

# MILRC Media Law Resource Center

## MEDIA LAW LETTER

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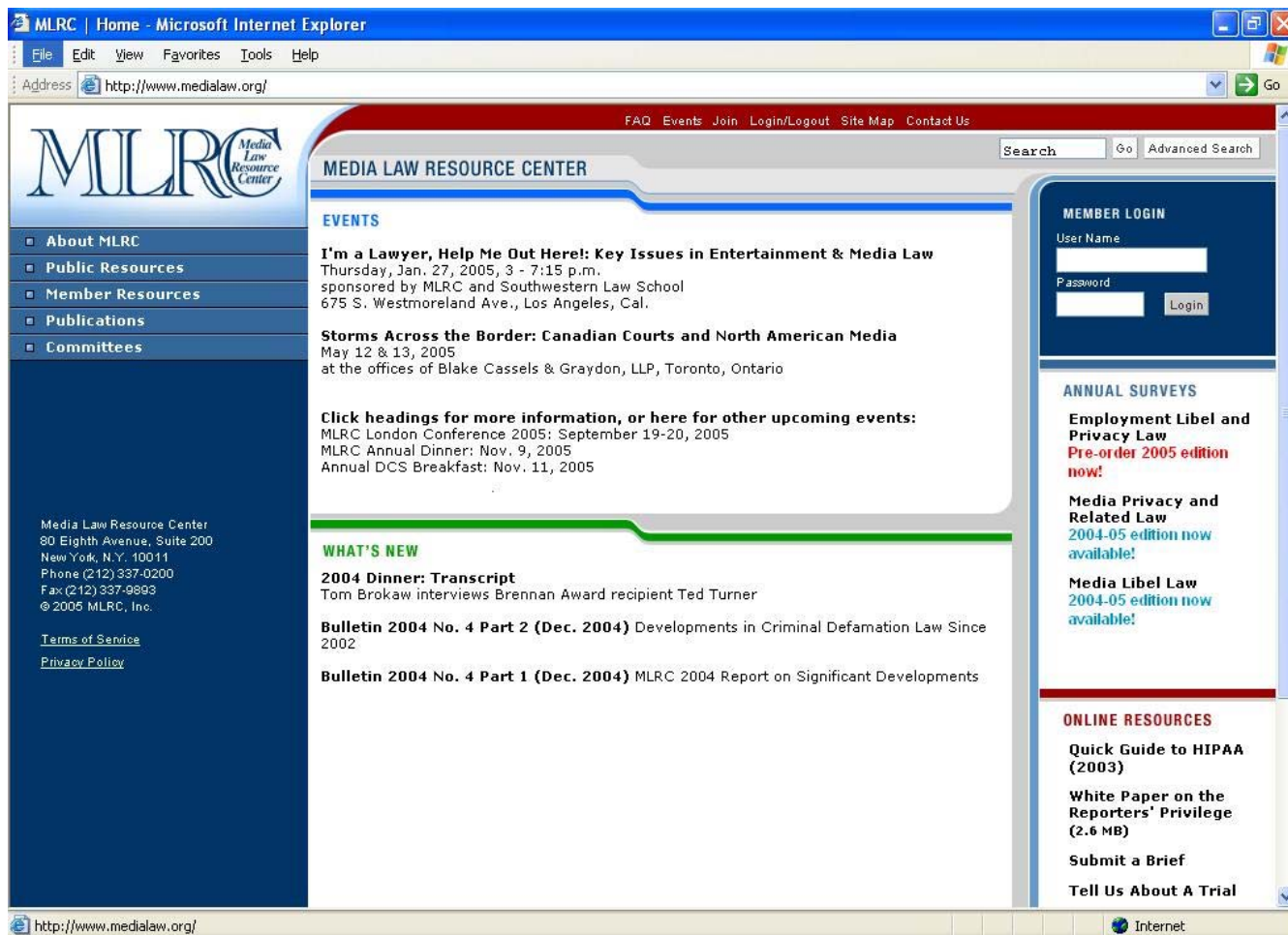
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**Contact Debby Seiden, [dseiden@medialaw.org](mailto:dseiden@medialaw.org), for details.**

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## Illinois Federal Court Quashes Subpoena Under Federal Rule 45 Balancing Test

By Gregory R. Naron and Natalie J. Spears

U.S. District Judge Joan Gottschall of the Northern District of Illinois recently issued an opinion quashing a subpoena served upon the news media in a high profile civil rights case. *Patterson v. Burge*, 2005 WL 43240 (N.D. Ill., Jan. 6, 2005).

In so holding, the court applied general federal procedural principles, thus avoiding the significant hurdle posed by the Seventh Circuit's decision in *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003), which limited the applicability of state shield laws in federal court, and questioned the very existence of a federal reporter's privilege.

Even so, the court evinced an (increasingly rare) sensitivity to the deleterious impact that litigants' subpoenas may have on the press' special role in investigating issues of public importance.

### Background

The underlying case is a federal civil rights action (with some pendent state claims) brought by pardoned former death row inmate Aaron Patterson against former Chicago Police Lt. Jon Burge and others.

Predictably, it has garnered considerable attention in the local media. Still in the early stages of the litigation, defendants served broad subpoenas on NBC affiliate WMAQ-TV; WGN Continental Broadcasting; and Chicago Tribune Company (the "news organizations"), asking them to turn over unpublished reporters' notes and unbroadcast "outtake" footage.

In response to the news organizations' Motion to Quash, defendants withdrew their request for the reporters' notes. However, defendants pressed their demand for all "outtake" video footage and audio tape from the reporters' interviews.

The news organizations had their work cut out for them. While Illinois has a statutory Shield Law – which has protected outtakes from compelled disclosure – the Seventh Circuit's *McKevitt* decision held that where fed-

eral claims are at issue in the underlying action, the state shield law cannot be invoked.

Worse, *McKevitt* cast considerable doubt on the continued viability of any federal reporter's privilege for non-confidential source material in the Seventh Circuit; the court "stated that [the Seventh Circuit] could find no basis, in law or fact, for recognizing a reporter's privilege under federal or state law cognizable in federal proceedings." *Patterson*, at \*1, citing *McKevitt*.

### District Court Relied on Rule 45

In light of *McKevitt*, the court did not even address the news organizations' statutory and constitutional re-

porters' privilege arguments (thus saving for another day the question of whether *McKevitt* leaves room for recognition of any federal reporters' privilege).

Instead, the court moved directly to the news organizations' contention that the subpoenas should be quashed under the ge-

neric Rule 45(c) standard applicable to subpoenas on press and non-press movants alike – which obviously is less protective of reporters' rights than the statutory and constitutional privileges, but can be used as a vehicle for advocating the same principles.

Quoting *McKevitt*, Judge Gottschall held that under Rule 45(c), "courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances." *Patterson*, at \*1.

Judge Gottschall then also cited the Seventh Circuit's recent exposition of the Rule 45(c) standards in *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004), where the court recognized that "pretrial discovery is a fishing expedition and one can't know what one has caught until one fishes," but "when the fish objects under Rule 45(c), the fisherman is called upon to justify his pursuit." *Patterson*, at \*1, quoting *Ashcroft*, at 931.

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***Under Rule 45(c), "courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances."***

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### Illinois Federal Court Quashes Subpoena Under Federal Rule 45 Balancing Test

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As Judge Gottschall elaborated:

Put in a fish-free way, non-parties are not treated exactly like parties in the discovery context, and the possibility of mere relevance may not be enough; rather, non-parties are entitled to somewhat greater protection. . . . That protection encompasses weighing the need for the material subpoenaed against the burden involved in its production. Burden in this context means more than mere administrative hardship. It encompasses the interests that enforced production would compromise or injure. *Id.*

Applying this standard, Judge Gottschall accepted the news organizations' argument that defendants had not shouldered their substantial burden of justifying broad discovery; to the contrary, "[t]he justifications defendants have advanced for these subpoenas are meager, to say the least, and consist largely of arguing repeatedly, albeit in different verbal formulations, that the materials sought may contain relevant information." *Id.* at \*2.

While not directly drawing upon the familiar "lack of critical relevance" and "failure to exhaust" requirements typically cited under the federal reporters' privilege, the court, nonetheless, concluded that under Rule 45(c), "mere relevance" is not the standard and subpoenas to the media should not be the first step:

Defendants are simply speculating, however, that the news organizations' non-published materials contain impeachment information or admissions. Defendants have apparently served these subpoenas before questioning Patterson, by deposition or interrogatories, about his statements to the news organizations or his conspiracy theory. Thus, defendants . . . cannot establish that their subpoenas seek information they do not already have or that is not readily available from other sources. *Id.*

The court also noted that the interests favoring disclosure in the *McKevitt* case – namely, "the important public obligation to assist in criminal proceedings and the federal interest in cooperating in the criminal proceedings of

friendly foreign nations" – were not "operative in the present context." *Id.* at \*4.

Turning to the other side of the Rule 45(c) balance, Judge Gottschall found that "[a]gainst [defendants'] weak justifications, the burden on [the news organizations] is significant."

The court set forth and relied upon, in the Rule 45 context, many of the same policy underpinnings that support the statutory and constitutional reporter's privileges. That is, even though "turning over the tapes from which their published materials were drawn does not represent a major administrative burden," it is problematic, to say the least, for "private parties in a civil suit [to] call on the press to turn over the fruits of its investigative efforts," based on a showing of mere relevance.

In a passage reminiscent of some of the better-reasoned federal reporter's privilege opinions, the court explained:

Since the press is involved in collecting information about all manner of things and circumstances that frequently end up in litigation, if there is no standard higher than mere relevance which civil lawyers must satisfy to help themselves to reporters' records, news organizations will be very busy responding to civil subpoenas. Similarly, the news organizations' efforts to maintain their independence and gain the trust of sources is an interest that will be severely impaired if mere relevance, meaning as it does here a mere relationship to the subject matter of a civil suit, makes their non-public records available on request. Further, the journalistic and editorial judgments involved in deciding what to ask an interview subject, and in deciding what to use from the material gathered, are the commercial and intellectual stock in trade of the news organizations; surely some good justification should be advanced before these journalistic and editorial judgments can be examined by outsiders and made public in the context of a civil lawsuit. *Id.* at \*3.

The court also echoed the recent observation in *Hobley v. Burge*, 223 F.R.D. 499 (N.D. Ill. 2004),

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### Illinois Federal Court Quashes Subpoena Under Federal Rule 45 Balancing Test

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(available online [here](#)) that Rule 45(c) explicitly permits the court to protect against the disclosure of trade secrets and other confidential commercial information, and “[t] here is nothing in the Federal Rules that suggests that research for the purpose of news reporting [not to speak of editorial judgments about what should and should not be published] is to be given *less* protection than research for the purpose of product development.” *Id.*, quoting *Hobley*, at 505 (emphasis in original).

However, the court disagreed with *Hobley*’s conclusion that letters from an identified source to a reporter were “analogous to the tape recordings ordered disclosed in *McKevitt*,” and rejected defendants’ argument that “recordings of a non-public interview by a journalist are otherwise analogous to the letters ordered disclosed in *Hobley*.” *Id.*

Instead, the court held, “such recordings are much more like the reporter’s notes as to which Judge Brown

quashed the *Hobley* subpoena. They reflect the journalist’s thought processes, his or her method of investigation, and his or her choices about what should be published and what withheld.” *Id.* at \*4.

All in all, the *Patterson* decision is a heartening development for news media who operate in the Seventh Circuit, and provides a road map around the obstacle that *McKevitt* has created to the assertion of the federal reporter’s privilege there.

*The news organizations were represented by Samuel Fifer, Natalie J. Spears, and Gregory R. Naron, of Sonnenschein Nath & Rosenthal LLP, Chicago, Illinois, along with Brande M. Stellings and Elizabeth Yap (for NBC affiliate WMAQ-TV); Chuck Sennet (for WGN); and Karen Flax (for Chicago Tribune). The defendants were represented by Freeborn & Peters and Hinshaw & Culbertson, both of Chicago.*

## The LDRC Institute Publishes MEDIA LAW RESOURCE CENTER WHITE PAPER ON REPORTER’S PRIVILEGE

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*Kelli L. Sager, Carolyn Killeen Foley, Andrew M. Mar, John D. Kostrey, and Trinh C. Tran*

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*Charles D. Tobin*

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**MLRC BULLETIN 2004:4 PART 2  
MEDIA ACCESS AND NEWSGATHERING IN HIGH PROFILE CASES**

**INTRODUCTION**

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LEGALLY OBTAINED INFORMATION IN HIGH PROFILE CRIMINAL CASES**

*By Joel Kurtzberg and Kayvan B. Sadeghi*

**JUDICIAL PROCEEDINGS AND RECORDS “ANCILLARY TO THE GRAND JURY” IN  
HIGH PROFILE CASES: TOWARD A MORE MEANINGFUL RULE-BASED STANDARD FOR ACCESS**

*By Theodore J. Boutrous, Jr., and Michael H. Dore*

**SEARCH WARRANTS: A QUALIFIED RIGHT OF ACCESS**

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**WHEN THE MEDIA COME TO TOWN: PROTOCOLS AND PRACTICES**

*By Rochelle L. Wilcox*

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## News Organizations Continue to Battle for Access in *People v. Michael Jackson*

By Theodore J. Boutrous, Jr., and Michael H. Dore

A coalition of major media organizations, including NBC, CBS, Fox News, ABC, CNN, The Associated Press, *Los Angeles Times*, The New York Times Company, and *USA Today*, continues to fight to ensure maximum public access to the records and proceedings in the felony prosecution of singer Michael Jackson on child-molestation and related charges in Santa Maria, California.

### *Media Attempts at Access*

The charges against Jackson resulted from grand jury proceedings held in March 2004. In conjunction with those proceedings, Presiding Judge Clifford R. Anderson III of the Santa Barbara Superior Court issued a Decorum Order that, among other things, restricted all persons, even those not involved in the grand jury process, from communicating with any person summoned to appear as a grand juror.

The order also mandated that no person photograph any grand juror, prospective grand juror, or witness even while entering or exiting the courthouse or any other facility utilized by the grand jury.

On March 29, 2004, the media contested the Decorum Order on an emergency basis, filing a writ petition with the California Court of Appeal and requesting an immediate stay of the grand jury proceedings. Judge Anderson responded by modifying some of the Decorum Order's provisions, with the Court of Appeal staying and modifying several others.

In addition, Judge Anderson held one hearing that was ancillary to the grand jury proceedings in open court. Nevertheless, the grand jury proceedings continued with several contested provisions of the Decorum Order in place. Additionally county officials were permitted to continue their practice of moving the grand jury out of the courthouse to a secret location, and then, once that location was discovered, barricading the public streets to exclude the press. The Court of Appeal still has not ruled on the media coalition's writ petition.

During an April 30, 2004 hearing, Judge Melville opened the grand jury's ten-count felony indictment against Jackson. The indictment alleges, among other things, conspiracy to commit the crimes of child abduction, false imprisonment, and extortion; commission of a lewd act upon a child; and administering an intoxicating agent to assist in the commission of a felony. The court redacted key portions of the indictment, however, such as the names of the alleged co-conspirators and seven pages listing the twenty-eight overt acts relating to the alleged conspiracy.

On June 8, 2004, the court denied the media coalition's motion to unseal the remaining portions of the indictment, re-adopting its findings from a January 2004 order sealing warrant materials that cited a concern for the integrity of the jury pool and the privacy of the alleged victim.

On July 27, 2004, at a hearing regarding Jackson's motion to dismiss the indictment, Senior Deputy District Attorney Gordon Auchincloss detailed in open court many of the alleged overt acts. Nevertheless, as trial approaches, the indictment remains partially under seal.

More generally, the trial court has adopted – over the repeated objections of the media coalition – procedures that in effect require every document of substance to be filed under seal in the first instance, along with a motion to seal, and those documents are presumed to be secret until the court rules otherwise.

As part of this process, the trial court has established a categorical rule that bans public filing by the parties of records containing what it has defined to be "sensitive material," including any part of a motion or brief that might reveal the substantive allegations of the felony charges, the identity of any potential witness or alleged co-conspirators, or the evidence, and it vets each document to redact such information before public release. As a result, several key documents in the case have been partially sealed, including the above-mentioned portions of Jackson's grand jury indictment, dozens of search warrants and related materials, and major portions of Jackson's motion to dismiss the indictment and related briefs.

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***The trial court has adopted – over the repeated objections of the media coalition – procedures that in effect require every document of substance to be filed under seal.***

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### ***People v. Michael Jackson***

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On July 23, 2004, the media coalition filed an appeal in the California Court of Appeal contesting this procedure adopted by the trial court, as well as its practice of conducting closed hearings without any prior notice to the public. The media coalition contended that the trial court's approach to secrecy conflicted with the requirements of the First Amendment to the United States Constitution; Article I, Section 2 of the California Constitution; California statutory and common law; and the California Rules of Court governing the sealing and unsealing of court records.

The Court of Appeal has scheduled oral argument for February 9, 2005.

### ***Issues Arising on the Eve of Trial***

In the trial court, jury selection is scheduled to begin on January 31, 2005. In anticipation of the start of trial, the Santa Barbara County District Attorney has caused an order to be issued from a state trial court in New York requiring journalist Martin Bashir to appear and testify in Santa Maria regarding his newsgathering and reporting in connection with his documentary "Living with Michael Jackson."

Noting that seven months of interviews by Bashir were distilled into a two-hour documentary, the District Attorney seeks information that was not included in the public broadcast that aired in the United States in February 2003. Bashir, therefore, filed a motion on January 18, 2005, invoking the California journalists' shield laws – Article I, Section 2(b) of the California Constitution and section 1070 of the California Evidence Code – which provide absolute protection from contempt for any television reporter who, when subpoenaed in a criminal action by the prosecution, declines to disclose either his sources or unpublished information obtained during newsgathering.

Bashir's motion asks the court to issue a protective order precluding him from being compelled to testify and clarifying that the court's broad Protective Order, issued on January 16, 2004 and barring any subpoenaed person from discussing a wide range of information related to the case, does not apply to Bashir, who is scheduled to report on the trial for ABC.

The Santa Barbara County District Attorney also has filed several motions in advance of trial, including a motion asking Judge Melville to authorize the District Attorney to present to the jury evidence of Jackson's alleged prior sexual offenses, pursuant to sections 1108(a) and 1101(b) of the California

Evidence Code. The December 10, 2004 motion, a redacted version of which was released to the public four days later, invokes an exception under the California Evidence Code that allows the prosecution to use evidence of other sexual offenses to establish the propensity of the defendant charged with a sexual offense to have engaged in the conduct of which he is accused.

Jackson opposed the District Attorney's motion and also filed his own motion asking Judge Melville to close the hearing on the District Attorney's motion, as well as every other pre-trial hearing on the admissibility of evidence. Jackson argued that public access to the admissibility hearings would prejudice the jury pool and undermine his ability to receive a fair trial. The media coalition, and even the District Attorney, opposed Jackson's motion to close the various proceedings. The media coalition relied primarily on *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 20 Cal. 4th 1178 (1999), the seminal public access decision by the California Supreme Court that rejected precisely the approach advocated by Jackson and established strict standards under the First Amendment and California law for closure of all or any part of a judicial hearing.

At a hearing on January 12, 2005, Judge Melville agreed with the media coalition that *NBC Subsidiary* required public access. He deferred the hearing on the District Attorney's "other acts" motion until after a jury is empanelled, but made clear that the parties would have to meet the *NBC Subsidiary* tests to achieve even partial closure. In response to an inquiry at the hearing by counsel for the media coalition, Judge Melville also indicated that he intended to hold the upcoming jury voir dire in open court.

Nevertheless, battles over secrecy likely will continue even after the trial begins. On January 18, 2005, for example, the District Attorney filed a motion asking Judge Melville to exclude the public during childrens' testimony at trial.

*Theodore J. Boutrous, Jr., is a partner in the Los Angeles office of Gibson, Dunn & Crutcher LLP and Co-Chair of the firm's Media Law Practice Group; Michael H. Dore is an associate in the firm's Los Angeles office and member of the group. The authors represent a coalition of major media organizations in the pending Michael Jackson criminal case, as well as journalist Martin Bashir in his efforts to obtain a protective order precluding him from being required to testify in the case.*

## Ninth Circuit Affirms Dismissal of Evel Knievel Libel Suit

By Nathan Siegel

Citing online slang dictionaries along with more traditional legal sources, the Ninth Circuit affirmed the dismissal of a defamation suit brought by famed daredevil Evel Knievel against ESPN. *Knievel v. ESPN, Inc.*, 393 F.3d 1068 (9th Cir. 2005) (Tashima, C.J.). Available online [here](#).

Along with Texas Supreme Court's recent opinion in *New Times v. Isaaks*, 146 S.W.3d 144, 32 Media L. Rep. 2480 (Tex. 2004), the case represents a significant reaffirmation of the broad protection the First Amendment provides for attempted humor and satire. Put more simply, the case reaffirms that you don't have a cause of action just because you can't take a joke.

### *The Knievel Photo and Caption*

The case arose out of a picture and caption on the ESPN-owned website EXPN.com, a site dedicated to extreme sports and its largely youthful fans. The picture appeared in the middle of a montage of 17 photos of celebrities taken at the 2001 ESPN Action Sports and Music Awards. The photos all had humorous captions, many using sexual innuendo to poke fun at the celebrities in the pictures.

The picture at issue showed Evel Knievel with his arms around two younger women (one then his wife). The caption read, "Evel Knievel proves that you're never too old to be a pimp." Both Knievels sued ESPN, alleging that the caption accused Evel of criminal activity and his wife, by implication, of being a prostitute. The district court granted ESPN's motion to dismiss, *Knievel v. ESPN, Inc.*, 223 F. Supp. 2d 1173 (D. Mont. 2002) and the Knievels appealed.

### *The Procedural Issues*

The majority first disposed of the Knievels' argument that a provision of the Montana Constitution guaranteed them a jury trial on the issues raised in ESPN's motion to dismiss. The provision states that in defamation cases "the jury, under the direction of the court, shall determine the law and the facts." Mont. Const. art. II, § 7.

The Court found that the Knievels' interpretation of this clause has been repeatedly rejected by the Montana Supreme Court. *Id.* at \*9-11. That Court has consistently held that the clause does not preclude trial judges from determining issues of law on pre-trial motions, including the question of whether a publication is reasonably susceptible to a defamatory meaning.

Moreover, even if that were not the case, the *Erie* doctrine requires federal courts to apply federal procedure, which permits trial judges to determine whether a complaint fails to state a claim as a matter of law regardless of the nature of the case. *Id.* at \*12.

Before turning to the merits, the Court next engaged in an extensive discussion of the circumstances under which trial courts may consider materials not contained in the complaint on a Rule 12(b)(6) motion to dismiss.

In this case, the Complaint only contained the Knievel photo in isolation. In order to demon-

strate the context necessary to interpret the Knievel photo, ESPN attached to its motion papers the other 16 photos and captions that appeared along with it, as well as the web pages that any viewer would have to access to reach the photo montage. The Court found that the material could be considered pursuant to the "incorporation by reference" doctrine, whereby documents upon which a plaintiff's claim depends may be considered if their authenticity is not disputed. *Id.* at \*20-22.

### *The Caption was a Joke*

On the merits, the Court held that the use of the term "pimp" in this context was attempted humor protected by the First Amendment because it could not reasonably be understood to state actual facts about the Knievels.

Since the word "pimp" has come to have a common, complimentary meaning in contemporary youth slang (meaning "that the person is cool"), the Court recognized that the caption "was most likely intended as a compliment." *Id.* at \*15. At a minimum, however, the majority held that in

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***The Court held that the use of the term "pimp" in this context was attempted humor protected by the First Amendment because it could not reasonably be understood to state actual facts about the Knievels.***

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(Continued on page 12)

**9th Circuit Affirms Dismissal of Evel Knievel Libel Suit***(Continued from page 11)*

context the caption could not reasonably be taken literally as an accusation of criminal activity.

The majority reached that conclusion by applying the Ninth Circuit's version of the three-part "totality of the circumstances" test applied in most Circuits to determine whether a statement can reasonably be interpreted as a factual assertion. That test looks at the broad context in which the statement appears, its specific context and content and whether the statement is factually verifiable. *Id.* at 16.

The Court recognized that while in isolation the word "pimp" could be defamatory, its use on a website and as part of a photo montage filled with loose, figurative, and risqué slang and humor made it obvious that the caption was intended to be a joke.

The Court evidently enjoyed the opportunity to launch into a near-exegesis of some of the slang terms appearing in close proximity to the Knievel photo, citing online dictionaries to explain the various meanings of phrases like "rollin' deep," "kickin' it," "kick flavor" and "throwing down a pose." *Id.* at \*23-25.

***The Dissent***

Judge Carlos Bea issued a lengthy and vigorous dissent arguing that the photo could reasonably be understood literally by persons unfamiliar with youth slang, which Judge Bea quite plainly finds to be offensive.

Judge Bea placed particular emphasis on the fact that the Complaint alleged that Knievel had lost corporate sponsorships as a result of the photo, suggesting that persons such as the "dowdy corporate bourgeois," *Id.* at \*43, and "adolescents brought up in traditional or religious families, where modesty and decency are core values," *Id.* at \*41 n.5, could have failed to recognize the supposed joke.

The Knievels have filed a petition for rehearing *en banc*.

*Nathan Siegel of Levine Sullivan Koch & Schulz LLP, with Peter Michael Meloy and Jennifer S. Hendricks of Meloy Trieweiler in Helena, MT., represented ESPN. Wade J. Dahood of Knight, Dahood, Everett & Sievers, Anaconda, MT, represented the Knievels.*

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## Sixth Circuit Affirms Dismissal of Libel Claim Over Rap Lyrics

The Sixth Circuit affirmed dismissal of a libel claim over the lyrics of a rap song, finding that the lyrics were typical hyperbole of the genre and did not represent actual, objectively verifiable facts. *Boladian v. UMG Recordings, Inc.*, No. 03-2148, 2005 WL 14981 (6th Cir. Jan. 3, 2005) (Norris, Cook, Beckwith, JJ.). Available online [here](#).

### ***Plaintiff Claims Rap Lyrics Were Defamatory***

Plaintiff, record executive Armen Boladian, brought suit against UMG Recordings, Inc., Universal Music & Video Distribution, Corp., the rapper Warren Griffin III and distribution company Meijer, Inc., alleging that lyrics contained in a rap song defamed him, invaded his privacy, caused him emotional distress, and unjustly enriched defendants.

Specifically, plaintiff took issue with a song entitled “Speed Dreamin” written by defendant Griffin and sung by “funk” musician George Clinton. Clinton feuded with Boladian in the past over ownership rights of prior recordings.

Plaintiff alleged that a reference in the lyrics to “Armen” would be understood by listeners to refer to plaintiff and that the following verse was false and defamatory:

*Heres to that someone who cant take the puresure. Mercy for that poor fu who made the news Who feel pissed on that insist on killing all men cant take the sorrow of the horrors of his abuse It ain't worth the sorrows to cuase the death ..... all men Hes a discrase to the species in to his face with some feacias Big nose mothafucka got it comin' . . . .*

In addressing plaintiff’s allegations, the court first recognized that a defamation claim must implicate statements that “state actual, objectively verifiable facts about plaintiff,” and that “[e]ven speech that is crude – what the Court calls ‘rhetorical hyperbole,’ ‘vigorous epithet,’ and ‘loose, figurative, or hyperbolic language’ – merits protection.” *Citing Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17-21 (1990).

In the instant case, the court found that none of the

lyrics cited by plaintiff amounted to a “specific allegation” that could be proven, but instead were the type of “loose, figurative” language protected under *Milkovich*, and represented the kind of “puerile taint that, for better or worse, is typical of rap music.”

The court distinguished plaintiff’s claim from an earlier defamation action upheld over lyrics in a song by pop artist George Michael, finding that while the lyrics in Michael’s song pertained to a specific event that had occurred between the artist and plaintiff police officer, the lyrics in the Griffin song did not pertain to facts “susceptible to verification.” *Citing Rodriguez v. Panayiotou*, 314 F.3d 979 (9th Cir. 2002).

### ***Claims Subject to Diversity Jurisdiction***

The appeals court additionally upheld the district court’s finding that it had diversity jurisdiction, notwithstanding plaintiff’s joinder of a non-diverse Michigan music distributor. While plaintiff claimed that the inclusion of the distributor defeated diversity jurisdiction, the district court accepted defendant’s claim that joinder of the company was fraudulent and that under state law a defamation claim could not have been sustained against the company.

The appeals court found that under Michigan law, a distributor of allegedly libelous materials would only be liable for defamation upon proof that the distributor knew or should have known of the material’s defamatory content.

Holding otherwise, the court noted, would place a duty on retailers of books and music to screen the products for potentially defamatory material, a burden that would not only be “onerous,” but could “potentially have a chilling effect upon protected speech because retailers, in an abundance of caution, might stop selling some categories of artistic product, such as rap music, to avoid liability” (citations omitted).

Finding that plaintiff had failed to allege that Meijer reviewed or had knowledge of the lyrics at issue, the appeals court affirmed the finding of diversity jurisdiction.

Plaintiff was represented by Richard S. Busch and Jeannine Huber, of King & Ballow, Nashville, TN. Defendants were represented by Daniel D. Quick and Michael D. Socha of Dickinson, Wright, of Bloomfield Hills, MI.

## “Extortion” in Context of Heated Litigation is Non-actionable Opinion

A Washington appellate court affirmed dismissal of a defamation claim against a weekly newspaper, finding as a matter of law that in the context of a heated litigation the use of the word “extortion” and related remarks were all non-actionable opinion. *Pinney v. Nordstrom, Inc.*, No. 52973-1-I, 2004 WL 2651521 (Wash. Ct. App. Nov. 22, 2004) (Baker, J.). Available online [here](#).

### Background

Plaintiff Stacy Pinney brought suit against Index Newspapers, LLC, d/b/a/ [*The Stranger*,] after the newspaper published an article detailing her lawsuit for sexual harassment against Nordstrom, Inc. and company official Peter Nordstrom.

Under the headline “Uncomfortable Suit: Nordstrom Challenges Sexual Harassment Allegations,” the article featured a number of statements by a Nordstrom representative that Pinney alleged were defamatory.

Specifically, Pinney claimed that she was falsely accused of a crime because of the statement that “the company says the case is an attempt at extortion;” that the article implied she lied during a judicial proceeding through the statement that “the company calls her story ‘revisionist history;” and that she was accused of being a gold-digger motivated by financial gain because of the representative’s comment that “we think [Peter Nordstrom] is being preyed upon because of his name and his financial position.”

The trial court granted defendants’ motion for summary judgment.

### Court Focused on Context of Statements

In analyzing the statements at issue, the appellate court adopted the trial court’s reasoning that “the context of the article” would be of “paramount importance” in completing its analysis.

The court found that while *The Stranger* characterized the article as a “news” story, “because the context of this article is a lawsuit and the statements come from

an entrenched defendant, no reasonable reader would have interpreted the statements as fact.” Instead, reasonable readers would recognize the statements as those made by a litigant at the outset of a judicial proceeding, and would thus expect “fiery rhetoric or hyperbole.”

Similarly, the court rejected plaintiff’s argument that a triable issue was raised by the use of the word “extortion” in the article – which plaintiff alleged implied she committed the crime of extortion. Reviewing Iowa, Illinois, and California case law proffered by plaintiff, the court distinguished them because the cases cited involved explicit accusations of extortion that could be interpreted as factual allegations. In contrast, plaintiff’s accuser was a “combative” litigant from

whom readers would – again – expect only rhetoric and hyperbole.

Finally, the court rejected plaintiff’s argument that even if the statements at issue were not of false fact, they implied false fact, based on “1) a reference to ‘sealed court filings,’ 2) Nord-

strom, Inc.’s representative’s statement that “[t]here are times when you have to stand up and defend yourself,” 3) the fact that the article did not reveal what threat Pinney must have made to commit extortion, and 4) the implication by analogy that undisclosed facts support the idea that Pinney is shaking down Nordstrom.”

The court’s conclusion once again centered on its finding that the statements in the article, made by the representative of a defendant in a sexual harassment suit, would be understood as expressing the litigant’s opinion of the lawsuit at issue and not interpreted as fact.

Holding that the statements at issue were opinions as a matter of law, the court affirmed the dismissal of plaintiff’s defamation and false light claims.

*The Stranger* was represented by Judith A. Endejan of Graham & Dunn PC, Seattle, Wa. Plaintiff was represented by Abraham Albert Arditi, Seattle, Wa.

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**Reasonable readers would recognize the statements as those made by a litigant at the outset of a judicial proceeding, and would thus expect “fiery rhetoric or hyperbole.”**

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## Michigan Court Reinstates Privacy Claims Over Filming in Hospital Emergency Room

Illustrating the perils of filming in hospitals, a divided Michigan Court of Appeals reinstated invasion of privacy claims against WJRT-TV, an ABC affiliate in Flint, Michigan, for videotaping inside a hospital emergency room for a documentary entitled “A Brush With Death, A Night in the E.R.” *Stratton v. Krywko, et al.*, No. 248669, 248676 2005 WL 27522 (Mich. App. Jan. 6, 2005). Available online [here](#).

In a per curiam opinion from Judges Sawyer and Smolenski the court affirmed dismissal of a variety of claims, including libel, false light and negligence against the WJRT defendants; and negligence and malpractice claims against hospital defendants, but went on to hold that plaintiff had triable claims for publication of private facts and intrusion against WJRT-TV and the reporter, anchor and coordinator who produced the documentary.

The court ruled that reasonable minds could differ as to whether the doctor’s statement during the broadcast, that plaintiff was “on Prozac,” was of a legitimate public interest and therefore could amount to an actionable disclosure of a private fact, notwithstanding that many of plaintiff’s friends apparently knew she took the medication. The court also reinstated the intrusion claim, finding that filming plaintiff in an emergency room after she refused to sign a release could be offensive and unreasonable.

### **Background**

In 2000, the media defendants obtained approval from the local sheriff’s department and hospital to produce a news documentary on trauma care. The media defendants were allowed to ride along with a paramedic crew and they agreed to work with the Hospital to seek releases from anyone filmed inside the hospital emergency room.

Plaintiff was injured in a car accident on November 17, 2000, when she and a friend collided their cars on a snowy ride while driving home after some drinks at a local bar. A reporter was riding along with the paramedic unit that responded to the scene. Plaintiff was filmed at the accident scene, in the ambulance and in the hospital emergency room.

Plaintiff refused to sign a release at the hospital. Images of plaintiff in the emergency room were included in the

broadcast, but were obscured by “digitization.” Plaintiff alleged, however, that she was still recognizable. A doctor could be heard referring to her by her first name “Jessie” and could be heard telling other members of the trauma team, “no allergies, on Prozac.” Plaintiff also complained that another doctor was shown discussing her x-rays and cat scans, and alleged that her name and address could be seen on the paramedic’s report that was shown on the video.

Plaintiff brought a variety of claims against the WJRT defendants and the hospital, including defamation, false light, intentional infliction of emotional distress, negligence, conspiracy, intrusion and publication of private facts.

### ***Trial Court Dismissed All Claims***

The trial court granted summary judgment to the WJRT defendants and the hospital defendants, dismissing plaintiff’s suit in its entirety. As to the WJRT defendants, the trial court found that the police sergeant’s statement that plaintiff was “drunk” was supported by public records and not materially false. The court dismissed plaintiff’s privacy claims, finding that the information at issue was either a matter of public record or not private and filming was not unreasonable where the hospital did not object to it.

The court also dismissed a negligence claim against the WJRT defendants for failing to follow state and federal medical privacy laws, ruling that such laws were not applicable to the media or general public.

The trial court also granted summary judgment to the hospital defendants on all claims, finding, in part, that they owed no duty to plaintiff to control the WJRT defendants’ broadcast.

### ***Private Facts?***

Reviewing plaintiff’s private facts and intrusion claims, the Michigan Court of Appeals first agreed that much of the information disclosed in the broadcast was a matter of public record. For example, information about her accident, identity and physical condition all came

*(Continued on page 16)*

### Michigan Court Reinstates Privacy Claims Over Filming in Hospital Emergency Room

(Continued from page 15)

from a public police report and were part of a public accident scene. The appeals court also agreed that broadcasting plaintiff's x-ray and cat scan was not private information. (The trial court described these as merely "shadows and marks on a screen.")

But the court reinstated a claim over the disclosure that plaintiff was "on Prozac." First, the court found that this information was not necessarily public as a matter of law even though plaintiff had disclosed it to close friends and family.

Moreover, the court found the disclosure was not necessarily newsworthy, ruling that under Michigan law "not only must the overall subject matter be newsworthy, but also the particular facts revealed." *Citing Winstead v. Sweeney*, 517 N.W.2d 874 (Mich. App. 1994).

Thus, while the documentary on emergency treat-

ment was undoubtedly newsworthy, "reasonable minds" could disagree on whether the specific information that plaintiff was "on Prozac" was newsworthy.

#### **Intrusion**

Finally, the court reinstated the intrusion claim against the WJRT defendants. The court found that under an objective standard filming in the emergency room when the plaintiff declined to consent could be objectionable to a reasonable man.

In dissent, Judge Murray did not address the merits but found that plaintiff's invasion of privacy arguments were not properly preserved for appeal.

The WJRT-TV defendants are represented by James Stewart and Laurie Michelson of Butzel Long, Detroit, MI. Plaintiff is represented by Carol Holmes of Carol Holmes, P. C., Lake Orion, MI.

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## Directed Verdict Dismissing Plumber's Libel Claim Affirmed

Last month, the Michigan Court of Appeals unanimously affirmed a directed verdict in favor of the *Lansing State Journal*, a Gannett-owned daily newspaper, and columnist John Schneider, on a libel claim over columns about a plumbing bill. *Armour v. Federated Publications, Inc.*, No. 245361, 2004 WL 2754682 (Dec. 2, 2004) (unpublished) (Griffin, Saad, O'Connell, JJ.). Available online [here](#).

Plaintiff, the owner of a plumbing business, sued the paper over three newspaper columns that questioned his bill of \$329 to an elderly widow for replacing the flapper and ballcock on her toilet. Plaintiff claimed that while the columns were literally true they were defamatory because they omitted the fact that plaintiff performed additional repairs on the toilet, claiming the columns gave readers the false impression he was a thief who overcharged an elderly woman.

The case went to trial in November 2002. After plaintiff presented his case over eight days, Ingham Circuit Court Judge Brown granted a directed verdict to the defendants.

In a per curiam decision the Michigan Court of Ap-

peals affirmed, finding that the columns were substantially true. The evidence at trial showed that plaintiff's extra repair work only began after the elderly widow was presented with the \$329 bill. According to the court, the sting or gist of the articles – that plaintiff's company would charge \$329 to replace a few parts in a toilet tank – was substantially true notwithstanding the omission of plaintiff's extra repairs.

Defendants were represented at trial by Charles Barbieri and Webb Smith of Foster, Swift, Collins & Smith in Lansing. Plaintiff was represented by Eric Clark in Livonia, Michigan.

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## Environmental Group Hit With \$600,000 Jury Libel Verdict

On January 21, a Tucson jury returned a \$600,000 verdict in favor of a rancher and his cattle company in a libel suit against an environmental group that criticized his management of grazing lands. *Chilton v. Center for Biological Diversity, et al.*, No. C20033724 (Ariz. Super. Ct., Pima County Jan. 21, 2005) (jury verdict).

The jury awarded rancher Jim Chilton and his company \$100,000 in actual damages and \$500,000 in punitive damages against the Center for Biological Diversity and several individual members.

At issue was a July 2002 press release and accompanying photographs published on the group's website – [www.biologicaldiversity.org](http://www.biologicaldiversity.org). The group alleged Chilton mismanaged a 21,500 allotment of grazing land. Many of the photos showed barren patches of land that had purportedly been over grazed by cattle. The group had previously opposed the renewal of plaintiff's grazing rights.

Plaintiff alleged that the allegations of mismanagement were false and that the photos were intentionally cropped to create a false impression. Defendants argued that the press release was true, protected opinion and/or not deliberately false.

The trial judge, Pima County Superior Court Judge Richard Fields, ruled that plaintiff was a public figure due to his prominence as a rancher and his wife's position as Chair of the Arizona Game and Fish Commission. The

defendants had also strongly opposed her appointment to the position.

According to one news report, the two-week trial was an "ode to the ranching lifestyle, plus dry testimony on the labyrinth of public-lands policymaking." See, e.g., [www.dailystar.com/dailystar/dailystar/58068.php](http://www.dailystar.com/dailystar/dailystar/58068.php).

Witnesses for plaintiff testified that the defendants ignored scientific studies favoring plaintiff's grazing practices and that the press release damaged the value of the grazing allotment by at least \$200,000. Plaintiff's wife testified that her husband suffered insomnia and stomach aches after the press release was issued. And plaintiff's lawyer accused defendants of having an anti-grazing agenda and contempt for plaintiff's way of life.

The defendants argued, among other things, that all the statements in the press release were true or conclusions of opinion and that the photos were not misleading because they depicted actual "hot spots." Moreover, even if some of the photographs depicted land outside of plaintiff's allotment it was an honest mistake.

The jury deliberated for 2 ½ hours before rendering a 10-1 verdict in favor of plaintiff.

Plaintiff was represented by Kraig Marton of Jaburg & Wilk, P.C. in Phoenix, AZ. Defendants were represented by Robert Royal of Tiffany & Bosco, P.A., Phoenix, AZ.

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## Directed Verdict in Cable Comments Case

After a day and a half of testimony, an Indiana judge issued a directed verdict for the host of a cable television program in a suit brought by the retired, 28-year-veteran assistant police chief of Portage, Ind., who also served on the city council for 12 years, eight of them as president. *Jarosak v. Bloyer*, Cause No. 64D01-9911-CP-2450 (Ind. Super. Ct., Porter County directed verdict entered Jan. 25, 2005).

The directed verdict came ten months after a mistrial was declared on the second day of the first trial sitting, after the plaintiff's lawyer fell ill. *Jarosak v. Bloyer*, Cause No. 64D01-9911-CP-2450 (Ind. Super. Ct., Porter County mistrial declared March 25, 2004).

The lawsuit alleged that Gordon Bloyer, who hosts

two talk shows on public access cable, had falsely stated during shows in April 1998 and June 1999 that Ted Jarosak was reprimanded after he was found in the back seat of his police car with a teenage girl, and that he had pointed a gun at his ex-wife's head.

In opening statements, Bloyer's attorney argued that the report on the incident with the woman was substantially true and that the allegation regarding the gun threat was made based on information from a reliable, confidential source.

During the plaintiff's case at trial, Bloyer testified that he had confidential sources for both statements, and that he had believed the statements to be true. He did not call Jarosak to verify the information.

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### Directed Verdict in Cable Comments Case

*(Continued from page 17)*

Jarosak testified that he had been suspended from his police job for one day after he hugged and kissed a 22-year-old woman in the front seat of her car, while he was in uniform, working off duty at private security job. His two ex-wives testified that he had never pointed a gun at either of them.

But at the close of plaintiff's case, Special Judge E. Duane Daugherty granted a defense motion for a directed verdict, holding that plaintiff had not shown any evidence of actual malice. Daugherty had previously

rejected a defense motion for summary judgment and a motion for judgment on the pleadings.

Daugherty also denied a defense counterclaim for attorney's fees, although the defense also filed a post-trial motion under an Indiana statute which allows for reimbursement of \$1,000 in fees after a plaintiff rejects a qualified settlement offer.

Bloyer was represented by Garrett Conover of Kopka Pinkus Dolin & Eads in Crown Point, Ind. The plaintiff was represented by Janice Gambill of Portage, Ind.

*Available in January 2005*

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## Minnesota Court of Appeals Affirms Dismissal of “Conspiracy Debunker’s” Libel Suit

By John Borger

A Republican former prosecutor who launched an Internet chat group to debunk conspiracy theories regarding the death of former U.S. Senator Paul Wellstone in an airplane crash shortly before the 2002 elections made himself a public figure – a status that doomed his defamation suit when the target of his criticism called him an incompetent lawyer who had been accused of sexual harassment and had been deprived of the right to practice law. *Thomas J. Bieter v. James H. Feltzer, et al.*, No. A04-1034, 2005 WL 89484 (Minn. App. Jan. 18, 2004) (Shumaker, J.). Available online [here](#).

The Minnesota Court of Appeals affirmed summary judgment in favor of the conspiracy theorist, his employer, and the alternative newspaper that published his theories. The court found that none of the defendants’ statements had been made with actual malice. Judge Gordon Shumaker wrote the decision for a unanimous court that included Chief Judge Edward Toussaint and Judge Jill Flaskamp Halbrooks. The unpublished decision is a welcome affirmation of well-established legal principles in the context of largely online public debate.

### Background

Defendant James Feltzer, a philosophy professor at the University of Minnesota-Duluth, published articles in a Duluth alternative newspaper called the *Weekly Reader* in which he speculated that high-level Republican government officials, particularly Dick Cheney, Donald Rumsfeld, and Karl Rove, might have been involved in the sabotage of Wellstone’s airplane.

Plaintiff Thomas Bieter started an internet chat group called “FETZERclaimsDEBUNK” to provide discussion, and refutation, of Feltzer’s assassination claim. Feltzer and Bieter frequently exchanged messages through Bieter’s chatline.

Bieter sued Feltzer and others because of statements Feltzer made in newspaper articles and on the chatline.

The Court of Appeals found that a public controversy existed: Feltzer had made his conspiracy claims in a public newspaper and on an internet source readily

available to the public, and public officials had raised similar questions about the airplane crash in other fora.

The conspiracy discussion clearly qualified as a public controversy. As the Court of Appeals observed in understated fashion: “the alleged assassination of a public official by members of a rival political party is a matter of grave concern for the entire nation and thus clearly qualifies as a public controversy.”

### Plaintiff Thrust Himself into Controversy

Bieter’s own online activities showed that he had thrust himself into the controversy, because he formed the chatroom that invited a discussion and refutation of Feltzer’s claim and participated fully in that chatroom. Although Bieter complained that Feltzer’s counterstatements about him took on a personal quality rather than centering on analysis of the issues, the Court of Appeals applied well-established law that an individual’s personal features and background may relate to the public controversy, and pointed out that Bieter himself “repeatedly presented himself as a ‘former criminal prosecutor’ and as someone who has specialized talents in evaluating evidence. In his effort to ‘debunk’ Feltzer’s theory, plaintiff vaunted his credentials and thereby placed his credibility at issue in the controversy.”

### No Actual Malice

The court found that Feltzer had not acted with actual malice when he called Bieter “incompetent” despite a past friendship and attorney-client relationship that (according to Bieter) should have made Feltzer aware of Bieter’s competence as an attorney. The court explained:

Competence in a profession is not an absolute that, once acquired, exists permanently. A lawyer can be thoroughly competent in his or her field of expertise and not competent outside that field. There is nothing in the record to suggest that Bieter had acquired any legal expertise in investigating or evaluating the causes of airplane crashes. To the extent that Feltzer questioned Bieter’s competence on the issue of the cause of the Wellstone crash,

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### Minnesota Court of Appeals Affirms Dismissal of “Conspiracy Debunker’s” Libel Suit

*(Continued from page 19)*

there are no facts from which actual malice can reasonably be inferred.

Fetzer’s statements that Bieter had been forced into retirement were “not baseless,” the court held. Official information established that Bieter was faced with the prospect of significant discipline when he agreed to a compromise that entailed the surrender of his license to practice law.

The court further held that Fetzer’s accurate statement that Bieter had been “charged with sexual harassment” could not support an inference of actual malice, even though the charge had been dismissed.

Applying established principles of group libel, the court held that Bieter, as a Republican, was not defamed

by Fetzer’s attacks on Republicans generally. The court disposed of Bieter’s other legal theories (unspecified in the opinion) in summary fashion, because they all were premised on the validity and viability of the defamation claim and failed along with that claim.

Bieter represented himself on appeal. Fetzer and University-related defendants were represented by University of Minnesota General Counsel Mark Rotenberg and associate general counsel Lorie Gildea. Greg C. Gilbert of Johnson, Killen & Seiler in Duluth, MN, represented defendant Assassination Research, Inc. (Fetzer’s business incarnation).

*John Borger is a partner with Faegre & Benson LLP in Minneapolis, MN.*

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## Reporter's Conduct Does Not Constitute Intentional Interference With Contract

By Slade R. Metcalf and Jeffrey O. Grossman

A newspaper reporter did not intentionally interfere with a professional athlete's contract by obtaining, from the organization that employed the athlete, information allegedly made confidential under the athlete's contract, nor by writing articles allegedly affecting the athlete's relationship with his team. *Sprewell v. NYP Holdings, Inc.*, No. 12292312002 (N.Y. Sup. Ct. Nov. 5, 2004) (Friedman, J.).

On November 5, 2004, a New York State judge denied the athlete's motion to add claims for intentional interference with contract based on such conduct to his defamation complaint against NYP Holdings, Inc., the publisher of the *New York Post*, and a *Post* sports reporter, Marc Berman, finding that the allegations were "insufficient as a matter of law to plead a cause of action."

The decision is one of only a handful that directly addresses the application of the tort of intentional interference with contractual relations in the context of journalistic activities.

### Background

The issue arose in a libel case brought by professional basketball player Latrell F. Sprewell based on several October 2002 articles concerning Sprewell's arrival at training camp with a broken bone in his hand.

The *Post* articles reported that, according to two confidential eyewitnesses, Sprewell had sustained the injury approximately ten days earlier during a party on his yacht on the Milwaukee lakefront when he took a swing at a guest, missed, and hit the wall instead. Sprewell's lawsuit alleged that this account of his injury was false. He also alleged that the Knicks subsequently fined him not because of his failure to report his injury in a timely manner (as the Knicks had asserted), but because of the *Post* articles.

During the course of discovery, Sprewell sought permission from the court to add claims that Berman (and NYP vicariously as his employer) had interfered with Sprewell's contract by contacting a confidential source at the Knicks for confirmation as to the type of hand fracture Sprewell had suffered.

Sprewell alleged that the release of such information by the source violated confidentiality provisions of the Collec-

tive Bargaining Agreement governing certain aspects of Sprewell's relationship with his team, and that the reporter's contact constituted an intentional inducement of that breach. Sprewell also argued that the *Post* articles reporting on his injury interfered with his contract by "calling into question" his explanation to the Knicks about how the injury was suffered.

Defendants opposed the motion to amend, arguing that the claims were insufficient as a matter of law.

### Tortious Interference Law

Under New York law, the tort of intentional interference with contract requires

- (1) "the existence of a valid contract between the plaintiff and a third party;"
- (2) "defendant's knowledge of that contract";
- (3) "defendant's intentional procurement of the third party's breach of the contract without justification";
- (4) "actual breach of the contract"; and
- (5) "damages resulting therefrom." *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424, 646 N.Y.S.2d 76, 82 (1996).

Defendants argued, among other things, that the third element required any interference to be "intentional, not merely negligent or incidental to some other, lawful, purpose," *Alvord & Swift v. Stewart M. Muller Constr. Co.*, 46 N.Y.2d 276, 281, 413 N.Y.S.2d 309, 312 (1978), and that even if the reporter's contact with the source was deemed to be interference, it was merely "incidental to the lawful purpose of obtaining the sought after information." *Trachtman v. Empire Blue Cross & Blue Shield*, 251 A.D.2d 322, 673 N.Y.S.2d 726 (2d Dep't 1998).

In *Trachtman*, a New York appellate court affirmed the dismissal of a doctor's interference claim, which had alleged that an insurance company interfered with his contracts with his patients by contacting those patients for information during an anti-fraud review.

Defendants also argued that the reporter's conduct was not merely incidental to a lawful purpose, but to a purpose – gathering and reporting news – that is protected by the First Amendment to the United States Constitution. *See Huggins v. Povitch*, No. 131164/94, 1996

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## Reporter's Conduct Does Not Constitute Intentional Interference With Contract

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WL 515498, \*9-10 (Sup. Ct. N.Y. Co. April 19, 1996); *Huggins v. National Broadcasting Co.*, No. 119272/95, 1996 WL 763337, \*4 (Sup. Ct. N.Y. Co. Feb. 7, 1996).

In both *Huggins* cases, the court dismissed claims that the press had intentionally induced an actress to breach the confidentiality provisions of her divorce settlement agreement by putting her on the air to talk about her ex-husband; both cases cited to the countervailing First Amendment interests as rendering the claims deficient with respect to essential elements.

Defendants also pointed out that the Supreme Court had recognized that asking questions of sources was a "routine newspaper reporting technique," see *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979), and that, at least in the case of the press' mere receipt of information, the Supreme Court had struck down laws imposing penalties for the public disclosure of illegally intercepted cell phone calls even when liability was to be imposed only on disclosing parties who were deemed to have reason to know that the calls were illegally intercepted. See *Bartnicki v. Vopper*, 532 U.S. 514, 525, 534-35 (2001).

In response, Sprewell argued that the First Amendment does not immunize journalists from liability for breach of neutral laws of general applicability, citing *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). *Cohen* held that liability could be imposed on journalists under the doctrine of promissory estoppel for breach of a promise of confidentiality to a source.

Sprewell argued that the reporter's conduct in actively contacting the source and promising him confidentiality, and plaintiff's allegations concerning the supposedly malicious intent of the reporter in doing so, were sufficient to constitute intentional interference with contract, and that the First Amendment provided no shield for such conduct.

### *No Tortious Interference Claim*

On November 5, 2004, the New York trial court denied Sprewell's motion to amend his complaint to add a tortious interference claim. The court held that such claims were insufficient as a matter of law and "clearly lacking in merit." (Op. at 1-2).

More specifically, the court found that Sprewell's allegations fell "far short of pleading that defendants engaged in any conduct that intentionally or unjustifiably interfered with the contract between plaintiff and the Knicks." (Op. at 2).

There was no intentional or unjustifiable interference, according to the court, because all of the alleged conduct was "merely incidental to defendants' exercise of their constitutional right to broadcast newsworthy information' about a public figure." (Op. at 2 (quoting *Huggins v. NBC*, 1996 WL 763337, \*4)).

*Slade R. Metcalf is a partner and Jeffrey O. Grossman is an associate with Hogan & Hartson LLP. in New York, NY. They represent defendants NYP Holdings, Inc. and Marc Berman in the case.*

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## Georgia Supreme Court Confirms That Anti-SLAPP Statute Contains Both Substantive And Procedural Protections

By Christopher L. Mezell

Last fall, the Georgia Supreme Court unanimously confirmed that Georgia's anti-SLAPP statute (O.C.G.A. § 9-11-11.1) contains independent procedural and substantive protections. *Atlanta Humane Soc'y. et al. v. Harkins*, 603 S.E.2d 289 (Ga. 2004) (Fletcher, C.J.).

### *Humane Society Starts Catfight Over Anti-SLAPP Statute*

In 2002, the Atlanta Humane Society (AHS), besieged by public outcry over its mismanagement of animal control services for Fulton County and the City of Atlanta, brought defamation actions against two of its most outspoken critics on the matter: Barbara Harkins and Kathi Mills.

Harkins, a former AHS employee, provided an "insider" interview during an investigative series prepared and broadcast by WSB-TV, wherein Harkins discussed her experience with the mismanagement of AHS and dissatisfaction with AHS' director (and co-plaintiff) Bill Garrett. Mills, a self-styled "local cat rescuer," openly criticized both the AHS and Garrett on her internet message board.

Both defendants brought motions to dismiss based upon AHS' failure to file affidavits certifying that their claims were not brought for improper purposes under Georgia's anti-SLAPP statute. Because AHS ultimately amended the complaints to include pro forma versions of these required verifications, both trial courts concluded that no further substantive review was required and denied the motions.

On Harkins' interlocutory appeal, however, the Georgia Court of Appeals reversed, holding that the speech in question came within the ambit of the substantive protections afforded by the anti-SLAPP statute. *Atlanta Humane Soc'y. et al. v. Harkins*, 590 S.E.2d 737 (Ga. App. 2003) (A report on this decision was included in the December 2003 MLRC MediaLawLetter).

For similar reasons, the Court of Appeals reversed the *Mills* case as well. See *Atlanta Humane Soc'y. et al. v. Mills*, 591 S.E.2d 423 (Ga. App. 2003). The Georgia Supreme Court granted certiorari and consolidated the cases.

### *Statute Requires Procedural and Substantive Review*

The Georgia Supreme Court has finally ended a long-running debate over the interpretation of Georgia's anti-SLAPP statute. All of the Justices concurred that the statute requires a trial court to conduct both a procedural and a substantive review of a SLAPP suit. Parsing the language of the statute, the Georgia Supreme Court first confirmed that as a procedural matter the statute imposes an absolute verification requirement:

The first two sentences of subsection (b) [of the anti-SLAPP statute] require only that the claimant file a written verification containing several certifications. The third sentence, which requires that the claim be stricken unless verified within ten days, applies if the claim is not verified as required by this subsection. Thus, the third sentence applies whenever a verification fails to comply with each procedural requisite set forth in the first two sentences, regardless of whether the verification is completely omitted or merely deficient upon filing. (internal cites and quotes omitted).

603 S.E.2d at 292.

Thus, the decision makes clear that the trial court must proceed to dismiss the action where a plaintiff has wholly failed to submit the required affidavit within ten days after such omission is called to the plaintiff's attention.

The Georgia Supreme Court further confirmed that the statute also provides significant substantive protections, affirming the Court of Appeals' determination that a "procedurally sufficient filing of a verification does not preclude dismissal if the trial court finds that the claim infringes on the rights of free speech or petition as defined by the statute." *Id.* at 292.

Thus, the mere act of filing a pro forma verification will not allow a claimant to escape the reach of the statute. Georgia's highest court has conclusively established that the statute "contemplates a substantive evidentiary proceeding to determine the truth of the claimant's certifi-

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**Georgia Supreme Court Confirms That Anti-SLAPP Statute Contains Both Substantive And Procedural Protections**

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cations” and that the “trial court may dismiss the claim if it makes a substantive, evidentiary determination that such a claim is falsely verified.” *Id.*

After unanimously establishing the framework for trial court review under the statute, the Court remained divided over the Court of Appeals’ application of the substantive portion.

Despite a dissent by Justice Norman Fletcher (joined by Justice Leah Ward Sears), the majority ultimately determined that the Court of Appeals had failed to properly conduct the substantive review called for by the statute. *Id.* at 293-94. The cases have been remanded to the Court of Appeals with direction to conduct further review of the record in light of the decision.

While this curious litigation continues, Georgia’s highest court has now definitively opined that Georgia’s anti-SLAPP statute contains both procedural and meaningful, substantive protections, thus establishing a judi-

cial obligation to ferret out meritless lawsuits at the trial court level through the direct application Georgia’s anti-SLAPP statute.

Defendant/appellee Barbara Harkins was represented by, Hollie Manheimer, Stuckey & Manheimer of Decatur, Georgia and Gerald Weber, ACLU of Georgia, Atlanta; defendant/appellee Kathi Mills was represented by Alan I. Begner and Katie K. Wood, Begner & Begner, P.C. of Atlanta, Georgia; plaintiffs/appellants Atlanta Humane Society and Bill Garrett were represented by Edward L. Greenblatt, James V. Zito and Janet Leah Bozeman of Lipshutz, Greenblatt & King, Atlanta, Georgia.

*Christopher L. Mezell is an associate in the Atlanta office of Dow, Lohnes & Albertson, PLLC, and, together with Peter C. Canfield and Thomas M. Clyde, filed an amicus brief in the Court of Appeals stage of the case on behalf of WSB-TV.*

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## Girls Gone Wild DVD Not Covered By California Anti-SLAPP Statute

A California appellate court held that the infamous *Girls Gone Wild* DVD series does not fall within the protection of the California anti-SLAPP statute. *Padilla v. MRA Holding*, No. B172540, 2004 WL 2988172 (Cal. App. Dec. 28, 2004) (affirming denial of motion to strike invasion of privacy, false light, unfair and fraudulent business practices and deceptive advertising claims) (Spencer, Mallano & Suzukawa, JJ.).

The plaintiff filed suit against MRA Holding, LLC (“MRA”), creators of the DVD series that specializes in depicting young women exposing themselves in public, after she appeared in one of the company’s *Girls Gone Wild* videos and commercials. (Plaintiff rode topless on a boat in Lake Havasu, California on Memorial Day weekend in 1999).

MRA filed a motion to strike under Cal. Civil Code 425.16, claiming that the DVD in which plaintiff appeared was made in furtherance of defendant’s constitutional right to free speech in connection with a public issue. The trial court denied the motion.

### Girls Gone Wild Not a Public Issue

The issue on appeal was whether the acts alleged in the complaint fell within the ambit of protected activity under the statute. The anti-SLAPP statute requires a defendant to establish that the complaint of speech or conduct was in furtherance of the defendant’s right of free speech in connection with a public issue. If a defendant passes this threshold question, then the burden shifts and the plaintiff must show that there is a probability of success on the claims.

Judge Spencer, writing for the court, noted that although the statute does not provide a definition for “public issue,” case law does provide guidance.

The Court found that *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO*, 105 Cal. App. 4th 913, sets out three factors to determine the public interest issue. The first factor asks whether the subject of the defendants’ activities is a person in the public eye.

The Court stated that in the case at bar, the plaintiff was not in the public eye, but “merely a college student on vacation who took off her bathing suit top.” The Court noted that although there was some connection between plain-

tiff’s cause of action and the media attention, which would be required to make her a public figure, the plaintiff was not in the public eye.

The court observed that the media attention the plaintiff received was limited; the videos had to be ordered through the internet and during late night cable television commercials, and advertisements were directed to a select audience.

The second factor from *Rivero* is whether the defendant’s activity could affect large numbers of people beyond the direct participants. The Court found that the videos were “marketed to a particular audience interested in viewing women in various stages of undress.”

MRA argued that young peoples’ activities during events like Mardi Gras and Spring Break have been a matter of discussion and commentary by the media and the public.

But, the Court held that the defendants made no showing that a large section of society was affected by the plaintiff’s conduct or that videos of women “flashing” presumed to affect a large number of people.

Finally, the third factor from *Rivero* asks whether the defendant’s activity involves a topic of widespread public interest. Defendant argued that the action of young adults “flashing” in public have produced a great deal of public and media interest.

The Court held that videos were not issues of widespread public interest, but only for financial benefit of the MRA, because the defendant was not engaging in a “public dialogue about the condition of American society in general.”

The Court concluded that the defendant failed to meet any of the factors articulated in *Rivero*, and thus was outside the scope of the statute.

Plaintiff was represented by Lisa Cervantes. Defendant was represented by Ronald Guttman and Victor Fu of Richardson & Patel in Los Angeles.

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## Statement Accusing Columnist of “Fabrication” Held Non-actionable Opinion

The New York Supreme Court recently rejected a defamation claim brought by freelance columnist Sidney Zion concerning an allegation that Zion had “fabricated” a column for the *New York Post*. *Zion v. NYP Holdings*, No. 115834/2002 (N.Y. Sup. Ct. Dec. 17, 2004) (Kapnick, J.).

On July 30, 2001, Zion published a column in the *New York Post* (“Post”) concerning Kathy Boudin, then imprisoned for her role in the 1981 New York “Brinks Robbery.”

The column included the statement that “[t]he line on Kathy Boudin, ... is that she should rot in jail for the murder of two cops whom she ambushed by convincing them to put down their arms.” Zion continued to opine, “[b]ut don’t bet the house against the line, which says against the evidence that she killed two COPS.”

When questioned about his use of the term “line,” Zion informed the NYP’s Deputy Editorial Pages Editor that “the term was a reference to a growing anti-Boudin media outcry predicated on a willful misrepresentation of the facts of her case.”

The following day, Robert McManus, the *Post*’s editorial page editor and Zion’s supervisor, sent Zion a letter in which he stated that a Nexis search had revealed that there was in fact no anti-Boudin media uproar, and he had thus concluded Zion had “fabricated” the column.

Zion brought suit against NYP Holdings as the publisher of the *Post* and McManus for breach of contract and defamation, claiming that McManus’s use of the term “fabrication” gave rise to a defamation claim because it “relates directly to [Zion’s] professional integrity.”

Although the court recognized that a journalist should not be “lightly characterized as inaccurate and dishonest or libelous,” it found that where, as here, a statement of opinion is accompanied by the facts on which it is based or “does not imply the existence of undisclosed underlying facts,” it would be understood by readers as conveying only non-actionable conjecture.

Additionally, the court held that plaintiff failed to proffer sufficient evidence to defeat the finding that the letter was subject to a conditional privilege as a “communication made by one person to another upon a

subject in which both have an interest.” *Citing Liberman v. Gelstein*, 80 N.Y.2d 429, 437 (1992) (additional citations omitted).

The court found that the letter had been written neither with constitutional nor common law malice, and that the fact that McManus was not a “fan” of the plaintiff did not translate into a finding that the motivation for the letter was “spite or ill will.”

The court thus dismissed plaintiff’s defamation claim.

Defendants were represented by Slade R. Metcalf and Jeffrey O. Grossman of Hogan & Hartson LLP in New York. Plaintiff was represented by Gary Naftalis, Jonathan Wagner, and Megan Davis of Kramer, Levin, Naftalis & Frankel LLP in New York.

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## Ramsey Libel Suit Against Fox News Dismissed

By Jason Conti

A federal district court judge recently dismissed a libel lawsuit filed against the Fox News Channel by the parents and brother of JonBenet Ramsey, the six-year-old murdered in December 1996 in her family's Colorado home. *Ramsey v. Fox News Network LLC*, No. Civ. A. 04-F-1464 (PAC), 2005 WL 32429 (D. Colo., Jan. 6, 2005) (Figa, J.).

The decision, issued on January 6, 2005 by Judge Phillip S. Figa, marks the first time a defamation case has been decided against the Ramseys. Since 1999, the Ramsey family has settled six other defamation actions against news organizations.

The case stems from a December 2002 Fox News broadcast marking the six-year anniversary of JonBenet's death. The amended complaint alleged that the gist of the news report was that one or more of the plaintiffs (parents John and Patsy, and brother Burke) killed JonBenet because they were the only three known individuals in the house the night of her death.

The amended complaint focused on the statements: "Detectives say they had good reason to suspect the Ramseys" and "...yet there has never been any evidence to link an intruder to her brutal murder." The Ramseys originally filed suit in federal court in Atlanta, but this past July Judge Thomas W. Thrash Jr. granted Fox News' motion to transfer the case to Colorado.

In his 16-page decision, Judge Figa first determined whether Colorado or Georgia law (where the action was first brought) should apply. The Court noted that the determination was significant, as in Colorado the constitutional malice standard applies to all matters of public or general concern, whereas in Georgia a private individual need only prove negligence to recover. Further, Colorado severely restricts damage recovery, while Georgia does not.

In determining which law would apply, the Colorado Court employed Georgia choice of law rules, which in a multistate defamation action requires the most significant relationship test. Although the Ramseys lived in Georgia at the time of the broadcast, the Court stated "it is clear that Colorado, not Georgia, is the state having the most significant relationship to the alleged defamation."

The Court noted that most of the actions related to the news report took place in Colorado and that Colorado has an interest in applying its defamation laws to Colorado-based

journalists. Further, the Court noted the Ramseys, who have since moved to Michigan, alleged damage throughout the United States and the world, not just in Georgia.

After quickly determining that the broadcast was a matter of public concern, the Court set out to assess whether the news report was capable of a defamatory meaning. The Court found that "as a whole," "it did not...accuse any [of the Ramseys] of participating in the murder [of] their youngest family member."

First, the Court determined that saying Burke had been cleared or suspected was not defamatory, because "A statement that detectives once said they had good reason to suspect someone now unequivocally cleared of having committed a crime is insufficient to meet the high threshold for defamation *per se*."

In addition, the Court noted that the statement that there "has never been any evidence to link an intruder to her brutal murder" "no more suggests that plaintiffs are blameworthy than it suggests that a stealthy intruder covered his or her tracks well." Ultimately, the Court found the news report to be an accurate summary of the then status of the case and the fact that John and Patsy Ramsey had been suspected.

After quoting Shakespeare's *Othello* to emphasize the importance of one's "good name," the Court noted

Plaintiffs may well have filed this case more for vindication than for money, and perhaps vindication is what they deserve. But they have a better chance for meaningful vindication in the court of public opinion through vigorous debate than by suing those whose reporting may arguably include some less than favorable inferences about them. Plaintiffs cannot have the public discourse playing field entirely to themselves.

Finally, the Court concluded that

those who broadcast publicly must accept some responsibilities of basic decency towards others as embodied in our Nation's defamation laws. Fox News, however, did not shirk those responsibilities here.

*The Fox News Channel was represented by Dori Ann Hanswirth, Slade R. Metcalf and Jason P. Conti of Hogan & Hartson LLP., New York City, and Edwin P. Aro of Hogan & Hartson LLP., Denver. The plaintiffs were represented by L. Lin Wood and Katherine M. Ventulett of L. Lin Wood, P.C. of Atlanta.*

## Professor Sued By Company for Posting Student's "Ethics" Paper on the Web

The Michigan Court of Appeals reinstated a company's claims for defamation and injurious falsehood against a professor who posted a business student's ethics paper on the web. *Ben-Tech Industrial Automation v. Oakland University*, No. 247471, 2005 WL 50131 (Mich. Ct. App. Jan. 11, 2005) (Donofrio, White, Talbot, JJ.). Available online [here](#).

The court, not surprisingly, found that posting the paper on the web satisfied the publication element of the claim and that plaintiffs did not need to identify someone to whom the defamatory statements were published.

### **Background**

In 1999, defendant Donald Mayer, an attorney and professor of business law at Oakland University ("OU"), taught a course entitled "Legal Environment of Business." Students were instructed to write "a paper analyzing a business experience from an ethical perspective." One student wrote about his experience with plaintiffs Ben-Tech Industrial Automation ("Ben-Tech") and individual employees.

The student had worked for a competitor of Ben-Tech. The paper detailed Ben-Tech's alleged attempt to persuade the student to work for Ben-Tech and take proprietary information with him in violation of a non-disclosure agreement. The paper further stated that Ben-Tech was later sued and searched, but that "Ben-Tech had destroyed all relevant materials," and the charges were dropped due to lack of evidence.

The professor, apparently believing the paper was just a hypothetical, posted it on his university website. He redacted the authors' names but did not redact references to the plaintiffs.

Plaintiffs discovered the paper through a Google search, and Ben-Tech asked OU to remove it and issue a retraction. OU removed the posting but did not issue a retraction.

### **Posting on Internet Amounted to Publication**

The trial court granted defendant's motion to dismiss the defamation claim after finding that "the complaint failed to identify 'someone to whom the defamatory statements were published . . . [and] specific words which the plaintiffs claim were defamatory.'"

While the appeals court recognized that no Michigan court had decided whether publication on the Internet fulfills

the publication element of a defamation claim under Michigan law, drawing upon precedent from other jurisdictions it concluded that plaintiffs' allegation that the paper was "published on the internet 'to the general public on a worldwide basis'" satisfied the requirement.

Additionally, the court noted that a "hit log" of visitors to defendant's web site could identify individuals who accessed the paper.

### **No Governmental Immunity**

The court also found that dismissal could not rest on a ruling that defendant was subject to governmental immunity under MCR 2.116(C)(7). The statute does not protect conduct amounting to gross negligence, defined as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

Noting that multiple factors could cause reasonable minds to differ with regard to defendant's conduct – including his background as a lawyer, his teaching of a business law course that covered basic defamation law and his admission he had posted the paper "without reading [it] closely" – the court could not rule as a matter of law that defendant was not grossly negligent.

### **Injurious Falsehood**

The appeals court also reversed the trial court's dismissal of the injurious falsehood claim. The court found that reasonable minds could differ as to whether defendant should have recognized that posting the paper was likely to harm plaintiffs.

Additionally, the appeals court found the trial court had erroneously applied an actual malice standard to the claim, looking to whether defendant had "entertained serious doubts regarding the truth of the statements published."

The court accepted that Ben-Tech was a private plaintiff and thus only needed to prove gross negligence. This holding is inconsistent with the traditional requirement that actual malice is required in all injurious falsehood cases. *See, e.g., Restatement (Second) of Torts* § 623A (liability requires that the defendant "knows that the statement is false or acts in reckless disregard of its truth or falsity").

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### **Professor Sued By Company for Posting Student's "Ethics" Paper on the Web**

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#### **Damages**

Finally, the court also ruled that the trial court erred in finding that plaintiffs failed to sufficiently allege damages. Since the paper strongly suggested that plaintiffs had com-

mitted a crime, stating, e.g., that "charges" were filed, plaintiffs stated a claim for defamation per se. The court found that presumed damages would be sufficient to substantiate the defamation claim. In addition, further discovery – such as reviewing OU's hit long – could lead to proof of damages.

## **Dismissal of Libel Claims Against *Albany Times Union* Affirmed Paper Was Sued by Former District Attorney/Judge/State Assemblyman**

By Michael J. Grygiel

In a unanimous decision issued on January 6, 2005, the Appellate Division, Third Department (an intermediate New York appellate court) affirmed dismissal of libel complaint by a former New York politician in its entirety as a matter of law. *Proskin v. Hearst Corp.*, 2004 WL 3053218 (N.Y. App. Div. Jan. 6, 2005).

#### **Background**

In 1994, well-known upstate New York politician Arnold W. Proskin was defeated in a Republican primary and thus denied the opportunity for re-election to a sixth term in the New York State Assembly.

Proskin's unexpected primary defeat occurred after a series of investigative articles published in the spring of that year by the *Albany Times Union* that exposed his controversial handling of several clients' wills in his private law practice, which were rewritten to benefit financially either Proskin himself or his family members.

After the articles were published, his primary opponent's campaign slogan humorously became "Proskin: Where There's a Will There's a Way." After being turned out of public office, Proskin resumed private law practice full time.

Already a defeated (and arguably disgraced) politician, Proskin would become a libel plaintiff almost a decade later. In November 2002, the *Times Union* published an article reporting on a decision of the Second Circuit which harshly criticized Proskin for having "affirmatively misled" his client, a Brazilian citizen, as to the deportation consequences under federal immigration laws of pleading guilty to a felony. Based in part on what it determined to be Proskin's ineffective assistance of counsel, the Second Circuit vacated his client's guilty plea as involuntary.

The last paragraph of the *Times Union's* article included the following sentence: "A former Albany County district attorney and county judge, Proskin's political career fizzled after public revelations that he altered a client's will to leave \$49,000 of the elderly woman's money to his own children." That background statement was based on the *Times Union's* previous campaign reportage concerning Proskin's will-drafting contretemps.

In objection to this statement, Proskin commenced a libel action seeking \$35 million in damages against The Hearst Corporation, parent company of the *Times Union*, and the reporter who wrote the November 2002 article, Andrew Tilghman, alleging that the use of the verb "altered" implied that he had committed a felony by forging a legal document without his client's knowledge or consent.

#### **Newspaper Moved for Summary Judgment**

Contemporaneous with serving an Answer to the Complaint (and thus preventing plaintiff from engaging in any discovery), defendants moved for summary judgment on the following grounds:

- plaintiff could not satisfy his constitutional burden of establishing that the statement complained of was false, as the proof in the record included his own sworn statements in an affidavit he had submitted to Albany County Surrogate's Court acknowledging that he had, in fact, "modified" the widow's will to leave financial bequests to each of his four children. *Roche v. Hearst Corp.*, 72 A. D.2d 245 (3d Dep't 1980), *aff'd*, 53 N.Y.2d 767 (1981).
- Proskin's status as a public official had not faded with the passage of time, and he could not meet the First Amendment's "actual malice" requirement because the statement

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### Dismissal of Libel Claims Against *Albany Times Union* Affirmed

(Continued from page 29)

at issue accurately reported information obtained from archived *Times Union* reportage which related to a matter of public controversy at the time plaintiff was running for office and which reporter Tilghman had no reason to and did not doubt the truth of.

- as the Complaint's defamation claims were based not on the actual printed words of the challenged statement but on an allegedly false "imputation" arising therefrom, plaintiff was proceeding on the disfavored theory known as "libel by implication" which no New York State court has recognized and which courts across the country have responded to by *per se* prohibiting such claims when asserted by public officials like Judge Proskin. *Price v. Viking Penguin, Inc.*, 881 F.2d 1426 (8th Cir. 1989), *cert. denied*, 493 U.S. 1036 (1990); *Strada v. Connecticut Newspapers, Inc.*, 193 Conn. 313, 477 A.2d 1005 (Conn. 1984); *DeFalco v. Anderson*, 209 N.J. Super. 99, 506 A.2d 1280 (1986); *Schaefer v. Lynch*, 406 So. 2d 185 (La. 1981); *Diesen v. Hessburg*, 455 N.W.2d 446 (Minn. 1990) (plurality op.), *cert. denied*, 498 U.S. 1119 (1991); *Pietrafesa v. D.P.I., Inc.*, 757 P.2d 1113 (Colo. Ct. App. 1988); *Mihalik v. Duprey*, 11 Mass. App. Ct. 602, 417 N.E.2d 1238, 1241 (1981).

#### ***Appellate Court Affirms Dismissal***

Without reaching defendants' actual malice and libel-by-implication arguments, the appellate court held that, because it was undisputed that "plaintiff physically altered or modified the prior will," the truth of the statement complained of was established, providing an absolute defense to defamation liability.

In reaching this result, the court noted that "nowhere in the article did defendants state that plaintiff did anything illegal, felonious or criminal," and applied the established principle that "innuendo or adverse inferences are not enough to establish that the statement was false" (*citing Roach v. Hearst Corp., supra*).

In the final analysis, the appellate court refused to allow plaintiff to sustain a libel claim by holding the newspaper to a higher standard than he held himself in describing his own conduct in "modifying" his client's will, which estab-

lished the truth of the statement complained of and defendants' absolute immunity from defamation liability.

*Michael J. Grygiel and William A. Hurst of McNamee, Lochner, Titus & Williams, P.C. in Albany and Jonathan R. Donnellan, Senior Counsel with The Hearst Corporation, represented The Hearst Corporation and reporter Andrew Tilghman. Plaintiff was represented by Todd D. Greenberg, Esq. of Addabbo & Greenberg in Queens.*

### NY Federal Court Dismisses Libel by Implication Claim

A New York federal court dismissed a libel by implication claim filed against a community newspaper. *Seymour v. The Lakeville Journal Company, LLC*, No. 04 CV 4532, 2004 WL 2848537 (S.D.N.Y. Dec. 9, 2004) (Daniels, J.).

At issue was a May 29, 2003, article published by *The Lakeville Journal*, a weekly newspaper in western Connecticut. The article entitled, "Lawsuit Revelation Spurs Check Seymour's Car Excise Tax will Now Go to Falls Village," reported that plaintiff owed back property taxes on her car which was registered in one district, but actually garaged in another higher tax district.

Plaintiff, a New York resident with a second home in Connecticut, appeared to be a private figure, though the decision notes that plaintiff's daughter (and the user of the car in question) was a former local mayor. Plaintiff alleged that the newspaper article implied that she "deliberately violated state law, concealed her violation, gave a false explanation, and was a tax cheat."

The decision did not address the standards for libel by implication, but instead turned on defamatory meaning. While noting that allegations of cheating on taxes could be defamatory, the court granted defendant's 12(b)(6) motion to dismiss finding that an average reader could not reasonably conclude that the article implied that plaintiff intentionally failed to pay taxes.

The article noted that plaintiff had paid taxes on her car (albeit to the wrong town which imposed a lesser tax rate), included plaintiff's version of events and, thus, was a balanced overview of the whole controversy.

## ***The Sun* sues Maryland Governor for Banning Journalists**

By Charles D. Tobin and Stephanie Abrutyn

*The Sun* of Baltimore, a Tribune Publishing newspaper, has sued Maryland Governor Robert L. Ehrlich claiming that he violated the Constitution when he ordered all executive department officials not to speak with two journalists the governor accused of “failing to objectively report” on his administration. *The Baltimore Sun Company, et al. v. Ehrlich, Jr., et al.*, No. 1:04-cv-03822-WDQ (D. Md.).

The newspaper and the journalists filed suit against the governor and two press aides on December 3, but the paper agreed to delay a motion for a preliminary injunction after the governor reversed himself and scheduled a meeting with the newspaper. The meeting was set for December 17 in Annapolis.

Before the suit was filed, the governor’s office said he only would meet if the newspaper first apologized for a 2002 editorial and agreed to an elaborate agenda that did not include discussion of the ban. He dropped the demands after the suit was filed.

### ***Ban On Two Journalists***

Ehrlich imposed the ban in a November 18 email from his Deputy Communications Director Shareese DeLeaver to all of the public information officers and departments in the executive branch of the state government. The email read:

Effective immediately, no one in the Executive Department or Agencies is to speak with David Nitkin or Michael Olesker until further notice. Do not return calls or comply with any requests. The Governor’s Press Office feels that currently both are failing to objectively report on any issue dealing with the Ehrlich-Steele Administration. Please relay this information to your respective department heads.

The email directed questions about the ban to Ehrlich’s senior press aide Gregory Massoni.

In a subsequent email with one of the banned journalists, DeLeaver said that the state would continue to comply with written public records requests. To the newspaper’s knowledge, however, that clarification was not communicated to the recipients of the original directive.

Immediately following the imposition of the ban, executive department officials stopped commenting to the two journalists. Some were apologetic, telling the journalists that they would be happy to talk to them but for the ban. Others would not return the journalists’ phone calls.

### ***Governor’s Shifting Explanations***

The embargoed journalists are David Nitkin, *The Sun*’s state house bureau chief, and Michael Olesker, a long-time columnist. In a series of media appearances, the reasons cited by Ehrlich and other officials for the ban changed over time. In addition to criticizing the objectivity of the specific journalists and the newspaper itself, Ehrlich also challenged the credibility of the two journalists covered by the “gag” order. The officials cited four specific instances:

- A map accompanying an article by Nitkin reporting on the proposed sale of state-owned lands to a Maryland developer at the same price the state had paid for the property. Officials had hidden the name of the developer, who is politically connected to the Governor, until *The Sun* learned his identity and reported it. The deal, which fell through, could have given the developer millions of dollars in tax breaks. The map, which Nitkin had no role in creating, erroneously showed all state-owned land as a part of the deal instead of the 836-acre tract. *The Sun* realized the error and promptly corrected it in the next day’s newspaper.
- A column by Olesker from last summer quoting Lieutenant Governor Michael Steele about the Ehrlich administration’s efforts regarding diversity. Officials initially said that Olesker had never interviewed the lieutenant governor. Days after the ban, however, Steele admitted that Olesker had interviewed him and that the substance of the quote was accurate, although Steele continued to quibble with the specific words spoken.
- Another column in which Olesker wrote that a state official was “struggling mightily to keep a straight face” at a legislative hearing about the ostensibly non-political nature of a television advertising campaign. The campaign showed the governor taking over household chores from several people to free them up to

(Continued on page 32)

## **The Sun sues Maryland Governor for Banning Journalists**

*(Continued from page 31)*

visit tourist attractions in the state. Olesker, who in the column's next paragraph used the exact same phrasing to describe the demeanor of a Democrat legislator, admitted he was not at the hearing. He later explained to readers that he chose the language in the column as a metaphor for the absurdity of the politicians' positions, and he apologized if anyone thought he had been at the hearing.

- Finally, the Ehrlich administration said that Olesker never interviewed an official he quoted in another column as saying "[t]he favor has been paid" to a campaign supporter who left a politically appointed job after just a few weeks.

While the governor and his aides cited these specific examples in some public appearances, later explanations were somewhat different. Ehrlich said in a talk-radio interview that he would meet with *The Sun* if the newspaper would apologize for an editorial published during Ehrlich's 2002 campaign.

The editorial criticized Ehrlich's selection of Steele, who is African American, as his running mate. *The Sun* wrote that Steele "brings little to the team but the color of his skin." At the time, the editorial was controversial, and since then *The Sun's* editorial page editor has stated publicly that while the newspaper stands by its opinion that Steele was not the best qualified for the job, with the benefit of hindsight she would have chosen to express that view differently.

In a later talk-radio interview, Ehrlich returned his focus on the two journalists. He said the writers "have no credibility" and boasted that the ban was "meant to have a chilling effect" on them. He referred to access as "[t]he only arrow in my quiver" and, when asked about whether it was proper to order all officials not to talk with the reporters, said: "That's my government. I'm the chief executive."

### **Reaction From Other Media**

Organizations representing journalists and the companies they work for were quick to criticize the governor's broad prior restraint.

- Lucy Dalglish, executive director of The Reporters Committee for Freedom of the Press, wrote the governor, criticizing his "lack of leadership and maturity" in han-

dling the press. "While it may prove temporarily satisfying to 'punish' journalists with whom you disagree, it is your constituents who will ultimately suffer," she said in her letter.

- Karla Garrett Harshaw, president of the American Society of Newspaper Editors, told the governor in a letter that his "petty, childish prohibition should be rescinded immediately." She told Ehrlich that he should not expect journalists "to be your public relations agents[,] and that "the remedy is not to bully them" when he feels the press has been inaccurate.
- Jeffrey Mezzatesta, president of the Maryland-Delaware-D.C. Press Association, wrote Ehrlich that when a public official disagrees with coverage, "[t]he appropriate response is for the official to talk with the newspaper and/or make his/her views publicly known through the many available vehicles." Mezzatesta called the ban "an extreme and troubling action to take."

### **Newspaper, Journalists Sue**

Following the governor's media campaign and refusal to reconsider the ban, *The Sun*, Nitkin, and Olesker filed suit in the U.S. District Court for the District of Maryland in Baltimore. The lawsuit seeks injunctive and declaratory relief under 42 U.S.C. §1983. The defendants are the governor and DeLeaver and Massoni, the two press aides through whom the ban was effectuated.

The lawsuit alleges that the embargo, issued under color of state law, violated *The Sun's* and its journalists' First Amendment rights by punishing them based on the Governor's subjective view of the content of their speech. The ban takes away from them a benefit they previously enjoyed – "access to information" from state employees willing to give it to them – and that executive branch officials "continue to make routinely available to the public and to all other members of the press." The lawsuit cites the chilling effect on the newspaper and these journalists, but it also notes the potential impact on all political speech for all people in the state:

The policy will discourage speech by any citizen of Maryland who disagrees with the Governor, and it will leave the door open for any public official to punish any individual who says something the government does not like.

*(Continued on page 33)*



### **The Sun sues Maryland Governor for Banning Journalists**

(Continued from page 32)

In more radio interviews after the lawsuit was filed, Ehrlich and lawyers who supported his actions cited to a late-1990s case involving a Baltimore television journalist. A Baltimore City Police Department spokesman, citing the journalist's excessive pages to him over weekends and her alleged violation of agreements to receive information off the record, had banned her from any further off-the-record interviews or access to any information not routinely given to the press and public.

The television journalist sued the spokesman. The district court and the Fourth Circuit, citing public officials' customary practice of providing enhanced access to favored journalists, found no First Amendment violation. *See Snyder v. Ringgold*, 1998 WL 13528 (4th Cir. Jan. 15, 1998); *Snyder v. Ringgold*, 40 F.Supp.2d 714 (D. Md. 1999).

*The Sun*, however, has argued to the governor's counsel that the Snyder case did not involve the same situation that confronts its journalists. The governor took away – solely and expressly based on the content of *The Sun's* coverage – the privilege and convenience of routine interaction with executive branch officials.

Ordinary and otherwise lawful acts can become unconstitutional retaliation under §1983 when government officials act in order to suppress speech. *See, e.g., Rossignol v. Voorhaar*, 316 F.3d 516 (4th Cir. 2003). Therefore, the content-based deprivation of *The Sun's* journalists' access, which remains available to all other members of the public and the remainder of the press, is a violation of the First Amendment.

Ehrlich's ban of these two journalists "sets a dangerous precedent, not just for the press but also for the public," *The Sun's* editor, Tim Franklin, told the newspaper. "So the stakes are very high, and we think we have an obligation to pursue legal options."

*The Sun is represented in the litigation by outside counsel Charles D. Tobin and Kara L. Daniels of Holland & Knight LLP, Washington, D.C., and in-house counsel Stephanie Abrutyn. The Governor is represented generally by Chief Counsel, Office of the Governor, Jervis Finney and Associate Counsel JP Schultes. The Governor is represented in the litigation by the Attorney General of Maryland.*

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## **NY Times Wins Release of OSHA Data Through FOIA Lawsuit**

By David McCraw

What exactly do you do when a government agency tells you that you may be entitled to the information you requested under the Freedom of Information Act but it will need 15 years – 30,290 staff hours, to be exact – to determine whether the information can be disclosed?

That was the bizarre question faced by *The New York Times* in July of 2003 after it requested that the Occupational Safety and Health Administration ("OSHA") release statistics documenting the most-dangerous places to work in the United States. The answer, at least for *The Times*, was to sue.

And in December 2004, *The Times* finally received the information it sought – data documenting injury rates at thousands of workplaces over a six-year period – after the newspaper won summary judgment in the Southern District of New York, and OSHA decided to abandon an appeal. *New York Times v. U.S. Dept. of Labor*, 340 F. Supp. 2d 394 (S.D.N.Y. 2004) (Scheidlin, J.).

For anyone who has experienced the endless delays and diversions that federal agencies serve up in response to FOIA requests, the case serves as an important reminder of how a record of recalcitrance and noncompliance can come back to haunt an agency when it finds itself before a federal judge.

### **Background**

In 2004, *Times* reporters David Barstow and Lowell Bergman won the Pulitzer Prize for Public Service for their series of articles on unsafe working conditions at the McWane Corporation, which runs foundries in the United States and Canada. In researching those stories and related articles on the failure of OSHA to protect worker health and safety, Barstow requested that OSHA provide the so-called "LWDII Rates" for the 13,000 U.S. companies with the worst safety records.

The LWDII Rate shows the number of injuries that a workplace has per 1,000 workers. While OSHA lists, un-

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## NY Times Wins Release of OSHA Data Through FOIA Lawsuit

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ranked, the names of some 13,000 employers with high LWDII Rates, it had consistently refused to release the rate of any company, arguing that the information could be used by competitors to calculate how many employee hours were worked at a given plant in a given year – information that OSHA said might be a trade secret.

For *The Times*, the actual rates were important because our reporters wanted to determine whether OSHA was truly going after the worst offenders and whether enforcement actions by OSHA actually led to a decline in injuries at particular companies. To measure that, the reporters needed to have the LWDII rates and to see whether the rate for a particular company changed from year to year.

For several months, after an initial denial of the FOIA request, *The Times* and OSHA discussed the request in letters and phone calls, but no statistics were forthcoming.

Finally, in July 2003, the agency's FOIA appeals officer sent a letter to *The Times* saying that OSHA would have to check with all 13,000 companies, find out whether the companies objected to the release of the LWDII rates, and then – after studying the companies' responses – make a determination as to whether the rates could be released. OSHA estimated that the entire process could be completed by 2018, assuming one employee worked full-time on the matter for the entire 15 years.

The letter went on to suggest that Barstow modify his request and perhaps seek data from fewer companies. OSHA offered to help him narrow the request.

### **Department of Labor Sued**

*The Times* declined that offer. Instead, it commenced an action against the Department of Labor (“DOL”), OSHA's parent agency, in the Southern District of New York.

OSHA's claim that it needed 15 years – rather than the 20 business days allowed by FOIA – may have seemed absurd, but was hardly unexpected. In 1996, OSHA had received a FOIA request for LWDII data from a private company called OSHA Data/CIH (“ODC”).

OSHA officials refused to proceed with a determination of the request unless ODC first paid \$1.7 million. As it would later do with *The Times*, OSHA asserted that it could not decide whether to release the information without first

consulting the thousands of companies that provided the data, a process that OSHA estimated would cost \$1.7 million to complete.

Rather than paying, ODC sued, but the Third Circuit found for OSHA. The court held that OSHA was justified in wanting to find out whether individual companies had confidentiality concerns about release of the statistics and that ODC was required to pay the cost of that notice and consultation process. *OSHA Data/CIH v. U.S. Dept. of Labor*, 220 F.3d 153 (3d Cir. 2000). ODC, with no guarantee that the information would ever be released, declined to pay and dropped its request.

Because FOIA prohibits agencies from charging for such review costs when the request comes from the news media, OSHA could not take the same approach to costs with *The Times*, even though Barstow's request sought much the same data as ODC had wanted.

*The Times's* case was assigned to Judge Shira Scheindlin, and the parties cross-moved for summary judgment. In its motion, OSHA argued that *The Times* had failed to exhaust its administrative remedies because OSHA had never denied the request. As OSHA saw it, the agency was still awaiting word from Barstow as to whether he wanted to wait 15 years or to modify his request.

The judge was not amused. She found that OSHA's response “was, for all practical purposes, a denial.” She went on: “In effect, DOL told the Times, ‘We may have an obligation to give you these documents, but the process of determining that is too hard, and we are not going to figure out a way to do it.’”

Judge Scheindlin found “especially troubling” that the agency had ignored the statutory requirement that an agency rule on a FOIA appeal in 20 business days and instead took seven months to respond with the letter from the FOIA appeals officer.

The court also made quick work of OSHA's suggestion that *The Times* had an obligation to engage in discussions over the scope of the request.

The DOL cannot avoid court intervention by neither granting nor denying a request, but rather seeking to alter it. The DOL's offers to negotiate and work with the Times do not change the fact that the DOL refused to provide the Times with the information it

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**NY Times Wins Release of OSHA Data Through FOIA Lawsuit**

*(Continued from page 34)*

sought, and the Times has been waiting for that information for close to two years.

Having failed to knock *The Times* out on procedural points, OSHA then argued, as expected, that the Third Circuit's decision in *OSHA Data* was binding. The Third Circuit had clearly held that competitors might be able to use LWDII rates to calculate the number of employee hours worked at another company. Because that information might be a trade secret, the Third Circuit said, OSHA was justified in surveying the companies that provided the data.

Judge Scheindlin disagreed. She noted that the LWDII rate could be "reverse-engineered" to disclose employee hours worked only if someone also knew the number of injuries at a plant. Because that number was not widely known, there was little chance that a competitor could use the LWDII data to figure out the hours worked.

In any event, she noted, OSHA now requires that every reporting company post in the workplace a document that includes the employee hours worked each year, so the information could not be as sensitive as OSHA claimed.

She also questioned OSHA's failure to provide proof from the companies themselves that they had confidentiality concerns. The record on summary judgment contained only one company's view on releasing the information to *The Times*, and that company – which had been the focus

of some of *The Times*'s worker safety articles – had voluntarily disclosed its LWDII rate.

*The Times* also pointed out that OSHA had notified all 13,000 companies of the lawsuit (via an Internet posting) and not one had intervened or taken any other step to be heard.

On that record, Judge Scheindlin ordered OSHA to release the data to *The Times*. OSHA initially noticed an appeal, then withdrew it a few weeks later.

***Conclusion***

For those who regularly handle FOIA matters, litigation is rarely a practical option, and the agencies know it. The statutory deadlines are ignored, and we are left with little recourse but beseeching phone calls and strident letters, hoping to prod FOIA officers into action.

In the face of all that, Judge Scheindlin's decision serves as a reminder that there are still cases worth bringing, and maybe we should be putting the agencies' bad habits and slovenly practices on trial more often.

*David McCraw is counsel at The New York Times Company. He represented The Times in the FOIA suit. The Department of Labor was represented by Assistant U.S. Attorney David Kennedy.*

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## Federal District Court in Chicago Grants The New York Times Access to Sealed Court Records

By Michael M. Conway and Thomas K. Anderson

*The New York Times* has obtained access to reports (previously undocketed and undisclosed) provided by an Independent Special Counsel to a federal district court overseeing the operation of the Central States Southeast and Southwest Areas Pension Fund (the "Fund"). *Reich v. Fitzsimmons*, No. 1:78-cv-00342 (N.D.Ill.) (Moran, J.); *Chao v. Fitzsimmons*, No. 78c 342 (N.D.Ill.) (Moran, J.).

In a series of three written opinions issued between October 21 and December 30, 2004, Senior Judge James B. Moran granted three individual Teamsters and *The New York Times* leave to intervene and ordered disclosure of the quarterly reports, subject to limited redaction, dating back to 2000 as well as all future quarterly reports submitted to the court.

Since 1982, the Fund has been subject to oversight by the federal district court in Chicago in accord with a consent decree it entered into with the Secretary of Labor in *Chao v. Estate of Fitzsimmons et al.* That consent decree called for an Independent Special Counsel ("ISC") to monitor the Fund and to file quarterly reports with the court. This pension fund is responsible for paying benefits to nearly 500,000 retired Teamsters union members.

The court relied upon several Seventh Circuit access cases in its analysis. First, citing *Jessup v. Luther*, 227 F.3d 993 (7th Cir. 2000), the court noted that intervention was the procedurally appropriate course to seek access to court records. Concerning the substantive issue of access, the court looked to Seventh Circuit case law establishing a presumption in favor of access to court records, which can be overcome only by a convincing demonstration that suppression is necessary to preserve higher values and is narrowly tailored to serve that interest (citing *B.H. v. McDonald*, 49 F.3d 294 (7th Cir. 1995); *Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir. 1994); *Union Oil Co. of California v. Leavell*, 220 F.3d 562 (7th Cir. 2000)).

Relying on this case law, the court held in its first opinion that quarterly reports submitted to the court since the third quarter of 2003 were "judicial documents and [were] entitled to a strong presumption of public access" because they had led to the court's 2003 decision approving the reduction in

benefits and could lead to further judicial action. These reports were ordered disclosed.

Following this opinion, the Fund moved for clarification of the court's order, arguing that future quarterly reports were not covered by the court's first opinion and ought not be disclosed. *The New York Times* and individual intervenors responded, arguing both that all future quarterly reports should be disclosed and that quarterly reports from years prior to 2003 ought to have been ordered disclosed as well.

In ruling on the Fund's motion, the court adhered to its original opinion requiring the disclosure of future quarterly reports. But responding to the intervenors' request for earlier quarterly reports, which was supported by an affidavit from a *Times* reporter, the court revised its original decision by ordering the release of all quarterly reports dating back to the third quarter of 2000. In doing so, the court found that the funding deficiency lurking in the Fund's future, which the court monitored in accord with the consent decree, first surfaced in that report.

All of the quarterly reports were subjected to limited redaction of both subjective opinions of the ISC and privileged materials before their release.

The court had originally appointed William Saxbe, former Attorney General of the United States, as the ISC. When Saxbe retired, the court appointed The Honorable Frank J. McGarr, former Chief Judge of the District Court for the Northern District of Illinois.

Since 1982 the ISC submitted his quarterly reports to the court in chambers. These reports were never docketed and their content was never disclosed to the public. Not only did the ruling change this prospectively, but the court also provided that copies of the unredacted reports be placed, for the first time, in the court file and therefore available in the record for further judicial review.

*Michael M. Conway and Thomas K. Anderson of Foley & Lardner LLP in Chicago, along with David E. McCraw, Counsel for The New York Times Company, represent The New York Times Company. Paul Levy of the Public Citizen Litigation Group represents individual intervenors Tommy Burke, Mike Brady, and Brent Lindberg. John Franczyk and James Condon of the Central States Southeast and Southwest Areas Pension Fund Legal Department represent the Fund.*

## NY Court Rejects Governor's Executive Privilege Claim

In a strong endorsement of the principles of open government, a New York trial court rejected a claim of executive privilege raised by Governor George Pataki, and denied his motion to quash a legislative subpoena seeking documents about a controversial government land sale. *In re Bueno, et al.*, No. 8031-04 (Sup. Ct. Albany County Ct. Dec. 30, 2004).

Judge Joseph Cannizzaro held that the documents the Governor sought to shield were not "deliberative" in nature for the privilege to apply. Moreover, even if they were sufficiently deliberative to invoke the privilege, the court ruled that executive privilege under New York law is qualified and would, under the facts, yield to the public's interest in open government.

### Background

The underlying controversy involved the government's 2001 sale of potentially lucrative land development rights along the Erie Canal. In what has been described as a "sweetheart" deal, the state sold the rights for only \$30,000 to a land developer. The contract was later cancelled by the State Comptroller and several criminal and ethical investigations were set up to probe the transaction.

New York State Assemblyman Richard Brodsky convened public hearings on the transaction and issued several legislative subpoenas to state authorities for relevant documents. The state authorities were prepared to comply with all the subpoena requests and waive any privileges, but the Governor's Office intervened to assert executive privilege over 600 pages of communications between the New York State Thruway Authority and the Governor's Office.

### Documents Not Privileged

After an *in camera* review, the judge found that the documents the Governor's Office sought to shield were mere post-decisional memorandums, memos setting forth the reasons for an agency decision, and thus outside the scope of the privilege. See *Cirale v. 80 Pine Street Corp.*, 35 N.Y.S.2d 113 (1974), *Dipace v. Goord*, 218 F.R.D. 399 (S.D.N.Y. 2003).

Moreover, even if the documents reflected deliberative policy-oriented communications, the assertion of privilege would have to be balanced against the public interest in open government. The court found that under New York law the governmental agency asserting the privilege must show that "the public interest would indeed be jeopardized by a disclosure of the information. Otherwise, the privilege could be easily abused, serving as a cloak for official misconduct." *Quoting Cirale*, 35 N.Y.S. 2d at 119.

Here the trial court, after its *in camera* review, found nothing in the documents to show that disclosure would harm the interests of government when balanced against the public's interest in disclosure.

The court went on to say that "Openness, accountability, and transparency are as essential to honest governmental administration as freedom of speech is to representative government."

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**"Openness, accountability,  
and transparency are as  
essential to honest  
governmental administration  
as freedom of speech is to  
representative government."**

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### Records Scrutinized by Press

The documents were made public on December 31, 2004 and reportedly dealt in large part with the Governor's concerns with the public perception of the scandal. According to one report, documents released show that the Governor's Office would leak information about the scandal to selected reporters but would stonewall other reporters' efforts to gather information about the land deal.

## DID YOU GO TO TRIAL RECENTLY?

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## Court Won't Bar Release of Libel Defendant's Videotaped Deposition

In an interesting decision, a New York federal court denied author Dominick Dunne's motion for a protective order barring the release of a videotape of his deposition in the libel action filed against him by former California Congressman Gary Condit. *Condit v. Dunne*, No. 02 Civ. 9910 (PKL) (S.D.N.Y. Dec. 15, 2004) (Leisure, J.).

Dunne alleged he was bullied and confused by Condit's lawyer, L. Lin Wood, and that if the embarrassing videotape was made public it would taint the jury pool. The court denied the motion, holding that embarrassment and bad publicity – even in high-profile cases – do not provide good cause to issue a protective order.

### Background

Gary Condit became the subject of intense media scrutiny in 2001 when Chandra Levy, one of his former Washington, D.C. office interns, disappeared and was later found murdered. Condit allegedly had an affair with Levy and was questioned but never charged in the case.

In 2004, Condit sued *Vanity Fair* writer Dominick Dunne for defamation over statements he made on radio and cable talk shows and at two private dinner parties – among them that a “horse whisperer” said Levy was put on a plane and dropped over the ocean; that Condit “knows more [about the murder] than he has ever said”; and that he “could have known” she was going to be murdered.

Last year, the trial court denied a motion to dismiss and held that these statements could be understood to imply false statements of fact. *Condit v. Dunne*, 317 F. Supp. 2d 344 (S.D.N.Y. 2004).

Discovery is proceeding in the case. As reported last month, the court granted Dunne's motion to compel Condit to answer questions about his relationship with Levy. *Condit v. Dunne*, No. 02 Civ. 9910, 2004 WL 2827640, at \*8 (S.D.N.Y. Dec. 8, 2004). According to news reports, Condit has denied having had a sexual relationship with Levy.

Dunne's motion for a protective order was spurred by comments made by Condit's lawyer L. Lin Wood to the media hinting that the deposition videotape would be released to the public.

The parties had stipulated the deposition as confidential, but presumably Condit could change his mind and release the videotape. In an interesting role reversal, Condit argued that the public has a right to see the videotape because of the public figures and accusations involved in the case.

### Good Cause Standard

The court considered the motion for a protective order under FRCP 26(c) under the good cause standard and concluded that potential embarrassment or jury tainting were insufficient cause to seal the videotape.

The potential embarrassment, the court found, was that the deposition might be misrepresented by media sound bites. In notable language the court noted that the “fact that the media may edit a tape that may or may not be released by the parties does not warrant a protective order barring all public dissemination of the videotape in this case.”

Moreover, the court deferred “to the Second Circuit's cogent view that publicity is unlikely to color incurably jurors views, even in the most high-profile cases.” See *In re NBC, Inc.*, 635 F.2d 945, 948 (2d Cir. 1980).

### Interest in Public Access

Finally, the court reasoned that its decision was further supported by the public's interest in the underlying case and instant motion. The court noted that underlying charges of serious misconduct by Condit raise an important matter of public concern. So too, the charges of misconduct during Dunne's deposition. And the Court found “no better way to assure that the reliability of Dunne's deposition testimony is properly represented than to allow public scrutiny.”

Dunne is represented by Paul Licalsi, Devereux Chatillon and Rachel Balaban of Sonnenschein, Nath & Rosenthal in NY. Condit is represented by L. Lin Wood, Atlanta, GA; and Mark Goidell, Melville, NY.

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## Galloway Decision Underscores *Reynolds* Emphasis on “Responsible Journalism”

By Amber Melville-Brown

In *Galloway v. The Daily Telegraph* [2004] EWHC 2786 (QB Dec. 2, 2004), (available online [here](#)) the English libel judge Mr. Justice Eady awarded £150,000 damages to George Galloway, Member of Parliament and anti-Iraq war campaigner, over the publication of allegations contained in and concerning documents found by a *Telegraph* journalist in the badly damaged offices of the Iraqi Foreign Ministry in Baghdad.

The decision has raised concerns in media circles because it disallowed the *Reynolds* qualified privilege defense and a separate defense that the newspaper’s articles were mere neutral reportage of newsworthy allegations about a prominent public official.

The *Reynolds* qualified privilege defense was welcomed in media circles at its birth as making England’s “draconian” libel laws fairer. But some now fear that its application in *Galloway* was too severe and inconsistent with the current jurisprudence in the European Court of Human Rights (ECHR), particularly in light of the recent case of *Selisto v. Finland* which found that even one-sided reporting of newsworthy allegations could be protected. See *MediaLawLetter* Nov. 2004 at 53.

### Background

In 2003, *The Daily Telegraph* published a series of articles that reported in full, with editorial comments, the contents of documents found in the Iraqi foreign ministry. Mr Galloway insisted the documents were fakes and were defamatory of him.

Mr Justice Eady found that the meaning of the articles was that:

- Galloway had been in the pay of Saddam Hussein, secretly receiving sums in the region of £375,000 a year,
- He had diverted monies from the oil-for-food programme depriving Iraqi people, whose interests he claimed to represent, of food and medicine,
- He probably used the Mariam Appeal, a charity he founded, as a front for personal enrichment, and
- What he had done was tantamount to treason.

### *Reynolds* Defense

The newspaper did not seek to prove the allegations true, but sought to rely on the *Reynolds* qualified privilege defense, arguing that “the public had a right to know the content of the documents ... even if it was defamatory of the Claimant and irrespective of whether the factual content was true or not.”

In summary, the *Reynolds* qualified privilege defense protects the publication of false and defamatory allegations where they are published in the public interest, there is a duty to report the matter to the public and the reporting is done responsibly.

### Neutral Reportage Defense

The defendants also argued that their articles were no more than neutral reportage of newsworthy allegations about a prominent public official, citing the recent ECHR case of *Selisto v. Finland*, No. 56767/00 (ECHR Nov. 16, 2004). There the ECHR found that where an article is “full, fair and disinterested” reportage, the publisher is entitled to avoid the repetition rule and publish documents the truth of which it cannot justify if it is in the public interest to do so.

In *Selisto*, a Finnish court fined a newspaper for reporting on allegations that a doctor had operated on a patient while drunk. The newspaper used statements made in the official investigation of the patient’s death.

The ECHR found that the fines imposed upon the journalist and publisher breached their Article 10 rights even where they could not prove the truth of the allegations in the documents. “In the court’s opinion no general duty to verify... statements contained in such documents can be imposed on reporters and other members of the media, who must be free to report on events based on information gathered from official sources. If this were not the case the efficacy of Article 10 of the Convention would to a large degree be lost.”

Maintaining that it should be similarly protected, *The Daily Telegraph* argued that any decision against it and disallowing it from reporting the Iraqi documents would be inconsistent with the European Convention of Human Rights.

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### **Galloway Decision Underscores Reynolds Emphasis on “Responsible Journalism”**

(Continued from page 41)

But Mr Justice Eady did not agree. In contrast to *Selisto*, in his view *The Daily Telegraph* fell down both with regard to the status of the documents, and the tone adopted by the newspaper.

“It is perhaps ironic,” he said, “that *The Daily Telegraph* should pray in aid the documents’ status at the same time as decrying Saddam’s intelligence service as being one of the most sinister and feared organisations in the world.”

He went on to find that the tone adopted by the newspaper had not been neutral; not only did they adopt the allegations, they “embraced them with relish and fervour. They then went on to embellish them....”

### **Reynolds Defense Rejected**

Considering each of the ten of Lord Nicholls’ Reynolds criteria in turn and applying them to the specific facts of the case, Mr Justice Eady found the newspaper could not assert the defense of qualified privilege.

For example, with regard to the perishable nature of news, he accepted that there is a certain urgency for newspapers to maintain their “scoop” but found that there was no need in this case to rush to publication without verifying the facts given that the story “would be of interest at any time.”

In particular, Mr. Justice Eady found that the newspaper failed to obtain adequate comment from Galloway prior to publication. While the newspaper had interviewed Galloway shortly before publication, it did not give him copies of the documents or read them to him. Thus Galloway had no meaningful opportunity to respond to serious allegations.

With regard to the tone of the articles – an important factor in a *Reynolds* analysis - he found it “dramatic and condemnatory.”

In conclusion, Mr. Justice Eady did not find that the newspaper had been under a duty to publish to the public at large the allegations in the way that it had. Accordingly, the *Reynolds* defense had not been made out.

### **Conclusion**

The decision is a reminder to those publishing in the UK of the need to review the status of documents on which they seek to report on, the tone in which they choose to present

the information and the whether a real opportunity is given to the subject to respond to the charges.

If complied with fully, *Reynolds* can still provide a very important defense. But if these key factors are not followed, English courts are highly unlikely to find that the newspaper published responsibly.

*The Telegraph* will seek leave to appeal the decision.

*Amber Melville-Brown is a lawyer with David Price Solicitors & Advocates in London.*

### **Qualified Privilege Defense Rejected in Lance Armstrong’s Libel Suit**

In another high-profile libel case in London, Judge Eady ruled that the *Sunday Times* had no chance of successfully raising the Reynolds qualified privilege defense in a lawsuit brought against the paper by cyclist Lance Armstrong. *Armstrong v Times Newspapers Ltd & Others* [2004] EWHC 2928 (Dec. 17 QB).

At issue is a June 2004 article about Armstrong entitled “LA Confidential” that discussed allegations that Armstrong has taken performance enhancing drugs. Among other things, the article stated “there are those who fear that a man who has won five Tours de France in a row [now six] must have succumbed to the pressure of taking drugs.”

Striking out the qualified privilege defense, Mr. Justice Eady found that the newspaper had not sufficiently verified the information or contacted Armstrong for comment, that the allegations were “rumor and speculation,” and found that the article had a “sensational” tone designed to “stir things up.”

Armstrong is represented by barristers Richard Spearman QC and Matthew Nicklin, 5RB; and the firm Schillings. The Times is represented by barrister Heather Rogers; and solicitor Gillian Phillips.

## Eighth Circuit Hands New Victory to ISPs Resisting DMCA Subpoenas

By Michelle A. Paninopoulos

Internet Service Providers that resist Digital Millennium Copyright Act subpoenas seeking identification of subscribers accused of using “peer-to-peer” software to share music files over the Internet obtained their second victory in 13 months in *In re: Charter Communications, Inc. v. The Recording Industry Association of America, Inc.*, 2005 U.S. App. LEXIS 31 (8th Cir. Jan. 4, 2005). Available online [here](#).

In *Charter*, Eighth Circuit Judge Kermit Bye (joined by senior judge Myron Bright) closely followed the reasoning of a D.C. Circuit decision and held that § 512(h) of the DMCA did not authorize the issuance of a subpoena to Charter Communications because Charter had been acting as a mere conduit for the transmission of information sent by others. See *Recording Industry Association of America, Inc. v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. App. 2003), *cert. denied*, 125 S. Ct. 309 (2004).

In dissent, Judge Diana Murphy protested that the decision would “block copyright holders from obtaining effective protection against infringement through conduit service providers.”

### “Peer-to-Peer” Software

Actions against the creators and distributors of P2P programs have proven unsuccessful to date. The Ninth Circuit, for example, held that Grokster was not liable for contributory infringement by its users. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029 (C.D. Cal. 2003), *aff’d.*, 380 F.3d 1154 (9th Cir.), *cert. granted*, 125 S. Ct. 686 (2004).

As a result, copyright owners have turned to enforcing their rights directly against individuals sharing copyrighted materials online. In many instances, copyright owners are able to obtain only the Internet Protocol (IP) addresses and user names of individuals who are using P2P software. Only the ISP can connect the IP address with a given individual’s real name and physical address. Accordingly, copyright owners (or their agents, such as the RIAA) have looked to the DMCA for author-

ity to subpoena this information from ISPs.

The results in *Charter* and *Verizon* relegate copyright holders and their agents, such as plaintiff Recording Industry Association of America (the RIAA), whose membership creates, manufactures and distributes some 90% of all legitimate sound recordings in the United States, to more cumbersome procedural devices such as “John Doe” lawsuits to enforce copyrights against P2P users.

The issues in *Verizon* and *Charter* arise at least in part because a new generation of P2P programs such as Grokster and KaZaA, unlike their better-known and now-enjoined predecessor Napster, do not rely on a centralized communications architecture. Instead, these programs allow Internet users to search directly the shared music files on other Internet users’ computers. Because of this architecture, ISPs act as passive conduits for the transmission of information sent by their subscribers using P2P programs.

### DMCA Subpoenas

Section 512(h) of the DMCA allows a copyright owner or its agent to request a subpoena for the identification of an alleged infringer from the clerk of any United States district court. One of the items to be included in any subpoena request is a “copy of a notification described in subsection [512] (c)(3)(A).” 17 U.S.C. § 512(h)(2)(A). *Charter* argued (as had *Verizon*) that § 512(h) only authorizes issuance of a subpoena on an ISP if the ISP is notified in accordance with § 512(c)(3)(A), and that § 512(c)(3)(A)’s notification requirement cannot be met where the ISP acts as a conduit.

Section 512(c)(3)(A)’s “notification of claimed infringement” lists six requirements that must be “substantially” included in the notification to constitute valid notice. 17 U.S.C. § 512(c)(3)(A). At the heart of the *Charter* decision is § 512(c)(3)(A)(iii), which requires

[i]dentification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

17 U.S.C. § 512(c)(3)(A)(iii) (emphasis added).

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## Eighth Circuit Hands New Victory to ISPs Resisting DMCA Subpoenas

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### **ISP Liability**

The Eighth Circuit agreed with Charter's argument that where an ISP acts as a mere conduit, it is impossible for the copyright holder to provide the required identification of material "that is to be removed or access to which is to be disabled," because an ISP acting as a conduit is powerless to "remove" or to "disable access" to these materials. Therefore, such an ISP cannot be provided proper notice under § 512(c)(3)(A)(iii). Because the provision of § 512(c)(3)(A)(iii) notice is a prerequisite for the issuance of a subpoena under § 512(h), no subpoena can issue to an ISP acting as a conduit.

Charter also argued that "the text and structure of the DMCA require the ISP to be able both to locate and remove the allegedly infringing material before a subpoena can be issued against it." *Charter*, 2005 U.S. App. LEXIS 31, at \*\*14-15.

The notification provision, § 512(c)(3)(A)(iii), falls within one of the DMCA's four safe harbors from liability available to ISPs that perform particular functions. See 17 U.S.C. §§ 512(a)-(d). Three of the four safe harbors involve an ISP physically storing infringing material or links to infringing material on its computers: by "system caching" infringing material (§ 512(b)); by hosting infringing material (§ 512(c)); or by linking to or providing the location of infringing material (§ 512(d)). These subsections provide a safe harbor *only* if the ISP "responds expeditiously to remove, or disable access to, the material that is claimed to be infringing upon notification of claimed infringement as described in [§ 512](c)(3)." 17 U.S.C. §§ 512(b)(2)(E), 512(c)(1)(C), and 512(d)(3). In contrast, § 512(a) provides a safe harbor to ISPs that provide only "transitory" communications (i.e., that act as mere conduits). Section 512(a), unlike its companion three sections, does not reference a "notice and take-down" provision.

This, argued Charter, confirms that ISPs who act as mere conduits are not subject to the DMCA's notification provision.

Charter raised additional arguments against enforcement of the subpoena similar to those raised by Verizon:

- (1) the DMCA's subpoena provisions violate the case or controversy requirement for Article III jurisdiction;
- (2) the DMCA's subpoena provisions violate the privacy protections for cable subscribers under the Communications Act of 1934, 47 U.S.C. § 551(c)(1); and
- (3) Section 512(h) violates the First Amendment rights of Internet users. *Charter*, 2005 U.S. App. LEXIS 31, at \*10.

Although the Eighth Circuit did not reach these issues, in dicta the court noted that § 512(h) may "unconstitutionally invade the power of the judiciary" and characterized as "at least . . . colorable" the argument that a § 512(h) subpoena is a "court order that must be supported by a case or controversy at the time of its issuance." *Id.* at \*18.

### **RIAA Arguments**

The RIAA raised several counter-arguments, which the Eighth Circuit rebutted largely by means of reference to the Court of Appeals for the D.C. Circuit's opinion in *Verizon*. *Charter*, 2005 U.S. App. LEXIS 31, at \*\*15-17.

The RIAA argued that the broad definition of "service provider" in § 512(k)(1)(B), which includes ISPs acting as mere conduits, coupled with the language of § 512(h) permitting issuance of a subpoena to any "service provider," shows that Congress did not intend to protect ISPs acting as conduits from the obligation to respond to § 512(h) subpoenas.

The *Verizon* court had "emphatically rejected" that argument, reasoning that the notification requirement of § 512(c)(3)(A) controls the issuance of a subpoena regardless of how a "service provider" is defined. *Id.* at \*16.

The RIAA also argued that its notification had "substantially" met the requirements of § 512(c)(3)(A)(iii). The *Verizon* court held that this limitation should not be extended to material failures such as failing to identify any materials to be removed or disabled, *Verizon*, 351 F.3d at 1235-36, and the Eighth Circuit concurred. *Charter*, 2005 U.S. App. LEXIS 31, at \*16.

It is the author's opinion that the RIAA's strongest argument was that a conduit ISP can in fact "disable access" to infringing materials by terminating a subscriber's account or

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## Eighth Circuit Hands New Victory to ISPs Resisting DMCA Subpoenas

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by taking intermediate steps short of termination designed to encourage the subscriber herself to disable access to the material.

If this view is correct, then effective notice can be provided under § 512(c)(3)(A)(iii) by identifying the material to which access is to be disabled. The Eighth Circuit endorsed the *Verizon* court's conclusion on this issue without extended discussion of its reasoning. The *Verizon* court relied on the fact that the DMCA authorizes an injunction against "providing access to infringing material" in § 512(j)(1)(A)(i), but *separately* authorizes an injunction against "providing access to a subscriber or account holder . . . by terminating the accounts . . ." in § 512(j)(1)(A)(ii). *Verizon*, 351 F.3d at 1235.

Based on this distinction, the court concluded that "terminating a subscriber's account is not the same as removing or disabling access by others to the infringing material resident on the subscriber's computer." *Id.*

The *Verizon* court failed to explain why that distinction is germane to interpreting the subpoena provisions, and the Eighth Circuit did not address that question either.

Given Congress' expressed concern that in issuing an injunction a court should consider "whether other less burdensome and comparably effective means of preventing or restraining access to the infringing material are available," 17 U.S.C. § 512 (j)(1)(D), it is perhaps not significant that Congress delineated separate forms of injunctive relief with instructions for courts to choose the least burdensome method that will effectively "prevent[ ] or restrain[ ] access." *Id.*

Indeed, one might reason by analogy that an ISP could determine, in light of its functional relationship to subscribers, the least burdensome means at its disposal to "disable access" to infringing materials. In any event, nothing in the language of § 512(c)(3)(A)(iii) expressly limits the *means* by which access to infringing material may be disabled. Neither the majority nor the dissent in *Charter* fully considered this argument.

## *Eighth Circuit Dissent*

The dissent relied largely on its novel method of parsing the language of § 512(c)(3)(A)(iii) to conclude that "identification of the material claimed to be infringing" is a stand-alone condition that can satisfy § 512(c)(3)(A)(iii).

In this way, the dissent sought to write the problematic requirement to identify material "that is to be removed or access to which is to be disabled" out of the statute altogether.

Because the RIAA's request for a subpoena did identify "material claimed to be infringing," the dissent argued that the notification provisions of § 512(c)(3)(A)(iii) were satisfied and the subpoena to Charter under § 512(h) should be

enforced. The dissent did not offer any sound basis to parse the text in this manner and it is submitted that the language does not reasonably permit this interpretation.

The *Charter* dissent more persuasively addressed the overall purpose of the statute and Congressional intention in enacting it, contending that the majority's interpretation:

denies copyright holders the ability to obtain identification of those subscribers who purloin protected materials through § 512(a) conduit ISPs. This interpretation also shields conduit ISPs from liability without requiring their assistance in protecting copyrights. The suggestion that copyright holders should be left to file John Doe lawsuits to protect themselves from infringement by subscribers of conduit ISPs like Charter, instead of availing themselves of the mechanism Congress provided in the DMCA, is impractical and contrary to legislative intent.

*Charter*, 2005 U.S. App. LEXIS 31, at \*\*31-32.

Indeed, as the majority recognized, organizations such as the RIAA now have many "John Doe" lawsuits pending in courts across the country in which the copyright owner files a motion for third-party discovery of the identity of "John Doe" along with the filing of the suit. *Id.* at \*9, n.3. The dissent convincingly contends that this outcome is contrary to Congress' intent.

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**Copyright holders will  
likely have to avail  
themselves of these less  
streamlined procedures.**

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## Eighth Circuit Hands New Victory to ISPs Resisting DMCA Subpoenas

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### **Conclusion**

Now that two circuit courts have ruled that conduit ISPs may not be served under 17 U.S.C § 512(h), copyright holders will likely have to avail themselves of these less streamlined procedures. Even if the RIAA or another copyright holder convinces a different court that § 512(h) reaches conduit ISPs, constitutional arguments remain to be resolved.

Moreover, the First Amendment arguments raised but never addressed in *Verizon* and *Charter* (except by the *Charter* dissent) have arisen in some of the John Doe lawsuits as well. See, e.g., *Sony Music Entm't, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564-65 (S.D.N.Y. 2004) (recognizing P2P use as protected speech implicating privacy concerns, but enforcing subpoenas in view of plaintiffs' showing on factors favoring disclosure).

In a recent twist, a judge in the Eastern District of Pennsylvania granted Plaintiffs' Motion for Leave to Take Immediate Discovery in a John Doe lawsuit, but conditioned such discovery upon plaintiffs' attaching to the subpoena a document entitled "Court Directed Notice Regarding Issuance of Subpoena." See *Elektra Entm't Group, Inc. v. Does 1-6*, Civ. No. 04-1241, Order and Attachment (E.D. Pa. October 13, 2004) (available at [www.eff.org/IP/P2P/RIAA\\_v\\_ThePeople/20041012\\_Order\\_Granteeing\\_Request.pdf](http://www.eff.org/IP/P2P/RIAA_v_ThePeople/20041012_Order_Granteeing_Request.pdf)).

The "Court Directed Notice" is an information sheet drafted by the court together with organizations which had appeared as *amici curiae* in other DMCA subpoena cases.

Among other things, it provides the recipient with 21 days in which to move to quash or vacate the subpoena before her identity will be disclosed to the plaintiffs, it provides information about how to challenge personal jurisdiction, it supplies contact information for the plaintiff record companies' settlement representatives and it lists legal resources including a number of *amici*.

Whether this ad hoc procedure will find favor with other courts and whether it will be challenged by any parties in the future remains to be seen.

As noted in an earlier article, "[t]he nuances of the ever-more-controversial DMCA seem to be getting more and more inscrutable as time goes by." *DMCA Safe Harbors*

*May Require Careful – If Not Strict – Compliance*, MLRC MediaLawLetter, Feb. 23, 2004, at 31.

The industry now may have to return to Congress to draft a solution that broadens § 512(h) to accommodate the current generation of P2P technology and . . . with any luck . . . perhaps that even accommodates the next generation of technology as well. Judge Murphy's dissent emphasized the stakes:

Regarded by some as an innocuous form of entertainment, internet piracy of copyrighted sound recordings results in substantial economic and artistic costs. . . . It is not just faceless corporations who pay the cost. Local music retailers are also vulnerable to the allure of free music, . . . and artists can lose economic incentive to create and distribute works.

*Charter*, 2005 U.S. App. LEXIS 31, at \*\*20-21.

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## Copyright Claims Against Amazon Barred by DMCA

A federal district court held that the Digital Millennium Copyright Act (“DMCA”) shielded Amazon.com from copyright liability for images sold by third parties on its “zShops” vendor platforms. *Corbis Corp. v. Amazon.com, Inc.*, No. CV03-1415L, 2004 WL 3092244 (W.D. Wa. Dec. 21, 2004) (Lasnik, J.).

The court found that Amazon was entitled to make use of the safe harbor provision of the statute since it did not know about, and could not control, the alleged infringements.

### Background

Defendant Amazon.com (“Amazon”) specializes in online commerce. In addition to directly selling products, Amazon hosts a number of “third party vendor platforms,” including “zShops,” which allow companies to list and sell their own merchandise directly to online consumers.

Companies selling through zShops enter into a “Participation Agreement” in which they agree to refrain from marketing any item that, *inter alia*, infringes on any third-party intellectual property rights.

Under the Agreement, Amazon reserves the right to remove vendors’ listings and terminate service for violations of the Agreement or Amazon’s internal policies.

Amazon also owns and operates the popular Internet Movie Database (“IMDb”), a website featuring profiles of movies, actors, directors and other entertainment-related people and topics.

### Copyright Infringement Suit

In June 2003, Corbis, a licensor of photographs and art images, sued Amazon and individual zShops defendants alleging that 230 images sold on zShops, as well as images contained on the IMDb website, infringed Corbis’s copyright interests.

Both sides filed multiple motions for summary judgment, and Amazon asserted that it was shielded from liability under the DMCA.

### DMCA Defense

In order to qualify for protection under the DMCA, a party must first prove that it meets the definition of a “service provider,” in that it functions as “a provider of online ser-

vices or network access, or [as] the operator of facilities therefore.”

Once that threshold is met, the service provider must then establish that it

“(A) has adopted and reasonably implemented, and informs subscribers and account holders of the service provider’s system or network of a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider’s system or network who are repeat infringers; and

(B) accommodates and does not interfere with standard technical measures.

17 U.S.C. § 512(i).

Further, under the safe harbor provision of 17 U.S.C. 512(c), a service provider is only protected from liability for copyright infringement for “storage at the direction of a user of material that resides on a system or network controlled or operated by the service provider” when:

- 1) it has neither actual knowledge that its system contains infringing materials nor an awareness of facts or circumstances from which infringement is apparent, or it has expeditiously removed or disabled access to infringing material upon obtaining actual knowledge of infringement;
- 2) it receives no financial benefit directly attributable to infringing activity; and
- 3) it responded expeditiously to remove or disable access to material claimed to be infringing after receiving from the copyright holder a notification conforming with requirements of § 512(c)(3).

After concluding that Amazon is a service provider, the court found that it had both adopted a User Policy and communicated its termination policy to its users. The policy had also been “reasonably implemented” in that Amazon had adopted an adequate procedure for receiving complaints of infringement and conveying the complaints to users, and that it had not been demonstrated that Amazon would tolerate repeat violations of its copyright infringement policy.

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## Copyright Claims Against Amazon Barred by DMCA

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The court also concluded that Amazon had not interfered with standard technical measures employed to identify and protect copyrighted materials.

### *Safe Harbor Protection*

After holding that Amazon qualified for protection under the DMCA, the court went on to address Amazon's argument that it was shielded from liability under the safe harbor provision of § 512(c)(3).

The court found that Amazon had neither actual nor apparent knowledge of the alleged copyright infringement by zShops, nor did it possess the right and ability to control the infringing activities of its third-party vendors.

Noting that the Central District of California had previously ruled that Amazon satisfied the requirements of § 512(c), the court rejected Corbis's attempts to distinguish the California case from the one at issue. *Citing Hendrickson v. Amazon.com*, 298 F. Supp. 2d 914, 918 (C.D. Cal. 2003).

The court found that Amazon's ability to identify zShops defendants and terminate their accounts did not amount to the right and ability to control the infringing users necessary for preclusion under the DMCA, which required more than "the ability of a service provider to remove or block access to materials posted on its website or located in its system." (citations omitted).

Additionally, the court ruled Amazon's meetings with movie poster vendors in an effort to encourage them to sell merchandise through zShops did not mean that Amazon knew of their infringing activities.

The court further noted that Amazon was never in the possession of the merchandise sold by the zShops defendants, did not preview the merchandise prior to its listing on the websites, did not edit the product descriptions, and did not suggest pricing for the merchandise.

Holding that Amazon qualified for protection under § 512(c), the court granted Amazon's motion for partial summary judgment concerning the allegedly infringing images on the zShops platform.

The court, though, denied both side's motions for summary judgment on Corbis's separate copyright claims over a photograph that appeared in a montage

advertisement on Amazon's IMDb website, finding issues of fact over whether the photographs had been properly registered.

### *Other Claims*

The court rejected Corbis's Lanham Act claim over the zShops images on preemption grounds, finding that an adequate remedy existed under the Copyright Act.

Finally, the court rejected Corbis's state law claims for violation of the Washington Consumer Protection Act and for tortious interference with business relations over the zShops and IMDb images. These claims were barred by § 230 of the Communications Decency Act.

Corbis argued that Amazon "shaped the content of what was offered for sale on its zShops and directly provided the unauthorized images displayed on its IMDb.com platform." But the court found that while Amazon may have encouraged third parties to use the zShops platform and provided tools to assist them, the zShops vendors ultimately decided what information to put on the web.

Similarly, Amazon was entitled to immunity for the state law claims over the images that appeared on the IMDb website where the evidence showed that Amazon did not create or develop the images posted on IMDb.

Plaintiff was represented by Brett Wade Sommermeyer of Gordon & Polscer LLP, Seattle, Wa.; and Dan J. Donlan and Mary K. Schug of Powell Spears Lubersky, Seattle, Wa. Defendant was represented by Charles Christian Sipos, Elizabeth L. McDougall-Tural and Kenneth B. Wilson of Perkins Coie, Seattle and San Francisco; and Dale L. Kingman, David Joseph Coey, John Clark Gibson of Kingman Peabody Pierson & Fitzharris, Seattle, Wa.

### ***Any developments you think other MLRC members should know about?***

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## Court Rules Identity of Anonymous Internet Poster Subject to Discovery

A federal district court has rejected the motion of an anonymous Internet poster to quash a subpoena served upon his internet service provider (“ISP”) in an effort to learn his identity. *Alvis Coatings, Inc. v. John Does One Through Ten*, No. 3L94 CV 374-H, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004) (Horn, J.).

Plaintiff Alvis Coatings, Inc., a manufacturer of coating products, alleged that beginning in 2003, unknown individuals began making false and disparaging postings on Internet websites concerning plaintiff and its products. Plaintiff filed an action against ten unknown individuals asserting claims under the federal Lanham Act, as well as for unfair and deceptive trade practices, unfair competition, tortious interference with business relations and defamation under state law.

After the court permitted plaintiff to serve subpoenas *duces tecum* upon the message board operators at [www.bobvila.com](http://www.bobvila.com) and [www.oldhouse.com](http://www.oldhouse.com), plaintiff learned the specific ISPs from which the messages originated, as well as the IP addresses of the messages’ authors.

Plaintiffs proceeded to serve subpoenas on ISPs Roadrunner and Comcast directing them to provide “documents sufficient to identify the name, address, and telephone numbers of the individuals” whose IP addresses were provided by the websites.

While Roadrunner provided the requested information, Comcast informed plaintiff that it would not respond to the subpoena without a court order and that it would inform the customer who was the subject of the present motion – and had posted sixteen messages concerning the plaintiff on one website – about the subpoena.

Defendant then moved to quash the subpoena served upon Comcast, arguing that “requiring Comcast to disclose his identity to the Plaintiff would violate his right under the First Amendment to the U.S. Constitution to engage in anonymous free speech.”

### ***Court Rejects Defendant’s Motion***

While the court recognized that the Supreme Court has ruled that anonymous speech is protected by the First Amendment, it found that “it is equally well settled that the First Amendment does not protect false commercial speech.” *Citing Central Hudson Gas & Elec. Corp. v. Pub-*

*lic Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980) (additional citation omitted).

The court noted that while there is a lack of precedent concerning when an anonymous defendant may retain his anonymity in an action alleging that his statements impugned a federally-registered trademark or disparaged a plaintiff’s business, courts grappling with similar issues “have concluded that where a plaintiff makes a prima facie showing that an anonymous individual’s conduct on the Internet is otherwise unlawful, the plaintiff is entitled to compel production of his identity in order to name him as a defendant and to obtain service of process.” *Citing John Doe v. 2themart.com, Inc.*, 140 F. Supp. 2d 1088, 1094-95 (W. Dist. Wa. 2001); *Columbia Ins. v. Seescandy.com*, 185 F.R.D. 573, 589 (N.D. Cal. 1999); *In re Subpoena Duces Tecum American Online, Inc.*, 52 Va. Cir. 26, 30 (Va. Cir. Ct. 2000).

Finding that defendant did not dispute that he was the author of the 16 allegedly disparaging statements at issue and that plaintiff “credibly averred that the statements are both false and damaging to the Plaintiff’s trademark and its business generally,” the court denied defendant’s motion to quash.

Interestingly, the court’s opinion failed to address the reasoning of courts such as the New Jersey state court in *Dendrite International, Inc. v. Doe, No. 3, 775 A.2d 756* (N.J. Super. Ct. App. Div. 2001), which have affirmed the principle that even after a plaintiff has presented a prima facie cause of action, a court must still balance a defendant’s First Amendment right of anonymous free speech against the strength of plaintiff’s case and “the necessity for the disclosure of the anonymous defendant’s identity to allow the plaintiff to properly proceed.”

Plaintiff was represented by Jason M. Sneed of Alston & Bird LLP, Charlotte, NC. Defendant was represented by John T. Herman, Berkley, MI.

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## Americans' Distrust of Media Greater Than That of Europeans

According to a recent Harris Poll, Americans distrust the media far more than residents of the European Union. The results of the poll are available online [here](#).

The poll, which surveyed 2,092 adults online between December 8 and 15, 2004, asked participants whether they "tend to trust" or "tend not to trust" a number of different institutions, including "the press," "radio" and "television." The results were then compared to the findings of the "Eurobarometer 61," a similar poll conducted in the European Union in which at least 1,000 adults in 25 countries were interviewed face-to-face.

### *Trust in the Media*

By a margin of 62 to 22 percent, Americans polled stated they tend not to trust "the press." In contrast, Europeans answered the same question with a 47 to 46 split in favor of trusting the press.

Television did not fare much better with Americans, with 58 % stating they do not trust the medium. In contrast, 55% of Europeans reported that they tend to trust television.

Surprisingly, a plurality of Americans polled said they tend to trust radio (43% to 33%). In contrast, a large majority of Europeans surveyed (62 %) said they trusted radio.

### *European Results*

Among the largest countries surveyed in the Eurobarometer, trust of the press was highest in Spain (61%) and France (60%); and lowest in the United Kingdom, where only 20% of those surveyed professed a trust in the press – a result chalked up to the UK's "own special mass market tabloid journalism." A plurality of Germans (49 %) and Italians (47%) said they tended not to trust the press.

### *Other Institutions*

Trust levels about other institutions was far less disparate. Both the Harris Poll and the Eurobarometer revealed that a majority of Americans and Europeans surveyed tend not to trust politicians or their governments, trade unions and big business.

Large majorities of Americans and Europeans surveyed, though, trust the police and military, as well as charitable and voluntary organizations.

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## **MLRC Cyberspace Committee: Articles on Selected Topics 2004**

### **JURISDICTION OVER INTERNET PUBLISHERS**

*By David A. Schulz and Kurt Wimmer*

### **THE STATE OF THE LAW OF SECTION 230 IMMUNITY**

*By Patrick J. Carome, Samir Jain, and  
C. Colin Rushing*

### **HAPPY SIXTH BIRTHDAY: EMERGING IMPLICATIONS FOR THE PRESS OF THE DIGITAL MILLENNIUM COPYRIGHT ACT**

*By Bruce P. Keller, Jeffrey P. Cunard, and  
Jeremy Feigelson*

### **SEARCH SERVICE KEYWORD-BASED ADVERTISING: TRADEMARK INFRINGEMENT OR FAIR COMPETITION?**

*By Mark Sableman*

### **AFTER THE CAN-SPAM ACT: WHY YOUR IN-BOX REMAINS FULL**

*By Kavita Amar and Thomas R. Burke*

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## Update: Former Reporters Challenge Station's License Renewal

Two former television reporters whose previous attempt to invoke Florida's private-sector "whistleblower" statute to allege that their news colleagues' edits to an investigative report violated an FCC policy against deliberately "distorting" the news was rejected by a appeals court in 2003 have now filed an FCC petition challenging their former station's license renewal. See File No. BRCT-20040927AMD (F.C.C. app. accepted Oct. 8, 2004).

The petition alleges that WTVT-TV in Tampa, Fla. is not operating in the public interest, based on Jane Akre's and Steve Wilson's allegations that management and outside counsel had ordered them to distort their never-aired news report about the safety risks of BGH, a synthetic hormone injected into dairy cattle to increase milk production. The former reporters allege that the station feared a lawsuit by Monsanto, which makes the hormone.

Although the story that Akre and Wilson repudiated never aired, WTVT did produce a new multi-part investigative piece on BGH and has continued to cover the controversy.

Akre and Wilson also allege that the station is not adequately maintaining its file of complaints, claiming that several letters on the BGH story were sent to the station but were not present in the file.

The station is preparing a response to the petition. In comments to the *Tampa Bay Business Journal*, station general manager Bob Linger said that he expects the station to be fully vindicated.

Previously, Akre and Wilson sued the station in for damages under Florida's private whistleblower statute, Fla. Stat. § 448.102(1), (3). The complaint said that the alleged "distortions" constituted a violation of a FCC's "news distortion policy," a policy developed by the agency in a number of decisions under which the FCC may act against a station's license on proof that senior station or news management has engaged in deliberate distortion of the news, about a subject that affected the basic accuracy of a news report. See, e.g., *In re CBS Program "Hunger in America,"* 20 F.C.C.2d 143 (1969).

The complaint then argued that WTVT's alleged violation of this FCC policy fulfilled the requirements of the whistleblower statute, which allows employees to sue when retaliated against for objecting to, or threatening to

report, employer conduct "that is in violation of a law, rule, or regulation." Fla. Stat. § 448.102(1), (3).

After trial in 2000, a jury awarded Akre \$425,000, while finding for the station on Wilson's claims. The award was vacated and the defense verdict was affirmed on appeal. See *New World Communications of Tampa, Inc., d/b/a WTVT-TV v. Akre*, 2003 WL 327505 (Fla. 5th DCA Feb. 14, 2003), *reh'g en banc denied* (Feb 25, 2004), *clarified on rehearing* (Feb 25, 2004); see also *MLRC MediaLawLetter*, May 2003, at 58.

### FCC Proposes \$220,000 Fine for Radio Indecency

Last month the FCC unanimously proposed levying the maximum fine of \$220,000 against the owner of radio station KQRC-FM in Leavenworth, Kansas, and KFH(AM) in Wichita, Kansas for repeatedly airing indecent material during broadcasts of the "Dare and Murphy Show." *In the Matter of Entercom Kansas City, Wichita Licenses, LLC*, File No. EB-02-IH-0485 (Dec. 22, 2004). Available [here](#).

The proposed fine is the maximum amount allowed – \$27,500 for each of the four apparently indecent broadcasts by the two stations.

The offending broadcasts included a "Naked Twister" segment with local strippers participating as contestants, that "dwell[ed] on descriptions of female genitalia and breasts in an explicit and graphic manner" and interviews with porn stars.

The FCC rejected the station owners argument that the FCC's indecency standard is unconstitutionally vague and overbroad under *Reno v. ACLU* and *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002).

The Commission concluded that neither case altered the relevant standards.

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## LEGISLATIVE UPDATE

# Shield Bill and FOIA Reform

By Kevin Goldberg

If I could predict what Congress would do in a given year, I would be a rich man. But I cannot. And I am not (both are quite a shame). But, as the 109th Congress commences, there are some indications of very important issues that are already moving their way to the forefront of the media's interest on matters of freedom of the press and access to government information.

### *Reporter's Shield Laws*

- In the 108th Congress, Senator Christopher Dodd (D-CT) introduced S 3020, the "Free Speech Protection Act", which is the first reporter's shield law that has been introduced in Congress since 1987.
- After an earlier draft was floated among interested groups, this version is the product of negotiations between the Senator's staff and many MLRC members and staff. It is based primarily on the laws already in place in the District of Columbia and Maryland
- It can be summarized as follows:
  - The bill does not attempt to define a "journalist," instead providing protection to a "covered person" who is one who:
    - Engages in the gathering of news or information and
    - has the intent, at the beginning of the process of gathering news or information, to disseminate the news or information to the public, with the term "news or information" defined very broadly in an attempt to cover as many media outlets as possible
  - The bill specifically lists 7 types of news media that are covered:
    - newspapers
    - magazines
    - journals or other periodicals
    - radio
    - television
- any means of disseminating news or information gathered by press associations, news agencies or wire services
- any printed, photographic, mechanical or electronic means of disseminating news or information to the public
- It creates an absolute privilege for confidential sources, which applies to the reporter's supervisors and assistants, rendering the information inadmissible in any proceeding or hearing before any branch of the federal government
- There is a qualified privilege for:
  - notes
  - outtakes
  - photographs or negatives
  - video or sound tapes
  - film
  - other data that is not communicated in the news media
- This qualified privilege can only be overcome through clear and convincing evidence that:
  - the news or information is critical and necessary to the resolution of a significant legal issue before an entity of the federal government;
  - the news or information could not be obtained by alternative means; and
  - there is an overriding public interest in the disclosure
- Many are working with Senator Dodd to see whether a strong Republican co-sponsor can be obtained for this bill. An alternative was also drafted primarily by MLRC members and is being circulated among House Members to be introduced in that chamber. The main provisions of this bill include:
  - An absolute privilege against compelled testimony before any federal judicial, legislative, executive or administrative body regarding the identify of a confidential source or information that would reveal the identity of that source

(Continued on page 54)

**LEGISLATIVE UPDATE: Shield Bill and FOIA Reform***(Continued from page 53)*

- A qualified privilege against the production of documents to these bodies unless clear and convincing evidence demonstrates that the information cannot be obtained by a reasonable, alternative non-media source and:
  - In a criminal prosecution or investigation:
    - There are reasonable grounds to believe a crime has occurred and
    - The information sought is essential to the prosecution or investigation
  - In a civil case, the information is essential to a dispositive issue in a case of substantial importance
- The protections discussed above apply to information sought by a third party but related to a “covered entity”, such as telephone toll records or E-mail records and, in the event that they are sought, the party seeking the information shall give the covered entity reasonable and timely notice of the request and an opportunity to be heard before disclosure
- A “covered entity” includes
  - The publisher of a newspaper, magazine, book journal or other periodical; a radio or television station, network or programming service; or a news agency or wire service, with a broad listing of media such as broadcast, cable, satellite or other means
  - Any owner or operator of such entity, as well as their employees, contractors or any other person who gathers, edits, photographs, records, prepares or disseminates the news or information

**Major FOIA Reforms**

- On September 14, 2004 Rep. Waxman (D-CA), introduced the Restore Open Government Act of 2004 (HR 5073).
- The bill, which received no action at the end of the 108th Congress, would effect six major changes to the current state of access to government information, many of which have been sought for several months:

- Enact into law the “Restore FOIA Act” which sought to reinstate the “compromise language” which was to be passed into law as the Critical Infrastructure Information Act of 2002 but at the last minute passed was over for much more stringent language
- Overturn both the “Ashcroft Memo” and “Card Memo” stating Administration policy on FOIA, in favor of a standard used by Attorney General Janet Reno, who said the Department of Justice would only defend a FOIA denial in federal court if foreseeable harm was likely to result from disclosure of the records at issue
- Overturn President Bush’s Executive Order relating to Presidential records in favor of the previously existing standard enunciated by President Reagan
- It essentially overturns the Supreme Court’s ruling that the records of the energy task force headed by Vice President Cheney are not subject to disclosure via the Federal Advisory Committee Act
- It seeks to reduce excessive classification of information by creating more Congressional oversight of the classification process
- It institutes “fee shifting” whereby a plaintiff seeking records from a federal agency can recover attorney’s fees upon receiving the records, even if the case was not officially resolved through a court order, as long as the commencement of litigation provided the substantial impetus for release of the records.

In addition, Senator John Cornyn (R-TX) has been soliciting ideas from members of the press and the FOIA requestor community as to possible FOIA fixes through James Ho, Chief Counsel to the Constitution, Civil Rights and Property Rights Subcommittee to the Senate Judiciary Committee. Mr. Ho has continued to work on this through the break and interested parties can contact him through the Senate Judiciary Committee.

No final draft is available yet, but among the areas being discussed are:

- The definition of the “news media” for purposes of fee waivers
- The proper circumstances for “fee shifting”, which is the award of attorney’s fees to a litigant who must go to court to obtain documents from a federal agency,

*(Continued on page 55)*

## LEGISLATIVE UPDATE: Shield Bill and FOIA Reform

*(Continued from page 54)*

- especially in cases where documents are released prior to a final verdict from the federal court
- An annual report to track the use of the FOIA exemption for critical infrastructure information that was created in the Homeland Security Act of 2002
- Enforcement of the 20-day deadline by which agencies must respond to a FOIA request and the penalties for non-compliance
- The continued accessibility of records that have been given to private contractors for storage and maintenance

- The creation of a “FOIA Ombudsman” within a new Office of Government Information Services to oversee FOIA

*For more information on any legislative or executive branch matters, please feel free to contact the MLRC Legislative Committee Chairman, Kevin M. Goldberg of Cohn and Marks LLP at (202) 452-4840 or [kmg@cohnmarks.com](mailto:kmg@cohnmarks.com).*

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## ETHICS CORNER

### Back from the Grave

#### ***The Defense of Arthur Andersen, Obstruction of Justice, and Document Retention***

By Lucian Pera

Remember Arthur Andersen? The enormously powerful, worldwide accounting and consulting firm that was destroyed by its indictment in connection with the Enron debacle?

Well, thanks to the U.S. Supreme Court, they're back in the legal news, though not back in business.

Those with longer memories will recall that the first indictment arising from the 2001 collapse of Enron was a single-count federal obstruction of justice charge returned against the giant accounting firm, Arthur Andersen, LLP, based on its shredding of loads of documents and destruction of email, all related to its work as Enron's outside auditor.

As a result of its indictment, the firm collapsed. In the months that followed, Andersen went to trial, was convicted, and had its conviction upheld on appeal by the Fifth Circuit. End of story, but a cautionary tale for lawyers in numerous respects.

But wait. On January 7, 2005, the U.S. Supreme Court granted Andersen's petition for certiorari, and a chapter thought closed is now re-opened.

#### ***Why Do I Care?***

You may ask yourself, So what? Why should anyone concerned with ethics and the prudent practice of law care?

Lawyers should care, and should keep an eye trained on the Supreme Court's handling of this case, because the result may have yet more implications and lessons for all of

us, including our law firms and clients, concerning the often obscure federal law of obstruction of justice and the very difficult area of document retention and destruction.

In-house lawyers, who naturally seek to require compliance with corporate document retention policies

and avoid unnecessary litigation risks, should pay particular heed, because it seems that they may also risk killing the company when they push for such compliance when litigation risks might exist.

Addressing the potential significance of a decision in this case, the government argued against review, first quoting Andersen's assertion in its petition for certiorari that

*(Continued on page 56)*

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***Lawyers should keep an eye trained on the Supreme Court's handling of this case, because the result may have yet more implications and lessons concerning the often obscure federal law of obstruction of justice and the very difficult area of document retention and destruction.***

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**ETHICS CORNER: Back From the Grave***(Continued from page 55)*

the Fifth Circuit decision “pose[s] serious risks of prosecution for virtually every company that maintains a document retention policy.”

The government – which originally declined to even respond to the petition, but was specifically requested to do so by the Court – then went on to argue that the Fifth Circuit decision really didn’t matter, anyway, because Congress has now passed, as a part of the Sarbanes-Oxley Act, a much more sweeping criminal obstruction of justice statute (18 U.S.C. § 1519) that covers the same ground and imposes even more serious penalties. (Thank you, Mr. Solicitor General. We feel better now.)

Our media clients already grapple with these issues daily in dealing with the possible retention or destruction of reporters’ notes, drafts of stories or scripts, video or audio broadcasts or outtakes, and, of course, the new scourge of all document retention policies, email. The Andersen fiasco and other developments caused many lawyers and clients to review and reconsider their document management policies, and the likely U.S. Supreme Court review of the Andersen conviction may well lead to some serious further reconsideration.

***Down Memory Lane***

Return with us now to those thrilling days of 2001, before the names Sarbanes and Oxley became hyphenated, to the story that spawned the death of one of the largest professional services firms in the world.

Following the August 14, 2001, resignation of Enron’s CEO, a drop in Enron’s stock price, and an internal controversy arising from whistleblower Sherron Watkins’ warning to Enron chairman Kenneth Lay that Enron “could implode in a wave of accounting scandals,” the internal unrest at Enron began to take on a life of its own, and the shock waves began to reach the company’s accountants.

On October 16, 2001, Enron Corporation announced in a press release that it would record a third-quarter loss, due to what it described as a \$1.01 billion “non-recurring” charge to earnings. In the days leading up to that announcement, there were serious discussions between David Duncan, the lead Andersen partner on its Enron engagement team, and Enron finance officials. After seri-

ous internal consultation at Andersen, Duncan told Enron’s leadership that Andersen believed that the proposed public description of the charge as “non-recurring” was wrong and could be misleading. Enron went ahead with the release anyway.

This release ensured the escalation of an existing SEC investigation of Enron, leading almost immediately to SEC requests for information directed to Enron, and eventually leading to an SEC subpoena concerning Enron that was served on Andersen on November 8, 2001. It was events during this critical period – from Enron’s October 16 public release through the November 8 SEC subpoena to Andersen – that became the basis of the Andersen indictment.

At the time, Andersen had adopted a lengthy, detailed, and aggressive document retention and management policy. Essentially, it provided that the core documents concerning an audit engagement, comprising the “audit file,” were to be assembled in one place and maintained, but that almost all other documents, paper or electronic, and including less important workpapers and additional copies of audit file documents, were to be destroyed. Unfortunately for Andersen, their partners and employees did not rigorously comply with the policy; specifically, by the time the Enron crisis was upon Andersen, they had only very poorly complied with the policy as to their Enron documents.

As the crisis deepened, however, several people within Andersen repeatedly encouraged their people to “comply” with the policy, and so began an extraordinary episode of shredding and destruction of documents, both paper and electronic. The proof showed that over two tons of paper was shredded and tens of thousands of emails and other electronic documents were destroyed.

***Crisis Management or Obstruction of Justice?***

The proof as to who ordered and encouraged the shredding, as well as on Andersen’s knowledge of the onrushing investigation, was largely unhelpful to Andersen. According to the Fifth Circuit opinion:

- By early September, senior Andersen officials and members of its legal department had formed a “crisis-response” group. In-house Andersen counsel

*(Continued on page 57)*



**ETHICS CORNER: Back From the Grave***(Continued from page 56)*

Nancy Temple was assigned to this effort by late September.

- On October 8, Andersen hired its own outside counsel to advise Andersen concerning its work with Enron.
- On October 9, Temple made notes in a meeting with senior in-house Andersen counsel that an SEC investigation was “highly probable” and that an Enron restatement of earnings was a “reasonable possibility.”
- In the same October 9 meeting, Temple also made notes of Andersen’s awareness that, as a result of Enron’s unfolding troubles, the SEC might charge Andersen with violating an SEC cease and desist order entered against Andersen earlier that same year in connection with Andersen’s alleged misconduct in work for Waste Management Corporation. (In connection with the same June 2001 Andersen settlement with the SEC, Andersen paid some \$7 million, the largest monetary settlement ever exacted by the SEC, and Andersen was censured under SEC Rule 102(e).)
- On October 10, Andersen partner Michael Odom urged Andersen personnel to comply with the document policy, noting “if it’s destroyed in the course of normal policy and litigation is filed the next day, that’s great . . . we’ve followed our own policy and whatever three was that might have been of interest to somebody is gone and irretrievable.”
- On October 12, Andersen in-house counsel Temple internally labeled the Enron matter a “governmental regulatory investigation.” She then asked Odom whether the Enron engagement team was in compliance with the document retention policy, and Odom forwarded this email inquiry to Duncan, the lead Andersen partner on the Enron engagement. The government argues that, by this email, Temple, aware that the engagement team was not complying with the document retention policy, urged them to comply with the policy as a “coded” instruction to destroy documents.
- Very shortly after the October 16 release, the SEC wrote Enron informing them that an SEC investigation had been underway since August and requesting various accounting information and documents. Andersen received a copy of this letter by October 19.
- On October 19, Temple emailed a link to the firm’s document retention policy to another Andersen accountant, allegedly causing personnel in that group to delete hundreds of Enron-related email.
- At a Saturday, October 20, Andersen meeting, Temple again reminded Andersen personnel “to make sure to follow the [document retention] policy.” Again, the government argues that this was essentially an instruction to destroy documents in the face of an official investigation.
- On October 23, at an “urgent” and “mandatory” meeting of the Andersen engagement team scheduled by Duncan in Houston, among other items discussed, Duncan directed the engagement team to comply with the records retention policy. Apparently, after this exhortation, the shredding apparently began in earnest and continued through November 8 or 9.
- On October 26, a senior Andersen partner circulated a *New York Times* article on the SEC response to Enron and noted that Andersen “will be in the cross-hairs.”
- On October 30, a second SEC letter went to Enron requesting accounting documents.
- On November 8, Enron restated four and a half years of earnings, eliminating \$586 million in profits.
- On November 8, Andersen itself received a subpoena from the SEC.
- The next day, November 9, Duncan’s assistant sent the Houston engagement team an email entitled, “Stop the Shredding,” instructing them, “No more shredding.” The document destruction ceased.

A month later, Enron was in bankruptcy. Six months later, Andersen was in the dock.

On the basis of this record, in 2002, the government charged Arthur Andersen, LLP with obstructing an official proceeding of the SEC by “corruptly persuading” one or more Andersen partners or employees to destroy documents, all in violation of 18 U.S.C. § 1512(b)(2). As the Fifth Circuit wrote,

[w]rit large, the government says that Andersen, in an effort to protect itself and its largest single account, ordered a mass destruction of documents to keep them from the hands of the SEC.

*(Continued on page 58)*

**ETHICS CORNER: Back From the Grave**

(Continued from page 57)

The government identified four potential “corrupt persuaders,” including Duncan and Temple.

By the time of trial, former Andersen partner David Duncan had pled guilty to obstruction of justice and was a star witness for the government.

The jury convicted Andersen, and the Fifth Circuit affirmed.

***What Was the Jury Thinking?***

One of the ironies of the case was that, based on post-verdict statements by the jurors, the jury convicted Andersen on a theory never advanced by government prosecutors.

In an effort to prudently document Andersen’s disagreement with their client over the October 16 release, Andersen partner David Duncan prepared a file memo, to be made part of the Enron audit file (which would not be covered by privilege or confidentiality) concerning his discussions with Enron personnel.

As a further attempt at prudence, he circulated a draft of this memo inside Andersen, including sending a copy to in-house counsel Nancy Temple. Temple helpfully responded by email with three suggestions for revisions to the file memo, including suggesting the deletion of reference to his consultation with the law department (apparently to preserve the privilege), the deletion of Temple’s name (apparently to avoid Temple becoming a witness), and the deletion of language “that might suggest we [*i.e.*, Andersen] have concluded the release is misleading.” Speaking after they convicted Andersen, several jury members said that this act by Temple was the obstruction of justice that they had found.

This sidelight on the conviction is what *really* scared lots of lawyers. As Nancy Temple’s lawyer explained to the press, “If there’s anything criminal about suggesting edits to a memo, then every lawyer in America should be quaking.”

And, just to make matters worse, the proof apparently revealed that Andersen retained in its files the original draft of the Duncan file memo, Temple’s suggestions for revisions, and the resulting, revised Duncan file memo. Go figure.

(A marvelously thorough law review note on Nancy Temple’s ethical duties in connection with this file memo has just

been published. See Note, *Nancy Temple’s Duty: Professional Responsibility and the Arthur Andersen Verdict*, 18 GEORGETOWN J. LEGAL ETHICS 261 (2004).)

***The Crux of the Matter***

While it’s certainly possible to read too much into the granting of certiorari in a particular case, it is hard not to conclude that the Court found some merit in the core arguments made by Andersen claiming error by both the district court and the Fifth Circuit panel. Out of all this, two sets of issues appear to be the important ones for us:

1. What does the “corruptly” in the federal criminal ban on “corruptly persuad[ing]” another to destroy evidence mean? Does it mean, as the trial court and the Fifth Circuit held, simply with an “improper purpose”? If so, what does that mean, anyway? Is some intent to violate some other criminal law required? And must one know that the proposed conduct is wrongful to be guilty of “corruptly persuad[ing]” another to destroy evidence?

2. What kind of proceeding or investigation must be on the horizon for a person to be guilty of obstruction of justice and, more importantly, how close must it be?

***Defining Down “Corruptly Persuade”***

The trial court’s jury charge defined the statutory term “corruptly” to mean “having an improper purpose” and, in turn, instructed the jury that “[a]n improper purpose, for this case, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding.”

Before the Fifth Circuit, Andersen argued that this definition renders the term “corruptly” “superfluous,” arguing that the term actually requires more than an intent to withhold documents, and that the term should be read to require either proof that the person persuaded violated an independent duty or that the person engaged in inherently culpable conduct, such as bribery.

The appeals court rejected this argument, finding that “corruptly” did add meaning to the statute, but did not require the additional proof suggested by Andersen. With

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***Andersen may have convinced the Supreme Court to consider whether every ordinary document retention policy could be argued to be obstruction of justice under this standard.***

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specific reference to document retention policies, the court found that the charge properly

insist[ed] upon a degree of culpability beyond an intent to prevent a document from being available at a later proceeding. A routine document retention policy, for example, evidences an intent to prevent a document from being available in any proceeding. But it does not alone evidence an intent to “subvert, undermine, or impede” an official proceeding.

The Fifth Circuit panel further wrote:

There is nothing improper about following a document retention policy when there is no threat of an official investigation, even though one purpose of such a policy may be to withhold documents from unknown, future litigation. A company’s sudden instruction to institute or energize a lazy document retention policy when it sees the investigators around the corner, on the other hand, is more easily viewed as improper. The instruction’s requirement of an improper purpose in withholding the documents ensures that the jury found a level of culpability over and above the mere intent to withhold a document from an official proceeding.

A reasonable observer must wonder – and Andersen may have convinced the Supreme Court to consider – whether these distinctions have any meaning and whether *every* ordinary document retention policy, if ultimately successful in its “intent to prevent a document from being available in any proceeding,” could be argued to be obstruction of justice under this standard.

***When a Proceeding is a Proceeding***

Equally important is the whole question of how near an, and what type of, “official proceeding” is needed to establish obstruction of justice. Andersen raised the further issue of whether the government was required to prove that it “had in mind a particular proceeding that it sought to obstruct.” The Fifth Circuit responded:

Andersen argues that Congress could not have intended to criminalize the widespread use of records retention programs, all of which have a general pur-

pose of not retaining documents that might be helpful to some later appearing adversary – that this court should read the statute to insist upon proof that a defendant intended to impede a particular proceeding. The argument anticipates a government argument that this is fanciful, pointing out that the prosecution argued just that in ascribing criminal intent to Michael Odom's statement in a videotaped meeting with employees that the records retention policy should be followed because it would make records unavailable in possible future litigation – even though it asserts his remarks were unrelated to Enron. Indeed, it argues, the jury asked to see the video during its deliberations. This, it urges, makes clear that the jury was allowed to convict for acts that do not violate the statute.

The court rejected this argument, pointing to the express language of 18 U.S.C. that the proceeding “need not be pending or about to be instituted at the time of the offense.” Noting that Andersen’s argument that the statute does not offer guidance as to the concreteness of the defendant’s expectation of a proceeding, the court nevertheless found that Andersen’s expectation apparently was concrete enough.

But when should Andersen have seen “the investigators around the corner”? Sophisticated SEC practitioners would apparently assert that virtually any significant restatement of earnings will draw an SEC investigation. Was that threshold crossed in August or September for Andersen? Certainly by October 9, Andersen’s in-house counsel had apparently concluded that an SEC investigation was “highly probable” and that an Enron restatement of earnings was a “reasonable possibility” – was that sufficient? And what of industries even more highly regulated – under this standard, if a business *knows* that there will be complaints or litigation of a particular kind, and *knows* that they will trigger an official proceeding, is any destruction of documents ever permitted?

While the facts of the *Andersen* case, at least as presented by the Fifth Circuit, suggest that a court reviewing its decision could stand on the facts to avoid reaching the most difficult questions of what “corruptly” means and how near and what type of “official proceeding” must exist, it is hard to understand why the Supreme Court would take

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this case had not some justices wished to provide meaningful guidance on these questions.

***And That's Not All***

The Andersen conviction certainly wasn't the sole cause, but, over the last several years, lawyers and regulators seeking information seem to have finally started to understand the power of electronic discovery and the eternal relevance of any efforts to withhold or destroy information or documents, however innocent they may seem.

Prosecutors and state attorneys general have skewered companies using neglected emails, special electronic document retention orders have been entered in litigation, monetary and substantive sanctions have been entered against companies that have not acted quickly enough to preserve electronic evidence from, and, all over America and the world, companies are trying to sort out what their document retention policies should say and whether they need to employ psychics to determine when to put "litigation holds" on destruction of documents.

Oh, and did we discuss the pending revisions to the Federal Rules of Civil Procedure concerning electronic discovery?

***Clarity, Fear or Both?***

Some believe that the decision to indict Andersen – as opposed to indicting some of its partners or employees most criminally culpable – was an abuse of prosecutorial discretion, leading directly to the destruction of a fine professional services firm and chaos for more than 28,000 Andersen partners and employees in the U.S. alone.

Even a reversal of Andersen's conviction by the U.S. Supreme Court won't bring Andersen back, nor will it settle the debate on the propriety of its prosecution, but the Supreme Court's decision may well bring more clarity to how and when to implement and manage a document retention policy for our law firms and our clients. Of course, it also has the potential to just scare the bejabbers out of all of us, too.

Stay tuned. A decision is likely before the Court's current term ends this summer.

*Lucian Pera is a partner with Armstrong Allen, PLLC, in Memphis, Tennessee and Chair of the DCS Ethics Committee.*

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