



## MEDIA LAW LETTER

Reporting Developments Through July 17, 2002

<b>LDRC</b>		
<b>LDRC</b>	<b>Prepublication Review of Reports on Rumors: Focus on Government Agency</b> <i>Prepublication/Prebroadcast Committee analyzes the Howard v. Antilla decision</i>	<b>13</b>
<b>LDRC</b>	<b>When Your Client Communicates With an Adverse Party Represented by Counsel</b> <i>City Bar of New York issues a formal opinion on "no-contact rule"</i>	<b>63</b>
<b>LDRC</b>	<b>Ethical Duties of Media Lawyers Where Colleagues' Speech is Involved</b> <i>Moral and ethical considerations may decisively influence how law is applied</i>	<b>63</b>
<b>LIBEL &amp; PRIVACY</b>		
<b>Ga. Super. Ct.</b>	<b>Georgia Jury Finds Newspaper and Columnist Libeled Deputy Sheriff</b> <i>Newspaper accused deputy sheriff of murdering man who died in police custody</i>	<b>3</b>
<b>D.Md.</b>	<b>Jury Finds for Defendant G. Gordon Liddy in Libel Case on Watergate Theory</b> <i>Plaintiff Ida "Maxie" Wells is considering yet another appeal</i>	<b>4</b>
<b>9th Cir.</b>	<b>Court Reverses Summary Judgment for Consumer Reports' Suzuki Samurai Review</b> <i>Dissent argues the independent examination rule applies to appeals from summary judgment</i>	<b>5</b>
<b>Cal. Ct. App.</b>	<b>Court: Statements Not Actionable as Defamation Can Support Misappropriation Claim</b> <i>Being imaginative, and thus not factual, may not make work "transformative"</i>	<b>7</b>
<b>S.D.N.Y.</b>	<b>Non-Profit Media Watch-Dog Groups Settle "Commercial Speech" Libel Suit</b> <i>Sued by the World Wrestling Entertainment, groups settle for \$3.5 million</i>	<b>9</b>
<b>1st Cir.</b>	<b>Court Reverses \$480,000 False Light-by-Implication Verdict</b> <i>Decision based on insufficient evidence of intent to imply falsehood</i>	<b>11</b>
<b>Ga. Ct. App.</b>	<b>Georgia Appeals Court Reverses Award in Radio Slander Case</b> <i>Man called radio station and identified a former co-worker as a homosexual</i>	<b>15</b>
<b>N.Y. Sup. Ct.</b>	<b>Hot 97 Morning Show Insults Not Defamatory</b> <i>DJ called company's executive a "big burly b**ch" who smells</i>	<b>16</b>
<b>9th Cir.</b>	<b>Court Refuses to Extend Berger v. Hanlon to Ridealong Cases with Different Facts</b> <i>Decision limits Berger to its particular facts</i>	<b>17</b>
<b>C.D. Cal.</b>	<b>Jennifer Aniston Settles Lawsuit Prior to Trial</b> <i>The "Friends" star was suing two magazines for running pictures of her topless</i>	<b>18</b>
<b>Ohio Ct. App.</b>	<b>UPDATE: Ohio Court of Appeals Upholds Summary Judgment for Beacon Journal</b> <i>Court finds that newspaper's use of medical files was not an invasion of privacy</i>	<b>19</b>
<b>Ill. Ct. App.</b>	<b>Fuggedaboutit: Illinois Appeals Court Affirms Dismissal of Sopranos Lawsuit</b> <i>Makers of television series were sued for allegedly violating Illinois "individual dignity" clause</i>	<b>22</b>
<b>PRIOR RESTRAINTS</b>		
<b>6th Cir.</b>	<b>Freelance Reporter Wins Reversal of Injunction in Ohio</b> <i>Court holds that release of names would not increase the security risks guards already face</i>	<b>27</b>
<b>Utah</b>	<b>UPDATE: Judge Recants Prior Restraint Order</b> <i>Verbal order barred newspaper from running story on a child custody case</i>	<b>16</b>
<b>NEWSGATHERING</b>		
<b>1st. Cir.</b>	<b>District Court Practice of Not Filing Legal Memos in Public Court Files Struck Down</b> <i>Court of appeals finds District of Rhode Island's practice is unconstitutional</i>	<b>29</b>
<b>N.D. Cal.</b>	<b>Prompted by Media Motion, Judge Lifts Juror Gag Order in Earth First Case</b> <i>Newspapers argued order violated rights of the press, the public and the jurors themselves</i>	<b>31</b>

<b>D.D.C.</b>	<b>Court Rejects Government Claim that National Security Assertion is Non-Justiciable</b> <i>Justice Department argued court lacked power to consider plaintiff's First Amendment claim</i>	<b>33</b>
<b>White House</b>	<b>UPDATE: More Reagan Papers Made Public</b> <i>Released documents deal with advice from then-Vice President Bush</i>	<b>34</b>
<b>Congress</b>	<b>FOIA Advocates Raise Alarm Over Homeland Security Bill</b> <i>Bill contains one of the broadest FOIA exemptions</i>	<b>35</b>
<b>N.J./U.S.</b>	<b>UPDATE: War Turns to Information</b> <i>Separate decisions have limited the information available to the public regarding detentions</i>	<b>36</b>
<b>Minn.</b>	<b>Appeals Court Reverses Order that Reporter Reveal Source</b> <i>Decision voids the trial court's \$200-a-day contempt penalty</i>	<b>39</b>
<b>E.D. Va.</b>	<b>Trial Court Refuses to Quash Subpoena to Reporter Who Interviewed Accused</b> <i>Ruling mooted by subsequent guilty plea</i>	<b>43</b>
<b>Cal. Super. Ct.</b>	<b>Trial Court Imposes Then Amends Restrictive Credential Procedures</b> <i>Court initially required extensive identifying information and reasons for requesting credential</i>	<b>45</b>
<b>INTERNET</b>		
<b>4th Cir.</b>	<b>Fourth Circuit Dives into Internet Personal Jurisdiction Case</b> <i>Underlying lawsuit arises from articles about 500 Connecticut prisoners sent to Virginia</i>	<b>21</b>
<b>C.D. Cal.</b>	<b>Analysis: Metrosplash and Recent Developments in Online Defamation Law</b> <i>District court decision runs contrary to holdings in every court to have considered this issue</i>	<b>23</b>
<b>Cal. Ct. App.</b>	<b>Court of Appeals Holds that Section 230 Immunizes eBay</b> <i>Claim was based on its users' fraudulent activities in selling sports memorabilia</i>	<b>49</b>
<b>E.D. Va.</b>	<b>Newspapers Get Preliminary Injunction Stopping Pop-up Web Ads</b> <i>Lawsuit challenges marketing company's practice of selling pop-up advertising</i>	<b>51</b>
<b>NEWS &amp; UPDATES</b>		
<b>Ariz.</b>	<b>Arizona Bans Non-Compete Clauses in Broadcasting Employment Contracts</b> <i>State legislature's goal is to initiate more balanced employment negotiations</i>	<b>38</b>
<b>Ky.</b>	<b>Mountain Citizen Wins Battle for its Name</b> <i>Three journalists are still fighting contempt citations and fines</i>	<b>42</b>
<b>N.Y. Sup. Ct.</b>	<b>Trial Court Allows Both Plaintiff and Defendant to Proceed Anonymously</b> <i>Judge claimed that publicity could result in "trial by newspaper"</i>	<b>44</b>
<b>5th Cir.</b>	<b>Private Building Codes Adopted as "The Law" Lose Copyright Protection</b> <i>A model code had been adopted as the building codes in two small Texas towns</i>	<b>47</b>
<b>Pew Survey</b>	<b>Research Center Study Reports Changes in American's Newsgathering Habits</b> <i>Interest in international news does not increase as much as predicted</i>	<b>61</b>
	<b>The Life and Death of an Investigative Reporter</b> <i>Robert I. Friedman: An appreciation</i>	<b>70</b>
<b>INTERNATIONAL</b>		
<b>Germany</b>	<b>Court Finds Microsoft Germany Liable for Third Party Posting</b> <i>Company held liable for fake nude photos of Steffi Graf</i>	<b>52</b>
<b>France</b>	<b>Webmaster and Domain Name Owner Found Liable for Defamatory Chatroom Comments</b> <i>Comments accused e-business firm of questionable business practices</i>	<b>53</b>
<b>Zimbabwe</b>	<b>American Reporter Acquitted, Deported</b> <i>Reporter tried for "abuse of journalistic privilege" under Access to Information Act</i>	<b>55</b>
<b>UK</b>	<b>Court Orders Disclosure of Source in London Suit Over Medical Records</b> <i>Case arose from article about murderer Ian Brady's hunger strike</i>	<b>55</b>
<b>UK</b>	<b>The Responsible Journalist</b> <i>Emerging standard in defamation cases challenges application of traditional principles</i>	<b>57</b>
<b>COE</b>	<b>Council of Europe Adopts Protocol Banning Racist and Xenophobic Speech Online</b> <i>Convention omitted criminalizing racist or xenophobic speech via computer networks</i>	<b>58</b>

## Georgia Jury Finds Newspaper and Columnist Libeled Deputy Sheriff

A Georgia jury has found that a weekly newspaper in Lake Park, its editor/publisher and a columnist libeled a Lowndes County sheriff's deputy in its coverage of the death of a prisoner in the county jail, awarding the deputy \$225,000 in compensatory and punitive damages. *Farmer v. Lake Park Post*, No. 2000-CV-308 (Ga. Super. Ct., Lowndes County June 21, 2002). The newspaper's publisher says that he will appeal, and that if the award is upheld it may result in the newspaper's demise.

### *Case Arose From Death of Suspect in Custody*

The case stemmed from the death of Willie J. Williams, who died in police custody on September 2, 1998, more than 24 hours after the plaintiff, Deputy Kevin Farmer, stopped him for a traffic violation. According to police, Williams resisted arrest when Farmer discovered that there was an outstanding warrant against him, and his head hit the pavement when Farmer pushed him to the ground while trying to arrest him. Farmer took Williams to the hospital for treatment, and then to the infirmary of the county jail, where law officials say he suffered a seizure. After he was arraigned, Williams was returned to the infirmary, where officials say they later found him unconscious and sprawled in his own vomit. He died on the way to the hospital, of what an autopsy found to be "complications of blunt force head trauma," with alcohol-induced damage to William's liver making the impact fatal.

The death galvanized the local African-American community, and a group called the People's Tribunal formed to press for investigations into the case, alleging that Williams' death was the result of beatings by police. In support of their claim, the group initially pointed to videotapes of Farmer's arrest of Williams, taken from cameras in the patrol cars at the incident, which appear to show Farmer hitting Williams with a flashlight. *Lake Park Post* publisher and editor Al Parsons said that the *Post's* conclusions were based on viewing these tapes.

But enhanced versions of the videos, created two years after the incident by the FBI, show that Farmer's flashlight remained clipped to his belt during the incident. In the libel

trial, the newspaper successfully argued that the enhanced tapes should not be shown as evidence of the newspaper's alleged malice because it did not exist at the time that the articles at issue were written.

Although state medical examiners labeled the death a homicide, a coroner's inquest ruled the death accidental. Inquiries by a grand jury, the Georgia Bureau of Investigation and the U.S. Department of Justice all concluded that there was no evidence of police misconduct. Williams' family has filed a lawsuit against Farmer, which is pending.

### *Newspaper Accused Policeman of Murdering Suspect*

In several articles published after Williams' death, the *Lake Park Post* accused Farmer of beating Williams and called him a murderer. Farmer made several demands for a retraction, but the paper refused. "They called this kid a murderer 35 to 40 times," plaintiff's attorney Mike Bowers told the *The Atlanta Journal-Constitution*. "That's defamation. That's malice." He also distinguished the medical examiners' findings: "Homicide and murder are two different things."

*Lake Park Post* publisher and editor Al Parsons was equally tough in comments to the *Fulton County Daily Report*. "If you use excessive force recklessly, without regard for human life, then you have committed murder. Basically, that was our take." Parsons also told the *Journal-Constitution* that the lawsuit was filed with the support of Lowndes County Sheriff Ashley Paulk, in retaliation for the newspaper's reports on abuse of prisoners at the county jail. Paulk confirmed that he had recruited Bowers to handle the case, and allowed a captain to solicit about \$90,000 in donations for the case.

### *Dispute Over Challenges to Jurors*

During jury selection, plaintiff's attorneys preemptorily challenged four blacks in the jury pool. The newspaper successfully argued that plaintiff was challenging jurors based on race, and Judge Harry Jay Altman ordered that three of

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***The newspaper successfully argued that the enhanced tapes should not be shown as evidence of the newspaper's alleged malice.***

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## Ga. Jury Finds Columnist and Paper Libeled Sheriff

(Continued from page 3)

the jurors be returned to the panel, resulting in a jury composed of eight whites and four African Americans.

Throughout the four-day trial, Farmer's attorney Mike Bowers — who served as Georgia's attorney general from 1981 to 1997 — argued that the *Post's* coverage was sloppy and ignored facts contrary to the theory of the publisher and writer. Parsons and Moore testified that the articles included facts on both sides of controversy, and that they were based on attending hearings of the various investigations into Williams' death. "We don't pick out news that serves our purpose," Parsons testified.

The judge rejected a defense attempt to present two dissenting members of the coroner's inquest jury to testify on the reasoning behind their finding that Williams' death was a homicide. The defense questioned plaintiff's handling of the incident and plaintiff testified that Williams would not

have died had he not resisted arrest. Plaintiff also testified that the allegations had hurt his career prospects outside the Lowndes County Sheriff's Department, but conceded that there had been no effect on his current position or salary.

The jury deliberated for less than three hours before returning the verdict for plaintiff. It awarded \$65,000 each in compensatory damages against the *Post*, publisher/editor Parsons and columnist Charles Moore, plus \$10,000 each in punitive damages, for a total of \$225,000.

J. Converse Bright of Valdosta, Ga. represented the Lake Park Post Bright and its publisher/editor Al Parsons. Columnist Charles Moore was represented by Patrick Cork of Cork & Cork in Valdosta. Mike Bowers and Chris Anulewicz of Meadows, Ichter & Bowers, P.C. in Atlanta represented plaintiff together with Bill Langdale, Jr. of Langdale, Vallotton, Linahan & Wetherington in Valdosta.

## Jury Finds For Defendant G. Gordon Liddy in Libel Case On Watergate Theory

A retrial of a former Democratic National Committee secretary's \$5.1 million libel case has ended in a jury verdict in favor of defendant G. Gordon Liddy, the conservative talk show host and former Nixon White House operative. *Wells v. Liddy*, No. S-97-946 (D.Md. Jury verdict July 3, 2002) (Smalkin, J.).

The previous trial, presided over by District Judge J. Frederick Motz, ended in a mistrial and Judge Motz dismissed the case for insufficient evidence of negligence. The 4th Circuit reversed and remanded in *Wells v. Liddy*, No. 01-1266, 2002 WL 331123, 30 Media L. Rep. 1481 (4th Cir. March 1, 2002) (unpublished). See also *LDRC MediaLawLetter*, March 2002, at 9.

This was the second time that the 4th Circuit reversed Motz in the case. In 1999 Motz granted summary judgment to Liddy, finding that plaintiff was an involuntary public figure. *Wells v. Liddy*, 1 F.Supp. 2d 532, 26 Media L. Rep. 1779 (D. Md. 1998). The 4th Circuit reversed that finding in *Wells v. Liddy*, 186 F.3d 505, 28 Media L. Rep. 2131 (1999), cert. denied, 528 U.S. 1118 (2000). See also *LDRC LibelLetter*, Oct. 1999, at 14.

The 4th Circuit may get another chance to review the case: plaintiff Ida "Maxie" Wells is reportedly considering yet another appeal.

### *Liddy's Call Girl Theory for the Watergate Burglary*

In the early 1970s, Wells — now a community college dean in Louisiana — was a secretary at the Democratic National Committee headquarters when it was burglarized, the incident which precipitated the Watergate scandal that led to President Nixon's resignation.

Liddy has for several years asserted that former Nixon White House counsel John Dean ordered the DNC office break-in to retrieve photos of prostitutes, including Dean's then-girlfriend (now his wife), who were allegedly used by the DNC to entertain guests. In speeches, Liddy has been telling audiences that the photos of the prostitutes were in Ida Wells' desk at the DNC. Wells also alleged that Liddy has said that Wells coordinated the prostitute's liaisons, but Liddy denied making such statements.

The second trial in Well's suit, reassigned to Chief District Judge Frederic N. Smalkin, focused on two speeches in which Liddy expounded his theory: a 1996 speech at James Madison University in Virginia and comments made on a Mediterranean cruise in 1997. During the eight-day trial, Liddy testified that the conventional explanation of Watergate — that the burglars were seeking political information — never made sense to him, and that he developed his the-

(Continued on page 5)

## Jury Finds For Liddy in Libel Case

(Continued from page 4)

ory after speaking with disbarred attorney and convicted felon Phillip Macklin Bailey, who has a history of drug problems and mental illness, and Watergate revisionist author Len Colodny. But Liddy could not recall the details of the conversation with Bailey, who testified that he did not recall telling Liddy that the goal of the break-in was to hide prostitution.

Smalkin rejected two summary judgment motions filed by the defense, although he stated at the conclusion of evidence — outside the jury's presence — that Liddy's theory was "debatable." As per the 4th Circuit's opinions, the jury was instructed that Wells was a private figure who had to show that Liddy had acted negligently in expounding his theory of Watergate. After four hours of deliberation, the jury found for Liddy, reportedly finding his statements not defamatory and not reaching the question of negligence.

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## Ninth Circuit Reverses Summary Judgment for Consumer Reports' Suzuki Samurai Review

***Dissent argues the independent examination rule applies to appeals from summary judgment***

The Ninth Circuit reversed a grant of summary judgment in favor of Consumers Union on a product disparagement claim over a critical car review, finding sufficient evidence of test rigging. *Suzuki Motor Corp., et al. v. Consumers Union of United States, Inc.*, 2002 WL 1363767 (9th Cir. June 25, 2002). The product disparagement claim stems from *Consumer Reports* 1988 review of the Suzuki Samurai sports utility vehicle. CU claimed the vehicle had a tendency to roll over and judged it "Not Acceptable" in terms of safety.

In 1996, CU cited its review of the Suzuki Samurai in a 60th anniversary issue of *Consumer Reports*. Suzuki filed suit that same year citing this publication and other ongoing references to the Samurai report in CU publications and mailings. In May 2000, Judge Alice-marie Stotler of the Central District of California granted CU's motion for summary judgment, holding that Suzuki failed to present clear and convincing evi-

dence of actual malice. See *LDRC LibelLetter*, June 2000 at 7. A divided court of appeals reversed in a decision by Judge A. Wallace Tashima, and joined by Judge Susan P. Graber. Judge Warren J. Ferguson in an interesting dissent argued that the court was constitutionally required to conduct an independent examination of the record when reviewing a summary judgment determination and that there was insufficient evidence of actual malice under such a review.

### ***Sufficient Evidence of Test Rigging***

In overturning the grant of summary judgment, the court found that a reasonable jury could find by clear and convincing evidence that CU sought to produce a predetermined result in its safety tests of the Suzuki and thus was aware of the probable falsity of its review. Among the evidence cited by the court: 1) initial tests of the Samurai found no rollover tendency; 2) following standard testing, CU's editorial director remarked, "If you can't find someone to roll this car, I will;" 3) the car tipped on the standard course only after ten successful runs by a non-CU test driver; 4) the Samurai was then subjected to a modified testing course, on which it tipped up after several runs; 5) CU employees cheered the test driver who made the vehicle tip; and 6) a former employee testified "that while he believed CU was honest 99.9% of the time, the 0.1 percent that he was excluding was the 1988 test of the Samurai."

In a troubling analysis the court also found there was sufficient circumstantial evidence of financial motive to support actual malice. Suzuki claimed that "CU was financially overextended due to capital improvements leading up to the Samurai report and needed a blockbuster story to raise CU's profile and increase fundraising revenues." The court found it undisputed that CU was then in debt and that it used the Samurai story in fundraising solicitations. While it acknowledged that "financial motive cannot by itself prove actual malice, it nonetheless is a relevant factor bearing on the actual malice inquiry."

### ***Allegedly Flawed Testing Procedures***

The court also found sufficient evidence of CU purposefully avoiding the truth because the National Highway

(Continued on page 6)

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## Ninth Circuit Reverses Summary Judgment for Consumer Reports' Suzuki Samurai Review

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Transportation Safety Administration (“NHTSA”) and British Department of Transportation had previously criticized CU’s testing procedures as flawed for relying too heavily on driver skill. The court held that CU had failed to address these criticisms and that a jury could conclude that CU was “aware that doing so would disclose the falsity of its negative Samurai rating.”

But the court rejected Suzuki’s claim that purposeful avoidance of the truth was also shown because the NHTSA and the Insurance Institute for Highway Safety issued subsequent reports showing that the Samurai had a lower roll-over rate than many other SUVs. The court noted that CU responded to and challenged the results of these contrary reports and that “such disagreement does not demonstrate CU’s purposeful avoidance of critical facts.”

### ***The Dissent: Independent Appellate Review on Summary Judgment Required***

At issue for the dissent was whether *New York Times v. Sullivan* and its progeny require appellate courts to conduct an independent examination of the record when hearing appeals from summary judgment. In his dissent, Judge Ferguson noted that this is an open question and cited the circuits which have extended the rule of independent examination to the summary judgment context — the Second Circuit, the Eighth Circuit, the 10th Circuit and the D.C. Circuit. Judge Ferguson also noted that the Fifth Circuit has held that conducting independent review of the record is appropriate when hearing an appeal from a directed verdict for the defendant.

Turning to the Supreme Court’s decisions, Judge Ferguson argued that the United States Supreme Court has “emphasized the importance of independent appellate review, describing it as a ‘rule of federal constitutional law’ that ‘reflects a deeply held conviction that judges – and particularly Members of this Court – must exercise such review in order to preserve liberties established and ordained by the Constitution.’”

Judge Ferguson was also very cognizant of the inhibiting costs of litigation and the practical effect it has on the exercise of free speech. He argued that independent appellate review was necessary as a proper procedural safeguard. The majority dismissed the argument, saying it “conflates the summary judgment standard of review with application of the *New York Times* standard.” The majority, instead, focused only on whether a reasonable jury could find, by clear and convincing evidence, that the plaintiff has shown actual malice.

Judge Ferguson also took issue with the majority’s application of the actual malice standard, saying the majority “fails to contextualize Consumers Union’s testing of the Samurai within the purpose and mission of the organization.” Judge Ferguson concluded that the evidence put forth by Suzuki only showed a “bulldog mentality” on the part of the CU — not actual malice. Judge Ferguson concluded that — after an independent review of the record — it was “unquestionable” that the district court properly applied the principles of actual malice.

Barry G. West, Corey E. Klein and Sylvia M. Virsik, of Gaimis, Weil, West & Epstein in Los Angeles, and Joseph W. Cotchett and Frank Pitre, of Cotchett, Pitre & Simon in Burlingame, Cal., and Michael N. Pollet, of Pollet & Felleman in Yonkers, NY, represented Consumers Union. Robert B. Fiske, Jr., of Davis Polk & Wardwell, New York, represented Suzuki.

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**LDRC would like to thank summer interns — Kimberly Rose, Fordham University School of Law, Class of 2004; and Adam Schwartz, Stanford Law School, Class of 2004 — for their contributions to this month’s *LDRC MediaLawLetter*.**

## Statements Not Actionable As Defamation Can Support Misappropriation Claim, California Court Holds

By Timothy L. Alger

A California intermediate appellate court has taken a recent right-of-publicity decision by the state Supreme Court a chilling step further, and opened the way for celebrities to obtain damages for use of their name and likeness in nondefamatory works of fiction. *Winter v. DC Comics*, 99 Cal. App. 4th 458, 121 Cal. Rptr. 2d 431 (Cal. Ct. App. June 19, 2002) (Hastings, J., Vogel, J. Curry, J.).

The Second District Court of Appeal in *Winter* reversed a grant of summary judgment to the authors and publishers of a comic book series, holding that the plaintiffs, musicians Johnny and Edgar Winter, were entitled to trial on their claim that fictional characters in the books misappropriated their likenesses, even though the court affirmed summary judgment on defamation and related torts on the ground that the representations in the comic books could not reasonably be viewed as factual.

Especially troubling about the opinion is the *Winter* court's misinterpretation of the California Supreme Court's holding in *Comedy III Productions, Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 21 P.3d 797, 106 Cal. Rptr. 2d 126 (2001). There, the California Supreme Court held that a work that "adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation" is protected by the First Amendment. In *Winter*, though, the court allowed public figures to proceed with a misappropriation lawsuit against an obvious work of fiction, ruling that whether a work is sufficiently "transformative" to be protected by the First Amendment is a jury question even though under the lens of defamation law the work of fiction is protected under the standard of *Hustler v. Falwell*, 485 U.S. 46 (1988).

### *The Comedy III Decision*

A brief discussion of *Comedy III* is necessary. The defendant, Gary Saderup, is an artist who makes charcoal drawings of celebrities. The plaintiff is the entity that controls the rights to The Three Stooges. Without obtaining the consent of Comedy III, Saderup reproduced and sold a "literal" drawing of The Three Stooges as lithographic prints and silk-screened T-shirts. At a trial submitted on stipulated facts, the court found for Comedy III, entered judgment against Saderup for \$75,000 in damages and \$150,000 in attorneys' fees, and enjoined Saderup from making any other likenesses of The Three Stooges. *Comedy III*, 25 Cal. 4th at 393.

The court of appeal modified the judgment by striking the injunction and affirmed the judgment as modified. The California Supreme Court affirmed the Court of Appeal.

The Supreme Court first found that Saderup's prints and T-shirts were "products" and fell within the scope of the California descendible right-of-publicity statute, Civil Code section 990 (now section 3344.1). It then found that Saderup's prints and T-shirts were not protected by the First Amendment because his drawing of The Three Stooges was not sufficiently "transformative," *i.e.*, the "literal and imitative" elements of the work predominated over the creative elements. A work is not sufficiently transformative to merit First Amendment protection where "the depiction or imitation of the celebrity is the very sum and substance of the work." According to the court, "[Saderup's] undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame."

Nevertheless, the California Supreme Court made clear in its analysis that the right of publicity could not

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***Especially troubling about the opinion is the Winter court's misinterpretation of the California Supreme Court's holding in Comedy III Productions, Inc. v. Gary Saderup***

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## Statements Can Support Misappropriation Claim

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be used to punish the use of celebrity likenesses for caricature, parody, and satire. Indeed, the Supreme Court took special note of the constitutional actual malice requirement for celebrity libel plaintiffs, and stated:

Giving broad scope to the right of publicity has the potential of allowing a celebrity to accomplish through the vigorous exercise of that right the censorship of unflattering commentary that cannot be constitutionally accomplished through defamation actions.

In explaining the need for courts to determine whether a work is sufficiently transformative to deserve constitutional protection, the Supreme Court stated:

Certainly, any such test must incorporate the principle that the right of publicity cannot, consistent with the First Amendment, be a right to control the celebrity's image by censoring disagreeable portrayals. Once the celebrity thrusts himself or herself forward into the limelight, the First Amendment dictates that the right to comment on, parody, lampoon, and make other expressive uses of the celebrity must be given broad scope.

Thus, while the *Comedy III* decision raises a host of unanswered questions and problems, the Supreme Court reaffirmed the constitutional protection of non-commercial expression that uses a celebrity likeness in a manner that departs from a literal depiction – where the artist creates “something recognizably ‘his own.’”

### **The Winter Decision**

In the early 1990s, DC Comics published two five-volume comic book series entitled *Jonah Hex: Two Gun Mojo* and *Jonah Hex: Riders of the Worm and Such*. The “Autumn brothers,” Edgar and Johnny, appeared in the third, fourth, and fifth issues of the *Riders of the Worm* series. The Autumn brothers are half-human, half-worm cowboys with green tentacles, who obey “the Big Worm,” and who are ultimately killed in an underground shootout.

The Winters asserted claims for defamation, invasion of privacy, appropriation of the right of publicity, negligence, and intentional infliction of emotional distress. They alleged that the comic books falsely portrayed them as “vile, depraved, stupid, cowardly, sub-human individuals who engage in wanton acts of violence, murder and bestiality for pleasure and who should be killed.” They alleged that the names used in the comic books, as well as the characters’ appearance with long white hair and albino features, signaled to readers that the Autumn brothers were, in fact, Johnny and Edgar Winter.

The trial court granted summary judgment on all counts, holding that a reasonable reader could not understand the comic books as stating facts about the Winters. The court of appeal affirmed the judgment in an unpublished opinion, but the California

Supreme Court granted review pending disposition of *Comedy III*. After *Comedy III* was decided, the Supreme Court remanded *Winter* to the court of appeal with directions

to vacate its earlier decision and to reconsider in light of *Comedy III*.

The court of appeal, this time in a published opinion, affirmed the dismissal of all of the claims other than those alleging misappropriation of the right of publicity. Citing *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), and *Pring v. Penthouse International, Ltd.*, 695 F.2d 438 (10th Cir. 1983), the court found that “no reasonable reader would believe any portion of the depiction arguably relating to appellants [was] factual.”

The court then went on to reverse the grant of summary judgment as to the right of publicity claims. Ignoring its lengthy description of the fanciful Autumn brothers and their incredible exploits, the court quoted *Comedy III* — including the Supreme Court’s description of its “transformative” standard as “essentially a balancing test between the First Amendment and the right of publicity based on whether the work in question *adds significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation*” — and held that “triable questions of fact exist whether or not the

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***The court found that “no reasonable reader would believe any portion of the depiction arguably relating to appellants [was] factual.”***

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## Statements Can Support Misappropriation Claim

(Continued from page 8)

use of [the Winters'] likenesses in the comic books qualifies as a "transformative use." (emphasis added).

In other words, the depictions were so imaginative that they could not be viewed as factual, but the court of appeal concluded that it could not decide as a matter of law that those same depictions were sufficiently creative to be "transformative" expression protected by the First Amendment.

The court stated that it was remanding the matter for further development of "the factual record in accord with the legal principles discussed in *Comedy III* and to afford the trial court an opportunity to address the issue in the first instance" — implying that summary judgment might still be available to defendants. But the court, at another point, declared without equivocation that there were triable issues of fact as to whether the use was "transformative."

In any event, the *Winter* decision, by permitting right of publicity claims to survive a finding that the same statements are not actionable as libel, will make it more difficult for media defendants in

California to successfully argue that a misappropriation claim by a public figure is duplicative and fails for the same reasons as the plaintiff's defamation claims.

Also, by declining to decide whether the "Autumn brothers" were transformative as a matter of law, the *Winter* court will encourage judges to let right of publicity claims proceed to trial, which was a likely result of *Comedy III*, anyway, given the Supreme Court's endorsement of such a vague, content-specific analysis. Given that the Supreme Court in *Comedy III* viewed "parody or other distortions of the celebrity figure," "fictionalized portrayal," "heavy-handed lampooning," and "social criticism" as "transformative," but the *Winter* court found the over-the-top "Autumn brothers" depictions as not being appropriate for dismissal, California judges may be reluctant to dispose of right of publicity claims on demurrer or summary judgment.

Timothy L. Alger is of counsel at Quinn Emanuel Urquhart Oliver & Hedges, LLP in Los Angeles.

## Update: Non-Profit Media Watch-Dog Groups Pay Millions to Settle "Commercial Speech" Libel Suit

Two non-profit television watchdog groups, Media Research Center (MRC) and the Parents Television Council (PTC) settled a lawsuit filed against them by World Wrestling Entertainment (WWE) for defamation and other causes of action. The suit stemmed from the groups' statements criticizing the WWE and its show *Smackdown!* for inspiring children viewers to copy the show and arguing that this led to the death of four children. Under the settlement, MRC and the PTC agreed to pay \$3.5 million to the WWE and to retract their statements. Another defendant, criminal defense attorney John Lewis, agreed to apologize to plaintiff.

The settlement follows a controversial ruling in the case last year by Judge Denny Chin, federal district court for the Southern District. Judge Chin found that the WWE sufficiently alleged that the speech was commercial speech by pleading that the statements were made

in fundraising materials that advertised and promoted PTC and MRC and dealt with specific products of the WWE, namely *Smackdown!*. He further suggested that the actual malice standard does not apply in public figure libel cases if the challenged speech is commercial. *World Wrestling Federation Entertainment, Inc. v. Bozell*, 142 F. Supp. 2d 514 (S.D.N.Y. 2001) (Chin, J.). See also *LDRC LibelLetter*, June 2001 at 20.

In denying defendants' motion to dismiss libel and related claims, the court found that the plaintiff had sufficiently alleged actual malice as an element of its libel claim. However, Judge Chin also cited with approval the holding in *Proctor & Gamble Co. v. Amway Corp.*, 242 F.3d 539 (5th Cir. 2001), *cert. denied*, 122 S. Ct. 329 (2001), that the actual malice standard does not apply to claims brought by public figures based on false commercial speech.

(Continued on page 10)

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***MRC and the PTC initiated a national campaign to criticize the violence portrayed on WWE's programs to the public and corporations that sponsor WWE events.***

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## Non-Profit Media Watch-Dog Groups Pay Millions to Settle “Commercial Speech” Libel Suit

(Continued from page 9)

Judge Chin’s decision was extraordinary on several levels, not the least of which was his failure to cite or reflect on *New York Times v. Sullivan*, a case about a fundraising advertisement for a issue oriented cause.

### *The Wrestling Defense*

The background to the libel case was the 2001 Florida murder trial of Lionel Tate, then 14 years old, who was tried and convicted of murdering 6 year old Tiffany Eunick. Tate’s attorney, John Lewis, argued in court and publicly that Eunick’s death was accidental; Tate’s actions were simply wrestling moves seen on television that Tate performed on Eunick. The so-called “wrestling defense” garnered a great deal of media attention, as well as the attention of the MRC and the PTC. Lewis frequented talk-shows declaring that the WWE’s programs were responsible for the deaths of four children.

See, *World Wrestling*

*Federation Entertainment, Inc. v. Bozell*, 142 F. Supp.2d 514, 519 (S.D.N.Y. 2001), *LDRC LibelLetter*, Jun. 2001 at 19.

With data from Lewis, the MRC and the PTC initiated a national campaign to criticize the violence portrayed on WWE’s programs to the public and corporations that sponsor WWE events. According to WWE’s complaint, the organizations allegedly published defamatory messages via “Action Alerts” sent by e-mail to members, articles on websites, fundraising letters, newspaper ads, letters to politicians, and a video sent to companies that advertise on wrestling programs. *LDRC LibelLetter*, Jun. 2001 at 19.

### *The Settlement*

The parties reached a settlement whereby Lewis wrote a formal letter of apology to the WWE while the

PTC and the MRC wrote a letter of retraction and paid the WWE approximately \$3.5 million. In his apology letter Lewis claimed that “I was never on a crusade against the WWF and I never intended to injure the reputation of the WWF...my goal throughout...was to win Lionel Tate’s freedom.”

Brent Bozell, director of the PTC, wrote the letter of apology for the PTC and the MRC. In the letter Bozell states that “it was wrong for MRC, PTC, their spokespersons and myself to have said anything that could be construed as blaming the WWE or any of its programs for the deaths of children...Please disregard what others and we have said in the past about the Florida ‘wrestling’ death. Neither ‘wrestling’ in general, nor

WWE specifically, had anything to do with it. Of that I am certain.” *PTC Retraction to the WWE and to the Public*, available at [www.parentstv.org/Main/letters/wweretraction.asp](http://www.parentstv.org/Main/letters/wweretraction.asp). The retraction also acknowledges that new evi-

dence shows that Tate was not watching *Smackdown!* when he assaulted Eunick but instead was watching *The Flintstones* and a cartoon called *Cow and Chicken* at the time of the assault.

Currently, Lionel Tate is appealing his guilty verdict. His new lawyers do not intend to use the wrestling defense and will instead argue that Tate’s actions were accidental and unintentional, according to the *Sun-Sentinel*.

The WWE was represented by Jerry S. McDevitt and Eugene R. Licker of Kirkpatrick & Lockhart in Pittsburgh and New York, respectively. James Lewis was represented by Robert Buschel of Buschel, Carter, Schwartzreich & Yates, Fort Lauderdale. The PTC and the MRC were represented by Thomas A. Leghorn of Wilson, Elser, Moskowitz, Edelman & Dicker LLP in New York and Robert J. Sparks, Jr. of Herge, Sparks & Christopher in McLean, Virginia.

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***The retraction also acknowledges that new evidence shows that Tate was not watching Smackdown! when he assaulted Eunick but instead was watching The Flintstones***

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## First Circuit Reverses \$480,000 False Light-by-Implication Verdict

### *Court Finds Insufficient Evidence of Intent to Imply Falsehood*

By Jonathan M. Albano

The First Circuit Court of Appeals has reversed a \$480,000 false light-by-implication verdict against a former *New York Times* reporter who wrote an article about a rumor that a prominent businessman was a convicted felon leading a double life. *Howard v. Antilla*, \_\_\_ F.3d \_\_\_, 2002 WL 1371041 (1st Cir. June 28, 2002). The decision requires public figure plaintiffs suing on implication claims to prove that the defendant either intended or knew of the implication sued on in order to satisfy the actual malice test. Because the evidence did not prove by convincing clarity that the reporter intended to imply that the rumor about the plaintiff was true, judgment for the defendant was required as a matter of law. The judges that heard the case were Torrvella, Lipez and Saris (a District Court judge).

#### **Reporting on a Felonious Rumor**

The *Howard* case arose out of an October 27, 1994, *New York Times* article written by business reporter Susan Antilla. Headlined "Is Howard Really Finkelstein? Money Rides on It," the article reported on a rumor then circulating on Wall Street that Robert Howard, the chairman of two publicly-traded companies, was in fact Howard Finkelstein, a convicted felon who had been known to use the name Robert Howard as an alias.

The article reported that the Finkelstein rumor was being spread by short sellers who stood to profit from a decline in the stock of one of Howard's companies. A significant portion of the article concerned the SEC's inability to confirm or deny the truth of the rumor, despite the rumor's effect on the market and the fact that the SEC previously had brought cases against both individuals. Howard's unequivocal denial of the rumor was prominently reported, as were Antilla's unsuccessful efforts to determine whether the rumor was true or false.

On the day the article was published, lawyers for Howard met with *The Times* and presented information not previously shown to Antilla that corroborated Howard's denial of

the rumor. On the same day, Antilla received a phone call from a former attorney of Finkelstein's (who had not previously returned Antilla's calls) who said that based on the picture of Howard published by *The Times*, Howard and Finkelstein were not the same person. Based on that new information, *The Times* published an Editor's Note and a front-page business section article stating that it had found "no credible evidence" to support the rumor and expressing regret that the rumor had been published.

#### ***A Split Verdict at Trial***

Almost three years later, Howard sued Antilla, but not *The Times*, for defamation and false light invasion of privacy. Prior to trial, the district court ruled that Howard was

a public figure and denied his motion to compel the disclosure of the identities of the short sellers who had told Antilla about the rumor. See *Howard v. Antilla*, 1999 U.S. Dist. LEXIS 17045 (D. N.H. 1999) and 1999 U.S. Dist. LEXIS 19772 (D. N.H. 1999).

Both the defamation and the false light claims went to the jury under the plaintiff's theory that the article implied that Howard was Finkelstein.

After a five-day trial, the jury returned a defense verdict on the plaintiff's defamation claim, but awarded Howard \$480,000 on his false light-by-implication claim. The district court denied Antilla's post-trial motions, holding that the defamation verdict meant the jury found the article did not imply the rumor *was* true, while the false light verdict meant the jury found the rumor *might be* true (a theory not pursued by any party at trial).

#### ***Appellate Review of a False Light Implication Claim***

On appeal, Antilla argued that she was entitled to judgment as a matter of law principally because implying a rumor "might be" true is not a provably false assertion of fact and because there was insufficient evidence of actual malice

*(Continued on page 12)*

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***The decision requires public figure plaintiffs suing on implication claims to prove that the defendant either intended or knew of the implication sued on in order to satisfy the actual malice test.***

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## First Circuit Reverses \$480,000 False Light-by-Implication Verdict

(Continued from page 11)

(including intent) to support the false light verdict.

At the outset, the First Circuit refused to address the constitutional viability of the district court's theory that the article improperly implied that the rumor "might be" true. Because the lower court had entered judgment on an "entirely novel and untried theory of liability," the court found that imposing liability after the close of trial on that basis "would run counter to important consideration of due process."

For that reason, and because any claim of inconsistency between the false light and defamation verdicts had to be raised before the jury was discharged, the court reviewed the verdict in the context of the false light theory that actually was presented to the jury, "namely, that Antilla's article falsely implied that Howard *is* Finkelstein and thereby placed him in a highly offensive false light."

### Actual Malice and Implication

The court began its analysis by observing that the First Amendment requires a public figure false light plaintiff to prove by clear and convincing evidence that the offending false statement was made with actual malice. Because Howard's claim was based on the alleged *implication* of the article, the court was required to address the application of the actual malice test to this relatively unsettled area of the law. LDRC *MediaLawLetter*, June 2002 at 29.

The *Howard* Court adopted an actual malice standard consistent with decisions from certain other jurisdictions holding that the unique nature of implication claims requires more than a showing of knowledge of falsity or reckless disregard for the truth. See, e.g., *Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662 (9th Cir. 1990) and *Saenz v. Playboy Enterprises, Inc.*, 841 F.2d 1309 (7th Cir. 1988). According to the First Circuit,

in a case such as this, where the plaintiff is claiming injury from an allegedly harmful implication arising from the defendant's article, 'he must show with

clear and convincing evidence that the defendant[ ] intended or knew of the implications that the plaintiff is attempting to draw.'

Undertaking the "searching independent review of the evidence" required by *Bose*, the court found insufficient evidence of intent to support an actual malice finding. A central factor in the Court's analysis was its conclusion that it was "questionable, even doubtful, that the article is actually capable of bearing the harmful implication charged by Howard – namely, that he is Finkelstein." Although the article republished the rumor being spread by short sellers, the court found that

read as a whole, the article points out flaws in both sides of the story and never places the author in a position of evaluating the truth or falsity of any party's account. In Antilla's words, the article remained 'agnostic' with respect to the truth of the short sellers' rumors.

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**"[Plaintiff] must show with clear and convincing evidence that the defendant . . . intended or knew of the implications that the plaintiff is attempting to draw"**

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### Different Proof of Malice Required

The rationale employed by the Court illustrated the sharp distinction between proof of traditional actual malice and proof of intent required to establish actual malice in an implication case.

Relying on the *Newton* and *Saenz* decisions of the Ninth and Seventh Circuits, the court rejected the plaintiff's argument that evidence showing Antilla doubted the truth of the rumor sufficed to prove by clear and convincing evidence that she intended the article to imply that the rumor was true. See *Newton*, 930 F.2d at 680 (evidence that the defendants should have foreseen the defamatory implication was insufficient to prove actual malice); *Saenz*, 841 F.2d at 1318 (evidence that the defendants could not reasonably have believed the defamatory charge did not prove that they intended to assert that the charge was true).

Because the evidence at trial showed, at most, that An-

(Continued on page 13)



## **First Circuit Reverses \$480,000 False Light-by-Implication Verdict**

*(Continued from page 12)*

tilla should have foreseen the potential interpretation of the article as accusing Howard of being Finkelstein, and because only a strained reading of the article itself would yield such an accusation, the court held that the plaintiff had not met his burden of proving actual malice.

Antilla's failure to include additional exculpatory information in the article that would have disproved the rumor also was insufficient to prove that she intended to imply the rumor was true. "While Antilla was clearly stingy in providing facts from which a reader might infer that Howard was probably not Finkelstein," her failure to correlate dates found in 1500 pages of documents she reviewed was not actual malice but, "at worst, a negligent failure to connect the dots in a voluminous paper trail."

Finally, although the case was decided on actual malice grounds, the court stated that it was "important to note" that even if the article could be read as implying that Howard was Finkelstein, it would "probably qualify" as protected opinion based on the disclosed facts concerning both sides of the Finkelstein controversy.

The First Circuit's opinion has two potentially sig-

nificant aspects. First, the decision adds to the line of cases holding that a public figure plaintiff who brings an implication claim must prove not just that the defendant acted with traditional actual malice with respect to the truth of the alleged implication, but also that the defendant intended or knew that the publication would convey that implication.

The decision also illustrates a point made by Tom Kelley of Faegre & Benson, LLP in last year's ABA conference in Boca: although there is no privilege to republish statements made by others, the context in which a republication occurs can permit a defendant to argue that the republication did not, or was not intended to, endorse the truth of the original statement, even when that statement is an uncorroborated rumor.

*Susan Antilla was represented by Jonathan M. Albano of Bingham McCutchen LLP in Boston, Massachusetts and William L. Chapman of Orr and Reno in Concord, New Hampshire. Robert A. Bertsche, Zick Rubin and Stuart Svonkin of Hill & Barlow in Boston, Massachusetts submitted an amici curiae brief in support of Antilla. Charles G. Douglas, III of Douglas, Leonard & Garvey in Concord, New Hampshire represented the plaintiff.*

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## **Prepublication Review**

### **Reports of Rumors: Focus on Government Agency**

#### **Howard v. Antilla, 2002 U.S. App. LEXIS 12851 (June 28, 2002)**

*Editor's Note: The LDRC Prepublication/Prebroadcast Committee is collecting reports on decisions that are based on a court's analysis of print or broadcast editorial copy. This Project will distill the lessons for lawyers who engage in prepublication review. Alice Neff Lucan will be a primary reporter on this Project. However, any member is welcome to contribute or to prompt report on particular cases, the more timely the better. Just send your ideas to LDRC or to Rob Bertsche and Jack Greiner, co-chairs of the Committee.*

**By Alice Neff Lucan**

By focusing on the actions of the government agency rather than the allegations about an individual, articles that might be otherwise problematic can be made more suitable for publication. That seems to be a lesson to learn from the *Howard v. Antilla* decision, reported here by Jonathan Albano. The one factor that emerges as important to the Court was that "[a] considerable portion of the article details the reporter's efforts to obtain confirmation of the rumor's truth or falsity from the SEC."

*(Continued on page 14)*

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## Prepublication Review of Reports of Rumors

*(Continued from page 13)*

The story focused on the inability of the regulatory agency to nail down the identity of the CEO of a publicly traded company, in spite of rampant and conflicting rumors in the marketplace.

As the facts are recited by the First Circuit it is apparent that the following elements were also important to the court:

1. Antilla had considerable and impressive experience as a business reporter.
2. She perceived a newsworthy connection between certain events in the market and the rumors she was hearing about Robert Howard.
3. She did a considerable amount of research, which included interviews with the subject of the story and the government agency responsible for regulation.
4. The article reported the rumor as rumor and discussed the regulatory agency's inability to confirm the story, one way or another.
5. The article took no position as to the truth of the rumor.
6. Both sides of the rumor were evenly reported.

It is of interest that the Court's opinion never mentions the words "neutral reporting" and the most recent LDRC Outline reports "no cases" on this issue in the First Circuit. So, perhaps the privilege survives without a name in the First Circuit.

*Alice Neff Lucan is a lawyer in Washington D.C., and an active member of the LDRC Prepublication/Prebroadcast Committee.*

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## Georgia Appeals Court Reverses Award in Radio Slander Case

A Georgia appeals court reversed a jury verdict requiring a man who called a radio station and identified a former co-worker as gay pay him \$280,000 for slander per se and intentional infliction of emotional distress. *Wolff v. Middlebrooks*, No. A02A0812, 2002 WL 1315803 (Ga. Ct. App. June 18, 2002) (reversing and remanding *Middlebrooks v. Wolff*, No. 99A4264 (Ga. Cir. Ct. Cobb County 2000)). The court found that while there was sufficient evidence to support liability for slander, the comments were not sufficiently outrageous to support a claim for intentional infliction of emotional distress. Because the verdict form did not allow the jury to distinguish which claim (s) were the basis of the damage award, the appellate court remanded the case for a new trial on the slander per se claim and on punitive damages.

### *Radio Show Caller Claimed Plaintiff Was Gay*

On the morning of December 11, 1998, Todd Wolff called radio station 99X, WNNX-FM, and spoke to the morning hosts, including Jimmy Baron. Wolff, who was then a manager at an Atlanta software development company, told Baron on the air that a former employee of his, Anthony Middlebrooks, was claiming to be having an affair with Baron. In fact, Wolff had fired Middlebrooks the previous day, after Middlebrooks complained about Wolff's behavior towards his wife at a company party. Wolff's comments were broadcast live, without a "dump button" which allows audio to be stopped before it is broadcast.

Middlebrooks sued Wolff — but not the radio station or the hosts — for slander per se, intentional infliction of emotional distress, and punitive damages based on the alleged aggravated circumstances of the firing. At trial, Cobb County State Court Judge Irma B. Glover denied a directed verdict for Wolff, and the jury awarded \$30,000 in actual damages, without specifying which claim led to the award, and \$250,000 in punitive damages. Wolff's post-

trial motions for judgment notwithstanding the verdict and for a new trial were both denied.

On appeal, Wolff argued that the trial court should have granted either a directed verdict or judgment notwithstanding the verdict. A three-judge panel of the Georgia Court of Appeals upheld the lower court's denial of judgment notwithstanding the verdict, but reversed the court's denial of a directed verdict on the intentional infliction of emotional distress claim. The panel consisted of Judge M. Yvette Miller, who wrote the opinion, Chief Judge G. Alan Blackburn, and Presiding Judge Edward H. Johnson.

### *Sufficient Evidence of Slander, but Not Emotional Distress*

The court found that there was sufficient evidence from which a jury could have determined that Wolff's on-air comments, by implying that Middlebrooks was having an illicit affair, constituted slander per se. But as to the intentional infliction of emotional distress claim, the appellate court quoted its own decision in a 1999 cases, *Lively v. McDaniel*, 522 S.E.2d 711 (Ga. App. 1999), in which it held that "defamatory remarks made ... to the public in general are classic examples of conduct that, though harmful to the plaintiff, was directed toward the hearer of the statements, not to the plaintiff, and thus is not actionable as intentional infliction of emotional distress."

The 1999 ruling was based on a 1992 Georgia Supreme Court case, *Ryckley v. Callaway*, 412 S.E.2d 826 (Ga. 1992), in which the court ruled that "[e]ven malicious, willful or wanton conduct will not warrant a recovery for the infliction of emotional distress if the conduct was not directed at the plaintiff."

Middlebrooks is represented by Christopher G. Moorman of Atlanta. Wolff is represented by William G. Leonard of Atlanta.

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***"[E]ven malicious, willful or wanton conduct will not warrant a recovery for the infliction of emotional distress if the conduct was not directed at the plaintiff."***

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## Hot 97 Morning Show Insults Not Defamatory

A New York State Supreme Court justice dismissed a defamation lawsuit against Emmis Communications, owner of New York City radio station Hot 97, and, Tarsha Nicole Jones, a Hot 97 DJ arising out of personal insults aired on the station's raucous morning show. *Mana Products, Inc. v. Emmis Communications Corp.*, (N.Y. Sup. Ct. N.Y.L.J. June 11, 2002, at 22).

The suit was filed by Mana Products, Inc., and company executive Barbara Novick, after the DJ called Novick a "big burly bitch, big gorilla bitch" who "smells" during the rowdy morning show in December, 2001. The DJ, a former Mana employee, discussed plaintiffs in a segment discussing the "worst job she ever had."

Mana and Novick each sued for defamation and intentional infliction of emotional distress. The judge dismissed Mana's defamation claim because the insults were directed at Novick only. Novick's claims were dismissed on three grounds. First, the insults were epithets or expressions of opinion that could not be verified as true or false. Further, in the context of a comedic radio show, reasonable listeners would conclude that the statements were merely the DJ's opinion of Novick. Although the court correctly dismissed the case, it made an obvious error when it improperly cited *Werner v. Doubleday*, 142 A.D.2d 100 (1988), suggesting that words of general abuse may be actionable if a plaintiff pleads special damages.

The intentional infliction of emotion distress claims were also dismissed. Isolated epithets are not outrageous and extreme enough to be "utterly intolerable by a civilized community," which is the standard in New York under *Murphy v. American Home Prods. Corp.*, 58 NY2d 293.

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## Arizona Bans Non-Compete Clauses in Broadcasting Employment Contracts

Employees of radio and television broadcasting companies in Arizona will no longer have to worry about non-compete clauses in their employment contracts after the state legislature passed a bill in May prohibiting such contract terms in broadcasting employment contracts. The statute states, "it is unlawful for a broadcast employer to require a current and prospective employee to agree to a non-compete clause." Az. St. §23-494.

Non-compete clauses typically prohibit an employee from working in a specific geographic area for a specific time after the termination of employment. Broadcasters' main reason for including a noncompete clause in employment contracts is to protect the financial investment in promoting and training on-air talent. But given the limited number of broadcasters in a local area, employees have argued that non-compete clauses severely limit their negotiating power. According to a recent article in the *American Journalism Review*, approximately 43% of all TV news people are covered by non-compete clauses.

The statute's stated goal is to initiate more balanced employment negotiations in the radio and television industry. The Arizona law is similar to laws in Illinois, California, Maine, and Massachusetts which ban non-compete clauses in broadcast employment contracts.

## Utah Prior Restraint Update

A Utah judge recanted the verbal order he issued last month that barred Utah's *Standard-Examiner* from running a story it was developing on a child custody case. See *MediaLawLetter*, June 2002 at 38. The judge explained that the order, issued from the bench after a public defender got upset that a reporter was involved in a child's case, was merely an admonition not to run the story, not a restraint against doing so. The judge said he would not oppose the story if published. The *Standard-Examiner* did not challenge the prior restraint because it had already decided not to run the story after the child's parents revoked their consent. However, the order generated public and media attention, which likely influenced the judge's withdrawal.

## **Ninth Circuit Refuses to Extend *Berger v. Hanlon* to Ridealong Cases with Different Facts**

**By Kelli Sager**

The Ninth Circuit recently limited the media's potential exposure for participating in a "ride-along" during the execution of a search warrant. In *Brunette v. Humane Society of Ventura County*, No. 00-56730 (9<sup>th</sup> Cir. June 28, 2002), (Trott, J., Thomas, J. and Wardlaw, J.) the panel affirmed the dismissal of a Section 1983 claim brought against the Ojai Valley News and reporter Tim Dewar for accompanying the local Humane Society onto private property during the execution of a search warrant. Significantly, in finding that the newspaper and reporter were not "state actors," as required under 42 U.S.C. § 1983, the court's decision essentially limited the Ninth Circuit's 1999 decision in *Berger v. Hanlon*, 88 F.3d 1155 to its particular facts.

### ***Reporter Accompanied Humane Society on Search Warrant***

This lawsuit arose after the Humane Society obtained a search warrant for the ranch belonging to plaintiff Glenda Brunette, a breeder of pedigree cats. The warrant included permission to photograph the premises during the search. Before executing the warrant, the Humane Society contacted the local newspaper, the Ojai Valley News ("OVN") and invited OVN to send a reporter to observe the search. Reporter Tim Dewar arrived at the ranch after the search began, and took photographs of the execution of the search warrant for later publication. There was no dispute that Dewar did not assist the Humane Society in executing the warrant. Brunette was arrested and charged with criminal animal neglect. However, the court later dismissed the charges, concluding that because of a legal technicality (which has since been changed by statute), the Humane Society did not have authority to execute search warrants. OVN published news stories about the execution of the warrant and subsequent legal proceedings, and an editorial about treatment of animals.

### ***Reporter Not a State Actor***

Brunette sued the Humane Society, OVN and Dewar in federal court. She alleged that the OVN defendants were

state actors and subject to liability under 42 U.S.C. § 1983. Brunette also asserted claims against OVN for trespass, invasion of privacy (intrusion), intentional infliction of emotional distress, conversion, conspiracy, declaratory relief, and for an injunction. Brunette did not assert any claims for defamation or disclosure of private facts. The OVN defendants moved to dismiss the lawsuit under F.R.C.P. 12, arguing among other things that they were not state actors and consequently could not be held liable under Section 1983. The district court granted OVN's motion, dismissing it from the action. Brunette subsequently settled with the Humane Society, and appealed the district court's dismissal of her claims against OVN.

In the published portion of its decision, the Ninth Circuit affirmed the district court's dismissal of Brunette's Section 1983 claim against OVN. The court analyzed Brunette's claim that OVN was a state actor — and consequently subject to liability under Section 1983 — under three different

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***The Ninth Circuit then rejected the "symbiotic relationship test" as a basis for establishing state action.***

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theories and rejected each. First, the court held that OVN and the Humane Society were not "joint actors." Joint action occurs if a private party is a "willful participant" with the state in an action depriving another of constitutional rights. However,

to constitute joint action, the actions of the government and the private party must be "inextricably intertwined" or there must be a conspiracy between the government and the private party. The court found that the actions of OVN and the Humane Society did not meet this test.

### ***Distinguishing *Berger v. Hanlon****

After discussing *Berger v. Hanlon*, 129 F.3d 505 (9<sup>th</sup> Cir. 1997), in which the Ninth Circuit "accepted the theoretical possibility of joint action between law enforcement and the media," the Court rejected that possibility here. Brunette's allegations of (1) a long-standing custom of the Humane Society to invite the media to observe execution of search warrants; and (2) the Humane Society's invitation to OVN to observe and photograph the search, were not sufficient to establish joint action. As the court explained, even

*(Continued on page 18)*



### **Ninth Circuit Refuses to Extend *Berger v. Hanlon***

*(Continued from page 17)*

accepting plaintiff's allegations as true, "[t]he generalized allegation of a wink and a nod understanding between the Media and the Humane Society does not amount to an agreement or a conspiracy to violate Brunette's rights in particular." The court pointed out that OVN did not help plan execution of the warrant (and only learned about it shortly before its execution), it did not receive any confidential information from the Humane Society, and it did not facilitate the Humane Society in executing the warrant. In addition, OVN retained complete control over the photographs it took and its later stories based on the search. Finding that "the Media's actions were its own; they were not 'state actions' directed by or jointly conceived, facilitated or performed by the Humane Society," the Ninth Circuit agreed with the district court that OVN and the Humane Society were not joint actors.

The Ninth Circuit then rejected the "symbiotic relationship test" as a basis for establishing state action. This requires a showing that "the government has 'so far insinuated itself into a position of interdependence (with a private entity) that it must be recognized as a joint participant in the challenged activity.'" The court found that Brunette's allegations were not "remotely sufficient" to meet this test. There was no financial integration between OVN and the Humane

Society, nor did Brunette claim that the Humane Society exercised any editorial control over OVN's news-gathering or publication. The court held that Brunette's claim that the Humane Society and the media each benefited from the Humane Society's practice of inviting the media to execution of its search warrants fell "far short" of the showing necessary for a symbiotic relationship.

Finally, the Ninth Circuit found that OVN was not a state actor under the "public function test." This can be met only if the action has been "traditionally the exclusive prerogative of the State." Brunette's claim that OVN entered the ranch "under the imprimatur" of the warrant and acted as though it was "part of the search brigade" did not establish that the media was engaging in a public function. Rather, as the Court noted, "[n]ews gathering is the quintessential private activity, jealously guarded from impermissible government influence."

In an unpublished portion of its decision, the court reinstated Brunette's trespass and invasion of privacy (intrusion) claims on the ground that sufficient facts had been alleged to allow these claims to go forward, but affirmed dismissal of the remaining five claims.

*Defendants Ojai Valley News and Tim Dewar were represented by partners Kelli Sager and Mary Haas and associate Rochelle Wilcox of Davis Wright Tremain's LA office.*

## **Jennifer Aniston Settles Lawsuit Prior to Trial**

### ***The "Friends" star was suing two magazines for running pictures of her topless***

Man's World Publications and Crescent Publishing Group reached a settlement with actress Jennifer Aniston, who filed a lawsuit for misappropriation after the publication of her topless photos. *Aniston v. Man's World Publications, Inc.*, No. 00-CV-11767 (C.D. Cal.). In her complaint, Aniston was seeking \$50,000 in damages, and an unspecified amount of punitive damages.

Aniston was suing over the publication of photos taken of her sunbathing in her back yard. According to reports, Aniston claimed a photographer had scaled a neighbor's wall and photographed her "reclining topless in her back yard." The pictures were then sold to magazines. The photographs originally appeared in European magazines before being printed in 1999 by *Celebrity Skin* and *High Society*.

On June 24, a week before a trial was to begin, U.S.

District Judge Ronald S. Lew denied Aniston's request for a jury trial. According to reports, Judge Lew said Aniston's lawyers had not properly made a jury demand under California law. On July 2 — the day the trial was to begin — the parties reached a settlement after a 2 and ½-hour in-chambers meeting with the attorneys. No details of the settlement were released.

Aniston has also received judgments and settled claims with other U.S. and European magazines that published the photos.

John H. Lavelly, Jr., Kevin L. James and Allison S. Hart, of Lavelly & Singer in Los Angeles, represented Aniston. Kent R. Raygor, Amy L. Johnson and Chad Justin Levy, of Sheppard, Mullin, Richter & Hampton in Los Angeles, represented Man's World Publications and Crescent Publishing Group.



## Update: Ohio Court of Appeals Upholds Summary Judgment Finds Newspaper's Use of Medical Files Not an Invasion of Privacy

In the latest ruling in a case that has floated up and down the Ohio court system, the Court of Appeals of Ohio upheld summary judgment for the *Akron Beacon Journal* and its attorney, Ronald Kopp, holding that the *Beacon Journal's* use of medical files in news reports obtained during discovery in a separate suit against the *Journal* was not an invasion of privacy. *Irvine v. Akron Beacon Journal*, 2002 WL 1371184 (Ohio Ct. App. Jun. 26, 2002). Judges Batchelder, Baird, and Carr heard the case.

The court concluded that the use of medical records of Geneva Irvine (the wife of Akron Police Chief Edward Irvine) obtained during the discovery of a lawsuit did not constitute invasion of privacy by publication. Furthermore, the court ruled that the newspaper did not invade Irvine's privacy when it contacted a nurse to confirm information in Irvine's medical file. The court also found that there was neither a valid fraud claim for leading the Irvines to believe that the medical information would not be used for news reports, nor a proper showing of emotional distress from the newspaper's use of Irvine's medical information.

### ***The Original Invasion of Privacy Claim***

The events giving rise to the case began in October 1998, when Geneva Irvine was hospitalized for injuries she reportedly blamed on her husband, the Akron chief of police. Irvine later dropped the allegations and no charges were ever filed against Edward Irvine. After Irvine dropped the allegations of spousal abuse, the *Beacon Journal* ran a series of stories about the alleged abuse and the internal police investigation that followed. The newspaper sent a reporter and photographer who were initially unsuccessful in their attempt to interview Geneva Irvine. According to the newspaper, the reporter tried to interview Irvine three times over a five-month period. The Irvines initially filed suit for invasion of privacy, trespassing, and stalking against the paper

(*Irvine I*).

The original complaint was subsequently withdrawn voluntarily but was later refiled with the added charge that the newspaper deliberately used its automatic telephone dialing system to harass the Irvines (*Irvine II*). The new harassment claim did not involve the *Beacon Journal's* newsgathering efforts. Instead, the alleged harassment stemmed from the newspaper's telemarketing department's use of an automated telemarketing device that was mistakenly allowed to run unattended on some nights and weekends, causing the Irvines to receive 18 calls. See *LDRC LibelLetter*, April 2000 at 7.

After the trial, the jury found that the reporters acted reasonably in their newsgathering but that the telemarketing constituted harassment. The jury awarded \$206,500 to the Irvines on the harassment claim. The liability verdict was upheld on appeal, but the damages were reduced by \$4,500 to match the statutory allowable amount. See

*LDRC LibelLetter*, January 2002 at 26.

### ***The Events of the Second Privacy Claim***

During *Irvine I*, the *Beacon Journal* requested the release of Geneva Irvine's medical records from the hospital that treated her for the alleged spousal abuse. To determine whether or not the medical records should be placed under seal, the trial court judge studied the records *in camera*. According to the Ohio Court of Appeals, the trial court judge reviewed the records and placed no restrictions on the medical files. Allegedly, the medical files revealed that Irvine told hospital personnel that her injuries were sustained from being assaulted by her husband.

Soon after the Irvines withdrew their initial complaint, the *Beacon Journal's* lawyer, Ronald Kopp, sent a letter to both the trial court judge and the Irvines, noting that unless told otherwise by the court the newspaper intended to use information in the medical records in a news story. The ap-

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**According to Judge Batchelder  
of the Ohio Court of Appeals,  
the trial court judge reviewed  
the records and placed no  
restrictions on the medical files.**

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## Use of Medical Files Not an Invasion of Privacy

(Continued from page 19)

pellate court noted that the Irvines failed to respond to the letter and that the trial court judge did not explicitly respond to the letter either. In addition, the court suggested that the trial court may also have implied that publication was okay because in a similar motion by the newspaper to release other discovery documents under seal, the trial court concluded that any information under seal during discovery would remain under seal. Hence, information not under seal was “fair game” for the newspaper.

On the same day that the Irvines refiled their complaint, (*Irvine II*) a *Beacon Journal* reporter contacted a nurse at the hospital that treated Mrs. Irvine to confirm notes written in Irvine’s medical records. And, on October 8, 1999, the paper published an article that focused on the allegations of domestic violence in the Irvine household, based on Irvine’s medical records. Immediately, the Irvines filed a motion requesting that the newspaper and its lawyer Ronald Kopp should appear in court and show cause why they shouldn’t be held in contempt of court for releasing the contents of the documents. The trial court ruled in December that the medical records were not under seal, and therefore, there was no violation of a court order.

In response to the October 8, 1999, article and the trial court’s refusal to hold Kopp and the *Beacon Journal* in contempt, the Irvines filed a suit against both the newspaper and Kopp for invasion of privacy by publication, inducing the unauthorized, unprivileged disclosure of non-public medical information, fraud, and intentional infliction of emotional distress. The trial court entered summary judgment for the defendants on all claims.

### ***Invasion of Privacy by Publication***

The Irvines claimed that the publishing of Geneva’s medical records in the *Beacon Journal* violated their privacy rights. The defendants argued in response that the possibly illegal activity of a city police chief is an issue of public concern, and therefore, the public has a right to know that Geneva Irvine initially blamed her injuries on

her husband. Citing the Ohio Sixth District Court of Appeals in *Early v. The Toledo Blade*, 130 Ohio App. 3d 302 (1998), the defendants argued that Ohio recognizes that how police officers handle domestic abuse complaints against police officers is a matter of public concern.

The court of appeals concluded that the allegation that a police chief physically abused his spouse is newsworthy and therefore publication was not an invasion of privacy. The court also noted that no valid privacy interest was at stake since the medical records were obtained through discovery and were never asked to be sealed by the Irvines. *Id.*

### ***Invasion of Privacy Via Contact with Medical Providers***

The second claim against the *Beacon Journal* and its attorney Ronald Kopp alleged that they induced the unauthorized, unprivileged disclosure of medical information — a violation of Title 23 of the (Ohio Rev. Code.) According to the complaint, Kopp’s dissemination of Irvine’s medical records to the newspaper afforded the paper the opportunity to review Irvine’s medical records, allowing the paper to interview a hospital nurse regarding what Irvine said during treatment.

The court concluded that Irvine’s claim should be dismissed because the Irvines had filed a civil action that would require an investigation into Geneva’s medical records and signed a medical release that permitted Kopp to obtain her records from the hospital. According to the court, the “appropriate inquiry is whether the release of the medical records by the physician or hospital was authorized,” and not “whether subsequent use of the medical records was restricted or unrestricted.” Furthermore, the court concluded that because Irvine signed a release form and the hospital nurse did not reveal any information and only validated the information in the medical records, there was insufficient evidence that the newspaper or Kopp could have reasonably believed that they were violating any doctor-patient confidentiality.

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***The court concluded that the allegation that a police chief physically abused his spouse is newsworthy and therefore publication was not an invasion of privacy.***

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## Use of Medical Files Not an Invasion of Privacy

(Continued from page 20)

### **The Fraud Claim**

With regard to the fraud claim against Kopp, the court concluded that even though in a deposition the law clerk in *Irvine I* explained that Kopp had told the Irvines and their counsel that the newspaper had no interest in publishing the medical records, there was insufficient evidence to show that the Irvines had relied on Kopp's supposed misrepresentation. The court explained that since the Irvines affidavit did not allege that they relied on Kopp's misrepresentation, they did not meet their burden to survive summary judgment.

The Irvines argued that they only released the medical records based on misrepresentations by both the newspaper and Kopp that the medical information would only be used in the legal proceedings. The court noted that, based on the record, no employees of the Beacon Journal were present during the discussion of the release of the records, and the Irvines had presented no evidence to the contrary, so the newspaper never had an opportunity to defraud the Irvines.

### **No Showing of Emotional Distress**

With regard to the Irvines claim that the publishing of information in Geneva's medical records coupled with the paper's interview of the hospital nurse constituted infliction of emotional distress, the court ruled that the activity of the newspaper was not extreme and outrageous. The court concluded the newspaper's activity was not "beyond all possible bounds of decency" because the trial court in *Irvine II* found the newspaper's activity did not violate a court order and that prior to publishing the article in dispute, the newspaper had sent a letter to the Irvines to which they did not respond.

Edward Glibert of Akron, Ohio was counsel for the Irvines. Bradford Gearing, John Hill, and Joy Malek of Scanlon & Gearing Co., L.P.A., Akron, Ohio were counsel for Ronald Kopp and the law firm of Roetzel and Andress. Edward Kemp and Karen Lefton, in-house counsel at the *Akron Beacon Journal* represented the paper.

## Fourth Circuit Dives Into Internet Personal Jurisdiction Case

The 4<sup>th</sup> Circuit heard oral argument on June 3, 2002, in *Young v. New Haven Advocate, et al.*, an appeal by two Connecticut newspapers of a Virginia federal district court's decision that it has personal jurisdiction over them in a libel case because the newspapers' web sites are accessible in Virginia.

### **Young v. New Haven Advocate**

The underlying lawsuit arises out of articles in the *New Haven Advocate* and *The Hartford Courant* addressing a highly controversial contract that resulted in sending nearly 500 Connecticut prisoners to Virginia prisons, including the Wallens Ridge Correctional Facility where plaintiff, Stanley Young, is the warden. Young alleged that some of the articles published by the newspapers imply that he is a racist who condones abuse of the inmates. Rather than answering the complaint, the newspapers filed a motion to dismiss, asserting

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***"When such information is posted on the Internet, the product is offered to a worldwide audience."***

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that two Connecticut newspapers with de minimus hard copy circulation in Virginia (*The Hartford Courant* sends eight mail subscriptions to Virginia. *The New Haven Advocate* has no mail subscribers in Virginia) and with employees who did not set foot there cannot, consistent with due process, be haled into court in that state.

In August 2001, Judge Glenn M. Williams of the United States District Court for the Western District of Virginia, rejected the newspapers' arguments. See *Young v. New Haven Advocate, et al.*, 184 F. Supp. 2d 498; 29 Media L. Rep. 2609 (W.D. Va. 2001). Focusing on the newspapers' website, the court observed that, "When such information is posted on the Internet, the product is offered to a worldwide audience."

The three-judge panel of the 4th Circuit, which included Judges Blane Michael (a Clinton appointee), Roger Gregory (a Clinton recess appointee who was later re-nominated by Bush), and Bobby Baldock (a senior judge visiting from the 10th Circuit who was appointed by Reagan), was active and focused. As ex-

(Continued on page 22)

### Fourth Circuit Dives Into Internet Personal Jurisdiction Case

(Continued from page 21)

pected, they quickly honed in on the “effects test” articulated by the U.S. Supreme Court in *Calder v. Jones*, 465 U.S. 783 (1984), examining counsel for both sides on whether the fact that plaintiff, a Virginia resident, would feel the effect of any harm in Virginia is sufficient to create personal jurisdiction there. Along the same lines, the panel aggressively questioned both attorneys regarding whether the article — in a publication directed to Connecticut readers but describing conditions and events in Virginia — was “targeted” to Virginia.

The court also addressed a number of other issues, including whether the minimal hard copy circulation is sufficient to confer jurisdiction apart from the Internet presence. On each of these issues, the court did not tip its hand, instead taking positions contrary to those advocated by whichever attorney was arguing at the time.

Robert D. Lystad of Baker & Hostetler in Washington, D.C., argued on behalf of the newspapers; R. Stuart Collins argued on behalf of the plaintiff.

in , or that incite violence, hatred, abuse or hostility toward, a person or group of persons by reason of or by reference to religious, racial, ethnic, national or regional affiliation are condemned.

Ill. Const. 1970, art. I, § 20. AIDA did not request damages or an injunction against the show.

#### *No Standing or Claim*

The trial court dismissed the case on two grounds: AIDA failed to show standing and failed to state a cause of action because the individual dignity clause was not meant to create a private cause of action, but merely to serve as a guide to ethical conduct.

On appeal, AIDA argued that (1) Time Warner had waived the standing issue by failing to bring it as an affirmative defense, (2) that the dignity clause creates a legitimate cause of action and (3) that the clause supports a suit brought under the Uniform Declaratory Judgment Act.

Reviewing the issue of standing *de novo*, the Appellate Court of Illinois, First District, found that since AIDA identified neither an injury nor any damages inflicted on a specific person that were traceable to Time Warner, it failed to show standing. Further, the appellate court affirmed that the individual dignity clause was merely hortatory by citing Illinois Constitutional commentary stating that the provision creates no cause of action.

Finally, the court held that the Uniform Declaratory Judgment Act does not provide a basis for declaratory relief in this case. The act requires that the issue at hand be an actual controversy, not just an abstract question. Since AIDA failed to show standing, and failed to state a valid cause of action, there is – bada bing bada boom – no actual controversy and the claim was not actionable.

Time Warner Entertainment was represented by Timothy Elliot of Kirkland & Ellis Chicago and Tom Yannucci, Christopher Landau and Elizabeth Petrela of Kirkland & Ellis in Washington, D.C. AIDA was represented by Enrico Mirabelli and Michael Pollelle of Chicago.

### Fuggedaboutit: Illinois Appeals Court Affirms Dismissal of Sopranos Lawsuit

An Illinois appellate court unanimously affirmed the dismissal of a lawsuit against Time Warner Entertainment by the Italian American Defense Association (AIDA) for allegedly violating the “individual dignity” clause of the Illinois Constitution by portraying Italian-Americans negatively on HBO’s hit show *The Sopranos*. *AIDA v. Time Warner Entertainment Company*, No. 1-10-3827, 2002 WL 1402024 (Ill. App. 1<sup>st</sup> Dist. June 28, 2002) (South, J., Hall, J. and Cerda, J.). See also *LibelLetter*, September 2001 at 18.

Last year AIDA filed a complaint for a declaratory judgment that *The Sopranos* violated the individual dignity clause of the Illinois Constitution. That clause provides that:

To promote individual dignity, communications that portray criminality, depravity or lack of virtue



## Online Defamation Law: Defining the Content Provider Under Section 230

By Laura A. Heymann

From the first days of its judicial construction, 47 U.S.C. § 230 ("Section 230"), a surviving portion of the Communications Decency Act of 1996, has been interpreted to provide broad immunity to Internet service providers and other interactive computer service providers against claims arising from tortious third-party content.

In particular, Section 230's provision that "[n]o provider or user of any interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider" has been held, in the words of the Fourth Circuit, to create "a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service."

A recent decision by Judge Dickran Tevzian of the U.S. District Court for the Central District of California, however, makes a surprising departure from the previous line of cases construing Section 230. *Carafano v. Metroplash.com, Inc.*, No. 01-0018 DT (CWx) 2002 WL 832529, 2002 U.S. Dist. LEXIS 10614, 30 Media L. Rep. 1577 (C.D. Cal. Mar. 12, 2002)

In holding that an interactive computer service provider can lose Section 230 immunity simply by soliciting information in a certain form from third parties, the *Metroplash* decision, if followed by other courts, threatens to put service providers at risk of liability for what would otherwise be considered to be wholly third-party content.

### ***Profiles for a Date Service***

*Metroplash* arises from an online dating service called Matchmaker.com, which, as the court described it, "permits members to search a database containing profiles posted by other members." The profiles are organized into "communities," each focusing on a particular geographic region, age group, interest, or lifestyle.

In order to become a member, individuals must fill out an application and complete a questionnaire tailored for

each community, consisting of up to 62 multiple-choice questions and a series of essay questions, at least one of which must be answered. The questions, the answers to the questions, and any optional photographs the member submits constitute the member's profile. Members can search profiles within their "community" and send e-mails to and chat with other members of the community online.

Members remain anonymous on the service; although each member has a unique user name, Matchmaker.com does not collect personal information about the member other than their responses to the questionnaire and billing information. Although Matchmaker.com does review photographs that are submitted before they are posted to ensure compliance with the site's terms of service, it does not review the profiles or otherwise verify the textual information

submitted, except in response to members' complaints about inappropriate content posted by others.

The terms of service for the site, to which all members were required to agree, specifically prohibit including a home address, e-mail address, telephone number, or sexually suggestive

language in a profile.

### ***Suit Over False Profile***

The case was brought by an actress who goes by the stage name "Chase Masterson," known for her recurring role on the television program "Star Trek: Deep Space Nine." On October 23, 1999, an unknown individual created a Matchmaker.com profile for "Chase 529" that included Masterson's home address, an e-mail address, and four photographs of the actress.

Messages sent to the e-mail address received an automatic response that included Masterson's home address and telephone number. Masterson also alleged that the essay answers and the responses to the multiple choice questions included in the profile contained a number of false statements about her, including that she was "looking for a one-night stand" and that she "might be persuaded to have

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***The Metroplash decision, if followed by other courts, threatens to put service providers at risk of liability for what would otherwise be considered to be wholly third-party content.***

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(Continued on page 24)



## Online Defamation Law

(Continued from page 23)

a homosexual experience,” and that the profile disclosed she lived alone with her son.

Masterson alleged that as a result of the profile, she received a number of obscene telephone calls and correspondence, and that she and her son were forced to leave their home. The court noted that the “undisputed evidence” showed that Matchmaker.com was “unaware of the contents of the profile when it was posted.”

Masterson filed suit against Matchmaker.com, Inc., and various related defendants in October 2000, alleging invasion of privacy, misappropriation of right of publicity, defamation, and negligence. The defendants moved to dismiss, at least in part on reliance on Section 230’s provision that “[n]o provider or user of any interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” After that motion was denied, the defendants filed a motion for summary judgment on January 30, 2002, arguing once again that all of Masterson’s claims were barred by Section 230.

### Defining “Content Provider”

The court agreed that Matchmaker.com qualified as an “interactive computer service; accordingly, whether the defendants could avail themselves of Section 230 protection depended on whether the offensive information in the profile was “information provided by another information content provider.” Because Section 230 defines an “information content provider” as “[a]ny person or entity that is responsible, in whole or in part, for the creation or development of any information provided through the Internet or any other interactive computer service,” the court deemed the question to be whether Matchmaker.com could be deemed “responsible, in whole or in part, for the creation or development” of the offending profile.

The court concluded that Matchmaker was an “information content provider” with respect to the profiles on the service because Matchmaker.com users “do not simply post whatever information they desire”; rather, their profile consists of their answers to the multiple choice and essay questions Matchmaker provides, questions that, the court

noted, were “tailored for each Matchmaker community.” Unlike an online bulletin board or similar forum, noted the court, Matchmaker.com contributed to the content of the profiles “by asking specific questions with multiple choice answers and specific essay questions.”

In short, the court concluded, Matchmaker.com “takes an active role in developing the information that gets posted.”

As a result, the court held, Matchmaker.com was an “entity that is responsible . . . in part, for the creation or development of information provided through the Internet or any other interactive computer service” and so could not avail itself of Section 230 immunity (although its motion for summary judgment was ultimately granted on other grounds).

### Putting it in Context

The *Metrosplash* court’s holding — that an interactive computer service provider can lose Section 230 immunity by soliciting a particular type of third-party content — runs contrary to the holdings of every court to have considered this issue.

As the Fourth Circuit noted in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), the “plain language” of Section 230 “creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.” Congress deemed this broad immunity necessary, as the *Zeran* court recognized, to minimize “the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium,” to “keep government interference in the medium to a minimum” and to encourage service providers to “self-regulate the dissemination of offensive material over their services” by eliminating the risk of notice-based liability due to self-policing efforts.

The question, then, is when, in *Zeran*’s terms, should content be deemed to have “originat[ed] with a third-party user of the service” or, in Section 230’s language, deemed to be “information provided by another information content provider.”

The fact that the interactive service might be an “information content provider” for *some* content on its ser-

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***The Metrosplash court’s holding runs contrary to the holdings of every court to have considered this issue.***

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## Online Defamation Law

(Continued from page 24)

vice is irrelevant (and, indeed, contemplated by the statute's reference to information provided by "another information content provider") — the issue is whether the *offensive content at issue in the litigation* was provided by the interactive service or by a third party.

In most instances, this determination is simple: an e-mail sent between two users of the service or content posted by a user on a message board is almost certainly "information provided by another information content provider," just as any terms and conditions of use posted on the service almost certainly are not.

Under Section 230's plain language, if a third-party is wholly or partially responsible for the creation of the content at issue, a service provider should benefit from immunity.

### **Contrary to Prior and Post-Decisions**

Of course, there is undoubtedly some point at which the interactive service's involvement in the creation of what would otherwise be thought to be third-party content rises to such a level that the content can no longer fairly be said to be "information provided by another information content provider" (such as when the service and the third-party are, in fact, co-authors of the content). But prior to the *Metrosplash* decision, no court had ever held that an interactive service's solicitation or encouragement of third-party content rose to such a level — indeed, the decisions have held precisely the opposite.

In *Ben Ezra, Weinstein & Co., Inc. v. America Online, Inc.*, 206 F.3d 980 (10th Cir. 2000), for example, the plaintiff, a publicly owned company, argued that AOL worked so closely with the third-party provider of the stock quotation information at issue that AOL should be considered the "information content provider" of that content. The court rejected this argument, noting that AOL's only involvement, consisting of communications with the third-party provider regarding errors in the stock information or the deletion of inaccurate information, did not rise to the level of development or creation of the stock quotation information.

Similarly, in *Blumenthal v. Drudge*, 992 F. Supp. 44

(D.D.C. 1998), the fact that AOL reserved the right to remove content from Matt Drudge's gossip column, which was carried on the AOL service, if AOL deemed the content to violate its terms of service, did not eliminate AOL's ability to invoke Section 230 immunity, given that Drudge was the only person who "edited, checked, verified, or supervised" the information in the column. Indeed, the court concluded (albeit begrudgingly) that Section 230 provides immunity "even where the interactive service provider has an active, even aggressive role in making available content prepared by others."

In both *Ben Ezra* and *Blumenthal*, then, the service provider was able to invoke Section 230 immunity notwithstanding the fact that it had contracted for the information at issue — and, in the *Blumenthal* case, even promoted the availability of the content on its service. Thus, the mere

fact that a service provider invites a third party to provide a particular kind of content for its service does not transform the service provider into an "information content provider" of that content, even if, as in those cases, the service provider reserves the right to

delete content after its creation.

In such cases, there is no question that the third party is "responsible, in whole or in part, for the creation or development" of the content at issue, and so that content remains "information provided by another information content provider."

This necessary conclusion was recognized by the Court of Appeals of Washington in *Schneider v. Amazon.com, Inc.*, 31 P.3d 37 (Wash. Ct. App. 2001), in which the court rejected the plaintiff's contention that the online bookseller Amazon.com was an "information content provider" with respect to negative customer book reviews featured on its website simply because Amazon reserved both editing and licensing rights in the posted material.

Relying on *Zeran* and *Blumenthal*, the court held that Amazon.com was nevertheless entitled to Section 230 immunity because there was no allegation that Amazon.com, as opposed to the visitors to its site, was responsible for creating the book reviews the plaintiff found offensive.

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**Prior to the *Metrosplash* decision, no court had ever held that an interactive service's solicitation or encouragement of third-party content rose to such a level.**

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## Online Defamation Law

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Similarly, in *Gentry v. eBay, Inc.*, 2002 Cal. App. LEXIS 4329 (Cal. Ct. App. 2002), a decision that postdates the *Metrosplash* opinion, the court rejected the plaintiffs' attempt to hold the auction site eBay responsible for the product representations made by its customers or for the reviews its customers submitted rating other participants (see page 49).

Although eBay created the categories in which items appeared, it was the individual customers, the court noted, who chose the particular category in which the item they were offering for sale would be listed, and therefore it was those customers who created the false identification that was the target of the lawsuit.

Similarly, although eBay invited comment on other participants, and compiled that commentary in a particular format, it was the third-party users, not eBay, who created the text of the commentary at issue in the case.

In a passage that goes to the heart of the *Metrosplash* court's confusion, the *Gentry* court wrote:

We note the fact appellants allege eBay is an information content provider is irrelevant if eBay did not itself create or develop the content for which appellants seek to hold it liable. It is not inconsistent for eBay to be an interactive service provider and also an information content provider; the categories are not mutually exclusive. The critical issue is whether eBay acted as an information content provider with respect to the information that appellants claim is false or misleading. . . . Appellants' negligence claim is based on the assertion that the information is false or misleading because it has been manipulated by the individual defendants or other co-conspiring parties. Based on these allegations, enforcing appellants' negligence claim would place liability on eBay for simply compiling false and/or misleading content created by the individual defendants and other co-conspirators. We do not see such activities transforming eBay into an information content provider with respect to the representa-

tions targeted by appellants as it did not create or develop the underlying misinformation.

Against this backdrop, the *Metrosplash* court's decision appears to be an aberration.

In the court's view, the mere fact that Matchmaker.com encouraged the creation of third-party content — by providing multiple-choice and essay questions for its members to answer and combining their responses into profiles viewable by others — transformed Matchmaker.com into the primary “information content provider” of its members' responses. This is apparently true even though certain information the member in that case posted in response to the essay questions, such as Masterson's home address, was not solicited in any way by Matchmaker.com (and, indeed, violated Matchmaker.com's terms of service). And even with respect

to the multiple choice answers, the offensive conduct was not the answers themselves (which were drafted by Matchmaker.com for selection by its members), but the *association* of those answers with Masterson, an association created solely by the third-party member

via the profile he established on the service.

In short, the *Metrosplash* court failed to consider whether Matchmaker.com was in any way an “information content provider” with respect to the content for which Masterson sought to hold it liable: Matchmaker.com was arguably the sole “information content provider” for the multiple-choice and essay questions, but it was not such a provider for the content attributing the answers to those questions to Masterson. Because the third-party member was “responsible, in whole or in part, for the creation or development” of the content Masterson found offensive, that content was “information provided by another information content provider,” and Section 230 immunity should have barred her claims.

The *Metrosplash* decision, if viewed as persuasive by other courts, has implications not only for Internet service providers, but for any online entity that qualifies as an interactive computer service provider under Section 230. If encouraging or guiding participation by customers in an online activity is enough, as the court suggests, to be deemed to

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**Given its departure from the long line of Section 230 jurisprudence, the *Metrosplash* rationale may well prove to be an anomaly.**

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(Continued on page 27)

## Online Defamation Law

*(Continued from page 26)*

“take[] an active role in developing the information that gets posted,” then a variety of interactive services and features will not fall within Section 230’s protections.

Service providers running moderated chat rooms or bulletin boards, for example, in which the host suggests topics of conversation or otherwise guides participation, may be deemed to have developed the discussion that results.

Entities that offer online polls or questionnaires may run a risk of liability based on the participants’ responses, as would online services that provide templates or guides to creating content on the service. This would apparently be true even if, as in *Metrosplash*, the service provider does not review any of the third-party content before it is posted or maintain any prepublication editorial control over third-party

content.

Given its departure from the long line of Section 230 jurisprudence, the *Metrosplash* rationale may well prove to be an anomaly. Indeed, as noted, every court to have considered the question at issue in that case has recognized that broad limitations on liability are necessary to fulfill Congress’s mandate that the Internet remain a robust medium of communication with a minimum of government interference. Should *Metrosplash* gain currency, however, service providers may need to be careful of what they ask their customers — or they may find themselves wishing they’d never asked the question at all.

*Laura A. Heymann is Senior Counsel at America Online, Inc., in Dulles, Virginia. The views expressed in this article are the author’s own.*

## Freelance Reporter Wins Reversal of Injunction

### ***Court holds that release of names would not increase the security risk guards already face***

On July 9, the Sixth Circuit Court of Appeals reversed a lower court’s injunction that prohibited a freelance reporter from disseminating information he had lawfully obtained from the Ohio Department of Commerce. *See County Security Agency v. Ohio Dept. of Commerce*, 2002 WL 1456904 (6th Cir. July 9, 2002). Michael J. Betzold, a freelance journalist, had been enjoined by the district court for the Northern District of Ohio from disclosing the names and “all other information” he had obtained from the Ohio Department of Commerce regarding security guards hired by AK Steel. In an opinion by Judge Ronald Lee Gilman, the Sixth Circuit reversed the injunction, finding it to be an improper prior restraint.

In September 1999, AK Steel locked out its unionized workforce at its Mansfield, Ohio, facility. In addition to replacement workers, AK Steel also hired County Security Agency to provide security at the plant. The security guards were brought in because of a violent atmosphere that surrounded the labor dispute. The violence included security guards being beaten as they escorted replacement workers to the facility.

### ***The Original Lawsuit and Issuance of the Injunction***

Betzold and two other freelance journalists were hired by the United Steelworkers of America to investigate and

report on the companies providing security guards and hiring replacement workers in labor disputes. The report was to form the basis for a published article about the labor dispute. Pursuant to Ohio law, all security guard companies must obtain registration applications from their employees and file these documents with the Ohio Department of Commerce. On February 10, 2000, Betzold submitted a written request to the ODC for County Security Agency’s registration records. The ODC faxed these documents to Betzold.

Despite faxing the documents to Betzold, the ODC withheld certain information, such as the security guards’ social security numbers, home addresses, telephone numbers, dates of birth, fingerprints and photographs. On February 23, 2000, County Security Agency and AK Steel filed a suit against the Department of Commerce, alleging that the release of information about the security guards would violate their constitutional rights. CSA and AK Steel filed a motion for a preliminary injunction against the ODC. Betzold was not a party to the original action.

One week later, however, CSA and AK Steel filed a motion seeking a TRO to prevent the ODC and Betzold from disclosing the information contained in the guards’ registration applications. On March 3, 2000, the district

*(Continued on page 28)*



## Freelance Reporter Wins Reversal of Injunction

*(Continued from page 27)*

court held an in-chambers conference and issued a TRO. Betzold was not notified. He received a copy of the TRO the following day. Betzold made a motion to intervene, which was granted. However, the same day that Betzold's motion to intervene was granted, the court also issued a "Stipulated Preliminary Injunction," signed by counsel for CSA, AK Steel and ODC. The injunction enjoined the ODC and Betzold from releasing "not only the names of the guards, but also and 'other information' from the registration applications."

On December 13, 2000, the district court denied Betzold's motion to dissolve the injunction. Betzold appealed this decision to the Sixth Circuit.

### ***The Appeal: Procedural Matters***

CSA and AK Steel tried to block Betzold's appeal to the Sixth Circuit by arguing that Betzold lacked standing to pursue the appeal and suffered no "injury in fact." The Sixth Circuit dismissed this argument, almost out of hand. The court, quite bluntly, stated:

The SPI's broad prohibition on the disclosure of "other information" in the materials Betzold received from the ODC results in a chilling effect on his ability to publish his news article, because Betzold might be found in contempt of court if he were to do so. As a result, Betzold has suffered an "injury in fact" sufficient to give him standing to appeal the TRO and SPI.

The court did not review the TRO — which had expired in April 2000 — because it was moot. Thus, the court turned to the Stipulated Preliminary Injunction. The Sixth Circuit held that Betzold had become a party to the action by intervening, and thus was properly subject to the injunction. But to the notice and hearing requirements, the Sixth Circuit held that the district court was incorrect not to consider Betzold's motion to intervene at a hearing prior to the issuance of the injunction. The Sixth Circuit said that the district court "could not fairly expect Betzold to anticipate

that his motion to intervene would constitute his only opportunity to be heard concerning the substantive basis for denying an injunction." However, the Sixth Circuit held that Betzold did have a hearing when the district heard his motion to dissolve the injunction.

### ***The Appeal: First Amendment Analysis***

Turning to the First Amendment analysis, the Sixth Circuit held that the injunction was an improper prior restraint, even as to the guards' names. From the outset, Betzold conceded that he was not going to disseminate the names of the guards. Betzold considered the names to have "no news value." Betzold was more interested in general back-

grounds of the security guards and the "impact that the security companies have on the communities in which they operate."

From the documents Betzold had discovered that most of the guards who were hired by CSA were from outside

Ohio and that the ODC had "not expeditiously carried out the required background checks on the guards." The Sixth Circuit was quick to find that restraining the publication of this "other information" violated Betzold's First Amendment rights. The court said the information was "of public concern because it pertains to actions of both the government and AK Steel with respect to the labor dispute." Furthermore, the "other information" posed "no discernable threat to the guards."

As to the disclosure of the guards names, CSA and AK Steel argued that the injunction was justified because of the need to protect the security guards' safety. The court recognized the violence that surrounded the AK Steel labor dispute. However, the court concluded that even if the names of the guards were disclosed, there would be no appreciable increase to the security risk that the guards currently faced.

Philip Hostak and Robert Weinberg, of Bredhoff & Kaiser in Washington, D.C., represented Betzold. Adam P. Hall, Matthew C. Blickensderfer and Thomas D. Amrine, of Frost, Brown & Todd in Cincinnati, represented AK Steel and CSA.

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***The court said the information was "of public concern because it pertains to actions of both the government and AK Steel with respect to the labor dispute."***

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## District Court Practice of Not Filing Legal Memorandum in Public Court Files Unconstitutional

By Howard A. Merten

On June 12, the First Circuit declared that the District of Rhode Island's practice of not making litigants' memoranda public violated the First Amendment presumption of access to court records. *In re Providence Journal Co.*, Nos. 02-1329, 02-1475, 2002 U. S. App. Lexis 11283 (1st Cir. 2002) (opinion by Judge Seyla, joined by Chief Judge Boudin and Judge Lipez).

The ruling came as a result of petitions for mandamus filed by the Providence Journal Company to review several of the district court's policies covering access to court filings and evidence in the criminal racketeering prosecution of Providence Mayor Vincent "Buddy" Cianci, Jr. and others. The First Circuit also reviewed portions of the district court's Non-Dissemination Order which made the lower court's approval a condition before memoranda could become public. The

First Circuit set forth specific guidelines for future high profile cases requiring, among other things, document-by-document consideration of redaction as a less restrictive alternative to wholesale sealing of records.

In a related second petition for mandamus, the Providence Journal sought access to audio and videotape evidence submitted during the *Cianci* trial. The district court had rejected that request on the grounds that copying the evidence was not feasible and that it had made arrangements for the press to observe the taped evidence as it was played in open court. The First Circuit, relying on what it found to be unique technological difficulties, found that the district court did not abuse its discretion in rejecting the *Journal's* request.

### ***Access to Memoranda***

The Rhode Island federal district court's treatment of litigant's memoranda was virtually unique in the federal court system. Under a long-standing policy, memoranda

did not become part of the case file available to the public in the clerk's office. Rather, memoranda were transmitted directly to the judge's chambers. (A survey conducted by the *Journal's* counsel revealed that only four other federal district courts follow this practice—New Jersey, Mississippi, Nebraska and the Southern District of Alabama.) The *Providence Journal* filed a motion seeking access to memoranda, charging that this practice interfered with its ability to gather news and reversed the constitutional presumption of access to judicial records. The district court upheld its policy.

The First Circuit found that the First Amendment right of access to judicial records applied to memo-

randas. It reviewed and rejected the justifications proffered by the district court in support of its policy of non-public filings.

The First Circuit swept aside logistical concerns respecting retrieval of memoranda

and storage problems in the face of the right of public access. It also rejected the district court's claim that the non-filing policy discouraged over-zealous counsel from attempting to gain tactical advantages by placing improper material in their memoranda, noting that the court had more specific antidotes (sanctions, contempt) should such problems occur.

Finally, the First Circuit addressed the district court's concern that memoranda in criminal cases might disclose grand jury or other prejudicial materials. Again the appellate court determined that any such concerns were more appropriately addressed on a case-by-case, narrowly tailored basis.

The court exercised its advisory mandamus powers to declare that the district court's treatment of memoranda violated the First Amendment. It invalidated the practice with respect to memoranda filed in civil cases as well, holding that a common law presumption of access applied to these filings, and none of the prof-

*(Continued on page 30)*

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***The First Circuit set forth specific guidelines for future high profile cases requiring, among other things, document-by-document consideration of redaction as a less restrictive alternative to wholesale sealing of records.***

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## Not Filing Legal Memorandum in Public Court Files Unconstitutional

(Continued from page 29)

ferred reasons for keeping memoranda out of the public court file was sufficiently compelling to defeat that right.

### *Managing Party Memoranda*

The *Providence Journal* also challenged the district court's order directed specifically to memoranda filed in the *Cianci* case. The district court had entered an order declaring that, in light of the public interest surrounding the *Cianci* case, it would review all memoranda and decide whether it would release specific memoranda to the public. The order required counsel to certify whether the memorandum they filed contained information barred from public disclosure in the court's previously issued Non-dissemination Order. (Earlier instances of misconduct, including leaks of grand jury materials, had prompted the district court to enter the Non-Dissemination Order that forbade counsel and parties from commenting on the case or disseminating information respecting the testimony, character, credibility or reputation of any witness, any information presented to the grand jury, and the like).

The *Providence Journal* challenged this order as well, arguing it was overbroad and reversed the presumption of access to judicial records by requiring judicial review of every memoranda before these records became public. The *Journal* also challenged that portion of the order in which the district court refused to consider redacting memoranda as a means of enhancing access.

The First Circuit questioned the district court's reluctance to rely on counsel to identify memoranda warranting court review. However, it held that nothing prohibited a district court from taking on the burden of screening all memoranda in a case so long as specific findings documented the existence of a threat to a defendant's fair trial. However, the First Circuit set out four specific criticisms of the District Court's order.

First, the order did not incorporate a specific timetable obligating the district court to complete its self-imposed screening obligations promptly and render a timely decision.

Second, the First Circuit criticized as unduly delaying public access the district court's practice of waiting for all memoranda on a given motion to be filed before reviewing

the memoranda.

Third, the order did not require the district court to state whether it intended to unseal the memoranda at some point in the future.

Fourth and finally, the appellate court found that "the district court's refusal to consider redaction on a document-by-document basis is unsupportable."

The First Circuit affirmed the obligation of all courts to consider all reasonable alternatives to foreclosing the constitutional right of access. It also criticized the district court's finding that references to improper material in memoranda was generally inextricably intertwined with disclosable material rendering redaction impractical. The First Circuit declared that courts must consider the feasibility of redaction on a document-by-document basis and make specific findings to support their determinations.

As for the *Cianci* case, itself, the First Circuit left the specifics of corrective action to the district court, noting that the trial had all but concluded and that advisory mandamus was important for setting the standards in future cases.

### *The Journal's Request to Copy Taped Evidence*

Key evidence in the *Cianci* trial consisted of numerous audio and videotapes of secretly recorded conversations of Providence City Hall functionaries. In preparation for trial, the U.S. Attorneys office had transferred the tapes onto CD-ROM. At trial, the U.S. Attorney used a software program to create and play clips of the tapes from the CD-ROM to the jury. The press and public could view the excerpts as they were played via monitors set up in the courtroom and in a remote overflow room.

Before the trial, various media outlets, including the *Providence Journal*, sought to obtain copies of the taped evidence shown to the jury. Originally, the district court's media liaison planned to have the parties submit extra copies of taped evidence for distribution to the media, but the district court rejected that proposal. On the eve of trial, the court also rejected the *Journal's* request to make copies from the original tapes submitted into evidence.

The *Providence Journal* filed a second mandamus peti-

(Continued on page 31)

## Not Filing Legal Memorandum in Public Court Files Unconstitutional

(Continued from page 30)

tion, seeking copies of the taped evidence. Relying on *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), the First Circuit held that the Journal's First Amendment right of access to the materials was satisfied by their ability to see or hear the tapes as they were played to the jury.

The court then considered the common law right of access to judicial records. The First Circuit held the tapes fell within the ambit of that right, but that, given the contradictory state of the record as to the feasibility of copying the excerpts involved that it "would leave this decision to the informed discretion of the trial court, so that it may be exercised with due regard for the idiosyncratic facts and circumstances of a specific case." It held that based on the state of the record before it, and upon the fact that the evidence was presented to the public and media during the trial, it could not say that the district court's denial of the request for copies during the trial was an abuse of discretion.

*Howard Merten and Gordon Cleary, principals of Vetter & White in Providence, Rhode Island, represented the Providence Journal Company.*

*Lucy A. Dalglish filed an Amicus Curiae brief on behalf of the Reporters Committee for Freedom of the Press, the American Society of Newspaper Editors, the Society of Professional Journalists, The Radio-Television News Directors Association, and the Newspaper Association of America. Jerry Elmer of Goldenberg and Muri filed an Amicus Curiae brief on behalf of the Rhode Island Affiliate of the American Civil Liberties Union.*

*William Patton, Joan McPhee and Michele Perillo of Ropes & Gray represented the Honorable Ernest C. Torres, Chief Judge, U.S. District Court for the District of Rhode Island.*

## Prompted by Media Motion, Judge Lifts Juror Gag Order in Earth First Civil Rights Case

By Roger R. Myers, Lisa M. Sitkin and  
Henry M. Burgoyne III

At a time when gag orders prohibiting communications between the press and jurors appear to be on the rise, the *San Francisco Chronicle* and the *Oakland Tribune* recently succeeded in convincing U.S. District Court Judge Claudia Wilken to lift a post-trial gag order prohibiting jurors in a civil rights case in Oakland, California from discussing any aspect of the case or their jury service.

The case, *Bari v. Buck*, No. 91-CV-1057 CW (N.D. Cal.), involved claims by the now-deceased Judi Bari and Darryl Cherney, two members of the environmental group Earth First, that Oakland police officers and FBI agents had violated their civil rights by trumping up charges and arresting them following the explosion of a bomb in their car in 1991.

After nearly 10 years of legal wrangling and a several-week trial, the jury deliberated for 17 full days before reaching a verdict for the plaintiffs and awarding them \$4.4 million in damages. During the deliberations, the defendants raised concerns that the jurors' exposure to an Earth First rally outside the courthouse might have unduly influenced the verdict. Judge Wilken held an evidentiary hearing to conduct voir dire on the issue before dismissing the jury. Although the jurors denied that the rally affected the deliberations or the verdict, Judge Wilken took the highly unusual step of ordering them not to discuss the case at all, citing concerns about protecting the integrity of the verdict.

When the media attempted to interview jurors about the case and to gain insight into the lengthy deliberations, the jurors refused to talk, citing Judge Wilken's order. Accordingly, the *Chronicle* and the *Tribune* moved to intervene and requested that Judge Wilken lift or modify the gag order.

### ***Newspapers Argued that Gag Order Violated First Amendment***

The newspapers argued that the blanket gag order violated the First Amendment rights of the press, the public and the jurors themselves. Although there are very few reported

(Continued on page 32)

## Judge Lifts Juror Gag Order

(Continued from page 31)

cases on the issue of post-trial juror gag orders, those that have been decided are unanimous in holding that they are highly disfavored and can only be imposed if the court finds a “clear and imminent danger” to a “compelling governmental interest” that cannot be protected by less drastic means.

For example, in *Journal Pub. Co. v. Mechem*, 801 F.2d 1233, 1236-37 (10th Cir. 1986), the Tenth Circuit reversed a post-trial gag order prohibiting jurors from discussing the verdict. And in *U.S. v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978), the Ninth Circuit vacated on mandamus a post-trial gag order forbidding the media from interviewing jurors. Several state courts have followed suit, holding that restrictions on the ability of jurors to communicate with the media are presumptively unconstitutional. *See, e.g., Cape Pub., Inc. v. Braden*, 39 S.W.3d 823, 826-27 (Ky. 2001) (standing order regulating post-trial communications with jurors unconstitutional); *State, ex rel. Cincinnati Post v. Ct. of Common Pleas*, 570 N.E. 2d 1101, 1102-04 (Ohio 1991) (vacating, on prohibition, post-trial order barring anyone from discussing case with jurors).

As the Tenth Circuit observed in *Journal Pub.*, “any inhibitions against news coverage of a trial carry a heavy presumption of an unconstitutional prior restraint.”

In response to Judge Wilken’s specific concerns, the newspapers pointed out that the court had already heard evidence from the jurors concerning their exposure to the Earth First rally, and that, based on this evidence, a post-verdict challenge on that ground appeared to be foreclosed. Moreover, even if the court was justified in imposing limits on jurors’ communications with the parties to prevent them from “ransacking the jurors in search of some ground ... for a new trial [or appeal],” that interest was insufficient to justify a prohibition on juror comments to the press. *See, e.g., Journal Pub.*, 801 F.2d at 1236 (“the media has less incentive to upset a verdict than does a losing party or attorney”); *Express News*, 695 F.2d at 810 (media interviews with jurors are

sought for a purpose other than attacking the verdict and cannot therefore be regulated); *Cape Pub.*, 39 S.W. 3d at 826 (distinguishing between post-trial contact with the parties and media).

Judge Wilken set a hearing on the media’s motion and gave the parties an opportunity to respond. The plaintiffs expressed support for the newspapers’ motion, the federal defendants took no position, and the Oakland defendants stated that they supported the gag order as it stood, but offered no authority for their position.

At the hearing, Judge Wilken acknowledged that the gag order was highly unusual, but noted that defendants’ motion regarding external influences on the jury was still pending and expressed continuing concern that jurors’

comments about the issue could threaten the integrity of the verdict. For this reason, she appeared poised to modify the gag order to prohibit discussion of the external influence issue only.

The newspapers argued that even a narrowed order would be unconstitutional as applied to communications with the press,

noting that the cases clearly distinguish between the press and the parties on the ground that the press was not motivated by a desire to upset the verdict in the same way the parties might be. In addition, the media questioned the appropriateness of limiting jurors’ speech to the press and the public in order to avoid publicizing statements by jurors that contradicted their prior sworn testimony, arguing that more, rather than less, speech was the better route to a just decision.

Two days after the hearing, Judge Wilken notified the jurors that they were free to discuss all aspects of the case with the press and entered an order to that effect. The jurors are still prohibited from discussing the case with the parties.

*Mr. Myers, Ms. Sitkin and Mr. Burgoyne, of Steinhart & Falconer LLP in San Francisco, California, represented the San Francisco Chronicle and the Oakland Tribune in this matter.*

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**Although there are very few reported cases on the issue of post-trial juror gag orders, those that have been decided are unanimous in holding that they are highly disfavored.**

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## Court Rejects Government Claim that National Security Assertion is Non-Justiciable

By Susan Buckley

If you have an interest in the interplay between the First Amendment and issues of national security, the recent exhaustive opinion of Judge Emmett Sullivan of the federal district court for the District of Columbia in *Stillman v. Department of Justice*, 2002 U.S. Dist LEXIS 10499 (D.D.C. 2002) is one you may want to add to your summer reading list.

In response to the Justice Department's insistence that the court *lacked the power* to consider plaintiff's claim that his First Amendment rights had been infringed by the government's refusal to permit his own counsel to review his manuscript in the course of a case challenging whether or not the manuscript could be published consistent with national security interests, Judge Sullivan rebuffed the government's argument finding that nothing in the separation of powers doctrine or governing case law could trump plaintiff's right to resolution of his constitutional arguments by an Article III court.

### ***Plaintiff Seeking to Publish Book on China's Weapons Program***

Plaintiff Danny Stillman, a former employee of the Los Alamos National Laboratory, hoped to publish a book on China's nuclear weapons program. He was obligated by contract to submit the manuscript to the government for security clearance. He did so and was no doubt displeased to learn that no portion of the manuscript would be cleared for public release. After negotiations with the Department of Defense and the Central Intelligence Agency proved unsuccessful, Stillman brought suit in the district court challenging the determination. In the course of that action Stillman requested that the government grant his counsel the necessary security clearance so that Stillman could communicate with his lawyer about the central issues in the case and so that his lawyer could effectively represent him in the matter. The government declined on the grounds that Stillman's counsel did not "need to know" the sensitive information to adequately argue the case; and no background security check was even undertaken. Stillman moved the district court for an order compelling the government to grant his counsel

access to the material. The government responded by claiming that its decision not to grant Stillman's counsel a security clearance was not reviewable by the district court (or indeed any court) and that in any event the national security interests at issue were so great as to defeat any First Amendment claim advanced by Stillman.

### ***Government Argued Case Was Non-Justiciable***

The government's non-justiciability argument was so sweeping as to be stunning, a word Judge Sullivan returned to several times in his opinion. Relying on both the political question doctrine and separation of power principles, the Department of Justice urged that because the authority of the President to control access to information that implicates national security interests is grounded in the text of Article II of the Constitution (citing Art. II, § 1(1) (the general Executive power) and § 2(1) (the President's role as Commander in Chief)), judicial review of classification decisions was simply prohibited altogether. This was so, according to the Department of Justice, even when competing constitutional rights were being advanced, here Stillman's rights under the First Amendment.

If the government's argument is right (which it can't be), then an awful lot of Supreme Court jurisprudence was either wrongly decided or should never have been decided at all. The *Pentagon Papers* case (*New York Times Co. v. United States*, 403 U.S. 713 (1971)) would flunk the government's proffered test; the decision in *Snepp v. United States*, 444 U.S. 507 (1980), which specifically considered whether the interests of the United States had been harmed by the publication of material in violation of an agreement to submit it in advance to the CIA, was off the mark as well. Indeed, as Judge Sullivan pointedly observed, if the government denied a security clearance to a prospective Los Alamos employee on the grounds of gender, race or religion, under the government's articulated view of the law, the federal courts would be powerless to provide a remedy for the constitutional violation. *Stillman v. Department of Defense*, 2002 U.S. Dist. LEXIS 10499 at \*22.

What is revealing (and troubling) about the *Stillman* case is that the government apparently believed it had a fair basis

(Continued on page 34)



## Court Rejects Government Claim the National Security Assertion is Non-Justiciable

(Continued from page 33)

for making such an argument at all. Although it is hardly uncharacteristic for the Department of Justice to take an aggressive stance in defending the extraordinary powers of the executive branch in matters of national security, the very advancement of the claim is testament to the fact that the balance between the executive branch and the judicial branch on matters of national security has been tipping (some might say bending over backwards) toward the executive branch in recent years. Nonetheless, as Judge Sullivan concluded, there is no basis in existing law for the sweeping unreviewable authority the government has urged in *Stillman*.

The *Stillman* case is far from over. Stillman's counsel is reportedly still undergoing a security clearance ordered by Judge Sullivan. The government is apparently considering whether to appeal his ruling. Stay tuned.

Plaintiff Stillman was represented by Mark S. Zaid of Lobel, Novins & Lamont; the Department of Justice (by Karen Kathleen Richardson) appeared for the defendants. Arthur Spitzer of the ACLU and Mark Lynch of Covington & Burling filed an *amicus curiae* brief in support of Stillman's position on behalf of the American Civil Liberties Union.

*Susan Buckley is a partner at Cahill Gordon & Reindel in New York.*

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## UPDATE: More Reagan Papers Made Public

On June 14, 2002, more than 17 months after their initial scheduled release date, the White House authorized the release of 844 pages of documents from the Reagan Administration dealing with confidential advice from then-Vice President George H.W. Bush to President Reagan. The administration also authorized the release of 23,653 pages of Reagan Administration documents that had been sought in 23 Freedom of Information Act requests dating back to 2000.

The new papers join almost 67,000 pages of Reagan-era presidential documents that were released in March and January. See *LDRC MediaLawLetter*, March 2002, at 36, and *LDRC LibelLetter*, January 2002, at 36. Almost 1,700 additional papers from the Reagan administration have been withheld and are still under review under the terms of an executive order issued by President Bush.

Under the Presidential Records Act of 1978, Pub. L. No. 95-961, 92 Stat. 2523-27, codified as amended at 44 U.S.C. §§ 2201-7, the documents were originally due to become public on Jan. 20, 2001. But the current administration delayed the release, first by invoking a 30-day delay allowed under an executive order issued by Reagan, see Exec. Order 12667, 54 Fed. Reg. 3403 (1989), then by issuing a new order giving both current and former presidents 90 days to review the material, and to block disclosure of the documents for indeterminate periods. See Exec. Order 13233, 66 Fed. Reg. 56025 (2001).

The released Reagan documents were all reviewed by Bush Administration officials and approved for disclosure under this process. The White House continues to review papers from the office of Vice President Bush and papers from Reagan's office regarding presidential appointments.

### *Congressional Bill May Overturn Executive Order*

Meanwhile, a bill has been introduced in Congress to reverse Bush's order, and a lawsuit challenging the order continues. The bill, introduced by Rep. Stephen Horn (R-Cal.), would give a current or former president 20 business days to invoke a constitutionally-based privilege to bar public disclosure of documents. The president invoking the privilege would then be required to file suit in the U.S. District Court for the District of Columbia to enforce the claim. See H. R. 4187, 107th Cong. (2002).

Although the bill has several Republican sponsors, according to published reports in the Congressional newspaper *The Hill* and elsewhere senior House Republicans planned to kill the measure. A committee mark-up session scheduled for May 15 was postponed until mid-July, at the earliest.

In the civil suit, filed in November by coalition of historical associations and public interest groups, defense motions for dismissal and summary judgment are pending. See *American Historical Ass'n v. Nat'l Archives and Records Admin.*, No. 01-CV-02447 (D.D.C. filed Nov. 28, 2001).

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## FOIA Advocates Raise Alarm Over Homeland Security Bill

By Kevin Goldberg

For the past two sessions of Congress, there have been numerous bills introduced proposing a FOIA exemption that would encourage private companies to share with the government information related to the nation's critical infrastructure. The most recent proposal on the table was S 1456 (Critical Infrastructure Information Security Act of 2002), legislation introduced by Senators Robert Bennett (R-UT) and Jon Kyl (R-AZ) that would create three protections for companies choosing to share such information with the government:

- An antitrust exemption which allows these companies to share information with each other and with government.
- A FOIA exemption for information which is shared with the government.
- Civil immunity providing that information which is shared with the government may not be used to prove liability in any civil action unless that information was independently obtained by the opposing party in that action.

After a hearing was held in the Senate Governmental Affairs Committee on May 8, 2002, this measure's progress was briefly stalled, as Senator Patrick Leahy (D-VT), the Chair of the Judiciary Committee and a longtime champion of FOIA, expressed his concerns with this bill. While the bill's main goal was actually enhanced cybersecurity, its opponents feared the FOIA exemption would end the public oversight of perceived dangers within our transportation, communications, water, banking, oil and gas, and other infrastructures.

### ***Contains Broad FOIA Exemption***

The Homeland Security Act of 2002 was proposed during the brief lull encountered by S 1456. It was introduced in the House of Representatives as HR 5005 on June 24, 2002 by Rep. Dick Armey (R-TX). Section 204 of this Act states:

Information provided voluntarily by non-Federal entities or individuals that relates to infrastructure vulnerabilities or other vulnerabilities to terrorism

and is or has been in the possession of the Department shall not be subject to section 552 of title 5, United States Code.

This section makes S 1456 look like the access community's best friend by comparison. In fact, Section 204 makes virtually every FOIA exemption introduced in the past decade look relatively benign. Its reach is so broad that a private company could virtually share any information with the government, state that it relates to infrastructure vulnerabilities or a vulnerability from terrorism, and never have that information, or even the fact of its existence, see the light of day, as it is highly unlikely that a claim of "vulnerable to terrorism" will be second-guessed by the courts.

In the interest of protecting security, the efforts of private industry and government to fix potential security

problems would go unchecked; residents of local communities would have no knowledge that they were in any danger, nor any idea of the remedial actions be-

ing taken and their status, whether such actions are proving effective, or how residents can protect themselves in the event that a remedy is not achieved and an attack occurs.

Another shortcoming of Section 204 is that it protects documents already covered by existing FOIA exemptions, while reaching numerous documents which pose no security risk. Exemption 4's protection of confidential or trade secret information, combined with Exemption 1's protection of information related to national security, have provided longstanding protections to companies wishing to share information with the government. Section 204's reach simply provides a mechanism by which these companies can receive complete immunity for anything they want to discuss with the government.

### ***FOIA Advocates Seek to Narrow Exemption***

There is some chance that the bill's proponents will amend Section 204 by inserting one of the current bills in its place. Three options have been put forth in the Senate:

*(Continued on page 36)*

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***Because it may be too late to affect  
this legislation in Committee, every  
Senator and Representative is integral  
to the future of this legislation.***

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## Homeland Security Act

(Continued from page 35)

(1) the aforementioned S 1456; (2) S 2452, Sen. Lieberman's (D-CT) bill which does not contain an onerous FOIA exemption; or (3) some new language which may be drafted by Senators who oppose the current Section 204. In any event it appears that there will be *some* type of FOIA exemption in the bill, so opposition to HR 5005 has already been mobilized.

On July 10, 2002 several groups, including the American Society of Newspaper Editors, College Media Advisers, Criminal Justice Journalists, Government Accountability Project, Journalism Education Association, National Newspaper Association, Newspaper Association of America, Radio-Television News Directors Association, Reporters Committee for Freedom of the Press, Society of Environmental Journalists, and the Society of Professional Journalists sent a letter to Members of Congress expressing their outrage with Section 204. These groups will also continue ongoing discussions with key members of Congress on the issue of access to critical infrastructure information generally.

The Homeland Security Act is expected to move quickly upon Congress' return from its Independence Day recess on

July 8, 2002. The House held hearings on the bill on July 9, with markups later that week. The Senate is taking a slightly more measured pace, with a markup expected in the Committee on Governmental Affairs the next week, and the bill expected to reach the Senate floor before the August recess. Because it may be too late to affect this legislation in Committee, every Senator and Representative is integral to the future of this legislation.

As Section 204 is considered a relatively unimportant provision when compared to substantive provisions dealing with homeland security — such as the creation of a cabinet-level “Department of Homeland Security” and attendant advisory commissions, the sharing of information between the federal and state and local governments, the creation of chemical, biological and radiological countermeasures, and enhanced border and transportation security — some effort may be required to focus Members' attention to this portion of the bill and the dangers it presents, both to FOIA and the nation's security in general.

*Kevin Goldberg is an associate at Cohn and Marks in Washington, D.C.*

## The War Turns To Information

In separate decisions, the U.S. Supreme Court and the New Jersey Supreme Court have taken actions which limited the information available to the public regarding the detention and expulsion of non-citizens held after the terrorist attacks on September 11.

### ***U.S. Supreme Court Stays Decision on Hearings***

The U.S. Supreme Court stayed of a decision by Federal District Court Judge John W. Bissell that would have overturned a Justice Department policy that immigration hearings in “certain cases” designated by Chief Immigration Judge Michael Creppy be closed. *Ashcroft v. North Jersey Media Group, Inc.*, No. 01-A-991 (order issued June 28, 2002) (staying ruling in *North Jersey Media Group, Inc. v. Ashcroft*, Civil No. 02-0967 (D.N.J. May 29, 2002) (granting preliminary injunction), *available at* [lawlibrary.rutgers.edu/fed/html/ca02-967-1.html](http://lawlibrary.rutgers.edu/fed/html/ca02-967-1.html) (visited July 15, 2002)).

The policy at issue in the case, which was implemented

via a memo from Creppy on September 21, was superceded on May 21 by new regulations allowing immigration proceedings to be closed if material that the Immigration and Naturalization Service can show is likely to harm the national security or law enforcement interests of the United States may be disclosed during the hearing. Motions to close hearings must describe the allegedly sensitive material, but the material itself may be disclosed only to the immigration hearing officer – and not to the person who is the subject of the proceeding. *See LDRC MediaLawLetter*, June 2002, at 60.

The government sought the stay from Justice David Souter after the 3rd Circuit refused to issue a stay pending appeal. *See North Jersey Media v. Attorney General*, Civil No. 02-2524 (3rd Cir. motion for stay denied June 17, 2002). Souter referred the stay application to the entire court.

Before the Supreme Court acted, there were reports that the INS was delaying immigration hearings to avoid holding them in public.

(Continued on page 37)

## The War Turns To Information

(Continued from page 36)

With the stay in place, briefing in the case is continuing before the 3rd Circuit.

The media plaintiffs' lead lawyers are Steve Shapiro and Lee Gelernt of the ACLU and Lawrence S. Lustberg of Gibbons, Del Deo, Dolan, Griffinger & Vecchione, P.C. in Newark. Assistant U.S. Attorney Michael A. Chagares is representing the government. A media amicus brief was filed, written by David Schulz and Mark Weissman of Clifford Chance Rogers & Wells.

Meanwhile, oral argument is scheduled for Aug. 8 in the government's appeal of a similar decision by a Michigan federal court holding the closure policy under the Creppy memo was unconstitutional. *See Detroit Free Press v. Ashcroft*, No. 02-1437 (6th Cir. filed April 10, 2002) (appeal of *Detroit Free Press v. Ashcroft*, 195 F.Supp.2d 937, 30 Media L. Rep. 1598, (E.D. Mich. April 3, 2002), *re-consideration denied*, (April 9, 2002)); *see also LDRC Media-LawLetter*, April 2002, at 31.

The appeals court initially imposed a temporary stay on the Michigan court's decision, but later dissolved it in a ruling that was not appealed. *See Detroit Free Press v. Ashcroft*, No. 02-1437 (6th Cir. order dissolving stay issued April 18, 2002).

### ***New Jersey Supreme Court Refuses Name Disclosure Case***

Meanwhile, the New Jersey Supreme Court refused to hear an appeal of an appeals court's reversal of a lower court decision holding that local jails in the state were required by the state's freedom of information law to release names of those detained as the federal government pursues deportation proceedings. *See ACLU v. County of Hudson*, No. \_\_\_\_ (N.J. July 9, 2002) (denying appeal of No. A-4100-01T5 (N.J. Super. Ct., App. Div. June 12, 2002), *available at* [www.judiciary.state.nj.us/opinions/a4100-01.pdf](http://www.judiciary.state.nj.us/opinions/a4100-01.pdf)).

The lower court held that New Jersey's freedom of information law applied to local county jails, where many INS detainees have been held under contracts with the federal government. The appeals court reversed, citing a new,

interim regulation that provides that public or private detention facilities for immigration detainees may not publicly disclose the identity or any other information regarding any detainee. It further provides that it applies to "all requests for public disclosure of such information, including requests that are the subject of proceedings pending as of April 17, 2002." *See* 67 Fed. Reg. 19508 (April 22, 2002) (to be codified at 8 C.F.R. § 236.6); *see also LDRC MediaLawLetter*, June 2002, at 61.

The suit was brought by the American Civil Liberties Union, which announced that it may ask the U.S. Supreme Court to review the case.

The ACLU is represented by Penny Venetis and Ronald Chen of the Rutgers University Constitutional Litigation Clinic, ACLU staff attorney Edward Barocas, and outside solo practitioner Howard Moskowitz of Jersey City. Hudson and Passaic counties, whose jails are housing INS detainees, are represented by First Assistant Hudson County Counsel Michael Dermody, Deputy Passaic County Counsel Matthew Malfa, and Assistant Passaic County Counsel Karen

Brown. The INS, which intervened in the case, is represented by Thomas Calcagni, Michael Chagares and Carol Federighi.

A similar lawsuit filed by the ACLU and other groups in U.S. District Court for the District of Columbia regarding detainees nationwide is pending. *Center for Nat'l Security Studies v. Department of Justice*, No. 01-CV-2500 (D.D.C. filed Dec. 5, 2001); *see LDRC LibelLetter*, Dec. 2001, at 51.

### ***New Public Records Law Limited***

While the New Jersey Supreme Court let stand the decision restricting access to detainees' identities, New Jersey Governor James McGreevy signed an executive order on July 8 which could also limit access to such information. Exec. Order 11 (July 5, 2002), *available at* [www.state.nj.us/grc/eom21.shtml](http://www.state.nj.us/grc/eom21.shtml).

(Continued on page 38)

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***The lower court held that New Jersey's freedom of information law applied to local county jails. The appeals court reversed, citing a new, interim regulation.***

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## The War Turns To Information

(Continued from page 37)

In addition to placing restrictions on various documents held by the governor's office, the order prohibits the disclosure of "[a]ny government record where the inspection, examination or copying of that record would substantially interfere with the State's ability to protect and defend the State and its citizens against acts of sabotage or terrorism, or which, if disclosed, would materially increase the risk or consequences of potential acts of sabotage or terrorism." The order applies to state, county and municipal records.

The executive order was issued on the effective date of a new state freedom of information law, which was signed by acting-Gov. Donald DiFrancesco in his last hours in office. See Open Public Records Act, 2001 N.J. Laws chap. 404 (signed Jan. 8, 2002), to be codified at N.J. Stat. § 47:1A-1 et seq, available at [www.state.nj.us/grc/act.html](http://www.state.nj.us/grc/act.html). At the time, the New Jersey Press Association said in a statement that while the new law "expands the public's access to government records, ... it falls short of being a full overhaul of the state's 38-year-old Right to Know Law."

### Magazine Protests Questioning

National Review editor Richard Lowry formally complained to the State Department after Joel Mowbray, a contributor to the magazine's web site, was detained and interrogated by department security personnel after a regular press briefing.

During the briefing, Mowbray asked about a classified cable regarding granting of visas by the American embassy in Saudi Arabia, which he had in his possession and which both he and the *Washington Post* had reported on the previous day.

State Department spokesman Richard Boucher responded by criticizing Mowbray's reporting, which has focused on alleged lax procedures in visa processing at the American embassy in Saudi Arabia. Meanwhile, officers of the Diplomatic Security Service – who heard the question on a live feed of the press conference – sent an agent to ask Lowry how he had obtained the memo, which was sent by U.S. ambassador Robert Jordan to State Department headquarters in Washington.

As he attempted to leave the briefing, a department official and four guards stopped him and said that he had to answer some questions. When Mowbray said that he had a lunch appointment and offered to come back later, the official said that questions had to be answered immediately. When

Mowbray asked if he was being detained, he was told "no." But when Mowbray tried again to leave he was told that now he was being detained. Mowbray then called a lawyer on his cell phone; the magazine, meanwhile, heard of the ongoing incident and called the State Department press office to find out what was happening.

Fifteen minutes later, after refusing to reveal his source for the cable, he was allowed to go.

The department defended its actions in a statement saying that "the Diplomatic Security Service is responsible for the protection of classified information, and investigates all alleged leaks of classified information to the fullest extent possible."

### Searching for Other Leaks

Besides the attempt to question Mowbray, federal government officials were also searching for the sources of other leaks to the media.

In June the chairs of the Congressional intelligence committees requested that the Justice Department investigate disclosures of committee material after they received telephone calls from Vice President Cheney warning that such leaks may be a federal crime. Cheney's calls came in reaction to press reports that the National Security Agency had intercepted communications on Sept. 10 that, in retrospect, could have warned of the imminent terrorist attacks, but that they had not been translated until Sept. 12.

And in July, Defense Secretary Donald Rumsfeld sent a memo to senior Pentagon officials saying that al Qaeda was using classified information leaked to reporters to plan future terrorist attacks. According to the *Los Angeles Times*, the memo was promoted by stories in the *New York Times* on Pentagon plans for attacking Iraq.

The administration has complained about leaks of government information frequently since Sept. 11. See *LDRC LibelLetter*, Oct. 2001, at 57; and Jan. 2002, at 35.

Also, on July 12 U.S. District Court Judge Alvin K. Hellerstein of the Southern District of New York ordered a temporary halt to proceedings in several cases filed against airlines, airport security firms, and others by families who lost relatives in the attacks, until a procedure for keeping sensitive information confidential is created. See, e.g., *Mariani v. United Air Lines, Inc.*, Civil No. 01-1162 (S.D.N.Y. filed Dec. 20, 2001).



## Minnesota Appeals Court Reverses Order that Reporter Reveal Source

By Mark Anfinson

In a June 18 decision, the Minnesota Court of Appeals ruled that a sports reporter for a suburban St. Paul newspaper could not be compelled to disclose the identities of sources on which he relied in preparing an article about a controversial high school football coach. The decision, *Weinberger v. Maplewood Review*, 2002 WL 1326945 (Minn. App. 2002), voids a \$200/day contempt penalty imposed on the reporter, and closes off what could have become a serious breach in the Minnesota reporter's shield law based on the defamation exception to the statute. The ruling also exemplifies the sort of critical scrutiny that appellate courts should apply when reviewing the rejection of reporter's privilege claim by a trial court.

### Background

Reporter Wally Wakefield's efforts to fend off the civil subpoena are unusually protracted. In January 1997, Wakefield, working as a reporter for the *Maplewood Review*, contributed to an article about high school football coach Dick Weinberger, a popular but controversial figure. Weinberger's coaching contract, which was up for renewal in late 1996, had been allowed to expire, despite his successful tenure as head coach of Tartan High School. School district officials (hobbled by state data privacy laws) declined to provide any explanation of this unexpected step. Undeterred, Wakefield and another *Maplewood Review* reporter, Jason Tarasek, pieced together a story—relying extensively on confidential sources—that depicted Weinberger's fall as being due to a sometimes intemperate and intimidating coaching style. According to the journalists, several potential sources expressed concerns about repercussions if they were identified.

Several months after the article appeared, Weinberger sued the school district and four of its officials under a variety of theories, prominent among them defamation. Neither the newspaper nor its reporters were named as defendants in the lawsuit, even though the defamation count

derived in large part from the newspaper article. Weinberger surmised that the negative comments about him appearing in the *Maplewood Review* were made by school district employees—including the defendants.

Eventually, Weinberger's attorney Stephen Cooper (a well-known local plaintiff's employment litigator and former state commissioner of human rights) decided to pursue the reporter's sources. He therefore served Wakefield with a deposition subpoena in July 2000, directing Wakefield to appear with his reporter's notes. When informed by Wakefield's counsel that Wakefield would not appear, Cooper responded with a motion seeking to compel enforcement of the subpoena, relying principally on the defamation exception to the state shield law, found at Minn. Stat. §595.025.

### Trial Court, Round I

A hearing on Cooper's motion was held before Ramsey County (St. Paul) District Court Judge Dale Lindman on August 21, 2000. Relying mainly on Cooper's failure to adhere to procedural rules, Lindman denied the motion but gave Cooper leave to cure the defects

and resubmit it, which he did a short time later.

A second hearing occurred on October 4. This time, Judge Lindman determined that the defamation exception did apply, even though the reporters were not parties to Weinberger's lawsuit. Lindman did narrow the scope of the plaintiff's inquiry, requiring "only" that Wakefield and Tarasek "identify by answer to written interrogatory the NAME of the original source for each statement" in the newspaper article that plaintiff claimed was defamatory. But the order contained no reference to the legal principles that pertain to a claim of journalist's privilege, and no findings explaining the court's grounds for rejecting the privilege in this case. (Reporter Jason Tarasek was subsequently dropped as a target of the proceedings, because he had moved out of state and was never served with the subpoena.)

### Court of Appeals, Round I

Because the district court's order was manifestly defective, Wakefield appealed the decision. He argued not only

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***The ruling also exemplifies the sort of critical scrutiny that appellate courts should apply.***

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(Continued on page 40)

## Minnesota Appeals Court

(Continued from page 39)

that specific findings were required, but also that the Free Flow of Information Act's defamation exception was never intended to cover reporters who were not parties to the underlying lawsuit. The latter claim was ambitious, because while the protections in Minnesota's shield law are generally quite strong, they can be defeated in a defamation action under §595.025:

where the person seeking disclosure can demonstrate that [1] the identity of the source will lead to relevant evidence on the issue of actual malice . . . [2] there is probable cause to believe that the source has information clearly relevant to the issue of defamation[, and 3] the information cannot be obtained by any alternative means or remedy less destructive of first amendment rights.

There is no express exemption for non-party journalists. The conditions found in §595.025 were construed in a Minnesota Court of Appeals decision, *Bauer v. Gannett Co., Inc. (KARE 11)*, 557 N.W.2d 608 (Minn. App. 1997), and basically parallel the criteria established by courts throughout the country for use in determining whether the conditional First Amendment privilege can be defeated in defamation actions.

In June 2001, the court of appeals reversed Judge Lindman, ruling in *Weinberger v. Independent School District No. 622* (unpublished opinion, Minn. App. June 22, 2001), 2001 WL 7413131, that while the defamation exception could indeed be employed against non-party reporters, Lindman's order compelling disclosure was fatally defective because it lacked the requisite factual findings and legal analysis. The court of appeals remanded the case, allowing Judge Lindman an opportunity to remedy these deficiencies.

### ***Trial Court, Round II***

On remand, Judge Lindman again directed Wakefield and his newspaper to disclose the identities of the sources for the article. Although the Order was dated August 8, 2001, Weinberger's attorney failed to trigger the running of the appeal period by serving a notice of filing of the Order.

Wakefield declined to comply with the Order, since appealing remained an option. In October, attorney Cooper brought a motion seeking contempt sanctions against Wakefield and the *Maplewood Review*.

A hearing was held on this request in early November, and in an Order dated November 6, 2001, Lindman ruled that Wakefield would be fined \$200 per day until he complied with the earlier disclosure Order. However, Lindman stated that any sanctions would be stayed if the disclosure Order was appealed on or before November 23, 2001. He also dismissed the proceedings against the newspaper, holding that only Wakefield could know the information sought by Weinberger.

### ***Court of Appeals, Round II***

Wakefield elected to appeal again, this time arguing that Weinberger had failed to make the necessary factual demonstration required under the multi-factor test mandated by decisions interpreting the shield law and the First

Amendment. Wakefield contended that although Judge Lindman had included extensive factual findings in his Order issued after remand, they nonetheless failed to show that such a demonstration had been

made, and were based on a misreading of the law as well. On this round, Wakefield's appeal was supported by the Reporters' Committee for Freedom of the Press, the Society for Professional Journalists and its Minnesota chapter, and the Minnesota Newspaper Guild Typographical Union as *amici curiae*.

In its June 18 decision, written by Judge Terri Stoneburner, the court of appeals decisively rejected Weinberger's legal position. The court first acknowledged that Weinberger, as the party seeking disclosure of Wakefield's sources, had the burden of establishing a factual basis for defeating the privilege. Then it took up the issue of what standard of review was called for. Weinberger had argued vehemently that a simple "abuse of discretion" analysis should be applied. The court disagreed, however, concluding that "this case implicates the First Amendment rights of the media to protect confidential sources" as well as statutory protections. "Because the construction of a statute and

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***The "possibility of relevance is not the same as demonstrating that the compelled disclosure is clearly relevant to the action."***

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(Continued on page 41)

## Minnesota Appeals Court

(Continued from page 40)

constitutional provisions are involved, we hold that the standard of review . . . is *de novo*.”

The court proceeded to consider the “way the [five inter-related factors]” that had been identified in the *Bauer* case were to be applied when a defamation plaintiff seeks to obtain the identities of sources. It observed that in resolving the balance of interests implicated by subpoenas of non-party journalists, “careful attention” should be given to the facts of each case. Moreover, it actually adhered to this standard in evaluating the five factors. Indeed, the court’s opinion is meticulous and thorough, and is an exemplar of the rigorous review that appellate courts should apply to journalist’s privilege claims.

**Factor 1. Falsity and Actual Malice.** The first issue considered by the court was whether Weinberger had established a *prima facie* case that the statements at issue were false and made with actual malice (as a public school teacher, Weinberger is a public official under settled Minnesota defamation law). In the district court, Wakefield had contended that Weinberger’s subpoena failed largely on this basis alone, because there simply was no evidence in the trial court record showing the existence of actual malice. That contention derived from the fact that before it even addressed the validity of Wakefield’s subpoena, the district court had heard a summary judgment motion brought by the school district defendants on, among other things, Weinberger’s defamation claim. An examination of the record indicated that the school district defendants had never even raised the actual malice defense, and it was not addressed in any but the most perfunctory way in Judge Lindman’s order denying summary judgment on the defamation count. But despite this, Judge Lindman repelled Wakefield’s efforts to re-argue the issue, holding that his summary judgment decision was conclusive on the question of actual malice, that it could not be collaterally challenged by Wakefield, and that for purposes of the subpoena dispute the court would assume that a *prima facie* case for actual malice had been established by

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**[I]n one of the most important parts of the opinion—the appellate court pointedly rejected the district court’s unwillingness to consider the possible harm to nonparties if Wakefield were required to disclose the identities of his sources.**

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Weinberger.

When this issue came up during oral argument at the court of appeals, some concern was expressed about the propriety of challenging the summary judgment decision. But to its credit, the court nonetheless concluded that—as Wakefield claimed—“the issues of whether [specific] statements are false or were made with actual malice have never been briefed, argued, or decided in this lawsuit.” Moreover, Weinberger “has directed neither the district court’s attention nor this court’s attention to specific evidence that shows any of the specific statements is false or was made with actual malice.” Thus, the first factor weighed against upholding the subpoena.

**Factor 2. Nature of Litigation, whether Reporter a Party.** Weinberger argued that he needed Wakefield’s sources in order to establish actual malice on the part of the lawsuit defendants (who, as noted, he assumed were the

sources who talked with the reporter). But the court of appeals responded that “even if Wakefield testifies that certain defendants were the source of certain statements, he cannot testify to a defendant’s intentions in furnishing the information.” Thus, “it is clear that Weinberger seeks disclosure to make Wakefield

his witness against defendants rather than to discover evidence of actual malice.” In the court’s view, this consideration weighed heavily against upholding the subpoena: “Compelling disclosure of confidential sources of statements in an article about a public official, for the purpose of making the reporter a witness against sources, has a significant potential to interfere with the reporter’s ability to gather news.”

**Factor 3. Whether Identities of Sources are Clearly Relevant.** In assessing whether Weinberger had demonstrated that the identities of the sources were clearly relevant to his defamation claim, the court of appeals observed that because reporter Wakefield had never confirmed that the sources on which he relied were any of the defendants in the case, “the disclosure compelled may prove not to be relevant at all.” The “possibility of relevance is not the same as demonstrating that the compelled disclosure is clearly relevant to the action.” Thus this factor failed to support disclosure as well.

(Continued on page 42)

## Minnesota Appeals Court

(Continued from page 41)

**Factor 4. Compelling Interest in Obtaining Identities of Sources.** The court next examined whether Weinberger had a compelling interest in the identities of the sources. Here the court agreed with the trial court that the plaintiff could in fact have a compelling interest in knowing if any of the defendants was a source of comments in the newspaper article. But—in one of the most important parts of the opinion—the appellate court pointedly rejected the district court’s unwillingness to consider the possible harm to non-parties if Wakefield were required to disclose the identities of his sources.

Wakefield had submitted an affidavit to the district court indicating that his sources had expressed concern about retaliation by Weinberger, and that his ability to function as a journalist in the future would be impeded by compelled disclosure. These considerations had little impact on Judge Lindman. But the court of appeals viewed them as significant, especially given that the article to which Wakefield contributed had distinct public importance:

“The article qualifies as having great public interest, and the public would be harmed by any chilling effect on the free flow of this type of information to the public.”

In the court’s estimation,

“Wakefield’s interest in and concern about the effect of required disclosure on the ability of the press to gather information about public officials is at least as great as Weinberger’s interest in the disclosure ordered in this case.”

**Factor 5. Possible Alternative Sources.** In the court of appeals’ judgment, this factor did seem to hew in Weinberger’s favor: It would be difficult, if not impossible, for him to obtain the information he sought from alternative sources. But this alone was not enough:

[W]e conclude that Weinberger’s failure to make a *prima facie* showing that the statements at issue are false or were made with actual malice; failure to demonstrate that the disclosure order will clearly lead to relevant evidence of actual malice; and the chilling effect and burden on the media that will result from making a reporter a witness against sources to whom he promised confidentiality are more significant than Weinberger’s interest in the disclosure and his inability to obtain the information he seeks from other sources.

## Conclusion

While the appellate court’s second decision in *Weinberger* may not break new ground, it represents a strong affirmation of the reporter’s privilege and the law on which it is grounded. Without question, the decision will deter future efforts to subpoena journalists in Minnesota. It is also useful in making clear that the defamation exception is a very narrow one, and can be applied only after a rigorous and factually detailed demonstration has been made, which—given the public interest considerations emphasized by the court of appeals—will be especially difficult to do.

Weinberger has until July 18 to request review of the decision by the Minnesota Supreme Court. His attorney has said in published newspaper reports that he will do so.

*Mark Anfinson is an attorney for the Minnesota Newspaper Association and represented Wally Wakefield in this matter.*

## Mountain Citizen Update

Three Kentucky journalists won a battle for the rights to their newspaper’s name, but are still trying to get rid of contempt citations and fines they received in the process.

In what the *Mountain Citizen*’s publisher describes as an attempt to stop the newspaper’s negative coverage of a corrupt public official, that official bought the newspaper’s name when its incorporation documents lapsed. After the purchase, the official convinced a judge that he would be irreparably harmed if the paper were published under the *Mountain Citizen* name, and was granted a restraining order. There was no hearing; the paper received the order via fax. The journalists published under the *Mountain Citizen* name anyway, and the owner, publisher and editor were each fined \$500 for defying the order.

The judge eventually dissolved the restraining order, but would not drop the contempt charges because doing so would “foster disrespect and distrust of the judicial system.” The journalists have asked the judge to reconsider the contempt charge, arguing that they did not willfully violate the order since they had a common law right to use the name they’ve used for more than 10 years.

The journalists are represented by David Fleenor of King and Schickli (Lexington).



## Court Refuses to Quash Subpoena to Reporter Who Interviewed Lindh Ruling Mooted By Subsequent Guilty Plea

Three days before John Walker Lindh pleaded guilty to aiding the Taliban and possessing explosives, the judge overseeing the case ruled that a freelance CNN reporter would be required to testify regarding his interview with Lindh shortly after he was captured by the American military. *U.S. v. Lindh*, No. 02-CR-037 (E.D.Va. bench ruling July 12, 2002) (case subsequently dismissed before trial).

Lindh was among 80 Taliban fighters captured by Afghan forces aligned with the United States in late November 2001. American troops took Lindh and the others into custody on December 1, after suppressing a prisoner revolt. Robert Young Pelton, a freelance writer working for CNN, interviewed Lindh the next day, while he was in the custody of American troops.

### ***Testimony on Lindh's Condition***

Lindh's attorneys, James Brosnahan and Tony West of Morrison & Foerster LLP in San Francisco, sought Pelton's testimony regarding Lindh's physical and mental condition at the time of the interview. At a July 12 hearing, the attorneys also argued that Pelton was acting as an agent of the government, saying that Pelton was summoned to interview Lindh by government officials. Because of this agency relationship, they continued, Lindh's self-incriminating statements in the interview should be excluded because he had not been read his *Miranda* rights.

Pelton, represented by Stuart F. Pierson and James C. Roberts of Troutman Sanders LLP, asked the court to quash the subpoena or to delay the reporter's testimony to determine whether it would be duplicative or even necessary. He argued that requiring the testimony would place war correspondents in peril, as evidenced by the killing of Wall Street Journal reporter Daniel Pearl by Islamic militants who alleged that he was a government agent, and lead to restrictions on reporters' efforts to gather independent information in combat areas. Lindh's lawyers responded that the reporter's testimony was necessary to relate what occurred during several gaps in the videotape of the interview.

### ***Sixth Amendment Wins Out***

At the conclusion of the hearing on the matter, District Court Judge T.S. Ellis, III issued a bench ruling refusing to

quash the subpoena, saying that Lindh's Sixth Amendment right to a fair trial outweighed Pelton's concerns.

"I think all the lawyers today recognize what the state of the law is on this subject. It's obviously still subject to some argument, although I wonder, really, how much argument there should be about it when we look at page 690 of the *Branzburg* opinion, and the court there stated, quote: 'We are asked to create a privilege by interpreting the First Amendment, to grant newsmen a testimonial privilege that other citizens to do enjoy. This we decline to do.'"

See *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972).

### ***Rejects Danger Threat to War Reporters***

Ellis also rejected Pelton's argument that requiring him to testify would place other reporters in danger. "I don't think the danger to foreign correspondents grows out of the subpoena to come and testify and give relevant information, nor do I think ... that the subpoena here creates some risk that foreign correspondents will be killed by terrorists and thus on the ground that they are government agents," Ellis said. "They don't need excuses like that. And whether they are there or not, they will make them up."

Ellis added, however, that he would allow the testimony of other witnesses to proceed and then re-evaluate whether Pelton's testimony would be necessary, including allowing his attorneys to argue against requiring the reporter to testify. But he warned Pelton's attorneys of the "heavy weight that should be accorded to the defendant's right to present a full and fair defense."

Ellis said that he would look at an amicus brief submitted by the media to determine whether it provides "a unique perspective or information that goes beyond what the parties are able to do," then decide whether to include or exclude it.

Lindh's guilty plea, accepted by the court on July 15, made the issue of Pelton's testimony moot.



## **New York Trial Court Allows Both Plaintiff and Defendant to Proceed Anonymously in Assault Case**

***Judge claimed “publicity could also result in a ‘trial by newspaper’”***

New York Trial Judge Louis B. York granted a motion to allow both a plaintiff and a defendant to proceed anonymously in a civil suit based on an assault in a public building. *Anonymous v. Anonymous*, 2002 WL 1396055, Index No. 100145/02 (N.Y. Sup. Ct. June 19, 2002). A search of the New York State Unified Court System’s webpage revealed that the defendant is New York University.

The underlying complaint stems from an assault that took place in a cafeteria restroom located on the defendant’s premises. While the cafeteria is open to the general public, identification must be shown to a security guard before one can access the restroom. An assailant has been indicted and, at the time of Judge York’s decision, was being held in lieu of bail.

The plaintiff sought to proceed anonymously because of the “unwanted publicity and exacerbation of the emotional distress suffered from the assault.” In turn, NYU made no objection to the plaintiff’s request, but also requested to proceed anonymously. The plaintiff opposed NYU’s motion, claiming there was a “substantial public interest in the security offered by defendant.”

NYU claimed that the plaintiff had “released defendant’s papers requesting anonymity to the public,” and any resulting adverse publicity would make it impossible for the defendant to obtain a fair trial.

### ***Judge Relies on Balancing Test of Other Jurisdictions***

With little New York law on point, Judge York turned to decisions from Connecticut, New Jersey, Illinois and Iowa. He found that these states conduct a balancing test, where the parties’ rights to privacy are weighed against the demands of the public interest. He also cited a willingness by federal courts to allow

plaintiffs to proceed anonymously in cases involving abortion, mental illness, homosexuality and religion.

Upon balancing these interests, Judge York disagreed with the plaintiff that concealing NYU’s identity would “undermine public confidence and perpetrate dangerous conditions.” Judge York said that the plaintiff “has not alleged past practice of negligence by defendant, nor has she shown that prior assaults have occurred on defendant’s property.” He concluded that “until it is shown that defendant was negligent, the public interest in security is not so great as to outweigh defendant’s interests in a fair trial and preservation of reputation.”

The most chilling part of Judge York’s opinion,

however, was his willingness to accept NYU’s argument that resulting publicity in the form of news coverage could make it impossible for a fair trial to take place. Judge York said that publicity “may allow the true facts of the case to be discovered,” but it could also “result

in a ‘trial by newspaper,’ where inadmissible prejudicial evidence could be introduced against defendant, not allowing defendant a fair trial.” He continued by saying “if the press were able to disclose the identity of defendant, the prospective jury pool may not be able to act impartially.” Nowhere in the opinion does Judge York discuss more traditional methods of assuring a fair trial, such as *voire dire*, sequestering and change of venue.

In his decision, Judge York made clear that granting the defendant the right to proceed as “Anonymous” was not a sealing of the records.

The plaintiff is represented by lawyers from Engel & McCarney in New York. An in-house lawyer for NYU declined to identify who was handling the case for NYU.

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***Judge York said that publicity “may allow the true facts of the case to be discovered,” but it could also “result in a trial by newspaper”***

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## California Court Imposes Then Amends Restrictive Credential Procedures Limiting Media Access to High-profile Murder Case

By Roger Myers and Rachel Matteo-Boehm

In the latest twist in the burgeoning battle over restrictive credential requirements and background checks, a California judge imposed, then partially withdrew, a requirement that all reporters covering the Yosemite triple-murder trial — which had been transferred more than 150 miles on a change of venue motion — travel to San Jose two weeks before trial to obtain a special photo ID press pass and submit information that could be used to conduct background checks. *People v. Stayner*, No. 210694 (Cal. Super. Ct.).

The case originated in Mariposa County, where Cary Stayner was charged with the 1999 murders near Yosemite of Carole Sund, her 15-year-old daughter Juliana Sund, and their teen-age Argentinian friend, Silvina Pelosso. Stayner has already been convicted in federal court, and sentenced to life in prison, for the beheading of naturalist Joie Armstrong that same year. He faces the death penalty if convicted in the state court case and the case has attracted national and even international media coverage.

### ***Courts Imposed Credentials Plan for Reporters to Attend Trial***

Early in 2001, the Mariposa Superior Court imposed a “media plan,” which, among other things, required journalists to submit to background checks before they would be issued credentials to cover the trial. When the media objected, the presiding judge eliminated the background check requirement. But later that year, venue was transferred to Santa Clara County, which has a much larger jury pool, and was assigned to Judge Thomas Hastings, who in 1996 issued a contempt citation — later vacated by the Court of Appeal — against two reporters for refusing to reveal to the judge their confidential source for information the judge believed was subject to a gag order he imposed in the trial of Richard Allen Davis for the murder of Polly Klaas.

In the weeks leading up to the start of jury selection on

June 10, the press learned that any journalists seeking to attend the Stayner trial would have to apply for and be issued a special press pass. To obtain this pass, the court's Press Credential Process required a reporter to submit, on “recognized print or broadcast entity letterhead,” verification of employment and “any other information as required by the Office of the Santa Clara County Sheriff.”

The sheriff's deputy administering the process informed the *Fresno Bee's* reporter that the personal information required included the reporter's Social Security number, driver's license number, date of birth and reasons why the reporter wanted a pass. When asked whether the Sheriff's Department planned to conduct background checks of reporters, the deputy refused to respond directly but said the

information would be used to “make sure you are who you say you are,” or words to that effect.

After submitting the required information, reporters were required to travel to San Jose to be

photographed by the Sheriff's Department, which would

*(Continued on page 46)*

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***[T]he personal information required included the reporter's Social Security number, driver's license number, date of birth and reasons why the reporter wanted a pass.***

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### **Silha Center Research Project**

The Silha Center for the Study of Media Ethics and Law is conducting a research project on the use of journalism ethics codes in litigation involving media defendants. The goal of the project is to determine whether these codes are being used to set legal standards of fault. [The following sentence could be deleted, but I think it might help explain where we're going with this: The results may assist voluntary journalism organizations in deciding whether to oppose the introduction of their aspirational codes as evidence.] Attorneys interested in providing information regarding cases in which they have been involved, please contact:

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## Ca. Ct. Amends Restrictive Credential Procedures Limiting Media Access to High-profile Murder Case

(Continued from page 45)

then issue the press pass “5 to 10 working days” later. Due to the change of venue, reporters from the area in which the crimes occurred would be required to make a 300-mile round trip to be photographed two weeks in advance if they wanted to attend the trial. The credential process also made it difficult, and in some cases impossible, to cover the trial when the “credentialed” reporter became ill or otherwise unavailable. In fact, the *San Francisco Chronicle* was unable to cover one of the early days of jury selection because its “credentialed” reporter was called away on another assignment.

### Media Coalition Challenged Credential Plan

When Judge Hastings refused to respond to a June 7 letter from the media requesting that he rescind or substantially revise the credential policy, a coalition of media filed on June 12 an emergency, *ex parte* motion to lift or modify the credential process requirements. Judge Hastings set a hearing for June 14 and instructed county counsel to defend the credential requirement, resulting in one of those rare cases where the judge would be ruling on a matter in which he was, in essence, also a party represented by counsel.

On the law, the case against the entire credential process seemed solid. While “reasonable” time, place and manner restrictions may be imposed to protect courtroom security, these restrictions were not reasonable on several grounds — not least that no justification existed for believing this case presented any unusual security issues. The trial did not involve allegations of terrorist or gang-related activity. Nor was it apparent how special screening of the media would redress any conceivable security concerns when any member of the public who stood in line could gain admittance upon showing a driver's license or other pre-existing photo ID.

As it turned out, the justification offered for the credential requirement was, essentially, that it was for the press' own good — the court and county counsel asserted that the credential process was valid because reporters who

secured a press pass would have access to the 25 seats (out of about 70 in the courtroom) set aside for the media. But that begged the question of why a special credential was required, since many less restrictive alternatives exist to ensure that those seeking access to the press seating area were, in fact, members of the press.

### Court Eliminates Restrictive Requirements

In the end, the court refused to acknowledge that the photo ID requirement was unwarranted. However, the court and county counsel did agree that no background checks would be conducted, that reporters need only submit their names and verification of media employment (not Social Security numbers or “reasons” for wanting a pass), and that the 5-10 day waiting period would be rescinded.

The court modified the process so that a press pass would be issued, in most cases, the same day a reporter was photographed, and streamlined the process even further for any “substitute” reporters, who would be allowed to sit in the media section even if unable to obtain a press pass

before the start of the day's proceedings.

The court rejected county counsel's contention that reporters could *only* sit in the media seating area, instead agreeing that any reporter who wanted to forgo the credential process could stand in line for the seats reserved for members of the public.

While the modifications were sufficient to remove the need for an appellate challenge to the credential requirement, they did not answer the fundamental question of why such an onerous process was initially imposed. Whether it was motivated, at least in part, to curtail the number of reporters who would actually attempt to attend the trial remains unclear. What does seem clear is that we are likely to see more attempts to impose similarly restrictive credential requirements.

*Mr. Myers and Ms. Matteo-Boehm, of Steinhart & Falconer LLP in San Francisco, represented the Associated Press, Fresno Bee, Modesto Bee, San Francisco Chronicle and Santa Rosa Press Democrat in this matter.*

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***The court rejected county counsel's contention that reporters could only sit in the media seating area.***

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## Private Building Codes Adopted as “The Law” Lose Copyright Protection

By David Moran

The Fifth Circuit, in an *en banc* opinion authored by Circuit Judge Edith Jones, recently held that “the law” is free for publication to all and that federal copyright law must yield to the rights of citizens to access and publish “the law” on the Internet. *Veeck v. Southern Building Code Congress International, Inc.*, \_\_\_ F.3d \_\_\_, 2002 WL 127117 (5th Cir. 2002). *Veeck* presents a novel and important copyright and Internet decision.

### *Texas Towns’ Building Codes Published on Web Site*

Peter Veeck, a non-commercial website operator, publishes information about north Texas. Veeck decided to put on his website the local building codes of Anna and Savoy, Texas, two small towns that had adopted the 1994 edition of the Standard Building Code, written by Southern Building Code Congress International, Inc. (“SBCCI”). Veeck made a few attempts to inspect copies of the building codes from the towns but was unable to locate them easily. Instead, Veeck purchased the model building codes directly from SBCCI; he paid \$72.00 for a disk of the codes. Although SBCCI’s software licensing agreement and copyright notice indicated that copying and distribution were not allowed, Veeck cut and pasted their text on his website. The website did not specify that the codes were written by SBCCI but instead identified them, correctly, as the building codes of Anna and Savoy, Texas.

The author of the codes, SBCCI, is a non-profit organization consisting of approximately 14,500 members of government bodies, the construction industry, business and trade groups. Its primary purpose is to develop, promote and encourage local governments to enact its codes into law, without cost to the government entity. SBCCI indisputably holds a copyright in its model building codes under which it claims the exclusive right to publish the codes or license their publication.

### *Building Code Not Copyrightable*

The issue presented was whether Veeck infringed SBCCI’s copyright on its model codes when Veeck posted them only as what they became – the building codes of Anna and Savoy, Texas – on his website. The *en banc* Fifth Circuit, in a 9-6 split, held as a matter of federal common law that Veeck did not infringe because “the law” – here in the form of town building codes – is not copyrightable. Accordingly, the Fifth Circuit ordered that SBCCI’s copyright infringement claims be dismissed. The Court further held, however, that as model codes, the SBCCI’s works continue to retain their protected status.

The Fifth Circuit concluded that “the law” was not copyrightable after analyzing Supreme Court authority, the Copyright Act’s exclusion from its scope of “ideas” or “facts,” case law and policy arguments.

The most surprising aspect of the Fifth Circuit’s decision by Judge Jones – joined by all of the

conservative members of the Court – is its embrace of a “metaphorical concept of citizen authorship” of laws and the need for citizens to have free access to the law. This proposition, the Fifth Circuit said, was the ultimate holding in *Banks v. Manchester*, 128 U.S. 244 (1888).

In *Banks*, the Supreme Court denied a copyright to a court reporter in his printing of the opinions of the Ohio Supreme Court. *Banks* noted that the work of judges in their official capacity cannot be regarded as authorship under copyright law.

As to public policy: “The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or statute.”

The Fifth Circuit further noted that “justice requires access to the opinions” and “it is against sound public policy to prevent” such access.

Embracing and expanding *Banks*’ century-old hold-

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**“The law,” whether articulated in judicial opinions, legislative acts or ordinances, is in the public domain and not amenable to copyright.**

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(Continued on page 48)



## Codes Adopted as “The Law” Lose Copyright Protection

*(Continued from page 47)*

ing to Internet publication, the Fifth Circuit said that *Banks* represents an understanding that “the law,” whether articulated in judicial opinions, legislative acts or ordinances, is in the public domain and not amenable to copyright. “As governing law, pursuant to *Banks*, the building codes of Anna and Savoy, Texas cannot be copyrighted.”

Additionally, the Fifth Circuit was persuaded that, independent of the rationale of *Banks*, once the copyrighted model codes were adopted as law, the codes became “facts” not protected under the Copyright Act. Further, because there is only one way to express the meaning of the building codes, the “idea” embodied in the law merges with SBCCI’s expression and therefore renders copyright protection unavailable under the copyright statute. See 17 U.S.C. § 102(b).

However, the Fifth Circuit limited its holding. The court noted that several national standards – writing organizations, as amici, feared their copyrights would be vitiated simply by the common practice of governments incorporating their standards into laws. The court distinguished those hypothetical situations because this case concerned the “wholesale adoption” of a model code promoted by its author, SBCCI, precisely for use as legislation.

In contrast, legislatures often require certain businesses to use privately copyrighted documents or compilations. For example, some states require insurance companies to use the “Red Book” list of automobile values.

The court suggested that the copyright on the Red Book is not invalidated by a statutory directive to use the copyrighted material.

The Fifth Circuit said that when a statute refers to the “Red Book,” the law requires citizens to consult or use a copyrighted work in the process of fulfilling their obligations. Thus, these copyrighted works do not “become law” merely because a statute refers to them, according to the court. (This distinction is a fine one, at best, and arguably is inconsistent with the majority’s holding that citizens have a right of free access to the law).

Finally, the court rejected SBCCI’s and the dissent’s

assertions that without full copyright protection for model codes, SBCCI will lack the revenue to continue its public service of model codes.

### *Opinion Draws Dissents*

The Fifth Circuit’s decision drew a dissent by well respected Judge Patrick Higginbotham who was joined by three other judges. Judge Higginbotham chided the majority’s concern about restricted access to “the law.” Higginbotham contended that access was not seriously impaired and suggested that statutory, common law and constitutional rights to access to the law would ensure its ready availability.

Higginbotham also rejected the underpinning of *Banks*, distinguishing it as a case about public officials not acquiring copyrights in their judicial opinions and not a case invalidating copyrights held by private actors when their work is licensed by lawmakers. Judge Higginbotham was not prepared to adopt as a matter of federal law the sweeping invalidation of the copyright. To him, Veeck simply violated the explicit terms of the license he agreed to when he copied and published the model codes on the internet. That alone would have been sufficient for him to uphold a finding of infringement.

Circuit Judge Jacques Weiner, joined by five other judges, wrote a comprehensive dissent. He noted that the trend toward adoption of privately promulgated codes is widespread, growing and socially beneficial. His view was that a necessary balancing of countervailing policy concern should have led the court to hold that copyrights on such codes remain valid notwithstanding adoption by the local governments. The copyrights remain enforceable, even as to non-commercial copying, as long as the citizenry has reasonable access to the publications as law and the copyrights are subject to traditional exceptions such as waiver and fair use.

*David Moran is a partner in Jackson Walker L.L.P. in Dallas, Texas and devotes a considerable portion of his appellate practice to media and First Amendment cases.*

## California Appellate Court Holds that § 230 Immunizes eBay

### *Claim Was Based on its Users' Fraudulent Activities*

By Patrick J. Carome and C. Colin Rushing

The California Court of Appeal for the Fourth Appellate District recently held that 47 U.S.C. § 230 — which immunizes an interactive computer service from claims that “treat” it as the “publisher or speaker” of third-party information — immunized eBay Inc. from claims based on the sale by third parties of forged sports memorabilia over its online auction service. *Gentry v. eBay Inc.*, \_\_\_ Cal. Rptr. 3d \_\_\_, 2002 WL 1371153 (Cal. Ct. App. June 26, 2002.) (O’Rourke, J., Haller, J. & McConnell, J.)

The court joined the numerous appellate courts, beginning with the Fourth Circuit in *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), that have held that Section 230 broadly immunizes providers of interactive computer services from liability for the dissemination of unlawful third party content.

This decision confirms the validity of the long line of cases agreeing with *Zeran’s* articulation of Section 230’s scope, and it is notable for at least two additional reasons. First, the court acknowledged that Section 230 generally applies to all causes of action based on third party information -- including claims alleging that the third-party information was fraudulent -- and is not limited to defamation torts. Second, Bill Lockyer, California’s attorney general, participated in this appeal as *amicus curiae* solely to urge the court to reject *Zeran* and its progeny -- an argument that the court squarely rejected.

#### ***eBay and California’s Sports Memorabilia Law***

At bottom, this case was about the sale of allegedly fraudulent sports memorabilia -- which was falsely described as bearing authentic autographs -- on eBay’s online auction service. The plaintiffs sued the individuals who sold the allegedly fraudulent collectibles, and they also sued eBay, on the theory that it, as well as the individuals, provided the false descriptions.

The plaintiffs alleged that by disseminating the false descriptions, eBay had violated California’s “Autographed Sports Memorabilia” statute, Cal. Civil Code § 1739.7, whether or not eBay played any role in the actual creation of the descriptions. According to that statute, whenever a “dealer” in sports collectibles “provides a description of [a] collectible as being autographed,” the dealer is required to “furnish a certificate of authenticity to the consumer at the time of sale,” and to otherwise warrant that the collectible indeed bears an authentic autograph.

The term “dealer” is broadly defined in the statute to include any person who is in the business of selling sports collectibles — “exclusively or nonexclusively” — and specifically “includes an auctioneer” who sells such goods.

The plaintiffs alleged that eBay was a “dealer” for purposes of this statute, that it had “provided” descriptions of collectibles as “autographed,” and that it was therefore liable for its failure to warrant the authenticity of the goods.

The Court of Appeal affirmed the trial court’s order dismissing the plaintiffs’ claim. First, as a matter of state law, the appellate court concluded that eBay could not be deemed a “dealer” for purposes of the sports memorabilia statute because eBay did not in fact make the allegedly unlawful sale; instead, the sale was made by the individual defendants, even though they used eBay to facilitate the transaction.

#### ***Memorabilia Claim Barred by §230***

Second, even assuming that eBay could be deemed a “dealer” for purposes of the statute, the Court of Appeal ruled that the plaintiffs’ sports memorabilia claim was barred by Section 230, because it impermissibly “treat[ed]” eBay as the “publisher or speaker” of the descriptions — descriptions that were necessarily provided in the first instance by an eBay user. Put another way, the gravamen of the sports memorabilia claim was that eBay should be li-

*(Continued on page 50)*

***[T]he court acknowledged that Section 230 generally applies to all causes of action based on third-party information . . . and is not limited to defamation torts.***

## Section 230 Immunizes eBay

(Continued from page 49)

able for the alleged “dissemination of representations made by the individual defendants,” and, as the court noted, Section 230 specifically prevents such a claim. Importantly, in reaching this conclusion the court recognized that *any* claim that would “hold eBay responsible for content originating from other parties” would run afoul of Section 230, on the grounds that such a cause of action would necessarily treat it “as the publisher, viz., the original communicator, contrary to Congress’s expressed intent.” Thus, even if the sports memorabilia statute would otherwise apply, it would be preempted as a matter of federal law.

### ***Section 230 Applies to Claims Based on eBay’s “Feedback Forum”***

The plaintiffs had also argued that eBay was liable under theories of negligence and unfair competition (under Cal. Bus. & Prof. Code § 17200) for the operation of its “Feedback Forum.” eBay’s Feedback Forum allows eBay users to rate (and comment on) their experiences with other eBay users. Further, eBay assigns indicia of substantial positive feedback (such as stars) to users who receive a certain number of positive comments.

The plaintiffs alleged that the individual defendants as well as various co-conspirators manipulated the Feedback Forum, so that the individual defendants would appear to be reputable when in fact they were not. According to the plaintiffs, eBay was responsible for this misinformation because even though its Feedback Forum was subject to manipulation, eBay’s system of assigning stars and other symbols, and its statements about the value of the Feedback Forum, gave eBay users (including in particular the purchasers of sports memorabilia) a false sense of confidence in the various merchants with whom they dealt.

The appellate court reasoned that all of the information in the Feedback Forum that the plaintiffs complained about was necessarily provided by eBay users and not eBay itself, and that the stars were assigned based entirely on this third-

party information. Therefore, the court ruled that under Section 230 eBay could not be liable for the allegedly false data in the Feedback Forum or the improperly assigned stars because it did not “create or develop the underlying misinformation.”

### **Section 230 Applies Notwithstanding eBay’s Alleged Constructive Knowledge of Unlawful Activity**

Like other plaintiffs in prior Section 230 cases, the plaintiffs asserted that eBay was liable for its users’ torts because it “knew or should have known about the individual [users’] illegal or fraudulent conduct but failed to take steps to ensure they comply with the law.” The Court of Appeal rejected this contention, holding that such notice-based liability was “the classic kind of claim that *Zeran* found to be preempted by Section 230,” and that it was

akin to claims in other cases that had been “uniformly rejected” by other courts. As the court explained, any claim based on allegations that eBay knew or should have known about allegedly unlawful material that it disseminated would necessarily hold eBay liable for its exercise of a “publisher’s traditional editorial functions,”

namely, monitoring and editing online content. Such claims, the court held, are barred by Section 230.

### ***The Court of Appeal Rejects Attorney General Lockyer’s Challenge to Zeran and its Progeny***

By rejecting the theory of notice-based liability, the court also rejected the arguments advanced by California Attorney General Lockyer, who participated as *amicus curiae*. Purporting to rely on indicia of congressional intent, Lockyer urged the court to reject *Zeran* and all of the case law that has followed it, and to instead adopt the principle — rejected by *Zeran* and various other courts — that Section 230 allows the imposition of liability whenever an interactive computer service “knew or should have known” about the allegedly harmful material. Lockyer also argued that Section 230’s prohibition on

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***[T]he court ruled that under Section 230 eBay could not be liable for the allegedly false data in the Feedback Forum or the improperly assigned stars because it did not “create or develop the underlying misinformation.”***

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## Section 230 Immunizes eBay

*(Continued from page 50)*

“publisher or speaker” liability only applied to defamation claims, and did not apply to other torts based on third-party content.

The court rejected Lockyer’s arguments in a footnote. Noting that the “plain effect of Congress’ words is to shelter service providers for providing access to another’s offensive or objectionable information,” the court also pointed out that Congress explained Section 230’s purpose in the language of the statute itself. By immunizing interactive computer services from liability, Congress intended “to promote the continued development of the Internet and other interactive computer services and other interactive media” and to “preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulations.” As the court explained, “[s]uch language does not reflect the limitations proposed by the Attorney General,” and instead mandates the broad immunity confirmed by it and numerous other courts.

*Patrick J. Carome is a partner and C. Colin Rushing is an associate at Wilmer, Cutler & Pickering, in Washington, D.C. They filed an amicus brief on behalf of America Online, Inc., in this appeal. The views expressed herein are their own, and do not necessarily reflect those of their clients. James C. Krause and Patrick N. Keegan of Krause & Kalfayan represented the plaintiffs and Michael G. Rhodes, Christopher R.J. Pace, and Andrea S. Hoffman of Cooley Godward represented eBay Inc. The Attorney General of California participated as amicus curiae.*

### **Editors Note:**

***The German and French court decisions on web liability discussed on pages 52-53 highlight the contrasting European legal landscape where providers of interactive computer services may, indeed, be held responsible for third-party speech.***

## Newspapers Get Preliminary Injunction Stopping Pop-up Web Ads

On July 12, Judge Claude Hilton of the U.S. District Court in Alexandria, Va., issued a preliminary injunction against The Gator Corporation, a California marketing company, ordering it to stop delivering pop-up web advertisements that appear without permission on the web sites of the publisher plaintiffs. *WashingtonPost Newsweek Interactive Co., et al. v. The Gator Corp.*, Civ. No.02209 A (E.D. Va. July 12, 2002). The 16 plaintiffs are WashingtonPost Newsweek Interactive Co., The Washington Post Company, Gannett Satellite Information Network, Media West-GSI, The New York Times Company, NYT Management Services, Globe Newspaper Company, Dow Jones & Company, Dow Jones L.P., Smartmoney, Tribune Interactive, Condenet, American City Business Journals, Cleveland Live, and Knight Ridder Digital and KR U.S.A..

In the suit, the publishers allege that Gator unfairly competes with them by selling advertising on their sites and violates their intellectual property rights since the pop-up ads mislead web surfers into believing the ads are authorized by and originate from plaintiffs’ web sites. Specifically, the complaint pleads unfair competition, trademark infringement and dilution, copyright infringement, misappropriation, interference with prospective economic advantage, unjust enrichment and violation of the Virginia Business Conspiracy Act.

Gator distributes software that allows Internet users to store personal data, saving them from having to input the same information multiple times when filling out forms or visiting different websites. According to the lawsuit, users who download this program also receive “trojan horse” software that monitors the sites the user visits. The complaint also alleges that since April 2002 Gator engaged in what is known as “drive-by-downloads” where monitoring software is installed on web users’ computers without any action on their part. Gator allegedly sells specific “urls” for targeted pop-up ads, often for competing sites or products, based on detected patterns or consumer preferences. For example, the complaint alleges that visitors to Dow Jones’ CareerJournal.com were greeted with a pop-up ad for HotJobs.com. Gator has argued, in part, that web surfers consented to receiving the ads.

*Plaintiffs are represented by Terence P. Ross and Hill Wellford of Gibson, Dunn & Crutcher LLP in Washington, D.C.*



## German Court Finds Microsoft Germany Liable for Third Party Posting

On May 28, 2002 an appeals court in Cologne, Germany affirmed a ruling holding Microsoft Germany liable for fake nude photos of tennis star Steffi Graf posted by a third party onto a web site operated by Microsoft. See, e.g., <[www.businessday.com/business/technology/ap\\_graf05282002.htm](http://www.businessday.com/business/technology/ap_graf05282002.htm)>.

Last year, an unknown person posted photos with Graf's head superimposed onto a naked body to a German MSN forum website. Microsoft removed the photos upon Graf's request. She then asked them to ensure that such photos would not appear in an MSN forum again. When Microsoft refused, claiming that it could not be responsible for third-party postings, Graf sued for violation of her personality rights.

### *Violation of Personality Rights*

Personality rights are codified in provisions of the German Civil Code that protect personal interests, including confidentiality in personal correspondence, privacy within the home and one's family and sex life. There are three categories of personality rights, each with its own level of protection. There is also a distinction between the level of privacy granted to public and private figures. The highest level of protection is afforded the "intimate sphere," which encompasses family and sexual matters. Those matters are protected even for public figures.

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***If a person could reasonably believe that Microsoft owned the content, then Microsoft would be liable for any personality rights violation regardless of who created the content.***

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The appeals court ruled that the pictures fell within the "intimate sphere" and were an automatic violation of Graf's personality rights. As to whether Microsoft was responsible for the violation, it argued that it was acting as an ISP, that ISPs have no control over content posted to the Internet via their services, and thus can't be held liable for third-party content.

The appeals court disagreed. It found Microsoft liable, and ordered the company to be fined if any more fake pictures of Graf appear on its sites. The court reasoned that if a person could reasonably believe that Microsoft owned the content, then Microsoft would be liable for any personality rights violation regardless of who created the content. The court ruled that because

Microsoft created the infrastructure for the web forum and the posts appeared within Microsoft-branded pages with links to Microsoft products, and Microsoft reserved the right to use any content posted on the site, an ordinary person would consider the pictures to be Microsoft's own content. See

"Microsoft verliert Rechtstreit um obszöne Graf-Fotomontagen" May 28, 2002, archived at <<http://de.news.yahoo.com>> for a German analysis of the ruling.

**SAVE THE DATE**

**DCS BREAKFAST MEETING**

**Friday**  
**November 15, 2002**

**Save the Date!**

**LDRC ANNUAL DINNER**

**Wednesday**  
**November 13, 2002**

***In honor of war reporting...***  
***moderated by***  
***Ted Koppel, ABC News***

## French Father Christmas Wins the Day

### *French Webmaster and Domain Name Owner Found Liable for Defamatory Chatroom Comments*

By Louis de Gaulle and  
Benjamin Amaudric du Chaffaut

On May 28, 2002, in an Internet defamation case, the Tribunal de Grande Instance de Lyon ordered the domain name owner and webmaster of a consumer rights website to pay stiff damages for defamatory comments made by third parties on the site about the French e-business firm Père Noël.fr that accused the company of questionable business practices. The defamatory statements were made by unidentified participants in a chat room that was not moderated – the messages were not previously screened or controlled in any way by the website operators. The defendants were ordered to pay approximately \$80,000.

#### *Case Stirring Controversy*

The case has stirred the Internet community and rekindled the debate concerning the liability of different web operators for press offences such as libel and slander. French law (Article 93-3 of the Act of July 29, 1982) organizes a tier system of liability for press offences committed using “audiovisual communication means,” which in France includes the Internet. Under French rules, the “director” or “co-director” of the publication is liable on the same basis as the main perpetrator of the offense if the defamatory statement was “fixed in a tangible medium before communication to the public”. The “producer” of the web site is similarly liable even if the defamatory statement is not so “fixed.”

In this case, while holding the defendants liable, the court restricted itself to finding the defendants liable as the “developers” of the website. The court found that

inasmuch as it is clear that [the defendants] took the initiative of developing an audiovisual communication service for the purpose of exchanging views on certain pre-defined topics, which in the present instance concerned the difficulties encountered by certain consumers with certain ven-

dors; as a consequence, they cannot disclaim liability on the basis that the disputed messages were not monitored; they consider themselves to be the creators of the website in question and as such are answerable for any offence committed on the website they created.

The fact that a holder of the domain name of a website, together with a webmaster, could be held liable for defamatory statements made on the website, simply by reason of being the “creators” of the website in question, despite the fact they had no control over the content of the messages posted in an unmoderated chat room, has caused a certain uproar. According to some legal scholars, holding website developers responsible for the views expressed on their sites by third parties would not only be inconsistent with existing legislation but would endanger freedom of expression over the Internet.

#### *Confusion Over Court’s Analysis*

However, on closer examination, it seems that the Court did not misinterpret the law or diverge from case law but simply failed to sufficiently elucidate the legal reasoning followed in reaching its decision, this failure having been the source of the confusion surrounding its decision. By strict reference to the terms of the law, the defendants could not have been found guilty as the “director(s) of the publication.” Liability is only possible if the defamatory material has been fixed prior to its communication to the public on a tangible medium, which it had not been in the case in point, since the statements were made in real time in an open chat room that was not moderated or screened by the defendants.

It would also not have been possible to find the defendants liable as the “authors” of the messages since they originated with anonymous participants.

The only remaining possibility under the law was to find the defendants guilty as the “producers” of the chat room (termed an “audiovisual communication service” by the Court).

The Court stumbled onto this third path when it re-

*(Continued on page 54)*

## French Father Christmas Wins the Day

*(Continued from page 53)*

ferred to the concept of the “creator,” which is not recognized by French law, instead of referring to the defendants as the “producers” pursuant to the Act of July 29, 1982.

### ***France’s High Court Rules on Producer Liability***

In a December 8, 1998 decision – Cour de Cassation, criminal division, December 8, 1998, JCP ed G 1999, jur no. 10135 – the Cour de Cassation (the highest court in the land) ruled that when a person has

taken the initiative of developing an audiovisual communication service for the purpose of exchanging views on certain pre-defined topics, the person “can be prosecuted as the producer, without being able to disclaim liability on the basis that the disputed messages were not monitored.

The Court cited the Cour de Cassation decision almost verbatim, but replaced “producers” with “creators.” While this was an error in formulation on its part, it is not substantive error in the application of the law or inconsistent with the position of the Cour de Cassation.

The defendants were found guilty as “creators” of chat rooms whose topics were chosen by them and not solely as webmaster and domain name owner, for which strict liability does not apply.

In view of the foregoing, this decision would not appear to mark a turning point or be as dangerous for freedom of expression as has been made out, despite the high award of damages (€ 80,000), which is unusual in France in this type of litigation. If nothing else, this decision has the merit of serving as a reminder of the risks incurred by the operation of websites, and in particular chat rooms or discussion forums.

### ***No Monitoring Obligation for ISPs***

Under French law it is clear that liability lies with the authors and/or publishers of the material posted on the Internet but not with the persons or technicians involved who are not behind the decision to post such material. It will be noted in this respect that the website host—the

company that hosted and transmitted the consumer website—was found not guilty pursuant to the strict application of the Act of August 1, 2000, which provides that the civil and criminal liability of web hosts cannot be sought on the basis that the hosted material is unlawful unless such host has been requested by a judicial authority to block or prevent access and has failed to do so.” French Act no. 2000-719 of August 1, 2000.

This rule is consistent with the principles adopted at the European level by the “electronic commerce” Directive of June 8, 2000 – European Directive, June 8, 2000, OJEC 17 July 17, 2000, no. L 178 p. 1 *et seq* – which exonerates, under certain conditions, access providers and hosts from all civil and criminal liability regarding information transmitted and distributed over the Internet.

This Directive emphasizes that such services providers may not be placed under “a general obligation [...] to monitor the information which they transmit or store” or to “actively [...] seek facts or circumstances indicating illegal activity.” European Directive, June 8, 2000, Article 15.

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## American Reporter in Zimbabwe Acquitted but Ordered Deported

On July 15, Andrew Meldrum, an American reporter for the *Guardian* newspaper, was acquitted of criminal charges of knowingly publishing falsehoods, following a trial in Harare. The charges carried a prison sentence of up to two years. But immediately upon acquittal, Meldrum — who has lived in Zimbabwe since 1980 as a permanent resident — was served with a deportation order requiring him to leave within 24 hours. The deportation order was signed almost two weeks before the verdict. The order has been stayed pending appeal.

Meldrum was charged with “abuse of journalistic privilege” under Zimbabwe’s Access to Information and Privacy Act, a series of draconian media laws enacted in March to suppress government opposition. See *Media-LawLetter* May 2002 at 32 and June 2002 at 66. At issue here was an article by Meldrum published in the *Guardian* in April that discussed published reports from Zimbabwean newspapers that a woman was brutally murdered by supporters of the ruling Zanu-PF party. Following the *Guardian*’s publication a Zimbabwean paper published an apology for reporting the story, acknowledging doubts about the story’s accuracy and that a

source may have deliberately sought to trick the paper and the opposition party.

At trial, Meldrum argued that he undertook reasonable steps to verify the story and, more broadly, that the court lacked jurisdiction to hear the charges since the *Guardian* article had not been published in Zimbabwe. Indeed, testimony at trial showed that a Zimbabwean police officer surfed the web to find and download the *Guardian* story and that it had otherwise not been published, uploaded or edited in Zimbabwe. According to news reports, Judge Godfrey Macheyo did not address the jurisdictional argument but acquitted Meldrum on the merits, saying prosecutors failed to prove that he did not take proper steps to verify the story. See, e.g., L. O’Carroll, “Meldrum told to leave Zimbabwe,” *Guardian*, July 15, 2002. Available at <<http://media.guardian.co.uk/>>.

At least thirteen Zimbabwean journalists face trials for abusing journalistic privilege.

Andrew Meldrum was represented by Beatrice Mtetwa, who was retained by the *Guardian*; the state prosecutor was Thabani Mpfu,

## Court Orders Disclosure of Source in London Suit Over Medical Records

By Susan Poffley

A decision of the House of Lords in *Ashworth v MGN*, was released June 27th, with their Lordships upholding the orders made by the High Court and Court of Appeal that the Daily Mirror must disclose the name of the source who provided it with the medical records of Moors murderer Ian Brady.

The case arose from an article published by the Daily Mirror on 2 December 1999, about Brady’s hunger strike. It included verbatim extracts of Brady’s medical records from Ashworth Security Hospital. Brady had himself written to various newspapers and broadcasters about his hunger strike and the director of communications at the hospital issued 12 press releases on the subject between 30 September 1999 and 11 January 2000. On 19 April 2000, Rougier J ordered the Daily Mirror to explain how it had

come into possession of Brady’s records, and to identify any persons involved with the transfer of the records from the hospital to the journalist. It was generally accepted that the ultimate wrongdoer had to be a member of staff at the hospital. The Mirror appealed, but the Court of Appeal upheld the decision in December 2000. The Mirror appealed to the House of Lords.

The Mirror had five main arguments:

1. The hospital had not proved that the information was truly confidential
2. As all the published information had been placed in the public domain by Brady himself, the Daily Mirror was not a tortfeasor in publishing the extracts from the records, and could not therefore be the subject of the Norwich Pharmacal order sought by the hospital

(Continued on page 56)



### Court Orders Disclosure of Source

(Continued from page 55)

3. The “interests of justice” exception to section 10 of the Contempt of Court Act 1981 is limited to cases where disclosure is required for existing or intended proceedings.
4. The hospital had not established that an order for discovery was proportionate to a legitimate aim within Article 10(2) of the European Convention on Human Rights, or that it was strictly necessary in a democratic society
5. The Norwich Pharmacal jurisdiction to order discovery is an aid to litigation and does not extend to cases where a claimant has neither brought nor intends to bring proceedings.

All of these arguments were rejected by the House of Lords. As to 1 and 2, Lord Woolf said that it did not matter whether the Daily Mirror was a tortfeasor or not for the purposes of a *Norwich Pharmacal* order. Such an order only required wrongdoing by someone - not necessarily (or even generally) the person from whom the order was sought.

At [30] Lord Woolf CJ stated:

“...what is required is involvement or participation in the wrongdoing and...if there is the necessary involvement, it does not matter that the person from whom discovery is sought is innocent and in ignorance of the wrongdoing by the person whose identity it is hoped to establish.”

In this case, the person who had given the records to the paper was the wrongdoer (for breach of his or her contract of service with the hospital, even if not for breach of confidence), but the paper could still be ordered to provide details of that person’s identity.

As to points 3 and 4, Lord Woolf CJ approved the statement of Lord Bridge of Harwich in *X v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1 that “the interests of justice” should be given a wide interpretation. Lord Bridge said at page 44 that “It is, in my opinion, “in the interests of justice” in the sense in which this phrase is used in section 10, that persons should be enabled to exercise important legal rights and to protect themselves from serious legal wrongs whether or not resort to legal proceedings in a court of law will be nec-

essary to attain these objectives.”

Their Lordships similarly disagreed with point 5, citing *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, in which the Court of Appeal made an order notwithstanding that no proceedings were planned against the wrongdoer. Templeman LJ said that “the principle of the *Norwich Pharmacal* case applies whether or not the victim intends to pursue action in the courts against the wrongdoer provided that the existence of a cause of action is established and the victim cannot otherwise obtain justice.”

Lord Woolf CJ held in *Ashworth* at [57]:

“The Norwich Pharmacal jurisdiction is an exceptional one and one which is only exercised by the courts when they are satisfied that it is necessary that it should be exercised. New situations are inevitably going to arise where it will be appropriate for the jurisdiction to be exercised where it has not been exercised previously. The limits which applied to its use in its infancy should not be allowed to stultify its use now that it has become a valuable and mature remedy.”

<http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd020627/ash-1.htm>

*Susan Poffley is with Clifford Chance in London.*

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## The Responsible Journalist

By Marietta Cauchi

“Responsible journalism” is being cited increasingly by UK courts as the standard by which the press will be judged when defending defamation actions. This development is challenging the traditional relevance of principles such as malice and meaning in libel defenses, particularly in the qualified privilege defense.

The common law defense of qualified privilege historically protected a defendant’s non-malicious statement where there was a legal, social or moral duty to communicate the relevant information and the recipient has a corresponding interest in receiving it – known as the duty-interest test. Malice in this context means a desire to injure the defamed person, or any other wrong or improper motive, which is the dominant motive for the publication.

### *The Reynolds Approach*

The House of Lords in *Reynolds v The Times Newspapers Limited* [2001] 2 AC 127 laid down the modern approach to the defense of qualified privilege for the press. The court confirmed that the defense is available when the duty-interest test is satisfied and went on to identify ten specific factors relevant to determining whether the test was satisfied.

All of these practical factors – including the urgency of the material, the steps taken to verify the information and seeking a response from the potential claimant – are matters that a journalist would or should consider as part of doing his job. Implicit in the court’s judgment, therefore, was that responsible journalism and journalists would be protected by the defense of qualified privilege.

More recently, in *Loutchansky v The Times Newspapers Limited & Ors* (No 2) [2001] EWCA Civ 1805 the Court of Appeal further developed the responsible journalism standard, identifying matters it considered relevant to a court’s thinking in deciding whether the standard had been met:

1) Setting the standard of journalistic responsibility

too low would encourage too great a readiness to publish defamatory matter. Journalists should be rigorous, not lax in their approach;

2) Setting the standard too high would deter newspapers from discharging their proper function of keeping the public informed.

Notably, the Court of Appeal also held that the *Reynolds* privilege pre-empts any separate inquiry into malice. Once a court has decided that a publisher has acted responsibly there is little scope for an additional inquiry into the motive for publication.

### *Responsible Intersects Defamatory Meaning*

In the recent Privy Council case of *Bonnick v Morris & Ors* June 17 2002 Appeal No 30 of 2001 (available at [www.privycouncil.org.uk/](http://www.privycouncil.org.uk/)) the court confirmed that, following *Reynolds*, matters relating to malice are to be considered within the duty-interest test and not as an independent issue. The Privy Council also

addressed the issue of implied meaning and qualified privilege.

In *Bonnick*, a Jamaican newspaper published an article discussing controversial contracts involving The Jamaica Commodity Trading Company. The article reported that plaintiff Hugh Bonnick’s “services as managing director were terminated shortly after the second contract was agreed.” Bonnick sued alleging the article implied he was fired because of “improprieties.” The trial court found for plaintiff. The Court of Appeal reversed and the Privy Council affirmed reversal.

While the Privy Council upheld the trial judge’s finding that the relevant words could bear the defamatory meaning complained of, it more importantly held that for purposes of deciding whether or not the journalist acted responsibly the court would consider the possibility that different readers would have different views on meaning.

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***A journalist should not be penalized for making a wrong decision on a question of meaning on which different people might reasonably take different view.***

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(Continued on page 58)

## The Responsible Journalist

(Continued from page 57)

It is one matter to apply [the single meaning] principle when deciding whether an article should be regarded as defamatory. Then the question being considered is one of meaning. It would be an altogether different matter to apply the principle when deciding whether a journalist or newspaper acted responsibly

*Bonnick* at ¶ 22.

Lord Nicholls, echoing his focus on the practicalities of journalism in the *Reynolds* judgment, said that the standard of conduct should be applied in a practical and flexible manner and that unnecessary rigidity would be introduced if the objective standard of responsible journalism had to be applied exclusively by reference to the “single meaning” of the words. Thus in determining whether a qualified interest applies

a journalist should not be penalized for making a wrong decision on a question of meaning on which different people might reasonably take different view.

*Id.* at ¶ 24.

Critics may see this flexibility as an erosion of the traditional principles on which defamation is based but the courts seem willing to depart from these principles particularly in areas highlighted by the growing awareness and relevance of human rights legislation.

In *Loutchansky* the Court of Appeal found the *Reynolds* privilege to be “a different jurisprudential creature from the traditional form of privilege from which it sprang.” The “interest is that of the public in a modern democracy in free expression and, more particularly, in the promotion of a free and vigorous press to keep the public informed.” While the corresponding duty on the journalist “is to play his proper role in discharging that function. His task is to behave as a responsible journalist.”

## Council of Europe Adopts Protocol Banning Racist and Xenophobic Speech Via Computer Networks

By **Rachelle Bin**

The Council of Europe (“COE”), comprised of 43 countries including all 15 members of the European Union, is Europe’s oldest political organization, founded in 1949. Observer status has been granted to five countries, including the United States, Canada and Japan.<sup>1</sup>

In September 2001, the COE approved The Convention on Cybercrime (“Convention”). The Convention attempts to harmonize national laws by defining certain computer-related crimes, such as hacking, copyright infringement, child pornography and computer-related fraud. Further, it provides for cross-border investigative and prosecutorial procedures to cope with global computer networks.

The Convention was presented for formal adoption in November 2001 and was signed by member countries, including Belgium, France, Germany, Spain, and the United Kingdom. The United States, represented by the Department of Justice and by the Department of State, actively participated in the drafting of the Convention and ultimately signed it. In order to take effect, the Convention’s provisions must be incorporated into the national laws of the different countries.

Due to disagreement among the drafters of the Convention, the Convention omitted criminalizing racist or xenophobic speech via computer networks. The United States and other delegations expressed strong concern that such a provision would be anathema to First Amendment principles and/or would violate their own national laws of freedom of expression. Consequently, the Committee of Ministers created the “Committee of Experts on the Criminalization of Acts of Racist or Xenophobic Nature Committed through Computer Networks” (“Committee”) to prepare an Additional Protocol (“Protocol”) to the Convention by April 30, 2002, which would explicitly criminalize racist and xenophobic speech via computers.

### *The First Additional Protocol to the Convention on Cybercrime*

The Protocol, published on May 14, 2002, not only attempts to harmonize national laws criminalizing racist

(Continued on page 59)

## Banning Racist and Xenophobic Speech Via Computer Networks

(Continued from page 58)

and xenophobic speech, it also permits parties to use the avenues of international cooperation set forth in the Convention to prosecute such crimes. The Protocol, a binding legal instrument, will be open to the signature and ratification of the parties who signed the underlying Convention.

The Protocol provides quite an expansive definition of “racist and xenophobic” speech or material and sets forth numerous instances where “racist and xenophobic” conduct should be criminalized. “Racist and xenophobic material” is broadly defined as “any written material, any image or any other representation of thoughts or theories, which *advocates, promotes or incites* hatred, discrimination or violence, against any individual or group of individuals, based on race, color, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors.”

### Report Tries to Explain Defining Terms

The Committee attempted to answer some of the ambiguities raised by this definition specifically and by the Protocol generally in the Draft Explanatory Report (hereafter, “Report”) attached to the Protocol. However, in many instances, the Report raises more questions than it answers.

The Report states that “racist and xenophobic speech” refers to “certain conduct to which the content of the material may lead” and *not* to the feelings/beliefs/aversions expressed. Thus, the message is not actionable *per se*, but only if it *may* lead to the objectionable behavior cited.

The Committee defined “advocates” as a “plea in favor of hatred, discrimination or violence”; it defined “promotes” as the “encouragement to or advancing hatred, discrimination or violence”; and it defined “incites” as “urging others to hatred, discrimination or violence.” Instead of narrowing the scope of objectionable behavior, the definitions merely broaden the scope.

The Report goes on to offer similarly expansive definitions of “hatred,” “violence” and “discrimination.” With such broad parameters, it is easy to envision many

instances where protected speech in the United States is deemed “racist and xenophobic” and thus actionable.

### Criminal Conduct Defined

Chapter II of the Protocol instructs parties to the Protocol to establish national laws criminalizing the enumerated conduct. Article 3, para. 1, makes it a crime to distribute or otherwise make available “racist and xenophobic material *to the public* through a computer system.” Thus, a public message or picture, which encourages discrimination against a particular ethnic group, is a crime. Purely private communications are not actionable under this provision. Whether the expression is public or not, depends on the intent of the sender. “Where such messages are sent at the same time to more than one recipient, the number of the receivers and the nature of the relationship between the sender and the receiver is a factor to determine whether such a communication be considered as private.” If a racist message is sent to two persons, is it “public” under this section? What if the message is sent to five persons?

Article 4 makes it a crime to threaten a person (or persons) with the commission of a serious criminal offense because “they belong to a group, distinguished by race, color, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors.” Private threats are actionable.

Regarding the definition of “threat,” the Report offers little guidance by stating that it “may refer to a menace which creates fear in the persons to whom the menace is directed, that they will suffer the commission of a serious criminal offense.” There is no standard for determining what may or may not cause fear. Further, “serious criminal offense” is left up to interpretation by the individual parties to the Protocol, thus adding to the confusion and ambiguity.

Article 5, para. 1, criminalizes insults made *publicly* through a computer system of “persons for the reason that they belong to a group, distinguished by race, color, descent or national or ethnic origin, as well as religion, if used as a pretext for any of these factors.” Again, as

(Continued on page 60)



## Banning Racist and Xenophobic Speech Via Computer Networks

(Continued from page 59)

with “threat”, “insult” is given a broad, ambiguous definition. An “insult” is “any offensive, contemptuous or invective expression which prejudices the honor or the dignity of a person.” Unlike a threat, insults made in private communication are excluded. Under Section 2(ii) a party does not have to criminalize insults.

### *Criminal Speech on Genocide*

Article 6 makes it a criminal offense to distribute or otherwise make available through a computer “material which denies, grossly minimizes, approves or justifies acts constituting genocide or crimes against humanity.” The provision applies to genocide or crimes against humanity which occurred during and after World War II and which have been recognized as such by international courts (i.e., the Nuremberg Tribunal) or by international legal instruments (i.e., U.N. Security Council Resolutions”).

As with public insults in Article 5, a party can reserve the right not to criminalize such behavior. This provision appears to criminalize passive websites which deny the existence of crimes against humanity, even if there is no active contact with third persons.

### *Intent Requirement Aids ISPs*

Finally, Article 7 criminalizes the aiding or abetting of any of the above-enumerated offenses. A third party is liable where an aider/abettor, such as an Internet service provider (“ISP”), also intends that the crime be committed. Though not stated in the Protocol, the Report does state that an ISP is not liable for the transmission of racist and xenophobic material through the Internet if the provider did not intend to commit the crime. Arguably, under this narrow interpretation, an ISP is not required to actively monitor content to avoid criminal liability. (Article 7, para. 45, page 16)

The Protocol’s language states that to be criminal, all of the offences must be committed intentionally (“when committed intentionally and without right”). As such, the drafters of the Protocol reasoned that an ISP could not be held liable if it only served as a “conduit for, or hosted a website or newsroom containing such material, *without the*

*required intent under domestic law.”* The Report explains that the meaning of “intent” has been left to national interpretation. Thus, where one country may find no intent, and thus no criminal liability, another country, with the same facts, may deem the action criminal.

### *Conclusion*

The Protocol raises serious First Amendment concerns since it prohibits speech which is generally protected in the United States. The ambiguity and broadness of the different forms of conduct criminalized leaves much open to the individual interpretation of member states.

Further, though the Protocol states that ISPs do not have to monitor content, because the definition of “intent” has been relegated to the individual signatories, ISPs may find themselves snared in criminal prosecution. As such, they could argue that, to be safe, they are required to monitor the content transmitted over their servers for potential offenses. It is not hard to envision the scenario where parties in the United States, whether individuals or ISP’s, sending objectionable conduct to parties in Europe, are subject to extra-territorial jurisdiction under the Protocol.

<sup>1</sup>The COE was established as a forum to uphold and strengthen human rights and to foster democracy throughout Europe. Its work covers all major issues facing European society except defense. The main components of the COE are: (1) the Committee of Ministers, the COE’s decision-making body, consisting of 43 foreign ministers (or their Strasbourg-based deputies); (2) the Parliamentary Assembly, the COE’s deliberative body, consisting of 602 members from the 43 national parliaments and Special Guest delegations; (3) the Congress of Local and Regional Authorities, the COE’s consultative body, consisting of a Chamber of Local Authorities and a Chamber of Regions; and (4) the 1300 member Secretariat. The COE’s headquarters are in Strasbourg, France.

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## Pew Research Center Study Reports Changes in American's Newsgathering Habits

A new survey on Americans' news consumption by the Pew Research Center reports that Americans' interest in international news coverage post-September 11th has not increased as much as experts projected. The study also concludes that Americans are reading newspapers less and that the increase in the number of Americans who use the Internet to retrieve news has slowed in 2002. Another interesting finding of the study is the leveling off of TV news consumption by Americans, explained primarily by the fact that young adults have not acquired the network news viewing habits of older age groups. For the full text of the study see *Public's News Habits Little Changes by September 11* (June 9, 2002), available at <http://www.people-press.org/reports>.

### ***International News: Interest Increases, but Not Substantially***

The proportion of Americans who claimed that they follow international news "very closely" has risen modestly from 14% in 2000 to 21% in 2002. The rise is primarily attributed to older, well-educated Americans who, according to the Pew Survey, "already showed a disproportionately high interest in international news." However, the number of participants in the study who claim to follow international news "somewhat closely" has remained almost constant, dropping from 45% in 2000 to 44% in 2002.

One of the reasons why Americans may tend to have a more moderate interest in foreign news may stem from the fact that 65% of moderate-to-low international news followers say that they lose interest in foreign news because of a lack of background to properly understand developments. Also, the study notes that while Americans have followed the events in the Middle East closely, other international events go entirely unnoticed by the public such as the success of right-wing French politician Jean-Marie Le Pen and the attempted military coup in Venezuela.

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**65% of moderate-to-low international news followers say that they lose interest in foreign news because of a lack of background to properly understand developments.**

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### ***Newspapers: Decline in Readership and Time Spent Reading***

Although interest in international news has increased somewhat, newspaper readership has continued to decrease, even after September 11th. Only 41% of respondents said that they read a newspaper the previous day, which is down from 47% in 2000 and 50% in 1997. The largest decline witnessed in newspaper readership occurred in the 35-49 age group. The under-35 age group has continued to shun newspapers and the Pew Study found that Americans under the age of 35 are more likely to read a book than to read a newspaper, while older Americans (65 and up) have maintained their relatively high levels of readership.

Furthermore, the amount of time that people spend reading a newspaper has declined. The study found that Americans on average spend approximately 15 minutes daily reading a newspaper, down from 19 minutes in 1994.

### ***The Internet: News Boom Slows Down***

The number of Americans who regularly go on-line for their daily dose of news has plateaued. Initially, the number of regular online news consumers increased tenfold from 2% in 1996 to 23% in 2000, yet in 2002, the percentage of respondents who claimed to regularly turn to the Internet for news on a daily basis was 25%. Additionally, when asked if they went on-line for news the day before the interview, only 16% said yes, up from 12% in 2000. The education and gender gap in online news readers has remained with 41% of men and only 29% of women saying that they regularly go online for news, and 57% of college graduates saying that they use the Internet for news at least once a week, compared to only 26% of high-school graduates.

The study indicates that 62% of the public goes online, triple the amount of people who used the Internet

*(Continued on page 62)*

## Pew Research Center Study Reports Changes in American's Newsgathering Habits

*(Continued from page 61)*

six years ago. It also suggests that Internet use is supplementary and does not detract from the time Americans usually spend watching TV, listening to the radio, or reading a newspaper.

One explanation for the leveling off of Internet news consumption is that most Americans do not go online specifically for news reading, but instead come across news inadvertently while surfing the web. According to the Pew Study, 65% of respondents are "grazers" who do not intentionally seek out news on the web but read news information in passing. Americans under 50 are more likely to be grazers than older Internet users.

### ***Television News: Gaining More Viewers But Networks Unable to Hook Young Adults***

The attrition of nightly network news viewers has halted with 32% of the Pew Survey respondents saying that they regularly watch one of the four major network news broadcasts (*NBC Nightly News*, *ABC World News Tonight*, *CBS Evening News*, and *NewsHour*). In 1993, 60% of respondents claimed to be regular watchers of network news, but over the last seven years, that number has been cut in half—only 30% in 2000 reported to be regular watchers. September 11th and the ensuing war on terrorism are likely reasons why the attrition has eased.

Although more are watching network news regularly, young adults have not made network news watching a habit. Only 19% under the age of 30 claimed to regularly watch network news, while 53% of senior citizens claim to do so. Similarly, Americans aged 30-49 do not watch network news regularly with just 23% claiming to be regular viewers. Hence, the networks' audiences are generally skewed towards older Americans.

Conversely, cable news channels have a more equally balanced audience in terms of age. The viewership of all of the all news cable channels (with the ex-

ception of CNBC) is up slightly from 2000. One possible explanation for the increase in cable news (although its viewership is down from the mid-to-latter 1990s) is that the amount of time that viewers watch television news has declined. In 1994, respondents to the survey spent 38 minutes watching TV news; today they spend just 28 minutes. Hence, the 24-hour availability and quick summary of news events that cable news stations provide may make the cable a more attractive alternative to network news for young viewers.

The study's key finding is that there is a great dichotomy in the way younger and

older Americans stay informed. The younger Americans seem to act as news grazers who use a less structured approach to finding news. Grazers use multiple mediums to stay informed and rarely become regular viewers/readers of any specific broadcast or publication.

Older Americans; however, are more likely to seek out traditional news media and regularly use the same source—they are the regular network news watchers and newspaper readers. These divergent news audiences present a challenge to producers and editors—how to attract the youthful audience while maintaining the core, older audience.

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***The 24-hour availability and quick summary of news events that cable news stations provide may make the cable a more attractive alternative to network news for young viewers.***

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## **Ethics Corner**

### **When Your Client Communicates With An Adverse Party Represented By Counsel**

By Richard Goehler

The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics (the "Committee") recently issued a formal opinion on the "no-contact rule" under DR7-104 of the Code of Professional Responsibility.

The question presented to the Committee was succinctly stated as follows:

Where a client conceives the idea of communicating directly with an adverse party who is known to be represented by counsel, may the attorney advise the client about the substance of the communication?

#### ***The Committee Reverses It's Interpretation of DR7-104***

The Committee concluded that where the client conceives the idea to communicate with a represented party, DR7-104 does not preclude the lawyer from advising the client concerning the substance of the communication. The lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the adverse party to take action without the advice of counsel or otherwise to overreach the adverse party.

The Committee's formal opinion recognized that the need for direct contact (by the client communicating directly with a counterpart) often arises in negotiation or set-

*(Continued on page 64)*

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### **Ethical Duties of Media Lawyers Where Colleagues' Speech Is Involved**

By Ralph Gregory Elliot

It is often so that cases that appear to deal with one subject or area of law raise issues in wholly different areas of law undreamed-of by the writer of the opinion. So it is with the decision of the United States Court of Appeals for the District of Columbia in *United States v. Microsoft Corp.*, 253 F.3d 34 (2001). The area of law collaterally affected by it is the duties and responsibilities of media lawyers.

In ten blistering pages at the conclusion of its opinion, the court in *Microsoft* excoriated trial Judge Thomas Penfield Jackson for interviews he gave to three journalists discussing his evolving thoughts on what his decision would be. The interviews, held in secret, began shortly after the conclusion of evidence-taking but two months before the court issued its findings of fact. The judge insisted that the fact and content of his interviews remain secret until he issued his final judgment.

In these interviews the judge discussed, among other things, his distaste for the defense of technological integration, one of the central issues in the lawsuit; his views on Microsoft's misconduct, including assessments of the

credibility of witnesses; his views on remedies; and similar matters. All of these, the Court of Appeals found, "dealt with the merits of the case" while it was "pending." His concealment of the interviews "suggest [ed] knowledge of their impropriety"

The ethical norms involved were set forth by the court as follows:

Canon 3A(6) of the Code of Conduct for United States Judges requires federal judges to "avoid public comment on the merits of [ ] pending or impending" cases. Canon 2 tells judges to "avoid impropriety and the appearance of impropriety in all activities," on the bench and off. Canon 3A(4) forbids judges to initiate or consider *ex parte* communications on the merits of pending or impending proceedings. Section 455(a) of the judicial code requires judges to recuse themselves when their "impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

Judge Jackson's violations of those precepts were found to have been "deliberate, repeated, egregious and

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## When Your Client Communicates With An Adverse Party Represented By Counsel

(Continued from page 63)

tlement circumstances — either “to cement a settlement or break a negotiating log jam.” The Committee further recognized that the client would expect to rely on the lawyer’s advice in these circumstances. Previously, however, the Committee had interpreted DR7-104 in a manner that deprived the client of the lawyer’s advice in these circumstances. At that time, in 1991, the Committee had undertaken a very broad interpretation of DR7-104 and concluded that the lawyer’s client was included within DR7-104’s prohibition against a lawyer’s causing “another” to communicate with a represented party.

DR7-104(A)(1) of the Code of Professional Responsibility establishes a “no contact” rule for counsel. That rule provides that during the course of the representation of a client, a lawyer shall not:

Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

This “no contact rule” is well established and recognizes the need to protect clients against over reaching by opposing counsel and the preservation of the attorney client relationship. The Committee traced the originals of the rule to an 1836 legal treatise and found a citation to the rule by the American Bar Association’s Canons of Professional Ethics going back to 1908.

The Committee also found, however, that the “no contact” rule was not meant to prohibit a lawyer from advising the lawyer’s own client concerning the client’s communication with a represented non-client. Prohibiting such advice would unduly restrict the client’s autonomy, the client’s interest in obtaining important legal advice, and the client’s ability to communicate fully with the lawyer.

## Lawyers May Advise Client in Lawful Talks With Opponent

Modern authority is consistent with this notion. For example, under the Model Rules of Professional Conduct, a lawyer is permitted to advise a client to speak directly to a represented party. (See Model Rule 4.2.) Moreover, the Ethics 2000 Commission’s commentary to Model Rule 4.2 further states: “parties to a matter may communicate directly with each other and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make.” Similarly, Section 99 of the Restatement of the

Law Governing Lawyers explicitly permits a lawyer to assist or advise a client concerning communications with a represented party.

The New York Committee then went on to find that there was nothing in DR7-104 on its face that would permit a severe limitation

on a client’s right to obtain legal advice to assist the client in communicating with its counterpart to achieve a lawful objective. In withdrawing its previous opinion, therefore, the Committee concluded that where the client conceives the idea to communicate with a represented party, DR7-104 does not preclude the lawyer from advising the client concerning the substance of the communication. The lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the non-client to take action without the advice of counsel or otherwise to overreach the non-client. A copy of the Association’s opinion is available at [www.abcnyc.org](http://www.abcnyc.org).

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***In withdrawing its previous opinion, therefore, the Committee concluded that where the client conceives the idea to communicate with a represented party, DR7-104 does not preclude the lawyer from advising the client concerning the substance of the communication.***

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## Ethical Duties of Media Lawyers

*(Continued from page 63)*

flagrant” and bespoke a “rampant disregard for the judiciary’s ethical obligations,” which jeopardized public confidence in the integrity of court proceedings. Indeed, the court raised the possibility that the favored reporters “may have been trading on the basis of the information [the judge] secretly conveyed.”

The court condemned “the impression of a judge posturing for posterity, trying to please the reporters with colorful analogies and observations bound to wind up in the stories they write” and judges “who covet publicity, or convey the appearance that they do.”

### ***A Question for Media Counsel?***

Nowhere does the opinion mention, let alone discuss, lawyers for the reporters or the media involved. And yet the question begs to be asked and answered: where were the lawyers in all of this? Are we to believe that neither the reporters nor the media organizations that ultimately published their stories consulted counsel during the process? Or are we to believe that any such consultations were on discrete and limited issues, such as vetting for defamation exposure? We shall never know.

Let us, however, hypothesize two scenarios that might well have taken place. Reporter comes to Lawyer and says one of two things while the case is still pending and no decision has been rendered, precisely the situation in Judge Jackson’s case: (a) “I’d like to interview the judge right now and find out what he’s thinking about the case. Are there any reasons I shouldn’t?” or (b) “The judge would like to be interviewed by me right now to discuss what he’s thinking about the case. Are there any reasons I shouldn’t accept his offer?”

In both of these scenarios the only lawyer-client relationship Lawyer has is with the reporter or with the media organization whose agent the reporter is. Thus, in the traditional model Lawyer only owes duties to the reporter. He owes no duty to the judge. Do rules of professional conduct impose on Lawyer any duties as to

the advice Lawyer should give the reporter in these circumstances? Does the fact that Lawyer is also an officer of the court impose yet other duties — or provide additional bases for the same duty — with respect to advice to the reporter? If so, is that latter set of duties owed to the reporter or to “the system” of which Lawyer is an officer? Is there any conflict between these duties? Is the conflict inevitable and inherent in the very nature of a lawyer’s dual capacity as counsel to a client and as an officer of the court?

### ***Lawyer As Counselor***

Lawyers are subject to a number of rules of professional conduct that help to chart a path through this ethical thicket. Most relevant here are rules dealing with the lawyer as counselor.

Model Rule 1.4(b), dealing with communications with a client, provides that:

(b) A lawyer shall explain a matter to the extent reasonably

necessary to permit the client to make informed decisions regarding the representation.

The “guiding principle,” as the comment to the rule states, “is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of the representation.”

Model Rule 1.2(d) is also relevant:

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client . . .

Finally, Model Rule 2.1, dealing with the lawyer as advisor, bears on the lawyer’s discharge of duties owed to the client:

In representing a client, a lawyer shall exercise in-

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***Code of Conduct for United States Judges requires federal judges to “avoid public comment on the merits of . . . pending or impending” cases.***

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*(Continued on page 66)*

## Ethical Duties of Media Lawyers

(Continued from page 65)

dependent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

The comment to the rule is helpful:

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

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***[T]he lawyer's duty to the system affects the discharge of his duty to the client to advise the reporter of the code violation the judge would be committing if the interview were to take place.***

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### ***Lawyer as Officer of the Court***

There are yet other rules that a lawyer must consider in this circumstance, and those are rules dealing with the lawyer's duty to the judicial system. Model Rules 8.4(d) and (f) make it professional misconduct for a lawyer to:

(d) engage in conduct that is prejudicial to the administration of justice;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.

And Model Rule 8.3(b):

(b) A lawyer having knowledge that a judge has committed a violation of applicable rules of

judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

While Model Rule 8.3(c), exempting from mandatory disclosure "information otherwise protected by Rule 1.6," might excuse a lawyer from reporting a judge for code violations of which he learned in the course of representing the reporter, the very duty imposed by Rule 8.3 (b) indicates the importance the rules attach to lawyers' not countenancing judicial code violations.

### ***Facilitating Judicial Code Violation?***

A powerful argument can be made that a lawyer's encouraging or facilitating a reporter's conduct that would result in a judge's violation of the Code of Judicial Conduct (like, for example, suggesting the wording of the reporter's questions most likely to elicit more revealing answers) would constitute conduct on the lawyer's part "prejudicial to the administration of justice" within the meaning of Rule 8.4(d). That is not to say that the lawyer is ethically compelled to discourage the reporter from pursuing his proposed interview. It is very much to confirm, however, that the lawyer's duty to the system affects the discharge of his duty to the client to advise the reporter of the code violation the judge would be committing if the interview were to take place.

Would a lawyer's encouraging or facilitating a reporter-client's conduct in interviewing the judge implicate the lawyer in "knowingly assist[ing] a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law," in violation of Rule 8.4(f)? That is a closer call. While the protections afforded by the attorney-client privilege may spare both the reporter and the lawyer from testifying as to what the

(Continued on page 67)

## Ethical Duties of Media Lawyers

*(Continued from page 66)*

lawyer advised the reporter, exposing the reporter to such questions at all is a disservice to the client to be avoided.

### ***Risks Posed by the Rules***

What do these rules, read together, tell us about our hypothetical? Rule 2.1 clearly permits and, I believe, Rules 1.2(d) and 1.4(b) read together with Rules 8.4(d) and (f) and 8.3(b) mandate, that the lawyer advise the reporter that if the judge discusses the pending case with him, he will likely be considered to have violated the Code of Judicial Conduct; and that the reporter, while not having himself engaged in illegal or fraudulent conduct in conducting the interview, and while not subject to civil, criminal or professional penalties for having done so, will nevertheless have aided and abetted a judicial officer's violation of the rules, thus at least exposing the officer to official discipline, and perhaps causing a mistrial in the case.

This advice as to the legal effect of the reporter's pursuing his contemplated course is an essential part of the lawyer's duty to the client. It gives the client information the client ought to assess in deciding whether to pursue the interview. Helping the judge to get himself into trouble could well impair the reporter's future working relationship with not only that judge but also his colleagues on the bench. It could involve the reporter as a witness in judicial discipline proceedings, in motions to recuse, in proceedings for a new trial. And these are just considerations going to the reporter's self-interest.

### ***Rules on Policing the Bench as a Factor***

If that were the end of the considerations, the lawyer who failed to advise the reporter of the legal consequences for the judge might at most be exposed to a malpractice claim for failing to give the reporter the advice he needed in order to decide what course to pursue. What raises the stakes for the lawyer are Rules 8.4(d)

and (f) and 8.3 (b), which impose duties on all lawyers with respect to policing bench and bar, and at least imply a professional obligation to prevent potential imminent ethical violations in the interests of the administration of justice and therefore in the interests of all persons involved in the system of justice.

Failure of a lawyer to comply with these duties exposes the lawyer to professional discipline. The most ready means of complying with these prophylactic duties to the system is to explain to the client-reporter as part of the lawyer's duty to that reporter under Rules 1.2(d) and 1.4(b) the untoward legal and ethical consequences to which conducting the interview might expose the judge.

Thus, the lawyer can fulfill his duty under Rules 8.4(d) and (f) and 8.3(b) by amplifying his communications with his reporter-client in fulfillment of his duties under Rules 1.4(b) and 1.2(d).

The lawyer's duty to advise the client of the potential ethical consequences of the judge participating in the interview is greater still precisely because the client is a reporter and the product of the interview is intended to be published broadly. This is not merely a conversation that will remain with the participants. Vast numbers of readers will learn the facts and contents of the interviews. This is clearly "public comment" under Canon 3A(6). It could clearly affect the public's perception of how justice is administered. Without minimizing the code violation that would result from a private conversation that went no further than the participants, a conversation intended to be repeated to millions inevitably affects the very institutional interests the code was designed to protect.

### ***And Policing the Bar***

Aiding judges in violating their obligations under the Code of Judicial Conduct is not the only transgression about which lawyers' dual roles require them to be alert. Model Rule 8.3(a) provides as follows:

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***The lawyer's duty [is] to advise the client of the potential ethical consequences of the judge participating in the interview***

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*(Continued on page 68)*

## Ethical Duties of Media Lawyers

(Continued from page 67)

(a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

And while Model Rule 8.3(c) applies here as well, sparing the lawyer from disclosing this information if it is protected by Model Rule 1.6, the lawyer's duty is clear if knowledge of the violation was otherwise obtained; and in any event Rule 8.3(a) shows the importance courts attach to self-policing of the profession and the avoidance by lawyers of ethical violations.

Thus if a media lawyer is asked his advice on a reporter's desire or opportunity to interview a lawyer about the latter's client — whether present or former — the media lawyer ought to advise the reporter that pursuing the interview, while legal for the reporter to do, may involve the interviewed lawyer in disciplinable ethical violations.

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***The interview, while legal for the reporter to do, may likely involve the interviewed lawyer in disciplinable ethical violations.***

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### ***Judges as Candidates***

Two situations particularly relevant to reporters' interaction with judges and lawyers concern judicial elections and lawyers' comments on pending litigation. Model Code of Judicial Conduct Canon 5A(3)(d) forbids a candidate for judicial office — whether an incumbent judge or one not yet a judge — to:

- (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
- (ii) make statements that commit the candidate with respect to cases, controversies or issues that are likely to come before the court;

A version of this canon — which barred a candidate for judicial office from “announc[ing] his or her views

on disputed legal or political issues” — was recently held unconstitutional under the First Amendment in *Republican Party of Minnesota, et al v. White*, \_\_\_ U.S. \_\_\_, 70 U.S.L.W. 4720 (June 27, 2002). The Supreme Court took pains to distinguish this “announce” prohibition from the separate “pledges or promises” Canon 5A(3)(d)(i) above, and expressly declined to express a view on the latter.

If, therefore, this canon retains continuing vitality, the Model Rules of Professional Conduct already discussed would require a media lawyer consulted by a reporter or editorial board about the possibility or imminence of interviews with such a candidate to advise them of this canon and of the sorts of questions which answering likely would constitute an ethical violation.

### ***Trial Publicity***

The same duty arises as a result of Model Rule 3.6, dealing with trial publicity<sup>1</sup> and Model Rule 3.8(g), dealing with the special responsibilities of a prosecutor.<sup>2</sup> Re-

porters should be made aware of these rules, and of the ethical harm's way into which their questions might place lawyers seeking to respond to them.

### ***Advising When Asked***

The careful reader will have noticed that nowhere in this article have I suggested an ethical duty of a media lawyer to seek out reporters, editors and the like to determine *if* these types of interviews or press conferences are contemplated or planned. I believe the media lawyer does his or her ethical duty by giving the sort of advice suggested upon being presented with a question like the hypotheticals discussed in the early part of this article or with an occasion — such as a seminar by the lawyer on dealing with the legal system — where it would be natural for such advice to be proffered.

And in bringing these special constraints upon judges' and lawyers' speech to the attention of reporters

(Continued on page 69)



## Ethical Duties of Media Lawyers

(Continued from page 68)

and editors, media lawyers also ought to point out that asking questions that invite ethically problematic responses is not illegal or otherwise punishable. Knowledge on the reporter's part of the ethical dangers to the interviewee in saying certain things to the reporter is simply one more factor to be weighed by the reporter in deciding how, in the exercise of his reportorial independence, he chooses to proceed.

There are, to be sure, a host of legal, ethical and common law norms that those speaking to the press might transgress by what they say. Doctors, nurses, hospital personnel, teachers, government employees, those bound by contracts and common law principles of agency can get into legal or ethical trouble by disclosing data to any third party, let alone to the press. While it would certainly be appropriate for media lawyers to point these matters out to reporters and editors, doing so is not an obligation mandated by rules of professional conduct. The rules operate on lawyers in this context only with respect to avoiding ethical errors by members of the bar — judges and lawyers. Media lawyers who follow the suggestions set forth in this article will, I believe, have fulfilled those special duties to their clients, and have done so with fidelity to the system.

Thus it is that had the reporters involved in the *Microsoft* articles and books consulted media lawyers before embarking on the interviews, they might well have become aware of the risk to Judge Jackson that interviewing him would pose. That may have made no difference to the reporters, or to Judge Jackson. But at least the reporters would have been armed with knowledge of the potential consequences of their contemplated conduct, the better to inform their own judgments as to whether to pursue their venture.

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*sional Responsibility and the ABA Standing Committee on Professional Discipline, and has represented media clients extensively since 1965.*

<sup>1</sup>(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

- (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
- (2) information contained in a public record;
- (3) that an investigation of a matter is in progress;
- (4) the scheduling or result of any step in litigation;
- (5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there

is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6);

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in the apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

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***Knowledge on the reporter's part of the ethical dangers to the interviewee in saying certain things to the reporter is simply one more factor to be weighed.***

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## Robert I. Friedman: The Life and Death of an Investigative Reporter

### *An Appreciation*

By Laura R. Handman and Elizabeth McNamara

If you are at a point in your legal career when you wonder if what we media lawyers do matters in the big scheme of things, an answer can be found in the life of one investigative reporter who needed it more than most. Neither five libel suits, nor countless threats of suit, nor assaults in the West Bank, nor contracts on his life by Russian mobsters could stop Robert I. Friedman from reporting on the corrupt or controversial. Only a rare and fatal disease, appearing upon his return from an overseas assignment to India, could ultimately silence him. Friedman died on July 2, 2002, at the age of 51.

To the world of investigative reporters, Mideast experts and Russophiles, Robbie was known as one of their unsung or under-sung heroes. In our world, he was known for the law he made, from the first case to require that an implication be intended in a gross irresponsibility case, to the standard of fault for newspaper publishers relying on freelance reporters, to the applicable statute of limitations on transfer of a case for lack of jurisdiction (*Chaiken v. VV Publishing Corp.*, 19 Media L. Rep. 1573 (S.D.N.Y. 1991), 907 F. Supp. 689 (S.D.N.Y. 1995), *aff'd*, 119 F.3d 1018 (2d Cir. 1997), *cert. denied*, 522 U.S. 1149 (1998)), to venue and choice of law in multi-country libel cases (*Weinstein v. Friedman*, 859 F. Supp. 786 (E.D. Pa. 1994), 24 Media L. Rep. 1769 (S.D. N.Y.), *aff'd*, 112 F.3d 507 (2d Cir. 1996)), to fair report privilege for a leaked FBI report, (*Komarov v. Conde Nast*, unpublished, New York Supreme 1998). Robbie was a chilling example of the concerted use of libel suits or threats of libel suits to silence investigative reporting.

Robbie drew their fire with his three books: *The False Prophet: Rabbi Meir Kahane, From FBI Informant to Knesset Member* (Lawrence Hill Books. 1990); *Zealots for Zion: Inside Israel's West Bank Movement* (Random House, 1992); and *Red Mafiya: How the Russian Mob has Invaded America* (Little, Brown, 2000), and with countless articles in *The Village Voice*, *New York Magazine*, *The New*

*Yorker*, *GQ*, *Vanity Fair*, *Harper's*, and *The Nation*, to name a few.

At least to start with, the suits were usually brought in venues other than New York, including France, and required costly depositions in places like Israel. For much of his career, he was a freelancer who, without the security of a regular gig, had to rely on various publishers willing to publish at the risk of a likely lawsuit and then defend him when the suits came. None of his legal tormentors ever prevailed.

The attacks became physical, however, when Robbie was beaten up by militant Jewish settlers on the West Bank, who believed that Robbie had tarnished the image of Rabbi Kahane. He was, however, an equal opportunity critic of extremists, winning an award from the Society of Professional Journalists for his coverage in the *Village Voice* of Muslim terrorists following the 1993 bombing of the World Trade Center.

Matters became even more serious when, one night, he received a call from one of his FBI sources that the FBI had intercepted a call from a Russian business mogul overseas taking a contract out on his life. The FBI's advice: get out of town.

It was on his return in 1995 from an assignment for *Vanity Fair* to cover the political connections to brothels in Bombay — brothels where, he would write, teenage girls have sex in triple-decker cages with their babies by their side — that Robbie came down with a rare form of pneumonia which, over the course of seven years, led with increasing frequency to emergency visits to the hospital. Nonetheless, last year, he with his wife, a reporter for *USA Today*, went to Israel to cover the latest intifada for *The Nation*. He was first on the heart transplant list when he died; the weekend before, he had written a new book proposal.

Laura Handman and Elizabeth McNamara, along with many colleagues at Davis Wright Tremaine, represented Friedman and his publishers for over 15 years.

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***Robbie was a chilling example of the concerted use of libel suits or threats of libel suits to silence investigative reporting.***

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