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LIBELLETTER

July 1995

VIEW OF PROTECTED OPINION WIDENED IN THE NINTH CIRCUIT

In a recent decision, *Partington v. Bugliosi, et al*, 1995 U.S. App. LEXIS 13769, a panel of the United States Court of Appeals for the Ninth Circuit has taken an expansive look at protected opinion in the post-*Milkovich* era. In a wide-ranging and eloquent decision written by Judge Stephen Reinhardt, the court applied a three-part test, first formulated in *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990), to find that a book and subsequent docudrama critical of a defense attorney's handling of a murder trial were completely protected under the First Amendment.

The Ninth Circuit test which examines "(1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact, (2) whether the defendant used figurative or hyperbolic language that negates the impression, and (3) whether the statement in question is susceptible of being proved true or false," *slip op. at 13*, seemed to have a rather narrow application in light of the decision in *Unelko*, which found that Andy Rooney's humorous commentary could be viewed as an assertion of objective fact, but was not proven to be false.

In the instant case, Judge Reinhardt draws more on decisions from other circuit courts (e.g., *Moldea II* and *Phantom Touring)* than *Milkovich* in "fleshing out" *Unelko's* framework by giving additional consideration to "the work as a whole, the specific context in which the statements were made, and the statements themselves to determine whether a reasonable factfinder could conclude that the statements imply a false assertion of fact. . . ." *Slip op. at 13.*

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MORE CHALLENGES LIKELY AFTER SUPREME COURT DECISION IN FLORIDA ATTORNEY ADVERTISING CASE

By Nory Miller

In the 18 years since the U.S. Supreme Court first held that the public had a constitutionally-protected right to receive information about legal services through advertising, and therefore lawyers had a right to advertise, the Court had only once upheld a restriction on such advertising -- until last month. On June 21, the Court upheld -- by a bare majority -- a Florida rule prohibiting plaintiffs' lawyers from sending targeted solicitation letters to injury victims or their relatives during the first 30 days after the accident. *Florida Bar v. Went For It, Inc.*, 1995 W.L. 365648 (U.S.).

The Florida Bar was not entirely successful. The Court rejected, without even discussing, the Bar's request that the Court overrule *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and subsequent cases that recognized the First Amendment's protection of attorney advertising. However, the extent to which the Court might be willing to recognize a wider range of permissible restrictions on attorney advertising is not entirely clear.

Generally, the opinion, written by Justice O'Connor, appears to regard the Florida rule as similar in nature to the one restriction the Court had previously found constitutional -- the prohibition on face-to-face solicitation upheld in *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978). *Ohralik* held that prohibiting lawyers from attempting to secure clients by button-holing them was permissible because face-to-face

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PRIVATE FACTS IN TEXAS

By Thomas J. Williams

In reporting matters of legitimate public concern, the press cannot be liable for invasion of privacy even if the story discloses facts by which "a party might be subjected to the stress of some unpleasant or undesired notoriety", the Supreme Court of Texas unanimously held on June 8, 1995.

In *Star-Telegram, Inc., et al v. Jane Doe*, 38 Tex. S.Ct. J. 718 (June 10, 1995), the Supreme Court affirmed a summary judgment in favor of the Fort Worth Star-Telegram in an invasion of privacy suit brought by a rape victim.

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CALIFORNIA STATUTE CANNOT BAR OJ JUROR BOOK

In what can be seen as yet another subplot in the "trial of the century", the stars were not OJ, bloody gloves and a white Ford Bronco, but a discharged juror, a publisher, the attorney general, a book and the First Amendment. A California Federal District Judge has ruled that California cannot use the recently enacted California Penal Code Section 116.5. to bar publication of a book by a discharged "Simpson" juror compensated to tell of his thoughts and experiences during his time on the jury. *Dove Audio Inc. v. Lungren.*, No. CV 95-270 RG (Jrx), (C.D. Cal. June 14, 1995).

Section 116.5 prohibits a juror from being paid more than $50 for any information about a trial until ninety days after the trial has ended. It applies to sitting jurors as well as jurors who are

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REPORTER'S PRIVILEGE REJECTED BY SOUTH CAROLINA COURTS

Source of Susan Smith Report Sought

By Jay Bender

The small town of Union, S.C. was the center of international attention in October 1994, when a young mother claimed that her two children had been kidnapped in a carjacking. The mother's emotional televised appeals for the return of her children ended after nine days when she confessed that there was no carjacking, and that she had rolled her car into a lake with her sons strapped in their carseats

Susan Smith's murder trial commenced in Union on July 10, 1995, but before the trial began the judge had held a reporter in contempt of court and ordered her to jail until she revealed her confidential source for information regarding a psychiatric evaluation conducted to determine Smith's competency to stand trial and her criminal responsibility on the night the car was rolled into the lake.

The trial judge interrupted a hearing on motions by two newspapers seeking access to the psychiatric evaluation report to call reporter Twila Decker to the stand to ask her to identify her source. Objections were raised to the examination on First and Fourteenth Amendment grounds as well as the state shield statute. In response to the objections the court dismissed Decker from the witness stand and called the director of security for the state's mental health department who testified that he had indentified four persons who had access to the report. The witness stated that he had talked with three of the four, and on that basis concluded that no one at the department was the source.

Decker was recalled to the stand for further questioning. An objection was made that every person known to have had contact with the report should be examined under oath regarding their activities with the report. The court rejected the objection, noted that the attorneys for the prosecution and defense had assured the court that they were not the source, and demanded that Decker reveal her source.

Decker responded by asserting a privilege against such a disclosure. The court concluded that the refusal to answer was contempt, and ordered Decker confined until she disclosed the identity of her source. The court stayed the confinement until the issue of a stay pending appeal could be heard by the South Carolina Supreme Court.

The Supreme Court granted Decker's request for a stay and accelerated the appeal time from two years to 10 days.

In response to Decker's appeal the Supreme Court rejected the reporter's privilege recognized by the great majority of federal circuit courts and adopted the view of the Sixth Circuit that there was no reporter's privilege arising under the federal constitution. The court also rejected Decker's claim that she had a privilege against compelled testimony arising under the state shield law on grounds that the state statute granted a qualified privilege only when a party to litigation sought to compel testimony and not where the court was seeking the information.

The Supreme Court acknowledged that the state shield law was designed to protect the flow of information to the public, but concluded that the psychiatric report was not information in the public interest because mental health patient records were confidential under state law.

Decker petitioned for rehearing on grounds that the mental health patient records confidentiality statute had no application because Smith was not a patient, nor was she subject to a commitment to the department of mental health. The court granted rehearing, withdrew its initial opinion and in the substituted opinion concluded that the evaluation was a record covered by the confidentiality statute.

On July 10 the psychiatrist who conducted the evaluation testified that Smith was not a patient, and that she had not been committed to the department for evaluation. The psychiatrist also testified that Smith met the legal definition of competency to stand trial, but that her mental state prevented her from being able to testify in her own self-interest. The trial court declared Smith competent to stand trial, and then released the competency report to the public.

As things stand Smith is on trial for her life, the competency report has been made public, the court order declaring the report to be confidential has been rescinded (the court's choice of language), Decker's contempt has been upheld, but jurisdiction has not been returned to the trial court by the Supreme Court. Decker is in Union covering the Smith story, but remaining outside the courtroom and not covering the trial itself.

Jay Bender is a partner with the firm Baker, Barwick, Ravenal & Bender, L.L.P., in Columbia, South Carolina and represented Twila Decker in this suit.

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UPDATES

Prodigy Moves for Reconsideration in *Stratton Oakmont* Case

Prodigy, the on-line computer service company recently held to be a "publisher" rather than a "distributor" with regard to allegedly defamatory material uploaded by an unknown person to one of its "bulletin boards" (See *LibelLetter*, June 1995 at p. 12), has moved for a reconsideration of that ruling. In papers filed July 7, Prodigy's new attorneys, Frankfurt Garbus Klein & Selz, contend that Nassau County Supreme Court Justice Stuart Ain had an inadequate factual record before him when he found that Prodigy — unlike other major on-line services — substantially controlled the content of its bulletin boards and that Prodigy's bulletin board "leaders" acted as "editors" and "agents" of the company, rather than "independent contractors," for defamation purposes. Prodigy argued that it is no different than any other on-line computer network and that the attempts of all on-line services to prevent disruptive practices such as harassment, fighting words or profanity cannot be equated with an undertaking to review or be responsible for defamatory content in the tens of thousands of third party communications uploaded daily to their networks.

In a related development, members of the Interactive Services Association, including CompuServe, America On-Line and other leading on-line services, have submitted a letter to the Court requesting leave to file an *amicus curiae* brief in connection with Prodigy's motion.

— Henry R. Kaufman

Order to Compel Disclosure of Confidential Sources Vacated in *Philip Morris v. ABC*

After the latest round of salvos in the *Philip Morris v. ABC*, the Virginia libel suit in which plaintiff is seeking $10 billion, ABC has come away with a win as Richmond Circuit Court Judge Markow vacated his order compelling disclosure of ABC's confidential sources. (See *LDRC LibelLetter*, "ABC Loses Philip Morris Source Motion", Feb. 1995 at p. 1)

The judge reaffirmed his prior ruling that a qualified privilege protected disclosure of the identity of the sources and that a three-part analysis, laid out by the Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972), was the relevant test. In response to ABC's Motion for Reconsideration, however, Judge Markow held that Philip Morris had not yet overcome the qualified privilege.

Under the test, which looks to (1) whether the information is relevant, (2) whether the information sought is available by alternative means, and (3) whether there is a compelling interest in the information, Judge Markow ruled that Philip Morris had yet to show that either the information was unavailable or that the need was compelling. *Memorandum* at 3. The court concluded that insufficient discovery has been completed to date in order for it to conclude that plaintiffs met these prongs of the analysis. Judge Markow, however, did not foreclose on the possibility that Philip Morris may, in the future, meet the requirements to "impinge on the qualified privilege." *Memorandum* at 4.

Did Philip Morris "Spike" the Tobacco?

The court also denied Philip Morris' Motion to Amend by refusing to allow the tobacco company to limit its defamation claims in this suit to a contention that ABC accused it of adding nicotine to cigarettes, with the result of eliminating from the suit the implication that the addition of nicotine was designed to "hook" smokers. Philip Morris was seeking to eliminate any issue of its motive, relying on the court's ruling that an allegation by ABC that it added nicotine was, in and of itself, defamatory.

The court denied Philip Morris' request based upon its prior decision that the gist of the broadcast dealt with Philip Morris' motive for adding nicotine; Philip Morris and the court could not ignore the entirety of the broadcast to focus only upon a portion.

The court granted, however, Philip Morris' motion to add the allegation of a defamatory news release published on February 24, 1994, reasoning that, "since it deals with the same subject matter and similar, if not exactly duplicative, charges by ABC into the conduct of Philip Morris, there should be no prejudice or surprise to ABC by allowing this amendment, and ABC should not need additional time to prepare to meet the count." *Memorandum* at 2.

The next stage in the case that has had its share of "interesting" moments, from American Express' over-reaching document disclosure, to Philip Morris' turnover of its red-colored, malodorous files, to recent rumors regarding a settlement, is set as ABC has moved for summary judgment on July 10, 1995. Arguments on the motion are scheduled for August.

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UPDATES (Continued)

Food Lion Claims Copyright in ABC Outtakes

Food Lion, Inc., in litigation for nearly three years now in the Winston-Salem division of federal court for the Middle District of North Carolina with CapCities/ABC over a report on ABC's *PrimeTime Live*, has filed a new complaint in the Salisbury division of that district against ABC, this time alleging copyright infringement claims.

In a suit that suggests the aggressive — might one even say "over the top" — nature of this litigation, Plaintiff claims copyright interest in the outtakes from ABC's hidden cameras, shot during ABC's investigative research of Food Lion for its *PrimeTime Live* report — an interest it now claims for the first time was infringed by ABC's use of the outtakes in that report.

Food Lion, the supermarket chain headquartered in Salisbury, North Carolina, has previously alleged claims under RICO and the federal eavesdropping statute — claims which were dismissed by the trial judge on ABC's motion — as well as trespass, common law fraud, negligent supervision, respondeat superior, breach of fiduciary duty, constructive fraud, and unfair and deceptive trade practices, all of which remain in the case as of this date. (See, *LDRC LibelLetter*, "RICO Claims Dismissed", May 1995, p. 1)

Both the existing and the new suit arise out of an investigative report by ABC News personnel into Food Lion's food handling and labor practices. ABC employees obtained employment with Food Lion in food packaging areas, capturing material with hidden cameras and microphones, some of which was later used in the broadcast report. The hidden camera tapes are the subject of the new copyright claims by Food Lion and of motion for a protective order previously filed by ABC attorneys, who sought to limit use by Food Lion of the tapes outside of the litigation. ABC registered the tapes for copyright protection in early 1993, shortly after producing them to Food Lion in discovery.

As a result of concerns about Food Lion's use of ABC's outtakes outside of the context of the litigation, ABC sought a protective order last month limiting their use to the litigation and seeking an accounting from Food Lion of all of its use of ABC material other than within the litigation. Food Lion had previously obtained a similar protective order from the court with respect to its discovery material.

The day after filing its response to the ABC motion, Food Lion filed its copyright infringement claim.

The copyright infringement suit offers two theories of copyright ownership by Food Lion: (1) ABC's employees were on the payroll of Food Lion at the time of the taping, thus rendering the tapes "works-for-hire", not for ABC, but for Food Lion; and (2) as a result of ABC's fraudulent behavior in gaining access to Food Lion facilities, the court should impose constructive, equitable ownership in the tapes for the benefit of Food Lion.

The new complaint was assigned to the same judge handling the original suit.

Food Lion is represented in this suit by Womble Carlyle Sandridge & Rice, North Carolina, and Akin, Gump, Strauss, Hauer & Feld, L.L.P., Washington D.C. These firms are also representing Food Lion in the original suit against ABC. For those who follow these matters, John Walsh, of Cadwalader, Wickersham & Taft, New York, who represented Food Lion in the original suit against ABC, has withdrawn as counsel to Food Lion in that suit. ABC is represented by Everett Gaskins, Hancock & Stevens, North Carolina, and Miller, Cassidy, Larroca & Lewin, Washington, D.C.

Matusevitch v. Telnikoff: Amici Join Appeal

Eighteen amici have filed notice of their intent to participate in a brief in support of appellee Vladimir Matusevitch in his efforts to avoid enforcement of a libel judgment levied against him in an English court.

The action arose from a letter to the *Daily Telegraph* of London in which Matusevitch, a Soviet emigré and U.S. citizen, said Vladimir Ivanovich Telnikoff espoused "racialist" views. In *Matusevitch v. Telnikoff*, Matusevitch sued Telnikoff in U.S. District Court for the District of Columbia to enjoin enforcement of a $416,000 libel verdict and argued that the British judgment violated the Constitution as well as public policy. After Matusevitch won on summary judgment, Telnikoff appealed to the U.S. Court of Appeals for the District of Columbia Circuit.

Amici include media organizations such as The New York Times Company, the Associated Press, the Hearst Corporation, Dow Jones & Company, Magazine Publishers of America, Times Mirror, CNN, as well as the Anti-Defamation League, Article 19 and Interrights. Amici are represented by Laura R. Handman and Robert D. Balin of Lankenau Kovner & Kurtz. *See, "British Law Rejected Again" LDRC LibelLetter*, Feb. 1995, at 1.

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N.J. Punitive Damage Reform

A tort reform bill recently passed by New Jersey will limit punitive damages to $350,000 or no more than five times compensatory damages, whichever is greater, and will also change the procedures for obtaining punitive damages.

Senate Bill 1926 (C. 142, P.L. 1995) was signed into law on June 29. Called the "Punitive Damages Act," the bill stipulates that the plaintiff must prove by clear and convincing evidence "that the harm suffered was the result of the defendant's acts or omissions, and such acts or omissions were actuated by actual malice or accompanied by a wanton and willful disregard of persons who foreseeably might be harmed."

A bifurcated trial to determine punitive damages is available at the request of the defendant. In such cases, punitive damages may only be awarded if compensatory damages have been awarded in the first part of the trial. A nominal damage award will not support a punitives award. Standards for the trier of fact in making an award of punitive damages are also set out. Punitive damages are subject to the abovementioned monetary limits, but the limits do not apply to actions pursuant to certain New Jersey statutes such as those for bias crimes, discrimination and injuries caused by drunk drivers.

LDRC WOULD LIKE TO THANK OUR SUMMER INTERNS FOR THEIR CONTRIBUTIONS TO THIS EDITION OF THE LIBELLETTER :

John Maltbie, Brooklyn Law School, and Sarah Edenbaum, Brendan Healey and William Schreiner, Jr., all from New York University Law School

HEARING HELD ON UNIFORM CORRECTION ACT IN DISTRICT OF COLUMBIA

The District of Columbia City Council's Judiciary Committee held a public hearing on July 12th on the issue of adopting the Uniform Correction Act in the District. Introduced by Judiciary Committee Chair William Lightfoot, at the behest of District Uniform Law Commissioners, the bill on the UCA will now face committee review and mark-up before coming up for a vote before the full Council, likely not before Fall.

Ten media entities in Washington -- including four television stations and six newspapers -- signed a letter to the committee chair in support of the bill. The media group's letter says that the Act "is a balanced bill which would serve the public interest both from the standpoint of litigants and the court system." According to the letter, media organizations support the bill because it encourages corrections and clarifications by limiting the risk of damages that otherwise might result from such admissions. Moreover, the letter's authors support the Act because it may eventually lead to a standard law on corrections and clarifications -- a helpful factor for media in an area such as the District of Columbia, the letter asserts, "where the print and broadcast media often operate across jurisdictional lines." In the end, media supporters believe it will reduce costly, and for plaintiffs as well as defendants, generally unproductive litigation, offering plaintiffs an opportunity to obtain a meaningful remedy to reputational harm.

In addition to the letter from D.C.-area media companies, a prominent Uniform Law Commissioner testified in support of the Act at the hearing. Uniform Law Commissioner and Dean of University of Nebraska College of Law Harvey Perlman, who also chaired the committee which drafted the Uniform Correction Act, reviewed how the Act would benefit both plaintiffs and defendants. "[The] Act encourages defendants in defamation cases to admit their mistakes without running the risk of admitting liability... [M]ost importantly, I believe the Act preserves our traditional commitment to the First Amendment values inherent in free speech and yet provides a remedy for those whose reputations are placed in jeopardy."

Perlman also stressed that uniformity in the Act was important. To that end, he asked the city councilors to try to change the proposal as little as possible. "The retention of the uniform nature of this act is particularly important. Because it regulates the activities of news media that publish on a national or regional basis, the efficiencies of uniformity are clear," Perlman said.

Dean Perlman was introduced by Benny Cass, Uniform Law Commissioner from the District. Also on the panel of witnesses was Kevin Baine. Kevin has served as an ABA Advisor to Dean Perlman's committee. He appeared before the D.C. Judiciary Committee to answer questions, along with Dean Perlman, on the UCA.

There was no testimony in opposition to the UCA and, to date, no opposing written submissions.

REGISTRATION FORMS HAVE GONE OUT FOR THE NAA/NAB/LDRC BIENNIAL LIBEL/PRIVACY CONFERENCE

THE CONFERENCE WILL BE HELD SEPTEMBER 20-22, 1995 AT THE RITZ-CARLTON TYSONS CORNER IN McCLEAN, VIRGINIA

PLEASE SIGN UP EARLY -- SPACE IS LIMITED!

FOR FURTHER INFORMATION CONTACT RENE MILAM OF THE NEWSPAPER ASSOCIATION OF AMERICA AT (703) 648-1065

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PRIVATE FACTS IN TEXAS

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Proceeding under the pseudonym "Jane Doe", the victim sued the Star-Telegram as a result of two articles concerning the rape. Although the articles did not identify the woman by name, they disclosed that she lived on the east side of Fort Worth, owned a Jaguar automobile, took medication, owned a home security system, and her age. One of the two articles also disclosed the fact that she owned a travel agency. In her suit, Jane Doe complained that although her name was not disclosed, those facts, when taken together, allowed her acquaintances to identify her.

The Star-Telegram moved for summary judgment on the basis that the matters publicized were of legitimate public concern. The Star-Telegram also moved for summary judgment on the basis that it had lawfully obtained truthful information about a matter of public significance, and therefore could not be subject to liability under the holding in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989).

In response, Jane Doe conceded that the general subject of the rape was newsworthy, but argued that the appropriate inquiry should be the newsworthiness of the specific details about her. She also argued that there was a fact issue as to whether the Star-Telegram "lawfully obtained" the information in question.

The trial court granted the Star-Telegram's Motion for Summary Judgment. As is customary in Texas state court practice, the trial judge did not specify the grounds upon which the judgment was based, nor did he write an opinion or otherwise explain his ruling. Jane Doe appealed.

The Texas Court of Appeals reversed and remanded the case for trial. *Jane Doe v. The Star-Telegram, Inc.*, et al, 864 S.W.2d 790 (Tex. App.--Fort Worth 1993), rev'd, 38 Tex. S.Ct. J. 718 (June 10, 1995). The Court of Appeals held that Jane Doe had raised a fact issue as to whether the Star-Telegram obtained the information lawfully, thus precluding summary judgment based on *The Florida Star*. The Court of Appeals then held that even if the article related to matters of legitimate public concern, "it is not protected if the information was secured unlawfully." Because the Court of Appeals believed that Jane Doe had raised a fact issue as to the lawfulness of the method by which the reporter obtained the information, it held that there was also a fact issue as to whether the articles were of legitimate public concern. 864 S.W.2d 790, 793.

The Star-Telegram then sought a writ of error in the Supreme Court of Texas, arguing, among other points, that the element of newsworthiness, or legitimate public concern, is not dependent upon the method used in obtaining the information. The Star-Telegram also argued that, contrary to the Court of Appeals holding, it had proved as a matter of law that it obtained the information lawfully.

The Supreme Court reversed the Court of Appeals and affirmed the summary judgment. Citing *Ross v. Midwest Communications, Inc.*, 870 F.2d 271 (5th Cir. 1989), cert. denied, 493 U.S. 935, the Court held that even if the general subject matter of a publication is of legitimate public concern "it does not necessarily follow that all information given in the account is newsworthy", and that "a logical nexus should exist between the rape victim's identity, or the private facts disclosed about the victim, and general subject matter of the crime." The Court went on to hold, however, that "we cannot say that the articles in question, considered in their full context, disclosed embarrassing private facts which were not of legitimate public concern." Accordingly, the Court held that the newspaper "negated an essential element of Doe's invasion of privacy cause of action", and did not reach the issues concerning the lawfulness of the method by which the information was obtained. 38 Tex. S.Ct. J. 718, 720-21.

Justice Bob Gammage, author of the Court's opinion, wrote that "it would be impossible to require [the press] to anticipate and take action to avoid every conceivable circumstance where a party might be subjected to the stress of some unpleasant or undesired notoriety without an unacceptable chilling effect on the media itself. Facts which do not directly identify an innocent individual but which make that person identifiable to persons already aware of uniquely identifying personal information may or may not be of legitimate public interest. To require the media to sort through an inventory of facts, to deliberate, and to catalogue each of them according to their individual and cumulative impact under all circumstances, would impose an impossible task; a task which foreseeably could cause critical information of legitimate public interest to be withheld until it becomes untimely and worthless to an informed public." 38 Tex. S.Ct. J. 718, 721.

Justice Raul Gonzalez wrote a concurring opinion in which he reprinted the two articles in their entirety. The inclusion of the full articles in the opinion will enable practitioners in future intimacy cases to compare the amount of detail disclosed in this case with the amount of detail disclosed in another case.

Thomas J. Williams is a partner with the firm Bishop, Payne, Williams & Werley, L.L.P., in Fort Worth, Texas, and represented the Star-Telegram and other defendant/petitioners in this suit.

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ABC WINS DISMISSAL OF FEDERAL WIRETAP CLAIM IN ILLINOIS

For the third time this year, Capital Cities/ABC has won a motion to dismiss a claim brought against it under the federal wiretapping statute (18 U.S.C. §2510 *et seq.*) based upon the use of hidden cameras and microphones during its newsgathering activities.

Judge Leinenweber of the United States District Court for the Northern District of Illinois, writing in *Russell v. ABC*, *slip op* (No. 94 C 5768; May 30, 1995), granted ABC's Rule 12(b)(6) motion to dismiss the wiretapping claims. Relying in part upon Judge Posner's opinion for the Seventh Circuit in *Desnick v. ABC*, 44 F.3d 1345, 23 Med. L. Rptr. 1161 (discussed further below; *see also LDRC LibelLetter* January 1995 at 1), Leinenweber dismissed the claims because ABC's surreptitious recording conversations for its *PrimeTime Live* program was protected under an exception to the statute which allows one party to a conversation to record it without the consent of the other party unless the recorder intends to commit a tort or crime. 18 USC §2511(2)(d).

Leinenweber found that while the broadcast itself may be tortious -- he did not dismiss plaintiff's claims of false light invasion of privacy -- plaintiff's complaint failed to allege that ABC recorded the conversations with an intent to produce a tortious broadcast. *Russell* at 8. Indeed, Leinenweber writes that "*Desnick* instructs that the critical question under §2511(2)(d) is <u>why</u> the communication was intercepted, not <u>how</u> the recording was ultimately used." *Russell* at 8.

Russell stems from an investigative report into sanitary conditions in the commercial fish industry broadcast on February 3, 1994. As part of its research, ABC sent a *PrimeTime Live* employee to work in a Chicago store that sold seafood. Using a hidden microphone and camera, the employee recorded the store manager telling her to inform customers the fish is always "today fresh... even if we knew that fish is sitting in a container in the back." The manager was also recorded saying that older fish was to be cooked before being sold because "it's something we can salvage and still make money off of it." *Russell* at 8. Plaintiff Russell, the store manager, sued ABC, alleging violation of the federal wiretapping law, false light invasion of privacy, and intrusion upon seclusion.

In discharging the wiretapping claim, the judge not only found that ABC did not intend to commit a "criminal and tortious act," when it recorded the conversations, he also rejected plaintiff's plea that the recordings were a prima facie violation of the statute: "It is circular to suggest that defendants violated the Wiretap Act because they violated the Wiretap Act." *Russell* at 3.

Additionally, the court rejected plaintiff's argument that, under the Illinois wiretapping statute and state court precedent, a conversation may not be recorded if either party has a reasonable expectation that it will be kept private: "When a party to a conversation records it, all he is doing is making a more accurate record of something he has already heard. This does not violate the declarant's right to privacy." *Russell* at 6, *quoting from People v. Herrington*, 206 Ill.Dec. 705, 707; 645 N.E.2d.957, 959 (1994).

False Light Claim Remains Intrusion Dismissed

However, Judge Leinenweber refused to dismiss Russell's false light claim. The judge found that while Russell's statements on their own would probably not be injurious to her reputation, the statements as incorporated in the context of the program may have been defamatory. In reference to Russell's instruction to cook older fish, for example, Judge Leinenweber noted that "although there may not be anything wrong with selling cooked fish that is not fresh, the insinuation from the voice-over is that the fish should have been thrown away rather than sold in any form." *Russell* at 11.

Furthermore, the judge asserted that the statements were not protected under Illinois' "innocent construction" rule, which requires the court to consider statements "in context, with the words and implications... given their natural and obvious meaning." Under this rule, if the statement may reasonably be innocently interpreted or reasonably interpreted as referring to someone besides the plaintiff, it is inactionable per se. *Russell* at 11, *see also Chapski v. Copley Press*, 65 Ill.Dec. 884, 442 N.E.2d 195 (1982). The judge said the defendant's suggestions for innocent constructions were not plausible; moreover, the judge determined that Illinois state courts have been very irregular in applying the innocent construction rule to false light claims (outside of its usual role as a defense to defamation claims). *Russell* at 12.

However, the judge dismissed plaintiff's third claim, for "intrusion upon seclusion." Judge Leinenweber determined that not only did the facts of the case meet the standards for this tort as defined in the Restatement -- "one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another in his private affairs or concerns" -- but that the tort is not formally recognized in the Illinois state appellate district where his federal court sits, although other state appellate court districts allow it. Russell at 14-15; *see also* Restatement (Second) of Torts §652B at 378 (1977).

Third Wiretap Claim Dismissal for PrimeTime Live in 1995

The dismissal of the Wiretap Act claim in *Russell* marks the third time in 1995 that ABC has won dismissal of wiretap claims stemming from its *PrimeTime Live* newsmagazine program. Earlier this year in *Desnick*, the Seventh Circuit Court of Appeals affirmed the

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CALIFORNIA STATUTE CANNOT BAR OJ JUROR BOOK

(Continued from page 1)
dismissed and thus will not take part in deliberations. This section was enacted last August by the California legislature in response to the media coverage surrounding the "Simpson" case.

The story behind *Dove Audio Inc. v. Lungren*, revolved around Michael Knox, one of the original twelve jurors chosen to serve on the *People v. Simpson* panel. On March 1, Knox was discharged from his duties. With strong opinions as to what he had seen and experienced during his five weeks as a juror, and feeling that others should hear what he had to say, Knox decided to write a book. Dove Audio wished to publish it and pay Knox for his efforts.

Having been informed that Los Angeles District Attorney Gil Garcetti would prosecute them under Section 116.5 were they to make an agreement to publish the book in violation of the statute, Dove Audio took the preemptive strike and, with Knox as co-plaintiff, filed suit. The suit against Daniel Lungren (Attorney General of California), Gil Garcetti (District Attorney of Los Angeles County), Sherman Block (Sheriff of Los Angeles County), and William Williams (Chief of Police for the City of Los Angeles), sought an injunction against enforcement of the statute and declaratory relief, claiming that California Penal Code Section 116.5 is unconstitutional.

The defense's main argument against the injunction was that the restrictions under Section 116.5 served the compelling state interest of protecting a defendant's right to an impartial jury and a fair trial. The defense maintained that "juror journalism" could only be stopped by removing the temptation of lucrative book and interview deals.

Pierce O'Donnell of Kaye, Scholer, Fierman, Hays & Handler, counsel for the plaintiffs, maintained that Section 116.5 was unconstitutional as it is a content based prior restraint and singles out compensated speech.

It was further argued that Section 116.5 is overbroad and not narrowly tailored to be as unintrusive of First Amendment rights as possible. Mr. O'Donnell asserted that while the protection of the integrity and impartiality of jury deliberations was a compelling state interest and would be advanced if applied to sitting jurors, the goal was in no way advanced by silencing discharged jurors who would not be deliberating and whose opinions would have no influence on the sequestered jury. Mr. O'Donnell further pointed out that there was no evidence that the prospect of financial gain affected a juror's ability in carrying out his duties and that general suspicions of possible harm will not justify the denial of free speech.

In addition, the law fell short of really achieving its prescribed goal as it only stifled jurors, while in no way prohibiting other participants, such as the respective parties or key witnesses, from making similar lucrative deals.

The Honorable Manuel L. Real decided for the plaintiffs and permanently enjoined the defendants from enforcing California Penal Code Section 116.5 against them in regards to this publication. Judge Real adopted the plaintiff's position stating that the court had been presented with no compelling evidence that Section 116.5 was necessary to protect the impartiality of jury deliberations in a situation where the party was no longer a sitting juror and thus would not be taking part in deliberations. *Dove Audio Inc. v. Lungren.*, No. CV 95-270 RG (Jrx), (C.D. Cal. June 14, 1995). While not declaring 116.5 unconstitutional per se -- it could justifiably be applied to sitting jurors -- Judge Real ruled that Penal Code Section 116.5 was unconstitutional as applied to the plaintiffs. Plaintiffs were successful as well in establishing that they would suffer great and irreparable injury, which could not be alleviated by legal remedies were Section 116.5 enforced against them.

The United States Court of Appeals for the Ninth Circuit denied Garcetti's emergency motion to stay the injunction. The book -- *The Private Diary of an OJ Juror: Behind the Scenes of the Trial of the Century* -- was published and is available in bookstores now. In its second week of publication, it was number 7 on the *New York Times* bestseller list.

FEDERAL WIRETAP CLAIM

(Continued from page 7)
dismissal of a federal wiretap act claim filed after the show sent seven people to a chain of eye surgery centers in Wisconsin and Illinois, where the people surreptitiously recorded being diagnosed for cataract surgery, even though all seven had healthy eyes. *Desnick v. ABC*, 44 F.3d at ___, 23 Med. L. Rep. at 1162.

In *Desnick*, Judge Posner reached essentially the same conclusions as Judge Leinenweber in *Russell*: first, that under the Wiretap Act one party to a conversation may record it without the other party's knowledge; and secondly, that ABC did not intend to commit a tort

In March, the Federal District Court for the Middle District of North Carolina upheld a magistrate's recommendation that a wiretap claim stemming from a *PrimeTime Live* investigation into food handling and labor practices at a supermarket chain be dismissed. *Food Lion v. Capital Cities/ABC*, No.92 CV00592, *slip op.* (M.D.N.C. March 21, 1995). *See also LDRC LibelLetter*, May 1995 at 1, July 1995 at 4.

Using essentially the same reasons used in *Russell* and *Desnick*, the magistrate dismissed the claim because ABC did not have a criminal or tortious purpose when it used hidden cameras and microphones to record Food Lion employees. The magistrate said that "making audio and video tapes for use on a for-profit television program is not a crime or tort per se. Nor has plaintiff made any libel or privacy tort claims to which this allegation could be tied to establish a tortious purpose." *Magistrate's slip op. at 49.*

Desnick, 44 F.3d at ___, 23 Med. L. Rep. at 1167

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PROTECTED OPINION

(Continued from page 1)

Beginning with the general tenor and broad context of the book, which chronicled Bugliosi's role as counsel to a defendant in the highly publicized Palmyra murder trial and commented upon Partington's handling of the defense of the co-defendant, the court finds "that the book's general tenor makes clear that Bugliosi's observations about Partington's trial strategies and the implications that Partington contends arise from them, represent statements of personal viewpoint, not assertions of objective fact." *Slip op. at 14-15, citing Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 729 (1st Cir.), *cert. denied*, 504 U.S. 974, 112 S.Ct. 2942, 119 L.Ed.2d 567 (1992) (holding that "the sum effect of the format, tone, and entire context of the articles is to make it unmistakably clear that [the author] was expressing a point of view only").

Pointing out that a reader would expect Bugliosi to "set forth his personal theories about the facts of the trial and the conduct of those involved in them," the court borrows from *Moldea II*, which arose in the context of a critical book review, to find that, "Bugliosi's book is a forum in which a reader is likely to recognize that the critiques of the judges, witnesses, and other participants in the two trials -- and particularly of the other counsel -- generally represent the highly subjective opinions of the author rather than assertions of verifiable, objective facts." *Slip op. at 15-16, citing Moldea v. New York Times Co.*, 22 F.3d 310 (D.C.Cir.) (*Moldea II*), *cert. denied*, 130 L.Ed.2d 133, 115 S.Ct 202 (1994).

Judge Reinhardt, writing for the panel, goes on to state that to prevent actors involved in controversial events from expressing their personal perspectives would not allow any "room for expression of opinion by commentators, experts in a field, figures closely involved in a public controversy, or others whose perspectives might be of interest to the public. Instead, authors of every sort would be forced to provide only dry, colorless descriptions of facts, bereft of analysis or insight. There would be little difference between the editorial page and the front page, between commentary and reporting, and the robust debate among people with different viewpoints that is a vital part of our democracy would surely be hampered." *Slip op. at 17-18.* (Citing as support, *inter alia*, *Masson v. New Yorker Magazine*, where "the Supreme Court has recently emphasized that the First Amendment guarantees authors 'the interpretive license that is necessary when relying upon ambiguous sources,' *Masson v. New Yorker Magazine*, 501 U.S. 496, 111 S. Ct. 2419, 2434, 115 L. Ed. 2d 447 (1991)."

The "general tenor" of the docudrama as well, according to the panel, suggested to the viewer that statements made were not ones of objective fact. Indeed, the court finds, the docudrama genre is one where viewers would more likely be aware that "parts of such programs are more fiction than fact." *Slip op. at 20.*

Turning its attention to the specific statements themselves the court continues to borrow from other circuits across the board to hold that the three alleged defamatory statements were protected as speculation, an outline of facts leading to a personal conclusion, and rhetorical hyperbole, citing *Haynes*, *Moldea II*, *Phantom Touring*, *Chapin*, and *Beverly Hills Foodland, Inc.*

Specifically, the court found that the first statement, questioning whether Partington had read earlier trial transcripts, when read in context clearly represents "Bugliosi's personal interpretation of the available information and not a verifiable factual assessment of Partington's conduct." *Slip op. at 25, citing Haynes v. Alfred A. Knopf, Inc.*,8 F.3d 1222, 1227 (7th Cir. 1993) (holding that "if it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable"). While a question can be defamatory, "inquiry itself, however embarrassing or unpleasant to its subject, is not an accusation". *Slip op at 27.*

As to the second allegedly defamatory passage in which Bugliosi contrasts his own actions with those of Partington's, implying that Partington's actions were inferior to Bugliosi's own, the court chooses "to join with other courts of appeals in concluding that when an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the reader free to draw his own conclusions, those statements are generally protected by the First Amendment." *Slip op. at 27, citing Chapin v. Knight-Ridder*, 993 F.2d 1087, 1087 (4th Cir. 1993), *Moldea II*, 22 F.3d at 317, *Phantom Touring*, 953 F.2d at 730, *and Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union*, 39 F.3d 191, 195-96 (8th Cir. 1994) .

Finally, the court disposes of Partington's third defamation claim based on a statement in the docudrama portraying Bugliosi telling his client that if she had Partington for a lawyer she would "spend the rest of her life in prison," by returning to the tests formulated in *Milkovich* and *Unelko*. The court states that "the context in which the statement was made negates the impression that it implied the assertion of an objective fact," because the "hyperbolic language strongly suggests that the movie character was not making an objective statement of fact." *Slip op. at 29, citing Unelko*, 912 F.2d at 1053, *and Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 111 L.Ed.2d 1, 110 S.Ct. 2695 (1990).

The court's opinion goes on to address the last prong of the *Unelko* analysis, the issue of whether the statements are capable of being proved true or false, to find that Partington's claims once again fail to surmount the obstacles of the First Amendment. Noting that "critiques of a lawyer's performance in a particular case generally cannot be proved true or false and, consequently, cannot ordinarily serve as the basis of a defamation claim," the court concludes that "negative statements concerning a lawyer's performance during trial, even if made explicitly, are generally not actionable since they are not ordinarily 'susceptible of being proved true or

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FLORIDA CASE

(Continued from page 1)

confrontations intruded on potential clients' comfort and objectivity and presented an unreasonable danger of overreaching by attorneys trained in the skills of advocacy. Similarly, the Court here found that targeted letters flooding the homes of victims and their families intruded on their privacy at a particularly vulnerable time.

Two aspects of the decision, however, are troublesome and leave open questions that will require further explication in future decisions. First, instead of resting the decision solely on the state's interest in protecting the privacy of victims of tragic accidents, the Court also appeared to give credence to the Florida Bar's argument that the prohibited letters reflected poorly on the profession. Given the Court's overall emphasis on the privacy issue, however, it is unclear to what extent the Court is now prepared to consider the preservation or improvement of a professions' reputation a legitimate and substantial government interest. States, including Arizona in *Bates*, have repeatedly attempted to rely on reputation arguments, but the Court had always rejected them. Because the nebulous nature of "preserving a profession's reputation" can theoretically support a vast range of restrictions on speech, and because a number of bar associations have shown an interest in restricting attorney advertising as close as possible to the pre-*Bates* confines of tombstone ads in bar publications, the question will undoubtedly be tested in the lower courts. Thus, the Court can be expected to have an opportunity to clarify its position in the near future.

The *Florida Bar* decision also raises concerns regarding the degree to which the Court is prepared to question the sincerity and extent of a government's asserted interest. Florida, for example, has imposed the 30-day restriction solely on attorneys seeking to represent those who have been hurt. Lawyers representing individuals or companies who might be charged with liability for these injuries remain free to pressure victims and their families to accept settlements that may not be in their best interests. Likewise, the very individuals or companies who are concerned with being held liable for the injuries, and their insurance companies, remain free to contact victims and their families during the first 30 days after the accident. The Court, however, ignored the possibility that Florida was acting to protect potential defendants and the defendants' bar rather than to protect victims and their families.

Attorney advertising has long been an issue that ignites strong feelings on the Court. Some Justices, such as Justice O'Connor, continue to think that the Court took a "wrong turn" with *Bates*. Others appear to single out the legal profession, finding that restrictions on attorney speech can be justified even though the same restrictions would not be permissible if imposed on another profession. In the *Florida Bar* case, the key fifth vote was the vote of the relatively new Justice Breyer. Thus, in the immediate future, it is Justice Breyer's view of the First Amendment protection accorded attorney advertising that will determine whether it can be restricted only to prevent attorneys from harming the public or also simply to enhance the reputation of lawyers.

Nory Miller is an attorney with Jenner & Block, Washington D.C., which submitted an amicus brief on behalf of the Institute For Access to Legal Services, et al., urging the Court not to overrule Bates and its progeny.

PROTECTED OPINION

(Continued from page 9)

false.'" *Slip op. at 30-31, citing Milkovich*, 497 U.S. at 21. In doing so, the court again draws support from across the circuits, stating in particular that:

> "[T]he District of Columbia Circuit [In *Moldea II*] emphasized that courts should be reluctant to hold comments concerning the professional abilities of an individual actionable... Indeed, the District of Columbia Circuit noted that in *Moldea I* it had 'failed adequately to heed the counsel of both the Supreme Court and our own precedents that "where [36*] the question of truth or falsity is a close one, a court should err on the side of nonactionability." '*Moldea II*, 22 F.3d at 317 (quoting *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.C. Cir.), cert, denied, 488 U.S. 825, 102 L. Ed. 2d 51, 109 S. Ct. 75 (1988))."
>
> "We agree with the District of Columbia Circuit that statements like the ones before us are not actionable. Authors should have 'breathing space' in order to criticize and interpret the actions and decisions of those involved in a public controversy. If they are not granted leeway in interpreting ambiguous events and actions, the public dialogue that is so important to the survival of our democracy will be stifled. We must not force writers to confine themselves to dry, factual recitations or to abstract expressions of opinion wholly divorced from real events. Within the limits imposed by the law, we must allow, even encourage, them to express their opinions concerning public controversies and those who become involved in them." *Slip op. at 36.* (Footnote omitted)

The panel finds it unnessary to reach the issue of how it would analyze libel by implication claims, finding the passages unactionable even if analyzed as stating the alleged implications directly. In concluding, the opinion also makes a veiled reference to the events surrounding the O.J. Simpson trial by acknowledging the "substantial harm [that] occurs when over a period of time the public views highly publicized but unrepresentative proceedings that significantly mislead it regarding what transpires in the normal course of trials," but the judge counters the harm by pointing to the Constitution which "requires that we permit the people to be fully informed about the operations of government, including the operation of the judicial branch." Judge Reinhardt goes on to state that the Constitution which also "requires that we tolerate individual expressions of opinion, hostile or otherwise, regarding the performance of those who carry out all aspects of our governmental functions." *Slip op. at 38.*

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LDRC MEMBERS NOTE: SPJ PROPOSES NEW ETHICS CODE

The Society of Professional Journalists (SPJ) has presented its membership with a draft of a revised set of ethical standards, a copy of which is included in this month's *LibelLetter*. Lou Hodges, Chair of the Ethics Code Task Force, has invited SPJ members to send him proposed amendments to the page-long draft. Formal action will be taken on the code at the national convention, which will be held October 11 to 14 in St. Paul, Minnesota. The code was last revised in 1987. *See APME/SPJ Ethics Codes*, LDRC *LibelLetter*, Oct. 1994 at 9.

LDRC members should review the proposed Code of Ethics so as to be in a position to advise their clients on any issues you may feel it raises.

The SPJ's proposed code emphasizes six "Principles and Standards," including: truth, which ranges from accuracy to plagiarism; comprehensiveness, which includes holding the powerful accountable and avoiding stereotyping; privacy, which involves respecting people's freedom from unwanted intrusion in certain circumstances; loyalty, which means avoiding conflicts of interest; confidences, which emphasizes keeping promises; and freedom, which encourages journalists generally to seek the public good and keep the public informed.

Included in the Code are admonitions to journalists under the heading of "Truth" to "[n]ever publish unsubstantiated or anonymous defamtory statements about a person", to use deceptive methods in gathering information "only if they are explained to the public at the time of publication" and "cannot reasonably be obtained by honest methods", and to[a]fford any business, organization or individual an opportunity to respond to an attack made against them".

The new set of guidelines is intended to provide journalists with a clear set of ethical standards, but with the understanding that the standards cannot be expected to cover all of the issues journalists may face. While speaking to the need of jounalists and news organizations to adhere to standards of practice, the Task Force assigned to prepare the code did not reach questions of their enforcement and implementation, issues left to the SPJ Ethics Committee.

While media attorneys are often seen as naysayers about codes of conduct such as that being reviewed by SPJ, Bruce Sanford, the SPJ's First Amendment counsel, wrote in the November/December, 1994, issue of *Quill*: "Written properly, codes of ethics should be largely irrelevant to the question of liability in a libel case."

According to Sanford, because a code of ethics is not a hard-and-fast set of rules akin to statutes but is instead a set of broad guidelines, it cannot be used by the libel plaintiff to point definitively to shortcomings in the journalist's work.

Sanford notes that in his experience no plaintiff has reaped any success by arguing that a journalist violated a professional code of ethics.

Sanford's thesis received support recently from the Washington, D.C., Court of Appeals case of *Kendrick v. Fox, et al.*, No. 92-CV-177 (App. D.C. June 1, 1995), in which the court rejected plaintiff's attempt to use the 1923 American Society of Newspaper Editors (ASNE) Code of Ethics as the basis for defining a negligence standard of care. In upholding the grant of summary judgment to defendant TV broadcaster in a libel case, the court said plaintiff had not shown via expert testimony or otherwise that the ASNE code ordinarily was followed by journalists, and "We therefore cannot accept them as authoritative." Slip op. at 18.

LDRC would appreciate members sending us examples of efforts to use industry association codes in libel and related litigation, whether successful, unsuccessful or undetermined as to result.

The Associated Press Managing Editors (APME) recently revised its ethical standards, too. APME approved its new ethics code at its October, 1994, meeting. Although APME had considered an exhaustive, 10-page draft, it ultimately settled on a one-page product. *See APME Updates Media Ethics Guidelines*, *LDRC LibelLetter*, Sept. 1994, at 3.

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LDRC members are encouraged to make copies of the *LDRC LibelLetter* for distribution to their colleagues.

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THE LDRC ANNUAL DINNER

Presenting LDRC's *William J. Brennan, Jr. Defense of Freedom Award* to

JUSTICE HARRY A. BLACKMUN

LDRC is truly honored to be able to invite all of you to spend this evening with Justice Blackmun as our esteemed guest.

PLEASE NOTE NEW DATE, TIME AND LOCATION:
THURSDAY EVENING, NOVEMBER 9, 1995
at 7:30 P.M.

THE ANNUAL DINNER HAS MOVED --

* New Night: Thursday
* New Location: The Sky Club Atop the
*Metropolitan Life Building

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Working draft of revised code of ethics

The Society of Professional Journalists recognizes that the people can govern themselves and guarantee their liberties only if they are informed. Therefore, in order to strengthen democracy and ensure informed public dialogue about issues of public importance, we accept the sacred duty to serve the people by providing information and by guaranteeing a public forum in which issues of common concern can be addressed. We believe in public enlightenment as the forerunner of justice and in journalists' mandate to seek and disseminate the truth.

The achievement of these public purposes depends finally upon the personal commitment and integrity of individual journalists. It also requires adherence to practices most likely to serve the public need. It is, therefore, the moral duty of committed journalists and their news organizations to promote such standards of practice.

The Society of Professional Journalists adopts this Code of Ethics to declare the Society's principles and standards of practice.

Principles and standards

I. Truth. Truthfulness means "getting it right." Truth-telling and accuracy are morally imperative. To gather information using undercover or other deceptive techniques always requires special circumstances and compelling reasons; to tell the truth never does. Therefore, journalists must:

1(a) Test the accuracy of information from all sources, recognizing that many sources may provide self-serving and misleading information.

1(b) Exercise care to avoid inadvertent inaccuracy. Deliberate distortion is never permissible.

1(c) Never publish unsubstantiated or anonymous defamatory statements about a person.

1(d) When information of overriding public importance cannot reasonably be obtained by honest methods, use deceptive methods in gathering information only if they are explained to the public at the time of publication.

1(e) Never manipulate quotations, pictures, or headlines in ways that might deceive.

1(f) Distinguish and separate news reports, re-enactments, expressions of opinion, advertising, and entertainment.

1(g) Afford any business, organization or individual an opportunity to respond to an attack made against them.

1(h) Make prompt and complete correction of errors.

1(i) Never plagiarize.

II. Comprehensiveness. The profession has the affirmative duty to report on all significant aspects of global society, including its constituent groups. We need to tell the story of the diversity and magnitude of the human experience boldly, even when it is unpopular to do so. Therefore, journalists must:

2(a) Be vigilant and courageous about holding those with power accountable, especially the press itself.

2(b) Avoid stereotypes in covering issues of race, sex, age, religion, ethnicity, geography, and social status.

2(c) Ensure that all segments of society can be heard in public discourse.

III. Privacy. Responsible journalists respect individuals' need for a measure of control over information about themselves. They also recognize that the public needs to know private information about individuals when it relates in important ways to the common life. Only an overriding public need can justify unwanted intrusion into private affairs. Therefore, journalists must:

3(a) Avoid further harm to victims by obtaining consent, whenever possible, to take their pictures or interview them in times of tragedy or grief.

3(b) Recognize that standards on intrusion are more strict concerning ordinary citizens than for public officials and public figures.

3(c) Exercise special sensitivity when dealing with children or other inexperienced sources or subjects.

IV. Loyalty. Responsible journalists possess a single-minded commitment to their audience. Any personal or professional interest that conflicts with the needs of the audience must be avoided or neutralized. Therefore, journalists must:

4(a) Tactfully refuse gifts, awards, favors, speaker's fees or special treatment from sources, subjects, advertisers or others trying to buy influence.

4(b) Search for potential conflicts with the journalistic role and avoid participation in organizations or events they might cover.

4(c) Where conflicts are unavoidable, disclose the conflict to the public.

V. Confidences. Responsible journalists keep promises and respect confidences. Failure to do so can put sources at risk. For that reason journalists must exercise care when promising anonymity to ensure that sources know what has and what has not been promised. Therefore, journalists must:

5(a) Identify sources wherever possible and explain any failure to do so. The public is entitled to know whether a source is reliable.

5(b) Question sources' motives and assess their risks before promising anonymity. If a promise is made, keep it.

VI. Freedom. Journalists have a special obligation to preserve and strengthen freedom of speech and the press. These freedoms bring with them special responsibilities to keep the public fully informed about the issues of the day. Therefore, journalists must:

6(a) Make constant efforts to assure that the public's business is conducted in public and that public records are open to public inspection.

6(b) In exercising freedom, always seek the public good.

6(c) Assist the public in understanding the function and role of the journalist in a democratic state, encourage the public to voice grievances against the media, and maintain open dialogue with the public.

Pledge

Adherence to this code is necessary to preserve and strengthen the bond of mutual trust and respect between journalists and the people.

The Society shall—by programs of education and other means—encourage individual journalists to adhere to these tenets, and shall encourage news organizations to recognize their responsibility to establish—in concert with professional journalists and the public—local codes of ethics to pursue these goals. ■

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Code changes: the why and how

BY LOU HODGES
CHAIR, ETHICS CODE TASK FORCE

At its April 28 meeting, SPJ board members asked me to disseminate the proposed Code of Ethics as widely as possible in preparation for formal action at the convention. Besides this issue of QUILL, it will be distributed on SPJ On-Line.

I hope members will post their proposed amendments on SPJ On-Line for discussion on the net. To subscribe to a special message thread on the proposed code, E-mail: **majordomo@dworkin.wustl.edu.** In the body of your message, include: **subscribe SPJ-ethics your E-mail address**. (I also invite members to send carefully worded amendments to me. While I can't reply to all, I will examine all proposals.) We hope, too, that every chapter will sponsor a program about the Code before the convention. The goal: Have the widest possible thinking and debate on ethics and the Code. We invite every member to examine the proposed Code carefully, and to do so in light of the following:

Task force members and mandates

The task force was appointed by Ethics Committee Chair Kevin Smith, outgoing chair Dan Bolton, and me. We solicited interested members. In November 1994, we appointed 15 people to the task force: Lawrence Alexander, Jay Black, Fred Brown, Casey Bukro, Caroline Dow, Deni Elliott, Gerard Iannelli, Robert S. McCord, Jean Otto, Cliff Rowe, Georgiana Vines, Dhyana Ziegler, Bolton, Smith, and me.

Because of the abundance of talent and interest in the task force, we also appointed 11 additional people to serve on an advisory panel: Ron Chepesiuk, Richard Cunningham, John Davis, Joyce Dodd, Ted Frederickson, Bill McCloskey, Jonathan Salant, Debra Reddin van Tuyll, Jim Upshaw, Lee P. Webber, and Anita Weier.

Note the richness of talent and diversity: three national past presidents, author of our existing Code, co-author of SPJ's ethics handbook, current and immediate past chairs of the Ethics Committee, six Ethics Committee members, the author of a book on "responsible journalism," and seven who teach ethics at universities.

The Ethics Committee asked the task force to produce a revision that would:

- Be as comprehensive as possible.
- Emphasize journalists' positive obligations (not a list of don'ts).
- Organize the Code around major issues of professional ethics, not around problems in the newsroom.

In drafting the proposal, the task force sought to produce a code that would serve three purposes:

1. State the commitments and ideals for which SPJ stands.
2. Guide journalists in establishing their own principles and standards of conduct.
3. Provide a useful document for education of both journalists and the public.

Structure of proposed code

Applied professional ethics seeks to "apply" basic moral principles and moral reasoning to professional practice. All logically structured codes of professional ethics state the organization's mission, declare its basic principles, and establish its standards of practice. Let me say a word about each of these components.

- Professional ethics always begin with a statement of the profession's purpose, its social function, and its mission. That requires that journalists show what we think we are about, why we exist as a profession, where we fit in the larger social order, and what we can contribute to the public good. Our "Preamble" reflects this beginning point, that journalists profess (hence "professional") to serve certain informational needs of the public.
- We then derive from that professional purpose the general or mid-range principles (truth, comprehensiveness, privacy, etc.). These provide some relatively concrete norms by which any professional decision can be judged.
- Then come more specific and concrete standards [For example, 1(a) Test the accuracy of information from all sources; 2(a) Hold the powerful accountable; 3(a) Avoid further harm to victims. . .]. Standards address matters of actual journalistic practice, accepting some and condemning others.

The logic of the proposed code is to move in an orderly way from purpose to principles to standards of practice.

Comprehensiveness

Can any code cover every conceivable professional problem or case? Of course not. Specific problems change dramatically and rapidly. For example, 20 years ago problems with digitally manipulated photos did not exist, but the principle of truth-telling did.

In this proposal we do not mention "digital," but we cover deceptive manipulation [see 1(e)]. We cannot hope for comprehensiveness in covering all problems, and we obviously cannot establish standards to cover every case. We can speak, and have, to many of the problems that exist today. We cannot anticipate which of them will soon disappear and what new ones will arise.

We can be comprehensive in establishing the principles by which every journalistic problem (case) can be decided. Principles tend to be timeless; problems come and go. Every moral problem in the practice of journalism, every moral choice, invokes one or more of the principles we have named: being truthful, being comprehensive, respecting privacy, avoiding conflict of interest (being loyal to audience), keeping confidences, and pursuing freedom responsibly. For that reason, practical journalistic decisions about problem cases cannot be made responsibly without a clear understanding of the principles that make them problems.

Enforcement/implementation

Task force participants have divided on some issues. But everyone agrees that questions of substance or content and questions of implementation are closely related. Everybody also agrees that the two questions can be separated.

The board did just that at its April 28 meeting. Board members asked the task force to exclude questions of enforcement and implementation from its deliberations, and referred the matter to Ethics.

At the annual convention, the committee will place the issue on the agenda, but it will be addressed separately from the Code itself.