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LDRC Libel Defense Resource Center

LIBELLETTER

July 1996

SPECIFIC INSTANCES OF CONDUCT AS EVIDENCE OF REPUTATION IN A DEFAMATION LAWSUIT

By Peter C. Canfield and Sean R. Smith

In the typical defamation case, the injury claimed by the plaintiff is injury to his or her reputation. Yet proof of plaintiff's reputation, and any attempt to quantify or even demonstrate injury to that reputation, is elusive. Especially in private figure cases, the plaintiff is known only to family and friends, and perhaps a few members of the community at large. Proof of plaintiff's reputation thus depends primarily on the testimony of people who know and often like the plaintiff. Thus it may be difficult to prove a bad general reputation. The defense against such a claim necessarily becomes one of attacking plaintiff's reputation, and by extension character, through extrinsic evidence of prior specific acts that reflect poorly on the plaintiff.

(Continued on page 14)

HIGHLIGHTS

* Annexed to this edition of the *LDRC LibelLetter* is a summary, for the Supreme Court's 1995-1996 term, of certiorari petitions raising free speech and related issues.

* In his essay reproduced in this month's *LDRC LibelLetter*, Burt Neuborne, director of the Brennan Center for Justice at New York University Law School and former legal director of the American Civil Liberties Union, offers a provocative look at the "First Amendment" decisions of this current Supreme Court. See back page.

MUSEUM BUILDING AS TRADEMARK
Photographer Enjoined

By Richard M. Goehler

On May 30, 1996, Chief Judge George White, United States District Court for the Northern District of Ohio, issued a preliminary injunction restraining photographer Charles Gentile from selling unlicensed posters of the Rock and Roll Hall of Fame and Museum in Cleveland. [*The Rock and Roll Hall of Fame and Museum, Inc., et al. v. Gentile Productions, et al.*; 96CV899, N.D. Ohio]

The Rock and Roll Hall had filed suit alleging that Gentile had infringed on its trademark by selling the unlicensed posters. The Rock and Roll Hall claims that it holds trademarks on the name and building design and has a right to control profit from the sale of photographs of the structure.

The District Court's ruling specified that the Museum's shape was "unique and inherently distinctive." The District Court also ruled that Gentile's poster was

(Continued on page 8)

INDECENCY AND CABLE ACCESS: DID *DENVER AREA V. FCC* RESURRECT AND EXPAND *PACIFICA*?

By Charles S. Sims and Peter J.W. Sherwin

A fractured Supreme Court recently handed down its decision on the constitutionality of the Section 10 of the 1992 Cable Act, whose three subsections regulate "indecent" programming on leased access and public, educational, and governmental access cable channels. In *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, a 7-2 majority (in two separate opinions) found §10(a) constitutional, a 6-3 majority struck down § 10(b), and a 5-4 majority (in two separate opinions) struck down § 10(c). There were six separate opinions in all, which taken together cast some doubt onto the standard of review of regulations of cable speech, and offer only limited guidance in the realm of "indecency" regulation.

Section 10, the Proceedings Below, and the Parties' Arguments

In awarding and renewing cable franchises, most municipalities require cable operators to establish access channels for public, educational, and governmental use ("PEG" channels), and prohibit any editorial control over those channels. Those channels are usually operated in conjunction with governmental units, universities, or non-profit "access centers" established to operate the channels in compliance with franchise agreements and applicable law. In

(Continued on page 11)

UPDATES

¤¤ *Turner v. Dolcefino, et al.*, No. 92-32914 (Tex. Dist. Ct. July 3, 1996)(Order)

We reported last month that Texas state district court judge Elizabeth Ray had imposed extraordinary sanctions on reporter/defendant Dolcefino and his employer, KTRK Television, for Dolcefino's refusal in a libel suit to identify his confidential source. While the court and the plaintiff believed that they knew the source, and the source had already been deposed about his contacts with Dolcefino, the trial court remained adamant that Dolcefino testify about his conversations and other contacts with the alleged source. The confidential source issue went up to the Supreme Court of the United States, which denied cert. (*See* Cert. Survey annexed to this month's *LDRC LibelLetter*)

The penalties to be imposed were to be in the form of jury instructions, to the effect that Dolcefino's refusal to testify, among other things, constituted presumptive evidence of actual malice. At a re-hearing on the issue of sanctions held on June 27, 1996, the court modified the sanctions order somewhat by removing the language instructing the jury that it was to presume that the "evidence that would have been revealed by his truthful answers to those questions would be detrimental to the defendants' case." The court also included a limit on the instruction to the effect that it would only apply to one of the questions posed to the jury and not to all issues before the jury.

On July 3, Mr. Dolcefino complied with the court's order by answering the questions about the identified source. According to counsel for Mr. Dolcefino, he did so after receiving permission from counsel for the source.

The proposed sanctions remain among the more onerous suggested for a refusal to answer source related questions, and particularly so when the identity of the source was presumed to be known.

Celebrities Revive California Criminal

¤¤ Celebrities Revive California Criminal Libel Bill

The California criminal libel bill (see the *LibelLetter*, May 1996), which looked as if it might die earlier this year in the Senate, has been resurrected in the state Assembly with the help of a little star power. Senator Charles Calderon (D- Montebello), the bill's sponsor, enlisted celebrities Steven Seagal (*Under Siege*) and Paul Reiser (*Mad About You*) to testify in support of SB 1583 on June 19th, and the seemingly star-struck Assembly Judiciary Committee committee okayed it the same day with a 9-0 vote.

SB 1583 makes it a misdemeanor to make "a maliciously false defamatory statement of fact to another person with knowledge that the other person may, for financial profit, publish, broadcast, or otherwise disseminate the malicous false defamatory statement of fact to the general public." The act is punishable by up to one year in jail and $10,000 in fines. The newest incarnation of the bill adds the crime of "accessory to criminal defamation" for engaging in a pattern of paying for the right to publish such information with actual malice.

The bill is expected to pass the Appropriations Committee in early August before going back to the Senate for approval. An eclectic alliance made up of the California Newspaper Publishers Association, the Teamsters, the ACLU, the California District Attorneys Association, the California Police Officers Association and the California Police Chiefs Association promises to fight it in the Senate.

¤¤ Applying "Subsidiary Meaning" Doctrine, Court Grants Summary Judgment on Remaining Claim in Scientology Suit Against *Time*

On July 16, 1996, Judge Peter K. Leisure granted summary judgment on the one claim remaining in the Church of Scientology's libel action against Time Warner, Inc., Time Inc. Magazine Company, and reporter Richard Behar. *Church of Scientology Int'l v. Time Warner*, 92 Civ. 3024 (S.D.N.Y. 1996).

As reported previously, Judge Leisure had granted summary judgment as to all but one statement in the libel suit, which was based on a 1991 cover story in *Time* written by Behar and entitled *Scientology: The Cult of Greed.* *See LDRC LibelLetter* (November 1995, at p. 5). In dismissing the claim as to the other statements, Judge Leisure had held that some were not of and concerning the plaintiff and that no rational jury could find by clear and convincing evidence that the others had been published with actual malice. *See Church of Scientology v. Time Warner, Inc.*, 903 F. Supp. 637 (S.D.N.Y. 1995). The one *statement not* dismissed was: "One source of funds for the Los Angeles-based church is the notorious, self-regulated stock exchange in Vancouver, British Columbia, often called the scam capital of the world."

In considering defendants' motion

(Continued on page 4)

In This Issue . . .

A YEAR'S RETROSPECTIVE WITH FOOD LION

By David S. Bralow

A plaintiff cannot recover damages for injury to its reputation when it sues the media for tortious newsgathering under trespass, fraud or unfair trade practices theories. That holding comes from *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 887 F. Supp. 811 (D.N.C. 1995). The case suggests an effective way for news organizations to limit damages, perhaps even bring an early end to certain claims, and protect themselves from the "chill" of newsgathering tort and breach of contract cases.

Under a *Food Lion* analysis, it may be possible to limit exposure early in a case by focusing on whether the damages allegedly arise from pre-publication conduct (fraud, trespass or misrepresentation) or the publication itself. Conduct claims will yield the limited damages caused by the actions taken to gather the information itself, and not the broader, intangible and perhaps more troubling damages arising from the publication of the information. Discovery that forces plaintiff to define the nature of the injury claimed may give media counsel the tools they need to limit complicated newsgathering-based actions in the early stages.

Unfortunately, there are no other reported decisions in which courts have followed the North Carolina federal court's lead in limiting newsgathering claims to non-reputational damages. Nor are there reported decisions that criticize *Food Lion*. But *Food Lion* is the natural development from *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) and *Cohen v. Cowles*, 501 U.S. 663(1991) and presents an opportunity for media defense counsel.

In *Food Lion*, two ABC/*Prime Time Live* producers submitted falsified employment applications to the grocery store chain. After getting hired, the producers videotaped non-public areas. Food Lion sued for fraud, trespass and civil conspiracy and, among other things, claimed reputational injury.

Relying on *Cohen v. Cowles*, the District Court noted that in this leading newsgathering conduct case, Justice White specifically observed that Cohen was not seeking damages for injury to his reputation or his state of mind. From that, the District Court limited Food Lion's potential recovery.

While upholding most of plaintiff's newsgathering claims, the Court held in broad terms, "Food Lion may not recover publication damages for injury to reputation." [As a corporation Food Lion undoubtedly did not seek damages for injury to state of mind. The district court leaves no doubt that those damages would be barred by *Cohen* as well.]

The Court, however, held "it may recover any non-reputational damages it allegedly suffered to the extent recoverable under (state law) and other laws governing the remaining claims." 887 F. Supp. at 822, n.1.

The holding is consistent with both *Cohen* and *Hustler*. *Cohen* involved a 1982 Minnesota gubernatorial campaign in which a political operative provided damaging information about a candidate to reporters who had promised him confidentiality. The newspapers revealed Cohen's identity. Cohen was fired and later sued the newspapers under contract theories.

The U.S. Supreme Court held that the First Amendment did not prevent Cohen from recovering damages under a promissory estoppel theory. But only promissory estoppel damages. The Supreme Court sharply noted that Cohen was not seeking to use promissory estoppel "to avoid the strict requirements for establishing a libel or defamation claim" and obtain reputational or state of mind damages.

In allowing Cohen's claim to stand, the Court found that there is a "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report news." *Cohen*, 501 U.S. at 669.

And, it has been suggested, *Cohen* opened the floodgates for a wave of newsgathering tort cases, involving claims for tortious interference with business relations, unlawful disclosure of trade secrets and unfair competition. *See* Kirtley, *Vanity and Vexation, Shifting the Focus to Media Conduct*, 4 Wm. & Mary Bill Rts. J. 1069 (1996).

At the same time, *Falwell* — where the Supreme Court held a public figure must prove actual malice to recover damages in a claim for intentional infliction of emotional distress against a publication — prompted other courts to recognize that certain newsgathering claims really are aimed at recovering defamation damages. *See e.g., Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345 (7th Cir. 1995); *Beverly Hills FoodLand, Inc. v. United Food and Commercial Workers*, 39 F.3d 191 (8th Cir. 1994); *Moldea v. New York Times Co.*, 22 F.3d 310 (D.C. Cir. 1994); *Washington v. Smith*, 893 F. Supp. 60 (D. D.C. 1995).

The *Food Lion* court reconciled *Falwell* and *Cohen* by recognizing their basic area of agreement: *Cohen's* application was limited to cases where non-reputational or non-state of mind damages alone are sought. The court in *Food Lion* observed: "To the extent that Food Lion is attempting to recover reputational damages without establishing the requirements of a defamation case, this case closely resembles [*Falwell*]." 887 F. Supp. at 823.

It also held "if Food Lion is ultimately successful in proving its case to a jury, it may recover non-reputational damages under North Carolina's unfair and deceptive trade practices statute and the other laws governing the remaining claims without offending the First Amendment." 887 F. Supp. at 823-824.

Some may argue that the *Food Lion* holding should not be read too broadly. For instance, in *Media Misbehavior and the Wages of Sin*, 4 Wm. & Mary Bill Rts. J. 1111 (1996), John J. Walsh, an

(Continued on page 4)

A YEAR'S RETROSPECTIVE WITH FOOD LION

(Continued from page 3)

attorney for Food Lion, on the motions, maintained that the *Food Lion* court "unnecessarily blurred the distinction between reputation damages and publication damages."

But the distinction between reputation injury and non-reputational publication damages is difficult, if not impossible, to make. Furthermore, it is doubtful that a reputation- publication dichotomy would provide the "breathing room" required by the First Amendment. That was recognized in a prior restraint context in *CBS Inc. V. Davis*, _ U.S. _, 114 S. Ct. 912 (1994). There, Justice Blackmun found that while "economic harm" could occur through publication of trade secrets, First Amendment protections were not nullified by CBS's alleged misdeeds.

But by drawing a lesson from *Food Lion*, defense counsel in such cases may want to do the following when confronted with one of the relatively new genre of claims:

* Through written discovery and requests for admissions, pin down plaintiff, early in the case, on its damage theory.

* Take depositions, again early in the case, of plaintiff's representative and the witnesses on which it will rely regarding the alleged injury.

* Have at the ready your traditional First Amendment defenses so that, if discovery reveals the plaintiff's claim is for reputational, state of mind, and other damages, you can eliminate, through motion practice, as many of the less-tangible aspects of the damages claim as possible.

If discovery shows the case really is all about reputation and/or state of mind, you may be able to dispose of it entirely, *Cohen* and "generally applicable laws" notwithstanding.

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Court Grants Summary Judgment on Remaining Claim in Scientology Suit Against *Time*

(Continued from page 2)

for reargument and reconsideration, Judge Leisure addressed three separate doctrines. First, he considered the "libel-proof plaintiff" doctrine, which holds that "when a particular plaintiff's reputation for a particular trait is sufficiently bad, further statements regarding that trait, even if false and made with malice, are not actionable because, as a matter of law, the plaintiff cannot be damaged in his reputation as to that trait." Slip op. at 8 (*citing Guccione v. Hustler Magazine, Inc.*, 800 F. 2d. 298, 303 (2d Cir. 1986)).

Second, he considered the "incremental harm" doctrine, which holds that a statement, even if maliciously false, is not actionable when it "causes no harm beyond the harm caused by the remainder of the publication." Slip op. at 9 (*citing Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 522 (1991); *Simmons Ford, Inc. v. Consumers Union of U.S., Inc.*, 516 F. Supp. 742, 750 (S.D.N.Y. 1981)).

Third, he considered the "subsidiary meaning" doctrine, which reasons that "where a maliciously false statement implies the same ultimate conclusion as that of the remainder of the publication, which has been published without actual malice, a plaintiff cannot 'base his defamation suit solely on inaccuracies contained within statements subsidiary to these larger views.'" Slip. op. at 10 (*citing Herbert v. Lando*, 781 F. 2d 298, 311 (2d Cir.) *cert. denied*, 476 U.S. 1182 (1986)).

In granting defendants' motion, the Court rejected the libel-proof plaintiff doctrine as "not appropriate at this stage of the litigation, because it requires the Court to make factual findings regarding plaintiff's reputation for a particular trait." Slip op. at 10. Judge Leisure held that it was premature to consider the incremental harm doctrine because the parties had not yet conducted discovery on the issue of damages, and "the doctrine requires a court to measure the harm flowing from the challenged statement as compared to the harm flowing from the rest of the statement." *Id.* at 11. Moreover, he noted that in *Masson* the Supreme Court had rejected "[t]he proposition that the incremental harm doctrine is grounded in the First Amendment." *Id.*

Judge Leisure found it unnecessary to consider whether the incremental harm doctrine barred recovery as a matter of state law, however, basing dismissal instead on the subsidiary meaning doctrine. Applying that doctrine, Judge Leisure held that the sole remaining statement at issue in the case (namely the assertion that "the notorious, self-regulated stock exchange in Vancouver" was one source of church funds) was subsidiary to the nonactionable or unchallenged views published in the remainder of the article because it "merely implies the same view which this Court has held to be nonactionable as not made with actual malice: that Scientology's purpose is making money by means legitimate and illegitimate." *Id.* at 14.

SUBSTANTIAL TRUTH AND FAIR REPORT WIN SUMMARY JUDGMENT

"Scared To Talk" In E.D. Mich

Among the suspects in the murder of an eighteen-year old woman was Kewai Hunter, the libel plaintiff in *Kewai Hunter v. Paramount Stations Group*, U.S. District Court, E.D. Mich., Southern Division, Case No. 95-75355 (April 22, 1996). At issue in this case was defendant's broadcast *"Scared to Talk,"* an account of that day's criminal court hearing in which the State of Michigan dismissed murder charges against plaintiff "pending further investigation." According to the complaint, the segment went on to recount the reluctance of potential witnesses to cooperate with authorities for fear of gang retaliation, displaying plaintiff's photograph while stating that "[f]inding and prosecuting the killers is....being hampered by fear of gang retaliation."

In his libel action against defendant WKBD-TV, plaintiff alleged that "[b]y the stated words, together with the remainder of the broadcast, including the photograph of plaintiff....Defendant meant, intended to mean, and was understood by its television audience [to mean]...that Plaintiff was guilty of the murder....and that the charges were dropped because witnesses were afraid to testify. In fact, plaintiff alleged, the "[c]harges were dropped...for the reason that plaintiff is totally innocent."

The Court's Decision

Applying Michigan law, U.S. District Judge Corbett O'Meara imposed upon plaintiff the burden of proving falsity, noting that "[t]ruth means only *substantial*, not *literal*, truth." (Emphasis supplied.) The judge also relied upon a Michigan statute, Mich. Comp. Laws. Ann. section 600.2911(3), which confers on the media an absolute privilege in the reporting of judicial proceedings, provided that the report is "fair and true."

Among the documents submitted by plaintiff to substantiate his claim of falsity was a transcript of the hearing in which the State of Michigan moved for dismissal of the charges without prejudice against plaintiff stating only that further investigation was necessary. Nevertheless, the court granted summary judgment in defendant's favor, holding that the broadcast was "substantially true" because: (1) plaintiff was, in fact, still "under investigation;" (2) the broadcast acknowledged the State's dismissal of murder charges against plaintiff; (3) any inaccuracies were not material. The court also held that defendant was entitled to its statutory privilege to broadcast a "fair and true report of matters of public record."

"Ripped Off" in the Sixth Circuit

By Paul Levy

In an appeal seeking to reverse the grant of a motion for summary judgment, the U.S. Court of Appeals for the Sixth Circuit set forth the standards to be used in determining the propriety of the district court's decision applying basic principles to reach a sensible result on the issue of truth. (*Stilts v. Globe International, Inc. and Bob Michals*, CAG, No. 95-5554 (6th Cir. July 2, 1996)).

On April 5, 1994, Globe International, Inc. published an article entitled "*Wynonna and Naomi: We were ripped off $20 million - They blame ex-business manager say pals*" in its tabloid *The Globe*. The article reported on the controversy surrounding the business relationship between Wynonna and Naomi Judd ("The Judds"), a country music mother and daughter duo, and their former business manager, Ken Stilts, a well known member of the country music business community in Nashville, Tennessee.

Stilts alleged, among other things, that the article reported that he had been "bleeding them [The Judds] dry for ten years - then dumped them," that Stilts "couldn't be trusted" and wound up with nearly $20 million of the money they [the Judds] had earned, and they were left with only $5 million, that Wynonna was "betrayed and used," that Stilts "pocketed most of what [The Judds] had earned" and that Stilts "owned practically everything [The Judds] worked so hard for - even their cars. Globe argued that the article was about the cause of and controversy surrounding the break-up of the Judds' business relationship with Stilts.

The district court granted the defendants' motion for summary judgment, and dismissed the action with prejudice. Stilts moved, pursuant to Rule 59(e) to alter or set aside the district court's decision.

In a *Per Curiam* decision the Sixth Circuit first held that its review of the district court's decision to grant summary judgment was *de novo* and had the purpose of examining all of the evidence presented so as to determine whether there was a genuine issue of any material fact for resolution at trial.

The Sixth Circuit first determined, as a matter of law, whether the article was capable of being understood as being defamatory. The district court had found that it would be "impossible" to understand the headline as charging Stilts with a crime or to construe the text of the article as defamatory. Stilts argues that the definition of "rip-off" in Webster's New World Dictionary, Second Edition, includes "to steal" or "to rob," so that "rip-off" could be construed in a defamatory sense. For purposes of reaching its decision, the Sixth Circuit accepted Stilts' argument that he created a factual dispute regarding whether the statements in the article are capable of being understood in a defamatory sense.

The Sixth Circuit then addressed the issue of whether the district court erred in concluding that the "gist" of the article is substantially true. In doing so, it relied on *Stones River Motors, Inc. v. Mid-South Publishing Co.*, 651 S.W.2d 713,

(Continued on page 6)

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Those of you who ordered the *1996-97 LDRC 50-State Survey: Media Privacy and Related Law* should have received your book(s) by now. Call us if there is any problem with your order. We would also appreciate prompt payment if you have not already done so. Thank you.

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TO HONOR THE 25TH ANNIVERSARY OF
THE *PENTAGON PAPERS* DECISION

"Ripped Off"

(Continued from page 5)

718 (Tenn. Ct. App. 1983) (Citing *Memphis Publishing Co. v. Nichols*, 569 S.W.2d 412, 419 (Tenn. 1978)). The court in *Stones River* held that to be actionable "the damaging words must be factually false. If they are true, or essentially true, they are not actionable, even though the published statements contain other inaccuracies which are not damaging. Thus, the defense of truth applies so long as the 'sting' (or injurious part) of the statement is true."

Stilts argues that the "gist" or "sting" of the article is that he stole from The Judds and that this allegation is false. The Sixth Circuit agreed with the district court, however, that the "gist" of this article is not that Stilts stole money from the Judds, but that a controversy exists between The Judds and Stilts regarding their business affairs, and that Stilts exploited this relationship through their contract and a power of attorney provided for under that agreement that gave him a right to a portion of the Judd's earnings. The critical aspect of *Stones River*, cited with approval by the Sixth Circuit, was the determination that, where an article publishes facts, as well as comments and characterizations of those facts, the comments and characterizations would not be libelous if the facts were true.

Here, the court held that the gist of the article was substantially true in that the controversy between The Judds and Stilts has resulted in a series of highly publicized lawsuits whereby The Judds have sued Stilts for fraud, breach of fiduciary duty, breach of contract, unjust enrichment and conversion.

The Sixth Circuit therefore held that Stilts had not created a genuine issue of material fact regarding whether or not the "gist" or "sting" of the article is demonstrably false. The court therefore found that Stilts had not presented evidence to create jury question with regard to the defendants' claim of truth.

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SUPERIOR COURT VACATES SEALING ORDERS AND ALLOWS SHERIFF'S OFFICE TO RELEASE BOOKING PHOTOS

By Halina F. Osinski

In March, 1996, prior to the primary election, California Assemblyman Scott Baugh, and two Republican campaign aides, Maureen Werft, his chief of staff, and Rhonda Carmony, the current campaign manager to U.S. Representative Dana Rohbacker, all indicted on election law violations, sought and obtained highly extraordinary orders from the Orange County Superior Court, preventing the Orange County Sheriff-Coroner Department ("Sheriff's Office") from releasing their respective booking photographs. What makes these sealing orders even more unusual is that they were issued before the defendants had been booked and before their photographs were taken as part of the booking process mandated by state law.

At the first available opportunity, The Orange County Register ("The Register") challenged these unprecedented sealing orders and ultimately was successful, despite vigorous opposition from the defendants, in persuading the court to vacate its previous orders and allow the Sheriff's Office to release the sought-after booking photographs. The Los Angeles Times and NBC joined in The Register's challenge.

This controversy arose after defendants Baugh, Werft and Carmony were charged with felony violations of election laws relating to alleged misconduct during the campaign leading up to the primary election. Defendants initially sought the sealing orders on the grounds that public release of the booking photographs could be used by their political opponents to the defendants' detriment during the campaign preceding the general election. They later argued that release of the photos would endanger their Sixth Amendment fair trial rights.

However, defendants cited no constitutional, statutory or case law authority to justify their extraordinary request. Even more perplexing is that the court, in granting their request, provided no findings of fact or any reason whatsoever, other than the generic "good cause," in issuing the sealing orders.

The Register's motion to vacate the sealing orders was based on the grounds that the orders constituted unconstitutional prior restraints on speech, exceeded the court's jurisdiction and contravened the statutory scheme governing public access to governmental records, and, if the sealed materials were deemed judicial records, violated the constitutional and common law rights of access to such records.

First, The Register argued that the sealing orders constituted a prior restraint on the press in violation of the First Amendment and the California Constitution, that under *Gilbert v. National Inquirer*, 43 Cal. App. 4th 1135 (1996), the press was entitled to challenge the order and that fear of how the booking photographs might be used in a political campaign could not possibly justify a prior restraint. In addition, the Register argued that release of the booking photographs was unlikely to cause cognizable harm to defendants' Sixth Amendment rights to a fair trial and that defendants' generalized speculation as to such harm was wholly inadequate to justify the extraordinary remedy of a prior restraint. Furthermore, The Register argued that there exist a variety of alternatives to the sealing orders that can protect defendants' Sixth Amendment rights, including a change of venue, citing to *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

Second, The Register argued that the court had exceeded its jurisdiction in preventing the Sheriff's Office from exercising its lawful discretion to release copies of its own records, the photographs, as granted to it by statute. The booking photographs were not judicial records, but records maintained by the Sheriff's Office, which has sole discretion to decide whether they should be released or not.

Third, The Register argued that the booking photographs are public records covered by the California Public Records Act, Government Code Section 6250 et seq. ("CPRA"), and which routinely are made available to the press and the public.

Finally, The Register argued, even if these photographs were deemed to be "judicial records," defendants had failed to demonstrate, as they were required to do, that the sealing orders were essential to preserve higher values and were narrowly tailored to serve that interest.

The defendants vehemently opposed The Register's motion, arguing that release of the booking photographs would violate their right to privacy as well as their right to a fair trial and would allow their political opponents to use the photographs to their advantage by embarrassing candidate Baugh and thereby violate "the integrity of the election process" during the general election campaign. Attorneys for the defendants also argued that the booking photographs were part of an individual's "local summary criminal history," as defined in California Penal Code § 13300. They argued that Penal Code Section 13300 et seq., not CPRA, applied and, pursuant to that statute, such material is prohibited from release to the public and the press.

At the hearing on The Register's motion to vacate, the court conceded that it had erred in ordering the booking photographs sealed "in part [based] on the effect that the release of such documents . . . have . . . on the primary election, which was [at the

(Continued on page 8)

Museum Building As Trademark

(Continued from page 1)

"misleading as to its source of sponsorship" and, therefore, not entitled to First Amendment protections. As a result, Gentile was ordered to deliver all copies of the poster to counsel for the Rock and Roll Hall for destruction.

Gentile has filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit. [Appeal No. 96-3759]

The case has already generated substantial interest. Some of that interest has to do with the "David and Goliath" relationship of the parties. The Rock and Roll Hall is represented by Jones, Day, Reavis & Pogue, while Mr. Gentile appeared *pro se* before Judge White at the preliminary injunction hearing.

There is also substantial interest in the significant issues raised by the case. Both Intellectual Property and First Amendment specialists are closely watching the development and resolution of these issues. For example, at issue are certain trademark questions, including whether Gentile's identification of the subject of his photo as the "Rock N' Roll Hall of Fame . . . Cleveland" is a trademark use and whether a building per se can serve as a trademark for collateral goods that can be sold there. In addition, important First Amendment and speech issues are involved, such as whether Gentile is protected by the First Amendment and whether the Copyright Act, which expressly states that the protection given to architectural works does not include the taking of photos of publicly visible buildings, preempts protection under the Trademark Act.

Finally, the case has also already gotten the attention of the legislature. A state representative in Ohio who was outraged by the District Court's injunction ruling has indicated that he will introduce a bill that says that any building backed by state money cannot be protected in this way. The Rock and Roll Hall of Fame and Museum, Inc. is a private, nonprofit corporation, but the building received significant support from public money.

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SUPERIOR COURT VACATES SEALING ORDERS AND ALLOWS SHERIFF'S OFFICE TO RELEASE BOOKING PHOTOS

(Continued from page 7)

time the orders were issued] only a few days away." The court stated it had been concerned about the "fundamental principle of the electorate deciding whether they thought Mr. Baugh was a genius or buffoon, having the right to decide that in a forum uninfluenced by the press or another party running his mug photograph with numbers under it."

However, the court stated that although the reasoning underlying the decision to seal the photographs had been flawed, the result had been correct, because release of the photographs may have impaired the defendants' constitutional right to a fair trial. The was concerned that the booking number -- the number assigned at the time of booking -- might be released along with the booking photograph and that such release prior to trial could violate the defendants' Sixth Amendment right to a fair trial. Although none of the defendants had raised any concern regarding the release of booking numbers in conjunction with the photos, and The Register had expressed its understanding to the court that booking photographs were normally released to the press without the booking numbers attached. However, because the court stated that it was still uncertain whether the Sheriff's Office released booking photographs with or without the booking numbers, the court denied The Register's motion.

The Court also held that CPRA "does not apply because it is general legislation which yields to the more specific provisions of Penal Code Section 13300," and because that section includes booking numbers in its definition of local summary criminal history information, which information may not be released to the public. Even though The Register then advised the court that it was willing to accept the booking photographs with the booking numbers redacted, the court refused to alter its decision. In so holding, the court distinguished on factual grounds *People v. McCloud*, 146 Cal. App. 3d 180 (1983), which held that Penal Code § 13300 et seq. do not apply to booking photographs.

The court also ignored *Detroit Free Press, Inc. v. Dep't. of Justice*, 73 F.3d 93 (6th Cir. 1996). That case rejected the argument that, because booking photographs convey strong connotations of guilt, dissemination should be prohibited.

On motion for reconsideration, the Register obtained and submitted to the court a declaration from the Sheriff's Office Press Information Officer which stated that the Sheriff's Office never released booking numbers with booking photographs released to the public or the press. At a lengthy hearing on the motion, the court was finally persuaded to vacate its prior orders, lift its ban on release of the booking photographs and allow the Sheriff's Office, pursuant to CPRA, to release the photographs in its discretion. However, the court ordered the Sheriff's Office to delete the booking number from each photograph released.

Finally, the court referred to the budget problems of Orange County (which was still in bankruptcy at the time of the hearing) and expressed concern about the press's manner and timing in publishing the photographs. Noting that the trials for two of the defendants did not start until August 26 and that Orange County was large enough to draw an unbiased jury pool, the court nevertheless cautioned the press to use the photographs "in a way that is newsworthy and not inflammatory."

Halina F. Osinski worked with Jim Grossberg, of DCS firm Ross, Dixon & Masback, in representing The Orange County Register in this matter.

LEGISLATIVE TORT REFORM TRENDS

By Richard Rassel

The following listing of tort reform activity is not exhaustive. It is however illustrative of the varying types of tort reform occurring around the country. Please direct your insights regarding tort reform developments in your jurisdiction to Dick Rassel, at Butzel Long, P.C., in Detroit at (313) 225-7000.

STATE ACTIVITY

1. **HB-158**
   Alaska house bill. Relevant provisions limit punitive damages to 3X compensatory damages or $300,000, whichever is greater; provides 2 year statute of limitations from accrual of action; provides for early offers of judgment. **Relevance:** Bill applies to all tort liability, including libel actions. **Document found:** ATRA rec'd 5/16/96. **Status:** passed the Senate; Governor has not taken action as of 5/30/96.

2. **AB-860**
   Wisconsin Assembly bill. Limits employer liability for providing employee references by establishing a presumption that the employer acted in good-faith (unless rebutted by clear and convincing evidence). **Relevance:** this bill would limit libel and privacy actions by employees against their employers for releasing employee references. **Document found:** ATRA rec'd 5/16/96. **Status:** signed into law; effective 7/9/96.

3. **AB-727**
   Wisconsin Assembly bill. Provides that a court can order a claimant to provide requested past medical records, including directly relevant pre-existing conditions and treatments, for inspection. Directly over turns Wisconsin case law (*Ambrose v. General Cas. Co.*). **Relevance:** bill limits libel and privacy actions against hospitals for providing this information. **Document found:** ATRA rec'd 5/16/96. **Status:** signed into law 5/20/96; effective 6/4/96.

4. **SB-1041**
   South Carolina Senate bill. Provides immunity from civil liability to employers who provide information about current or former employees, so long as they did not intentionally release false information. **Relevance:** this bill would limit libel and privacy actions by employees against their employers. **Document found:** ATRA rec'd 5/10/96. **Status:** signed into law May 9, 1996; effective _____.

5. **SB-1046**
   South Carolina state bill. Limits non-economic damage awards to $250,000 or an amount equal to economic damages, whichever is greater. **Relevance:** assuming bill applies to all tort liability, including libel actions. **Document found:** ATRA rec'd 5/10/96. **Status:** n/a

6. **AB-2129**
   California Assembly bill. Prohibits multiple punitive damages awards. **Relevance:** assuming bill applies to all tort liability, including libel actions. **Document found:** ATRA rec'd 5/10/96. **Status:** Judiciary Committee is holding hearings.

7. **AB-2385**
   California Assembly bill. Eliminates joint liability for service providers. **Relevance:** bill applies to actions not involving personal injury, wrongful death or property damages, assuming this includes libel actions. **Document found:** ATRA rec'd 5/10/96. **Status:** Judiciary Committee is holding hearings.

8. **AB-3071**
   California assembly bill. Allows for arbitrators in disputes of $150,000 or less. **Relevance:** assuming bill applies to all tort liability, including libel actions. **Document found:** ATRA rec'd 6/7/96. **Status:** n/a

9. **AB-1862**
   California assembly bill. Requires a judge to limit punitive damage awards to no more than three times compensatory damages. **Relevance:** assuming bill applies to all tort liability, including libel actions. **Document found:** ATRA rec'd 6/14/96. **Status:** Senate judiciary hearings.

10. **HB-20**
    Louisiana house bill. Repeals the statutes authorizing punitive damages awards **Relevance:** assuming bill applies to all tort liability, including libel actions. **Document found:** ATRA rec'd 6/14/96. **Status:** signed into law; effective 4/16/96.

(Continued on page 10)

LEGISLATIVE TORT REFORM TRENDS

(Continued from page 9)

11. HB-23

Louisiana house bill. Deters frivolous lawsuits by enacting offer of settlement provisions. When settlement offer is refused, any additional attorney fees incurred are awarded if the judgment is less than 75% of the settlement offer. **Relevance:** assuming bill applies to all tort liability, including libel actions. **Document found:** ATRA rec'd 6/14/96. **Status:** signed into law; effective 5/9/96.

12. SB-173

Ohio Senate bill. Affords a cause of action against persons who falsely communicates that a producer's perishable agricultural product is adulterated or unsafe for consumption. Statute awards compensatory damages, reasonable attorney fees, and court costs; 2-year statute of limit-actions; if malice established, court "shall" award punitive or exemplary damages three times the compensatory damages.
Relevance: expands possibility for libel action. **Document found:** LDRC rec'd 2/26/96. **Status:** signed into law; effective _____.

13. HB-350

Ohio house bill. Abolishes joint liability, except for defendants who are more than 50% at fault and would be liable for economic damages only; limits non-economic damages to the greater of $250,000 or four times the economic damages, no greater than $500,000; limits punitive damages to the greater of $250,000 or three times compensatory damages. **Relevance:** assuming bill applies to all tort liability, including libel actions. **Document found:** ATRA 2/1/96. See also Ohio Alliance Publication, dated 1/29/96. **Status:** currently in conference committee hearing.

14. HB-597

Maryland house bill. Protects employers from liability when giving employee references. **Relevance:** bill limits libel and privacy actions by employees against their employers. **Document found:** ATRA 2/1/96. **Status:** signed into law; effective 10/1/96.

15. HB-593

Idaho house bill. Limits liability for an employer who provides a reference about a current or former employee. Creates a presumption that employer was acting in good faith unless proven the information was knowingly false, deliberately misleading, or disclosed for malicious purpose. **Relevance:** bill would limit libel and privacy actions by employees against their employers. **Document found:** ATRA rec'd 3/22/96. **Status:** signed into law; effective _____.

16. HB-729

North Carolina house bill. Limits the amount of punitive damages recoverable to three times the amount of compensatory damages or $250,000, whichever is greater. Discourages frivolous claims by awarding reasonable attorney fees to defendants when found. **Relevance:** assuming bill applies to all tort liability, including libel actions. **Document found:** Tort Reform Report from Michael Hays. **Status:** signed into law.

FEDERAL ACTIVITY

1. Federal Act

47 U.S.C. § 509. Removes all disincentives to any efforts by commercial on-line and other interactive computer services to restrict or limit "children's access to objectionable or inappropriate on-line material." **Relevance:** creates an exemption from defamation actions for providers and users, overruling *Stratton Oakmont, Inc. v. Prodigy Services Co.*, 23 Media L. Rep. 1794 (N.Y. Sup. Ct. Nassau Co. 1995), which held that on-line distributors were liable under state defamation law as "publishers," for any defamatory information carried by them even when created by others. **Document found:** LDRC rec'd 2/26/96, pg. 3.

2. Model Act

Uniform Law Commissioners' Model Punitive Damages Act. Attempts to define more precisely when punitive damage award may be made by the trier of fact in terms of the standards of culpability and the manner in which the amount should be determined. **Relevance:** affects all tort liability including libel and privacy actions. **Document found:** attached to letter rec'd 4/22/96, from Cam Devore.

INDECENCY AND CABLE ACCESS: DID *DENVER AREA V. FCC* RESURRECT AND EXPAND *PACIFICA*?

(Continued from page 1)

the 1984 Cable Act, Congress blessed PEG access requirements and federalized the prohibition of editorial control. Congress also required cable systems to set aside channels for leased commercial access, and prohibited the cable operator from exercising any editorial control over those channels as well.[1]

Through amendments offered primarily by Senator Helms on the last legislative day and with no committee review or congressional findings, the 1992 Cable Act sought to modify these prohibitions on editorial control but only as to "indecent" programming, defined as "depicting or describing sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." Section 10(a) allowed cable operators to have and enforce written policies banning "indecent" programming on leased access channels, and, if they did not, § 10(b) required them to block and segregate it with subscribers being able to gain access only on written request, which the cable operators could wait 30 days to honor. Section 10(c) similarly permitted cable operators to ban "indecent" programming on PEG channels, but without any § 10(b)-like requirement to block such programming if they chose not to have such a policy.[2]

The D.C. Circuit

After the FCC's rulemaking to implement § 10, Denver Area Educational Telecommunications Consortium, Inc. (a leased access programmer), the American Civil Liberties Union, the Alliance for Community Media (a coalition of access centers), and several citizens groups representing access viewers challenged § 10 before the Court of Appeals for the District of Columbia Circuit. A panel of Carter appointees unanimously held that §§ 10(a) and (c) were content-based regulations that did not survive strict scrutiny and that § 10(b) posed such serious constitutional questions that the FCC must reconsider it on remand.[3]

The full court vacated that judgment and reheard the case en banc. Over four dissents, the seven-judge majority found that §§ 10(a) and (c) were not even subject to constitutional scrutiny (because any censorship would be undertaken by private parties). The majority further upheld § 10(b), finding it the least restrictive means of achieving the government's interest in protecting children from "indecency."[4] The Supreme Court granted the petitions for certiorari.

Arguments at the Supreme Court

The petitioners argued that the en banc court's avoidance of constitutional scrutiny was in error, because a statutory grant of authority to ban speech, even if a restoration of prior authority, is nonetheless an Act of Congress subject to the constraints of the First Amendment. On the merits, petitioners argued that § 10's content-based regulation of protected speech is not narrowly tailored and falls under strict scrutiny, because § 10(a) and (c) allow for a complete ban of a specific type of speech and because § 10(b) is more restrictive than other means available to assist parents in protecting their children from exposure to "indecent" leased access cable programming, such as lockboxes (required by the 1984 Cable Act) and customer-initiated blocking (required by the 1996 Cable Act). Petitioners also argued that § 10 is unconstitutional because it authorizes and requires censorship under vague standards ("indecent" and "offensive") and lacks essential procedural safeguards for review of cable operators' decisions of what is "indecent" programming.[5]

Abandoning the position it had convinced the en banc court to accept below, the government conceded that §§ 10(a) and (c) are subject to constitutional scrutiny, but argued that they are legitimate regulations because they only restrict access programmers' speech to the extent they expand that of cable operators. As for § 10(b), the government argued that strict scrutiny does not apply, because the Court applied a lesser standard to "indecent" speech in *Pacifica*, and that regardless this provision's automatic blocking requirement was the least restrictive means, because all alternate means were less effective. As for the vagueness challenge, the government responded that the Court had previously declined to reach such challenges and had rejected similar challenges in the context of obscenity cases.

The Decision

Justice Breyer wrote the lead opinion, which Justices Stevens and Souter joined in its entirety. Seven justices found § 10(a) constitutional; Justice O'Connor joined this section of Justice Breyer's opinion to form the four-member plurality, and Justice Thomas concurred in the plurality's judgment in an opinion joined by the Chief Justice and Justice Scalia. Justices O'Connor, Kennedy, and Ginsberg joined the Breyer-Stevens-Souter plurality in striking § 10(b). That same group lost Justice O'Connor when they struck down § 10(c); she found herself unable to distinguish § 10(c)'s authorization of cable operator censorship of "indecent" programming on PEG channels (which five members of the Court were striking down) from an identical authorization of cable operator censorship of such programming on leased access channels (which the Court, with her vote, upheld).

In short, Justices Kennedy and Ginsberg found all of § 10 unconstitutional, the Chief Justice and Justices Scalia and Thomas found all of it constitutional, and Justice O'Connor found §§ 10(a) and (c) constitutional and § 10(b) unconstitutional, leaving only Justices Stevens, Souter, and Breyer in agreement with the full judgment of the Court.[6]

(Continued on page 12)

INDECENCY AND CABLE ACCESS: DID *DENVER AREA V. FCC* RESURRECT AND EXPAND *PACIFICA*?

(Continued from page 11)

Sections 10(a) and 10(c)

Justice Breyer quickly dispatched the basis for the en banc court of appeal's decision as to §§ 10(a) and (c), holding that Congress' authorization of private parties to ban speech is subject to constitutional review. Justice Kennedy fully agreed, finding that there must be First Amendment scrutiny when "Congress singles out one sort of speech for vulnerability to private censorship in a context where content-based discrimination is not otherwise permitted."

On the merits of § 10(a), which allows cable operators to ban only "indecent" programming on leased access channels, Justice Breyer refused to "declare a rigid single standard, good for now and for all future media and purposes," because "of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications." Rather, Justice Breyer would "decide this case more narrowly, by closely scrutinizing § 10(a) to assure that it properly addresses an extremely important problem, without imposing, in light of the relevant interests, an unnecessarily great restriction on speech." Justice Souter supported this approach in a concurring opinion, stating that because "we know too little to risk the finality of precision," the Court should observe "a much older rule, familiar to every doctor of medicine: 'First, do no harm.'"

In applying this formulation, which amounts to little more than standardless balancing, Justice Breyer wrote that the interests of cable operators and access programmers should be weighed and that recourse should be had to the resolution of the similar problem in *Pacifica*, the mid-day radio broadcast of George Carlin's "seven dirty words" monologue. Considering four factors, Justice Breyer found § 10(a) constitutional: 1) the extremely important interest in "protect[ing] children from exposure to patently offensive sex-related material"; 2) the historical context of leased access channels, which would not even exist but for a previous Act of Congress; 3) the remarkable similarity to *Pacifica*, in that children's accessibility to access channels is as great as their accessibility to radio broadcasts; and 4) the permissive nature of § 10(a) (cable operators empowered to ban *or not ban* leased access "indecent" programming), making § 10(a) less restrictive than the ban at issue in *Pacifica* that had been upheld.

Rejecting the vagueness challenge, Justice Breyer explained that "indecency" is simply "material that would be offensive enough to fall within that category [of "obscenity"] but for the fact that the material also has 'serious literary, artistic, political or scientific value' or nonprurient purposes."

'[T]he Court should observe "a much older rule, familiar to every doctor of medicine: 'First, do no harm.'" — Justice Souter

Applying that analysis to § 10(c), which allows cable operators to ban only "indecent" programming on PEG access channels, the plurality came up with the opposite result because of four "important differences": 1) cable operators did not historically exercise editorial control over PEG access programming, so § 10(c) does not restore speech rights; 2) PEG programming is normally subject to a complex supervisory system that can itself take care of programming considered patently offensive in that community (in other words, there was a good-government kind of filter between potential Al Goldsteins and American families); 3) the operator's "veto" is here less likely necessary to protect children because PEG access programming is aimed at encouraging programming valuable to the community; and 4) the record revealed virtually no existing "problem" with patently offensive programming on PEG access channels.

Justice O'Connor agreed with Justice Breyer's analytical framework and the result of his application of it to § 10(a), but did not agree that there were "important differences" between leased and PEG access that merited a different result for § 10(c).

Kennedy: Strict Scrutiny For Programmers

Notably, five justices disagreed with the plurality's analysis and signed on to opinions requiring strict scrutiny. Justice Kennedy (whose opinion was joined in full by Justice Ginsberg) noted that

> While it protests against standards, the plurality does seem to favor one formulation of the question in this case . . . . This description of the question accomplishes little, save to clutter our First Amendment case law by adding an untested rule with an uncertain relationship to the others we use to evaluate laws restricting speech. The plurality cannot bring itself to apply strict scrutiny, yet realizes it cannot decide the case without uttering some sort of standard; so it has settled for synonyms.

Justices Kennedy and Ginsberg would apply strict scrutiny from the point of view of the access programmer, because as to leased access channels cable operators act merely as common carriers and because PEG access channels are congressionally created public forums even though they are part of private property. Under this analysis, §§ 10(a) and (c) were unconstitutional because they delegated to one private party a content-based power to censor another person's speech.

(Continued on page 13)

INDECENCY AND CABLE ACCESS: DID *DENVER AREA V. FCC* RESURRECT AND EXPAND *PACIFICA*?

(Continued from page 12)

Thomas: Strict Scrutiny For Cable Operators

Justice Thomas (joined by the Chief Justice and Justice Scalia) also rejected the plurality's analysis. Declaring that it is time for the Court "to articulate how and to what extent the First Amendment protects cable operators, programmers, and viewers from state and federal regulation," he would not "go along with the plurality's assiduous attempts to avoid addressing that issue openly," and wrote that strict scrutiny should be applied, but from the point of view of the cable operator, who has (apparently as a matter of natural right) the same editorial rights on any channel carried on its wire as a newspaper publisher would have on its pages. Under this analysis, which would seem to imply that federal or local access requirements are unconstitutional interferences with the First Amendment rights of cable operators, §§ 10(a) and (c) were said to be permissible restorations of speech rights previously taken from cable operators.

Section 10(b)

In Part III of his opinion, which was joined by Justice O'Connor, and, to the extent it applied strict scrutiny, Justices Kennedy and Ginsberg, Justice Breyer held unconstitutional § 10(b), which requires cable operators to segregate and block automatically all "indecent" programming on leased access channels not already banned under § 10(a), and requires unblocking not later than 30 days after a subscriber's written request for access to the "indecency" channel.

After noting the "obvious restrictive effects" of this scheme, Justice Breyer again avoided deciding whether strict scrutiny or some lesser level of scrutiny applies. Instead, Justice Breyer's opinion found that § 10(b) failed either standard: the "segregate and block" requirements are not the "least restrictive alternative," are not "narrowly tailored," and are considerably "more extensive than necessary" to serve the compelling interest in protecting children. Justice Breyer noted that the 1984 Cable Act requires lockboxes and that the 1996 Cable Act requires cable operators to block any program at a subscriber's request and television manufacturers to install "V-chips," which are lesser restrictive means (although the Court does not reach their validity) without many of § 10(b)'s restrictive effects. The Court noted the absence of any record evidence establishing that those other measures (or others it identified, such as informational requirements) might not be adequately protective of the interest at stake, and of any basis for finding that any added protection that § 10(b) might afford (if any) would outweigh the restrictions on First Amendment interests imposed.

Joining in the plurality's analysis insofar as it applies strict scrutiny, Justice Kennedy, along with Justice Ginsberg, contended that strict scrutiny was required by the Court's precedents, and that it was plainly not satisfied. Justice Kennedy also observed that it was hard to square the plurality's position on § 10(b) with its upholding of § 10(a). "In the plurality's view, § 10(b), which standing alone would guarantee an indecent programmer some access to a cable audience, violates the First Amendment, but § 10(a), which authorizes exclusion of indecent programming from access channels altogether, does not. There is little to command this logic or result."

Justice Thomas, with the Chief Justice and Justice Scalia, would also apply strict scrutiny to § 10(b), but (applying it rather less strictly than previous cases had) would have found § 10(b) narrowly tailored to achieve the compelling interest involved. He wrote that lockboxes are largely ineffective, and that the Court had overstated § 10(b)'s "restrictive effects."

Implications for the Future

Although the Court struck down two of the three portions of § 10, the decision is unsatisfying and worrisome, backing away from old First Amendment verities and seemingly following a far more result-oriented approach (based on distaste for the content of speech on sexual matters directed to adults) than the Court has followed in the years since *Pacifica*. Indeed, given a chance to overrule *Pacifica*, or limit it to its broadcast facts (a course that the Court had taken repeatedly in recent years), the Court seems to have given the *Pacifica* impulse (for it is too vague and unbounded to call a "doctrine" or a "test") new life.

From a practical point of view, it is notable that various amici supporting § 10(a) (Morality in Media, Inc., National Family Legal Foundation, the Family Life Project, and Family Research Counsel, among others) seem to consider the decision a victory, noting that they can now pressure local cable operators to ban all "indecent" programming on leased access channels, which has been their primary target. That was a principal goal of Senator Helms, and the Supreme Court has not only invited such pressure, but written a decision that not only upholds the power of cable operators to challenge "indecent" speech generally, but will make as-applied challenges with respect to particular programs (on the ground that a given program is not "indecent") difficult to prevail on. And it is hard to account for the different results as to § 10(c) and § 10(a) except on the basis that the latter is valid because the likes of Al Goldstein might speak directly to our children, whereas the universities and access centers can be depended on to make covert censorship decisions on PEG channels, so that the delegation to cable operators is unnecessary.

From a doctrinal point of view, the plurality's unwillingness to simply apply

(Continued on page 14)

SPECIFIC INSTANCES OF CONDUCT AS EVIDENCE OF REPUTATION IN A DEFAMATION LAWSUIT

(Continued from page 1)

It would be a rare defamation plaintiff who has not been warned of this scenario by counsel. One reason many libel cases may not be brought is simply the potential plaintiff's desire to avoid having his or her dirty laundry aired in discovery and ultimately in the courtroom. A past criminal record or other less public unseemly acts may prevent a plaintiff from bringing a libel case. Yet in some courts, there is a danger that evidence of specific instances of plaintiff's conduct may be improperly excluded at trial. This danger arises from an antiquated and incorrect interpretation of certain rules of evidence and a paucity of case law actually addressing the issues of proof of reputation and demonstration of injury in a defamation case.

Because judges are conditioned to exclude character and reputational evidence as unduly prejudicial or irrelevant in most criminal and civil cases, they are sometimes wary of admitting the evidence even when reputation and character are directly at issue in the cause of action.

From the defense side, on what basis does one seek admission of evidence of plaintiff's specific bad acts, at least under the Federal Rules of Evidence? Three Federal Rules of Evidence -- Rules 405(b), 405(a) and 609 -- are potentially useful.

Federal Rule of Evidence 405(b) allows the admission of evidence of prior specific instances of conduct where "character or a trait of character is an essential element of a charge, claim or defense." This rule has repeatedly been held to permit the direct introduction of specific acts evidence by a defamation defendant. *See, e.g., Longmire v. Al-*

(Continued on page 15)

INDECENCY AND CABLE ACCESS: DID *DENVER AREA V. FCC* RESURRECT AND EXPAND *PACIFICA*?

(Continued from page 13)

strict scrutiny is troubling, especially given the indications in the *Turner* decision from a few terms ago that strict scrutiny would apply to content-based regulations. This was, after all, a pure content-based restriction. So too is the backing away from the key First Amendment rule that, unlike in other areas, Congress cannot go "one step at a time" when it does so on the basis of speech content or speaker identity. Worrisome, as well, is the upholding of Senator Helms' effort to accomplish indirectly "by conscripting cable operators as censors" what Congress could not have done directly, by giving the FCC that same task.

To be sure, leased access programmers and civil rights groups were at least heartened to hear that PEG access was untouched, that legislatively mandated automatic scrambling was not viable, and that the Court had given some context to the "indecency" standard by linking it to the *Miller* standard for obscenity and finding that its § 10 history shows it is limited to the graphic sexual programming its sponsors cited and does not include the scientific or educational programs with which petitioners were primarily concerned. Additionally, Justice Breyer read into § 10(a) a rational basis requirement that cable operators must follow when and if they establish policies banning or otherwise restricting indecent leased access programming vis-à-vis similar programming on their own commercial channels.

The impact of the Court's decision and multiple opinions, however, is not limited to this debate. Rather, it will have repercussions on the internet/indecency challenge recently appealed to the Court[7] and the challenges to other indecency-centered provisions of the 1996 Cable Act.[8] Most significantly, the Court seems to have foreclosed, for the foreseeable future, a facial validity challenge to the "indecency" standard as overbroad or vague, and has opened the possibility that regulations using the "indecency" standard may be subject to less than strict scrutiny regardless of the medium at issue (at least where the medium reaches into the home), and that regulations of speech on cable are not necessarily subject to strict scrutiny as its prior case law indicated.[9]

Endnotes

1. 47 U.S.C. §§ 531(e), 532(b), 532(c)(2).
2. 47 U.S.C. §§ 531, 532(h), 532(j).
3. *Alliance for Community Media v. FCC*, 10 F.3d 812 (D.C. Cir. 1993).
4. *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995) (en banc).
5. The parties' briefs are available on Westlaw. Petititioners' briefs: 1995 WL 763716, 1995 WL 763721, 1995 WL 781698. Government's and intervenor-respondents' briefs: 1996 WL 34312, 1996 WL 32782. Petitioners' reply briefs: 1996 WL 63304, 1996 WL 63305, 1996 WL 67637.
6. 64 U.S.L.W. 4706, 1996 WL 354027 (June 28, 1996).
7. *ACLU v. Reno*, 1996 U.S. Dis. LEXIS 7919 (E.D. Pa. June 11, 1996) (3-judge court).
8. E.g., *Playboy Enterprises v. United States*, C.A. 96-94 (D. Del.) (3-judge court) (TRO in effect and pending decision on plaintiffs' motion for a preliminary injunction).
9. E.g., *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989); *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994).

Charles S. Sims is a member, and Peter J.W. Sherwin is an associate, of DCS member firm Proskauer Rose Goetz & Mendelsohn LLP. They represented petitioners Denver Area Educational Telecommunications Consortium, Inc., and the American Civil Liberties Union.

SPECIFIC INSTANCES OF CONDUCT AS EVIDENCE OF REPUTATION IN A DEFAMATION LAWSUIT

(Continued from page 14)

Longmire v. Alabama State University, 151 F.R.D. 414, 419 (M.D. Al. 1992) ("Because Dr. Howard has placed his character 'in issue' by filing a defamation action, his good or bad character may be proven by specific instances of his conduct."); *U.S. v. Piche*, 981 F.2d 706, 713 (4th Cir. 1992) ("Rule [405(b)] confines [specific acts] evidence to instances in which character is an issue 'in the strict sense' ... such as plaintiff's reputation for honesty in a defamation action."); *Government of Virgin Islands v. Grant*, 775 F.2d 508, 511 (3d Cir. 1985) ("Fed. R. Evid. 405(b) permits the introduction on direct examination of evidence regarding specific acts when character is an essential element of a claim or charge. One illustration would be a defamation case where the plaintiff's claim is that the defendant's defamatory statements harmed his reputation for good character. In such cases, character is said to be 'in issue'").

Permitting the use of direct evidence on the issue of reputation only makes good sense in a defamation case. A plaintiff is claiming injury to reputation and is often seeking extraordinary damages. To forbid a defendant from presenting evidence that plaintiff's specific conduct has been such that his reputation is not what it might first seem, or what an uninformed jury might presume, can create a situation in which a jury may presume a good reputation where none exists.

Unless jurors know who the plaintiff really is and what questionable (or worse) acts he has committed, then their natural assumption that a defamatory statement has injured the plaintiff effectively results in presumed injury and, likely, presumed damages. Those resulting damages, like any presumed damages, should be constitutionally suspect.

While a court could still rein in reputational evidence through the traditional methods of relevance or a finding of undue prejudice to plaintiff, a ruling prohibiting direct evidence of specific conduct by a plaintiff in a defamation case is unsound under both the Federal Rules of Evidence and fundamental constitutional guidelines.

There are few cases discussing the subtleties of the interplay between Rule 405(b) and the reputational elements of a defamation claim. One difficulty that must be confronted in the application of this rule is that some long-cited cases and well-worn treatises were written before this rule of evidence was implemented. Those sources create the impression that no direct evidence of any facet of plaintiff's reputation is permitted in a defamation case, other than general questions about plaintiff's good or bad reputation. *See, e.g., Butts v. Curtis Publishing Co.*, 225 F. Supp. 916 (N.D. Ga. 1964), *aff'd*, 351 F.2d 702 (5th Cir. 1965), *aff'd*, 388 U.S. 130 (1967); 50 Am. Jur. 2d *Libel and Slander* §§ 411 and 500; L. Eldredge, *The Law of Defamation*, at § 97 (1978).

Under Rule 405(b), this should not be the result. Courts are sometimes confused by the fact that in most types of cases, direct evidence is not permitted simply because character is not at issue. Because that is not the case in a defamation lawsuit, that difference must be emphasized to the court in order to avoid exclusion of proper reputational evidence.

Other rules also permit the admission of specific acts evidence in a defamation lawsuit. Federal Rule of Evidence 405(a) provides an important tool in this approach. Under that rule, any time that plaintiff's reputation is addressed by a witness, be it by plaintiff himself or by someone attempting to bolster plaintiff's reputational claim, inquiry into specific instances of conduct is permitted. Courts have long recognized that cross-examination into specific instances of conduct is particularly appropriate in a defamation case under this rule. *Meiners v. Moriarity*, 563 F.2d 343, 351 (7th Cir. 1977).

Under Federal Rule of Evidence 609, any felony conviction less than ten years old is admissible as to the credibility of the witness. If plaintiff testifies, felony convictions are available to attack his reputation as part of cross-examination.

Plaintiff may try to avoid the force of these rules by removing injury to reputation altogether as an issue in the case. In states where reputational injury has been recognized as a necessary element of any defamation claim, *e.g., Richie v. Paramount Pictures Corp.*, 1996 Minn. LEXIS 104 (Minn. 1996), attempts to deflect the force of the arguments for admissibility should be to no avail.

In other states, a plaintiff may attempt to claim only emotional distress or similar non-reputational damages in order to bolster a claim that evidence of specific instances of conduct is not admissible. Specific acts evidence may be admissible in those instances to address issues of causation of injury, amount of damages and credibility of witnesses. For example, a specific bad act at or near the time of the supposed defamatory comment might be the real source of mental anguish or the real reason friends or family have reacted negatively to the plaintiff. A bad act in the past, if known to the public and yet not having caused injury to plaintiff in any way, might demonstrate that his damages claim is in fact inflated or even fabricated. If probative of truthfulness or untruthfulness, those specific acts may be inquired into on cross-examination under Federal Rule of Evidence 608.

Peter C. Canfield and Sean R. Smith are with the DCS member firm of Dow, Lohnes & Albertson in Atlanta, GA.

MARK YOUR CALENDARS!

Defense Counsel Section Breakfast
Thursday, November 7, 1996
7:00 a.m.
Manhattan Crowne Plaza

PUSHING FREE SPEECH TOO FAR

By Burt Neuborne

The current Supreme Court is the fiercest defender of the First Amendment in the Court's history. None of the great names in First Amendment theory -- Holmes, Brandeis, Black, Douglas, Brennan -- ever sat on a Court so protective of speech.

Consider what the Supreme Court decided in the past term alone. It ruled that Rhode Island's ban on advertising liquor prices violated commercial free speech. Kansas and Illinois were told that patronage, the tradition of awarding government contracts to political supporters, violated freedom of association. Ceilings on campaign spending by political parties were found to violate political free speech. Mandatory controls on sexually explicit cable programming were held unconstitutional.

First Amendment arguments prevailed in every case last term, and in eight of nine cases in the term before that. So why am I not smiling? Why am I uneasy just as the Court is accepting expansive First Amendment arguments that I have been making for more than 30 years?

It is not because my commitment to freedom of speech has lessened. Protection of free speech, especially by dissenters and the powerless, remains the Court's most important duty. The recent lower court decision barring government censorship of the Internet is exactly on target. I am troubled because the First Amendment is increasingly being used to reinforce concentrations of private power. The current Court cannot seem to distinguish between government efforts to censor speech and government efforts to regulate private power.

At the beginning of the century, when vast wealth was being used to mass produce tangible goods, the Supreme Court declared early laws regulating the minimum wage, maximum workweek, child labor and product safety unconstitutional because they interfered with private property and freedom of contract. Only the Great Depression forced the Court to retreat, and the earlier damage was subsequently undone both by future justices and Congress.

As we move toward the 21st century, vast wealth is being used to mass-produce not only tangible goods but information. The First Amendment is being deployed by this Court to block reform, just as property and contract rights were used at the turn of the century. Consider the practice of campaign financing and concentration of media ownership. American democracy has become a vast feeding farm, where the rich throw money in a trough and invite selected politicians to put their snouts in. But the Supreme Court, by treating money as speech, has virtually doomed campaign finance reform.

The Court has also used the First Amendment to reinforce the increasing power of media barons. To this Court, communications empires are just high-decibel street-corner orators. In fact, the modern media empire acts as a gatekeeper, determining whose speech reaches the public. The Court should not treat government efforts to let alternative voices be heard as violations of the First Amendment.

Allowing government any power over the process by which speech is produced poses obvious dangers. But paralyzing government in the face of concentrations of private power is even worse. We can prevent democracy from turning into the domain of the rich without submitting to government censorship. A good place to start would be to remind the Supreme Court that money isn't speech: it's raw power. There is nothing unconstitutional about curbing excessive powers over any market, especially the market of ideas.

This essay first appeared on the OP-ED page of the Monday, July 15 edition of The New York Times.

SUPREME COURT REPORT
1995 TERM: SUMMARY OF THE COURT'S RESPONSE TO CERTIORARI PETITIONS WITH LIBEL, PRIVACY AND RELATED CASES

Because of the obvious importance of Supreme Court action, LDRC again this year has undertaken to catalogue the Court's responses to the term's petitions for certiorari which raise libel, privacy and certain other First Amendment issues of specific interest to media.

The 1995 Supreme Court term proved, as did the 1994 term, to be generally advantageous to media organizations in libel and privacy actions. Eight decisions favorable to the media were left standing. No cases were accepted for hearing by the Court.

Brought to conclusion was perhaps the best known disparagement case since *Bose v. Consumers Union*: *Auvil v. CBS "60 Minutes."* Brought by Washington State apple growers, the suit spawned the significant and reasonably successful efforts by agri-business to obtain state adoption of produce disparagement laws.[1]

Left standing, not surprisingly, were two state supreme court decisions, each articulating protection for speech mandated under state constitutions beyond that required by the First Amendment. *See Turf Lawnmower Repair Inc. v. Bergen Record Corp.; Vail v. Plain Dealer Publishing Co.* Three certiorari petitions are pending in cases which likewise have favorable lower court rulings for media defendants.

Certiorari was denied in two cases unfavorable to the media. Neither, however, may suggest long-term consequences for the media.

Dolcefino v. Ray, a case out of the Texas state courts, has a fact pattern that is somewhat unique. A Texas Court of Appeals affirmed a lower court's order requiring a journalist to answer questions about a confidential source. In addition to defendant's argument that the confidential source played a modest role in the report at issue, the plaintiff had acknowledged that he knew the identity of the supposed source. And, indeed, the individual identified had already been deposed. The journalist argued unsuccessfully that his own testimony would verify that the individual was, in fact, the confidential source in question. [Note: In the June *LDRC LibelLetter* we reported on the sanctions being imposed upon the reporter and his employer as a result of his continuing refusal to testify on this matter, with an "Update" this month at page 2.]

While the second case has a more commonplace fact pattern, and a disturbingly un-analytical California appellate decision, the decision is "unpublished," which should reduce its importance, even in California. In *National Enquirer v. Hood*, the California Supreme Court let stand a lower court decision, refusing to dismiss an invasion of privacy claim based on the National Enquirer's publication of some of the *details* about the illegitimate child of the performer Eddie Murphy, an admittedly public figure, even though the court conceded that the *subject matter* was newsworthy.

The Court also let stand seven decisions favorable to non-media defendants which raise libel

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[1] Note, however, *Schnabolk v. Securitron Magnalock Corp.*, a non-media disparagement case in the Second Circuit which also raised claims of deceptive business practices and RICO, in which the court upheld an order restraining the defendant from making certain future disparaging remarks.

or privacy issues. Two of those cases appear to have applied expansive views of the concept of "limited purpose public figure"; four found statements shielded by various privileges; one found that the statement in question was not defamatory.

The Court, however, let stand two narrow applications of the limited purpose public figure doctrine in non-media cases. *McKnight v. American Cyanamid Co.*, an unpublished opinion, continues the regrettably pinched view of public figures of the Fourth Circuit, finding that American Cyanamid is neither a limited nor a general public figure in connection with comment on a dispute over a contract for a popular drug. And in *Heller v. Bowman*, the Massachusetts Supreme Court found that a candidate for president of a 8,700-person municipal union was not a limited purpose public figure, refusing to apply *Hustler v. Falwell* reasoning to a claim for intentional infliction of emotional distress. Here, a union worker had superimposed the plaintiff's face on nude and lewd body shots which he circulated during the campaign.

In the same term as *44 Liquormart, Inc. v. Rhode Island*, the 1995-96 installment from the Court on commercial speech doctrine (*see* May *LDRC LibelLetter* at p.1) the Court also vacated judgment in two other alcohol advertising cases. Certiorari was also denied in three relatively diverse commercial speech cases, from California's restrictions on the use of environmental terms (e.g., "biodegradable") on consumer goods, to direct mail advertising by lawyers, doctors, and others in Texas, to Amtrak's policies for its station billboard.

Employment dismissal, stalking, Professor Jeffries as Black Studies Chair in New York and fugitive Katherine Power's probation terms in Massachusetts, were among the matters denied certiorari that raised First Amendment "media-interesting" issues.

The cable broadcast "must carry" requirements of the 1992 Cable Television Consumer Act, however, will be heard by the Court next term. And while the Court heard and decided the challenge to those sections of the 1992 Cable Television Consumer Act that concerned indecent programming on leased access and PEG (public, education, or government use) channels (*See,* page 1 of this July issue of the *LDRC LibelLetter*), the Court refused to hear a First Amendment challenge to the FCC's continuing efforts to "channel" indecent programming on radio and television. *Action for Children's Television v. Federal Communications Commission.* Also to be heard next term a challenge to forced assessment by the Department of Agriculture of nectarine and peach handlers for generic advertising programs.

Media Defendants -- Favorable Libel/Privacy Decisions Left Standing - 8

Media Defendants -- Unfavorable Libel/Privacy Decisions Left Standing - 2

Media Defendants -- Libel/Privacy Petitions Filed But Not Yet Acted Upon - 3

Other Areas Of Interest

I. Commercial Speech

A. Judgment Reversed - 1

B. Judgment Vacated - 2

C. Review Denied - 3

D. Petitions filed but not yet acted upon - 2

VI. Other

A. Judgment vacated

B. Probable jurisdiction noted

C. Review Granted - 1

D. Review Denied - 3

E. Petitions filed but not yet acted upon - 2

Auvil v. CBS 60 Minutes, 67 F.3d 816 (9th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3722 (4/30/96, No. 95-1372). The Ninth Circuit affirmed the District Court's grant of summary judgment in favor of CBS. At issue was a *60 Minutes* segment which charged that Washington state apple growers used daminozide, a chemical growth regulator sprayed on apples. The district court ruled that the plaintiffs had failed to raise a genuine issue of material fact regarding the falsity of the statements in the report. The questions presented by the petition were: (1) Is evidence that some scientific tests have failed to demonstrate that Alar causes cancer in humans, plus testimony from experts that there is no confirmed link between Alar and cancer in humans, sufficient evidence for plaintiffs in product disparagement case to withstand Rule 56 summary judgment motion on the question of the falsity of a media defendant's claim that Alar is "the most potent cancer-causing agent in our food supply"? (2) Must a defendant seeking summary judgment call to the court's attention the precise legal grounds for its motion before the burden shifts to the plaintiff to show a genuine issue of fact material to those legal grounds? (3) Does the First Amendment insulate a broadcast defendant from liability if all of the broadcast defendant's individual statements are true, even though the plaintiff demonstrates that the implied message of the broadcast taken as a whole is false?

Coody v. Thomson Newspaper Publishing Inc., 320 Ark. 455, 896 S.W.2d 897 (Ark. 1995), *cert. denied*, 64 U.S.L.W. 3396 (12/4/95, No. 95-364). In a public figure libel case, the Supreme Court of Arkansas reversed and dismissed an award of $275,000 in compensatory and punitive damages. At trial, the jury found that the defendant newspaper had strongly implied that the plaintiff, a candidate for mayor, had been involved in criminal activities before his move to Arkansas five years earlier. Questions presented: (1) May an appellate court in a defamation case undertake an independent review of subsidiary or historical facts found at trial and of factual determinations based on credibility? (2) May a public official or public figure prove actual malice largely or exclusively by circumstantial evidence that the defendant "entertained serious doubts" as to the truth of his publication? (3) Should the actual malice standard be reconsidered in light of the virtually insurmountable burden imposed on public plaintiffs in defamation cases?

Dolenz v. Southwest Media Corp., No. 05-94-00091 CV, 1994 WL 720265 (Tex. Ct. App. Dec. 30, 1994) (unpublished), *cert. denied*, 64 U.S.L.W. 3690 (4/15/96, No. 95-1256). The Court of Appeals of Texas in Dallas affirmed a grant of summary judgment in favor of the defendants, writer and publisher of an allegedly defamatory article about the plaintiff, the attorney for a well-known Dallas portrait artist, Dimitri Vail. The court found that, taken as a whole, the article was substantially true, that the plaintiff was a limited purpose public figure, and that the defendants did not act with actual malice. Questions presented: (1) Did the court of appeals err in ruling that the petitioner is a limited purpose public figure? (2) Did the court of appeals err in ruling that a libelous newspaper article as a whole, and specific statements therein, are protected by the following privileges: (a) "fair, true, and impartial account[s] of a judicial proceeding[s]" pursuant to Tex. Civ. Prac. & Rem. Code 73.002(b)(1)(A), and (b) "reasonable and fair comment on or criticism of an official act of a public official or other matters of public concern for general information" pursuant

to Tex. Civ. Prac. & Rem. Code 73.002(b)(2)? (3) Did the trial court err in ruling that the article as a whole is a reasonable and fair comment on a matter of public concern? (4) Did the trial court err in ruling that the article is a protected statement of opinion that does not imply false and defamatory facts and is therefore not libelous? (5) Did the court of appeals err in ruling that the article as a whole, and the factual statements therein, are true or substantially true? (6) Did the trial court err in ruling that the article is shielded by the "neutral reportage" privilege? (7) Did the court of appeals err in ruling that no material issue of fact existed as to whether or not the defendants subjectively drafted/published article with actual malice?

Parker v. Evening Post Publishing Co., 452 S.E. 2d 640 (S.C. Ct. App. 1994), *cert. denied*, 64 U.S.L.W. 3623 (3/18/96, No. 95-1085). The Court of Appeals of South Carolina affirmed a directed verdict in favor of the defendants on a privacy claim and a jury verdict on a libel claim. The defendant newspaper had printed an article implying that the plaintiff, a new owner of an auto dealership, may be liable in a lawsuit against the previous owner. Because he had recently engaged in a large public advertising campaign, the plaintiff was deemed to be a limited purpose public figure. Questions presented: (1) Does an individual who acquires a corporate ownership interest in a new automobile dealership, which company employs advertising for the new dealership, thereby individually become a public figure with respect to erroneous media reports of his potential individual liability for judgment obtained against the owners of the former dealership's assets and business location? (2) In a news article about a judgment obtained for bad acts of a former auto-dealership for fraudulently structuring straw purchases, does a media defendant invade the privacy of a private individual who, through a new corporation, has acquired an ownership interest of the old dealership's assets, when the media defendant reports that the individual may be personally liable for judgment against the former dealership?

Rielly v. News Group Boston Inc., 38 Mass. App. Ct. 909, 644 N.E.2d 982 (Mass. App. Ct. 1995), *cert. denied*, 64 U.S.L.W. 3244 (10/2/95, No. 95-106). The defendant, owner of the Boston Herald, published information about compensation paid by the National Association of Government Employees (NAGE), a labor organization, to the plaintiff and others. The phrase in question was "Lorraine Reilly also is on the NAGE pad," presumably implying by the use of the word "pad" that the plaintiff was receiving compensation not legally due her. Affirming the lower court's dismissal of the complaint, the Massachusetts Court of Appeals held that the use of the word "pad" must be considered "in the totality of the article," and, thus considered, was not defamatory as a matter of law. Question presented: Did the state court action in ruling that the characterization of a union employee as "on the pad" was incapable of defamatory meaning *per se* violate the plaintiff's rights of Free Speech and to Due Process?

Stolz v. KSFM 102, 30 Cal. App. 4th 195, 23 Media L. Rep. 1233 (Cal. Ct. App. 1995), *cert. denied*, 64 U.S.L.W. 3240 (10/2/95, No. 94-2049). In a defamation action between two radio stations concerning derogatory statements made by the defendant on air about the quality of the plaintiff's journalism, the California Court of Appeal for the Third District affirmed a jury verdict for the defendant, holding the plaintiff radio station to be an all-purpose public figure because it occupies

a position of general fame and has a pervasive influence in the community through advertisements and charity work. The court also held that the station owner and general manager are limited purpose public figures, and thus have the burden of proving actual malice. Comments concerning the plaintiff's allegedly irresponsible journalism or on-air comments were held to be an issue of public concern, imposing on the plaintiff the additional burden of proving falsity. Accordingly, the court upheld the use of jury instructions which stated that to establish falsity, the "gist" of the information must be false and that minor inaccuracies are not sufficient. The court also held that none of the statements asserted as unambiguous fact that the plaintiff radio station took part in shoddy journalism and thus the remarks were not slander *per se*. The questions presented by the petition were: (1) Does the fact that the plaintiff is a radio station and can rebut slanderous statements conclusively render it a public figure, thereby shifting to the plaintiff the burden of proving falsity and forcing it to prove actual malice? (2) Does the fact that the plaintiff is a radio station make an unrelated subject a matter of public concern, thus shifting to the plaintiff the burden of proving falsity merely because responsibility in broadcasting is a matter of public concern? (3) Does the absence of a showing that he has interjected himself into a particular public controversy render the owner of a radio station a limited purpose public figure, based solely on his ownership of the station?

Turf Lawnmower Repair Inc. v. Bergen Record Corp., 139 N.J. 392, 655 A.2d 417 (N.J. 1995), *cert. denied*, 64 U.S.L.W. 3455 (01/09/96, No. 95-424). The New Jersey Supreme Court upheld application of the actual malice standard to cases in which the defamatory information reported, if true, would constitute a violation by the plaintiff of the New Jersey Consumer Fraud Act. Although the investigative newspaper reporter may have been negligent or grossly negligent in alleging that plaintiffs routinely cheated their customers, plaintiffs failed to show that the reporter ever doubted that the plaintiff's conduct constituted fraud, therefore failing to establish actual malice in the reporting. The questions presented by the petition are: (1) Does a decision which allows media defendants to create their own defense and control the applicable standards of liability violate a plaintiff's rights to Equal Protection? (2) Did the court's failure to consider an individual libel plaintiff's claim as distinct from a corporation's claim violate the individual plaintiff's right to Equal Protection? (3) Can the court's decision finding no actual malice be sustained in light of *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991), *Milkovich v. Lorain Journal*, 497 U.S. 1 (1990) and *Harte Hanks v. Connaughton*, 491 U.S. 657 (1989)?

Vail v. Plain Dealer Publishing Co., 72 Ohio St. 3d 279, 649 N.E.2d 182, 23 Media L. Rep. 1881 (Ohio 1994), *cert. denied*, 64 U.S.L.W. 3455 (01/09/96, No. 95-491). The Ohio Supreme Court ruled that, under the Ohio Constitution, Ohio courts, when determining whether speech is protected as opinion, must consider the totality of the circumstances, including whether the statement is verifiable, the general context of the statement, and the broader context in which the statement was made. In the case at hand, the court ruled that the average reader would have accepted the statements at issue--an editorial column in which the author stated that plaintiff, a political candidate, "doesn't like gay people" -- was *opinion* as opposed to *fact*. The questions presented by the petition were: (1) May the Ohio Supreme Court, based on its own state Constitution, adopt an opinion privilege in libel cases broader than that of the U.S. Supreme Court's in *Milkovich v. Lorain Journal Co.*, 497

U.S. 1 (1990)? (2) Does the Due Process Clause require the state to provide a reasonable means to vindicate reputational interests adversely affected by publication of defamatory falsehoods that are actionable under the standard adopted by the Supreme Court in *Philadelphia Newspapers v. Hepps*, 475 U.S. 767 (1986) and reaffirmed in *Milkovich v. Lorain Journal Co.*?

Media Defendants -- Unfavorable Libel/Privacy Decisions Left Standing - 2

Dolcefino v. Ray, 902 S.W. 2d 163 (Tex. Ct. App. 1995), *cert. denied*, 64 U.S.L.W. 3656 (4/1/96, No. 95-1250). The Court of Appeals of Texas, First District, affirmed the lower court's order requiring a journalist in a libel action to answer questions about a confidential source. The court already had deposition testimony from a person who was identified by the libel plaintiff as the confidential source, and who had testified about his communications with the journalist. However, by answering the questions posed, the defendant would be confirming or denying that this individual was in fact the confidential source in question. Question presented: Is a journalist, who is a defendant in a libel action brought by a public official plaintiff, protected by the First Amendment from answering deposition questions that would tend to reveal the identity of a confidential source who was inconsequential to the publication at issue, without a determination by the trial court that there is a compelling need for such testimony and that the information cannot be obtained from an alternative source?

National Enquirer, Inc. v. Hood, No. B082611 (Cal. 1995) (unpublished), *cert. denied*, 64 U.S.L.W. 3396 (12/04/95, No. 95-468). The California Supreme Court refused review of an unpublished decision of the Superior Court in a privacy, intrusion and misappropriation suit brought by the mother of an allegedly illegitimate child of the performer Eddie Murphy. The article in question, whose truth plaintiff did not dispute, reported that Mr. Murphy was the father of the plaintiff's child, and further disclosed the name of the child, his mother, and other salient details of certain financial arrangements between Murphy and the plaintiff. Upholding dismissal of the intrusion and misappropriation claims, the Court of Appeal found that under both California common law and Constitutional law, even when the *subject* of the article is newsworthy, publication of certain *details* may not be newsworthy, and that, consistent with the First Amendment and California law, a jury may find invasion of privacy based on the reporting of those details. The question presented by the petition was: Do the First and Fourteenth Amendments permit state privacy laws to impose liability for truthful publication about a public figure on a subject of public interest, if the jury finds that the facts published lacked sufficient "social value," or finds that there had been "feasible and effective alternatives" to including those facts?

Media Defendants -- Libel/Privacy Petitions Filed But Not Yet Acted Upon - 3

Hopewell v. Midcontinent Broadcasting Corp., 538 N.W.2d 780, 24 Media L. Rep. 109 (S.D. 1995), *cert. filed*, 64 U.S.L.W. 3823 (3/16/96, No.95-1954). The South Dakota Supreme Court affirmed summary judgment in favor of the defendant, a television station, that had been sued for defamation by a judicial candidate in Sioux Falls. The station aired a news report, based on

information from a confidential source, that twelve years earlier the candidate had been slipped a hallucinatory drug that caused him to enter a drug store and a cathedral completely nude and ultimately lead to his arrest for attempted rape. The South Dakota Supreme Court ruled that the lower court correctly did not compel the journalist to divulge his source and that there was no evidence of actual malice. Question presented: Did the release of confidential records in violation of city regulation and state statutes deprive the petitioner of his rights to Equal Protection, Due Process, the protections of the Fourth Amendment, and his First Amendment right to run for office without tortious interference by his election opponents?

Lafayette Morehouse Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46, 23 Media L. Rep. 2389 (Cal. Ct. App. 1995), *cert. filed*, 64 U.S.L.W. 3861 (2/27/96, No. 95-1789). Plaintiffs, More University and several affiliates, brought a libel claim against the publisher of the San Francisco Chronicle based on a series of articles describing a dispute between More University and the county authorities. Defendant moved to dismiss, relying on section 425.16 of California Code Civ. Proc, an anti-SLAPP statute that provides a procedure for early review and dismissal of nonmeritorious actions involving free speech. Ruling that More failed to present proof of falsity, the trial court granted the defendant's motion. On appeal, the California Court of Appeal affirmed the dismissal, holding that the plaintiffs did not show a probability that they would prevail on the libel claim. Questions presented: (1) Is California's anti-SLAPP statute unconstitutionally vague? (2) Were the petitioners denied equal protection guaranteed by the Fourteenth Amendment by application of the anti-SLAPP statute against them, limiting their access to the courts when they sought redress against a newspaper for a series of articles that defamed them and invaded their commercial and academic interests? (3) Is an anti-SLAPP statute depriving the petitioners of their right to discovery fundamentally unfair in violation of their due process and equal protection rights under the Fourteenth Amendment? (4) Were the petitioners incorrectly held to be limited purpose public figures?

McFarlane v. Esquire Magazine, 74 F.3d 1296, 24 Media L. Rep. 1332 (D.C. Cir. 1996), *cert. filed* 64 U.S.L.W. 3765 (3/29/96, No. 95-1769). In October 1991, *Esquire Magazine* published an article by a free-lance writer accusing the plaintiff, former Reagan security advisor "Bud" McFarlane, of working with Israeli intelligence to forestall the release of the American hostages in Iran until after the 1980 Presidential election. The D.C. Circuit affirmed summary judgment for the magazine, holding that the plaintiff could not show that the magazine acted with actual malice. Affirming the lower court's dismissal of the action against the freelancer for lack of personal jurisdiction, the D.C. Circuit went on to note that, even if provable, the freelancer's malice could not be imputed to the magazine except by application of *respondeat superior*, a doctrine inapplicable to a freelancer. (The case is discussed in greater length in the February 1996 issue of *LDRC LibelLetter*.) Questions presented: (1) In a case governed by *New York Times v. Sullivan*, does a publisher act with actual malice when it publishes without corroboration highly defamatory accusations of an informant that the publisher acknowledges is a liar? (2) In a case governed by *New York Times v. Sullivan*, can a publisher avoid a finding of actual malice by claiming that it trusts the reporter who has relied upon an acknowledged liar, when the publisher knows that the reporter has no independent corroboration

for the liar's statements? (3) In a case governed by *New York Times v. Sullivan*, does a publisher act with actual malice when it advocates believability of an untruthful informant, and fabricates and suppresses material information that could lead the reader to discredit the publisher's endorsement? (4) Is the *New York Times v. Sullivan* standard so purely subjective that admitted review of information demonstrating the publication's falsity will not constitute actual malice unless the publisher confesses to his thoughts concerning the material? (5) In a case governed by *New York Times v. Sullivan*, may a court disregard evidence of actual malice through weighing of evidence that the court acknowledges would support a conclusion of recklessness? (6) Can a publisher be liable under *respondeat superior* for defamatory statements concerning a public figure made with actual malice by a writer "assigned" by the publisher to "cover" a story, when the publisher edits, approves, and shapes the defamatory product? (7) Should the actual malice requirement of *New York Times v. Sullivan* be re-examined, when its "daunting" standard allows publication of defamatory falsehoods invented by an acknowledged liar? (8) Is construction of D.C. Code Section 13-423(a)(3) by the court below, separating the "act" of libel from the "injury" it causes, inconsistent with *Keeton v. Hustler Magazine*, which recognized that the tort of libel occurs "wherever offending material is circulated," and based upon an impermissible extension of procedural safeguards to protect First Amendment rights in violation of *Calder v. Jones*?

Non-Media Defendants -- Favorable Libel/Privacy Decisions Left Standing - 7

Allan and Allan Arts v. Rosenblum, 201 A.D.2d 136, 615 N.Y.S.2d 410 (N.Y. App. Div.), *cert. denied*, 64 U.S.L.W. 3269 (10/10/95, No. 95-221). The New York State Appellate Division, Second Department, affirming the lower court's dismissal of the action, upheld as absolutely privileged statements made at a quasi-judicial public hearing, in this case a zoning board of appeals. In the lower court, plaintiff contended, among other things, that the defendant's *voluntary* participation rendered the privilege inapplicable. Question presented: Did New York violate First and Fourteenth Amendments by granting an absolute privilege to a voluntary participant at a zoning board of appeals hearing, thus protecting her from liability for making malicious and false statements about applicant?

Denney v. Regents of University of California, was *Nadel v. Regents of University of California*, 28 Cal. App. 4th 1251, 34 Cal. Rptr. 2d 188, 22 Media L. Rep. 2481 (Calif. Ct. App. 1994), *cert. denied*, 64 U.S.L.W. 3416 (12/11/95, No. 94-426). The California Court of Appeal, First Appellate District, Division Five, affirmed summary judgment in favor of the defendants, Regents and employees of the University of California at Berkeley, who had made statements to the press characterizing the plaintiffs, members of the People's Park Defense Union, as violent and destructive of property. The court found that the plaintiffs were limited purpose public figures, conferring on the defendants the protections of *New York Times Co. v. Sullivan*. Question presented: Should the standards of *New York Times Co. v. Sullivan* be extended to a public entity and its employees acting in their official capacities who are sued by alleged limited public figure plaintiffs and critics of the public entity's policies?

Einhorn v. LaChance, No. 01-94-00180-CV, 1995 WL 134861 (Tex. Ct. App. March 30, 1995), *cert. denied*, 64 U.S.L.W. 3690 (4/15/96, No. 95-1279). In an action for slander, the Court of Appeals of Texas in Houston reversed a jury verdict awarding $250,000 in actual damages to plaintiffs, pilots employed by the defendant hospital. Finding that the plaintiffs were limited purpose public figures, the court held that the statement in question, that the plaintiffs were fired by the defendant hospital because they had a "conflict of interest" with the hospital, was not shown by clear and convincing evidence to have been made with actual malice. Questions presented: (1) Does the First Amendment require proof of actual malice in a slander suit against non-media defendants? (2) Did the Texas Court of Appeals misinterpret First Amendment law to conclude that the petitioners, helicopter pilots in hospital life flight program, were "limited purpose public figures," required to prove actual malice? (3) Did the Texas Court of Appeals misinterpret First Amendment law to set aside a jury finding that respondents acted with actual malice when they slandered petitioners, on the theory that the First Amendment (a) requires the fact-finder to accept respondent's professions of good faith, even if they disbelieve the testimony, and (b) disallows through circumstantial evidence, proof of actual malice?

Gensburg v. Miller, 37 Cal. Rptr. 2d 97, 31 Cal. App. 4th 512 (Calif. Ct. App. 1994), *cert. denied*, 64 U.S.L.W. 3240 (10/2/95, No. 94-1984). The Court of Appeal of California sustained a demurrer on the ground that the defendants, state and county employees, have absolute immunity from civil liability for having issued an allegedly defamatory report to the effect that the plaintiffs were bigoted and violent toward the foster children in their care. Questions presented: (1) Should county social workers, who lack any prosecutorial authority, be denied absolute immunity? (2) Should a state prosecutor be denied absolute immunity for his own investigative conduct in seeking evidence of unrelated new charges to add to a pending proceeding to revoke a foster care license? (3) Should state prosecutors be denied absolute immunity for their unilateral administrative action in suspending a foster care license pending a hearing on licensing revocation charges in order to protect the foster children from a substantial threat of harm? (4) Should county social workers and state prosecutor be denied absolute immunity for making defamatory statements about foster care licensees outside the ambit of proceedings to revoke the foster care license?

Kittler v. Eckberg, Lammers, Briggs, Wolff & Vierling, 535 N.W. 2d 653, 64 U.S.L.W. 2178, 11 Law. Man. Prof. Conduct 265 (Minn. Ct. App. 1995), *cert. denied*, 64 U.S.L.W. 3793 (5/28/96, No. 95-1539). The Court of Appeals of Minnesota affirmed summary judgment in favor of the defendant law firm in a libel case. Soliciting plaintiff's former shareholders, the law firm claimed to be investigating "the possibility of bringing an action against [plaintiffs] for, among other things, theft of corporate property, fraud and misrepresentation, and breach of fiduciary duty as an officer," qualifying this statement with the statement that "[w]e have only done a preliminary investigation." Defendant was granted summary judgment under the judicial action privilege. Questions presented: (1) Is it a denial of Due Process for a state to deny access to its courts for the trial of claims arising from loss of property, freedom of association, and loss of employment opportunity based on an attorney's immunity from suit for use of untruthful statements in a letter soliciting clients and retainer fees? (2) May a state court grant substantial benefit to attorneys and their clients as a class by

adopting a rule that denies all others the only judicial remedy available to protect the value of their property, employment, and commercial associations from *per se* defamatory statements maliciously made as part of a solicitation of clients for possible litigation?

Ragan v. ContiCommodity Services, Inc., 63 F.3d 438 (5th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3639 (3/25/96, No. 95-1151). The Fifth Circuit affirmed summary judgment in favor of the defendant, plaintiff's former employer, for having made disparaging remarks about the plaintiff to a potential new employer. Holding that an employer's communications to a person having an interest in the matter are subject to a qualified privilege, the Fifth Circuit found that the plaintiff had failed to present clear evidence of actual malice required to overcome the privilege. Questions presented: (1) Under Fed.R.Civ.P. 56 and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), may a movant carry the burden of a summary judgment motion simply by asserting generally that the non-movant lacks evidence of an element of his claim such as "actual malice" without specification of actual acts? (2) Under *New York Times v. Sullivan* are statements of purely subjective belief in the truth of a defamatory statement sufficient as a matter of law to establish lack of "actual malice" when the defamatory statements admittedly lack factual support and are contrary to facts of record showing that the speaker knew that defamatory statements are false?

Sanjuan v. American Board of Psychiatry and Neurology, Inc., 40 F.3d 247 (7th Cir. 1994), *cert. denied*, U.S.L.W. 3591 (3/4/96, No. 95-1172). Plaintiffs, two psychiatrists who failed an oral examination for board certification, sued the American Board of Psychiatry and Neurology and its Executive Director for defamation and other claims. The Seventh Circuit affirmed the lower court's dismissal of the action, finding that the statement in question, that the plaintiffs failed the oral exam, was true, and, in any event, was *not* defamatory. Questions presented: (1) Have the petitioners asserted claims upon which federal relief may be granted? (2) Do antitrust violations involve factual determinations? (3) Should the U.S. Supreme Court interfere with a board certification process when it appears that oral examination is not duly authorized and that misconduct is rampant among examiners, grading is done in non-customary manner of unusual standards, and when the internal appeals process failed to at minimum review any portion of petitioners' oral examination answers? (4) Did the respondents, by engaging in concerted activity with others, unduly burden interstate commerce? (5) Have the respondents placed arbitrary and capricious restraints on international medical graduates specializing in the field of psychiatry? (6) Did the district court fail to review the petitioners' claims against the respondent pursuant to Fed. R. Civ. P. 9(b)? (7) Are the respondents quasi-state actors who are violating numerous clauses of the Constitution? (8) Did the American Board of Psychiatry and Neurology defame petitioners by publishing false statements stating that petitioners had failed psychiatry board certifying examination? (9) Is board's release against public policy?

Non-Media Defendants -- Unfavorable Libel/Privacy Decisions Left Standing - 5

Heller v. Bowman, 420 Mass. 517, 651 N.E.2d 369 (Mass. 1995), *cert. denied*, 64 U.S.L.W. 3416 (12/11/95, No. 95-393). During an election campaign for the 8,700-member union, a worker

distributed to other union workers a photo which superimposed the face of a female candidate for president over lewd photos of nude women. Holding that the candidate was neither a limited-purpose public figure nor a general purpose public figure, the Massachusetts Supreme Judicial Court held that the union worker responsible for the doctored photos was *not* entitled to the protection of the First Amendment against the candidate's claim for intentional infliction of emotional distress. Questions presented: (1) Under *Hustler Magazine, Inc. v. Falwell* may a state constitutionally impose tort liability for a pure expression of opinion totally devoid of false statements of fact made during a union election campaign when the expression was made as political satire? (2) May a candidate for presidency of an 8,700 member union constitutionally be deemed not to be a public figure? (3) Does the First Amendment ever permit states to impose tort liability for pure expression of opinion utterly devoid of false factual statements? (4) May states constitutionally impose tort liability for infliction of emotional distress based on judicial determinations imbued with an unconstitutional viewpoint discrimination?

McKnight v. American Cyanamid Co. (4th Cir. 1995) (unpublished), *cert. denied*, 64 U.S.L.W. 3248 (10/02/95, No. 94-1942). The Fourth Circuit held that a contractual dispute between two pharmaceutical companies over American Cyanamid's efforts to market a drug developed by the plaintiff, the smaller of the two rival companies, was not a public controversy because the issue in dispute was not one that would potentially affect the public. Finding that the larger firm is *not*, in such a context, a public figure, the court reinstated a libel counterclaim for consideration under the libel standards applicable to *private* individuals. Questions presented by petition: (1) Is the respondent an all-purpose public figure? (2) Is the respondent a limited-purpose public figure with respect to speech about its corporate conduct in marketing hypertension drug used by hundreds of thousands of people throughout the country?

National City, Calif. v. Rattray, 51 F.3d 793 (9th Cir. 1994), *cert. denied*, 64 U.S.L.W. 3240 (10/03/95, No. 94-2062). The Ninth Circuit affirmed in part and reversed in part verdicts for defendants in an action for discrimination, invasion of privacy and defamation. The action brought by the plaintiff arose out of remarks made by the defendant city's chief of police after the plaintiff resigned his position and filed an invasion of privacy action in response to having been secretly taped as part of a sexual harassment investigation. The chief of police was quoted as saying that there was "clear, convincing and strong information and evidence" that plaintiff had lied. The Ninth Circuit affirmed the jury verdict for the defendants on the discrimination claim, but reversed the district court's directed verdict for the defendants on the invasion of privacy claim, holding that Cal. Penal Code Section 633 was intended to authorize use of electronic listening devices by law enforcement officials for *criminal* investigations only. Additionally, the court affirmed the district court's original grant of a new trial on the defamation claim because the clear weight of the evidence was against the original jury finding of actual malice. In doing so, however, the Ninth Circuit reversed the district court's subsequent grant of defendants' motions for summary judgment, stating that it was error to hold the plaintiff to the "clear and convincing" standard of evidence on the issue of falsity. Falsity, the Ninth Circuit held, unlike actual malice, need only be proved by a preponderance of the evidence. Question presented: Did the Ninth Circuit err in holding that a public official who brings a defamation

action need only prove falsity by a preponderance of the evidence in light of this Court's imposition of the "convincing clarity" standard of *New York Times Co. v. Sullivan*, and the Second Circuit's view that falsity must be proven by clear and convincing evidence?

Schnabolk v. Securitron Magnalock Corp., 65 F.3d 256 (2nd. Cir. 1995), *cert. denied*, 64 U.S.L.W. 3557 (2/20/96, No. 95-893). The Second Circuit affirmed a jury verdict granting plaintiff damages in the amount of $1,050,000, under RICO, the New York General Business Law and the New York law of defamation. Plaintiff, a manufacturer of security equipment, proved at trial that defendant and its principals had deliberately prevented plaintiff from receiving numerous municipal contracts by making false statements about the plaintiff's products. On the RICO claim, the Second Circuit upheld the lower court's finding that the defendants constituted an "enterprise," dismissing as without merit defendants' other contentions under RICO. In addition to affirming the monetary award, the Second Circuit also upheld the lower court's injunction, prohibiting the defendant from making certain specific misrepresentations about plaintiff's product in the future. Questions presented: (1) Does a single individual who does business through two closely held corporations constitute an "enterprise" under RICO? (2) Does the civil RICO statute permit persons alleged to have committed RICO acts to be exactly the same as a RICO enterprise beyond particular acts alleged? (3) Does the New York Constitution permit a court to issue an injunction imposing prior restraint of allegedly defamatory speech?

Williams v. Garraghty, 455 S.E.2d 209, 249 Va. 224 (Va. 1995), *cert. denied*, 64 U.S.L.W. 3240 (10/3/95, No. 94-1959). The Supreme Court of Virginia upheld a $177,000 damage award in a defamation suit brought by a prison warden against a subordinate employee who had written a memorandum accusing the warden of sexual harassment. The court held that while defendant's claim that she was being sexually harassed may be characterized as mere opinion, "the statements supporting her opinions are factual in nature . . . [and] can form the basis of a defamation suit." Applying independent review, the court also upheld a punitive damage award against the defendant, finding that "the record supports a finding of actual malice with convincing clarity." Question presented: Can the protection afforded employees by the opposition clause of Title VII of the 1964 Civil Rights Act for voicing concerns about sexual harassment in the workplace be limited by a more restrictive definition of a qualified privilege under state defamation law adopted by the highest court of state?

Other Areas of Interest

I. Commercial Speech

A. Judgment Reversed

44 Liquormart Inc. v. Rhode Island, 39 F.3d 5, 22 Media L. Rep. 2409 (1st Cir. 1994), *rev'd* 64 U.S.L.W. 4313 (U.S. 1996). Plaintiff challenged on First Amendment grounds R.I. Gen. Laws 3-1-5, which prohibits the advertisement of liquor prices except at the place of sale. The First Circuit

upheld the regulation by characterizing the prohibition as controlling "traffic in alcoholic beverages" rather than infringing upon speech. Question presented: May Rhode Island, consistent with the First Amendment, prohibit truthful, non-misleading price advertising regarding alcoholic beverages? For a summary of the Supreme Court's decision, see *LDRC LibelLetter* May 1996, at 1.

B. Judgment Vacated

Anheuser-Busch Inc. v. Schmoke, 63 F.3d 1305, 64 U.S.L.W. 2152 (4th Cir. 1995), *vacated*, 64 U.S.L.W. 3778 (5/20/96, No. 95-685). The Fourth Circuit upheld Baltimore municipal ordinance 288, which prohibits the placement of outdoor stationary advertisements of alcoholic beverages. As it did with ordinance 307 in *Penn Advertising of Baltimore Inc. v. Schmoke, infra* at 21, decided the same day, the Fourth Circuit ruled that the statute survives the *Central Hudson* test for state regulation of commercial speech. *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980). Questions presented: (1) May a court dismiss a commercial speech challenge on a motion without conducting an independent review of the evidence relied on by the government to carry its burden of proof, or allowing the plaintiffs to test the government's evidence or submit contrary evidence? (2) Does the government satisfy its burden of proof under the test of *Central Hudson*, (i) when it shows no more than a reasonable belief that a logical nexus exists between its restrictions on speech and its asserted goal and (ii) when it fails to address obvious alternatives for achieving its goal that would impose no restrictions on speech?

Hospitality Investments of Philadelphia Inc. v. Pennsylvania State Police, 650 A.2d 863 Pa. 1994), vacated, 64 U.S.L.W. 3778 (5/20/96, No. 94-1247). The Pennsylvania Supreme Court reversed the decision of the lower court in favor of the plaintiff and held that the Twenty-First Amendment of the U.S. Constitution confers on the states broad authority to regulate liquor prices. Specifically at issue was plaintiff's advertising of liquor prices. Questions presented: (1) Does the Twenty-First Amendment strip commercial speech concerning alcoholic beverages of all First Amendment protection, thereby reducing judicial scrutiny of Pennsylvania's ban on price advertising from the rigorous test articulated in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, to whether the ban bear[s] a reasonable relation to the evil sought to be controlled? (2) Does Pennsylvania's ban on price advertising for alcoholic beverages violate the First Amendment, particularly when the government (a) omits its own advertising from that ban, (b) introduced no evidence that its ban will directly and materially advance its asserted purpose of reducing excessive consumption, and (c) contradictorily concluded in 1985 that price advertising for beer does not cause increased consumption?

C. Review Denied - 3

Association of National Advertisers Inc.v. Lungren, 44 F.3d 726, 22 Media L. Rep. 2513 (9th Cir. 1994), *cert. denied*, 64 U.S.L.W. 3240 (10/2/95, No. 94-1930). Section 17508.5 of the California Business and Professions Code makes it unlawful for a manufacturer or distributor of consumer goods to represent that its products are ozone friendly, biodegradable, photodegradeable,

recyclable, or recycled unless the goods in question meet the statute's definitions of those terms. A panel of the Ninth Circuit, over one dissent, held that since the statute directly advances California's substantial interests in conservation and consumer protection, it does not run afoul of the First Amendment's limited protections for commercial speech. Questions presented: (1) May a state, consistent with the First Amendment, prohibit manufacturers and distributors from using specific language about environmental attributes of their consumer goods, except as specifically prescribed by the state, even though the language is truthful and not misleading? (2) May a state, consistent with the First Amendment, prohibit manufacturers and distributors from using specific language about environmental attributes of their consumer goods, except as specifically prescribed by the state, at the same time that their critics are permitted to use identical language about the same goods in an unrestricted manner?

Lebron v. National Railroad Passenger Corp., 69 F.3d 650, 64 U.S.L.W. 2291 (2nd Cir. 1995), *cert. denied*, 64 U.S.L.W. 3762 (5/13/96, No. 95-1373). In a case challenging defendant Amtrak's refusal to display the plaintiff's political advertisement on its billboard, known as the "Spectacular," the Second Circuit held that defendant's historical refusal to accept political advertisements is a viewpoint-neutral, reasonable use of that forum. The court further held that the plaintiff lacked standing to assert a challenge to the defendant's general advertising practice. Questions presented: (1) Did Amtrak's refusal to display the petitioner's advertisement based on an unwritten policy against political advertising constitute viewpoint discrimination under *Rosenberger v. Rector of University of Virginia*, 63 U.S.L.W. 4702 (U.S. 1995), when Amtrak previously had permitted the display of conservative political advertising and would have permitted petitioner's ad had he addressed the same subject matter -- whether to buy *Coors* beer -- from a commercial rather than a political viewpoint? (2) In its public forum analysis, did the court of appeals err by focusing narrowly on only a single Penn Station billboard, when Amtrak's implementation of its stationwide advertising policy showed that it had created a designated public forum for political and commercial advertising on all billboards? (3) Was Amtrak's unwritten and undefined policy against political advertising unconstitutionally vague under the Supreme Court's decision in *Hynes v. Mayor of Oradell*, 425 U.S. 610 (1976), which held impermissibly vague the term political ... cause ? (4) Did the court of appeals err in creating a standing doctrine that makes it more difficult to bring First Amendment claims than other legal claims and bars the petitioner from challenging the very policy that was applied to him?

Ventura v. Morales, 63 F.3d 358, 64 U.S.L.W. 2178 (5th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3557 (2/20/96, No. 95-920). Texas Penal Code 38.12(b)(1)(1994) prohibits doctors, attorneys, private investigators and chiropractors from direct mail solicitation of accident victims and their families within thirty days of an accident. In a challenge to the statute, the Fifth Circuit upheld the statute as applied to attorneys, relying on the decision of the U.S. Supreme Court in *Florida Bar v. Went for It Inc.*, 63 U.S.L.W. 4644 (U.S. 1995), which upheld a similar ban on Florida attorneys. As to the other professions, the court remanded the case for further proceedings in light of the three prong First Amendment test articulated in *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980): (1) the State must assert a substantial interest supporting the regulation; (2) the regulation must directly and materially advance that interest; and (3) the regulation

must be narrowly drawn to advance that interest. Questions presented: (1) Does the First Amendment standard of review articulated in *Bose Corp. v. Consumers Union of the United States Inc.*, 466 U.S. 485 (1984), allow a court of appeals to review *de novo*, rather than by the clearly erroneous standard of Fed. R. Civ. P. 52(a), findings of the trial court striking down a state barretry statute as violating the First Amendment, and, if the First Amendment allows such review, does it or another law require that a court of appeals articulate its findings of fact and conclusions of law in a manner similar to that prescribed in Fed. R. Civ. P. 52(a)? (2) May a district court, applying *Cincinnati v. Discovery Network Inc.*, 61 U.S.L.W. 4272 (U.S. 1993), give close scrutiny to a state barratry statute criminalizing direct mail solicitation within thirty days of an accident when, because of anticompetitive motivation, the statute favors the speech of insurance company adjusters and lawyers, and disfavors the speech of personal injury lawyers, or does *Florida Bar v. Went for It Inc.*, 63 U.S.L.W. 4644 (US SupCt 1995), establish the new rule that content-based, discriminatory commercial speech prohibition is subject to scrutiny only under the standard of *Central Hudson Gas & Elec. Corp.v. Public Service Comm'n*? (3) May a district court, applying *Central Hudson*, decide that a state barratry statute criminalizing direct mail solicitation within thirty days of an accident is a bad fit when the state has adopted a more narrow and direct means of promoting the professionalism of lawyers and the privacy of accident victims, namely, submitting for review by state bar copies of all written solicitations prior to or concurrently with the solicitation, and may a district court, in such circumstances, decide that a barratry statute is a bad fit when there is no economically feasible means for lawyers of moderate means to communicate with poor and minority communities except through direct mail solicitation? (4) After hearing conflicting evidence, may a district court decide that under *Central Hudson* a state has not justified its barratry statute criminalizing direct mail solicitation within thirty days of an accident, or does *Florida Bar* establish a new burden of proof rule that a state's evidence, if alone sufficient, adequately justifies such a criminal statute? (5) After hearing trial evidence, may a district court decide -- consistent with *Central Hudson* and *Edenfield v. Fane*, 61 U.S.L.W. 4431 (U.S. 1993) -- that a state has not justified its criminalization of direct mail solicitation within thirty days of an accident by physicians, surgeons, chiropractors, and other health professionals, or does *Florida Bar* establish a new analytical framework for judicial review of all professional solicitation?

D. Petition filed but not yet acted upon

Greater New Orleans Broadcasting Ass'n v. U.S., 69 F.3d 1296, 24 Media L. Rep. 1146 (5th Cir. 1995), *cert. filed*, 64 U.S.L.W. 3741 (4/22/96, No. 95-1708). The Fifth Circuit affirmed the lower court's dismissal of a challenge to the constitutionality of 18 U.S.C. 1304, which prohibits the broadcasting of radio and television advertisements for casino gambling. Acknowledging that commercial speech is entitled to limited protection, the court held that the statute did not violate the First Amendment because the statute (1) promotes federal interests in assisting states that restrict gambling and discourage participation in commercial gambling, and (2) is narrowly tailored to serve these interests. Question presented: May governmental restrictions on truthful, non-misleading commercial speech be upheld when the government failed to provide evidence that such restrictions materially advance any legitimate goal or are narrowly tailored to do so, and when the reviewing court, rather than demanding such evidence and making an independent inquiry regarding the

effectiveness and scope of the restrictions, relied instead upon speculation and conjecture to uphold them?

Penn Advertising of Baltimore Inc. v. Schmoke, 63 F.3d 1318, 23 Media L. Rep 2367 (4th Cir. 1995), *cert. filed*, 64 U.S.L.W. 3399 (11/22/95, No. 95-806). Baltimore municipal ordinance 307 prohibits outdoor cigarette advertisements in certain areas of the city. Plaintiff challenged the statute as pre-empted by the Federal Cigarette Labeling and Advertising Act and also as a violation of the First and Fourteenth Amendment protections of commercial speech. The Fourth Circuit upheld the constitutionality of the ordinance because it limits only the *location* of cigarette advertisements and not their *content* and, therefore, is not pre-empted by the Federal Cigarette Labeling and Advertising Act, which regulates the *content* of advertisements. The court likewise denied the First and Fourteenth Amendment challenges. Applying the test for state regulation of commercial speech announced by the Supreme Court in *Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980), the court held that, although the ordinance may not be the ideal means of reducing illegal consumption of cigarettes by minors, it nonetheless falls within the restrictions on commercial speech tolerated by the First Amendment. Questions presented: (1) May a restriction on non-misleading commercial speech be upheld when the reviewing court asked only whether the legislature could have found a logical nexus between the restriction's means and ends, and made no independent inquiry as to whether the restriction either would in fact materially advance its goals or was narrowly tailored to do so? (2) Does an ordinance that bans cigarette advertising on billboards escape pre-emption under the Federal Cigarette Labeling and Advertising Act on the ground that the ordinance does not purport to dictate the content of cigarette advertisements?

II. Employment

Barnard v. Jackson County, Mo., 43 F.3d 1218, 10 IER Cases 323 (8th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3239 (10/2/95, No. 94-1846). The Eighth Circuit affirmed in part and reversed in part the district court's grant of summary judgment in favor of defendant in plaintiff's section 1983 action alleging retaliatory discharge in violation of his First Amendment rights. Plaintiff, who worked as a legislative auditor, investigated allegations about a legislator in office, brought these allegations to the FBI's attention and, on another occasion, released to a local newspaper results of an audit of the county medical examiner before presenting them to the legislature. Plaintiff was fired shortly thereafter. The Eighth Circuit reversed the trial court's grant of summary judgment as to plaintiff's contacts with the FBI, finding issues of material fact as to whether such contacts underlay his termination. The court did, however, affirm the trial court's grant of summary judgment regarding plaintiff's contacts with the *newspaper*, holding that the defendant had satisfactorily demonstrated that its interest in the efficient functioning of the legislature outweighed plaintiff's personal interest in disseminating audit and investigation results to the press prior to providing them to his employer. Questions presented: (1) May a public employee be discharged for allegedly violating a confidentiality rule when he speaks with members of the press on matters of inherent public concern that have already been fully disclosed in newspaper accounts? (2) In conducting the balancing test set out in *Pickering v. Board of Education*, 391 U.S. 563 (1968), may the court of appeals engage in fact

finding in order to resolve the legal question of whether petitioner's interest in free speech was outweighed by the interests of respondents as his governmental employers?

Botchie v. O'Dowd, 456 S.E.2d 403 (S.C. 1995), *cert. denied*, 64 U.S.L.W. 3244 (10/2/95, No. 95-77). On the third appeal of this case, the Supreme Court of South Carolina affirmed a directed verdict in favor of the defendant, Sheriff of Charleston County. Plaintiff, a former employee of the Sheriff's department, challenged his termination on First Amendment grounds based on "speech activity" which, according to the defendant, included disloyal comments about the defendant that undermined his standing with the public. The court below applied the two-prong test articulated in *Connick v. Myers*, 461 U.S. 138 (1983), to determine whether discharge of an employee for speech violates the First Amendment: (1) whether the speech at issue involves a matter of public concern; and (2) if so, whether the government's countervailing interest in effectively and efficiently fulfilling its responsibility outweighs the plaintiff's First Amendment rights. The court agreed that the state's interest in effectively managing the Sheriff's Department outweighed plaintiff's interest in free speech and affirmed the directed verdict. Question presented: Under a proper application of *Waters v. Churchill*, 62 U.S.L.W. 4397 (U.S. 1994), and *Connick v. Myers*, can a plaintiff fired for engaging in speech protected by the First Amendment have his claim dismissed upon a directed verdict: (a) without the fact-finder determining whether the speech in question motivated the employee's termination, (b) when the court applied *Connick*'s balancing test, not to protected speech, but to conduct the employee claims never occurred and is a pretext for his firing, or (c) when no evidence is offered to show that the protected speech in any way disrupted public employment?

Canez v. Laborers' Int'l Union of North America, 40 F.3d 1246 (9th Cir. 1994) (unpublished), *cert. denied*, 64 U.S.L.W. 3347 (11/13/95, No. 95-418). Plaintiff, Manager/Secretary of Local 383, also served as trustee of the Laborers' pension fund. In the latter capacity, the plaintiff took a loan from union funds but did not disclose it. Plaintiff also knowingly sent a misleading letter to pension fund recipients falsely assuring them that over $50 million in fund losses were recoverable. Following a union audit of the plaintiff's activities, the union terminated his employment. Claiming that his speech was protected, the plaintiff brought an action alleging retaliatory discharge, alleging that the union fired him for speaking out about the pension fund losses in violation of his Free Speech and Due Process rights under Section 101 of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. 411. The trial court granted summary judgment in favor of defendant. On appeal, the Ninth Circuit affirmed, holding that the plaintiff's claim to protected speech, even if true, would not immunize him from discipline on other grounds. Questions presented: (1) Does the Ninth Circuit's decision conflict with *Sheet Metal Workers v. Lynn*, 488 U.S. 347 (1989), by holding that the petitioner's removal from his union office was not retaliatory and did not deny him rights of Free Speech, voting, and assembly guaranteed under 29 USC 411? (2) Does the Ninth Circuit's decision conflict with *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986), by affirming summary judgment despite compelling evidence that the petitioner's firing was based on pretextual grounds hiding the true reason for his firing, i.e., to remove him from office so that he could not exercise his rights of Free Speech and assembly to inform local union members regarding respondent's wrongdoing in handling pension fund monies? (3) May district court judges properly grant summary judgment under

Anderson by adopting factual and legal determinations made by a union "hearing panel" composed of one hearing officer who is the vice president of the defendant, when allegations in the court action are made against that hearing panel's employer, and when the prosecutor at the "hearing" was a fact witness on a dispositive issue on which summary judgment was based by the district court?

Jeffries v. Harleston, 52 F.3d 9 (2nd Cir. 1995), *cert. denied*, 64 U.S.L.W. 3244 (10/2/95, No. 95-34). In its first disposition of this case, the Second Circuit had held that defendant City University of New York could not remove from his chairmanship a non-policymaking employee for voicing his view on issues of public concern unless the speech was actually disruptive of government operations. Thereafter, the Supreme Court vacated the Second Circuit's decision, remanding in light of *Waters v. Churchill*, 62 U.S.L.W. 4397 (US SupCt 1994), in which the Court held that the government can terminate the employment of a non-policymaking employee based on a reasonable prediction that the speech will cause disruption. On remand, the Second Circuit, relying on *Waters*, upheld the constitutionality of defendant's actions because, notwithstanding a jury finding of lack of actual disruption, there was a reasonable expectation that the speech in question would disrupt university operations. Questions presented: (1) Did the Second Circuit properly apply the principles enunciated in *Waters*, by affirming punishment of government employee for speech? (2) Did the Circuit Court err in failing to balance the interests of the parties as required by *Pickering v. Board of Education*, 391 U.S. 563 (1968)? (3) Did the respondents, as a matter of law, and considering petitioner's First Amendment rights and the exercise of academic freedom, meet their burden of justifying their denial of petitioner's chairmanship in response to petitioner's speech? (4) Is the principle of "reasonable expectation" without limitation or qualification with respect to the time, circumstances, and actual conditions known to the employer at the time the employee is punished for his speech?

Picklesimer v. Cox, (4th Cir. 3/19/96) (unpublished), cert. filed 65 U.S.L.W. 3001 (6/17/96, No. 95-2037). The plaintiff claimed that he was constructively discharged from his position as juvenile court counsellor for "protected speech", namely complaints made about his supervisor to superiors.. In considering whether the speech at issue was protected by the First Amendment, the court employed the four-prong test of *Hall v. Marion School Dist. No. 2*, 31 F.3d 183 (4th Cir. 1994): (1) whether plaintiff's speech involved an issue of public concern; (2) whether the plaintiff would have been fired but for his protected speech; (3) whether the plaintiff's exercise of speech is outweighed by the "countervailing interest of the state in providing the public service" that plaintiff was hired to perform. In a *per curium* decision, the Fourth Circuit summarily rejected plaintiff's claim of protected speech, holding that the speech at issue did not involve matters of public concern, but was "only a matter of personal interest." Questions presented: 1) Are there genuine issues as to material facts concerning petitioner's constitutional claims against respondent, in her individual capacity, sufficient to withstand a motion for summary judgment? 2) Are there genuine issues as to material facts sufficient to overcome respondents' motion for summary judgment as to petitioner's claim for intentional infliction of emotional and mental distress?

III. Access

A. Certiorari denied

Globe Newspaper Co. v. U.S., 61 F.3d 86, 23 Media L. Rep. 2262 (1st Cir. 1995), *cert. denied*, 64 U.S.L.W. 3726 (4/29/96, No. 95-815). The First Circuit affirmed the lower court's decision to deny plaintiff access to a juvenile proceeding. Media access to juvenile proceedings is governed by the Federal Juvenile Delinquency Act, 18 USC 5031-42. The First Circuit held that the Act does not mandate "across-the-board" closure for all juvenile proceedings, but merely authorizes, at the discretion of the court, any measures designed to ensure confidentiality, closure included. Questions presented: (1) Does the public have a presumptive First Amendment right of access to juvenile delinquency proceedings charging an 18 year-old and two 16 year-olds with a series of hate crimes intended to rid the community of black and Jewish citizens? (2) Does the First Amendment require that juvenile delinquency proceedings may be closed to the public only if the trial court makes specific findings demonstrating that, first, there is a substantial probability that the juvenile's interests in rehabilitation will be prejudiced by the publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect interests in rehabilitation? (3) Does the Federal Juvenile Delinquency Act supplant the public's common-law right of access by establishing a presumptive rule of closure for proceedings conducted under the Act?

IV. Obscenity/Indecency

A. Judgment reversed in part, affirmed in part

Alliance for Community Media v. FCC, 56 F.3d 105 (D.C. Cir. 1995) (en banc), *aff'd in part, rev'd in part*, 64 U.S.L.W. 4706 (6/28/96, No. 95-227). At issue were three subsections of Section 10 of the 1992 Cable Television Protection and Competition Act: (1) subsection (a), which confers on cable operators the right to refuse to carry programs that the operator "reasonably believes describe[] or depict[] sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards;" (2) subsection (b), which directs the FCC to establish rules requiring cable operators to place "indecent" programs on a separate, blocked-out channel which individual subscribers can access only by written request; and (3) subsection (c), which required the FCC to promulgate regulations authorizing cable operators to prohibit the use of PEG (public, educational, or governmental use) channels for "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."

Sitting *en banc*, the D.C. Circuit upheld, over a First Amendment challenge by five organizations, the constitutional validity of all three subsections. First, the Court held that subsections (a) and (c) do not constitute state action by the F.C.C. because, among other reasons, the content requirements are discretionary; that is, in the court's words, they "do not command." Cable operators, the court noted, "may carry indecent programs on their access channels, or they may not." The court went on to hold subsection (b), challenged on a number of grounds, does not impermissibly single out leased

access programming and, moreover, is acceptable under the First Amendment as the least restrictive means of limiting children's access to indecent programming. Summarily rejected were two other challenges to subsection (b): that it constitutes "prior restraint;" and that it is "impermissibly vague."

Questions presented: (1) Can a federal statute evade scrutiny under the First Amendment for lack of state action when that statute -- Section 10 of the 1992 Cable Television Consumer Protection and Competition Act -- on its face disfavors certain constitutionally protected speech on cable access channels based solely on its content? (2) Does Section 10 implicate state action and therefore invoke First Amendment scrutiny because: (a) the statute and its implementing regulations preempt state and local law and cable franchise agreements, (b) the government has significantly encouraged the ban on indecent programming, and (c) the media that Section 10 regulates -- cable access channels -- have been dedicated by governmental authorities for the public to use for expressive discourse and are therefore public forums? (3) May Section 10's content-based requirement that cable operators segregate and block "indecent" access programming on cable television be considered the least restrictive means to further a compelling interest when Congress never evaluated the effectiveness of existing, less restrictive means of furthering that interest? (4) Is Section 10 unconstitutionally vague under the heightened scrutiny required in First Amendment cases, when it (a) defines "indecent programming" based upon its "patently offensive manner as measured by contemporary community standards," (b) authorizes cable operators to ban leased access programming that they "reasonably believe" to be indecent, and (c) will produce self-censorship by access programmers by requiring them -- on pain of fines or cut-off of access -- to guess what the FCC may decide is, and what the cable operator may "reasonably believe" to be, "indecent," and to certify that their programs do not violate these standards?

The Supreme Court's decision is reported at p. 1 of this *LDRC LibelLetter.*

B. Certiorari denied

Action for Children's Television v. Federal Communications Commission, 58 F.3d 654, 78 Rad. Reg. 2d(P&F)685 (D.C. Cir. 1995*), cert. denied,* 64 U.S.L.W. 3465 (1/8/96, No. 95-520). In a challenge to the constitutionality of Section 16(a) of the Public Telecommunications Act of 1992, the D.C. Circuit remanded the cases to the FCC with instructions to revise its regulations. Section 16(a) seeks to shield minors from indecent radio and television programs by restricting the hours within which such programs may be broadcast, authorizing broadcast of indecent materials only between midnight and 6:00 a.m. At issue here is the exception granted to stations that go off the air at or before midnight; such stations may broadcast indecent materials after 10:00 p.m. The court found that the Government has a compelling interest in protecting children under the age of 18 from exposure to indecent broadcasts and that the "channeling" of indecent broadcasts between the hours of midnight and 6:00 a.m., standing alone, would not unduly burden the First Amendment. The D.C. Circuit held, however, that the distinction drawn between the two categories of broadcasters is unconstitutional because it bears no apparent relationship to the governmental interests served by 16(a). The court thus instructed the FCC to revise its regulations to permit the broadcasting of

indecent material between the hours of 10:00 p.m. and 6:00 a.m. Petitioner presents the following question: Does section 16(a) of the 1992 Public Telecommunications Act, standing alone or as limited by the court of appeals, violate the First Amendment?

V. Internet

A. Petition filed but not yet acted upon

Thomas v. United States, 74 F.3d 701 (6th Cir. 1996), *cert. filed* 64 U.S.L.W. 3839 (6/10/96, No. 95-1992). The Sixth Circuit affirmed the conviction of defendants, husband and wife, for distributing sexually explicit images across state lines via the electronic bulletin board system they owned and operated in California. Because the government agent chose to download the images to a computer in Tennessee, defendants were tried and convicted in the United States District Court for the Western District of Tennessee, which applied that state's community standards. Questions Presented: 1) Whether 18 U.S.C. sec. 1465, which forbids the transfer of "obscene material," is applicable to the transfer of Graphic Interchange Format files which are transmitted in binary code through computers and are therefore not tangible objects subject to the statute? 2) Whether venue is proper in a federal district where the sole connection between petitioners and that district was the act of a government agent in downloading information from a computer bulletin board which was established in another federal district? 3) In a federal obscenity prosecution, which community's standards should determine whether the contents of a nationwide computer-accessed communication system are obscene?

VI. Other

A. Judgment vacated

U.S. v. US West Inc., 48 F.3d 1092, 63 U.S.L.W. 2428 (9th Cir. 1995), *vacated*, 64 U.S.L.W. 3590 (3/4/96, No. 95-315). The Ninth Circuit affirmed the district court's grant of summary judgment in favor of US West, which had challenged 47 USC 533(b), a portion of the 1984 Cable Communications Policy Act which prohibits telephone carriers from providing cable television service to customers in their telephone service areas. Employing intermediate level scrutiny, the Ninth Circuit held that the provision fails the "narrow tailoring" requirement. (*See U.S. v. Chesapeake et al., infra*, for the question raised in the government's petition for certiorari.)

U.S. v. Chesapeake and Potomac Telephone Company of Virginia and *National Cable Television Association Inc v. Bell Atlantic Corp.*, 42 F.3d 181, 63 U.S.L.W. 2348 (4th Cir. 1994), *vacated*, 64 U.S.L.W. 4115 (2/27/96, No. 94-1893). The Fourth Circuit, as did the Ninth Circuit in U.S. v. West, *supra*, likewise struck down Section 533(b), holding that the statute was not sufficiently "narrowly tailored" to serve the government's interests in promoting competition in the market for video programming and in preserving a diversity of communications media ownership, and also because it does not leave open sufficient alternative channels for communication of information.

Question presented: Does 47 USC 533(b) violate the First Amendment?

B. Probable jurisdiction noted

Turner Broadcasting System Inc. v. Federal Communications Commission, et. al., No. Civ. A. 92-2247, 1995 WL 755299 (D.D.C. December 12, 1995), *prob. juris. noted*, 64 U.S.L.W. 3557 (2/20/96, No. 95-992). Plaintiff challenged the "must carry" provisions of the 1992 Cable Television Consumer Protection and Competition Act, which require cable television systems to devote a portion of their channels to the broadcast of local commercial and public television stations. On remand from the U.S. Supreme Court, the three-judge district court, utilizing intermediate level scrutiny, upheld the provisions because (1) they are "narrowly tailored" to serve the government's interest in protecting the economic health of the broadcast industry, and (2) they are "content-neutral restrictions" that impose only a minimal burden on speech. The court thus granted the defendants' motions for summary judgment. Question presented: In the absence of any jeopardy to the health of the overall system of free, local broadcast television (nationally or in particular markets), does the First Amendment permit Congress to impose on all cable operators the requirement of mandatory carriage of local broadcast stations in preference to all other programmers?

C. Review Granted

Glickman v. Wileman Brothers & Elliott, Inc., was *Wileman Brothers & Elliott, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995), *cert. granted* 64 U.S.L.W. 3806 (6/3/96, No. 95-1184). The Ninth Circuit affirmed in part and reversed in part summary judgment in favor of the Secretary of Agriculture in an action arising under the Agricultural Marketing Agreement Act of 1937. The Department of Agriculture sought to compel California nectarine and peach handlers to fund a generic advertising program. The Ninth Circuit held that while the assessment regulations were acceptable, using *forced* assessments to fund generic advertising programs violated plaintiffs' First Amendment right not to be compelled to render financial support for the speech of others. Question presented: Does it violate the First Amendment for the Secretary of Agriculture, pursuant to marketing orders issued under the 1937 Agricultural Marketing Agreement Act, to require handlers of California peaches, nectarines, and plums to fund generic advertising programs for those commodities?

D. Review Denied

Bilder v. Ohio, 651 N.E.2d 502, 99 Ohio App. 3d 653 (Ohio Ct. App. 1994), *cert. denied*, 64 U.S.L.W. 3396 (12/4/95, No. 95-531). An Ohio appellate court affirmed defendant Bilder's conviction for stalking a probation officer in violation of Akron City Code Section 135.09. On appeal, the defendant challenged the statute as an unconstitutionally overbroad infringement upon free speech. The Court upheld the validity of the ordinance as applied to the defendant on the ground that the stalking ordinance undoubtedly reflects a legitimate state interest. Questions presented: (1) Is section 135.09 unconstitutional as applied in this case because it denied the defendant freedom of speech and association? (2) Is section 135.09 overbroad in its application? (3) Can name calling form

the basis for criminal violation when the speech is merely expression and is incidental to association?

Power v. Massachusetts, 650 N.E.2d 87, 420 Mass. 410 (Mass. 1995), *cert. denied*, 64 U.S.L.W. 3465 (1/8/96, No. 95-277). Plaintiff, Katherine Power, long sought by the FBI for her role in the 1970 robbery of State Street Bank, surrendered to the state of Massachusetts in 1993. After she entered a plea of guilty, the lower court granted probation on the special condition, to which Power agreed, that she not profit in any form from the sale of her story. Despite her agreement to this condition on appeal from the portion of her sentence containing the special provision, the plaintiff challenged the restriction as a violation of her First Amendment rights. The Supreme Judicial Court of Massachusetts affirmed the condition, distinguishing *Simon and Schuster, Inc. v. New York Crime Victims Board, 502 US 105 (1991)*, on the grounds that the condition was (1) rationally related to the State's interest underlying the probation, (2) narrowly tailored to permit the plaintiff to speak of her crimes without pecuniary gain, and (3) distinguishable from an outright ban applicable to all convicted criminals. Questions presented: (1) May a state court impose admittedly content-based restrictions on the speech of a probationer upon no more than a general finding that such restraint "reinforces moral foundations of our society"? (2) Must the courts strictly scrutinize content-based restrictions on speech, or, alternatively, did the court below err by not reviewing the content-based restriction as specified in *Madsen v. Women's Health Center Inc.*, 62 U.S.L.W. 4686 (U.S. 1994)? (3) Is a probation condition that forbids a probationer from "directly or indirectly engaging in any profit or benefit generating activity relating to publication of facts or circumstances pertaining to [her] involvement in criminal acts for which [she was] convicted" so vague as to impose a prior restraint on speech?

State of Louisiana v. Schirmer, 646 So. 2d 890 (La. 1994), *cert. denied*, 64 U.S.L.W. 3347 (11/13/95, No. 94-2022). In a case challenging the constitutionality of LSA-R.S. 18:1462(A), subsections (2), (3), and (4), which effectively prohibit all political speech within 600 feet of polling places on election days, the Supreme Court of Louisiana affirmed the lower court's ruling that the statute is unconstitutionally overbroad. The Louisiana statute was drafted in order to provide a sanctuary in the vicinity of polling places to protect voters from interference with their right to vote. The defendant, charged with violating this ordinance by soliciting signatures at a polling place for a petition to recall the Governor, challenged the statute as an infringement of his First Amendment rights. Affirming the lower court's decision to quash the information filed against the defendant, the state's high court held that the statute is an unconstitutionally overbroad limitation upon the defendant's right of free speech and expression. The court also held that subsection (a)(2) is unconstitutionally vague in that it fails to establish guidelines for enforcement. Questions presented: (1) Is Louisiana's electioneering law, LSA-R.S. 18:1462A, (3) & (4), constitutional? (2) Is Louisiana's compelling interest in maintaining a campaign-free zone around its polling places during elections best served by its total ban on all political campaigning? (3) Is the 600-foot limitation in Section 1462 narrowly tailored to protect Louisiana's compelling interest? (4) Is LSA-R.S. 18:1462 overbroad? (5) Is LSA-R.S. 18:1462A(2) void for vagueness?

E. Petition filed but not yet acted upon

Hill v. Colorado, 911 P.2d 670 (Colo. Ct. App. 1995), *cert. filed* 64 U.S.L.W. 3808 (5/24/96, No. 95-1905). Section 18-9-122(3), C.R.S. (1994), a Colorado statute, creates a buffer zone around abortion clinics. Specifically, the statute makes it a crime knowingly to approach a person -- within eight feet of that person and within one hundred feet of an abortion clinic -- for the purpose of disseminating information to or counseling that person without that person's consent. In a challenge to the statute on First Amendment grounds, the trial court granted summary judgment for the defendant. On appeal, the Colorado Court of Appeals affirmed the trial court, holding that the statute is content-neutral, advances significant governmental interests in ensuring safety and unobstructed access for patients and staff entering and departing from health care facilities, and does not burden speech more than is reasonably necessary. Questions presented: (1) Is a statutory obligation to obtain consent before exercising constitutionally protected expressive rights in a traditional public forum inconsistent with the decision in *Madsen v. Women's Health Center, Inc.*, 62 U.S.L.W. 4686 (U.S. 1994), striking down an injunctive "consent to speak" requirement? (2) Does C.R.S. 18-9-122(3) violate petitioners's First and Fourteenth Amendment rights to Freedom of Speech, Press, and Assembly? (3) Does C.R.S. 18-9-122(3) violate petitioners' Fourteenth Amendment rights to Equal Protection of the law?

Titan Sports Inc. v. Ventura, 65 F.3d 725 (8th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3623 (3/18/96, No. 95-1192). Defendant, which operates the World Wrestling Federation (WWF), entered into a licensing agreement for the production of videotapes of WWF matches, ninety of them featuring performances by the plaintiff. Initially negotiated without an agent and later with one, the plaintiff's contract with the defendant did not provide royalties for commercial use of plaintiff's image. Plaintiff brought an action for *quantum meruit* recovery of royalties from these videotapes. The Eighth Circuit held that the district court did not err in permitting *quantum meruit* recovery for the period before and after plaintiff had the services of an agent. Questions presented: (1) Is a federal appellate court, conducting a predictive law analysis under *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), free to create *sua sponte* a heretofore unannounced state right that is acknowledged by the court to be prohibited by federal law -- Section 301 of the Copyright Act? (2) Is it appropriate for this Court to exercise its supervisory powers when a federal appellate court creates *sua sponte* a previously non-existent state claim to sustain an award rendered on other grounds when the newly announced state right: (a) was dismissed prior to trial on both factual and legal grounds; (b) was not preserved for appeal by respondent; and (c) is prohibited by provisions of Section 301 of the Copyright Act?