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California Protects Phone Call Participants In California From Unconsented Out-Of-State Recordings

By Stuart Pierson

California is the latest state to illustrate that no reliable judicial or statutory guidance exists on choice of law issues arising where an interstate communication implicates the laws of states with different domestic interception and recording rules. Practical considerations and the few decisions indicate that the most likely choice will be made by the forum court to serve its perception of the local state interest.

In *Kearney v. Salomon Smith Barney, Inc.*, 2006 WL 1913135, No. S124739 (Cal. July 13, 2006), a case arising out of WorldCom litigation, the California Supreme Court has held on choice of law principles that Salomon Smith Barney's routine recording in Georgia of telephone conversations with customers in California gives rise to a claim under California's all-party-consent statute. The claim would not have survived, however, if SSB had given advance notice of the recording.

Background

The plaintiffs were California residents who opened accounts with SSB in Georgia for the exercise of WorldCom options. When they learned in the ensuing litigation that their telephone conversations had been taped, they filed suit seeking an injunction and monetary damages under the California privacy and business regulation statutes.

The place of recording was not as decisive as the respective state's interest in the privacy of its residents.

The trial court dismissed the complaint, concluding that the recordings were not an unfair business practice because they did not violate Georgia or federal law, and that less restrictive federal law preempted the claim for invasion of privacy under California law. The appellate court affirmed, holding

on choice of law grounds that Georgia had the stronger interest because the recording was made there.

The Supreme Court reversed, easily rejecting the preemption ruling on the basis of congressional history and a strong line of cases confirming that the federal one-party-consent is a minimum that allows more restrictive rules by the states.

(Continued on page 4)

Other courts in both one-party and all-party consent states demonstrate that, if any prediction can be made of the choice of law, it will favor the forum state's policies.

See Koch v. Kimball, 710 So. 2d 5 (Fla. Dist. Ct. App. 1998) (finding that an un-noticed recording in Georgia of conversations originating in Florida violated the rights of Florida residents).

Becker v. Computer Sciences Corp., 541 F. Supp. 694 (D. Tex. 1982) (determining that the Texas one-party-consent statute governs suit in Texas federal court where recordings were made in California, an all-party consent state).

Mustafa v. State, 591 A.2d 481 (Md. 1991) (concluding Maryland's all-party consent provision precluded admission in evidence of a tape-recorded communication which was legally intercepted under the District of Columbia law).

MacNeill Eng'g Co. v. Trisport, Ltd., 59 F. Supp. 2d 199 (D. Mass. 1999) (concluding Massachusetts residents have no claim against un-noticed recordings made in other one-party consent states).

State of Hawaii v. Bridges, 925 P.2d 357 (Haw. 1996) (finding that the Hawaii eavesdropping statute was not intended to have extra-territorial affect, and, therefore, would not operate to suppress evidence obtained by Hawaiian law enforcement agents in California in compliance with federal or California law, even if it would have violated Hawaii eavesdropping statute).

Wehringer v. Brannigan, 1990 U.S. Dist. LEXIS 16447 (S.D.N.Y. November 30, 1990) (holding that New York residents in one-party consent state have no claim in New York federal court for recordings that violate all-party consent statute in another state).

California Protects Phone Call Participants In California From Unconsented Out-Of-State Recordings

(Continued from page 3)

In choosing the applicable law, it held that the place of recording was not as decisive as the respective state's interest in the privacy of its residents. Thus, where someone in another state secretly records her conversation with someone in California, the California resident has a claim in California court; and, where the recording is conducted in a business context, the privacy violation may also be a violation of the state's unfair competition law.

As added weight, the court observed that a different rule would put California business competitors at a disadvantage. Recognizing that its choice of law decision could not have been predicted with certainty, the court denied the plaintiffs any opportunity for money damages. Now that its decision has brought certainty to the issue, however, monetary recovery will be available in the next case.

Conclusion

Business reaction to the decision in *Kearney* predicted great difficulty for national businesses needing routinely to record conversations. To the contrary, a simple pre-conversation advisory that the call may be monitored – already standard in many contexts – can readily resolve any exposure in an all-party-consent state. The effect of the decision will have more impact, however, in situations where a recording is necessary to preserve an accurate record but the circumstances indicate that an unaware speaker would not talk if he knew the conversation was being recorded.

Stuart Pierson is a partner with Troutman Sanders LLP in Washington, D.C.

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Sixth Circuit Rules News Boycott Lawsuit Moot

New Mayor Ended Boycott of Publisher

By Patricia Foster

Whether a government official may ostracize a media outlet for exercising its First Amendment right of free speech is once again an open question in the Sixth Circuit. A district court opinion gave a green light to such official actions of retaliation. However, that opinion was recently vacated by the Sixth Circuit, leaving the underlying issue undecided. *Youngstown Publishing Company v. McKelvey*, 2006 WL 1792215 (6th Cir. 2006).

Background

The case originated in Youngstown, Ohio when the sitting Mayor, George M. McKelvey, received critical press from a local business newspaper, *The Business Journal*. In a series of articles, the newspaper described the Mayor's willingness to purchase a piece of environmentally tainted land for an inflated price without due diligence. Another critical article exposed the Mayor's use of a 911 call to remove a journalist from a public sidewalk near a restaurant where the Mayor was dining.

Scorned by this constitutionally protected criticism, the Mayor issued an official punishment. The Mayor acknowledged the city's obligation to abide by public records requests, but went on to accuse the newspaper of irresponsible and untrustworthy journalism. He then issued a formal edict prohibiting all city employees from communicating with all representatives of *The Business Journal*.

The edict had its desired effect. *The Business Journal* found itself cut off from normal lines of communication with official sources of the city in which it operates and reports.

The Business Journal challenged the Mayor's edict by filing a 42 U.S.C. § 1983 retaliation claim. The newspaper pled the elements of a § 1983 claim: that the Mayor's edict was made under color of law; was motivated, at least in part, by the newspaper's constitutionally protected behavior; and was a reprisal that would chill a similarly situated person of ordinary firmness from engaging in that behavior for fear of similar treatment.

The district court dismissed the newspaper's claim by erroneously imposing an additional element - requiring *The Business Journal* to allege and prove that the Mayor's chosen punishment deprived it of a constitutionally protected right.

Sixth Circuit Decision

On appeal, the Sixth Circuit panel, at least during oral arguments, seemed unwilling to endorse the lower court's spurious analysis under 42 U.S.C. § 1983. However, by the time of the appeal, McKelvey had been replaced by a new mayor.

Under the new mayor, the city was once again on good terms with *The Business Journal*. On the eve of the appeal, the new mayor rescinded McKelvey's edict. On that basis, the Sixth Circuit determined the case to be moot.

Although the city had reopened lines of communication with *The Business Journal*, the newspaper asked the court to rule on the merits of its retaliation claim under an exception to the mootness doctrine. A plaintiff maintains standing in cases where a defendant voluntarily ceases offensive behavior but remains free to resume it. Similarly, a plaintiff retains standing in cases where short-lived offensive conduct ceases before final adjudication but is capable of repetition that will similarly evade review. *The Business Journal* claimed both exceptions to mootness.

The court was persuaded that the new mayor's revocation of McKelvey's edict was genuine and provided a secure foundation to expect that the new mayor would not "return to the 'old ways' of Mayor McKelvey and issue a similar edict."

The court expressed sympathy for *The Business Journal's* position and acknowledged the newspaper's concern that it could once again be subjected to a similar exclusionary edict. However, with McKelvey's departure, the Sixth Circuit had no reason to expect another edict that would once again shun *The Business Journal* for exercising its right to criticize the city.

Because the new mayor's revocation of McKelvey's exclusionary edict provided relief to *The Business Journal*, the Sixth Circuit found no live case or controversy for it to address. Because moot on appeal, the judgment of the lower court was vacated and the case was dismissed.

Therefore, the appeal extinguished the lower court's authorization of McKelvey's method of punishing the press for its constitutionally protected critical speech. However, the Sixth Circuit failed to replace it with clear disapproval to prevent its reoccurrence.

Patricia Foster is a lawyer with Frost Brown Todd LLC. The Business Journal was represented by Jill P. Meyer and Richard M. Goehler of Frost Brown Todd LLC.

Federal Magistrate Rules Tenth Circuit Recognizes Reporter's Privilege Even for Non-Confidential Sources

By Jim Dines and Gregory P. Williams

Relying on the federal reporter's privilege, a federal magistrate judge in New Mexico has quashed a subpoena issued to a local newspaper and its reporter. The court held that the reporter was not required to produce documents and information relating to non-confidential sources. *Allianz Life Ins. Co. v. Richards et al*, Civ. No. 05-256-JCH/RLP (D.N.M. May 8, 2006).

The lawsuit involves complicated claims and counter-claims between Allianz, an insurance company, and certain former insurance agents. Allianz served a subpoena duces tecum upon Steve Ramirez, a reporter for the Las Cruces Sun-News. The broadly-worded subpoena required Ramirez to produce all documents regarding articles he had written regarding Allianz. It further required Ramirez to produce any documents he had regarding a public meeting which was the subject of the articles, or regarding any of the parties to the lawsuit.

Ramirez and the Las Cruces Sun-News moved to quash the subpoena, citing *Silkwood v. McGee*, 563 F.2d 433, 3 Media L. Rep. 1087 (10th Cir. 1977) (finding a common law federal reporter's privilege). *Silkwood* and numerous subsequent decisions from courts in the Tenth Circuit had held that the reporter's privilege could not be overcome without application of a balancing test which required the court to weigh the First Amendment interests of the media and the public against the litigants' need for the information sought. In response to the motion to quash, Allianz argued that *Silkwood* did not apply to non-confidential sources, and that recent case law from around the country had held that no reporter's privilege exists.

U.S. Magistrate Judge Richard Puglisi entered an order quashing the subpoena. The court noted that because the lawsuit involved claims under both federal and state law, it

should consider the rules of privilege under both federal law and the law of the state of New Mexico (including its shield law, N.M. Evid. Rules § 11-514). The court then held that the common law federal reporter's privilege should apply.

Judge Puglisi noted that a federal district court in the Tenth Circuit had previously held that the balancing test announced in *Silkwood* was applicable to non-confidential sources. He then applied the *Silkwood* criteria, which are whether (1) the party seeking information has independently attempted to obtain the information elsewhere and has been unsuccessful; and (2) the information goes to the heart of the matter and is relevant.

The court agreed with Ramirez that the balancing test weighed in his favor. The court noted that Allianz had not attempted to depose any of the individuals who were the subject of the articles, and thus had failed to make the necessary showing that it had attempted to obtain the requested information from a non-privileged source. Because Allianz had failed to show that it had attempted to obtain the information elsewhere, the court did not address whether the information sought was centrally relevant or whether the subpoena was otherwise reasonable under the Federal Rules of Civil Procedure.

In a footnote, the court specifically acknowledged *McKevitt v. Pallasch*, 339 F.3d 503 (7th Cir. 2003), which questioned the existence of a federal reporter's privilege, but stated that McKevitt's analysis "does not appear to be the law in this circuit." Allianz did not file an objection to Judge Puglisi's decision.

Jim Dines and Gregory P. Williams of Dines & Gross, P.C. in Albuquerque, New Mexico represented Steve Ramirez, and the Las Cruces Sun-News. Allianz was represented by Stanley N. Harris of Modrall Sperling Roehl Harris & Sisk PA in Albuquerque and Barbara P. Berens of Kelly & Berens, PA in Minneapolis, Minn.

SAVE THE DATE -- November 8, 2006

MLRC Annual Dinner
New York, New York

Update on Federal Shield Law

The federal shield law bill introduced by Senator Richard Lugar (R-IN) in mid-May, the Free Flow of Information Act of 2006, remains before the Senate Judiciary Committee. It is expected that the committee will act on the bill (S. 2831) following the congressional recess in August. In the interim, the media coalition working on the bill continues to lobby members of the committee for their support, focusing, in particular, on Senators Kyl (R-AZ), Sessions (R-AL), Brownback (R-KS), Coburn (R-OK) and Cornyn (R-TX).

The proposed legislation would provide a qualified privilege against disclosure of confidential sources and information received in confidence, but it does not cover the circumstances under which unpublished, non-confidential information may be disclosed. Such information would continue to be governed by existing law. (Please see the May MediaLawLetter for a summary and full text of the bill.)

Since introduction of the bill, the Department of Justice has sent a letter to Senator Lugar, the chairman of the Senate Judiciary Committee, announcing the department's opposition to the bill on grounds that it "...would subordi-

nate the constitutional and law enforcement responsibilities of the Executive branch – as well as the constitutional rights of criminal defendants – to a privilege favoring selected segments of the media that is not constitutionally required."

Various business entities, including the Texas-based insurance company USAA, the U.S. Chamber of Commerce and the National Association of Manufacturers, have also expressed concern about the federal shield law to members of Congress. The Chamber of Commerce and the National Association of Manufacturers, however, unlike USAA, do not oppose enactment of a federal shield law. USAA became involved in blocking shield law proposals following broadcast of a videotape and publication of other information given to a television station by a confidential source.

Representative Mike Pence (R-IN) remains committed to the federal shield law bill he introduced last year, the Free Flow of Information Act of 2005 (H.R. 3323). He recently announced that the House Judiciary Subcommittee on the Courts, the Internet and Intellectual Property will hold a hearing on the 2005 bill on September 14.

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McKevitt Applied to Quash Journalist Subpoena

In an interesting decision, a federal court in Illinois quashed a subpoena to a journalist on the grounds that the subpoena was overbroad and burdensome under federal discovery rules. *Bond v. Utreras*, No. 04 C 2617, 2006 WL 1806387 (N.D. Ill. June 27, 2006) (Keys, J.).

The underlying case is a § 1983 action over alleged police misconduct. The defendant police officers sought to obtain evidence from an author/activist, Jamie Kalven, who had written an article entitled “Kicking the Pigeon,” which detailed plaintiff’s allegations of abuse at the hands of the Chicago Police. Kalven was a community activist based in the same housing complex as plaintiff.

The police defendants issued a broad subpoena to Kalven seeking all documents relating to any of the defendants and other related parties to the litigation. The defendants alleged the unpublished notes would reveal discrepancies in statements made by plaintiff and her witnesses and were therefore relevant. Kalven refused to produce the documents or answer deposition questions and the defendants brought a motion to compel.

Addressing the motion, the court first noted that the journalist was “wisely” not relying on a claim of privilege because the “Seventh Circuit has rejected the notion of a federal reporter’s privilege.” *See McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir.2003).” Under *McKevitt*, a subpoena directed to the media should be “reasonable in the circumstances” – the general criterion for judicial review of any subpoena. *See* 339 F.3d at 533.

The court noted that while Kalven was not a member of the media he had conducted research and interviews resulting in a series of publications, and therefore there was “no reason why *McKevitt*’s reasonableness standard should not apply.”

The court first agreed that the subpoena was overbroad because it sought all information in the journalist’s posses-

sion about 24 different people some of whom had nothing to do with the allegations in the underlying lawsuit. It also sought information about any other allegations of misconduct against the defendants – a request found not to be probative of any of the issues in the case.

Notably the court also agreed that the subpoena was burdensome. In reaching this conclusion the court noted that the discovery request was not obviously necessary to defendants’ case. The alleged inconsistencies that this discovery would show were “extremely nit-picky.” Moreover, any inconsistencies could be established based on the published article alone. Finally, the court noted that defendants had not shown that the information contained in the notes is unavailable from another source.

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Texas Federal Court Dismisses Internet Libel Suit

“Single Publication” Rule Applies to Websites

By Pete Kennedy

In a case of first impression in Texas, on June 26, 2006, U.S. District Judge Sam Sparks held that Texas would apply the “single publication” rule to bar libel suits against Internet publications brought more than a year after an article was first posted, even when the article remains available in online archives. *Hamad v. Center for the Study of Popular Culture, et al.*, No. A-06-CA-285-SS.

Background

Plaintiff Riad Elsolh Hamad filed a *pro se* lawsuit on April 13, 2006, in the Western District of Texas complaining of an article published on the Center for the Study of Popular Culture’s Front Page Magazine website. The article discussed, among other things, a federal investigation of Hamad and his association with an organization called the Palestine Children’s Welfare Fund. Although Hamad did not identify the date the Front Page article was published, he did not dispute that the article was first posted to the Front Page website on June 16, 2003, more than two years before suit was filed.

The Center, and its founder David Horowitz, moved to dismiss under Texas’ one-year statute of limitations for libel and slander, arguing that limitations began to run when the article was first placed on the website and therefore expired June 16, 2004. Hamad argued that limitations should not run while the Front Page article remains publicly available on the website’s archive.

Single Publication Rule

No court in Texas had yet addressed how the state’s statute of limitations applies to Internet publications. Texas courts had, however, adopted the “single publication” rule for print publications. That rule provides that “the statute of limitations begins to run on the last day of mass distribution to the public.”

Judge Sparks’ opinion dismissing Hamad’s claims noted that when the single publication rule was adopted,

Texas courts had specifically rejected the argument that limitations should “begin to run only when the allegedly libelous article is removed from circulation.” Instead, the single publication rule “provides certainty regarding the limitations tolling date – “otherwise publishers would have to worry about continually extended limitations periods based upon retail sales or secondary distributions of the printed matter.”

Applying the Texas rule and rationale to Internet publications, Judge Sparks held that “limitations begin to run from the date the article is first posted and made available to the public,” noting that each court to address this question had reached the same conclusion. Because the Front

“Limitations begin to run from the date the article is first posted and made available to the public.”

Page article was posted more than a year before suit was filed, Hamad’s libel claim was time-barred. The Court also dismissed a host of other state law claims based on the same publication, noting that in Texas “the one year statute of limitations applies to any claim wherein the primary complaint is injury to reputation, humiliation and mental anguish from allegedly false publications.”

Hamad promptly filed a *pro se* notice of appeal, so this issue may ultimately be decided by the Fifth Circuit.

Pete Kennedy of Graves, Dougherty, Hearon & Moody, P.C., represented David Horowitz and the Center for the Study of Popular Culture. Plaintiff Riad Elsolh Hamad was pro se.

Save the Date
November 10, 2006

**MLRC Defense Counsel Section
Annual Breakfast**

New York, New York

Indiana Supreme Court Will Not Review \$235,000 Libel Verdict Against Local Paper

On July 20th, the Supreme Court of Indiana refused to review a \$235,000 jury award in favor of Clinton, Indiana Mayor Ron Shepard against the *The Daily Clintonian* and its publisher and editor George "Sonny" Carey, awarding \$235,000 in compensatory and punitive damages.

At issue was an advertisement published on April 28, 2002 stating that "Abuse of office is a criminal offense" which alleged that Mayor Shepard abused his office when he refinanced a city fire truck and did not renegotiate rates with the Clinton Township Water Company, a water utility actually run by Carey. The ad was signed only with the phrase "Concerned Citizens."

Before a three-judge Indiana Court of Appeals, Carey contested the jury's finding of actual malice and argued that the advertisement should not be read to accuse Shepard of a crime. *Daily Clintonian v. Shepard*, 837 N.E.2d 230 (Ind. App. 2005). The court cited *Journal-Gazette Co., Inc. v. Bandido's Inc.*, 712 N.E.2d 446, 451 (Ind. 1999), *cert. denied* 528 U.S. 1005 (1999) for the proposition that appellate courts must independently examine the whole record when actual malice is required in a defamation case as a matter of federal constitutional law.

Noting that the parties had stipulated that Carey had "published a paid political advertisement...which accused

[Shepard] of the crime of abuse of office," the court quickly dismissed Carey's assertion that the advertisement had not in fact accused Shepard of a crime. The Court then recounted Carey's testimony on redirect:

Q. Do you or do you not think that the Mayor have [sic] committed a criminal offense?

A. No.

Q. In July . . . or excuse me, in May of 2002 . . . did you think that the Mayor may have committed a criminal offense?

A. No.

Q. Then . . . why weren't you concerned about this statement abuse of office as [sic] a criminal offense?

A. I probably should have been more concerned.

This was "sufficient to demonstrate Carey's reckless disregard of the truth or falsity of the advertisement and to support a finding of actual malice."

Carey was represented by Robert F. Hellman of Terre Haute. Plaintiff was represented by Eric A. Frey of Terre Haute.



50-STATE SURVEYS



Media Privacy and Related Law 2006-07

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please check the MLRC web site at WWW.MEDIALAW.ORG**

Philadelphia Judge Dismisses Lawsuit Against Website Operator

Pennsylvania Court of Common Pleas Judge Nitza I. Quinones Alejandro ruled on May 31 that the operator of a website aimed at unseating state Senator Vincent Fumo could not be sued for defamation for posting a news story from another source. *D'Alonzo v. Truscello*, No. 722 EDA 2006, 2006 WL 1768091 (Pa. Com. Pl. May 31, 2006).

In February 2004, the *Philadelphia Daily News* reported that a Fumo aide, Tracy D'Alonzo, had been subpoenaed by a grand jury regarding a federal probe into local parking ticket fixing. Nora Truscello, posted the *Daily News* report on her anti-Fumo website, www.dumpfumo.com. When the *Daily News* filed a retraction the following day, Truscello followed suit with her own retraction. Nevertheless, D'Alonzo sued Truscello for defamation.

Judge Quinones Alejandro dismissed the case, however, writing that Truscello's website acted merely as "a conduit to reproduce and disseminate the articles published by the *Daily News*."

The judge based her findings on section 230 of the Communications Decency Act, 47 U.S.C. § 230, which

provides immunity from defamation liability to "interactive computer services," which are defined as, "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service."

Although the plaintiff insisted that www.dumpfumo.com was not an interactive computer service, Judge Quinones Alejandro rejected this claim arguing that § 230 of the Communications Decency Act was created specifically to protect website operators like Truscello "from liability for information or material that [she] did not publish, create, or develop."

D'Alonzo has appealed Judge Quinones Alejandro's decision, but her attorney suggested that she would likely re-evaluate her options in light of *DiMeo v. Max*, No. Civ. 06-1544, (E.D. Pa. May 26, 2006) (holding that a blogger could not be sued for libel based on anonymous postings on his websites); see also *MLRC MediaLawLetter*, June 2006 at 24.

RECENTLY PUBLISHED **MLRC BULLETINS**

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MLRC 2006 REPORT ON TRIALS & DAMAGES

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**WHEN GOVERNMENT SHUTS OUT CRITICAL PRESS:
GOVERNMENT RETALIATION AND THE FIRST AMENDMENT**

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**2005 REPORT ON SIGNIFICANT DEVELOPMENTS
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CONFIDENTIAL SOURCE LITIGATION: LESSONS FROM 2005

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Jury Declines to Award Damages to “Girls Gone Wild” Plaintiffs

In *Lowry v. Hastings Entertainment, Inc.*, No. 2003-30333-211 (Tex. Dist. Ct., Jury verdict, June 26, 2006) a Texas state court jury decided not to award damages to two plaintiffs who had exposed their breasts for an installment of the “Girls Gone Wild” series of videotapes and DVDs.

The plaintiffs, Brittany Lowry and Lezlie Fuller, were on spring break vacation in March 2002 with their mothers in Panama City, Florida where they were filmed on a public beach by a cameraman who was working as an independent contractor for Mantra Films, the creator of “Girls Gone Wild.” The plaintiffs, who were both 17 at the time, were offered “Girls Gone Wild” t-shirts if they exposed their breasts for the camera for three seconds, which they both did voluntarily. They were then asked to sign consent forms on which they both claimed to be over 18 years old. The cameraman then told them that their images would not be televised, an agreement that was memorialized by the two plaintiffs writing “No TV” on the respective consent forms. The footage of Lowry and Fuller eventually appeared in a “Girls Gone Wild” video that was released in September 2002.

The plaintiffs asserted a number of claims, including intentional infliction of emotional distress, fraudulent misrepresentation, fraudulent concealment, invasion of privacy, negligence per se, unjust enrichment, and *quantum meruit*. The plaintiffs were originally joined in the suit by their parents, but the parents were removed on summary judgment.

Two retail companies, Musicland and Hastings Entertainment, were also original parties to the suit. Musicland was knocked out when it filed for bankruptcy, and the case against Hastings was dismissed with prejudice after no discovery was conducted on the company.

Although the plaintiffs are Texas residents, Judge L. Dee Shipman determined that it was appropriate to apply Florida law under the “most significant relationship” test because all the activities giving rise to the plaintiffs’ causes of action occurred in Florida. The majority of the issues were disposed of on summary judgment, including the invasion of privacy claims (under Florida law, a minor is capable of consenting to the publication of her image where there is no compensation involved). After determining that the consent form signed by the plaintiffs was valid, the main issues before the jury were whether the plaintiffs had in fact misrepresented their ages, whether Mantra’s reliance on the plaintiffs’ representations of their ages was reasonable, and whether Mantra committed fraud against plaintiffs by promising that their images would not be televised. The jury found for the defendants on all counts, but did decline the defendants’ request for an award of \$160,000 in attorneys’ fees.

The defendants were represented by Richard Merrill of Fabio & Merrill in Houston. Lowry and Fuller were represented by Roger Yale of Denton, Texas and Herbert W. Fortson III of Fortson, Frazier & Siegrist, P.C. in Houston.



50-STATE SURVEYS



Media Libel Law 2006-07

REPORTS FROM ALL FIFTY STATES,
THE FEDERAL COURTS OF APPEALS,
U.S. TERRITORIES, CANADA, AND ENGLAND.

Edited by the Media Law Resource Center, Inc.

MEDIA LIBEL LAW

(published annually in November)

The 2006-07 edition will be available in November 2006

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Republication • Privileges • Damages • Motions to Dismiss • Discovery Issues
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Constitutional/Statutory Provisions • Summary Judgment

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Single Publication Rule Applied to Members Only Website

A New York trial court last month dismissed a libel complaint over comments posted on a member-restricted website, holding that the single publication rule applied and that the complaint was untimely. *Rare 1 Corp. v. Moshe Zwiebel Diamond Corp.*, No. 117595/05, 2006 WL 1915000 (NY Sup. Ct. June 19, 2006) (Tolub, J.).

Both parties were members of a jewelry industry group called Polygon which offered a website containing industry information and a forum for members to post comments. In 2002, a wholesaler posted comments criticizing a retail jewelry company. The retailer apparently did not discover the comments until approximately four years later.

New York's highest court had previously recognized that the single publication rule applies to publication on the Internet. *See Firth v. New York*, 98 NY2d 365 (2002).

Plaintiff sought to distinguish *Firth* by arguing that it should not apply in the context of a "private, subscriber-only website." Plaintiff moreover argued that the web posting was akin to the issuance of a false credit report and should be actionable based on the date of retrieval and not the original date of publication.

The court rejected both arguments. In a short opinion, the court found no significance to the fact that the website was a fee-based subscriber site. Even though subscribers could only access the comment by request, that was no different than turning the pages of a book. Finally, even if the comments were akin to a false credit report, "the fact still remains that the single publication rule remains applicable." *Citing Gold v. Berkin*, 2001 WL 121940 at *4 (S.D.N.Y. 2001) (continued reporting to credit bureaus falls within the single publication rule).

MLRC Calendar

September 27-29, 2006

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November 8, 2006

MLRC Annual Dinner
New York, New York

November 10, 2006

MLRC Defense Counsel Section Annual Breakfast
New York, New York

Criminal Libel Defendant Acquitted of Other Charges

A man whose conviction on criminal libel charges was overturned in an April ruling that held New Mexico's criminal defamation statute unconstitutional was acquitted July 18 of other charges stemming from his altercations with a police officer. *State v. Mata*, No. M-47-MR-200500028 (N.M. Dist. Ct. jury verdict July 16, 2006).

Juan Mata was found guilty in August of criminal libel, harassment and stalking after he picketed Farmington, N.M. police headquarters, claiming that he was being harassed by an officer with the department. *See MLRC MediaLawLetter*, Aug. 2005 at 34; Oct. 2005 at 40. Mata also signed a petition accusing the officer of conducting illegal searches.

Mata was convicted after a one-day jury trial in San Juan County Magistrate's Court, and was given a 360-day suspended sentence and ordered to pay \$114 in court costs,

perform 50 hours of community service and attend a life-skills class.

Magistrate court results are subject to *de novo* review by district courts. *See* N.M. Rule 6-703 (J).

Before trial in the district court, Chief District Judge William C. Birdsall asked the parties for briefing on the constitutionality of New Mexico's criminal libel statute, leading to his April 4 ruling invalidating the statute. But Mata still faced a district court trial on the harassment and stalking charges.

After two days of testimony, the district court jury acquitted Mata of the harassment and stalking charges.

Mata was represented by Dennis W. Montoya of Albuquerque; San Juan County Assistant District Attorney William Cooke handled the prosecution.



50-STATE SURVEYS

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Sixth Circuit Dismisses Challenge to Closure of Juvenile Court

Press Challenge Not Ripe

By Jon Fleischaker

The Sixth Circuit this month dismissed as unripe a First Amendment challenge to Kentucky's closure of juvenile court hearings and records. *Ky. Press Ass'n v. Kentucky*, No. 05-5224, 2006 WL 1867118 (6th Cir. July 7, 2006) (Batchelder, Norris, Rice, JJ.)

Background

In 2004, the Kentucky Press Association ("KPA") filed a First Amendment facial challenge to several provisions of Kentucky's Unified Juvenile Code. The challenged statutes automatically seal various kinds of juvenile court hearings and records. The kinds of juvenile court cases covered by Kentucky's closure laws include juvenile delinquency cases involving both misdemeanors and felonies, dependency and abuse cases, adoptions, and status offenses such as truancy.

The U.S. District Court for the Eastern District of Kentucky in Frankfort dismissed the case for failure to state a claim under the First Amendment. *See* 355 F.Supp.2d 853 (E.D.Ky. Feb 01, 2005). On appeal, the Sixth Circuit declined to address the merits of the case and dismissed it on the ground that the full application and interpretation of the challenged statutes has not been litigated in Kentucky's courts. According to the Sixth Circuit, it remains to be seen whether the challenged statutes actually do close juvenile courts to the press.

Kentucky's Unified Juvenile Code

The lawsuit involved four provisions of Kentucky's Unified Juvenile Code: KRS 610.070; KRS 610.320; KRS 610.330; and KRS 610.340. Among other things, those statutes provide that "[t]he general public shall be excluded" from juvenile court hearings (KRS 610.070), and that "court records regarding [juveniles] shall not be opened to scrutiny by the public," (KRS 610.320). As such, the very existence of any given Kentucky juvenile court case is hidden from the public.

The statutes purport to permit courts to open hearings and records to limited classes of individuals, such as those

with a direct interest in the work of the court. However, the laws do not permit courts ever to open juvenile proceedings to the public at large, which is a feature of the First Amendment right of access.

Further, KPA argued that the statutes' exceptions are illusory because all juvenile court proceedings and records, including dockets, are kept secret. Without pre-existing access to know about the existence of particular juvenile cases, it is impossible for anyone to assert an exception to closure because the public cannot ascertain what, if any, juvenile cases exist, much less the circumstances of such cases.

KPA's First Amendment Claim

KPA's challenge was based entirely on the First Amendment right of access to court proceedings first recognized in the landmark Supreme Court decision of *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). The test established by *Richmond Newspapers* and its progeny to determine whether the First Amendment right of access applies to a particular proceeding is the two-part "experience and logic" test. The "experience" part of the test asks whether the kind of proceeding has a history of openness. In answering this question, the Sixth Circuit has often examined how much a proceeding is like a traditional criminal trial. If the "experience" test is answered affirmatively, then the court addresses the "logic" question, which asks whether public access plays a significant positive role in the particular proceeding in question.

Once the First Amendment right of access is established, it is not absolute. Hearings and records can still be sealed if there is an overriding interest in closure in order to preserve higher values and where closure is narrowly tailored to serve that interest.

Although the Supreme Court has never addressed the First Amendment right of access outside the scope of criminal cases, the Sixth Circuit has extended the right to include civil cases. *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983). In 2002, the Sixth Circuit extended the right to include administra-

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Sixth Circuit Dismisses Challenge to Closure of Juvenile Court

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tive deportation hearings. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 702 (6th Cir. 2002).

KPA's First Amendment challenge to Kentucky's closure of juvenile courts focused on the fact that many of the kinds of cases in juvenile court are very much like traditional criminal cases, with similar procedures and penalties including incarceration and removal of children from their parents. KPA also emphasized that Kentucky's mandatory closure statutes removed the case-specific weighing of competing interests contemplated by the Supreme Court's First Amendment jurisprudence in cases such as *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-609 (1982), and replaced it with automatic closure, which is inherently not narrowly tailored.

District Court's Ruling

The Commonwealth made a litany of jurisdictional objections under federal abstention doctrines and theories of prudential standing. The District Court denied each of the objections and ruled on the merits of the First Amendment challenge. The District Court dismissed KPA's lawsuit, finding that it failed the "experience and logic" test because proceedings and records in the juvenile courts have been historically closed to the press and public.

According to the District Court, even if juvenile proceedings had been historically open to the public, the "logic" test would also fail because opening juvenile proceedings would frustrate the purpose of juvenile court, which is to protect the juvenile.

Sixth Circuit's Ruling

In the published opinion authored by Circuit Judge Alice Batchelder, the Sixth Circuit declined to rule on the merits of KPA's First Amendment challenge. Instead, the court dismissed the lawsuit under the doctrine of ripeness.

According to the Sixth Circuit, there is one fact of crucial importance to the lawsuit that has yet to be determined: whether Kentucky law, as interpreted by the Kentucky courts, completely closes juvenile proceedings and records to the media. "Until we know the answer to this question, our adjudicating KPA's First Amendment claim would constitute entangling ourselves in an abstract disagreement."

As support for the ruling, the Sixth Circuit cited to the specific language in the challenged closure statutes. For example, KRS 610.070 mandates that "[t]he general public shall be excluded" from juvenile court hearings but also provides that the juvenile court judge

may open the hearing to those who "have a direct interest in the case or in the work of the court."

According to the Sixth Circuit, this language might reasonably be interpreted by Kentucky's courts as permitting the news media to petition the Kentucky courts to release juvenile court dockets revealing the existence and nature of juvenile cases that are pending, which in turn could lead to the courts' permitting the media to attend juvenile court cases in some circumstances.

Jon L. Fleischaker, R. Kenyon Meyer and Jeremy S. Rogers of Dinsmore & Shohl LLP, Louisville, KY represent the Kentucky Press Association.

"[A]djudicating KPA's First Amendment claim would constitute entangling ourselves in an abstract disagreement."

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<http://www.medialaw.org/LitigationResources/ClosingArguments>

Florida Judge Orders Release Of Statement And Surveillance Tape In Florida Murder Trial

Statement Was Not The “Substance Of A Confession”

By Suzanne Meyer Judas

A Tallahassee trial court found that the “substance of a confession” exemption to the Florida Public Records Act did not apply to statements made by a defendant to police prior to his arrest for first degree murder, nor to surveillance videos allegedly showing the defendant carrying the victim’s body from a building. Order Denying Defendant’s Motion to Preclude Release of Information, *State of Florida v. Smith*, 2005-CF-2291 (Leon Cty. Cir. Ct. July 6, 2006).

In denying the criminal defendant’s motion to preclude release, the Florida court reiterated that exemptions to the state public records act must be “narrowly construed” and distinguished between a confession and the “admission of certain facts from which guilt may or may not be inferred.”

Background

After reviewing a probable cause affidavit filed by the state against a defendant accused of the murder of a Florida A & M student, a reporter for Gray Television’s station WCTV Eyewitness News requested from the State Attorney copies of a statement made by the defendant to the police prior to his arrest. She also asked for copies of apartment surveillance tapes which allegedly showed the defendant carrying the victim from an apartment and placing the victim in the trunk of a car. Both the statement and the tapes had been turned over by the state to the defendant in discovery, and the existence of both the statement and tapes were reported in local newspapers.

The state refused to produce the documents and the defendant filed a Motion to Preclude Release of Information, alleging that the release of these documents would adversely impact public opinion and deprive the defendant of a fair trial. As it is well-established Florida law that the news media has standing to seek an order preventing a court from sealing public records, WCTV moved to intervene and for an expedited hearing. After hearing oral arguments, Leon County Circuit Court Judge John C. Cooper entered a temporary protective order to review the statement and surveillance tapes in-camera.

At issue in the release of the statement was a Florida statute exempting from release to the public “any information revealing the *substance of a confession* of a person arrested ... until such time as the criminal case is finally determined by adjudication, dismissed or other final disposition.” Fla. Stat. § 119.07(3)(k)(2004). Florida statutes do not define what is meant by “substance of a confession.”

The defendant argued that any statement made by the defendant to law enforcement while in custody, “regardless of whether it contains an explicit admission of guilt” is covered by this exemption. Indeed defendant broadly construed the term and argued:

[w]hether the statements are characterized as inculpatory statements, express admissions, or inconsistent exculpatory statements which are inconsistent with the physical evidence, the intent of [the substance of a confession exemption] is to limit the prejudicial effect of prematurely exposing the public to a defendant’s custodial statements before they are deemed admissible and admitted at trial.

The court disagreed, instead applying the more narrow definition of “substance of confession” articulated in a 1984 opinion of Florida’s Attorney General.

The “substance of a confession” would appear to be the material or essential part of a statement made by a person charged with the commission of a crime in which he or she had in it i.e., a statement inculcating the offender in which the essential elements or summary of such essential elements of the acts constituting entire criminal offense or charge are acknowledged.

Op. Att’y Gen. Fla. 84-33 (1984) (emphasis added)

The court also found that a confession of guilt or admission of acts constituting the entire criminal offense was distinguishable from the admission of a fact that

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Florida Judge Orders Release Of Statement And Surveillance Tape In Florida Murder Trial

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would tend to prove guilt or from which guilt could be inferred. The court then held that “the admission of certain facts from which guilt may or may not be inferred is not a confession and not exempt from disclosure under Fla. Stat. § 119.07(3)(k)(2004.).”

Finding that the “substance of confession” exemption did not apply to the statement, the court applied the three-part test set forth in *Miami Herald Publishing Co. v. Lewis*, 426 So. 2d 1(1983), to both the statement and the surveillance video. Agreeing with WCTV, the court held that: (1) the release of both the statement and the surveillance tapes did not pose a serious and imminent threat to the administration of justice, (2) defendant had not met his heavy burden of showing that there were no other alternatives available to ensure a fair trial, and (3) closure would not be effective in protecting the defendant from the perceived harm.

The court’s decision was based, in part, on the fact that the existence and content of the surveillance tape were described in detail in the probable cause affidavit provided to WCTV by the Leon County Clerk of Court. In addition, (1) the city of Tallahassee issued a press release reporting the defendant was seen “bring[ing] the deceased [victim]

down from the apartment and plac[ing] [the victim] in the trunk of [defendant’s] car[.]”(2) the content of the surveillance video was confirmed by a Tallahassee Police Officer’s interview with WCTV, and (3) both WCTV and *The Tallahassee Democrat* had already reported on the surveillance video and its content. Therefore, restricting the release of the statement and the surveillance tape to the media was unlikely to be effective in protecting the defendant’s right to a fair trial.

“Since much of this information has already been made public, there is little justification for granting [defendant’s]

motion [to preclude release of the information,]” the court held.

Pursuant to the order, the state turned over to WCTV the defendant’s statement and the apartment’s surveillance tapes a month prior to the defendant’s trial.

Restricting the release of the statement and the surveillance tape to the media was unlikely to be effective in protecting the defendant’s right to a fair trial.

Suzanne M. Judas and Charles D. Tobin, who are, respectively, partners in the Jacksonville and Washington D.C. offices of Holland & Knight LL, represented Gray Florida Holdings, Inc. d/b/a “WCTV” Eyewitness News. The Defendant was represented by Marie Ines Suber and Paula S. Saunders, Assistant Public Defenders, Tallahassee, FL; Neill Wade, Assistant State Attorney, Tallahassee, appeared for the State of Florida.

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Florida Judge Grants Access To Child Protection Records After Teen's Tragic Death

By David C. Borucke

On June 16, 2006, a Ft. Myers judge granted the public records petition of the *News-Press*, Gannett's Southwest Florida newspaper, seeking access to documents of The Children's Advocacy Center of Southwest Florida's Child Protection Team, relating to the death of Michelle Fontanez, who was sexually assaulted and beaten to death in her home. Her stepfather is in jail on charges in connection with the incident. He has pleaded not guilty.

The tragic death of the 13-year-old Florida girl may have been prevented through more effective state intervention, according to the records obtained by the newspaper after a judge ordered a state contractor to make the documents public.

Background

Child Protection Teams have been established throughout Florida under the auspices of the state's Department of Health. A team is comprised of lawyers, medical doctors, and therapists who provide support to local law enforcement and to state Department of Children and Family Services.

Obtaining records maintained by a Child Protection Team raises at least two unique challenges. First, a state statute specifically exempts these records from public disclosure. § 39.202(6), Florida Statutes (2006). While the statute provides that the records may be disclosed "by order of the court," the statute does not set forth any criteria for the court's consideration.

The second obstacle arises from the independent confidentiality that attaches to the work-product of Child Protection Team professionals. Florida law ordinarily protects the work-product of lawyers, doctors, and psychotherapists. A judge must also address these concerns, in addition to the statute, before records can be released.

Access Hearing

In the case of young Michelle's records, Judge Hugh E. Starnes considered the newspaper's arguments at a hearing on June 9 in Ft. Myers. The newspaper argued that the statute's core purpose is to protect the interests of the child and, thus,

upon Michelle's death, this statutory purpose was no longer at issue. Further, the newspaper argued that the interests of third-parties, including family members and Child Protection Team professionals were *de minimis* in relation to the substantial public interest in disclosure.

The judge agreed. Applying a "good cause" standard, he determined that the public interest in these documents trumped any privacy interests at stake:

Access to the records will allow the public to fully evaluate the circumstances of Michelle Fontanez's death. Access will also enable the public to better monitor the criminal proceedings against the girl's step-father. These public interests are compelling.

Judge Starnes further found that, "Because Michelle Fontanez has died, the privacy interests that would normally

The public interest in these documents trumped any privacy interests at stake.

attach to these records has dissipated. Additionally, the Court determines that there are no privacy interests of third-parties." He therefore ordered the records released.

Underlying these legal considerations is a tragic story. In this case, Michelle came to the attention of state officials when she received medical treatment for purposefully cutting her own arms. She told investigators that her stepfather had been sexually abusing her. Child Protection Team members determined that there was medical evidence to support these claims.

Nonetheless, and apparently despite the conclusions reached by the team, the state returned Michele to her home, and while officials instructed the stepfather to move out of the home, he merely moved across the street. On February 20, 2006, the stepfather allegedly returned to the home and assaulted and strangled the girl, who died a few days later.

The *News-Press* has done extensive reporting on this story, making good use of the documents it obtained through the public records lawsuit.

David C. Borucke, a partner with the Tampa office of Holland & Knight LLP represented the News-Press in this matter. Stephen D. Thompson of Ft. Myers represented The Children's Advocacy Center of Southwest Florida.

Speakers Bureau on the Reporter's Privilege

The MLRC Institute is currently building a network of media lawyers, reporters, editors, and others whose work involves the reporter's privilege to help educate the public about the privilege.

Through this network of speakers nationwide, we are facilitating presentations explaining the privilege and its history, with the heart of the presentation focusing on why this privilege should matter to the public. We have prepared a "turn-key" set of materials for speakers to use, including, a PowerPoint presentation and written handout materials.

We are looking for speakers to join this network and conduct presentations at conferences, libraries, bookstores, colleges, high schools and city clubs and before groups like chambers of commerce, rotary clubs and other civic organizations.

The MLRC Institute, a not-for-profit educational organization focused on the media and the First Amendment, has received a grant from the McCormick Tribune Foundation to develop and administer the speakers bureau on the reporter's privilege.

We hope to expand this project so that the reporter's privilege is the first in a number of topics addressed by the speakers bureau.

If you are interested in joining the speakers bureau or in helping to organize a presentation in your area, please contact:

Maherin Gangat
Staff Attorney
Media Law Resource Center
(212) 337-0200, ext. 214
mgangat@medialaw.org

The Reporter's Privilege

Protecting the Sources of Our News

This Presentation has been made possible by a grant from
the McCormick Tribune Foundation

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Suggestion for background reading:
Custodians of Conscience by James S. Ettema and
Theodore Glasser. Great source re: nature of
investigative journalism and its role in society as
force for moral and social inquiry.

Presentation note: During the weeks leading up to
your presentation, consider pulling articles from local
papers quoting anonymous sources -- circle the
references to these sources as an illustration for the
audience of how valuable they are for reporters.

A Federal Shield Law?

- Bipartisan proposals for federal shield law in face of increased threats
- -- Need for nationwide uniformity
 - ✓ Reporters need to know the rules so they can do their jobs
 - ✓ Would-be whistleblowers and other potential sources need to be able to predict the risks
 - ✓ Will cut down on costly litigation over subpoenas

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What Is the "Reporter's Privilege"?

Various rules protecting journalists from being forced, in legal and governmental proceedings, to reveal confidential and other sources.

- Sometimes also protects unpublished notes and other journalistic materials

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3

Florida Supreme Court Extends Temporary Moratorium On Internet Access To Records

Agrees To Develop Permanent Statewide System

By George D. Gabel, Jr. and Corinne R. Simon

The Florida Supreme Court, in two recent administrative orders, extended its moratorium on Internet access to state court records for another year. However, the orders also established an interim policy on electronic access to records and approved a pilot program for one Florida county. The limited moratorium will be further reviewed by July 2007, but will continue until permanent procedures are established and approved.

The June 30, 2006 orders were in response to recommendations issued last August by the Committee on Privacy and Court Records. Signed by outgoing Chief Justice Barbara Pariente and incoming Chief Justice R. Fred Lewis, the Court ultimately agreed with the Committee's recommendation that the state should develop a statewide system of online court records, but the system will include some limitations.

"The conditions must not be so onerous that our approval of electronic access exists only in theory, but unfettered electronic access to all courts without policies in place to protect privacy interests and guard against unintended consequences detrimental to the judicial process cannot be allowed," wrote the justices.

The Court articulated the conflict between "two competing yet important values...openness and transparency in court records, on the one hand, and individual privacy, on the other hand." Much of the Court's concern revolved around the privacy threat presented by "[t]he instantaneous and inexpensive dissemination of information [afforded by electronic access to court records which] raises the specter of increased opportunity for identity theft and misuse of personal information."

The Court noted that many Florida clerks of court already store and maintain court records in electronic form and that many organizations, such as law enforcement agencies and law firms, often prefer electronic filing. However, according to the order, clerk of courts will not be charged with "making substantive decisions regarding whether documents accepted for filing are confidential[.]"

Rather, the individual or organization filing the document with the court will be responsible for establishing a document is confidential if it does not fall within a soon-to-be established

set of finite exemptions. The Court did not address the question of whether statutory records exemptions are "absorbed" into the court record and must be treated as confidential.

However, the Court stated "[t]he issue is not whether the courts will make records available electronically, but rather when and under what conditions they will do so," the Justices said in the orders.

Interim Policy

The interim policy will allow online access to some court records such as docket information, a limited range of real property records and all appellate court filings, including motions, briefs, petitions, orders and opinions. In addition, the order gave lower-court chief judges the discretion to, in cases of significant public interest, make all records available electronically. However, the order does not require nor obligate the clerk of court to provide electronic access.

According to the orders, the Manatee County, Florida Clerk of Court will, with help from the Florida Courts Technology Commission, develop and implement a one-year pilot program, which the Court will later review as a potential model for permanent procedures to allow public access to court records statewide. The permanent procedure will include policies on user identification, access fees, sealing of court documents and redaction of confidential information.

The federal court system currently allows some electronic access to court records through a centralized service called PACER, which stands for Public Access to Court Electronic Records. After registering, the online service allows users to obtain case and docket information from individual court web sites for a fee. Additionally, some federal courts also allow the public to access to actual court documents. Internet access to state court records varies by state and even by jurisdiction within a state, according to the Center for Democracy and Technology.

George D. Gabel, Jr., is a partner with the Jacksonville, FL, office of Holland & Knight LLP. Corinne R. Simon, a summer associate with the firm, is a student at the University of Florida College of Law.

"[U]nfettered electronic access to all courts without policies in place to protect privacy... cannot be allowed."

Roberts Court Strikes Down Campaign Expenditure and Contribution Limits

By Jerianne Timmerman

On June 26, the Supreme Court struck down a Vermont campaign finance statute ("Act 64"). *Randall v. Sorrell*, No. 04-1528 (June 26, 2006). In a 6-3 vote, the Court concluded that Act 64's limits on the amounts that candidates for state office may spend on their campaigns violated the First Amendment, as interpreted in *Buckley v. Valeo*, 424 U.S. 1 (1976).

By the same margin, the Court found that the Vermont law's stringent limits on the amounts that individuals, organizations and parties may contribute to state campaigns were not narrowly tailored, but instead disproportionately burdened numerous First Amendment rights.

Thus, for the first time, the Supreme Court has invalidated a limit on campaign contributions as inconsistent with the First Amendment. Among other impacts, this case may slow the movement toward greater regulation of campaign financing.

Background

Thirty years ago in *Buckley*, the Supreme Court addressed the constitutionality of the Federal Election Campaign Act of 1971 (FECA), which imposed both expenditure and contribution limits on campaigns for political office. The Court upheld FECA's contribution limits as constitutional, but found that the Act's expenditure limits violated the First Amendment. Last month the *Randall* case largely reaffirmed this constitutional distinction between limiting campaign expenditures and restricting campaign contributions. With both Chief Justice Roberts and Justice Alito voting in the majority, the Court rejected efforts to reopen the issue of expenditure limits. For the foreseeable future, *Buckley*'s determination that campaign expenditure limitations are unconstitutional will remain in force.

The more interesting aspect of *Randall* involved the Court's treatment of the Vermont statute's strict limitations on the amounts that individuals and parties may contribute to state political campaigns.

Here, the majority agreed (consistent with *Buckley*) that some limits on campaign contributions were constitutional, but the Court held for the first time that a particularly severe limi-

tation on contributions violated the First Amendment. The Court was splintered, however, into multiple separate opinions on this question.

Campaign Contribution Limits

Justice Breyer's plurality opinion, joined by Chief Justice Roberts and Justice Alito, generally accepted the constitutionality of campaign contribution limits, as expressed in *Buckley*, but nonetheless recognized "the existence of some lower bound."

Vermont's Act 64 limited contributions from both parties and individuals to \$200-\$400 per candidate (depending on the office) for each election cycle (*i.e.*, for the primary and general election combined). Observing that these contribution limits were substantially lower than the limits the Court had previously upheld and comparable limits in other states,

the plurality found "danger signs" that Act 64's contribution limitations "may fall outside tolerable First Amendment limits." Accordingly, the Court stated that it "must examine the record independently and carefully to determine whether Act 64's contribution limits

are 'closely drawn' to match the State's interests."

Based on this examination of the record, the plurality found that Act 64's contribution limits were too restrictive and not closely drawn. In reaching this conclusion, the Court pointed to five factors:

- The record suggests that Act 64's contribution limits "will significantly restrict the amount of funding available for challengers to run competitive campaigns."
- Act 64's requirement that political parties abide by exactly the same low contribution limits applicable to other contributors "threatens harm to a particularly important political right, the right to associate in a political party."
- Act 64 seems to count the expenses of campaign volunteers against the volunteer's low individual contribution limits, thereby impeding a campaign's ability effectively to use volunteers and making it more difficult for individuals to associate in this way.

(Continued on page 24)

***For the foreseeable future,
Buckley's determination that
campaign expenditure
limitations are unconstitutional
will remain in force.***

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INTRODUCTION

I. "She Threw Me Out!" - Closed Courts

- A. Preliminary Hearings
- B. Evidentiary Hearings, Pretrial
- C. Voir Dire
- D. Trial

II. "It's the Next OJ!" - High Profile Problems

- A. Orders Regulating Media Conduct
- B. Access to Jurors and Jury Identity
- C. Access to Exhibits – Especially Videotape Exhibits

III. "He Said: 'Don't Print That!'" - Prior Restraints

- A. Trial-Related Orders
- B. Other Prior Restraint Orders

IV. "I Just Got Subpoenaed!" - The Reporter's Privilege

- A. Confidential Source Information
- B. Unpublished Photographs or Outtakes & Reporter's Notes

V. "I'm in Jail!" - Newsgathering Impediments

VI. "Clear the Area!" - Working with Police in the Field

VII. "They Took All My Stuff!" - Search & Seizure of Media Materials

Roberts Court Strikes Down Campaign Expenditure and Contribution Limits

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- The Act's contribution limits are not adjusted for inflation so the limits decline in real value each year.
- The record fails to show any special justification that might warrant a contribution limit so low or so restrictive as to bring about serious associational and expressive problems.

These five considerations, taken together, lead to the conclusion that Act 64's contribution limits were not narrowly tailored, but disproportionately burdened First Amendment interests.

Campaign Finance Regulation

Randall clearly shows that the Court remains divided when considering the constitutionality of campaign finance regulations.

Justices Thomas, Scalia and Kennedy concurred only in the judgment finding the challenged Vermont expenditure and contribution limits to be unconstitutional. Thomas and Scalia would overrule *Buckley* -- and its distinction between campaign expenditures and contributions -- as providing insufficient protection for political speech, and would subject both expenditure and contribution limits to strict First Amendment scrutiny (thereby likely finding all such limits unconstitutional).

Justice Kennedy expressed similar but more general skepticism about the system of campaign finance regulation endorsed by the Court in *Buckley* and subsequent cases.

Dissents

On the other hand, the dissenting opinions of Justices Stevens, Souter and Ginsberg in *Randall* showed them to be more favorably inclined toward regulating both contributions and expenditures. As discussed above, Chief Justice Roberts and Justices Alito and Breyer are somewhere in the middle, finding expenditure limits to be unconstitutional while supporting some contribution limits (at least those that are not too low).

Implications

Randall clearly sets the stage for new legal challenges to the constitutionality of particular laws limiting contributions to

political campaigns. The multi-factor test set forth by the plurality invites challenges to some existing state limits on political contributions and will inhibit the creation of new, lower limits.

The expressed willingness of a majority of the Court to look closely at campaign finance regulations may also result in a slowing of the movement toward increased regulation of campaign finance that many observers expected after the Supreme Court's 5-4 decision upholding the Bipartisan Campaign Finance Reform Act of 2002. See *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003).

The rationale of the plurality in *Randall* may also change the focus of future challenges to campaign finance regulations. Past challenges to campaign finance restrictions focused on the First Amendment rights of political donors.

In contrast, Justice Breyer's plurality opinion finding Ver-

Thomas and Scalia would overrule Buckley -- and its distinction between campaign expenditures and contributions.

mont's contribution limits unconstitutional focused on whether the state's contribution limits were so low as to "harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability." Rather than its role in safeguarding individuals' First Amendment rights, Justice Breyer stressed the institutional role of the judiciary in preserving the fairness of the democratic process.

In addition, the *Randall* plurality emphasized the important role that parties play in the political arena. Although recent Court decisions such as *McConnell* had seemed to call into question any special rights for parties, *Randall* found that subjecting political parties to the same low contribution limits applicable to individuals threatened to harm the "particularly important political right" to "associate in a political party."

In counting the "special party-related harms" that Act 64 threatened as a factor specifically weighing against the constitutional validity of the Vermont law, *Randall* apparently returned to the idea that parties matter. The extent to which parties constitutionally matter will no doubt be a subject of future campaign finance regulation and litigation.

Jerianne Timmerman is Senior Vice President and Deputy General Counsel of the National Association of Broadcasters.

Net Neutrality Debate Heats Up

During the past year “Net neutrality” has been at the center of a heated debate among content providers, network operators, and net users and a recent push on Capitol Hill to pass new communications legislation has intensified the conflict.

Net neutrality, according to its supporters, will guarantee that content providers are treated equally, and that they receive equal access to users and to transmission speeds on the Internet. Opponents to Net neutrality insist that efficient growth of the Internet can only continue if markets are allowed to operate without restrictions.

Currently, network operators charge consumers different rates for different speeds of service. Meanwhile, content providers pay, not for speed of service, but for the quantity of their content accessed over the Internet. The “Net neutrality” debate has grown stronger as network operators have begun to discuss charging content providers – companies like Google, Yahoo, Microsoft and eBay – a premium to ensure that their content moves quickly over the Internet. In December 2005, for example, the Washington Post reported that William L. Smith, a BellSouth executive, told reporters that an Internet service provider should be able to charge Yahoo Inc. for the opportunity to have its search site load faster than that of Google Inc. “If I go to the airport, I can buy a coach standby ticket or a first-class ticket,” he said.

Some speculate that this “pay-for-performance” approach could result in a gross inequality, where regardless of consumer preference, network operators ultimately decide which content providers are accessible to subscribers. Large content providers fear that network operators will discriminate in favor of their own content – much like the battles between cable systems and networks. (Comcast, for example, has refused to broadcast the Mid-Atlantic Sports Network because they want to broadcast regional sports programming on Comcast SportsNet instead.) Smaller companies and “bloggers,” who cannot afford premium fees, fear they will be relegated to the proverbial freight elevator.

Background

In its infancy the Internet was accessed through telephone lines and was subjected to telecom regulations under the Communications Act of 1934. But last year, the FCC agreed that as of August 2006 network providers would no longer be subject to the Communications Act of 1934.¹ In testimony before the Senate Committee on Commerce, Science, and Transportation,

Google Vice President, Vinton Cerf, stressed that, “the Internet has thrived because of an overarching regulatory framework mandating nondiscrimination.” Network operators debate this conclusion, however, attributing the Internet’s success to an absence of regulation.

In 2002, select consumer groups, trade associations and content providers formed the Coalition of Broadband Users and Innovators (CBUI). The group’s primary purpose was to lobby the FCC to ensure that network operators did not “encumber” relationships between their customers and content providers. Since that time there have been only a few isolated incidents of abuses by network operators. Most famously, the FCC discovered that the Madison River Telephone Company was blocking ports used by its DSL customers to access competing voice-over IP services. The telephone company stopped shortly after receiving complaints about the activity. Still, content providers and Internet users fear what might happen in the absence of regulations to ensure equal service.

Although differences abound in the matter of Net neutrality, there is a single, over-arching issue at the heart of the debate. Cerf identified the issue in his testimony before the Commerce Committee: “Were there sufficient competition among and between various broadband networks, the concerns of companies like Google, among many others, about the future of the Internet would be largely allayed.” In other words, so long as the network operators have to compete for customers, they will try to provide superior service. In the absence of competition, however, networks might interfere “by limiting what the consumer is permitted to do with the capacity the consumer has paid for.”

The Positions

Each side of the altercation has a different view of how much competition exists, and what the future holds for network operators. Earlier this month, Cerf cited a 2004 FCC analysis, which reported that only 53 percent of Americans had a choice between cable modem service and DSL service. Other reports from 2006 suggest that 60 percent of the country has four or more choices, and that 88 percent of the nation’s ZIP codes have at least two high-speed Internet service providers. Such discrepancies account, at least in part, for opposing views on net neutrality.

According to an April 2006 broadband deployment report from the FCC, regionally established cable and telephone com-

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Net Neutrality Debate Heats Up

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panies account for 99.5 percent of consumer broadband services. Because of the dominance of incumbent players in broadband services Net neutrality proponents argue that competition is unlikely to rise.

Moreover, the General Accounting Office has questioned whether recent FCC accounts of broadband availability are too high. The GAO reports that FCC numbers “may not provide a highly accurate depiction of local deployment of broadband infrastructures for residential service, especially in rural areas.” That is, the FCC might consider a zip code served if one consumer has broadband service, but that does not mean that service is available throughout the zip code. Content providers are concerned that network operators are creating monopolies in service areas, and that as sole providers they may restrict access to content without recourse.

Although the operations of network operators have had some regulation in the past, those operators are quick to attribute recent successes in Internet growth to the deregulation of their industry. According to Comcast Executive Vice President, David Cohen, deregulation “fostered the massive investments in network infrastructure that first [Comcast], and then our competitors, made in order to develop and deploy broadband access services.”

Cohen, in testifying before the Senate Commerce Committee, argued that if Internet pricing mechanisms were regulated, investment in infrastructure would likely dry up. Although network operators are adamant that competition in their space is strong and will continue to grow, they also insist that anti-monopoly regulations already in place in the Sherman Act provide the necessary consumer protections. Regulating the Internet further, they say, will inhibit innovations and is simply “a solution in search of a problem.”

Congress

Congressmen and senators from both sides of the aisle have offered bills to address regulation on the Internet. H.R. 5252, the Communications Opportunity, Promotion, and Enhancement Act of 2006 (COPE)² was approved by the full body of the House and sent to the Senate earlier this month. However, a proposed amendment to H.R. 5252 by Representative Edward Markey (D-MA)³, which sought to “restore important non-discrimination requirements enforced by the Federal Communications Commission that from the inception of the Internet until

August of 2005 were binding on telecommunications carriers,” was soundly defeated.

Also, the Communications, Consumer’s Choice, and Broadband Deployment Act of 2006⁴, sponsored by Senator Ted Stevens was endorsed by the Senate Commerce, Science and Transportation Committee. Senator Stevens’ bill calls for FCC oversight and would allow the FCC to impose fines on network providers that block subscriber access to legal content. The bill specifically stipulates that the FCC should keep tabs on the development of networks, how such developments impact the free flow of information, the consumer experience, the relationship between service providers, applications, and users, and the development of services.

“If the commission determines that there are significant problems with any of the matters described,” the bill reads, “[it] shall make such recommendations in its next annual report as it deems necessary and appropriate to ensure that consumers can access lawful content and run Internet applications and services.” The bill does not contain language to specifically regulate the operations of network providers. Several senators have vowed to prevent the Senator Steven’s bill from reaching the Senate floor unless it includes Net neutrality language.

The Internet Freedom Preservation Act stipulates that each broadband service provider “enable any content, application, or service made available via the Internet to be offered, provided, or posted on a basis that . . . is at least equivalent to the access speed, quality of service, and bandwidth that such broadband service provider offers to affiliated content, . . . and does not impose a charge on the basis of the type of content, applications, or services made available via the Internet into the network of such broadband service provider.” Sponsored by Senator Olympia Snowe, S.2917 is not expected to make it out of committee.

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

Call us, or send us a note.

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No Jurisdiction in California Over British Website Without “Something More”

By Kevin W. Goering and Aimee Kahn

Since 1984, the lower courts have struggled with the proper application of the Supreme Court’s “effects test” for personal jurisdiction created in the libel case of *Calder v. Jones*, 465 U.S. 783 (1984). This exercise has been especially difficult in the context of foreign operators of websites. In a recent trademark infringement case, the United States Court of Appeals for the Ninth Circuit held that courts in the United States lack personal jurisdiction over a British operator of a passive website. In *Pebble Beach Company v. Caddy*, No. 04-15577, U.S. App. LEXIS 17381 (9th Cir. July 12, 2006), the Court affirmed the District Court’s holding that it lacked both general and specific personal jurisdiction over a British company which used the website www.pebblebeach-uk.com and which catered in part to Americans.

Two Pebble Beaches

The plaintiff in the case is the owner of Pebble Beach, the well-known golf course and resort located in Monterey, California. The resort alleged that it has used the name “Pebble Beach” as its trade name for over 50 years and that it operates the website www.pebblebeach.com. The defendant, Michael Caddy (“Caddy”) operates “Pebble Beach,” a three room bed and breakfast located on a cliff overlooking a pebbly beach in southern England. The services he describes on his non-interactive website include general accommodation information, room rates, a menu and a wine list. Except for a brief time when Mr. Caddy worked at a restaurant in Carmel, California, he has lived in the United Kingdom. Pebble Beach Company sued Caddy under the Lanham Act and the California Business and Professions Code for trademark infringement and dilution of its “Pebble Beach” mark. *Id.*

Personal Jurisdiction and the “Effects Test”

Citing *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002), the Court first noted in a footnote that Caddy’s activities were “not continuous or substantial enough to establish general jurisdiction.” *Pebble Beach*, No. 04-15577, slip op. at 7673. The Court then turned to the more difficult issue of specific jurisdiction,

applying the Ninth Circuit’s three part test for “minimum contacts.” Under that test, personal jurisdiction exists where

“(1) the defendant has performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of the privileges of conducting activities in the forum, (2) the claim arises out of or results from the defendant’s forum-related activities and (3) the exercise of jurisdiction is reasonable.”

Id. at 7680. The Court held that Pebble Beach Company could not satisfy even the first prong of the three prong test and, accordingly, it proceeded no further.

Analyzing the first prong of the test, the court cited to *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004) and examined whether Caddy had either “purposefully availed himself of the privilege of conducting activities in California” or “purposefully directed” his activities toward California. Noting that all of Caddy’s activities took place in England, the Court found no basis for a finding of “purposeful availment.” As for “purposeful direction,” the Court discussed and applied the “effects test” of *Calder v. Jones*, *supra*, but cautioned “that ‘something more’ is needed in addition to a mere foreseeable effect.” *Id.* at 7676. The Court then drew a distinction between “foreseeable effects” in the forum and “express aiming” at the forum.

The Court distinguished *Panavision Int’l v. Toeppen*, 141 F.3d 1316, 1321 (9th Cir. 1998), where a cybersquatter had registered a domain name in the hope of obtaining money from the California-based plaintiffs. Similarly, the Court found this case was unlike *Bancroft & Masters, Inc. v. Augusta National, Inc.*, 223 F.3d 1082 (9th Cir. 2000) and *Metropolitan Life Insurance Co. v. Neaves*, 912 F.2d 1062 (9th Cir. 1990), because both of those cases involved defendants who sent letters to California which gave rise to the causes of action in those cases.

The Court relied heavily upon *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797 (9th Cir. 2004). In that case, the Ninth Circuit refused to exercise personal jurisdiction over an Ohio car dealership which had used the California Governor’s “Terminator” image in a newspaper advertisement. The court emphasized the importance of the passive nature of the website, refusing categorically to find personal jurisdiction

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Recent Developments in Ireland

New Bills on Defamation and Privacy

By Karyn Harty

Those with experience of publishing in the Republic of Ireland will be interested to hear that the Irish Government has recently published two significant pieces of draft legislation, which will directly impact on media defendants.

The long awaited Defamation Bill 2006 promises radical reform of Ireland's libel laws. Controversially, alongside that draft legislation the Government has also published a Privacy Bill and has made it clear that libel reform is contingent upon press regulation by way of a statutory Press Council and statutory recognition of the ECHR's decision in *Von Hannover v. Germany*. It is expected that the Government will seek to enact both pieces of legislation later this year.

This article examines some key provisions in the draft legislation, but those who want a closer look can download copies of the Defamation Bill and the Privacy Bill from the Department of Justice website at [www.justice.ie/80256E010039C5AF/vWeb/flJUSQ6REJAY-en/\\$File/DefamationBill06.pdf](http://www.justice.ie/80256E010039C5AF/vWeb/flJUSQ6REJAY-en/$File/DefamationBill06.pdf).

Defamation Bill 2006

The Defamation Bill would repeal the Defamation Act 1961 in its entirety, introduce significant procedural changes, redefine existing defences and introduce some new defences, as well as establishing a Press Council.

A list of the key procedural changes and new initiatives in the Bill is set out below, but it is worth focusing on two key developments which will be of particular interest to media specialists, namely the new *Reynolds* type defense and the Press Council. Unfortunately the Bill is clumsily drafted and ambiguous in many respects, but it is hoped that these may be resolved prior to enactment.

The key procedural changes are listed below, but it is worth noting that the limitation period would be reduced from six years to one year. That and other changes may allow libel defendants to resolve cases earlier, rather than being carried along to trial as is currently the case.

Reynolds Privilege

Section 24, if enacted in its current form, would introduce a new defense of "fair and reasonable publication on a matter of public importance." The defense is intended to provide *Reynolds*

type protection for media defendants and largely follows the Lord Nicholls formula, in providing a non-exhaustive list of things to which the court can have regard in assessing whether or not the publication was fair and reasonable.

To succeed under Section 24 a defendant must prove that it published the statement in good faith and in the course of the discussion of a subject of public importance for the public benefit. It would then have to demonstrate that it was fair and reasonable to publish the statement in all the circumstances, based on the court's assessment of all the circumstances of the case. Section 24(5) stipulates that the jury is to carry out this assessment.

Significantly, the Bill provides that the defense *shall fail unless* the defendant proves that it believed the statement to be true at the time of publication, that it did not act in bad faith, that "the statement bore a relation to the purpose of the defence" and that the manner and extent of publication did not exceed that which was reasonably sufficient in all the circumstances. It is not clear what is meant by the stipulation that the publication must bear a relation to the "purpose of the defense."

The fact that the jury must carry out the factual assessment, and that the trial judge in a jury case is precluded from doing so, reflects the particular importance of the jury's role under Irish jurisprudence, but could become unwieldy in practice.

The Bill steers away from terms such as "responsible journalism" and "the right to know," which have become central to any assessment of the *Reynolds* defense in England. This practitioner is sceptical as to the prospects of defendants successfully bringing this defense home, given the attitude of the Irish courts to privilege and indeed the experience in England, where *Reynolds* has become uncertain and largely ineffective as a defense. Note that there has not to date been any Irish decision adopting *Reynolds*, other than one High Court decision where the court said *obiter* that it was a useful way to approach the issues in that particular case, but where the defendants had not pleaded the defense. See *Hunter –v-Gerald Duckworth & Co Ltd and anor*, Unreported, 31 July 2003

Statutory Press Council

The media has largely welcomed the Defamation Bill but has greeted the idea of a statutory Press Council with consider-

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No Jurisdiction in California Over British Website Without “Something More”

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“where the sole basis for asserting jurisdiction is a non-interactive passive website.” *Id.* at 7681.

Pebble Beach argued in the alternative for a finding of personal jurisdiction under Federal Rule 4(k)(2) of Civil Procedure, the so-called federal long arm statute, claiming that Caddy had purposefully directed his action at the United States as a whole. Pebble Beach argued that the use of a “.com” domain name demonstrates that the United States was Caddy’s primary market, that the name “Pebble Beach,” which is an American trademark, indicates that the United States was his primary target, and that some of Caddy’s business has been with Americans. Again, reasoning that foreseeable effects alone, without “something more,” are insufficient to confer jurisdiction, the court summarily rejected Pebble Beach’s arguments under Rule 4(k)(2). The fact that “Pebble Beach” may be a famous trademark in the United States was deemed to be of “little practical consequence,” while Caddy’s selection of a “.com” domain name instead of a United Kingdom domain had “minimal importance.” *Id.* at 7683. The court noted that the fact that Caddy’s bed and breakfast occasionally had American guests again tends only to show an “effect,” and “not the ‘something more’ that is required.” *Id.* at 7683.

Finally the court held that the District Court had not abused its discretion by disallowing additional jurisdictional discovery because of the Circuit’s ruling as a matter of law “that a passive website and domain name are an insufficient basis for asserting personal jurisdiction.” *Id.* at 7684.

Conclusions and Comparisons

The broad ruling in *Pebble Beach* suggests that it is virtually impossible in the Ninth Circuit for a plaintiff to establish specific jurisdiction over the operator of a non-interactive website in a foreign country. The Ninth Circuit in essence extended its holding in *Schwarzenegger* to all cases where the sole basis for asserting jurisdiction is a non-interactive website. See *Rio Properties, Inc. v. Rio International Interlink*, 284 F.3d 1007, 1020-21 (9th Cir. 2002) (finding that plaintiff alleged “something more” required to establish specific jurisdiction, where the defendant not only operated a passive website but also issued print and radio advertisements); see also *Panavision International v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998) (specific jurisdiction was found where the defendant had directly aimed his conduct at the forum state by registering a do-

main name and sending a letter demanding \$13,000 in return for the name).

Pebble Beach is yet another example of the more restrictive approach to internet jurisdiction taken by courts in the United States compared with courts in the United Kingdom, where the defendant in the case was located. There are recent indications that the British and other Commonwealth courts may be recognizing some limits on the exercise of jurisdiction over foreign internet publishers. See *Jameel v. Dow Jones*, [2005] EWCA Civ 75 QB 946 (3 February 2005) (declining to exercise jurisdiction where access to publication in England on the Internet was minimal); *Bangoura v. Washington Post Company*, 258 D.L.R. (4th) 341 (Ontario Court App. 2005) (no jurisdiction in Canadian libel case where plaintiff moved to Canada after publication). Yet, these courts have historically exercised jurisdiction in transnational internet cases where a court in the United States probably would not. E.g., *Gutnick v. Dow Jones*, [2002] HCA 56 (10 December 2002) (jurisdiction in Australia libel case for publication on an American subscription-based website); see also *Burke v. NYP Holdings, Inc.*, [2005] BCSC 1289 (British Columbia Court has jurisdiction over foreign internet publisher where plaintiff lived in British Columbia at the time of publication); *Harrod’s Ltd. v. Dow Jones & Company, Inc.*, [2003] EWHC 1162 (QB) (22 May 2003) (upholding jurisdiction where an article about Harrod’s was printed in the American edition of the Wall Street Journal and published online, but where only ten printed copies were sent to England and only a few hits on the website occurred); *Kitakufe v. Oloya Ltd.*, 67 O.T.C. 315 (jurisdiction upheld in Canada in a defamation suit for Ugandan newspaper article available on the internet). In sum, in England and other Commonwealth countries, the mere showing that the plaintiff suffered harm in the forum is generally still a sufficient jurisdictional basis, whereas courts in this country require the “something more” which the court in *Pebble Beach* found lacking. See D. Schulz and K. Wimmer, “Jurisdiction Over Internet Publishers,” MLRC Bulletin No. 3 (2005 at 53).

Stephen M. Trattner of Washington, D.C., represented the plaintiff-appellant. Mikal J. Condon, Boies, Schiller & Flexner LLP of Oakland, California represented the defendant-appellee.

Mr. Goering is a partner and Ms. Kahn is a summer associate at MLRC member firm, Sheppard Mullin Richter & Hampton, LLP.

Recent Developments in Ireland

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able suspicion, not least because the Minister will have a role, albeit indirect, in appointing the council members.

There has not previously been any coherent press regulation in Ireland and statutory regulation was perhaps inevitable in the absence of an effective initiative by the Irish and UK press. The Press Council will include a Press Ombudsman, who will have statutory powers to investigate, hear and determine complaints and will be able to require the publication of corrections or findings. The fact that a defendant has complied with the code of standards issued by the Press Council can be taken into account as one of the factors under the defence of fair and reasonable publication.

Privacy Bill 2006

The Minister for Justice has expressed reservations about the need for a statutory privacy law, following *Von Hannover*. The Irish cabinet however insisted on a review group to examine privacy law and produce a draft Bill. It seems that a statutory privacy law is now inevitable.

The Privacy Bill is clear and concise and arguably does no more than codify the current protections under Irish common law. It does however represent a significant blow for publishers in Ireland as it gives formal recognition to privacy rights which up to now have been largely undefined, and confirms that individual citizens can enforce privacy rights as against other citizens and the media, as well as the state.

The Irish courts have long recognised that the right to privacy exists and have in appropriate cases compensated individuals for breach of privacy. An analysis of this case law is beyond the scope of this note, but in a recent case the High Court provided helpful guidance on the nature of privacy rights. See *Cogley –v- Radio Telefís Éireann*, Unreported, July 2005

In essence, the court said some things are inherently private, such as medical information and where there is a threat of disclosure of such information, the court is likely to restrain its publication and other factors such as freedom of expression and the public interest do not come into play. If however the issue is the method of obtaining information that is not inherently private, for example where there has been surreptitious filming, then the court must weigh the privacy rights against the wider public interest.

The Privacy Bill goes further in that it defines the entitlement to privacy in some detail. The definition is very broad, encompassing surveillance, use of a person's identity without

consent for advertising or financial gain, disclosing private items such as diaries and medical records, or committing an act amounting to harassment.

The court must have regard to the factual circumstances, including any office or position held by the person who claims breach of privacy and the extent to which the infringement relates to that office or function. The court must also consider the nature of the information disclosed and whether it relates to private and family life, for example. Significantly, the fact that the information published was available publicly already or that the event happened in public will not preclude a privacy claim.

The Bill also provides defences, including a 'good faith' defence and a Reynolds type defence specifically protecting newsgathering and it will be possible to apply to have cases heard *in camera*. While there is some political opposition to the Bill it is expected that it will be enacted in something close to its current form later this year.

Karyn Harty is Defamation & Media Partner at McCann FitzGerald in Dublin, Ireland.

Key Procedural Changes

- Distinction between libel and slander to be abolished
- Limitation period to be reduced from 6 years to 1 year
- Plaintiff and defendant to be required to swear affidavits verifying the accuracy of all factual assertions and allegations, with significant criminal penalties for false or misleading statements
- Defendants will no longer have to admit liability in order to pay money into court
- Cause of action to survive death of the plaintiff
- Juries to hear submissions on damages (not currently permitted)
- Supreme Court to substitute a figure when overturning an award

New Initiatives

- New multiple publication rule
- Existing defences redefined
- New defence of 'fair and reasonable publication on a matter of public importance'
- New offer of amends procedure
- New declaratory order procedure, without entitlement to damages

MLRC Examines Complaints Filed Against News Media in 2005

Libel is the most common claim made in lawsuits against the media over content, and corporations are the most frequent plaintiffs, according to a study by the Media Law Resource Center of lawsuits filed in 2005 against media defendants.

The study, the latest in a series examining complaints from various years since 1995, examined 397 complaints filed in state and federal courts during 2005. The 2005 Complaint Study examines in detail the types of cases filed against media defendants, broken down by media type, plaintiff type, jurisdiction, and type of claim(s), and compares results to MLRC's previous studies in 2001 and the 1990s.

While the sample is neither comprehensive nor scientific, it provides a useful snapshot of such cases. MLRC obtained information on the bulk of the cases from its members, including major media insurance companies, media companies and outside counsel for media companies.

The study found that corporations were the most common plaintiffs, named in 19.6 percent of the complaints, followed by government plaintiffs (including judges and other judicial officers, elected officials, non-elected government employees, government contractors, law enforcement officers, and political candidates), named in 18.6 percent.

Almost three-quarters – 72.5 percent – of the 2005 complaints were filed in state court, with California, New York and Pennsylvania the leading jurisdictions. Of complaints filed in federal court, the district courts in the Ninth Circuit had the most cases, followed by the Second Circuit.

Print media, named in 53.7 percent of complaints, were sued more often than audio-visual (named in 43.1 percent) and Internet (named in 0.8 percent) defendants. By market size, the share of complaints naming media defendants in the smallest markets, 29.0 percent, was almost double the share naming defendants in the top 20 markets (15.9 percent).

Individual newspapers were the most frequently named individual defendants, in 39.3 percent of cases, followed by reporters and correspondents with 25.7 percent. Television stations were sued in 17.6 percent of cases, produc-

tion entities in all media were named in 16.4 percent, and television and radio networks (programming services) were named in 11.8 percent.

Virtually all – 94.8 percent – of the newspapers named as defendants in suits in the 2005 sample were dailies, and more than half were in the smallest U.S. markets. The small markets were also the largest share of television stations sued. Among radio station defendants, those in the top 20 markets were the most frequently named.

Internet defendants were named in a very small number of complaints in the study, with content providers sued more often than service providers.

General reporting was the most frequent activity leading to lawsuits, accounting for 45.8 percent of cases. Investigative reporting is second, representing 8.8 percent of lawsuits. Business relationships led to 8.3 percent of complaints, while advertising and promotion accounted for 8.1 percent of cases in the sample.

Libel was by far the most popular claim, made in 61.0 percent of complaints; but this share is somewhat lower than MLRC's prior studies. Various invasion of privacy claims were made in a third of the complaints, with false light claims leading the pack. Contractual claims were made in 18.4 percent of complaints, followed by emotional distress claims in 16.6 percent of cases and intellectual property claims in 13.9 percent.

Libel was pled as the sole claim in 26.4 percent of cases. But more than a third of cases had libel and other claims in the same suit, with the most common additional claims being privacy, emotional distress and contractual claims. Other claims frequently paired with libel were simple negligence claims and conspiracy claims.

The 2005 MLRC Complaint Study will be available for distribution in the coming days.

Please contact us at medialaw@medialaw.org for ordering information.

MLRC Issues Supreme Court Report

The Media Law Resource Center has issued its annual report on the recently concluded U.S. Supreme Court term, summarizing and examining its actions on petitions for certiorari in libel, media privacy and other media and First Amendment cases of interest.

MLRC has cataloged libel and privacy petitions before the Court for 21 terms, reviewing the cases appealed and questions presented in text and tables.

Nine petitions in libel and media privacy cases were filed with the Supreme Court during the 2005 term, tying with 2004 for the lowest number of petitions filed. The highest number of petitions filed was 37 in the 1988 term. The average number of petitions filed over the 21 terms studied is 19.9.

The Court denied all nine of the petitions in the 2005 term. Over the 21 terms studied by MLRC, the Court has granted certiorari in only 17 of 419 libel and media privacy petitions filed (4 percent).

The most frequently raised issues in petitions this year were actual malice, falsity (burden of proof) and plaintiff status, each raised in two petitions. Over the past 21 Terms, the most frequently petitioned issues were actual malice (86), plaintiff status (58), privilege (48) and opinion (46).

Among the petitions denied in the 2005 Term was in *Hatfill v. New York Times*, 416 F.3d 320, 33 Media L. Rep. 2057 (4th Cir. 2005), *reh'g denied*, 427 F.3d 253, 33 Media L. Rep. 2530 (4th Cir. Oct 18, 2005), *cert. denied*, 126 S.Ct. 1619 (U.S. Mar 27, 2006) (No. 05-897), where a divided Fourth Circuit panel reinstated claims of libel and intentional infliction of emotional distress over a series of *New York Times* op-ed articles discussing the FBI's anthrax murder investigation. In reinstating plaintiff's intentional infliction of emotional distress claim, the Fourth Circuit disregarded well-established law that the publication of newsworthy information cannot meet the standard for "outrageousness" as a matter of law.

The Supreme Court also declined to hear an appeal of the Supreme Judicial Court of Massachusetts' decision upholding a \$2.1 million libel damage award against the *Boston Globe* after the trial judge defaulted the *Globe* on liability because of its unwillingness to name a confidential source. *Ayash v. Dana-Farber Cancer Institute, et al.*,

822 N.E.2d 667 (Mass. 2005), *cert. denied sub. nom. Globe v. Ayash*, 126 S.Ct. 397 (U.S. Oct. 3, 2005) (No. 04-1634).

Confidential source protection was also raised in two separate petitions coming out of the Wen Ho Lee case. Last year the D.C. Circuit Court of Appeals upheld contempt citations against four reporters for refusing to comply with a discovery order directing them to reveal the identity of their confidential source(s) in a civil Privacy Act lawsuit brought by former Department of Energy scientist Wen Ho Lee against the government for leaking information about him to the media. *Lee v. Dep't of Justice*, 413 F.3d 53, 33 Media L. Rep. 2096 (D.C. Cir. 2005), *reh'g denied*, 428 F.3d 299, 33 Media L. Rep. 2537 (D.C. Cir. 2005), *cert. denied sub. nom. Drogin v. Lee and Thomas v. Lee*, 126 S.Ct. 2351 (U.S. June 5, 2006) (Nos. 05-969, 05-1114).

While the petitions for certiorari were pending, the underlying case was settled when the government defendants and the media involved paid plaintiff a combined \$1.6 million to drop the suit, with the government defendants paying a combined \$895,000 and the media defendants paying \$750,000.

The Supreme Court also issued interesting decisions in three non-media First Amendment cases.

In *Garcetti v. Ceballos*, it held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 126 S.Ct. 1951 (U.S. May 30, 2006) (No. 04-473) (reversing 361 F.3d 1168, 1170 (9th Cir. 2004)).

In *Rumsfeld v. FAIR*, 126 S.Ct. 1297 (U.S. 2006) (No. 04-1152) (reversing 390 F.3d 219 (3d Cir. 2004)), the Court, in a unanimous decision written by new Chief Justice Roberts, held that the government can require colleges and universities to admit military recruiters on campus as a condition of receiving public funds.

And in *Randall v. Sorrell*, 126 S.Ct. 2479 (U.S. 2006) (Nos. 04-1528, 04-1530, 04-1697) (reversing *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004)), the Court issued a lengthy decision on campaign finance reform, striking down as unconstitutional a Vermont statute that sought to impose spending and contribution limits on campaigns for state office.

LEGISLATIVE UPDATE

Broadcast Indecency Bills

By Kevin Goldberg

One of the most important – and controversial – bills to be enacted into law in the 109th Congress is the Broadcast Decency Enforcement Act, which increases by ten-fold the penalties for airing indecent content in violation of Federal Communications Commission regulations.

It was signed by the President on June 15, 2006. In the wake of the passage of the Broadcast Decency Enforcement Act, it is a good time to review other bills introduced in Congress that seek to control content on the airwaves.

Broadcast Decency Enforcement Acts (S 193 and HR 310)

- Two bills were introduced once again that would increase the penalties for broadcasters who air obscene, indecent or profane programming, as those terms are already defined by Section 503 of the Communications Act of 1934
- On January 26, 2005, Senator Sam Brownback (R-KS) introduced S 193.
 - The bill increases the penalty for violations of these content provisions to a maximum of \$325,000 per violation, up to a total of \$ 3 million.
- One day earlier, Rep. Fred Upton (R-MI) introduced HR 310, which was more extensive
 - It would also increase the penalty for these violations, though Rep. Upton's bill proposed a maximum of \$500,000 per violation
 - This bill also proposed that certain mitigating factors be considered such as:
 - whether the material was live or recorded, scripted or unscripted;
 - whether the violator had a reasonable opportunity to review recorded or scripted programming
 - if the violator originated live or unscripted

***For the foreseeable future,
Buckley's determination that
campaign expenditure limita-
tions are unconstitutional
will remain in force.***

- programming, whether a time delay blocking mechanism was implemented for the programming
- the size of the viewing or listening audience of the programming;
- whether the programming was part of a children's television program
- whether the violator is a company or individual
- if the violator is a company, the size of the company and the size of the market served.
- It also provided that the licensee or permittee may be required to broadcast public service announcements that serve the educational and informational needs of children, with those announcements perhaps being required to reach an audience that is up to 5 times the size of the audience that is estimated to have been reached by the obscene, indecent, or profane material
 - The bill also stated that repeat offenders may find themselves subject to license revocation hearings
- As noted above, S 193 eventually was passed into law to increase the penalties for violations of broadcast indecency regulations.

Indecent and Gratuitous and Excessively Violent Programming Control Act of 2005 (S 616)

- Seeking to extend indecency regulation to violent programming, this bill was introduced March 14, 2005 by Sen. Rockefeller (D-WV). It was referred to Commerce, Science and Transportation Committee but has not received any action in that committee.
- The bill primarily requires the FCC to study the effects of violent programming on children and ways in which such programming can be identified and, subsequently, blocked by parents who do not wish to have it in their homes.
- If the FCC concludes that current ratings systems are not effective in assisting parents in protecting their

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LEGISLATIVE UPDATE

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- children, then the Commission must initiate a rulemaking to augment these systems.
- The FCC is also allowed to increase penalties for violations of these new rules – and current rules applying to sexually indecent programming – in order to improve compliance by licensees.
- Finally, the minimum requirements for educational programming are increased.

Kid Friendly TV Programming Act (S 946)

- This bill was introduced April 28, 2005 by Sen. Wyden (D-OR) and referred to the Commerce, Science and Transportation Committee, where it has lain dormant.
- The bill simply requires the cable and satellite providers to offer child-friendly mechanisms.

FAIR Ratings Act (S 1372)

- The acronym in this bill stands for “Fairness, Accuracy, Inclusivity and Responsiveness in Rating”
- The bill was introduced by Sen. Conrad Burns (R-MT) on July 1, 2005 but has not received any action from the Commerce, Science and Transportation Committee in the past year.
- The bill seeks to standardize media ratings by requiring any voluntary ratings system to be accredited by a Media Ratings Council. It provides its own accrediting standards.

**The MLRC Legislative Committee’s
frequently updated web page on**

Pending Legislation

is available to all MLRC members at

www.medialaw.org/LegislativeAffairsCommittee

Stamp Out Censorship Act of 2005 (HR 1440)

- This bill pushes back at attempts to penalize indecent or violent programming. It was introduced on March 17, 2004 by Rep. Bernie Sanders (I-VT).
- The committee of reference, Energy and Commerce, has not acted on the bill.
- The bill reaffirms that only broadcast television or radio stations, *not* satellite or cable television stations or providers, are subject to indecency rules.

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

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ETHICS CORNER

Conflict Waiver Letters

By Gary Bostwick

Written conflict waivers are being required in more and more states. Do you practice in one of them?

Changes to the American Bar Association Model Rules of Professional Conduct increasingly are being incorporated into state rules of professional conduct arising as a result of the proceedings of ABA Ethics 2000. The jurisdiction in which you practice may be one that has adopted changes brought about by Ethics 2000 or one that is about to do so. The overwhelming majority of those states considering the changes wrought by Ethics 2000 have adopted the amended rules requiring that if "informed consent" of clients is required, it must be in writing. It is well worthwhile determining whether you are practicing in one of the many states that have the written conflict waiver requirement.

The question addressed by this article is what constitutes an adequate conflict waiver letter. First, a little background.

Rule 1.0 of the Model Rules introduces the term "confirmed in writing". When used in reference to informed consent to be given by a person, "confirmed in writing" means that the informed consent must be given in a writing *by the person* or in a *writing that a lawyer promptly transmits* to the person confirming an oral informed consent.

Further, Section (e) of Model Rule 1.0 defines "informed consent" as the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of, and reasonably available alternatives to, the proposed course of conduct. When drafting a waiver letter, one should pay particular attention to the phrases "adequate information and explanation" and "material risks."

Later rules deal specifically with different species of conflicts that may arise. (Client-lawyer business transactions and gifts are, for example, dealt with somewhat differently than client-representation conflicts.) Model Rule 1.7 deals specifically with conflicts of interest among current clients. The rule makes it clear that it is possible to

represent clients even in the face of a concurrent conflict of interest if four conditions precedent are satisfied. The condition addressed by this article demands that "each affected client gives informed consent, confirmed in writing." Model Rule 1.7(b)(4). Comment 20 to Model Rule 1.7 explains the objective of the written confirmation: "the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing."

Model Rule 1.9 sets forth duties to *former* clients. Here again, informed consent must be confirmed in writing.

It is even possible under Model Rule 1.7(b) to request that a client waive conflicts that may arise in the future. Comment 22 to the Model Rule states that the effectiveness of such waiver is "generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise in the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding."

Preeminent authors Geoffrey Hazard and William Hodes state the matter slightly differently, and coin a useful turn of phrase: "the most important of these [protective devices in the rules] is that for any consent to be valid, it must be given only after the client has been *armed with sufficient information* about the situation to be able to make a rational choice." ¹ Hazard and Hodes, *The Law of Lawyering*, Section 10.8 (2005) (emphasis added).

So, we are told that we must "arm our clients" with information that is sufficient for them to make a "rational choice." But *how* to arm them? As another preeminent author said, putting words into the mouth of his princely character battling existential agony: "Ay, there's the rub." Fortunately, Hazard and Hodes provide something more than abstractions. The recipe they suggest is that "when valid consent is possible, the law of lawyering universally requires as an initial step full disclosure of all aspects of the conflict. This includes *the source* of the competing demands on the lawyer's loyalties, *the posture of the matter*,

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the potential ways in which the conflict could change (either for worse or for better), and the *potential harm* that could result.” Hazard and Hodes, *supra*, Section 10.8. That is a fairly clear-cut list of four.

Restatement (Third) of The Law Governing Lawyers, Section 122 has another, if somewhat wordy recipe. It states in Comment c(i) that the information normally necessary in a multiple-client situation should “address the interests of the lawyer and other client giving rise to the conflict; contingent, optional, and tactical considerations and alternative courses of action that would be foreclosed or made less readily available by the conflict; the effect of the representation or the process of obtaining other clients’ informed consent upon confidential information of the client; any material reservations that a disinterested lawyer might reasonably harbor about the arrangement if such a lawyer were representing only the client being advised; and the consequences and effects of a future withdrawal of consent by any client, including, if relevant, the fact that the lawyer would withdraw from representing all clients.”

The Restatement goes on to say that in the former-client conflict situation, “it is necessary that the former client be aware that the consent will allow the former lawyer to proceed adversely to the former client. Beyond that, the former client must have adequate information about the implications (if not readily apparent) of the adverse representation, the fact that the lawyer possesses the former client’s confidential information, the measures that the former lawyer might undertake to protect against unwarranted disclosures, and the right of the former client to refuse consent.”

Comment 30 to Model Rule 1.7 points out some particular dangers of common representation because of its effect on client-lawyer confidentiality and attorney-client privilege. “With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the *privilege will not protect any such communications, and the clients should be so advised.*”

Along these same lines, Comment 31 to Model Rule 1.7 states that “as to the duty of confidentiality, continued com-

mon representation will also certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. . . . the lawyer should, at the outset of the common representation and as part of the process of obtaining each client’s informed consent, *advise each client that information will be shared* and that *the lawyer will have to withdraw* if one client decides that some matter material to the representation should be kept from the other.”

With all of the above, we can come to an approximate answer as to how to write the conflict letter. We are advised that we must provide adequate information and explanation. We must tell the client about material risks of the conflict. We should tell the client what the source of the competing demands upon our loyalties will be. We should talk about material risks and potential ways in which the conflict could get better or could get worse.

***We must tell the
client about material
risks of the conflict.***

We should explain the potential harm that can result. We should, above all things, impress upon the client the seriousness of the decision the client is being asked to make. We should probably attempt to put ourselves in the shoes of an outside disinterested lawyer advising our client as to whether or not the conflict should be waived in order to identify any material reservations that that disinterested lawyer might have.

We should advise the client to seek independent counsel. We should outline the consequences and effects of the future withdrawal of consent by any client, including the possibility that the withdrawal of representation from all of the clients might be necessary. One thematic urging is important. While disclosure of every possible consequence is almost impossible, “the closer the lawyer who seeks a prospective waiver can get to circumstances where not only the actual adverse client but also the actual potential future dispute are identified,” the more likely the prospective waiver is ethically permissible. ABA Formal Opinion 93372 at 1001:177.

Here is a waiver letter that withstood attack by a defendant: “Our engagement by you is also understood as entailing your consent to our representation of our other present or future clients in ‘transactions,’ *including litigation* in which we have not been engaged to represent you and in which you have other counsel, and in which one of our other clients

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would be adverse to you in matters unrelated to those that we are handling for you. In this regard, we discussed *[Heller's] past and on-going representation of Visa U.S.A. and Visa International . . .* in matters which are not currently adverse to First Data. Moreover, as we discussed, we are not aware of any current adversity between Visa and First Data. Given the nature of our relationship with Visa, however, we discussed the need for the firm to preserve its ability to represent Visa on matters which may arise in the future including matters adverse to First Data, provided that we would only undertake such representation of Visa under circumstances in which we do not possess confidential information of yours relating to the transaction . . .” *VISA U.S.A., Inc v. First Data Corp.*, 241 F.Supp.2d 1100, 1108 (N.D. Cal. 2003).

And here is an engagement letter relating to the possibility of future conflicts that was not sufficient:

“Morgan, Lewis & Bockius is a large law firm, and we represent many other companies and individuals. It is possible that some of our present or future clients will have disputes or other dealings with you during the time that we represent you. Accordingly, as a condition of our undertaking of this matter for you, you agree that Morgan, Lewis & Bockius may continue to represent, or may undertake in the future to represent, existing or new clients in any matter, including litigation, that is not substantially related to our work for you, even if the interests of such clients in those other matters are directly adverse to you. Further, you agree in light of its general consent to such unrelated conflicting representations, Morgan, Lewis & Bockius will not be required to notify you of each such representation as it arises. We agree, however, that your prospective consent to conflicting representations contained in the preceding sentence shall not apply in any instance where, as the result of our representation of you, we have obtained confidential information of a non-public nature that, if known to another client of ours, could be used to your material disadvantage in a matter in which we represent, or in the future are asked to undertake representation of, that client.”

Concat LP v. Unilever, PLC, 350 F. Supp.2d 796, 801-802 (N.D. Cal. 2004).

The court called this waiver “boilerplate,” and held that the waiver letter insufficiently disclosed the nature of the conflict that subsequently arose between the parties. *Id.* at 821.

In considering how explicit and far reaching the explanation of possible consequences of a conflict must be, the client’s level of sophistication and experience with legal services is relevant. In the *VISA* case cited above, the waiver was deemed fully informed partially because the company had 50 lawyers in its internal legal department.

Obviously some situations occur in which one is representing clients with vast differences in legal sophistication between them, for example, when jointly representing an executive producer of a television production company and the corporate distributor of the film. One conflict waiver letter may not serve for all of the clients in any given situation.

Another issue that needs to be kept in mind is that one letter may not be good forever and further confirming waivers may be required. See *Concat, supra*, at 821. Even where a prospective conflict has been obtained, a second waiver may be required because of a change in circumstances. Facts may be determined, lawsuits may be filed, patents may be registered, and trade secret information may suddenly become relevant. Anything that would change the ability of the attorney to provide loyalty and confidentiality may require further informed consent confirmed in writing.

It is readily apparent that there are multiple issues that could give rise to more advice and articles in this space with respect to the adequacy of written waivers. Attorneys practicing in states where the new rules have recently been adopted may despair for want of precedent and authority. However, California has required written informed consent for many years.

Thus, several issues and problems likely to arise in the jurisdictions that have newly adopted the requirement already have been the subject of appellate decisions there. Looking to California cases may provide some suggested solutions to questions. A helpful resource in this regard is Vapnek, Tuft, Peck and Wiener, CAL. PRAC. GUIDE: PROFESSIONAL RESPONSIBILITY (The Rutter Group 2005).

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MLRC Calendar

September 27-29, 2006

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