

MILRC Media Law Resource Center
MEDIA LAW LETTER

Reporting Developments Through January 17, 2003

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U.S. v. Randel: Ex-DEA Employee Sentenced to One Year in Prison for Giving Information to Times of London

Jonathan Randel, a former intelligence analyst with the Drug Enforcement Agency (DEA), was sentenced in federal district court to one year in prison after admitting to passing on government information to the Times of London. The information was not classified, it was designated as "sensitive." Randel was charged under 18 U.S.C. 641 with selling government property, the restricted government information, in violation of federal statute and his federal employment agreement. The U.S. Attorney's Office for the Northern District of Georgia charged Randel as a felon by placing a substantial media market price on the leaked information.

The indictment of Randel, which was filed on July 12, 2001, and the proceedings prior to sentencing, apparently took place way under the radar of local news, First Amendment, and legal organizations. He pled guilty to a single count of the indictment while the government dismissed six other counts on January 13, 2003.

The information at issue was published in the Times

and concerned Lord Michael Ashcroft, former treasurer of the Conservative Party. After sentencing, the government stated that the case should serve as a warning to government employees tempted to divulge government information to the news media. This development comes after a DOJ task force report recommended government agencies utilize existing laws and policies to prosecute those who leak government information.

Background

The case originated with a Times investigation into the finances of Lord Ashcroft (no relation to US Attorney General John Ashcroft). In 1999, Randel, who was a DEA Intelligence Research Specialist, provided information from a restricted DEA database

containing intelligence information on suspected narcotics traffickers. Lord Ashcroft's name surfaced in the database because of his financial stake in the Bank of Belize, which

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The U.S. Attorney's Office for the Northern District of Georgia charged Randel as a felon by placing a substantial media market price on the leaked information.

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Ex-DEA Employee Sentenced to One Year in Prison for Giving Information to Times of London

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the DEA suspected had been used by a drug dealer to launder money.

After receiving the information from Randel, the Times published a series of articles documenting Ashcroft's activities in Belize, and Belize's role as a haven for money-laundering by drug dealers. However, the Times articles reported that Ashcroft was not implicated in any criminal misdeeds in the DEA reports. Ashcroft eventually resigned his position due to the scandal.

Randel claimed that he gave the information to the Times for free because he thought Ashcroft was guilty of wrongdoing. The Times, however, gave Randel \$13,000, which both the Times and Randel assert was to reimburse him for plane fare and days of work missed when he met with Times editors in London in connection with a defamation claim Lord Ashcroft subsequently brought against the Times. That suit was settled by the parties. However, in the criminal case, the government contended that the money was in direct exchange for the information.

Statutory Basis for Protection

The government eventually charged Randel with violating 18 U.S.C. 641, which applies to an individual who,

“embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof.”

The statute also applies to the person who receives the information knowing it was stolen, embezzled, purloined or otherwise converted. The government chose not to pursue a case against the Times.

This is the same statute that the government used, among other provisions, to prosecute Samuel Morison, then an employee of the Naval Intelligent Support Cen-

ter, for passing classified photographs to Jane's Defence Weekly, back in the mid-1980's. (For a more detailed discussion of the statute, see Reporting on the War on Terror: The Espionage Act and Other Scary Statutes by Susan Buckley, *LDRC Bulletin*, March 2002, 5, 29).

To charge Randel under the statute, the government maintained that the information in the records was government property. The government contended that the information had a market value of at least \$13,000, the price the government claimed it fetched in the English news market. In a hearing on the issue, the government called a London literary agent who testified that the value of the information could even be greater, approaching \$80,000.

In its indictment, the government also relied on an extensive nondisclosure agreement Randel had signed before being given access to DEA files and the intelligence database. According to the government, Randel had explicitly agreed sensitive nonclassified information was the property of the United States government and unauthorized disclosure of such information violated federal law.

At sentencing, district court Judge Richard W. Story was clearly dismayed by Randel's actions. Judge Story stated that even though Randel's conduct did not result in serious damage to national security, or the loss of life, “Anyone who would leak information poses a tremendous risk.” William S. Duffy, the U.S. Attorney for the Northern District of Georgia, stated afterwards that Randel's case could have seriously damaged the justice system, and that his office would prosecute all similar cases.

Both the Times and Randel's attorney believed the sentence to be harsh. Times legal advisor, Alastair Brett, referring to the sentence as “monstrous,” stated that journalists speak to many different sources and “we don't expect them to be banged up for it.”

For Jonathan Randel: Steven Howard Sadow of Atlanta; Brenda Joy Bernstein of Atlanta.

For the United States: Randy S. Chartash and Phyllis Sumner of the U.S. Attorney's Office for the Northern District of Georgia.

Modified ALI Proposal on International Judgments Still Troubling To First Amendment Advocates

Editor's Note: WE NEED YOUR HELP ON THIS MATTER. Please review the text below and see how you, or perhaps your colleagues who are members of ALI, can help us on what became a struggle at ALI to protect existing protections against enforcement of foreign libel judgments.

By Tom Leatherbury

Thanks to all of you who responded with suggestions and comments concerning the portion of the American Law Institute's proposed Act on International Jurisdiction and Recognition of Judgments which may affect the ease with which foreign libel judgments are enforced. See *MediaLawLetter*, Nov. 2002 at 9. Our collective comments had some impact on the most recent, revised draft, which was circulated and discussed by the ALI's Council in mid-December. The Reporters' Notes, however, remained troubling. The Reporters' Notes to the December draft provided:

(d) The Public Policy Exception and the First Amendment.

The appropriate scope for the public policy exception [to enforceability of foreign judgment] has given rise to sharp debate in the context of several recent libel cases in the United States. In both *Bachchan v. India Abroad Publications, Inc.*, 154 Misc. 2d 228, 585 N.Y.S. 2d 661 (Sup. Ct. N.Y. Cty. 1992), and *Telnikoff v. Matusevitch*, 347 Md. 561, 702 A.2d 230 (1997), *aff'd* (table), 159 F.3d 636 (D.C. Cir. 1998), libel judgments obtained in England were denied enforcement in courts in the United States on the ground that the libel law of England is incompatible with the values reflected in the First Amendment of the U.S. Constitution, and hence, that enforcement would be contrary to U.S. public policy. In *Telnikoff*, the libel judgment had been obtained by one resident of England against another resident of England, both of whom were Russian émigrés; the offending letter and published comments had no connection with the United States. In *Bachchan*, an Indian plaintiff had sued a New York news operator, who had distributed an allegedly libelous news story in both New York and the United Kingdom; the libel related to alleged misconduct by the Indian plaintiff in India and the story was reported in numerous counties in the world. Several aspects of §5(a)(vi) [the section of the Act which contains the public policy exception] are raised by these cases. The first is whether the differences between American and English libel law — with respect to issues such as the standard for liability in actions brought against the press and differences over where the burden of proof lies — are so fundamental that they are repugnant to basic concepts of justice and decency in the United States. That issue remains subject to intense debate. Compare Scoles, Hay, Borchers, Symeonides, *Conflict of Laws* (Third ed. 2000) 1211 n. 12; Joachim Zekoll, "The Role and Status of American Law in the Hague Judgments Convention Project," 61 *Alb. L. Rev.* 1283, 1305-06 (1998) (criticizing the implicit holding in *Bachchan* that even minor deviations from American free speech standards violate public policy and render judgments unenforceable) with Kyu Ho Youm, "Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law", 16 *Hastings Comm. & Ent. L.J.* 235 (pointing out that American libel law offers publishers significantly more protections than does British law and thus the *Bachchan* decision was "no surprise"). The second aspect relates to the territorial connection or nexus with American interests necessary to trigger the exception of U.S. public policy. If the reason for enforcement in the United States is simply the presence of assets here, the values represented in differences about the limits of free expression do not appear to be engaged. In contrast, where expression emanates from the United States or is directed or connected to the United States in some way — e.g. an alleged libel in Singapore by the Asian Wall Street Journal — consideration of the effect of the differences in approach to freedom of expression is an appropriate consideration in the public policy calculus. Of course, not all interests are purely territorial, and the public policy exception clearly allows

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Modified ALI Proposal Still Troubling

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for consideration of basic universal principles that should be applicable to any judgment for which recognition is sought. Thus, a judgment for damages in a dictatorship that punished all critique of government might be denied enforcement irrespective of any connection with the United States. See generally Craig A. Stern, "Foreign Judgments and The Freedom of Speech: Look Who's Talking," 60 Brook. L. Rev. 999 (1994) (arguing that *Bachchan* misconstrues the First Amendment by making it a universal declaration of human rights rather than a limitation designed specifically for American civil government).

An illustration of the approach called for by §5(a)(vi) may be seen in *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Anti-semitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001). A French court had issued an order pursuant to French Law purporting to restrain an Internet Service Provider based in the United States from making accessible to users in France offers to purchase Nazi texts and memorabilia. Prior to an action by the French plaintiffs to enforce the order in the United States, the U.S.-based Internet Service Provider applied to the U.S. District Court for a declaratory judgment stating that the order of the French court would impermissibly infringe on its rights under the First Amendment to the U.S. Constitution. In granting a judgment to this effect, the court wrote:

The Court has stated that it must and will decide this case in accordance with the Constitution and laws of the United States. It recognizes that in so doing, it necessarily adopts certain value judgments embedded in those enactments, including the fundamental judgment expressed in the First Amendment that it is preferable to permit the non-violent expression of offensive viewpoints rather than to impose viewpoint-based governmental regulation upon speech. The government and people of France have made a different judgment based upon their own experience. In undertaking its inquiry as to the proper application of the laws of the United States, the Court intends no disrespect for that judgment or for the experience that has informed it.

169 F. Supp. 2d at 1187.

The *Yahoo!* case has been argued in the Ninth Circuit and remains pending; however, press coverage of the argument indicated that the court expressed a great deal of skepticism about the district court's reasoning touted so highly by the ALI Reporters. The Reporters will continue to revise the December draft and will present a Tentative Draft to the ALI's general membership at the ALI Annual Meeting in May.

Based on correspondence with one of the Reporters, it is anticipated that the Tentative Draft will comment on the First Amendment cases but will try to avoid taking a position on how any particular case should be decided. However, the Reporters' Notes will continue to suggest that not every difference between the United States' libel law and the libel laws of other countries is a matter of "fundamental public policy" that would preclude enforcement of the foreign judgment and that a sufficient "nexus" between the allegedly libelous publication and the United States is necessary to invoke the public policy exception.

Finally, rather than recognize and acknowledge the unique constitutional privileges that protect American publishers and broadcasters as "fundamental public policy," the Reporters continue to want to leave room for a "universal human rights" exception which could bar the enforcement of a judgment rendered in a country whose justice system has insufficient regard for universally accepted "human rights."

Please let me know if you want to join our working group on this ALI project and please begin to educate the members of your firms who are ALI members that, at least in the First Amendment field, the Reporters are unwittingly injecting great confusion when clarity is most needed. We will report again when a new draft is circulated.

Tom Leatherbury is a partner in the Dallas office of Vinson & Elkins L.L.P.

PGA Can Limit Redistribution of Real-Time Golf Scores

By David Bralow

In a decision that recognizes a protectable property right in published golf scores, the United States District Court for the Middle District of Florida (Judge Schlesinger) granted summary judgment against Morris Communications Corporation in its antitrust complaint against PGA Tour, Inc. ("PGA"). *Morris Communications Corporation v. PGA*, 2002 WL 31870348.

At a minimum, the case is difficult to reconcile with the holding in *National Basketball Assoc. v. Motorola, Inc.*, 105 F. 3d 841 (2d Cir. 1997), that scores are unprotectable facts. In the extreme, the Court's focus on the notion of "public domain" could be interpreted as recreating a common law copyright for scores generated in events that have limited public access. Most important, the effect of the decision will be to encourage sports leagues to impose greater controls on the media's use of information by conditioning access to a sports venue on acceptance of such restrictive terms.

Most important, the effect of the decision will be to encourage sports leagues to impose greater controls on the media's use of information by conditioning access to a sports venue on acceptance of such restrictive terms.

Limits Placed Thru Credentials

The case involves the following facts. In January 1999, the PGA Tour stated that reporters would receive credentials only if they agreed that all "[s]coring information appearing onsite may be provided [on the Internet] no sooner than thirty minutes after the actual occurrence of the shots." Later, the PGA relaxed its 30-minute requirement but prohibited any syndication of the real-time scores. The PGA Tour admitted that the regulation was designed to give the PGA Tour — and its official website — a limited exclusivity.

The restriction directly affected Morris. Since 1996, Morris published golf information on its Internet news sites. Its most popular feature was the publication of real-time golfer scores, especially during the preliminary tournament rounds — when television coverage is nonexistent. Real-time scores are posted contemporaneously with the actual pace of competition. These scores

are collected by tournament volunteers, communicated to a central location, and posted on a leader board. Tournament rules, including a ban on cell phones and two-way radios, make it impossible for any news organization to duplicate the PGA Tour Leader Board even if a news organization wanted to collect its own scores.

Because of the popularity of the Morris website, Cable News Network/Sports Illustrated purchased this real-time feature from Morris. By the time the PGA Tour imposed the Internet restriction, Morris' coverage extended to all professional golf tournaments promoted by the PGA Tour.

Morris Anti-Trust Claim

Morris filed a lawsuit seeking to invalidate contractual restrictions that prohibited the resale of information derived from the PGA leader board on antitrust grounds. It relied on four theories. Morris claimed the restrictions violated Section 2 of the Sherman Act because it constituted: 1) monopolization of the internet markets; 2) unlawful refusal to deal; 3) monopoly leveraging, and 4)

attempted monopolization.

These claims, distilled, were that the PGA Tour's contract constituted an unlawful attempt by the PGA to use its monopolistic control over access to the real-live tournament to hinder competition in the real-time Internet market. Morris asserted that the PGA unlawfully sought to extend its monopoly power by restraining the dissemination of information that it cannot own and should not be able to protect.

PGA Tour responded that the trial court should find that it had a valid and enforceable property interest, apart from copyright law or the application of the *Motorola* case, in a limited exclusivity to the golf scores. Once the court so recognized this protectable interest, PGA Tour could impose contractual restrictions on those who gain access to those scores to protect its investment and prevent free-riding. Thus, the trial court could find that PGA Tour had a valid business reason for the restrictions to protect that in-

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PGA Can Limit Redistribution of Real-Time Golf Scores

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terest. Under those circumstances, Morris would have the burden of demonstrating that the restrictions against Internet publication were merely a pretext to gain monopoly power in the Internet market.

Court Finds Protectable Interest

The issues so framed focused the District Court's attention on whether the PGA Tour had a protectable interest in the golf scores once that information was posted on the leader board. Simplified to an extreme, the District Court's antitrust analysis was: If such an interest was protectable, a rational business person would have valid business justification to impose contractual restrictions to preserve the value of that interest and prevent free-riding. Such restrictions, according to the District Court, would not offend the antitrust laws. If there was no protectable interest in the leader board scores, such restrictions could be perceived as an attempt to wield monopoly power in the PGA Tour event to restrain competition in the Internet market.

Ignores "Hot News" Analysis

The problem with the decision is the way in which the Court found a protectable property interest. The Court refused to undertake a "hot news" analysis, originally recognized in *International News Service v. Associated Press*, 248 U.S. 215 (1918). That case held, after refinements in *Motorola*, that facts were protectable when: 1) the sports promoter generates information at some cost or expense; 2) the value of the information is extremely time sensitive; 3) the defendant's use of the information would constitute "free riding;" 4) the defendant is a direct competitor in the primary service or product (promoter of basketball games); and 5) free riding would reduce the incentive of the promoter or threaten the existence of the product or service.

Instead, it found a protectable interest was created from the very contractual provisions that Morris contended vio-

lated the antitrust laws. In circular logic, the District Court found that the PGA Tour does have a property right in the scores compiled by the use of the leader board system because the PGA Tour can restrict public access to the sports event through credentials and other contracts. The Court observed that while the golf scores were available to all those who attended the event, such publication does not enter the "public domain" until disseminated by broadcast, radio or webcast. In other words, restrictions on dissemination would offend the antitrust laws only after the information entered the "public domain."

The Court's basis for finding a valid property interest started with its decision that *Motorola* was inapplicable. It observed that in *Motorola* the scores were "in the public

domain, having been broadcast on television or radio." Having broadcast the sporting event, the Court determined that the NBA "had already reaped the profits of its investment" and could not protect that information further. The Court also noted

In circular logic, the District Court found that the PGA Tour does have a property right in the scores compiled by the use of the leader board system because the PGA Tour can restrict public access to the sports event through credentials and other contracts.

that Motorola expended its own resources in collecting the purely factual information in the public domain by attending the basketball game or by watching television.

In PGA Tour's case, the scores were available only to the media and audience attending the tournament — there had been no broadcast. Both the audience and the media had restrictions upon the immediate dissemination of that information. Indeed, the credential restrictions prohibited Morris from compiling these facts on a timely basis. Even if Morris wanted to expend its own resources, the credential restrictions prohibited it.

To find a valid property interest in the facts, the trial court relied on a shrinkwrap contract case and two old U.S. Supreme Court cases relating to restrictions on the dissemination of ticker tape information to support its holding. First, it cited *ProCD Inc. v. Zeidenberg*, 86 F. 3d 1447 (7th Cir. 1996) as an example of a case that recognized that contractual restrictions that prohibited republication of non-copyrightable information was enforceable

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PGA Can Limit Redistribution of Real-Time Golf Scores

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and not preempted by the Copyright Act. Interestingly, the Court wholly ignored cases that stand for the opposite proposition that a contract cannot create an enforceable interest.

Then it relied on *Board of Trade of the City of Chicago v. Christie Grain and Stock Company*, 198 U.S. 236 (1905) and *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926). These “ticker” cases recognized the right of members of a private board to restrain the dissemination of ticker tape exchange prices to non-members. In both cases, the Court found that that an exchange has a property right in the information “which relates solely to its own business upon its own property,” akin to a trade secret.

The trial court observed:

[T]he events occur on private property to which the general public does not have unfettered access, and the creator of the event can place restrictions upon those who enter the private property. The vastly increased speed of that the Internet makes available does not change the calculus of the underlying property right. Accordingly, the PGA Tour, like the exchanges in the ticker cases, has a property right in the compilation of the scores, but that property right disappears when the underlying information is in the public domain.

This analysis — that the right to exclude the media from the event itself, creates a property interest in the facts generated by the event — circumvented the Morris’ premise: Absent a demonstration that the facts were protectable independently from the PGA Tour’s control of the venue, the assertion of a restriction constituted an unlawful extension of monopoly power inherent in the venue.

In other words, Morris sought to attack the restriction on access as anti-competitive precisely because it created a property right in mere facts without a demonstration that the PGA Tour could establish that it fell met the analysis established in the INS case.

For Morris Communications: George D. Gabel, Jr., Timothy J. Conner, Holland & Knight LLP, Jacksonville, Jerome W. Hoffman, Holland & Knight, Tallahassee.

For PGA: Gregory F. Lunny, James M. Riley, Richard S. Vermut, Peter Andrew Smith, Rogers, Towers, Bailey, Jones & Gay, Jacksonville, Jeffrey A. Mishkin, Skadden, Arps, Slate, Meagher & Flom, LLP, New York, NY.

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The Tribe Has Spoken: Judge Denies CBS Request for Injunction to Prevent ABC from Broadcasting *I'm A Celebrity, Get Me Out of Here!*

On January 13, a federal district court in the Southern District of New York denied CBS's motion for a preliminary injunction in the network's copyright infringement suit against ABC. CBS hoped to enjoin ABC from proceeding with its broadcast of a new reality-television series, *I'm a Celebrity, Get Me Out of Here!* which CBS claims infringes on the copyright of its hit show *Survivor*. CBS advanced a theory that a combination of otherwise generic and unprotected ideas is protectable if the combination itself is unique. Judge Loretta A. Preska, in a decision read from the bench, agreed that a compilation of generic ideas can be protected, albeit with somewhat thin protection, but ultimately held that even if such a compilation was entitled to full copyright protection, CBS did not succeed in meeting its burdens for injunctive relief.

Judge Preska held that the two shows were not "substantially similar," did not have the same "look and feel", and thus CBS could not prove it would likely succeed on the merits. The court examined each program as a whole and concluded that while both used similar generic ideas, each program's expression of these ideas was different. Judge Preska also found that an injunction at this time would also harm ABC more than CBS.

Background

The claim stemmed from ABC's new reality-television show, *I'm a Celebrity, Get Me Out of Here!* ("*Celebrity*"). CBS filed a copyright infringement suit against ABC in November claiming that ABC's show was substantially similar to *Survivor*. ABC contended that no infringement took place as *Celebrity* was developed independently from *Survivor*, key aspects of the show were conceived before *Survivor* debuted in the U.S. (both programs had earlier versions in the U.K.), and that each program was a different expression of several generic and unprotectable ideas.

Infringement and Probative Similarity

The court began with a discussion of the various tests associated with copyright infringement and which should be applied in this case. First, to win on an infringement action, CBS must prove, "[o]wnership of a valid copyright, and copying [of] the constituent elements." *Quoting Feist Publi-*

cations v. Rural Telephone Serv. Co., 499 U.S. 340, 361 (1991) The court assumed CBS held proper ownership for purposes of its decision. In the Second Circuit, to establish "copying", plaintiff must show that its work was actually copied, then that the copying was "improper or unlawful". *Quoting Castle Rock Entertainment v. Carol Publishing Group, Inc.*, 150 F. 3d 132, 137 (2d Cir 1998).

Because there was no admission of copying, CBS could prove ABC actually copied *Survivor* by demonstrating ABC had access to *Survivor* and the existence of "similarities that are probative of copying". *Quoting Castle Rock at 137.* Access was evident, the court recognized, due to *Survivor*'s wide dissemination in both U.S. and British media. To satisfy the "probative similarity standard" a court would determine that, after comparing both works in their entirety, similarities exist between the protectable expression of the two which would not be expected to "arise independently".

In this case, the court found that the "substantive elements" of *Celebrity* were created independently by ABC prior to *Survivor*'s initial broadcast in the U.S. However, the court was unsure as to the extent, if at all, ABC "tweaked" the *Celebrity* format after it became aware of *Survivor*. Judge Preska then assumed for her decision that actual copying took place regarding elements incorporated after *Survivor*'s premiere.

Substantial Similarity Test

After assuming the existence of actual copying, the court examined whether the copying was illegal. To determine illegality, the court explained that a "substantial similarity exists between the defendants' work and the protectable elements of the plaintiff's work". *Citing Streetwise Maps, Inc. v. VanDam, Inc.* 159 F. 3d. 739, 747 (2d Cir. 1998) The court first explained that when applying the "substantial similarity" test to works containing both protected and unprotected elements, the analysis would only focus on the protected elements. This separation occurs to ensure the purpose of copyrights, protection of expression, not ideas, is preserved.

While works need to be examined as a whole — comparing the "total concept and feel" — the court had to be careful

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Judge Denies CBS Request for Injunction to Prevent ABC from Broadcasting "I'm A Celebrity, Get Me Out of Here!"

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that such a consideration does not result in ideas, as opposed to the expressions of those ideas, being protected. Thus while parsing works to their most basic components is likely to yield a conclusion that everything is made of basic elements that are not protected, "total concept and feel" analysis can result in protecting ideas that should not be protected.

Judge Preska found the analysis used by the Second Circuit in *Williams v. Crichton*, 84 F.3d 581, 587 (2d Cir. 1998) useful. In *Williams*, the author of a series of children's adventure books in a man-made animal park for dinosaurs challenged the makers of Jurassic Park. While each work involved "the unprotectable idea of a dinosaur zoo," the ultimate total concept and feel of the two works, their approach to the subject matter and the perspective of the adventure (e.g., that the dinosaur park was in or was totally out of control was a key differentiation between the works) was decidedly different.

To assist her in her application of the "substantial similarity" test, Judge Preska favored the analysis of the evolution of television program development of ABC's expert, Professor Lynn Spigel of Northwestern University. According to Judge Preska, Professor Spigel's "analysis of the evolution of the serial TV reality show as a cycle in the real-

ity TV genre which in turn evolved from combining characteristics of earlier genres," was better suited to handle the intertwining concepts of idea and expression. Judge Preska specifically cited Professor Spigel's example of "I Love Lucy" and "The Honeymooners", two programs which employed the same generic ideas of plot structure, domestic situation comedies, and humor style, but expressed each in a substantially different fashion.

The interpretation of CBS's expert, Professor Robert Thompson of Syracuse University, on the other hand, Judge Preska decided, was "scattershot" and did not rely on the whole of the programs. Using CBS's approach Judge Preska determined would lead to CBS's copyright protecting the ideas shared by both programs, and not merely the expression of those ideas. This analysis focusing only on ideas "without consideration of the presentation or expression of those elements – would stifle innovation and would stifle the creative process that spawned the two shows at issue here."

Judge Preska also briefly discussed CBS's submission of short compilation clips from each program. According to the court, the clips did not aid in the analysis because the entire program should be examined, not merely short, unconnected segments. In this type of analysis, the use of

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Judge Denies CBS Request for Injunction to Prevent ABC from Broadcasting "I'm A Celebrity, Get Me Out of Here!"

(Continued from page 11)

clips to show substantial similarity is misplaced as clips are subjectively selected and unreliable.

Applying the Test: Programs are not "Substantially Similar"

Applying this analysis to the programs, Judge Preska found the two programs are not substantially similar to each other and any copying by ABC was not unlawful. The court began its analysis with the "concept and feel" of *Celebrity* and *Survivor*. First, Judge Preska believed the programs to have a different "tone." *Survivor*'s tone "is one of unalterable seriousness" evident in the intensity of the competition, manner of the contestants, the lack of food provided to competitors, solemn demeanor of the host, and ultimate prize. On the other hand, Judge Preska interpreted *Celebrity* to have a more comedic tone due to the constant laughing and joke-telling by both the contestants and hosts, contestants not competing for money they would keep, and that the "elimination" process was without noticeable drama.

Next, the court compared each show's "production values" which were also found to not be substantially similar, and be different expressions of various generic ideas. First, the overall visual look is different. *Survivor* has a look of higher production value similar to National Geographic while *Celebrity* appears to have been less edited with a more-documentary look. Second, even though both programs used Australia for a setting (the court only examined the Australia season of *Survivor*), each portrayed it differently with *Survivor* taking place in the dry Outback and *Celebrity* in the jungle. Other generic production values expressed differently in each show included background music and cinematography.

Third, the generic idea of a host and live people contestants was expressed differently with *Survivor* having a extremely serious host and "regular" folks whom the audience knows nothing about competing for \$1 million while scheming with and against each other. In contrast, *Celebrity* has two comedian hosts who make jokes throughout the show, some at the expense of the celebrity contestants who compete light-heartedly for money which will go to a charity. These differences are also reflected in the competitions contestants perform in both programs, for while both

have bug eating contests, *Survivor* contestants must participate (and participate rather intensely) with *Celebrity* contestants having the option of participation. The idea of serial elimination of contestants is also expressed differently as *Survivor* contestants must go through an intense ritual whose outcome they decide, while on *Celebrity* contestants are left to the whims of the audience.

Balance of Hardships Favors ABC

Judge Preska also concluded that the balance of harm element in a preliminary injunction proceeding also favored denying the motion. After receiving testimony from two of the heaviest hitters in the ABC and CBS hierarchy, Susan Lyne, President of ABC Entertainment, and Les Moonves, CEO of CBS Broadcasting, Inc., the court explained that an injunction at this time would prevent ABC from not only broadcasting *Celebrity* but would have a significant effect on the network's ratings during the February Sweeps period, effectively bringing "a screeching halt the momentum ABC has generated in regaining its ratings." CBS however would only lose an "unspecified amount of losses in ratings and revenues". The court did not give much weight to CBS's claim that *Celebrity* would hinder CBS's attempt to produce a celebrity version of *Survivor*.

Conclusion

Among the most interesting aspects of Judge Preska's decision is her attempt to grapple with CBS's argument that a combination of *otherwise unprotectable* elements can be protectable if *the combination* is unique. Citing the *Feist* case, among others, she concluded that protection for a combination of otherwise unprotectable ideas (as opposed to facts as in *Feist*) was entitled to some, albeit "thin", protection. But even if the combination of elements is entitled to more than thin protection, Judge Preska reasoned, CBS had failed to carry its burdens of proving substantial similarity, likelihood of success on the merits, and sufficient harm under either standard.

For CBS: Leslie Gordon Fagen and Lewis Clayton of Paul, Weiss Rifkind, Wharton & Garrison, LLP.

For ABC: Thomas A. Smart, Jane Parver, James D. Herschlein, and Paul C. Llewellyn of Kaye Scholer, LLP.

Supreme Court Gives Big Win to Copyright Owners in *Eldred v. Ashcroft*

Editor's Note: *Intellectual property issues often highlight fault lines in the media bar...indeed, within media companies themselves. Chuck Sims, who authored the summary of Eldred v. Ashcroft published here has, I think you will agree, a decided perspective on the matter. We would welcome rejoinders, however, from those of you who look at Eldred and the arguments made by Professor Lessig, the amicus on behalf of Eldred's side of the case, and the dissenting justices differently from the views expressed below.*

By Charles Sims

On January 15, the Supreme Court finally pulled the plug on the attack on the Copyright Term Extension Act ("CTEA") by Professor Lawrence Lessig and his band of anti-copyright crusaders. In a strongly worded, 7-2 decision, the Court upheld the Copyright Term Extension Act, rejecting each of the petitioners' arguments. The thrust of the decision was to emphasize the framers' commitment of copyright law and policy to Congress, leaving to Congress – and not to the judiciary – fine judgments how much protection will best serve the public interest. *Eldred v. Ashcroft*, 2003 WL 118221.

Justice Ginsburg's opinion was joined (without separate concurrences) by six other justices; Justices Breyer and Stevens each dissented, separately. The lineup was thus precisely the same as in the *Tasini* case, where Justices Breyer and Stevens again took the "low protection" point of view.

The bulk of the majority opinion addressed the Copyright Clause attack on the CTEA. Relying on the constitutional text, as well as history and precedent, the Court rejected Lessig's challenge comprehensively, holding that "the Copyright Clause empowers Congress to prescribe 'limited Times' for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future. Among the highlights of the decision:

Instead, the Court reaffirmed that the Copyright Clause empowers Congress — not the courts — "to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the [Copyright] Clause."

- The Court rejected the entire attack, and upheld the CTEA in its entirety, as to both future works and existing works (*i.e.*, works already created when the CTEA was enacted).
- The Court rejected the argument that the CTEA exceeded Congress's power under the copyright clause of the Constitution. The Court held that the extension of copyright term, for both existing and future works, is supported by the text, by history, and by various goals Congress could permissibly seek to further. The Court cited particularly comparable extensions enacted by the first Congress and subsequent Congresses; the goal of seeking harmonization with the copyright law of our trading partners, particularly in the EU; and Congress' effort to take account of demographic, economic, and technological changes.
- The Court rejected the argument that any expansion of copyright protection for existing works is invalid because it is not supported by a "quid pro quo," and pointedly dispatched Lessig's contention that courts should look to "quid pro quo" analysis when considering revisions to copyright law.
- It is for Congress, not the courts, to determine if the copyright law effectuates the goals of the Copyright and Patent Clause."
- The Court rejected as fundamentally wrong Justice Stevens' characterization of reward to the author as "a secondary consideration" of copyright law. It reaffirmed, instead, the view that "copyright law celebrates the profit motive, recognizing that the incentive to profit from the exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge . . . copyright law serves public ends by providing individuals with an incentive to pursue private ones."
- The Court refused to consider a twenty year extension as if it had established a "perpetual copyright."

(Continued on page 14)

Article re decision in *Eldred v. Ashcroft*

(Continued from page 13)

- Without pausing to remark on the incongruousness and expedience of Professor Lessig's reliance on the states' rights holdings that he had undoubtedly strongly opposed, the Court rejected Lessig's contention that the "congruence and proportionality" standard of review described in cases evaluating exercises of Congress' power under Section 5 of the Fourteenth Amendment should generally apply to "necessary and proper" cases generally. Justice Ginsburg's opinion for the Court cabined that analysis to the Section 5 context where it arose.

First Amendment Argument Rejected

The principal theme of the petitioners throughout the litigation had been the disastrous impact of the CTEA on First Amendment rights. They argued that the CTEA "is a content-neutral regulation of speech that fails heightened judicial review under the First Amendment." The Court made quick work of that argument, rejecting it in the shortest and most pointed portion of its opinion without plowing new ground (Point III).

The basis for the Court's First Amendment holding was *Harper & Row v. Nation Enterprises*, 471 U.S. 539. Since copyright law is itself the "engine" of free expression, not its enemy, and because it has "built-in" First Amendment accommodations (fair use and the idea-expression dichotomy), and the CTEA supplements those safeguards in additional respects, no separate First Amendment assessment or intermediate review was appropriate. When "Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary."

In rejecting petitioners' First Amendment challenge, the Court rejected the primary goal of the petitioners and their anti-copyright protection allies, which was for closer judicial scrutiny of statutes enacted to protect intellectual property. Instead, the Court reaffirmed that the Copyright Clause empowers Congress — not the courts — "to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the [Copyright] Clause."

Dissents

Neither Justice Breyer nor Justice Stevens joined the other's dissent, and both were highly predictable. Justice Breyer echoed the themes of his pre-bench law review article, which had used economic analysis to argue what he considered "the uneasy case for copyright," contending that the extension was altogether invalid in affording too little public benefit for the delayed entry of many works into the public domain. Justice Stevens made a more limited argument, informed by his anti-trust, anti-monopoly background, arguing that the CTEA's application of copyright monopoly to existing works exceeded Congress's power.

For Eldred: Lawrence Lessig.

For Ashcroft: Theodore B. Olson.

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Fifth Circuit Holds *Calder* Sets High Bar for Establishing Specific Jurisdiction in Internet Defamation Cases

By David T. Moran and Kimberly Van Amburg

A three member panel of the Fifth Circuit recently held that in order to establish specific jurisdiction in an Internet defamation case, the plaintiff must have knowledge of the “particular forum” in which the plaintiff’s reputation will be harmed and the article or its sources must “in some way connect with” the forum state. *Revell v. Lidov et al.*, ___ F.3d ___, 2002 WL 31890992, ___ (5th Cir. Dec. 31, 2002). (Judge Higginbotham).

Revell v. Lidov is an important Internet defamation and personal jurisdiction case because it holds that under *Calder v. Jones*, 465 U.S. 783 (1984), specific jurisdiction does not arise – even if the publisher knows that the publication will harm the plaintiff wherever he resides — unless the author directs the statements toward the plaintiff in the forum. It is the particular knowledge that the plaintiff’s reputation will be harmed *in the forum* and the article’s connection *with the forum* that are key to establishing specific jurisdiction.

In addition, *Revell* is important because in analyzing specific jurisdiction under the “sliding scale” set forth in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997), the Court looked solely at the interactive features of the Internet bulletin board on which the article was posted and disregarded interactive features contained in other portions of the website. In addition, the Court held that Internet bulletin boards are “interactive” under the *Zippo* sliding scale.

Posted Article on PanAm 103

Hart G.W. Lidov, an Assistant Professor of Pathology and Neurology at the Harvard Medical School and Children’s Hospital, authored an article on the subject of the 1988 terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland, and posted it on a Columbia Journalism Review (“CJR”) Internet bulletin board. The article accused senior members of the Reagan Administration of involvement in a conspiracy to conceal information relating to the

bombing. The article was particularly critical of former Associate Deputy Director of the Federal Bureau of Investigations, Oliver “Buck” Revell, and accused him of complicity in the conspiracy and of knowing about the bombing in advance and making sure that his son, who was previously booked on the flight, took a different flight. The CJR bulletin board was accessible by a link to persons who visited the CJR website. Lidov, who was unaware at the time he authored and posted the article that Revell resided in Dallas, Texas, posted the article on the CJR bulletin board without Columbia University’s knowledge or participation. Lidov was not employed by or affiliated with Columbia University.

Revell filed suit against Lidov, Columbia University, and the Columbia University School of Journalism

The Court held that “[k]nowledge of the particular forum in which a potential plaintiff will bear the brunt of the harm” forms an “essential part” of the Calder test.

(“Columbia University”) in the United States District Court for the Northern District of Texas, asserting causes of action for defamation, intentional infliction of emotional distress, conspiracy, and negligent publication arising out of Lidov’s

posting of the article. Lidov and Columbia University filed motions to dismiss Revell’s claims for lack of personal jurisdiction, and those motions were granted. The Fifth Circuit affirmed the district court’s dismissal of the claims.

Expressly Directed at Forum

Revell argued that because he asserted intentional tort claims against the defendants and the harm to his reputation occurred in Texas, the “effects” test of *Calder v. Jones* mandated specific jurisdiction. The Fifth Circuit reasoned that the “effects” test is only one facet of the minimum contacts analysis, and went on to hold that the “application of *Calder* in the Internet context requires proof that the out-of-state defendant’s Internet activity is expressly directed at or directed to the forum state.” *Revell v. Lidov*, 2002 WL 31890992, ___ (citing *Young v. New Haven Advocate*, ___ F.3d ___, 2002 WL 31780988 (4th Cir. Dec. 13, 2002)).

(Continued on page 16)

5th Cir. Holds *Calder* Sets High Bar for Establishing Specific Jurisdiction in Internet Defamation Cases

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The Court held that “[k]nowledge of the particular forum in which a potential plaintiff will bear the brunt of the harm” forms an “essential part” of the *Calder* test. *Id.* Because neither Lidov nor Columbia University were aware that Revell resided in Dallas or that harm to his reputation would necessarily occur there, the Court held this “essential part” of the *Calder* test was not met in spite of the fact that Lidov “must have known” that harm to Revell’s reputation would occur wherever he resided. *Id.*

The Court further held that the facts that the article:

- (a) contains no reference to Texas;
- (b) does not refer to the Texas activities of Revell; and
- (c) was not directed at Texas readers as opposed to those in other states;
- (d) were “insurmountable hurdles” to the exercise of personal jurisdiction over the defendants in Texas. *Id.*

Thus, specific jurisdiction under *Calder* requires a publisher’s knowledge of the state of the plaintiff’s residence and some additional connection or reference to the forum state. The Fifth Circuit found these factors lacking.

Application of the Zippo Sliding Scale

In analyzing both general and specific jurisdiction, the Fifth Circuit applied the *Zippo* “sliding scale” adopted by most federal courts in Internet jurisdiction cases. Under the *Zippo* sliding scale, if a defendant enters into contracts with residents of another state that involve the “repeated transmission of computer files” over the Internet, jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on a web site which is accessible to users in other jurisdictions, and in these cases jurisdiction is not proper. In the middle ground are interactive websites where a user can exchange information with a host computer. In this middle ground, jurisdiction is determined by looking at the “level of interactivity and commercial nature” of the exchange of information. *Zippo*, 952 F. Supp. at 1124.

Revell argued that the *Zippo* “sliding scale” mandated jurisdiction because the CJR website (as opposed to the bulletin board on which the article was posted and accessible) allowed visitors to subscribe to the CJR, purchase advertising, and submit electronic applications to the

School of Journalism. Thus, Revell reasoned the website was “completely interactive” and in the top tier of interactivity under *Zippo*. The Court rejected these arguments. As it relates to specific jurisdiction, the Fifth Circuit held — as did the district court — that it is the level of interactivity of the Internet bulletin board on which the article was posted, rather than the website as a whole, that should be examined. *See Revell v. Lidov*, 2002 WL 31890992, _____. In addition, the Court held that the bulletin board was in the middle range of interactivity under *Zippo* because individuals could send information to and receive information from the bulletin board.

These holdings are important for two reasons. First, in analyzing specific jurisdiction the Fifth Circuit looked at the interactive features of the bulletin board — where the article was posted — without regard to the interactive features of the CJR website as a whole. Thus, in the Fifth Circuit a defendant may be able to “compartmentalize” a website into pages or sites at issue versus those not at issue, and a court may disregard certain interactive features that would otherwise weigh in favor of jurisdiction.

Second, the district court, following case law from other jurisdictions, held that the bulletin board on which the article was posted by Lidov was passive. *See Revell v. Lidov*, No. 3:00-CV-1268-R, 2001 WL 285253, *6 (N.D. Tex. 2001). The Fifth Circuit, however, held that the CJR bulletin board was interactive. *Revell v. Lidov*, 2002 WL 31890992. Thus, whether an internet bulletin board or discussion group is considered passive or interactive under *Zippo* will vary depending upon the substantive law of the controlling jurisdiction.

For Revell: Joe C. Tooley (argued), Rockwall, TX.

For Lidov: Paul Christopher Watler (argued), Robert Brooks Gilbreath, John T. Gerhart, Jenkins & Gilchrist, Dallas, TX.

Charles L. Babcock and David T. Moran are partners, and Kimberly Van Amburg is an associate, in the Dallas, Texas office of Jackson Walker L.L.P. They represented The Board of Trustees of Columbia University in the City of New York and Columbia University School of Journalism in this lawsuit.

Win For Stronger Libel Protection in Idaho

By Ronald E. Bush

A rarely seen defamation law decision from the Idaho Supreme Court (Justice Walters) has strengthened common law and constitutional protections for media defendants in Idaho. In *Steele v. The Spokesman-Review*, 2002 WL 31890208 (Idaho, December 31, 2002), a unanimous court upheld the trial court's dismissal of a lawsuit finding both substantial truth and a lack of malice.

Update: Utah Criminal Libel Case Finally Ends With Dismissal

In response to a request by a newly-elected county prosecutor, a Utah Juvenile Court Judge has dismissed charges against 19-year-old Ian Lake for a web site he created while in high school that maligned classmates, teachers and school administrators.

The former prosecutor, Beaver County Attorney Leo Kanell, subpoenaed Lake to appear for arraignment in December, after the Utah Supreme Court ended a prior attempt to prosecute Lake by holding one of Utah's two criminal libel statutes to be unconstitutional. See *LDRC Media-LawLetter*, Dec. 2002, at 13. The arraignment was for new charges under Utah Code § 76-9-404, the statute not effected by the Supreme Court's ruling.

Kanell was defeated for reelection in November by Van Christiansen, who told Fifth District Juvenile Court Judge Hans Chamberlin that,

"[c]onsidering the Supreme Court ruling, we cannot see how justice is being pursued with these charges and ask that they be dismissed."

Chamberlin agreed, and dropped the charges.

Lake was represented by Richard Van Wagoner and Robert J. Shelby of Snow, Christensen & Martineau, P.C. in Salt Lake City, and Janelle P. Eurick and Stephen C. Clark of the ACLU.

LDRC BULLETIN 2002:4, Part 2 due out shortly, includes an extensive analysis, state by state, of criminal libel laws and the cases brought under them in the last 40 years.

Report on High Profile Lawsuit

The suit was brought by an Idaho attorney who had represented several defendants in a lawsuit filed by the Southern Poverty Law Center against the Aryan Nations white supremacy group. That lawsuit sought damages resulting from an assault allegedly carried out by security guards from the Aryan Nations' compound in Northern Idaho upon a woman and her son. This lawsuit, which garnered extensive regional and national media attention, ultimately resulted in a verdict and judgment against the Aryan Nations and the subsequent sale of the compound as a partial satisfaction of the judgment.

A July 23, 1999 article published in the *Spokesman-Review* (which circulates primarily in Eastern Washington and Northern Idaho) identified Edgar J. Steele as the new attorney for the defendants. The article went on to report various details concerning a legal defense fund that had been created for the benefit of the defendants and identified connections between that legal defense fund and an organization called the "Bonner County Taxpayers Coalition."

The taxpayer group had used the same post office box address as that being used for the legal defense fund. The taxpayer group had sent a newsletter to area residents shortly after an anti-Semitic mailing also sent to area residents by the 11th Hour Remnant Messenger, a white supremacist group founded by Carl E. Story and Vince Bertollini. The article stated that it was unclear who had funded the newsletter.

According to the decision, the article went on to report,

"that Story, Bertollini and Steele had moved to Idaho from California at about the same time; that Story and Bertollini had ties to Richard Butler [the head of the Aryan Nations] and the Aryan Nations; and that Steele was acquainted with the two men."

Steele sought a retraction from the newspaper, alleging that the statements were untrue or falsely depicted

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Win For Stronger Libel Protection in Idaho

(Continued from page 17)

him as a white supremacist by insinuation or innuendo. The *Spokesman-Review* did not retract the statements and Steele filed a lawsuit alleging defamation, invasion of privacy and intentional distress.

Attorney Was Public Figure

In dismissing the lawsuit on summary judgment, the trial court agreed with the newspaper that Steele's actions in involving himself in local politics along with becoming a spokesman and advocate for free speech rights in the context of community reaction against the white supremacists in the area, had made him a limited purpose public figure for purposes of his claims against the newspaper. On appeal, the Idaho Supreme Court affirmed the trial court's ruling that Steele was a limited purpose public figure and had failed to demonstrate by clear and convincing evidence that the newspaper had acted with constitutional "actual malice" in publishing the article.

Substantial Truth Defense

Further, the appeal court agreed that the article was protected from liability under the substantial truth doctrine. This is particularly noteworthy, as the article said that Steele had moved to Idaho "at about the same time as Story and Bertollini. The record before the trial court indicated that the moves had occurred two years apart. The Idaho Supreme Court said that the discrepancy was "not a material deviation from the truth" and cited prior Idaho decisions and Restatement (Second) of Torts § 581 A, comment f (1977) in holding that

"[i]t is not necessary to establish the literal truth of the precise statement made. Slight inaccuracies of expression are immaterial provided that the defamatory charge is true in substance." *Steele*, 2002 WL 31890208, *3.

No Basis for Privacy Claims

The Court also ruled that dismissal of Steele's false light invasion of privacy claim was justified, for the reason that there was no public disclosure of falsity concerning Steele. The discussion does not discuss whether the truthful disclosures could have left a false impression with the reader. Dismissal of a second privacy tort claim, based on the alleged publication of private facts, was also affirmed on appeal on the grounds that none of the information concerning Steele was private in nature.

The Court also agreed with the trial court's dismissal of the intentional infliction of emotional distress count of Steele's complaint, which was based upon the publication of the article. In a matter of first impression in Idaho, the

Court held that the "actual malice" standard applicable to Steele for purposes of the defamation claim also applied to his burden of proof on the intentional infliction of emotional distress claim, citing *Hustler Magazine v. Falwell*, 485 U.S. 46,

56, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988).

Steele represented himself in the case. The *Spokesman-Review* was ably represented by its long-time counsel, Duane Swinton of Witherspoon, Kelley, Davenport & Toole, P.S.

Ronald E. Bush is with Hawley Troxell Ennis & Hawley LLP in Pocatello, Idaho.

On appeal, the Idaho Supreme Court affirmed the trial court's ruling that Steele was a limited purpose public figure and had failed to demonstrate by clear and convincing evidence that the newspaper had acted with constitutional "actual malice" in publishing the article.

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Student Wins \$25,000 From University For Administrator's Comments To Newspaper

In December, the Ohio Court of Claims awarded a former Ohio University student \$25,000 in his libel suit for statements that a school administrator made to a newspaper regarding a sexual battery charge against the student. *Mallory v. Ohio University*, No. 99-4593 (Ohio Ct. Cl. Dec. 17, 2002), available at www.cco.state.oh.us. Previously, the court had rejected the suit on the grounds that the administrator's statement was opinion, but was reversed by the Ohio Tenth District Court of Appeals.

The case stemmed from charges filed against Benjamin Mallory in 1997, after he had sex with a fellow student, Audrey DeLong, who witnesses said was too drunk to consent. Mallory was acquitted in a criminal trial, but he was expelled from the university over the incident.

After Mallory's criminal trial ended in a hung jury and the prosecutor declined to continue prosecution, the assistant director of Ohio University's health, education and wellness department, Jeanine Woodruff, told *The Athens*

{Ohio} *News* that she believed that Mallory "definitely committed a sexual battery."

Mallory filed a complaint against the university in 1999, claiming that Woodruff's statement was libelous. Court of Claims Judge Fred J. Shoemaker heard the case in June 2000. In February 2001, Shoemaker ruled that Mallory was a private figure, but also held that the university could not be held liable because "the ordinary reader would view Woodruff's statements as opinion and not as fact." *Mallory v. Ohio University*, No. 99-4593 (Ohio Ct. Cl. Feb. 5, 2001), available at www.cco.state.oh.us.

Mallory appealed to the Tenth District Court of Appeals, which reversed. *Mallory v. Ohio University*, 2001 Ohio 8762, 2001 WL 1631329 (Ohio App. 10th Dist. Dec. 20, 2001) (unpublished). The appeals court held that while Wood-

The appeals court held that while Woodruff had couched some of her statements in terms indicating that her statements were opinion, she had not done so for the statement that Mallory "definitely committed a sexual battery."

ruff had couched some of her statements in terms indicating that her statements were opinion, she had not done so for the statement that Mallory "definitely committed a sexual battery."

"The immediate context of the statement," the court wrote, "indicates that Woodruff intended to convey factual information." 2001 WL 1631329, at *6.

"[W]e conclude that the statement involves a direct accusation of criminal activity involving moral turpitude on the part of the plaintiff, and we therefore conclude, as a matter of law, that the statement constituted slander *per se*." *Id.* at *8.

The court also held that the statement was not privileged, entered judgment for the plaintiff on liability, and remanded the case for determination of damages.

The Ohio Supreme Court denied an appeal of the decision. 95 Ohio St.3d 1440, 767 N.E.2d 272 (table) (Ohio May 2, 2002).

The Court of Claims held a trial on damages in Sep-

(Continued on page 20)

Massachusetts High Court Holds That All Elected Officials are Libel Public Officials

In *Lane v. MPG Newspapers*, 2003 WL 122296, issued on January 16, 2003, the Supreme Judicial Court of Massachusetts (Judge Cordy) held that however low in the hierarchy of local government, anyone who serves in an elective public office, should be considered a "public official" under libel law. The speech at issue must relate to the plaintiff's official conduct or qualifications for office. But with that, and recognizing that the plaintiff, a town meeting representative, in a post that met but once per year, was "at the far end of a continuum of elected public officials from that of the President of the United States, the principle of 'uninhibited, robust, and wide-open' public debate regarding the conduct of those we elect to govern applies equally to both."

Student Wins \$25,000 From University For Administrator's Comments To Newspaper

(Continued from page 19)

tember 2002, and ruled in December. Judge Shoemaker found that Woodruff's statement was only a contributing factor to the stress and depression that Mallory experienced in the aftermath of the criminal trial and his expulsion from OU, and awarded him \$25,000 for actual losses and pain and suffering. He had sought more than \$300,000.

Ohio University was represented by Randall Knutti of the Ohio Attorney General's Office; Mallory was represented by Jan Roller of David & Young in Cleveland.

Mallory also filed a federal civil rights suit against the university, alleging that it discriminated against him by expelling him but not DeLong. Judge John D. Holschuh of the Southern District of Ohio granted the defendants in the case summary judgment in September 2001. *See Mallory v. Ohio University*, Civil No. 98-1168 (S.D. Ohio order Sept. 13, 2001) (granting summary judgment to defendants). Oral argument in Mallory's appeal is pending. *See Mallory v. Ohio University*, No. 01-4111 (6th Cir. filed Oct. 19, 2001).

A separate civil suit by DeLong against Mallory was settled in April 2000. *DeLong v. Mallory*, No. 98-CI-354 (Ohio C.P., Athens County dismissed April 26, 2000).

Getting Their News From Talk Jocks

A recent Gallup Poll, released the first week of January 2003, found that 22% of those surveyed claimed they got their news every day from talk radio programs.

That is to say, 22% of the Americans polled are getting what they understand to be *NEWS* from Rush Limbaugh and other "talk jocks." Far more Republicans than Democrats reported getting their news daily from talk radio – 29% versus 15%. The Gallup Poll reported that as compared with the results of a similar survey in 1999, "there has been a significant increase in the daily use of radio talk shows over the last 3 years (among all Americans), from 12% who said they used radio talk shows every day in 1999 to 22% today.

While Democrats were more likely than Republicans or Independents to get news from public television (42/31/31), the percentage who said they got news from NPR was almost identical (22/23/22)

The Gallup people were quick to point out that the poll also found that 57% said they got their news daily from local television outlets and 47% from newspapers. Regardless of party affiliation – Republican, Democrat or Independent – all said they used their local television news and local newspapers more than any other source of news. And the way the poll was structured, it was possible for a respondent to say he/she got his/her news from more than one source each day.

What was interesting was that in each of the following categories – national newspapers, cable news outlets (all lumped together in one category), public television news, radio talk shows, Internet, NPR – there was a rise in the percentage of people reporting that they read or listened to these outlets than in past years. Local newspapers, nightly network news programs, morning national TV news programs, were all down a bit since 1999, while local television news scored about even with 1999.

Gallup's summary of the poll and its results can be found at www.gallup.com/poll/releases/pr030106.asp.

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Supreme Court of Canada Opens Door to Qualified Privilege

By Roger McConchie

The Supreme Court of Canada has quietly, unanimously and in a single paragraph signaled that journalists enjoy a qualified privilege for the publication of “defamatory information in the public interest that he or she honestly believes to be true.”

Prud'homme v. Prud'homme, [2002] S.C.J. No. 86, 2002 SCC 85, at paragraph 50 per Justices L'Heureux-Dube and LeBel, speaking for the entire nine-member Court:

50. The defence of qualified privilege is not reserved exclusively to elected municipal officials. It applies whenever a person has an interest or a duty, legal, social or moral, to make it to another person who has a corresponding interest or duty to receive it...This will be the case, for example, where an employer or professor provides references about his or her employee or student, or where a journalist publishes defamatory information in the public interest that he or she honestly believes to be true.

Clear Message for Libel Defense

The decision to juxtapose the classic example of qualified privilege (an employment reference) with the non-classic (in fact highly controversial) occasion (publication in the news media) has to be have been very deliberate. It is a clear message that lawyers acting in defense of defamation litigation against the media cannot afford to ignore. Qualified privilege should not be rejected out of hand as a potential defense plea.

It seems safe to predict that the requirement that publication be “in the public interest” will require a journalist to behave responsibly, in the sense of observing the standard of care of a reasonable journalist in all the circumstances.

In this decision pronounced December 20, 2002, Canada's highest Court dismissed an appeal from a ruling of

the Quebec Court of Appeal which set aside a trial verdict against a municipal politician over statements he made at a city council meeting. See the full text at <http://www.lexum.umontreal.ca/csc-scc/en/rec/html/prudhomme.en.html>

Possible Reynolds Type Privilege

This is the first defamation case decided by the Supreme Court of Canada since its landmark decisions in *Hill v. Church of Scientology* and *Botiuk* in 1995. It has significant implications for the balance between freedom of expression and protection of reputation not only for Quebec but also in the common law provinces.

It seems likely that the Court's discussion of the relationship between Quebec law and the common law of the

The passage from Prud'homme and the associated reasoning appears to open the door to adoption by Canadian courts of “Reynolds privilege”

other nine provinces will inform the future evolution of the common law defense of qualified privilege by Canadian trial and appellate courts. In this regard, the above passage from *Prud'homme* and the associated reasoning appears to open the door to adoption by Canadian courts of “Reynolds privilege” [In *Reynolds v Times Newspapers Ltd.* [1999] 4 All E.R. 609, the House of Lords held that a publication to the world at large may attract the protection of qualified privilege, on a case by case basis, depending on all the circumstances. To obtain the benefit of “Reynolds privilege”, a publisher must satisfy the requirements of “responsible journalism.”]

This is not to say that *Prud'homme* heralds an imminent sea change in the common law of defamation. However, a number of statements in this unanimous judgment appear to create a wide portal between a distinctive Quebec defamation law (based on fault) and the common law. Particularly with respect to qualified privilege, it appears on first reading of this judgment that common law libel litigants may well find themselves looking to the rich Quebec jurisprudence relating to the standard of care which journalists, publishers and broadcasters must exercise if they are to be exonerated for defamatory expression.

The Court held that it would be inappropriate simply to

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Supreme Court of Canada Opens Door to Qualified Privilege

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import the common law defence of qualified privilege into Quebec law but stated that this defence “has an equivalent in the civil law [of Quebec]:

59. [Quoting Gaudreault-Desbiens]: In this sense, the qualified privilege conferred on elected municipal officials by the civil law is not a mere defence of justification which a priori relies on the absence of fault on the part of the official, having regard to the nature of the office, the duties that it implies and the specific circumstances of the case. The rules of civil liability mean that the conduct of an elected official will be assessed objectively, referring to the conduct that comparable persons would have adopted in the same circumstances. What is called “qualified privilege” is therefore, in the civil law, simply the defence raised by a person who may have performed an objectively wrongful act, but who has not committed a fault, because the act was performed in the normal performance of the duties of public office, that office imposes a duty on him or her to perform that act (or the act may be connected to a duty inherent in the duties of that office) it was therefore in the public interest to perform it, and in performing it, the person who did so acted with all the care that a comparable person would reasonably have exercised in the same circumstances.

... In Quebec civil law, the criteria for the defence of qualified privilege are circumstances that must be considered in assessing fault.

These passages from Prud-homme are highly compatible with the “circumstantial test” for qualified privilege prescribed by Lord Nicholls, who wrote the principal majority judgment of the House of Lords in Reynolds, supra. He held that a publication by the media to the world at large may attract a defence of qualified privilege at common law, if in all the circumstances of publication, the public interest is served by treating the occasion as one of qualified privilege, including consideration of the nature of the matter published and its source.

The so-called “circumstantial test” described by Lord Nicholls was analyzed by the English Court of Appeal in *Loutchansky v The Times Newspapers*, [2001] E.W.J. No. 5622, [2001] EWCA Civ 1805. In that case, the Master of the Rolls, speaking for the Court, held that the application of the circumstantial test required the journalist to “behave as a responsible journalist. He can have no duty to publish unless he is acting responsibly any more than the public has an interest in reading whatever may be published irresponsibly. That is why in this class of case the question of whether the publisher has behaved responsibly is necessarily and intimately bound up with the question whether the qualified privilege defense arises.”

The decision in Prud’homme warrants very careful study.

Roger D. McConchie is a partner in Borden Ladner Gervais LLP, Vancouver, Canada.

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High Court Again Refuses to Apply Qualified Privilege in *Loutchansky v. Times Newspapers*

By Meryl Evans

Introduction

The libel action brought by Russian businessman Grigori Loutchansky against Times Newspapers Ltd, publishers of *The Times*, has spawned a number of important, not to say extraordinary, decisions in the High Court in London and in the Court of Appeal on issues ranging from qualified privilege to liability for publication on the Internet.

A further round of hearings took place in the High Court in November and December 2002 primarily on *The Times*' qualified privilege defense. In order to explain the latest developments, it is necessary to recap the history of the case. See also *Media-LawLetter* June 2001 at 45, July 2001 at 40), December 2001 at 33 and January 2002 at 15.

History

At issue are articles published in September and October 1999 reporting on Loutchansky's possible links to the Russian Mafia and the Bank of New York money-laundering scandal. *The Times* defended publication solely on the defense of qualified privilege. Because of evidentiary constraints, it did not raise the defense of justification, i.e., truth.

As outlined by the House of Lords in *Reynolds v. Times Newspapers Ltd* [1999] 3 WLR 1010, under the qualified privilege a newspaper can escape liability for publishing defamatory material which is in the public interest and which it was under a duty to publish, even though it cannot prove the publication to be true. The promise of the qualified privilege defense has dimmed, though, in practice with trial courts narrowly construing the privilege.

The case first came to trial in March 2000. The Judge, Mr Justice Gray, ruled that the Reynolds defense failed, applying what was, in our view, too stringent a test for the application of the privilege. The Judge effectively said that the defense only operates when the circumstances are such

that the newspaper would have been "open to criticism" if it had decided not to publish. The Court of Appeal reversed this decision. *Loutchansky v. The Times Newspapers Ltd. & Ors*, [2001] EWCA Civ. 1805 ((Dec. 5, 2001). The Court of Appeal held that Justice Gray's test was too stringent and the case was sent back to the High Court for the same Judge to re-consider the case in light of the proper test as formulated by the Court of Appeal — as to which, more later.

Other Major Decisions Reached in the Course of the Action

A number of other major decisions reached in this case highlight the gauntlet media defendants face in defending a defamation claim under English law. *The Times* applied at an early stage to strike out the action or, alternatively, stay it. Loutchansky has, since December 1994, been excluded from the UK on the grounds that his presence here would not be "conducive to the public good."

The Times argued that the action should not be allowed to proceed, it being disproportionate to take a case to trial when the Claimant can have little or no reputation in a jurisdiction from which he is excluded. Alternatively, the action should not be allowed to proceed unless and until Loutchansky succeeded in overturning the exclusion order (which he has been trying to do since 1996). Our application failed.

Justice Gray also ruled that *The Times* could not rely, in support of its Reynolds privilege defense, upon material which was in existence at the time of publication but which was not in the possession of the journalist (despite the fact that this material might have been known to the journalist's sources).

He ruled that a 'single publication rule' should not be introduced into our law. As a result, the articles which appeared on *The Times*'s website could be sued upon not-

(Continued on page 24)

Justice Gray also ruled that *The Times* could not rely, in support of its Reynolds privilege defense, upon material which was in existence at the time of publication but which was not in the possession of the journalist.

High Court Again Refuses to Apply Qualified Privilege in *Loutchansky v Times Newspapers*

(Continued from page 23)

withstanding the expiry of more than one year (the limitation period for libel) since they were first placed on the website. The net result is that there is no effective limitation period for Internet publication in the UK. In addition, Justice Gray ruled that the Reynolds defense for the Internet publication failed because there could be no duty to continue to publish material which *The Times* knew could not be proved to be true.

The Times appealed all these decision to the Court of Appeal then to the House of Lords but the only argument which met with any success was that the Judge's test for Reynolds privilege was too stringent.

Re-determination of the Reynolds defense

In November 2002, Mr. Justice Gray sat in the High Court to hear renewed closing arguments from both sides, as though the original trial had just come to an end, but applying the test laid down by the Court of Appeal in December 2001. That test is difficult to summarize, partly because it is intimately bound up with the speeches — particularly that of Lord Nicholls — in the House of Lords in Reynolds itself. For present purposes I will sum it up thus: the Reynolds privilege arises where the public has a right to know the contents of the article because the subject matter of the article is in the public interest and it is the product of responsible journalism.

The Court of Appeal's test is extremely wide and it left open how trial judges are to assess whether or not journalism is responsible. One approach would be to have the parties present expert testimony from other journalists or academics on how the journalist's conduct compared to that of an ordinary competent journalist (if that indeed is the test for "responsible" journalism), although nothing in the Court of Appeal's judgment specifically anticipated such an approach. Another approach is for the trial judge to form his own view of responsible journalism in each case.

Justice Gray took the latter approach. Reviewing the articles under the Court of Appeal's test of responsible journalism Justice Gray held again that the defense failed. [2002] All ER 371 (High Court Nov. 26, 2002). In the manner of an editor, he reiterated his original criticisms of *The Times's* journalism which he now concluded was not "responsible." For example, he found the newspaper should have taken additional steps to verify the allegations of the articles and it should have made greater efforts to contact Loutchansky for comment prior to publication.

Justification

To complete the picture, *The Times* also applied to the

Judge for permission to amend its defense to plead partial justification. The application was based in large part on the work of an Italian Public Prosecutor in Bologna who has applied for (but has hitherto been denied) an order for pre-trial custody against Loutchansky (amongst others). The Public Prosecutor believed that companies controlled by

Loutchansky were involved in the criminal laundering of substantial amounts of money, leading back to the Bank of New York money-laundering scandal.

An application to amend the defense so late in the day is extremely unusual and, for it to succeed, the proposed pleading and the supporting evidence must be particularly compelling. Gray was not impressed by the standard of the Italian case against Loutchansky and did not believe that we would be able to obtain the evidence necessary to prove our draft pleading. Accordingly, he refused permission for the Defense to be amended.

What Happens Next?

Procedurally, the next step should be a hearing before Gray to assess the damages to be awarded to Loutchansky which are capped at £20,000 (because of a tactical choice made by Loutchansky earlier in the proceedings to limit a

The Reynolds privilege arises where the public has a right to know the contents of the article because the subject matter of the article is in the public interest and it is the product of responsible journalism.

(Continued on page 25)

High Court Again Refuses to Apply Qualified Privilege in *Loutchansky v Times Newspapers*

(Continued from page 24)

challenge to the assessment of damages under the Human Rights Act.) According to directions already given by Gray, Loutchansky must attend that hearing and be available for cross-examination for half a day. But it seems that Loutchansky may be content with what he has obtained so far (the satisfaction of defeating *The Times's* defense, and an injunction preventing re-publication of the defamatory allegations) and he is currently considering whether to apply for a damages hearing to be listed, or simply apply for his costs of the action. Should he opt for the latter, there will probably then be a contested hearing on costs which will involve a claim for over £1 million.

In the meantime, *The Times* has lodged an application in the Court of Appeal for permission to appeal Gray's ruling on Reynolds privilege. We await the outcome of that application. If it succeeds, we will seek to persuade the Court of Appeal that Gray did not apply the test properly and, as a result, once again reached too restrictive a conclusion on the impact of the shortcomings he perceived in *The Times's* journalism. If that application fails, we shall then have 6 months within which to apply to the European Court in Strasbourg.

We have already lodged an application in Strasbourg in relation to the website publication and the rejection — by the High Court, the Court of Appeal and the House of Lords — of our argument that English law should adopt a single publication rule for the Internet, with the limitation period starting to run when the material is first posted. We have not yet heard whether the European Court will entertain that application.

The Law As It Stands

The joy with which the media welcomed the House of Lords's decision in Reynolds has long since dissipated. With the exception of certain snatches of sunlight — notably *Al-Fagih v. H H Saudi Research* — a gloom has settled over most media defense lawyers in this country. One fears that any imperfection in the journalism — or any imperfec-

tion perceived by the Judge — will be enough to defeat a Reynolds defense. In practice, the Judges become the arbiters of proper standards of journalism (without the benefit of any expert evidence on the point) and there is a significant risk that journalists will be measured against standards of perfection, judged under laboratory conditions and with the benefit of 20:20 hindsight, not of "responsible journalism" measured against the pressurized environment of a busy newsroom. One prospect for counter-acting this is to try to obtain directions for expert evidence to be given at trial concerning the standard of journalism, although whether the Courts will allow such evidence is another matter.

The net outcome in the Loutchansky case is all the more baffling since all these decisions have been reached since the enactment of the Human Rights Act which, among other things, enshrined in UK law the right to freedom of expression under Article 10 of the European Convention on Human Rights. The approach of the European Court has tended

to give greater weight to freedom of expression than to the individual's right to his reputation (provided there is a public interest in publication) and one might have expected UK law to reflect this balance rather more closely.

Unless we get some encouragement from the higher courts, or ultimately from Strasbourg, defense lawyers will be slow to contest a case where the only available defense is the Reynolds privilege. That stance completely undermines the usefulness of the Reynolds decision so that, in spite of the House of Lords recognising that there will be instances when a publication will be warranted even though it cannot be proved to be true, there is a significant risk that the very fact that it cannot be proved to be true may be enough for a Judge to conclude that the journalism was irresponsible. Perfect journalism is, by definition, always right and capable of being proved right. Responsible journalism is not necessarily perfect.

Meryl Evans, a partner in the solicitors firm Reynolds Porter Chamberlain in London, represents The Times. Geraldine Proudler, Olswang, represents Loutchansky.

The Judges become the arbiters of proper standards of journalism... and there is a significant risk that journalists will be measured against standards of perfection.

UPDATE: Supreme Court Denies Cert in *Brunette v. Ojai Publishing*

On January 13, the Supreme Court denied cert in *Brunette v. Ojai Publishing Co. et al.* without comment. (2003 WL 99398) Plaintiff, Brunette, appealed the Ninth Circuit's decision to affirm the lower court's dismissal of §1983, infliction of emotional distress, conspiracy, and conversion claims, and for declaratory and injunctive relief. (294 F. 3d 1205) (*See LDRC MediaLawLetter October 2002 at 19*). The case originated when Brunette brought claims against the Humane Society of Ventura County, The Ojai Valley News, and the Valley News' reporter and publisher. The Humane Society, a non-profit corporation created by the state, invited a reporter from The Valley News to witness and take pictures of a search conducted of Brunette's farm. The Valley News published several articles, accompanied with photos, on the search and subsequent charges of criminal animal neglect brought against Brunette.

Brunette brought §1983 and several tort claims

against both the Humane Society and The Valley News after the criminal charges against her were dismissed. The district court dismissed all of the Brunette's claims. The Ninth Circuit upheld the dismissal of the 1983 claim against The Valley News agreeing with the lower court that the paper was not acting as a state actor during the search. Dismissal of claims for conspiracy, conversion, infliction of emotional distress, declaratory and injunctive relief were also upheld. However, the Ninth Circuit reversed dismissal of trespass and invasion of privacy claims brought against the paper.

For Plaintiff-Appellant: Henry H. Rossbacher and Nanci E. Nishimura of Rossbacher & Associates (Los Angeles)

For Defendants-Appellees: Kelli L. Sager, Mary Haas, and Rochelle Wilcox of Davis, Wright, Tremaine (Los Angeles)

UPDATE: Seattle City Counsel Passes Bill Outlawing "Upskirt" Photography in Public Places

By Andrew M. Mar

In the wake of the Washington Supreme Court decision in *State v. Glas*, holding "upskirt" photography in public places did not violate Washington law, the Seattle City Counsel passed Council Bill 114411 in December criminalizing the behavior. The new law makes it a gross misdemeanor to use any device to record or transmit images of a person's "intimate areas covered by clothing" taken without that person's consent while that person is in a public place. Penalties include a maximum fine of \$5,000 and up to one year in jail.

There is no newsgathering exception or implied consent provision, and the broad language of the law may cover activities such as models at fashion shows, cheerleaders at sporting events and the like as undergarments are included in the definition of "intimate areas." Moreover, the law broadly defines a public place as "an area generally open to the public, regardless of whether it is privately owned, and includes, but is not limited to, streets, sidewalks, bridges, alleys, plazas, parks, drive-

ways, parking lots, transit stations, monorail trains, buses, commuter trains, shelters, tunnels, and buildings, including stores and restaurants."

Some local commentators have questioned the constitutionality of the law as overbroad, but no legal challenge has yet emerged.

Andrew M. Mar is with Davis Wright Tremaine in Seattle.

Any developments you think other MLRC members should know about?

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Ohio Courts Address Privacy of Expunged Criminal Records

By Kenneth A. Zirm

Two Ohio courts, in two very different settings, have recently weighed in on the question of whether expunged criminal records are public or private records. There is both good news and bad news in these decisions.

Villa v. Village of Elmore

Most recently, in *Villa v. Village of Elmore*, Case No. 3: 02 CV 7353, 2002 US Dist. LEXIS 23253 (N.D. OH., December 3, 2002), the plaintiff had been charged with carrying a concealed weapon and impersonating an officer in April, 1970. Those charges had since been expunged, but in July, 2000, after the plaintiff had become chief of police for a nearby community, the local newspaper published an article identifying the charges, and citing the municipal clerk of courts as the source for the information.

The plaintiff sued the city and its clerk of courts, asserting a §1983 claim for violation of his constitutional rights under the 4th, 5th and 14th Amendments, along with various other state and federal statutory claims. The plaintiff also asserted state law claims for invasion of privacy against all defendants, and for defamation against the newspaper and its reporter.

The court (Judge Carr) granted the government defendants' motion to dismiss the §1983 claim, holding that an individual does not have a reasonable expectation of privacy in his expunged criminal records. The court relied on two 6th circuit decisions, *JP v. DeSanti*, 653 F. 2d 1080 (6th Cir. 1981), and *Cline v. Rogers*, 87 F. 3d 176 (6th Cir. 1996), for the proposition that nondisclosure of one's criminal record is not a "fundamental right," and reasoned that the fact that the records had been expunged did not change the analysis. Although the court did not address the pending state law claims, its holding that there is no expectation of privacy in expunged criminal records will certainly prove valuable in defending a private facts claim based upon the publication of such information.

Cincinnati Enquirer v. Winkler

In a different setting, the court (Judge Gorman) in *State ex rel. Cincinnati Enquirer v. Winkler*, 149 Ohio App. 3d 350 (1st Dist. 2002) was presented with the question of

whether expunged criminal records were subject to disclosure under Ohio's Public Records Act. The court's ruling is a good news/bad news decision for the media.

The court initially held that Ohio's expungement statute specifically exempts expunged criminal records from Ohio's Public Records Act. As a result, however, the court held that the expungement statute is facially unconstitutional because it impinges on the presumptive right of access to court proceedings and court records under both the Ohio constitution and the common law. To avoid this constitutional infirmity, the court decided to construe the expungement statute as requiring trial courts to conduct a *Press-Enterprise* balancing prior to determining that any criminal records will be expunged, and remanded the case to the trial court to conduct such a balancing and make on-the-record findings as required under *Press-Enterprise* and its progeny.

The trial court on remand conducted the balancing test as instructed by the court of appeals and found that the particular privacy interests at issue outweighed the public's limited right of access. The court of appeals affirmed the decision of the trial court. (2002 Ohio 7334) Judge Doan, for the court of appeals, explained that the state statute vested in the trial court discretion as to whether to seal the records, and could only be reversed if it abused that discretion. Here, the court of appeals found no such abuse as the trial court did not act unreasonably in its balancing of the interests involved.

Although only a decision of an intermediate appellate court, it will be interesting to see what its impact will be. The decision will undoubtedly be used by public agencies to deny access to expunged records, and by the media to attack the process by which the records have been expunged. Thus, it looks more like litigation on this issue is inevitable.

Graydon, Head & Ritchey, L.L.P., John C. Greiner and Ann K. Schooley, Cincinnati, for petitioner.

Michael K. Allen, Hamilton County Prosecuting Attorney, and Gordon M. Strauss, Assistant Prosecuting Attorney, for respondents.

Ken Zirm is a partner with Walter & Haverfield LLP in Cleveland.

UPDATE: Denver Publishing Co. v. Bueno (continued)

**By Bruce W. Sanford, Marc D. Flink and
Bruce D. Brown**

In the October 2002 Newsletter, it was reported that in *Denver Publishing Company v. Bueno*, 54 P.3d 893 (Colo. 2002), the Colorado Supreme Court, in a four to three decision, refused to recognize the tort of false light invasion of privacy. It was further reported that the Colorado Supreme Court remanded the case to the Colorado Court of Appeals for consideration of Bueno's cross-appeal challenging the dismissal of his defamation claim. The trial court had entered a directed verdict for the Denver Publishing Company on the defamation claims at the close of the evidence at a trial held May 5, 1997 through May 13, 1997. As to the libel per quod claim, the trial court concluded that such a claim would require proof of special damages, or monetary losses resulting from the publication, not including injuries to reputation or feelings. The trial court found that Bueno had not submitted such proof, and thus dismissed the claim. As to the libel per se claim, the trial court concluded that such a claim would require proof that the defamatory publication was directed at Bueno. The trial court found that the publication was not "specifically directed at" Bueno and thus granted the motion for directed verdict on both claims. Because the Court of Appeals had upheld the verdict of false light (later reversed by the Colorado Supreme Court), the Court of Appeals did not reach the issues presented by Bueno's cross-appeal on the dismissal of Bueno's defamation claims.

On December 19, 2002, the Colorado Court of Appeals issued its second opinion in *Denver Publishing Company v. Bueno*, 2002 Colo. App. LEXIS 2210 (Colo. Ct. App. 2002). The Court of Appeals (Judge Metzger) reversed the directed verdict against Bueno and remanded the case to the District Court for further proceedings. The opinion was not selected for publication. Pursuant to Rule 35(f) of the Colorado Appellate Rules, only opinions selected for official publication shall be followed as precedent by the trial judges of the state of Colorado.

With respect to the libel per se claim, relying on a case decided in 1875, the Restatement (Second) of Torts

§ 564A cmt. B (1977) and Debra T. Landis, Annotation, *Defamation of Class or Group as Actionable by Individual Member*, 52 A.L.R.4th 618 (1987), the Court of Appeals held:

"It is not necessary that the publication be specifically directed at the plaintiff. [citations omitted] Rather, it can constitute libel per se if, as here, a member of a group or class involving twenty-five or fewer members can point to general defamatory comments about the group."

Because the Court of Appeals found that the publication "is replete with general defamatory comments about the group," it concluded that the trial court's dismissal of Bueno's libel per se claim was error. Whether or not the Court of Appeals application of group libel principles is correct in this case, the Court of Appeals' decision suffers from the deficiency that it completely ignored the fact that the publication excluded Bueno and his youngest brother from the group of criminal siblings featured in the article by expressly stating that both Bueno and his youngest brother stayed out of trouble.

As to the libel per quod claim, the Court of Appeals, without identifying the "proof of special damages" which it concluded Bueno had submitted at trial, nonetheless concluded that Bueno had submitted proof of special damages. Bueno argued that he suffered special damages because he missed work and lost wages and incurred expenses for medical and psychological treatment as a result of the article. The Court of Appeals determined that "[e]ven if we were to agree with the trial court's characterization of plaintiff's claim as one of libel per quod, we conclude that dismissal of that claim was error."

Marc D. Flink is a partner in Baker & Hostetler's Denver office. Bruce W. Sanford is a partner with the Washington office of Baker & Hostetler LLP where Bruce D. Brown is also a member. The authors represented Denver Publishing Company. Roger T. Castle, Denver represented Bueno.

Privacy Plaintiff Overrides N.J. Shield Law

By David McCraw

A New Jersey judge has ruled that, despite the state's far-reaching shield law, a television news show must turn over unaired footage to a plaintiff who claims his privacy was invaded by the show's film crew.

Judge Louis F. Locascio of the Superior Court, Monmouth County, held that the shield law (N.J.S.A. 2A:84A-21) did not create a privilege for the defendant, New York Times Television, because the material at issue did not come from confidential sources and because plaintiff's invasion-of-privacy claim has "constitutional roots." The decision stands in sharp contrast to the leading New Jersey civil case on the shield law, *Maressa v. New Jersey Monthly*, 89 N.J. 176, 189 (1982), in which the Supreme Court held in a defamation suit that journalists had "an absolute privilege not to disclose confidential sources and editorial processes absent any conflicting constitutional right."

Taped in ER

The case, *Kinsella v. Welch*, Docket No. Mon-L-1836-02, arises from the filming of the show "Trauma: Life in the Emergency Room," a *New York Times Television* production that airs on The Learning Channel. The hospital documentary show follows the treatment of patients who are brought into emergency rooms. In July of 2001, the show's producers were on location at Jersey Shore Medical Center in New Jersey.

Plaintiff Joseph Kinsella was injured when he fell from the roof of a house where he was working. While being treated at Jersey Shore, he signed a consent to be filmed for "Trauma." (The hospital and its staff members, as well as other patients, also signed consents.) Ultimately, the footage of Kinsella was not used in either of the two "Trauma" episodes that resulted from the Jersey Shore filming.

In early 2002, Kinsella brought a personal injury suit against the owner of the house and served a subpoena on *The Times* for the unaired footage. Informed by *The Times* that it would move to quash the subpoena on the basis of the shield law, Kinsella then amended his complaint to add *The Times* as a defendant in an invasion-of-privacy claim.

Kinsella raised a variety of arguments before Judge Locascio in support of his theory that the shield law was inapplicable. He asserted, for instance, that "Trauma" was an entertainment show and not a news program covered by the shield law and that the unaired tapes were part of his medical records and therefore subject to disclosure under the patients' bill of rights. He also alleged that the "Trauma" crew had promised him a copy of the tape and therefore waived the privilege and that he was entitled to the footage because his consent had been improperly obtained either while he was incapacitated or through misrepresentations.

No Confidential Info Involved

In ruling in his favor, the court largely ignored those arguments and instead focused on the fact that no confidential information was involved and on what it considered the constitutional basis of Kinsella's invasion-of-privacy claim. The court acknowledged that *Maressa* construed the statutory shield law to be absolute in a libel case where discovery was sought by a plaintiff against a media defendant. But, the court said, *Maressa* applied only in cases involving common-law claims and confidential sources. The court instead relied on an Idaho case, *State v. Salsbury*, 129 Ida. 307 (1996), a criminal case construing that state's common-law privilege.

The Times had argued that *Maressa* by its terms applied broadly to a news organization's "editorial processes" and not merely to confidential-source information, an interpretation that has been repeatedly adopted in later cases to protect unpublished photographs, notes, and other materials.

The Times had also distinguished between constitutional privacy claims, where a state actor intrudes upon a protected privacy interest, and common-law privacy claims, where the defendant is not a state actor. Because the privacy claim raised by Kinsella involved an alleged intrusion solely by a private actor, the exception for constitutional claims recognized in *Maressa* was inapplicable, *The Times* argued.

Judge Locascio dismissed that distinction. He held that Kinsella's claim "involves state action in two respects: de-

The court focused on the fact that no confidential information was involved and on what it considered the constitutional basis of Kinsella's invasion-of-privacy claim.

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Privacy Plaintiff Overrides N.J. Shield Law

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defendants (1) rely upon an affirmative legislative effort (the shield law) and (2) request an affirmative judicial effort (by this court) to prohibit plaintiff from obtaining the videotape at issue.” *The Times* had earlier pointed out that under that view of state action a court’s evidentiary decision excluding hearsay would — inexplicably and illogically — convert a common-law privacy claim into a constitutional tort. In finding that his own judicial decision could be state action, the judge cited a divorce case in which a court refused to

enforce visitation rights that would have infringed on a plaintiff’s religious freedom.

The Times is appealing the decision to the Appellate Division.

Plaintiff is represented by Gerald Clark of Lynch Martin. *The Times* is represented by Peter Banta and Carolyn Geraci Frome of Winne, Banta, Hetherington & Basralian.

David McCraw is a lawyer with The New York Times Company.

Student Journalists Protected By Qualified Reporter’s Privilege

District Court Judge Denies Motion to Compel Student Reporter to Disclose Confidential Sources

By Erin W. Sheehy

Student journalists are entitled to a qualified reporter’s privilege under federal common law, according to a recent ruling in the Southern District of New York. Judge Lawrence McKenna denied a motion to compel disclosure of a student reporter’s confidential sources, holding that such information could be disclosed only upon a clear and specific showing — not made on the facts before the Court — that the information is (1) highly material and relevant, (2) necessary or critical to the maintenance of the claim, and (3) not obtainable from other available sources. *Persky v. Yeshiva Univ.*, No. 01 Civ. 5278 (LMM), 2002 WL 31769704 (S.D.N.Y. Dec. 10, 2002). The only other known decision to extend a reporter’s privilege to a student journalist is *Blum v. Schlegel*, 150 F.R.D. 42 (W.D.N.Y. 1993).

Background

In December 1999, Yeshiva University student reporter Pinchas Shapiro published an article in the university newspaper about then-Yeshiva administrator Diane Persky’s threatened legal action against the university. Persky later filed suit against Yeshiva, claiming employment discrimination. Persky, a secular non-Orthodox Jew, alleged that the university denied her a promotion, reduced her job duties and ultimately demoted her because she was not sufficiently Orthodox.

Persky subpoenaed Shapiro’s testimony, focusing on a statement in his article that “a number of university employees” claimed that Persky’s role was reduced because she was

“not the proper role model” for Yeshiva students. At his deposition, Shapiro (at that point appearing pro se) declined to identify his sources, asserting that this information was obtained under condition of confidentiality. Persky moved to compel.

The District Court’s Decision

Judge McKenna first determined that federal law governs questions of privilege in federal question cases asserting pendent state law claims. Thus, the issue was whether Shapiro was entitled to the qualified privilege recognized in the Second Circuit. (As an aside, the court stated that Shapiro would not be entitled to a privilege under state law, because New York’s Shield Law explicitly limits its reach to professional journalists.) Judge McKenna found that Shapiro was entitled to assert the privilege because when he interviewed his confidential sources, he intended to disseminate the information gathered to the public.

Turning to whether Persky could overcome the qualified privilege, the court applied the stringent three-part test employed in the Second Circuit when the information sought is confidential. The court found that Persky had made the necessary “clear and specific” showing to satisfy the first two prongs: The information sought from Shapiro was (1) highly material and relevant to Persky’s claims (because Shapiro’s article was written about the facts surrounding Persky’s litigation) and also (2) necessary or critical to the maintenance of her claim (because, according to the court, evidence of employment discrimination is often very hard to find).

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Student Journalists Protected By Qualified Reporter's Privilege

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Persky failed, however, to satisfy the third part of the test because she had not demonstrated that the information sought was not obtainable from other available sources. Absent any indication of the number of people in the relevant university departments who would have to be deposed to uncover the identities of Shapiro's sources, the court found Persky's efforts — deposing three people and informally questioning three others — to be inadequate to show that the material was unavailable from other sources. The court cited cases where dozens and even hundreds of depositions were deemed nec-

essary to satisfy this third prong. The court denied Persky's motion, while allowing her to re-apply if she can make a "clear and specific showing" that the information is unavailable elsewhere.

Ms. Persky is represented by Rick Ostrove of Leeds Morelli & Brown, P.C. Yeshiva University is represented by Daniel Riesel and Steven Russo of Sive, Paget & Riesel, P.C.

Erin W. Sheehy is an associate with Debevoise & Plimpton in New York City. She represents Pinchas Shapiro in connection with the motion to compel.

Roman Catholic Diocese of Lexington v. Lexington Herald-Leader: Kentucky Supreme Court Refuses to Hold Newspaper in Contempt for Publishing Sealed Information

The Supreme Court of Kentucky, in a decision by Chief Justice Lambert, refused to hold the Lexington Herald-Leader in contempt of court for publishing a story containing information that the court had previously ordered sealed. *Roman Catholic Diocese of Lexington v. Lexington Herald-Leader* (2002 WL 31819672) The court found that the order only prohibited the dissemination of information directly acquired from the documents, not information obtained through independent investigation, as done by the Herald-Leader. By not sanctioning the paper, the court refused to read their earlier order as a broad prior restraint on publication of the information contained in the sealed documents.

The court first assumed that the article at issue did contain the "sum and substance" of the sealed records. Next, the court established the scope of its earlier order. In a short discussion, the court ruled that its earlier order sealing the records focused more on the records, not the information itself. The seal only prevented dissemination of information secured from the records themselves. Information contained within the records could be published if gathered through independent investigation, therefore the seal order was not a prior restraint. The court stressed that seal orders should not be read as prohibiting the publication of information,

"An order sealing a record or part thereof should not

be read as creating a prior restraint on publication of the contents of the sealed material, unless the order expressly says so."

As the prior order did not explicitly forbid the dissemination of the information itself, and the Herald-Leader obtained the information in this manner, the newspaper did not violate the terms of the seal order and could not be punished.

Finally, the court compared the ruling in *Seattle Times v. Rhinehart*, "the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes" (467 U.S. 20, 33-34 (1984)), to the present case and found that facts in the instant situation

afforded the Herald-Leader greater protection than in *Seattle Times*. Specifically, the Herald-Leader did not obtain the information contained in its article through a court file or process, but from its own independent investigation.

For Roman Catholic Diocese of Lexington: John M. Famularo, Daniel E. Danford.

For Lexington Herald-Leader: Robert F. Houlihan.

For Cape Publications: Jon L. Fleischaker, Kimberly K. Greene, Kenyon R. Meyer.

For Michael J. Turner: William F. McMurry, Douglas H. Morris II, Ann B. Oldfather, Hans George Poppe Jr.

For Many Noble: Mary C. Noble

The court refused to read their earlier order as a broad prior restraint on publication of the information contained in the sealed documents.

FOIA: DC District Courts Rule on “Agency”

Center for International Environmental Law v. Office of the US Trade Rep:

Foreign Nation Not “Outside Consultant” for Purposes of FOIA

In *Center for International Environmental Law v. Office of the United States Trade Representative* (2002 WL 31840970), Judge Friedman of the D.C. district court ruled that the Office of the U.S. Trade Representative (Trade Representative) was incorrect in refusing to release certain documents relating to trade negotiations with Chile to several non-profit organizations. On an issue of first impression, the court held that the documents did not fall within the “inter-agency or intra-

When the outside party’s self-interest “predominates over its interest in informing or assisting the agency, that party’s communications cannot be considered inter-agency for purposes of Exception 5.”

agency” exception because Chile is a sovereign nation pursuing interests different than that of the Trade Representative and that these interests were stronger than Chile’s interest in providing neutral advice during negotiations. However, the court also ruled that the government had provided sufficient reasoning and evidence that the release of certain documents would harm the United States’ foreign and trade policy. Finally, the court held that plaintiffs had not proven that the government had waived its right to contest public disclosure.

Background

Plaintiffs filed a Freedom of Information Act (FOIA) request with the Trade Representative in June 2001 for records relating to recent negotiations between the United States and Chile over a bilateral free trade agreement. Out of 280 relevant documents, the Trade Representative only released ten. The Trade Representative

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Electronic Privacy Information Center v. Office of Homeland Security & Tom Ridge

District Court Permits Discovery on Whether OHS is “Agency”

Judge Kollar-Kotelly of the D.C. District Court, in a December 26 unpublished opinion, dismissed summary judgment and dismissal motions by the federal government, and permitted plaintiff, the Electronic Privacy Information Center (EPIC), to proceed with discovery in order to determine whether jurisdiction was appropriate over the Office of Homeland Security (OHS). Specifically, the court ruled that discovery was necessary to determine whether OHS was an “agency” under FOIA because the public documents presented by OHS did not foreclose the possibility that the entity performed functions beyond that of “advising” the President. *Epic v. OHS*, Civ. No. 02-0620 (D.D.C.).

The case originated when EPIC submitted a FOIA request with the OHS for all documents involved with several OHS programs, including the standardization of driver’s licenses, and biometric technology. EPIC brought a suit for injunctive relief aiming to facilitate the release of the records by OHS.

OHS brought motions to dismiss and for summary judgment claiming that the court lacked jurisdiction because FOIA does not apply to OHS or the Homeland Security Council as neither are “agencies” for purposes of the statute. EPIC submitted a Rule 56(f) Motion claiming that it did not presently have facts material to its opposition to the motion and required further discovery. Plaintiffs stated that the government’s motions were not solely based on information available to the public and that OHS had exclusive control over information necessary for Plaintiff’s opposition, such as OHS’s organizational structure and its interactions with other government entities.

To determine whether discovery was appropriate, the court examined whether OHS had provided sufficient evidence to prove it is not an “agency” for purposes of FOIA jurisdiction. Following *Armstrong v. Executive Office of the President*, 90 F. 3d 553, 558 (D.C. Cir. 1996), the court declared that “agency” does not include “units in the Executive Office whose sole function is to advise and assist the Presi-

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based the denial of release on Exceptions 1 (interest of national defense or foreign policy) and 5 (inter-agency, intra-agency communication) of FOIA. Plaintiffs subsequently brought a FOIA suit before the D.C. district court. Both sides then submitted summary judgment motions.

Chile Not “Outside Consultant”

The Trade Representative defended its withholding of most of the documents at issue claiming they fell within Exception 5 of FOIA. Exception 5 pertains to documents that are “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. 522(b)(5). The court found that this exception was designed to protect the deliberative process by ensuring unfettered open discussion between government officials.

Accordingly, to fall within Exception 5 the court held that the document “must be either inter-agency or intra-agency in nature, and must be both predecisional and part of the agency’s deliberative or decision-making process”. The government maintained that communications between the Trade Representative and Chile were inter-agency in nature as Chile’s representatives were “outside consultants” to the Trade Representative. According to the government, the parties were in pursuit of a mutually-beneficial outcome to the negotiations.

The court acknowledged the existence of the “outside consultant” exception, but also recognized that the Supreme Court limited its application to when the communications or documents from the non-agency party,

“played essentially the same part in an agency’s process of deliberation as documents prepared by agency personnel might have done,” or where “the consultant functions just as an [agency] employee would be expected to do.” *quoting Dep’t of the Interior & Bureau of Indian Affairs v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 10-11 (2001).

The Court in *Klamath Water Users* also stated that the outside party could not be classified as an “outside con-

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dent.” In support of its argument, OHS submitted evidence from various public documents, including congressional testimony, an Executive Order, and Presidential Directives which suggest OHS’s sole function is to advise the President.

EPIC contended that courts in *Armstrong* and other similar cases had decided the issue based on evidence within the “exclusive knowledge and control of the government”, not public documents, and that the evidence presented by OHS did not support the conclusion that OHS was only an advisory entity. According to EPIC, the current record did not “foreclose the possibility that

The court also held that OHS had presented no affidavits in support of its motion, and that the evidence presented by the government does not “foreclose the possibility that OHS is an agency.”

OHS may exercise some independent authority”.

On the motion to dismiss, the court ruled that because the relevant evidence on deciding jurisdiction is in the hands of the government, limited discovery would be permitted to proceed before the court decided the motion. The court held that it was plaintiff’s burden to prove jurisdiction was appropriate and that the burden had not been met. However, the court recognized that the information necessary for plaintiff to satisfy the burden is within the government’s control. The court also held that OHS had presented no affidavits in support of its motion, and that the evidence presented by the government does not “foreclose the possibility that OHS is an agency.” Even though OHS’s briefs did indicate that at times, the office did only “advise” the President, the door was still open as to whether OHS performed any other functions. The entity’s charter (“perform the functions necessary to carry out this mission” *Executive Order 13228 §2*) also supported EPIC’s claim that OHS did more than “advise.”

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sultant” when the party pursues its own interests to the detriment of other competitors. *See Klamath Water Users* at 12. Interpreting this standard, Judge Friedman found that when the outside party’s self-interest “predominates over its interest in informing or assisting the agency, that party’s communications cannot be considered inter-agency for purposes of Exception 5.”

In this case, the court held that Chile was not an “outside consultant” as its “participation in the development of a trade agreement with the United States, however mutually advantageous, cannot rightly be characterized as advice or consultation.” Despite the Trade Representative’s claims that the negotiations were focused on creating a treaty for the benefit of both nations, the court recognized that Chile did have its own independent interests to protect during the negotiations. This self-interest superceded any desire Chile may have to provide the Trade Representative with the same type of neutral consultation as that from a true “outside consultant” or agency employee.

Trade Representative Provided Sufficient Support for Non-Disclosure

The court did however rule that the government had provided sufficient support to justify the denial of plaintiff’s FOIA request regarding five documents. The government claimed that the documents fell under Exception 1 of FOIA which permits the government to withhold documents which “(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order.” 5 U.S.C. §552(b)(1). A court will give “substantial weight” to agency determinations “as long as those declarations ‘contain reasonable specificity in detail.’” (*citing Halperin v. Central Intelligence Agency*, 629 F. 2d 144, 148 (D.C.Cir. 1980).

According to the court, proper specific evidence was presented to the court by the government in support of their Exception 1 claim. The government submitted declarations by the Assistant U.S. Trade Representative, Joseph Papovich, who stated that disclosure of the docu-

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The court reached a similar conclusion on OHS’s motion for summary judgment. Once again, the court permitted discovery in order to give plaintiff’s the opportunity to collect relevant evidence in the government’s possession. Expanding on its earlier rejection of OHS’s claim, the court reiterated that courts previously had examined evidence not in the public domain to rule on the issue of “agency” and that OHS had failed to provide that here. While OHS did appear to provide an advisory role to the President, the evidence was not conclusive that OHS is not an agency.

ments at issue would expose U.S. economic, trade, and foreign policy to other governments and increase the difficulty for the U.S. to negotiate international agreements. This reasoning was presented with the requisite specificity, and was not opposed by other evidence in the record, nor “impugned by bad faith on the part of the agency.” (*quoting King v. Dep. ’t of Justice*, 830 F. 2d 210, 217 (D.C. Cir. 1980)).

Government Did Not Waive Right to Public Disclosure

Finally, the court rejected plaintiffs’ argument that the government had waived the right to withhold some of the documents by previously releasing information contained in the documents. Plaintiffs claimed that this information was released in several letters to various individuals which contained information regarding to inter-agency proposals and the negotiations. According to the court, plaintiffs had not satisfied their initial burden and had failed to present specific information which was disclosed to the public so as to merit waiver by the government. The government also refuted the waiver argument through the declaration of Trade Representative officials who claimed that no information or documents withheld from disclosure had previously been disseminated to the public.

John Martin Wagner, Oakland, CA, for Plaintiffs.

Joshua Z. Rabinovitz, U.S. Department of Justice Civil Division, Washington, DC, Anne L. Weismann, U.S. Department of Justice Civil Division, Washington, DC, for Defendants.

First Amendment Right of Access Applies To Jury Lists and Responses to Voir Dire Questionnaires, Ohio's Highest Court Rules

By David Marburger

Ohio's highest court has ruled unanimously that the First Amendment and the Ohio Constitution afford the press and the public a right of access to jury lists and the written responses of prospective jurors to voir dire questionnaires. The December 24, 2002, ruling came in an appeal by the Akron Beacon Journal in its suit to compel a local trial court judge presiding over a murder case to release the jury list and questionnaire responses after the judge declared a mistrial and discharged the jurors. *State, ex rel. Beacon Journal Publishing Co. v. Bond*, 2002 WL 31889983 (Case No. 2001-1702).

What the Trial Court Did

In 1999, the criminal defendant, Denny Ross, was charged with aggravated murder, rape, kidnapping, and abuse of a corpse, making him eligible for the death penalty. Summit County, Ohio, Common Pleas Court Judge Jane

Bond ordered 290 prospective jurors to complete a questionnaire of 67 questions that inquired about medical history, criminal record, religious beliefs, and matters related to the issues in the case. Judge Bond told the prospective jurors that they would be identified only by number and that their responses to the questionnaire would not be made public. The judge distributed the responses to the questionnaires to counsel in the case, who conducted oral voir dire using the responses to the questionnaires.

During the trial in the fall of 2000, a Beacon Journal reporter asked to see the questionnaire responses and the jury list. Judge Bond denied the request and sua sponte filed a journal entry stating that "the extraordinary level of pretrial publicity requests the protection of the privacy of the jurors and is necessary to assure the independence and integrity of the jury and to avoid complete sequestration during the trial." Judge Bond ordered the questionnaire responses and jury list to be held under seal until the "close of the proceedings."

The First Amendment qualified right of access applies to juror names, addresses, and responses to voir dire questionnaires, creating a presumption of openness.

As the trial proceeded, Judge Bond declared a mistrial based on juror misconduct and discharged the jury from service, but because of the probability of a retrial, refused to permit release of the questionnaire responses or the jury list. Judge Bond asserted that the likelihood of a retrial meant that the proceedings were not yet over.

The Beacon Journal Seeks an Extraordinary Writ in the Court of Appeals

The Beacon Journal then sued Judge Bond in the intermediate level appellate court, the Summit County Court of Appeals, seeking a writ of mandamus to compel Judge Bond to release the questionnaire responses and jury list.

After the Beacon Journal sued, Judge Bond asked the 290 former prospective jurors whether they would agree to have their identities and questionnaire responses released to the public. Of the 170 responses to that inquiry, nine granted permission to release their names.

The Court of Appeals ruled that the First Amendment right of access to jury voir dire adopted in *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*) applied to the questionnaire responses, but not to the jury list. The court held that there was no right of access to the jury list. The Beacon Journal appealed to the state's highest court, the Ohio Supreme Court.

The Ohio Supreme Court Affirms in Part and Reverses in Part

In an opinion written by Ohio Supreme Court Chief Justice Thomas Moyer, the court agreed with the Court of Appeals as to the questionnaire responses, but disagreed as to the jury list. Applying *Press-Enterprise I*, the court ruled that the First Amendment qualified right of access applies to juror names, addresses, and responses to voir dire questionnaires, creating a presumption of openness. Applying the same caselaw, the court ruled that the presumption of openness may be overcome "by an overriding interest based on

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First Amendment Right of Access Applies To Jury Lists and Responses to Voir Dire Questionnaires

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findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.” The court decided that the “All Courts Shall Be Open” provision of the Ohio Constitution (Section 16, Article I) mandated the same result.

The First Amendment Applies to the Questionnaire Responses

As for the questionnaire responses, the court observed that “virtually every court having occasion to address this issue has concluded that such questionnaires are part of voir dire and thus subject to a presumption of openness.” To determine whether the record in the case rebutted the presumption of openness, the court examined whether the record showed that respecting juror privacy and preserving the right of the accused to a fair trial justified continued sealing of the questionnaire responses.

Affording no deference to the trial court, the Ohio Supreme Court concluded that “as articulated by the trial court,” the privacy interests of the selected jurors and the venire members were “not sufficiently compelling to rebut the presumption of openness.” The court ruled that the trial court “neither articulated particularized findings regarding the privacy interest of jurors nor considered alternative to the total suppression of the questionnaires.”

In evaluating juror privacy, the court asserted that certain juror information was “per se” private enough to overcome the constitutional right of access in every case. The court stated:

[W]e acknowledge that certain questions will invariably elicit personal information that is relevant only to juror identification and qualification, rather than for the selection of an impartial jury. Accordingly, these questions – such as those that elicit Social Security number, telephone number, and driver’s license number – are not properly part of the

voir dire process and should be redacted from the questionnaires prior to disclosure.

The court added:

Indeed, such information does nothing to further the objectives underlying the presumption of openness – namely the enhancement and appearance of basic fairness in the criminal trial. In recognizing these per se exemptions [from the right of access], however, we limit our holding to questions that elicit information used for juror identification and qualification

The court’s admonition is dicta, however, because

the jury questionnaires at issue did not solicit juror social security numbers, driver’s license numbers, home telephone numbers, or other information that would fall within the scope of the court’s “per se exemptions.”

In evaluating the impact of releasing the questionnaire responses on the 6th Amendment

right of the accused to a fair trial, the court decided that the trial court’s record was “void of specific findings of prejudice or any consideration of less restrictive alternatives” to preserve the right to a fair trial.

The First Amendment Applies to the Jury List

As for the jury list, the court found that the names and residences of jurors traditionally have been public throughout English and American history, and that the policy rationales for openness applied fully to the public availability of juror names and addresses. The court decided that, as with the questionnaire responses, *Press-Enterprise I* requires that the presumption of openness attaches to juror names and addresses. The court observed: “Among the purposes served by access to juror identities is the preservation of fairness when suspicions arise that jurors were improperly selected from a narrow social group or from a particular organization.”

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“Among the purposes served by access to juror identities is the preservation of fairness when suspicions arise that jurors were improperly selected from a narrow social group or from a particular organization.”

First Amendment Right of Access Applies To Jury Lists and Responses to Voir Dire Questionnaires

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Protecting Juror Privacy in Future Cases: A Required Procedure

However, the Ohio Supreme Court did not order the immediate release of the questionnaire responses or the jury list. Instead, the court ruled that the questionnaire responses and the list of juror names and addresses should be disclosed only after the trial court followed procedures set forth in the Ohio Supreme Court's opinion to "ensure that the presumption of openness is not rebutted." The court required the trial court to inform all of the prospective and impaneled jurors that each has a right to request an in-camera hearing on the record to prevent public disclosure of any questionnaire response or their names and addresses. If any such

hearing occurs, the trial court may withhold release of information if the "overriding interest" test for rebutting the presumption of openness is satisfied. The court stated that all Ohio trial courts should follow that procedure in the future.

Counsel for the Beacon Journal: Edward G. Kemp and Karen C. Lefton.

Counsel for Judge Jane Bond: Sherri Bevan Walsh, Summit County Prosecuting Atty and Assistant prosecutors Holly E. Reese and Sandy J. Rubino.

David L. Marburger is a partner in the Cleveland office of Baker & Hostetler LLP.

Missouri Supreme Court: New Rule Mandating Juror Names in Criminal Trials Must be Public

By Jean Maneke

In December, the Missouri Supreme Court entered an order mandating that the names of jurors in criminal cases would be public. The order reversed an earlier order of the Court, set to go into effect on January 1, 2003, which would have closed juror lists in criminal cases in the state. The Court left closed questionnaires completed by jurors.

The decision came after a meeting between members of the Court, court staff, members of a committee appointed by the court to study the rule, and members of the Missouri Press Association, including its executive director Doug Crews, and representatives from The Kansas City Star, The St. Louis Post-Dispatch, and the Springfield News Leader, as well as attorneys Jean Maneke, for the association, and Joe Martineau, for the Post-Dispatch.

Since the initial order came out in the spring of 2002, media entities around the state had written about the rule and stated their unhappiness with it. However, press coverage had peaked in November, leading the parties to agree to a meeting.

At the meeting, which lasted about an hour, media members explained their viewpoint that the rule was overbroad and in fact was not only unconstitutional under Missouri's

constitution, but also, said Mr. Martineau in a memo prepared for the court, reverses the well-recognized principle that court proceedings and court records are "presumptively open to public inspection...absent a compelling justification for their closure." *Pulitzer Publishing Co. v. Transit Casualty Co.*, 43 S.W.3d 293, 301, 303-04 (Mo. banc 2001).

Mr. Martineau's memo pointed out to the court that there was a presumptive right of access to criminal proceedings found in U.S. Supreme Court decisions. In *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555 (1980), the Court held that a trial judge must articulate on the record case-specific findings of (i) the compelling circumstances justifying closure and (ii) its consideration of less restrictive means of ordering closure.

Further, in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), the Court held that a blanket rule of mandatory closure in all cases did not meet the *Richmond Newspaper* requirement, Mr. Martineau's memo stated.

The memo concluded noting that in *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), the Court was required to articulate findings with specific necessity regarding closure and in *Press-Enterprise Co. v.*

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Missouri Supreme Court: New Rule Mandating Juror Names in Criminal Trials Must be Public

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Superior Court, 478 U.S. 1, 10-13 (1986), the Court set forth a two-part test to determine whether the public had a presumptive right of access, including whether the proceeding had traditionally been accessible, and whether access played a significant role in enhancing the judicial process.

The Court's final rule, in part, follows:

1. By order of January 28, 2002, this Court adopted a new subdivision 27.09 of Rule 27...The Court hereby corrects the order so that subdivision 27.09 shall read as follows:

27.09 JURY RECORDS

- (a) Jury lists maintained by the court in criminal cases shall be presumptively open to the public. The court, upon its own motion or upon motion by any interested person, may order such list closed upon the entry of written findings of specific facts supporting the existence of a compelling reason why the list should be closed.
- (b) Jury questionnaires maintained by the court in criminal cases shall not be accessible except to the court and the parties. Upon conclusion of the trial, the questionnaires shall be retained under seal by the court except as required to create the record on appeal or for post-conviction litigation. Information so collected is confidential and shall not be disclosed except on application to the trial court and a showing of good cause.
- (c) Any person aggrieved by any order under this Rule 29.07, including interested members of the public, may apply to the court entering the order for reconsideration of the order....

"There appears to be a movement sweeping the nation, driven by privacy issues, to close these records. Missouri's Supreme Court took a step in the right direction. Our Supreme Court came out with a more balanced approach." said Mr. Crews.

Jean Maneke is with The Maneke Law Group in Kansas City, Missouri.

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Access to Federal Court Electronic Records Under the E-Government Act of 2002

By David B. Smallman

Following the September 11, 2001 attacks, proponents of broad access to government records confronted new concerns that national security, in addition to privacy, provided added justifications for restricting availability of online information from official sources. Since that time, the federal government has implemented a mixed bag of laws, regulations, and directives, including most recently the E-Government Act signed into law by President Bush on December 17th, 2002. As a general matter, the bipartisan law sponsored by Senators Lieberman and Thompson, seeks to “enhance the management and promotion of electronic Government services.” It would do so through a seemingly laudable framework of measures requiring Internet-based information technology to enhance citizen access. At the same time, however, the E-Government Act contains provisions regarding security, privacy, and “confidential information” that could curtail existing access to government records across the three branches of government as well as all federal agencies.

Section 205 of the E-Government Act, which concerns “Federal Courts,” has not yet received wide attention, but may have important practical implications for newsgathering activities. According to a report of the Senate Committee on Governmental Affairs accompanying the legislation, Section 205 requires federal courts “to provide greater access to judicial information over the Internet.” Here is an overview of some key provisions:

- Subsections 205(a) requires the U.S. Supreme Court, and each federal circuit, district, and bankruptcy court to establish a website that contains, among other things, docket information for each case, as well as access in a text searchable format for all written opinions — even if not published in the official court report — that are issued by the court. Documents filed electronically and those converted to electronic form (*e.g.*, through scanning) are to be made available, except that documents not otherwise available (*e.g.*, those filed under seal) shall not be made available online.
- Subsection 205(b) requires that information on each website be updated regularly and kept reasonably current, but electronic files and docket information for cases closed for more than 1 year are not required to be made available online (except for written decisions issued after the effective date of the E-Government Act).
- Subsection 205(c) provides that the Supreme Court shall prescribe rules to protect privacy and security concerns relating to electronic filing of documents and the public availability of documents filed electronically. Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the federal courts and shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security. To the extent such rules provide for redaction of certain categories of information in order to protect privacy and security concerns, they shall provide that a party wishing to file an otherwise proper document containing such information may file an unredacted document under seal that is retained by the court as part of the record, and which, subject to the court’s discretion, shall be either in lieu of, or in addition to, a redacted copy in the public file. Interim rules and interpretative statements that conform with the above may be issued by the Judicial Conference of the United States. A year after promulgation of rules by the Supreme Court, and every 2 years thereafter, the Judicial Conference shall submit to Congress a report on the adequacy of the rules to protect privacy and security.
- Subsection 205(d) requires the Judicial Conference of the United States to explore the feasibility of technology to post online dockets with links allowing all filings, decisions, and ruling in each case to be obtained from the docket sheet of that case.
- Subsection 205(e) amends existing law regarding the fees that the Judicial Conference prescribes for access to electronic information: instead of allowing

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the Judicial Conference to charge fees that it deems “reasonable,” the law now mandates that the Judicial Conference “may, only to the extent necessary, prescribe reasonable fees” for collection by the courts for access to information available through automatic data processing equipment. Although not stated expressly in the language of Subsection 205(e), the Senate Report accompanying the legislation stated that: “The [Senate Committee on Governmental Affairs] intends to encourage the Judicial Conference to move from a fee structure in which electronic docketing systems are supported primarily by user fees to a fee structure in which this information is freely available to the greatest extent possible.” The Report further notes that users of the current electronic access system (PACER) are currently “charged fees that are higher than the marginal cost of disseminating the information.

- Subsection 205(f) requires that courts are to establish websites within two years from the date of the law, and to establish access to electronically filed documents within four years. Although subsection 205(g) provides that compliance with the time limits may be deferred, the Senate Report states that the deferral provision is not to allow “courts to avoid their obligations indefinitely, but rather recognizes that “some courts may have a difficult time meeting the prescribed deadlines, and intends to provide flexibility for courts with different circumstances.

Enactment of the E-Government Act of 2002 has occurred against the backdrop of ongoing debates within federal and state court policymaking bodies about the nature of scope of access to court electronic records, and also coincides with the gradual implementation nationwide of web interfaces that provide for electronic filings of documents in federal bankruptcy and district courts. For example, within the last two years, the Judicial Conference approved the following policies after receiving hundreds of comments from interested parties:

- Documents in civil cases should be made available electronically to the same extent that they are available at the courthouse with one exception (Social Security

cases should be excluded from electronic access) and one change in policy (certain “personal data identifiers” should be modified or partially redacted by the litigants; these identifiers are Social Security numbers, dates of birth, financial account numbers, and the names of minor children. Appellate case files should be treated at the appellate level in the same way in which they are treated at a lower level.

- Subject to creation of a pilot program to allow selected courts to provide Internet access to criminal case files, although public remote access to documents in criminal cases was eliminated for “potential safety and law enforcement issues” pending review of that prohibition within two years (2003-2004)
- Documents in bankruptcy cases should generally be made available to the same extent that they are available at the courthouse, with a similar policy change for personal identifiers in civil cases, and with proposed amendments to the Bankruptcy Code to establish privacy and security concerns as the basis for sealing a document and to allow collection of a debtor’s full Social Security number but display only the last four digits.

In addition to these policies, federal district and bankruptcy courts have been issuing additional policies in connection with their individual Case Management/Electronic Case Filing Systems (CM/ECF), which allow attorneys to file documents electronically through the Internet by using a standard web browser. This system allows the electronic case file to be examined by the attorneys (but not the public) via the Internet from any location. In light of the overarching policymaking provisions contained in Section 205 of the E-Government Act of 2002, it is clear that media organizations and others with an interest in promoting public access to court records must pay close attention to the implementation of the Act and to the development and application of any policies that would seek to restrict presumptive rights of public access on the purported grounds of privacy, security, or confidentiality.

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New Developments: E-Access to Court Records

Prying, Self-Interest Is Good

By David Marburger

State courts across the nation are debating whether or not to follow the lead of the nation's federal courts in adopting rules and policies governing remote public access to court records over the Internet.

Electronic Access to Federal Court Records

In September, 2003, the Judicial Conference of the United States, the principal policy-making body for the federal court system, will consider whether to extend the electronic openness of civil and bankruptcy case files to records filed in criminal cases. In September, 2001, the 27-member Judicial Conference adopted a policy to make most civil and bankruptcy

case files available electronically to the same extent that they are available at the courthouse, except that social security numbers, birth dates, and financial account numbers are not available on-line. At that time, the Conference, which is composed of the Chief Justice

of the United States Supreme Court and federal appellate and district court judges, voted to prohibit public remote electronic access to criminal case records, with the understanding that the prohibition would be re-examined in 2003. The Conference voted to bar electronic access to criminal case files to protect the safety of informants and law enforcement personnel.

In March, 2002, the Judicial Conference modified its bar of public electronic access to criminal case records, permitting public access over the Internet in high-profile cases where media demand for copies is burdensome when provided in paper form, provided the parties consent to the electronic access. The Conference also created a pilot project, which allows the Court of Appeals for the Eighth Circuit and ten federal district courts to allow remote public access to electronic case files in criminal matters. The district courts in the pilot program

are: S.D. Calif., D.D.C., S.D. Fla., S.D. Ga., D. Idaho, N.D. Ill., D. Mass., N.D. Okla., D. Utah, and S.D. WVa.

All remote electronic access to federal court records is over the federal court PACER (Public Access to Court Electronic Records) system at seven cents a page.

Electronic Access to State Court Records

Of the state court systems that have adopted rules or policies governing remote public electronic access to court records, most are not as liberal as the federal courts in permitting access. Arizona, California, Missouri, Vermont, and Washington have adopted court rules that govern public access to court records over the

Internet. Of those, only Arizona permits remote public access to actual case files in addition to docket information and judicial opinions. The other states permit access only to the docket itself, and expressly bar making case files publicly available on-line. Arizona does not permit electronic

access to all case files, however; it bars electronic access to victim and witness information, probate cases, juvenile cases and mental health cases.

Other state court systems are busy formulating policies. In January, 2003, the Chief Judge and two other members of Maryland's highest court announced that they would make recommendations to the entire Maryland Court of Appeals about how to proceed in adopting rules to govern remote public electronic access to judicial records. The Court has before it a report issued in early 2002 by a committee of judges and lawyers, including media lawyers. The report recommends keeping electronic access the same as in-person access.

In November, 2002, the Florida Supreme Court deferred to the judgment of the state legislature in formulating policy governing on-line public access to court

The issue is privacy. It pits the "practical obscurity" of court records available only through in-person inspection at the courthouse against the ease of widespread availability through on-line technology.

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records. A Florida law enacted last year placed a temporary moratorium on electronic access to court records in probate, family law, or juvenile court cases until a policy governing that access can be adopted. A council appointed by the Florida Supreme Court and a committee of the legislature spent last year separately studying the issue. The Florida Supreme Court declined to decide what to do with its committee's report, ruling that it would wait until at least early 2003, when the legislative committee report is due.

The Ohio Supreme Court has appointed a committee of judges, a newspaper editor, and court administrative personnel to study the issue. A report is expected in 2003. The Chief Judge of New York's highest court formed a Commission on Public Access to Court Records to examine the issue. First Amendment lawyer Floyd Abrams of Cahill, Gordon, and Reindel in New York City is chair. Several outside and in-house counsel for news organizations are also members of the 22-member panel.

The "Practical Obscurity" of Courts That Are Open Only to In-Person Observers

The issue is privacy. It pits the "practical obscurity" of court records available only through in-person inspection at the courthouse against the ease of widespread availability through on-line technology. The notion that public records at the courthouse are, as a practical matter, obscure comes from Justice Stevens' observation in a Freedom of Information Act case over press access to police rap sheets. Writing for the Court, Justice Stevens recognized that private citizen Philip Medico had a privacy interest in avoiding public disclosure of a rap sheet that law enforcement agencies had compiled from a variety of publicly-available sources. Justice Stevens opined that

"[p]lainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."

United States Dept. of Justice v. Reporters Committee For Freedom Of The Press, 489 U.S. 749, 773 (1989).

For years before on-line communication became a norm, the courts of this country have lauded the openness of this country's court system. "The courts are public institutions funded by public revenues for the purpose of resolving public disputes" documented by public records typifies federal and state judicial opinions addressing the openness of our courts. *United States v. Ford*, 830 F.2d 596, 599 (6th Cir. 1987).

"There is a natural desire of parties to shield prejudicial information contained in judicial records from competitors and the public," observed the federal court of appeals for the Sixth Circuit, "This desire, however, cannot be accommodated by courts without seriously undermining the tradition of an open judicial system."

Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1180 (6th Cir. 1983).

If the goal of the judicial system is to maintain "practical obscurity," then the long tradition of openness touted by the judiciary is philosophical lip service.

Self-Interest in Inspecting Court Records Fuels Societal Benefits

The concern about on-line access is that, armed with a mouse, individuals will misuse information contained in court records to commit crimes or torts, or otherwise to exploit information for prying, self-gratification. As to crimes and torts, we already have laws that bar them. To buttress those laws, on-line access screens could remind viewers of the redress and punishment available against those who commit crimes and torts, such as stalking or harassment, using information gleaned from the public record (or elsewhere).

As for those who use court records for selfish purposes, advocates against electronic access argue that selfish motives do not translate into societal benefits. But, in fact, selfish motives have been the hallmark of public access to court records in this country.

The principal rationales supporting public access to judicial records include an interest in assuring that the courts are run fairly and judges are honest, to obtain a

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more complete understanding of the judicial system, and to encourage integrity by the litigants, counsel, and jury. All of those boil down to fostering public confidence in the fairness, honesty, and relative thoroughness with which the judicial system resolves disputes. Accordingly, openness is mandated because of the need for public scrutiny of the court's role in resolving disputes among citizens, not any need for public scrutiny of the merits of any particular dispute.

While those are the principal rationales for openness, the principal users of that openness do not seek to facilitate those socially beneficial rationales. The chief users of our open judicial system are title insurers, casualty insurers, banks, credit reporting agencies, private investigators, employment screening companies, law enforcement agents, attorneys, paralegals, journalists, and gadflies. All examine court records to foster their own self-interests, not to benefit our society. Probably no title insurer in history has searched judicial records motivated by a desire to obtain a more complete understanding of the judicial system, or to ensure the integrity of the litigants or the judge. Even journalists are more interested in the meat of a particular dispute than ensuring fairness and honesty by the trial judge.

Yet, when tens of thousands of citizens examine court records, motivated as they are by selfish reasons, society benefits. That is because “[t]he value of openness lies in the sure knowledge that anyone is free to [examine court records], [which] gives assurance that established procedures are being followed and that deviations will become known.” *Press-Enterprise v. Superior Court*, 464 U.S. 501, 508 (1984).

Self-interested examination of court records about other people is the norm in our open judicial system, and that norm furthers the democratic ideals that justify the openness. Nearly two centuries ago, philosopher George Hegel observed:

Self-interested examination of court records about other people is the norm in our open judicial system, and that norm furthers the democratic ideals that justify the openness.

In history an additional result is commonly produced by human actions beyond that which they aim at and obtain, that which they immediately recognize and desire. They gratify their own interest; but something further is thereby accomplished, latent in the actions in question, though not present to their consciousness and not included in their design.

Introduction to Philosophy of History, Hegel (1832). Indeed, it is the self-interest of each individual that fuels the societal benefits of our economic system. “It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard for their own interest.” *The Wealth of Nations* (1776) 1.2, Adam Smith.

“Capitalism . . . was adopted as an economic principle on the express ground that it provides selfish motives for doing good, and that human beings will do nothing except for selfish motives.” *The Intelligent Woman's Guide to Socialism, Capitalism, and Fascism* (1928) 66, George Bernard Shaw.

Concern about a mass of self-interested web surfers should have no impact on the future openness of our court system. Those web surfers benefit us all.

We Used to Fear the Technology of Photocopying

About forty years ago, the technological advance of photocopying caused concerns about public access that seem silly today, but sound similar to fears expressed about on-line access to court records. In the late 1950s, an Illinois school board allowed a group of citizens to inspect certain financial records of the district, and said that the citizens could copy the records by hand. When the citizens tried to photograph the records, the school board said “no.” In the early 1960's, county officeholders in New Jersey allowed a group of citizens to inspect county financial records, but when they brought a portable photocopying machine, the officeholders said, “no – hand copying only.”

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In both cases, the official custodians of the records expressed apprehension that the new technology of photocopying would disrupt public offices because it would fuel increased demand for information, and uncontrollably proliferate it. But, in both cases, the courts rejected the arguments in favor of maintaining enforcing outdated modes of transmitting information. The New Jersey court explained:

To ignore the efficacy and practical worth of [photocopying] equipment and to compel plaintiffs to resort to laborious and time-consuming hand copying, would substantially impair their right to inspect and copy. To prohibit photocopying with proper equipment is to ignore the significant progress which our generation has witnessed. Were we to accept the reasoning defendants advance for denying the right to photocopy then it might well be said that a records custodian in some past day could [insist] that the interested citizen use quill instead of pen, or pen instead of typewriter.

Moore v. Bd. of Freeholders, 184 A.2d 748, 754 (N.J. App. 1962); *accord People v. Peller*, 181 N.E.2d 376 (Ill. App. 1962).

Nor should the courts today insist that the interested citizen travel to the courthouse to examine court records instead of her living room.

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**UPDATE:
Judge Keeps Preliminary
Hearing for John Lee Malvo Open**

In a January 10 ruling from the bench, Judge Charles J. Maxfield of the Fairfax County Juvenile Court rejected suspected sniper John Lee Malvo's request to bar the media and public from a preliminary evidentiary hearing. The hearing will determine whether Malvo should be tried as an adult before a circuit court. Malvo's attorneys argued that evidence presented at the hearing would detail many aspects of the case and influence potential jurors, prejudicing Malvo. Virginia prosecutors, as well as several media organizations, claimed that the hearing should remain open because the defense had presented no compelling reason to bar access, the high public interest in the case, and that Virginia case law has well settled the issue in favor of access.

Judge Maxfield held the hearing will remain open and expressed doubts as to the defendant's arguments. Specifically, the court doubted whether this individual hearing would increase the difficulty in finding objective jurors, "The commonwealth is going to have the same problem in selecting a jury even if the information from this hearing comes out." In Virginia, proceedings involving criminal cases with defendants younger than 14 are open to the public. If access would present "substantial prejudice" to the defendant, the judge can close the proceeding.

Media was represented by: Dane Butswinkas of Williams & Connolly LLP (DC); and Craig T. Merritt of Christian & Barton, LLP (Richmond).

Fairfax County of Virginia was represented by: Robert F. Horan.

John Malvo was represented by: Michael Arif of Martin, Arif, Petrovich & Walsh (Springfield, VA).

Published in July

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Nine Police and Media Organizations Cooperate to Write a Guide to Access to Georgia Law Enforcement Records

By Tom Clyde

Until recently in Georgia, certain categories of law enforcement records were frequently tying the news media and police in knots. Could mug shots be disclosed? Was videotape from police dashboard cameras available to the media? What about 911 audiotapes and autopsy reports?

Working throughout much of 2002, a coalition of law enforcement and media organizations teamed to write a guide for the state's 18,000 police officers. The Guide, titled "A Law Enforcement Officer's Guide to Open Records in Georgia," is now being used in training at the Georgia Public Safety Training Center and the state's 12 other law enforcement academies. It has also become an essential tool for police reporters statewide.

The genesis of the Guide emerged from conversations between Vernon Keenan, Director of the Georgia Bureau of Investigation (Georgia's primary statewide law enforcement agency) and Tom Bennett, an editor at The Atlanta Journal-Constitution and board member of the Georgia First Amendment Foundation. Eventually, nine organizations representing a diverse group of law enforcement and media interests agreed to try to hammer out a straightforward explanation of the law on access to police records.

The nine groups that cooperated in writing the Guide were:

- Georgia Association of Chiefs of Police
- Georgia Bureau of Investigation
- Georgia Department of Law
- Georgia Department of Public Safety
- Georgia First Amendment Foundation
- Georgia Press Association
- Georgia Public Safety Training Center
- Georgia Sheriff's Association
- Prosecuting Attorney's Council of Georgia

Instrumental to the success of the Guide was Georgia Attorney General Thurbert Baker. Baker authored an introduction to the Guide emphasizing that under Georgia

law all government records are presumptively public and any statutory exceptions to that presumption must be interpreted narrowly. Baker's views on this subject have particular influence in Georgia because his office is vested with authority to bring civil or criminal actions to enforce Georgia's Open Records Act.

Remarkably, despite their different perspectives, the media and law enforcement organizations involved in the effort came to agreement on almost every issue. The Guide confirms that mug shots, 911 tapes and autopsy reports must be disclosed under Georgia law. Similarly, videotape from dashboard cameras in police cruisers must be disclosed once the relevant investigation or prosecution

is complete. The Guide also clarifies areas of past confusion, confirming that the public and press must be permitted to inspect most police records involving juveniles and virtually all personnel records on police officers.

One of the virtues of the Guide is that it should improve the uniformity with which Georgia's diverse law

enforcement agencies respond to record requests. The Georgia Bureau of Investigation has had an admirable record of responding to such requests promptly and directly, particularly under Director Keenan. The Guide will hopefully provide a tool for smaller law enforcement agencies to similarly adhere to Georgia's records law. Where that does not happen voluntarily, the Guide should also prove handy for police reporters insisting on adherence.

The editors of the guide were Gary Theisen, assistant deputy director of the Georgia Bureau of Investigation, and Hollie Manheimer, executive director of the Georgia First Amendment Foundation. A PDF version of the Guide can be accessed at the Georgia First Amendment Foundation's website at .

During preparation of the Guide, Peter Canfield and Tom Clyde of Dow, Lohnes & Albertson in Atlanta assisted the Georgia First Amendment Foundation's Executive Director Hollie Manheimer. The Georgia Press Association was represented in the negotiations by David Hudson of Hull, Towill, Norman, Barrett & Salley in Augusta.

Despite their different perspectives, the media and law enforcement organizations involved in the effort came to agreement on almost every issue.

New Texas Rule Orders Opinions Published

Permits Citation to Unpublished Opinions

By Ryan Pierce

Thanks to an amendment to Rule 47 of the Texas Rules of Appellate Procedure that became effective on January 1, 2003, a New Year's resolution for Texas lawyers should be to read more cases. Under new Rule 47, all new opinions issued by Texas courts of appeals in civil cases must be published, and parties in both civil and criminal cases may now cite—as persuasive, but not as precedent—those courts' unpublished opinions.

Previously, Rule 47 required courts of appeals to issue unpublished opinions unless, for example, an opinion established new law or criticized existing law. Despite unpublished opinions' wide availability on computer services such as Lexis and Westlaw, the old rule expressly prohibited parties and courts from citing these opinions as authority.

The new rule establishes two types of court of appeals opinions, "opinions" and "memorandum opinions." The new rule's official comments state that the rule favors the use of "memorandum opinions," which essentially permit courts of appeals to dispose of cases in shorter published opinions that probably would have previously gone unpublished. The new rule specifies that when the "issues are settled" a memorandum opinion should be "no longer than necessary to advise the parties of the court's decision and the basic reasons for it." (The rule, however, retains the constitutionally based provision that requires that opinions address every issue raised and necessary to the court's final disposition.)

Whether an opinion will be designated an "opinion" or a "memorandum opinion" is determined by a majority of the participating justices. When issuing a new opinion, the new rule directs justices to issue a "memorandum opinion" unless the opinion:

- establishes a new rule of law;
- alters or modifies an existing rule of law;
- applies an existing rule of law to a novel fact situation likely to recur in future cases;
- criticizes existing law;
- resolves an apparent conflict of authority; or
- involves issues of constitutional law or other legal issues important to Texas jurisprudence.

If an opinion falls under one of these categories, it must be a regular "opinion." Also, the initial designation of an opinion

as "memorandum" is not absolute. If any participating justice issues a concurring or dissenting opinion and objects to a "memorandum" designation, the opinion must be designated a regular "opinion." Additionally, an *en banc* court of appeals may order that an opinion's initial designation be changed.

In civil cases, "opinions" and "memorandum opinions" will not only be available through electronic reporting services but will also find their way into the *Southwestern Reporter*. Civil opinions that were designated "unpublished" before January 1, 2003 will remain unpublished. In criminal cases, courts of appeals may continue to issue unpublished opinions, effectively creating four categories of criminal opinions: published "opinions," unpublished "opinions," published "memorandum opinions," and unpublished "memorandum opinions."

Perhaps the most significant change under the new rule is that all court of appeals opinions—both published and unpublished — are citable. (Notably, however, Texas Rule of Appellate Procedure 77, left untouched by the amendments, prohibits parties from citing unpublished opinions issued by the Court of Criminal Appeals). Although new Rule 47 permits parties to cite unpublished court of appeals opinions, the new rule, like the old rule, specifies that unpublished opinions have no precedential value. And when citing to unpublished opinions, parties must include the notation "(not designated for publication)."

As there are fourteen courts of appeals in Texas, it remains to be seen how widely their application of the new rule will diverge. It will also be interesting to watch courts as they reveal their perceptions of the persuasive appeal of "memorandum opinions" and unpublished opinions. And as courts may strive for shorter opinions to be designated "memorandum," it remains to be seen whether these opinions will be too cursory to be meaningfully cited and whether such opinions will affect the parties' sense that they received a full and fair hearing. These are just some of the issues that will be resolved, if at all, only after the passage of time. There are some relative certainties regarding the new rule, however: case law publishers aren't complaining, and attorneys will read more cases.

Ryan M. Pierce is an associate in the Dallas office of Vinson & Elkins L.L.P.

MLRC COMMITTEE REPORTS 2003

Every member of MLRC is welcome to join a committee. It is a rewarding way to contribute to the wealth of materials and information we have in this organization, as well as to meet other media counsel across the country. Below are summaries of the projects that the committee chairs who reported in anticipate for 2003.

Ad Hoc Jury Debriefing Committee

Chairs: Jim Stewart, (Butzel Long)

The Ad Hoc Jury Debriefing Committee is chaired by Jim Stewart and is actively searching for a co-chair. Volunteers are welcome as are volunteers for the committee. The Committee seeks to interview jurors in trials that have been completed and publishes a “lessons learned” report on those interviews. No interviews are done unless the parties and the trial judge agree. The Committee is planning to use interviews of mock jurors done as part of trial preparation for libel and privacy trials that did not come to trial as part of its reports this year as well as completing at least one report on a trial that actually occurs.

Advertising and Commercial Speech Committee

Chairs: Steve Brody, (King & Spalding) & Richard M. Goehler, (Frost Brown Todd LLC)

The Advertising and Commercial Speech Committee is busy with several Committee projects and initiatives. The Committee is presently in the process of establishing a regular publication rotation for its members to submit monthly articles for the *MediaLawLetter* on current cases, decisions and substantive developments in the area of advertising and commercial speech. In addition, the Committee intends to continue to closely monitor ongoing developments in the areas of right of publicity and misappropriation, and the growing tension between these claims and traditional First Amendment protections. A supplement to the Committee’s April 2001 MLRC Bulletin on these issues is anticipated during the year.

Conference & Education Committee

Chairs: Dan Waggoner (Davis Wright Tremaine LLP) & Peter Canfield (Dow Lohnes & Albertson)

NAA, NAB and MLRC are in the early planning stages for the 2004 conference, having gathered both positive and negative feedback from the last conference this fall. There is a shared commitment to maintaining and improving the sophistication of conference content and to ensuring that new speakers and discussion leaders have an opportunity to participate.

Now is the time to suggest to Dan (danwaggoner@dwt.com), Peter (pcanfield@dlalaw.com) and Sandy (sbaron@ldrc.com) your ideas for new program elements as well as thoughts on ways to update and improve (or lose) conference staples.

Employment Law Committee

Chair: Sanford Bohrer (Holland & Knight LLP)

Tentatively, subject to committee responses, we have three projects for the year:

1. The usual update of the outline.
2. Preparation of a monthly article/column, sort of like the ethics column, for the *MediaLawLetter*.
3. Communicating with ALI regarding its employment law project.

Ethics Committee

Chair: Robert C. Bernius (Nixon Peabody LLP)

The ethics committee has prepared for publication the following articles in the Ethics Corner section of the *MediaLawLetter*:

- Fee Awards for In House Counsel - Chuck Tobin
- Hidden Justice: The Ethics of Secret Settlements - Jane Kirtley
- Recent MJP recommendations offer hope for ‘unauthorized’ in-house practitioners - Bruce Johnson

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- Suing Government Clients for Fun and Profit? A look at a common conflict of interest problem - Lucian Pera
- When Your Client Communicates With An Adverse Party Represented By Counsel - Dick Goehler
- Ethics Corner: Confidentiality and Phone Conversations - Bob Bernius

International Media Law Committee

Chair: James T. Borelli (Media/Professional Insurance, Inc.) & Kurt A. Wimmer (Covington & Burling)

In 2003 much of the committee's focus will continue to be on planning the MLRC London Conference scheduled for Sept. 21 to 23. The program has already generated a great deal of interest and excitement among MLRC members, and a lot has been accomplished. Over the course of the last year the format for the program was developed; speakers, panelists and facilitators have been lined up; a venue has been chosen; and an invitation list has been developed. In 2003 one area of concentration will be fleshing out the content of various sessions of the conference. This London Conference will differ from past ones in that a concerted effort has been made to involve media lawyers from other European countries as conference participants.

Committee members will continue to serve as MLRC liaisons to other international law associations. Last October Kurt Wimmer and Mark Stephens attended the International Bar Association Conference in Durban, South Africa. This April, Mark Stephens will attend the 13th Commonwealth Law Conference in Australia, which is hosted by the Law Council of Australia on behalf of the Commonwealth Lawyer's Association.

The membership will also continue its role in evaluating and commenting upon proposed changes in laws and regulations affecting the media internationally. Last year, Kurt Wimmer participated in a consultation and drafted comments for MLRC at the European Commission with respect to proposed changes in choice of law rules within European Union. The proposal under con-

sideration sought to adopt the law of the victim as the applicable law and the Committee argued that the law of the origin of the content should apply. Mr. Wimmer will continue to monitor this process and lobby on the media's behalf. The committee also provided comments to David Heller's letter to the Law Commission of England and Wales on Internet defamation issues.

The committee will also continue to be active in monitoring important media law decisions abroad and participating in amicus efforts where appropriate. Last year David Schulz led the amicus effort before the High Court of Australia in the Gutnick case involving issues of Internet jurisdiction. A number of corporate MLRC members signed on to this brief. Unfortunately, the Court rendered a decision that was adverse to the media, and in 2003 committee members may well be involved in legislative efforts to provide relief from this result.

As the committee is fortunate enough to have a long list of talented members, it is planned to get all committee members involved in serving the MLRC membership. Committee members will be encouraged to provide articles to the *MediaLawLetter* on international media law developments and be a resource to the MLRC on international media law issues. Producing a survey of international media law will continue to be a project under consideration, but much of the work on this may have to be deferred until after the London Conference. It is hoped that contacts made with media lawyers from various countries may develop useful leads on survey preparers.

Jury Committee

Chair: David Klaber (Kirkpatrick & Lockhart)

My plan is for the committee to:

1. Review and update as needed the Jury Instruction Manual;
2. Draft a Jury Questionnaire for use in defamation and privacy related tort cases;

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3. In conjunction with the Trial Techniques Committee, consider use of jury consultants to identify jurors with preconceived notions in defamation cases.

Legislative Committee

Chair: Kevin Goldberg (Cohn & Marks/ASNE)

The Legislative Committee will likely eschew larger projects in favor of a series of smaller efforts intended to keep MLRC members informed of the goings on in Congress and the state legislatures. The ultimate goal is to provide resources that can be used by members and the press alike to offer greater publicity to both positive and negative legislative proposals so that nothing slips under the collective radar.

The main effort in this regard will be the construction of an ongoing list of legislation introduced in the 108th Congress that affect the First Amendment or FOIA. The list itself will be relatively simple, containing enough information to give the reader an idea of each bill's impact. It will also include compiling all legislative materials related to each bill in one central location, so that they are easily accessible to MLRC members. The hope is that the list can be posted at some central location – ideally the MLRC web site – to allow members to track legislation that may affect their clients and further to allow them register support or opposition in some way.

The Committee will supplement this overview with a series of in-depth looks at one or more of the “hot” issues of the moment, which would be published on a regular (ideally, monthly) basis. This may become a regular part of the *MediaLawLetter* or it may just take the form of updates available to members who choose to receive them.

The final piece of the puzzle is the effective dissemination of our message to legislators and the public at large. This will entail the creation of a list of persons who are active in this field that can be offered as contacts for the media when editorials or articles are being written on a pending piece of legislation. The Committee hopes to call upon its contacts to create a list that is diverse, deep and articulate.

Membership Committee

Chairs: Karen Fredrickson (Davis Wright Tremaine LLP) & Kim Walker (Faegre & Benson LLP)

The Membership Committee will continue our efforts to expand the membership of the Defense Counsel Section. If you have any leads on prospective new members, please contact one of us by phone or e-mail. One new project this year will be to ask each current Section member to identify at least three non-member firms that we can try to entice to join our ranks.

Committee on New Legal Developments

Chair: Nathan Siegel, (ABC, Inc.)

The Committee on New Developments looks forward to an active year. We plan to continue to assist the plaintiffs in the cases concerning access to immigration proceedings, which may be headed for the Supreme Court. We will also continue to monitor other new legal developments and periodically report about them in the *MediaLawLetter*.

We would also like to develop a broader network to discuss new developments. In the fall, we plan to organize a Roundtable to bring together academics with an interest in First Amendment matters and distinguished media law practitioners for an open discussion. We hope this will be the first of many opportunities to exchange ideas and develop new insights into the issues we all care about.

Newsgathering Committee

Chairs: Dean Ringel (Cahill Gordon & Reindel) & Kelli Sager (Davis Wright Tremaine LLP)

The Newsgathering Committee is currently at work on the following projects for 2003:

1. A model brief concerning legal issues arising in connection with press contacts with jury members. The

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- utility of such a brief is dramatized by recent decisions in several circuits and in New Jersey restricting and/or punishing press efforts to interview jurors.
2. Preparation of a nationwide list of bailbondsmen and criminal lawyers familiar with press concerns.
 3. Finalizing a report on HIPPA (Health Insurance Portability and Accountability Act) and its implementation. This takes on particular significance in light of concerns about biological warfare and other health/terrorism issues.
 4. A model brief on privacy tort issues (photography, undercover reporting, electronic eavesdropping, etc.)
 5. We are also monitoring post-9/11 developments as to governmental restrictions on newsgathering, including the closing of deportation hearings, deviations from the Attorney General's guidelines on subpoenas, etc.
 6. We have discussed — and solicit input with respect to — a symposium on “Media Defense of the First Amendment in Changing Times”. This is a discussion that we envision would involve present and former media executives discussing the changing role of media in defending the First Amendment in the wake of 9/11, changing media ownership and the expanding role of the Internet.

Pre-Publication/Pre-Broadcast Committee

Chair: John Greiner (Graydon, Head & Ritchey)

We expect to continue our efforts on the following:

1. Seminar Bank — We intend to circulate items that involve prepublication or prebroadcast review material. To the extent these items involve broadcast materials and video clips, we will follow up and attempt to obtain the video clips. On an ongoing basis, we intend to prepare regular updates about case law especially pertinent to prepublication review issues.

2. Prepublication/Prebroadcast Checklist — We have prepared a draft checklist, and we need to decide how best to circulate/publish/utilize it.
3. “White Papers” — we will publish several papers (longer in length than the updates mentioned above) on prepublication issues. Last year we produced three, including one on the aftermath of Bartnicki, note retention and the advice of counsel/privilege waiver conundrum.
4. Releases — We plan to produce/gather and share thoughts and forms concerning releases.

Trial Techniques Committee

Chairs: Guylyn Cummins (Gray Cary Ware & Freidenrich, LLP) & David P. Sanders (Jenner & Block LLC)

The goal of the Trial Techniques Committee is to develop a repository for transcripts of closing arguments in various types of media law cases. In addition, the committee will explore the possibility of updating the DSC's information on expert witnesses now that the Expert Witness Committee has been dissolved.

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ETHICS CORNER

Fee Awards for In-house Counsel: Just Desserts or Forbidden Fruit?

By Charles D. Tobin

Whether it's after a contentious public records battle, heated copyright litigation, or the obligatory defense against a frivolous claim, nothing brings a smile to a general counsel's lips faster than an award of the company's attorney's fees. The grin turns positively giddy when the lawyer handling the case is in-house. Talk about a win-win. Not only is the substantive issue favorably resolved, but for one brief, shining moment, the legal department is not a cost center – and, depending on the size of the award, it may even bring in a profit.

Do victories like these raise ethical flags? Like most everything else in litigation, the answer depends on who decides the issue, and where it arises. Fee awards to in-house counsel can implicate questions about how much money the company can recover, who can ask for it, and who gets to keep it. Bar ethics rules can quickly wipe the grin off the boss's face.

The first conundrum for court and corporate counselor is the appropriate measure of the company's success. Courts awarding fees for in-house time have taken two distinct analytical tracks: market value or actual cost. Policy choices – chiefly revolving around how hard the courts should work to decide fee claims and whether companies should financially profit from the use of in-house legal talent – drive the different approaches.

Market-Based Award

Market-based awards follow the “Iodestar” method. That is, the court calculates the prevailing corporation's lawyer's fee according to the reasonable number of hours actually devoted to the case multiplied by the prevailing hourly rate in the community for similar work. The court may also take into account additional factors,

“including the nature of the litigation, its difficulty,

the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.”

PLCM Group, Inc. v. Drexler, 22 Cal. 4th 1084 (Cal. 2000) (citation and internal quote marks omitted).

In *Drexler*, a contract action, California's Supreme Court found the market-based award less “cumbersome, intrusive, and costly to apply” than the burden of requiring corporate litigants to disclose attorney compensation figures and tabulate the precise allocation of overhead for their in-house counsel. *Id.*, 22 Cal. 4th at 1098. *But see*,

Broadcast Music, Inc. v. R. Bar of Manhattan, Inc., 919 F. Supp. 656 (S.D.N.Y. 1996) (federal court employs market-rate analysis in copyright action, but reduces in-house fee award by 50% because lawyer did not keep contemporaneous time

records and could only furnish an estimate through “hindsight review”).

Cost-Plus

Other courts have taken a different view, adhering to the “cost-plus” approach. Under this method, the in-house lawyer's fee is calculated based on her actual total compensation — including salary and benefits — and the proportionate share of her overhead. Utah's Supreme Court, among others, has found the cost-plus method to be “the more reasonable measure of attorney fees to in-house counsel.” The quote below is from *Softsolutions Inc. v. Brigham Young University*, 1 P.3d 1095, 1107 (citation omitted):

“Fees for in-house counsel are limited to consideration actually paid or for which the party is obligated, calculated using a cost-plus rate and taking into account (1) the proportionate share of the party's attorney salaries, including benefits, which are allocable to the case based upon the time ex-

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pending, plus (2) allocated shares of the overhead expenses, which may include the costs of office space, support staff, office equipment and supplies, law library and continuing legal education, and similar expenses. The party seeking recovery of fees has the burden of proving these amounts.”

The court also was of the view that, while it should render a prevailing corporate litigant whole cases where fees are recoverable, the company should not make money off of its decision to use in-house legal talent.

“[T]he basic purpose of attorney fees is to indemnify the prevailing party and not to punish the losing party by allowing the winner a windfall profit.”

Softsolutions, Inc. v. Brigham Young University, 1 P. 3d 1097, 1107 (Utah 2000).

Fairness or Fee Splitting

Not surprisingly, the corporate counsel community favors the market-based approach. The court in *Drexler* largely followed the reasoning of a brief *amicus curiae* submitted on behalf of the American Corporate Counsel Association (ACCA). In addition to advancing arguments that a market-based fee is easier to calculate and results in a more reasonable fee, ACCA’s brief also suggested that the cost-plus method relegates corporate counsel to second-class citizenship of sorts, as it would “mandate a separate (and non-equal) standard for in-house counsel” by subjecting their fee calculations “to desultory, highly-detailed, and intrusive scrutiny.”

Some authorities, however, have raised concerns that run deeper than issues of intrusiveness, certainty, and fairness. Under their reasoning, market-based recovery for a corporation’s lawyer’s time amounts to fee-splitting with nonlawyers. For example, the Sixth Circuit rejected the market approach urged by the successful defendant in a patent-infringement action. In *PPG Industries, Inc. v. Celanese Polymer Industries, Inc.*, 840 F.2d 1565, 1570 (6th Cir. 1988), the court of appeals held that on remand, the district court should consider a cost-based calculation, in part because the market system struck the panel as ethically suspect:

“The implication of using a private firm market standard is to allow a nonlegal business corporation to use the services of in-house counsel, and reap a profit therefrom. We know of no authority to support this practice.”

Indeed, the Sixth Circuit’s observation raises a critical and thorny ethical question. If a corporation recovers more than the market rate for the employee-litigator’s efforts, does the company engage in the unlicensed practice of law by earning income for legal representation by an employee? That is the view the ABA has taken in opining that it is simply unethical for a corporate employer to recoup more than its in-house lawyer’s direct costs.

ABA Approach

ABA Formal Op. 95-392 (Apr. 24, 1995), titled “Sharing Legal Fees with a For-Profit Corporate Employer,” notes that Rule 5.4, ABA Model Rules of Professional Conduct flatly prohibits a lawyer from sharing legal fees with a nonlawyer. Moreover, the opinion observes, Rule 5.4(c) provides that lawyers cannot let someone who is paying the legal bills for another person “direct or regulate the lawyer’s professional judgment[.]”

The opinion finds it untenable for a company to create “a situation in which the provision of legal services by the in-house lawyers became a profit center for the enterprise.” The pressures to pursue the highest profit, the opinion suggests, would cloud the in-house litigator’s sound legal judgment: under a market-fee system, they wrote, “the corporation’s incentive to interfere with its lawyers’ handling of matters would be enhanced.” ABA Formal Op. 95-392 at 4-5. The ABA opinion concludes that “a for-profit corporation should not share in court-awarded attorney’s fees with respect to services provided by its lawyer employees,” except for recovery of “the corporation’s cost of providing the legal services in question.” *Id.* at 5-6.

Years earlier, the Circuit Court of Appeals for the District of Columbia found similar cause for pause when an attorney, who represented a plaintiff under a union’s prepaid legal services plan, candidly disclosed at oral argu-

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**Fee Awards for In-house Counsel:
Just Desserts or Forbidden Fruit?**

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ment that the union would bank any fee award. *National Treasury Employees Union v. U.S. Dept. of Treasury*, 656 F. 2d 848 (D.C.Cir. 1981). Looking to the ABA canons for guidance, the court found that the disclosure rendered untenable any argument for a market-based fee award.

[This] means that the employing lay organization would capitalize on the attorney's services, reap a profit therefrom, and put the monies thus made to any use it chooses. In the absence of any compelling reason to disregard the ethical considerations implicated and we discern none here we believe that an allowance of above-cost fees to the union is inappropriate.

Id. at 853. See also *Harper v. Better Business Services, Inc.*, 768 F.Supp. 817 (N.D.Ga.,1991) (in action where counsel retained under union prepaid legal services plan, court rejects market approach and awards fees based on actual cost, citing Georgia Code of Professional Responsibility.)

Let the Lawyer Keep It

Of course, there is a simple and obvious solution to any ethical issues for corporations that want to recover a market-rate award for use of in-house talent. In fact, the D.C. Circuit hinted at it in *National Treasury Employees' Union*. And the ABA Committee on Ethics and Professional Responsibility drew a roadmap for the corporate counselor preparing her fee petition:

It is permissible for the corporation to be reimbursed for its costs, and its lawyer can receive directly fees in excess of the corporation's cost, but it is unethical for the lawyer to share the excess with the corporation.

ABA Formal Op. 95-392. In other words, the court awards the market rate, the corporation keeps its actual costs, and *the in-house lawyer keeps the profit.*

The general counsel may not grin at that advice. But others in the legal department surely will.

Chuck Tobin is with the Washington, D.C. office of Holland & Knight LLP.

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