more to the Memorandum Order; however, the authors of this article are limited in what they can reveal about that ruling because it remains under seal. This description of the Memorandum Order is based only upon what was revealed about that ruling in the D. C. Circuit's opinion in *In re Sealed Case*, 1999 WL 1240913.

D.C. Cir . Recognizes "Limited Right of Access"

(Continued from page 44)

matter and the Court of Appeals' understandable deference to the Chief Judge's supervision of the district court's administrative functions and rules.

A "Limited Right of Access"

In the context of that ruling, however, the court explicitly recognized that the press had a "limited right of access" to "grand jury ancillary proceedings" under the district court's Local Rule 6.1. *Id.* That rule provides that when "continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury" ancillary proceedings may be made public. This recognition of a "limited right of access" is significant because, in so stating, the court went beyond what it was willing to say in its early decision in *In re Motions of Dow Jones*, 142 F.3d 496.

The court then turned to what it called an "alternative" to public docketing in all cases, namely, a right to request a public docket relating to *specific* matters. The court, in the most significant passage in its opinion, interpreted Local Rule 6.1 as providing something very close to a common law right of access to redacted public dockets:

> When a party makes a request under Rule 6.1 for a redacted public docket in a specific proceeding, the District Court must duly consider the request and, if it denies the request, offer some explanation. The District Court's explanation must bear some logical connection to the individual request. In other words, it must rest on something more than the administrative burdens that justified the denial of across-the-board docketing, and it must be more substantial than, say, an arguable possibility of leaks.

In so stating, the Court read a number of procedural protections into Local Rule 6.1 that are not contained in the text of that rule. Most importantly, the Court required an *explanation* of any denial of a request for public docketing, and required that the explanation be specific to the request and be based upon something more than a generalized fear of grand jury "leaks." The court thereby, in essence, rejected Chief Judge Johnson's reasoning.[3] The Court remanded the case back to the district court for further proceedings in light of its opinion.

Conclusion

The D.C. Circuit's opinion in *In re Sealed Case* should be helpful to the press and public in connection with future grand jury proceedings. In conjunction with the court's earlier opinion in *In re Motions of Dow Jones*, there is now firmly established law in the D.C. Circuit that makes clear the substantive and procedural "limited right" of the press to seek — and in some cases obtain — access to grand jury ancillary proceedings and judicial records relating to those proceedings. Local Criminal Rule 6.1 provides the procedural mechanism for seeking such access, which must be granted if doing so is possible without revealing matters occurring before the grand jury.

When seeking access to ancillary proceedings, it is important to focus on the limited scope of Rule 6(e) pursuant to the D.C. Circuit's recent ruling in *In re Sealed Case (Office of Independent Counsel Contempt Proceedings)*, 192 F.3d 995, and to bring to the court's attention, to the greatest extent possible, the facts about the particular grand jury investigation that already are publicly known and thus no longer subject to Rule 6(e) protection.

While Local Rule 6.1 seems to suggest that all hearings will be closed, the D.C. Circuit's opinion in *In re Motions of Dow Jones* interpreted the rule to mean that such closure need only be temporary — long enough for the district court to determine if an open hearing can be held without revealing secret grand jury material.

Especially in high-profile investigations — such as the Lewinsky investigation — a body of law that has now been created is quite likely to result in the unseal-

(Continued on page 46)

[3]The Court also stated that this "alternative remedy" was never addressed by the District Court "because the matter was never pursued on remand [from *In re Motions of Dow Jones*] by appellants." *Id.* at *5. That statement, which allowed the D.C. Circuit to avoid an outright reversal of Chief Judge Johnson, was simply false. Indeed, the "alternative" remedy was the *only* remedy the media coalition had consistently and repeatedly sought in the District Court.

D.C. Cir . Recognizes "Limited Right of Access"

(Continued from page 45)

ing of transcripts and other records, either in whole or redacted form, relating to those ancillary proceedings. And both D.C Circuit opinions make clear that, as with the common law right of access, a district court that denies access must make specific findings tailored to the specific request explaining the denial.

While such denials will be reviewed under what amounts to a form of abuse of discretion review, the D.C. Circuit in both cases arising from the Lewinsky investigation remanded the cases to the Chief Judge for further review, refuting any notion that the District Court's ruling will simply be rubber-stamped on appeal.

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Supreme Court Upholds Federal Restrictions on Access to Motor Vehicle Registrations

Somewhat tempering its federalist tendencies of the last decade, the U.S. Supreme Court has upheld the Driver's Privacy Protection Act of 1994, a federal law which restricts the disclosure of personal information contained in the records of state motor vehicle departments. *Reno v. Condon*, No. 98-1464, 2000 U.S. LEXIS 503 (Jan. 12, 2000). In a unanimous decision issued January 12, the Court dismissed South Carolina's claims that the law violates the federalist principles embodied in the Tenth and Eleventh Amendments. It found that the DPPA is a constitutional application of Congress' commerce clause powers, as it neither requires states to implement federal policies nor commands state officials to administer federal programs.

The DPPA prohibits state DMVs from disseminating drivers' personal information, such as names, addresses, photographs, and social security numbers, without drivers' consent, except for particular purposes involving public safety. Private persons who receive such information for restricted purposes must also observe those restrictions in passing it on to third parties. Current South Carolina law, on the other hand, makes DMV records available to any person or entity, as long as the requester states that he, she, or it will not use the information for telephone solicitations.

Following passage of the conflicting federal legislation, South Carolina and its Attorney General, Charlie Condon, filed a suit in federal court, asserting that the DPPA violated the Tenth and Eleventh Amendments to the U.S. Constitution. The U.S. District Court for the District of South Carolina agreed, and permanently enjoined the DPPA's enforcement against the State. The Fourth Circuit affirmed.

In reversing the finding of unconstitutionality, the Supreme Court, in an opinion by Chief Justice Rehnquist, first held that the DPPA fits squarely within Congress' power to regulate interstate commerce under the Commerce Clause:

> The motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations. The information is also used in the stream of interstate commerce by various public and private entities for matters relating to interstate motoring.

South Carolina argued that the DPPA violated the Tenth Amendment under the principles articulated in *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997). The state contended in its brief that the law "thrusts upon the States all of the day-to-day responsibility for administering its complex provisions," and thereby makes "state officials the unwilling implementers of federal policy." In addition, the statute provides for penalties for failure to comply with its provisions.

The Supreme Court disagreed, relying on the earlier case of *South Carolina v. Baker*, 485 U.S. 505 (1988). That case, which involved a statute prohibiting the issuance of unregistered bonds, distinguished between federal regulation of state activities and federal laws that seek "to control or influence the manner in which States regulate private parties." Here, the Court found that "[t]he DPPA regulates the States as owners of databases," without requiring state officials to enforce the restrictions as to private parties. The Court did not reach the issue, raised by South Carolina, that prohibitive federal laws applying only to States are unconstitutional, for the DPPA in fact does apply to private parties as well as to States.

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