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LIBELLETTER

June 1998

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Shulman v. Group W: Coming to Grips with Privacy

By Lee Levine

Introduction

In the Spring of 1997, when the California Supreme Court agreed to review *Shulman v. Group W Productions, Inc.*, the so-called "fly along" case, the first murmurs of concern could be heard among media defense counsel. Shortly thereafter, when the same court granted review in *Sanders v. ABC Inc.*, 60 Cal. Rptr. 2d 595 (Ct. App. 1997), *review granted*, 64 Cal. Rptr. 2d 399 (Cal. 1997), involving an ABC hidden camera investigation of psychic hotlines, palms became noticeably moist. Then, however, things got truly ominous: Princess Diana died, a tragedy blamed – especially in California celebrity circles – on photographers. To top it all off, Justice Mosk, the senior member of the Court, urged the Bar in a published interview to watch these cases closely for, it appeared, he and his colleagues were about to make some momentous pronouncement about privacy and the press.

For many, Justice Mosk's comments provoked terrifying flashbacks to 1989 and *Brown v. Kelly Broadcasting Co.*, 257 Cal. Rptr. 708 (Cal. 1989), the California Supreme Court's last dedicated effort to come to grips with the "modern" mass media. Although the composition of

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the Court was quite different in 1989, the hostility to the media that rises from the pages of *Brown* – and its resulting rejection of an "actual malice" standard in private figure defamation cases – appeared to many to be a preview of what the press could expect from the justices in *Shulman*.

The *Shulman* case, after all, involved an undeniably sympathetic plaintiff thrust into the public spotlight through no fault of her own – she was the unfortunate victim of an automobile accident on an interstate highway that left her a paraplegic. She and her son, also a victim of the accident, were videotaped by "On Scene: Emergency Response," a reality-based syndicated television series, as Mrs. Shulman was extricated from their car by the "jaws of life," loaded in a helicopter, and flown to the hospital. Through a wireless microphone worn by the emergency paramedic that treated her at the accident scene, Mrs. Shulman is heard communicating with the nurse and telling her, among other things, that "I just want to die."

It appeared to be small comfort that neither of the plaintiffs' full names was mentioned in the account of the rescue that was ultimately broadcast and that neither of their faces was shown. Indeed, the Court of Appeal was decidedly unmoved by such factors, not to mention the plaintiffs' stipulation that the resulting broadcast involved a matter of public concern – a severe traffic accident on a public highway and the work of rescue teams licensed by local government to respond to such emergencies. It reversed a summary judgment for the media defendants that produced the program, holding that claims sounding in "intrusion" and "publication of private facts," to the extent they arose from the videotaping, sound recording and ultimate broadcast of events inside the rescue helicopter, could properly go to a jury.

With respect to both such claims, the Court of Appeal held, judicial analysis is governed by the California Constitution's guarantee of privacy, a right which, as interpreted by the California Supreme Court in *Hill v. NCAA*, 7 Cal. 4th 1 (1994), requires courts to balance a litigant's "reasonable expectation of privacy" against *any* competing interest, including the First Amendment's guarantee of a free press. To make matters worse, the Court of Appeal interpreted *Hill* to tip the balance in favor of privacy, even if the competing interest were compelling, so long as that interest could be otherwise achieved without invading the plaintiff's privacy. In the context of common law claims against the press, this analysis appeared to require that privacy claims be sustained whenever a court or jury concluded that a news report could be prepared and disseminated without including allegedly "private" facts.

Viewed against this backdrop, the California Supreme Court's June 1 decision should properly be greeted with significant relief by the media and it lawyers. As the following summary of the several opinions produced by a divided court suggests, the Court has not only discarded, definitively but politely, the Court of Appeal's reliance on the *Hill* balancing test and the state's constitutional right of privacy, it has issued an important pronouncement on the "publication of private facts" tort, one which places California in the forefront of judicial efforts to cabin the reach

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of such claims in the cause of press freedom. In addition, the opinions written or joined by five of the Court's seven justices reflect a tangible appreciation of the constitutional value of a vigorous press and are happily devoid of the hostility to the media that characterized *Brown*. By the same token, the Court plainly had substantial difficulty coming to grips with plaintiffs' "intrusion" claim and, as a result, has raised more questions than it answered about the reach of that increasingly popular tort and the role of the First Amendment, if any, in cabining it.

The Result and the Line Up

The pivotal opinion in the case, written by Justice Werdegar and joined by Chief Justice George and Justice Kennard, holds that both plaintiffs' private facts claims should be dismissed and that a portion of their intrusion claims be returned to the trial court for further proceedings. The "private facts" holding is joined by Justices Chin and Mosk, both of whom would also have dismissed the intrusion claims. The "intrusion" holding is joined by Justices Brown and Baxter, both of whom would also have reinstated plaintiffs' private facts claims as well.

In addition to Justice Werdegar's plurality opinion, three other justices offered their own views. Justice Kennard wrote separately, joined by Justice Mosk, to express her belief that - at some future date - the Court might be required to hold that the private facts tort cannot be reconciled with the First Amendment under any circumstances. In her view, requiring a Court to assess the "newsworthiness" of a publication or broadcast, even under the deferential standard articulated by the plurality, impermissibly authorizes court to intrude in the editorial process.

Justice Chin, also joined by Justice Mosk, took issue with the Court's reinstatement of the intrusion claim, holding that recording of Mrs. Shulman's voice and images at issue were not, as a matter of law, "highly offensive to a reasonable person" as required by the intrusion tort. Indeed, Justice Chin asserted, "to turn a jury loose on the defendants in this case is itself 'highly offensive' to me."

Finally, Justice Brown, joined by Justice Baxter, chastised the Court for dismissing the private facts claims. In her view, the majority's ruling represents a "radical departure" from the Court's "private facts" jurisprudence, one that "sacrifices the constitutional right of privacy on the altar of the First Amendment."

In the last analysis, Justice Werdegar's opinion, although joined in its entirety by only three justices (Justices Werdegar, George, and Kennard), in fact speaks for a majority of the Court when it articulates the contours of both the "private facts" tort (where the plurality is joined by Justices Chin and Mosk) and the "intrusion" tort (where the majority is joined by Justices Brown and Baxter). It is, therefore, well worth reviewing Justice Werdegar's opinion in some detail.

"An analysis measuring newsworthiness of facts about an involuntary public figure . . . incorporates considerable deference to reporters and editors. . ."

Private Facts

The Court unambiguously holds that neither plaintiff can properly maintain a claims for publication of private facts. In so doing, Justice Werdegar's opinion deftly casts aside prior California case law that had caused substantial mischief in "private facts" cases nationwide and substituted a new formulation, largely derived from the *Restatement (Second) of Torts* (and urged both by the defendants and their *amici*) that promises to limit the reach of the tort significantly.

Specifically, the Court definitively holds that the publication of "newsworthy" information, or information about a "matter of public concern," cannot - as a matter of law - be the subject of a private facts claim. In so holding, Justice Werdegar's opinion resolves the con-

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fusion injected into California law by the Court's prior decision in *Briscoe v. Reader's Digest Ass'n*, 4 Cal. 3d 529, 541 (1971), which had suggested that even a newsworthy report of a private fact could be actionable if sufficiently offensive. In footnote 6 of the plurality opinion in *Shulman*, the Court affirmatively disowns this language in *Briscoe* and, most significantly, asserts that the First Amendment requires that the publication of a newsworthy fact is nonactionable, even if offensive.

In addition, the Court takes great pains to explain that the determination of "newsworthiness," in the context of a given case, is a matter to which substantial deference must be afforded the press: "An analysis measuring newsworthiness of facts about an involuntary public figure . . . incorporates considerable deference to reporters and editors, avoiding the likelihood of unconstitutional interference with the freedom of the press to report truthfully on matters of legitimate public interest." And, the Court emphasizes, again relying on the *Restatement*, "newsworthiness is not limited to 'news' in the narrow sense of reports of current events" but "'extends also to . . . giving information for purposes of education, amusement or enlightenment.'"

Most significantly, the Court – largely adopting the views expressed in the *Restatement (Second) of Torts* §652D, cmt. h – holds that, so long as the subject matter of a given publication or broadcast involves a matter of public concern, the inclusion of even a "private" fact remains nonactionable if it bears a "logical nexus" to the newsworthy subject. Indeed, although the Court references the multi-factor test of "newsworthiness" it had set out in *Kapellas v. Kofman*, 1 Cal. 3d 20, 35-36 (1969), it largely abandons it – as Justice Brown is quick to point out in dissent – in favor of its "logical nexus" test.

Applying its newly minted formulation to the plaintiffs' private facts claim, Justice Werdegar proceeds from the premise that the subject matter of the broadcast – *i.e.*, "automobile accidents" and the "rescue and medical treatment of accident victims" – is one of "legitimate public concern." Then, the Court concludes that "the broadcast video depicting Ruth [Shulman's] injured physical state (which was not luridly shown) and audio showing her disorientation and despair were substantially relevant to the segment's newsworthy subject matter." It did not, therefore, "constitute a 'morbid and sensational prying into private lives for its own sake,'" as the "logical nexus" test requires to divest the publication of a private fact of constitutional protection, and indeed was not "so lurid and sensational in emotional tone, or so intensely personal in content, as to make its intrusiveness disproportionate to its relevance." Thus, the Court concluded, the plaintiffs' private facts claims were properly subject to summary disposition, especially since "'summary judgment is a favored remedy'" in cases such as this.

Hill and the California Constitution

In disposing of the private facts claims, the Court also found it appropriate to say "a few words" about the Court of Appeal's reliance on *Hill v. NCAA* and the right to privacy guaranteed by the California Constitution. Justice Werdegar, writing here for a majority of the Court, "agree[d]" with defendants and their *amici* that "the publication of truthful, lawfully obtained material of legitimate public concern is constitutionally privileged," "does not create liability under the private facts tort," and cannot be subjected to balancing against privacy interests protected by the state constitution. Thus, although the Court conceded that interest-balancing undergirds its adoption of the "logical nexus" test, it made clear that "[n]othing in *Hill*" or its progeny "suggests that the conceptual framework developed for resolving privacy claims under the California Constitution was intended to supplant the common law tort analysis or preclude its independent development."

Intrusion

In contrast to its precise articulation of applicable law in the private facts context, Justice Werdegar's controlling opinion offers decidedly less clarity in its treatment of the plaintiffs' intrusion claims. On the one hand, the Court holds that the cameraman's "mere presence at the accident scene and filming of the events occurring there cannot be

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deemed either a physical or sensory intrusion on plaintiffs' seclusion." On the other, the Court asserts that a reasonable jury could find "highly offensive," and thus actionable as intrusion, the use of a wireless microphone to record Mrs. Shulman's conversations at the accident scene with the flight nurse and the use of a video camera to record events inside the rescue helicopter.

With respect to the helicopter, the Court held that "a triable issue exists as to whether both plaintiffs had an objectively reasonable expectation of privacy in the interior of the rescue helicopter" because, although the "attendance of reporters and photographers at the scene of an accident is to be expected," there is "no law or custom permitting the press to ride in ambulances or enter hospital rooms during treatment without the patient's consent." In addition, the Court concluded that a jury could properly find that such filming was "highly offensive to a reasonable person."

With respect to the use of a wireless microphone outside the helicopter to record Mrs. Shulman's conversations with the flight nurse, the Court held that there remained a factual dispute concerning whether Mrs. Shulman's comments could be overheard by others at the accident scene. If the jury instead concluded that the conversation could otherwise be heard only by the nurse, it would be justified, the Court held, in concluding both that (a) Mrs. Shulman had a reasonable expectation of privacy in those discussions and (b) that recording them without her knowledge was "highly offensive."

Tort of General Application

Both of these holdings are the product of the Court's efforts to come to grips with the tension it perceived between the intrusion tort and press freedom. In this regard, Justice Werdegar purports to hold, on the authority of *Cohen v. Cowles Media Co.*, that the intrusion tort – being a "neutral law of general application" – is subject to First Amendment scrutiny only if, in the context of a given case, intrusion liability would have an "impermissibly severe burden on the press." That circumstance, the Court explained, did not obtain in this case because the "conduct of journalism does not depend, as a general matter, on the use of secret devices to record private conversations."

In this regard, the Court rejected the defendants' suggestion that the First Amendment precludes the imposition of intrusion liability so long as (1) the information to be gathered is related to a matter of public concern and (2) the means employed is not otherwise unlawful. According to the Court, "[n]either tort law nor constitutional precedent supports such a broad privilege."

Publication Damages Available?

In addition, the Court declined to reach the contention – made both by defendants and their *amici* – that the First Amendment precludes the recovery of damages resulting from the broadcast itself in the context of an intrusion claim where, as here, the broadcast has been held to be constitutionally protected. The Court simply did not address the defendants' argument that the intrusion claims should be dismissed on this ground, because the plaintiffs alleged only damages resulting from the broadcast itself – as distinguished from the alleged intrusion, holding that such issues were relevant to "damages" and not properly before the Court at this juncture. It appears, however, that the issue would be properly addressed to the trial court on remand.

By the same token, the Court emphasizes that the defendants' "motive – to gather usable material for a potentially relevant story" – is relevant to determining whether its conduct is "highly offensive." Thus, "[i]nformation collecting techniques that may be highly offensive when done for socially unprotected reasons – for purposes of harassment, blackmail or prurient curiosity, for example – may not be offensive to a reasonable person when employed by journalists in pursuit of a socially or politically important story." Indeed, although "the mere fact the intruder was in pursuit of a 'story' does not . . . generally justify an otherwise offensive intrusion," the Court noted, the use of "routine reporting techniques," such as the mere posing of questions, "could rarely, if ever, be deemed on actionable intrusion."

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Petition for Rehearing on Eavesdrop Note

Finally, in its discussion of the intrusion claim, Justice Werdegar's plurality opinion contains two unfortunate footnotes concerning the reach of Section 632 of the California eavesdropping statute, which creates both civil and criminal liability when one party to a "confidential" communication records it without the consent of the other party. Most recently, in *Deteresa v. American Broadcasting Cos.*, 121 F.3d 460, 463-64 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1840 (1998), the Ninth Circuit had held that a communication is "confidential" for purposes of Section 632 only when the participants reasonably believe it will not be repeated.

In footnote 15 of her plurality opinion in *Shulman*, however, Justice Werdegar indicates that "a conversation may be confidential, within the meaning of Section 632, even if the participants do not expect its contents to remain secret against secondhand repetition." Rather, the communication may be "confidential" if the participants simply, albeit reasonably, believe that it will not be overheard. Moreover, in footnote 16, the plurality observes that, even though the plaintiffs in *Shulman* had not properly alleged a Section 632 claim – their motion to amend their complaint to include it having been untimely filed – their contention that Mrs. Shulman's conversations with the flight nurse had been recorded in violation of the statute is nevertheless "comprehended in the complaint's claim of intrusion and the substantive law relating to that claim."

On this narrow point only, the defendants have filed a petition for rehearing. In it, they urge the Court to follow *Deteresa* and hold that the statute's reference to "confidential" communications be construed according to its plain meaning. In addition, the petition argues that, under California's "new right/exclusive remedy" doctrine, Section 632 provides the "exclusive remedy" for eavesdropping claims and that such conduct cannot form the basis of a common law intrusion claim.

The Future

The impact of *Shulman* is likely to be felt soon, as the Court now turns its attention to *Sanders v. American Broadcasting Cos.* In *Sanders*, the Court of Appeal held that plaintiff, an employee of a so-called "psychic hotline," could not maintain an intrusion claim against ABC arising from its surreptitious recording of conversations with him in an "open" work space to which the public was not permitted access. The Court of Appeal concluded that, as a matter of common law, the plaintiff did not have a "reasonable expectation of privacy" in those conversations, which could presumably be overheard by his co-workers. At the very least, therefore, the California Supreme Court's treatment of *Sanders* should provide additional guidance concerning the permissible scope of intrusion claims arising from secret recordings.

Lee Levine, of Levine Pierson Sullivan & Koch, L.L.P., served as counsel to several media entities as amici curiae in the California Supreme Court in the Shulman case.

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LIBEL

11th Circuit Reverses Jury Verdict for Defense in *Schafer v. Time* Over Misleading Malice Charge

Allows Evidence of Plaintiff Misconduct

Finding that the trial court gave a confusing jury instruction on the definition of common law malice, the 11th Circuit reversed a jury verdict for *Time* magazine in a multimillion dollar libel claim arising out of the misidentification of plaintiff as a suspect in the 1988 bombing of Pan Am flight 103. *Schafer v. Time, Inc.*, No. 96-8730 Slip Op., 1998 U.S. App. Lexis 12201 (11th Cir. June 8, 1998). The court also addressed two evidentiary rulings, rejecting plaintiff's challenge to the admission into evidence of specific instances of his misconduct and to the exclusion of a *Time* internal report on the initial story.

An April 1992 *Time* cover story on the downing of flight 103 entitled "The Unknown Story of Flight 103" contained a photograph of private figure plaintiff Michael Schafer, identifying him based on court documents and other evidence as one "David Lovejoy, a reported double agent for the U.S. and Iran" involved in the bombing of the plane. Plaintiff was not a traitorous double agent but was then working in his family's janitorial business in Georgia. *Time* obtained the misidentified photograph of Schafer from an affidavit filed in a civil lawsuit brought by family members against Pan Am. This filing identified David Lovejoy as a double agent involved in the bombing and erroneously attached plaintiff's photograph as that of Lovejoy. No explanation for this error was adduced at trial. *Time* later published a correction.

The error in defining malice found by the appellate court arose in the following context. First, in giving its jury charge, the court correctly recited Georgia's statutory definition of libel as "a false and malicious defamation of another . . . ." (O.C.G.A. 51-5-1(a)) and gave instructions on the negligence standard to be applied. Second, in connection with plaintiff's presumed and punitive damage claims, the court gave a charge explaining "actual malice." The jury asked the court to explain "malice" as used in the statutory definition of libel. The trial court's recharge stated:

> Malicious, as used in this particular paragraph [of the statute] . . . is not the same as the term actual malice, which is defined for you in connection with Mr. Schafer's claim that injury to his reputation should be presumed. Instead, as used here, it, along with the word false that precedes it, describes the character of a defamation that is libelous. *It denotes statements deliberately calculated to injure.* In all actions for defamation, this type of malice may be inferred from the character of the charge but it may be rebutted by proof.

Slip op. at 10 (emphasis in original).

The 11th Circuit held that the phrase "deliberately calculated to injure" was misleading because it suggested to the jury that it must find that the defendant subjectively intended to injure the plaintiff, as opposed to finding that *Time* was merely negligent. Although, according to the court, the trial judge is entitled to wide discretion in giving the charge, here the court was "left with 'an ineradicable doubt' that the jury found for the defendant because the plaintiff had not proved *Time*

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deliberately intended to injure him." *Id.* at 19.

The phrase "deliberately calculated to injure" was taken directly from an earlier 11th Circuit decision that undertook to explain the difference between "actual malice" and the term "malice" as used in the libel statute. *Straw v. Chase-Revel, Inc.*, 813 F.2d 356 (1987). In *Straw*, the 11th Circuit explained that "malicious" as used in Georgia's libel statute "refers to the defendant's statement, and that it requires that statement to be of the type 'deliberately calculated to injure.'" Slip op. at 12. Here the court engaged in an extended analysis of *Straw*, noting that although it correctly states the law, it does so in a confusing manner by suggesting that in cases governed by the negligence standard plaintiffs must show some intent to injure. Id. at 13-17.

Attempting to clarify, the court noted that "any statement can be malicious in the sense that it is of a type calculated to injure, regardless of how the writer feels towards his subject, if it suggests injurious (or, more plainly, bad) things about the subject to the ordinary reader. . . . Indeed, in the typical case common law malice is presumed from the character of the defamation at issue . . . ." *Id.* at 14. The court concluded that without the benefit of this sort of attendant explanation,"[t]he trial court's instruction to the jury in this case, although literally accurate, in the context presented here, failed to properly guide the jury in its deliberations and likely resulted in a legally misguided verdict." *Id.* at 17.

Time will request rehearing and/or a rehearing en banc on whether the charge was erroneous and merits reversal of the jury verdict.

Character Evidence Properly Admitted

On another issue of note, the court addressed the extent to which specific instances of misconduct by a libel plaintiff can be explored at trial. The trial court permitted *Time* to question plaintiff about a number of events, including a felony conviction, a possible parole violation, convictions for drunk driving, an arrest for writing a bad check, failure to pay alimony and child support and failure to file tax returns. Id. at 31.

In response to plaintiff's objections, the 11th Circuit analyzed Rule 405 of the Federal Rules of Evidence, specifically §405(b) which provides that "in cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person's conduct." The court concluded that in a libel claim under Georgia law a plaintiff's character is substantially at issue. Therefore, the trial court correctly allowed *Time* to explore on cross-examination specific acts of misconduct by plaintiff. Id. at 37.

Internal Memo Excluded

Also noteworthy in the decision is the 11th Circuit's review of the trial court's exclusion of an internal *Time* memo evaluating alleged inaccuracies in the article. The trial court excluded the memo because its probative value was substantially outweighed by the danger of unfair prejudice. Fed. R. Evid. §403. The 11th Circuit held the exclusion was not an abuse of discretion, noting that the memo did not mention *Time's* decision to publish the photograph or its efforts to verify the identity of the man in the photograph.

In fact, the court noted that evidence tending to show that the article was false had virtually no direct impact on Schafer's libel claim which would remain intact whether the article was true or false. The only relevance of the memo would be to infer that *Time's* efforts to verify the identity of the "Lovejoy" photograph were also inadequate. On this point, the court concluded that "the potential for prejudice from such a memorandum is plain." *Id.* at 42.

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Ninth Circuit Reaffirms: Defendant Must Intend Implication

"Who's Judging the Judges"

The Ninth Circuit has again affirmed that a plaintiff asserting a libel by implication case must prove with convincing clarity that the defendant intended to convey the defamatory implication. *Honorable Bruce W. Dodds v. American Broadcasting Company, Inc.*, 98 Daily Journal D.A.R. 5489 (May 27, 1998). Rejecting plaintiff's challenge to this rule established in *Newton v. National Broadcasting Co. Inc.*, 930 F.2d 662 (9th Cir. 1990), the panel noted that every court of appeal to have considered the issue of defamation by implication has imposed a similar intent standard, citing cases from the Fourth and D.C. Circuits.

In addition, the Ninth Circuit articulated the broad protection for expression of opinion regarding a given individual's fitness or competency for high government office, protection under the First Amendment "whether or not those statements are supportable, verifiable, or based on facts or premises disclosed." Id. at 5495.

Summary Judgment on Judge Dodd's Claims

The Ninth Circuit affirmed a grant of summary judgment to defendant ABC in a suit for libel by Bruce Dodds, a California state court judge, arising out of a *Prime Time Live* segment on judicial disciplinary processes. The court found that plaintiff failed to meet his burden on many fronts: whether the statements were defamatory, were fact versus opinion, were made with actual malice, and were *intended* to convey the alleged defamatory implication. In October 1994 the ABC news program *Prime Time Live* broadcast a segment entitled "Who's Judging the Judges." The segment, using three individual judges as examples, examined the disciplinary processes for judges who have been accused of misconduct. Judge Bruce Dodds was one of the individuals mentioned in the broadcast. Judge Dodds at that time was under investigation by the California Commission on Judicial Performance. The judge's conduct was called into question for, among other things, using a crystal ball to support his decisions, a practice that news commentator Cynthia McFadden stated had been confirmed by lawyers, litigants and even one of the judge's former clerks. As McFadden stated in her introduction to the segment, "In the past four years, I've covered about 250 trials, most of them gavel to gavel. I've often been struck by the way that judges justify their decisions on thorny points, often with wisdom drawn from experience, or with a superior grasp of the law. But never the way a judge in California has been accused of." Judge Dodds brought suit against ABC in federal court, Central District of California.

Thirteen Statements at Issue

Originally, Judge Dodds' complaint alleged that thirteen direct or implied slanderous or false statements were made during the broadcast. Dodds alleged that ABC had depicted him as a criminal and unfit for office. ABC moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and the district court granted the motion on all but three of the statements. The three statements were: (1) that Dodds uses a crystal ball to support his decisions; (2) that the judge consistently reads newspapers and magazines while he is on the bench, and (3) that Judge Dodds screamed, yelled and spit in the courtroom.

After additional discovery and depositions, ABC moved for summary judgment on these statements. Judge Dodds opposed the motion only with respect to the "crystal ball" statement. He argued that ABC, "by stating that he uses a crystal ball to support his decisions . . . implied that he only makes decisions based on a crystal ball." The district court concluded that there was insufficient evidence to support a finding that ABC had acted with actual malice and granted ABC's motion for summary judgment. Judge Dodds appealed the district court's motion on the "crystal ball" statement as well as on the dismissal of seven of the ten original claims.

The Ninth Circuit noted at the top of the opinion that "[j]udges provide an easy and attractive target for unwarranted verbal assaults by all kinds of people," including disgruntled litigants, lawyers and other public officials as well as from the media (id. at 5490), that "[a]busive criti-

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cism simply goes with the territory." The court also noted, however, that however distasteful the remarks, wise judges will probably dismiss the attacks as part of the "baggage of their jobs."

Judge Dodds claimed that the "crystal ball" statement was defamatory in two aspects--that it stated that he used the crystal ball to support his decisions and that it also implied that he used the crystal ball to make his decisions. He argued that "no one could honestly believe that a sitting judge would use a toy in the context of serious judicial proceedings," that "ABC must have known that he did not use the crystal ball to support his decision and consequently must have known that its statement to that effect was false," and had obvious reasons to doubt its sources.

The Ninth Circuit was not persuaded that Dodds had proven the "reckless disregard" demanded by the actual malice standard.

The court noted that ABC had several sources who confirmed that Dodds had used the crystal ball to support his decisions. The court found that ABC had no particular reason to doubt its sources, had itself seen the object on his desk, and that ABC's efforts to interview Judge Dodds himself, the "best possible source," belied any "purposeful avoidance of the truth." Id at p. 5493. That the alleged behavior was bizarre was insufficient to create an issue of fact. Even judges, the court noted, engage in bizarre conduct.

No Defamatory Implication

Judge Dodds also alleged that a defamatory implication could be derived from the broadcast--that he used the crystal ball to make his decisions. The Ninth Circuit determined that, in order for Judge Dodds to prevail on this allegation, he would have to show that "the words ABC uttered were reasonably capable of sustaining that meaning. More important, he must show that a jury could reasonably find by clear and convincing evidence that ABC 'intended to convey the defamatory impression.'" The Ninth Circuit relied on *Newton v. National Broadcasting Co., Inc.*, 930 F.2d 662 (9th Cir. 1990).

Considering the totality of the "crystal ball" statements, the Court conceded that a reasonable juror could draw an implication that Judge Dodds used the crystal ball to make his decisions. But "reasonable implication" is only one of the prongs of the test set out in *Newton*. The plaintiff must also establish that ABC "intended to convey the defamatory implication--and he must do so with "convincing clarity." The Court found that Judge Dodds' evidence on this point was weak, the strongest point being that originally ABC had slated the segment in a category entitled "how judges decide," by the time of the broadcast, however, no such categorization was in use.

"Reasonable Viewer" Standard Rejected

Significantly, the Ninth Circuit rejected Judge Dodds' request to reconsider *Newton's* subjective test--that the network must have actually intended to convey the defamatory impression--and replace it with an objective, "reasonable viewer standard." Under such a standard, a media defendant would be liable as long as "an ordinary viewer would have perceived the implication," regardless of the broadcaster's actual intent. Citing its recent decision in *Eastwood v. National Enquirer*, 123 F.3d 1249,1256 (9th Cir. 1997), --"there is no actual malice where journalists unknowingly mislead the public" -- and the Fourth Circuit, (*Chapin v. Knight-Ridder*, 933 F.2d 1087, 1093 (4th Cir. 1993)) and the D.C. Circuit, (*White v. Fraternal Order of Police*, 909 F.2d 512, 520 (D.C. 1990)) the Court upheld the requirement of subjective or actual intent to convey the defamatory impression.

No Defamatory Implication is Reasonable

The court dispatched with the seven other alleged defamatory statements, finding that they failed either because a reasonable jury could not find them implied in the broadcast or because they were not susceptible of being proved true or false. Among those that the court found were not implied in the broadcast was the implication that Judge Dodds was a felon because his alleged misconduct was portrayed between that of two judges who were guilty of felonious conduct. Another -- that he was one of three worst judges in the country, simply because he appeared as one of three judges in the segment -- was not a reasonable implication,

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Dodds v. ABC

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but would have failed as well due to its status as an opinion rather than factual statement.

The court also refused to find that a shot of the judge refusing to answer ABC's questions suggested that he was "hiding from public view." Id. at 5495. Noting that ABC stated in the report that the Judge was barred from talking about the disciplinary proceeding, the court further said that contrary to having a defamatory implication, such a shot "is simply a regular part of the nightly news these days." Id.

"Unfit to Serve" is Protected Speech

Judge Dodds asserted that ABC implied that he was unfit to serve as a judge. The court dispatched of this claim in two ways. The court first held that an opinion based on an implication arising from disclosed facts is simply not actionable when the disclosed facts themselves are not actionable. Implications aside, if ABC had stated outright that it did not believe Dodds fit to serve, it would have been protected speech based upon nonactionable disclosed facts.

> "[M]ore important[ly]," the court held that "statements of opinion concerning whether a person who holds high public office is fit for that office or is competent to serve in that position are protected under the First Amendment, whether or not those statements are supportable, verifiable, or based on facts or premises that are disclosed." id. at 5495.

This is particularly true, the court said, when the office-holder is an elected official or a candidate. While recognizing that such statements, often expressed in hyperbolic and vitriolic ways, may, in some instances, add little to the actual debate and may even be erroneous, the court stated that they are important parts of the political and public policy debate. The right to express opinions about politicians and those in public office (and, the court notes, umpires) is part of our heritage.

ABC was represented by Steven M. Perry of LDRC member firm Munger, Tolles & Olson LLP in Los Angeles, CA.

Fraud Claim Over Investigative Report Survives Summary Judgment

Court Finds Assurances of Favorable Portrayal Actionable

Finding that assurances of a favorable portrayal allegedly made by representatives of NBC *Dateline* to the subjects of a story are "actionable under a theory of fraudulent misrepresentation," the U.S. District Court in Maine partially denied NBC's motion for summary judgment in a case arising out of two 1995 investigative reports on the trucking industry. *Veilleux v. NBC,* Civ. No. 97-CV-9-B (D. Me. May 29, 1998). While denying such assurances were given, NBC moved for summary judgment based on the plaintiffs'version of the facts.

NBC won summary judgment on the issue of punitive damages. In addition to fraudulent misrepresentation, negligent misrepresentation, defamation and privacy claims will be going to trial.

The plaintiffs, Classic Carriers trucking company owners, Raymond and Kathy Veilleux, and their employee, truck driver Peter Kennedy, allege they were persuaded to cooperate with production of the story based on assurances from network representatives that the report would show the "positive side" of the trucking industry. Along with the alleged assurances of a positive story, the plaintiffs claim they were told by the defendants that the story would not involve Parents Against Tired Truckers (PATT), an organization advocating more stringent trucking regulations. Classic Carriers allowed NBC to bring their cameras along on a coast-to-coast haul with Kennedy as the driver.

Rather than the "positive" stories the plaintiffs expected, the broadcast reports were exposes examining the stresses of long-haul truck driving, including "hours of service" violations and driver fatigue, and included interviews with PATT representatives. The reports also revealed Kennedy tested positive for amphetamine and marijuana use in a drug test prior to his road-trip with reporters, and alleged that he violated several other service and safety regulations during the journey.

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Fraud Claim Over Investigative Report

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Court Finds Breach of Promise Actionable

Following *Boivin v Jones & Vining, Inc.* 578 A.2d 187 (Me. 1990) and *Wildes v. Pens Unlimited,* 389 A.2d 837 (Me. 1978), the court held a breach of a promise of future performance can be considered actionable under a theory of fraudulent misrepresentation in certain circumstances. This ruling is contrary to the earlier ruling by the U.S. Court of Appeals for the Seventh Circuit in *Desnick v. American Broadcasting Companies Inc,*.44 F.3d 1345 (7th Cir.1995), where the appellate court held promises made by investigative reporters were not actionable as fraud.

Negligent Misrepresentation Stands

The court also extended the duty of care for negligent misrepresentation imposed by the *Restatement (Second) of Torts* beyond the realm of buyers and sellers, and held that media representatives could be liable for negligent misrepresentation in cases where the reliance on media promises resulted in pecuniary harms. According to the district court, members of the media may be held liable if they fail "to use reasonable care in conveying information for the guidance of others in their business transactions where one justifiably relies on the negligently conveyed information." Slip op. at 6.

In allowing Veilleux's fraud claim to go to trial, the court found that evidence presented by Veilleux raised issues of material fact sufficient to survive summary judgment as to whether NBC's alleged assurances were made knowing they would not be honored, and whether he justifiably relied upon NBC's promises and suffered pecuniary harm as a result. Veilleux claimed that three of his major clients stopped doing business with him shortly after the program aired, resulting in revenue losses close to $250,000. Summary judgment was granted to the network, however, on Kennedy's fraudulent and negligent misrepresentation claims as he did not demonstrate financial loss. Harm to reputation, emotional and physical health would not suffice.

Defamation

NBC's motion for summary judgment was denied on the plaintiffs' defamation claims as well. The court simply declined to engage in a statement-by-statement analysis as to the actionability of various statements in the *Dateline* broadcast that the plaintiffs allege were false and defamatory. The court did reject plaintiff's efforts to challenge statements in the broadcast that had not been alleged in their complaint to be false and defamatory absent formal amendment of the complaint. With respect to the claims for presumed damages, the court was unable to conclude the defendant did not make at least some of the allegedly defamatory statements with knowledge they were false, or with reckless disregard for the truth.

Privacy: Drug Test Not Newsworthy

In addition, the court denied summary judgment on the claims for invasion of privacy for offensive publicity and false light theories. While stating that the safety threat posed by drug use among interstate truck drivers is a legitimate matter of public interest, the court found that Kennedy's positive results on a random drug test were not, as a matter of law, an issue of legitimate public concern or "newsworthy." The court ultimately ruled, however, that the question of legitimate public concern was a question of fact for the jury to decide.

Further, despite the fact that following the cross-country trip, Kennedy himself disclosed that he tested positive for marijuana and amphetamines prior to departure, the court found that a question of fact existed as to whether he "knowingly and intelligently consented to the publication of the drug test." Slip op. at 27. Kennedy alleged that he revealed the information to NBC reporters after receiving assurances that the information would be kept "off the record," but was later questioned on camera about the test results as part of an interview.

Summary judgment was also denied on the claims for negligent infliction of emotional distress, but was granted to the defendants on the plaintiffs' claims of intentional infliction of emotional distress. The court also dismissed plaintiffs' claims for punitive damages as to all counts, as plaintiffs failed to make the required showing of common law malice under Maine law.

Trial in the case is currently underway.

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Chocolate Maker's Post-Trial Motion Bitter-Sweet Success

Holding the evidence insufficient to justify economic and noneconomic damage awards, an Oregon trial court threw out $1.2 million of a $1.6 million nonmedia libel verdict. *Bippes v. Hershey Chocolate USA*, 1998 WL 261573 (D. Or. May 20, 1998).

Plaintiff, the former key account manager and district account supervisor for Hershey's Portland, Oregon distribution area, alleged claims of defamation, intentional infliction of emotional distress, and breach of the implied covenant of good faith and fair dealing, following her firing for allegedly falsifying expense reports. Plaintiff claimed that Hershey made "statements that [she] had listed thousands of dollars of lunches on expense reports and that her supervisor had told her time and time again that she had to keep her expenses in line." *Bippes*, 1998 WL 261573 at *1. Following a February 18 trial, the jury returned a $1,680,000 verdict for Bippes.

On post-trial motion, the court threw out the economic damage award of $405,000, finding "no evidence tying Bippes' inability to obtain an equivalent job to the defamation rather than the termination," the termination itself being proper. *Bippes*, 1998 WL 261573 at *3. Further, the court noted "[t]here was no evidence that any employer had declined to offer Bippes a job because he or she had heard of the defamatory remarks. There was no evidence that any prospective employer had heard of the defamatory remarks except for the employer who, in fact, had hired Bippes." *Id.*

The court also reduced the non-economic damage award from $1,275,000 to $475,000, reasoning "that the jury confused noneconomic damages caused by Bippes' termination with noneconomic damages caused by Bippes' defamation." *Id.* at *4. The court also stated that "the jury made the high award to punish Hershey, which is not allowed under the laws of the State of Oregon." *Id.* According to the court, the maximum amount sustainable by the evidence was $475,000.

Maryland Requires Knowledge of Falsity for Punitive Award

A Maryland Court of Appeals held in a recent case that Maryland common law requires any plaintiff in a libel suit, regardless of the plaintiff's status, to prove by clear and convincing evidence that the defendant had actual knowledge that the statements at issue were false to recover punitive damages. *Le Marc's Management Corporation v. Valentin*, 1998 Md. Lexis 318 (5/19/98). With only one dissent, the court found that Maryland law requires conscious wrongdoing for an award of punitive damages. Translated into the defamation context, the requisite mens rea is actual knowledge.

The court rejected reckless disregard for the truth as a standard, finding that it was "no greater than the level of scienter required by the 'reckless indifference' standard" rejected in other case law in other tort contexts. The dissenting judge protested what he saw as the continuation of "the inexorable campaign that this Court began...to eliminate punitive damages" in Maryland.

"Slip-and-Fall Lawyer" Not Libelous

By Carl Solano, Alan Lieberman, and Wendy Beetlestone

The phrase "slip-and-fall lawyer" is not defamatory. That was the decision of a Philadelphia Common Pleas Court judge in a case in which a Republican candidate for mayor, Benjamin Paul, sued over use of that phrase to refer to him in an article published in *Philadelphia Magazine*.

The article was a profile of a Philadelphia power broker, Martin Weinberg, known for backing winning political candidates. It described a conversation between him and City Councilman Frank Rizzo, Jr. (son of the late mayor), in which they discussed Paul's campaign for mayor. The description of the conversation noted in passing that Paul was referred to by the phrase "slip-and-fall lawyer," but did not attribute the phrase specifically to either Rizzo or Weinberg.

At trial, Rizzo testified that he used the phrase to de-

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"Slip-and-Fall Lawyer" Not Libelous

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scribe Paul and that he did not believe the phrase to be defamatory.

At the close of plaintiff's case, counsel for *Philadelphia Magazine* made a motion for compulsory nonsuit, seeking to dismiss the case as a matter of law for plaintiff's failure to satisfy his burden on liability.

On May 27, 1998, Judge Myrna Field, ruling from the bench, agreed with *Philadelphia Magazine* that the phrase was not defamatory, that Paul was a public figure and had not shown that the defendants acted with actual malice, and that, in any event, the phrase was true — Paul did handle slip-and-fall cases.

Brief Filed on Slip and Fall

Although a motion for compulsory nonsuit is generally made orally immediately upon conclusion of plaintiff's case and before defendants have introduced any evidence, *Philadelphia Magazine* filed a brief in support of the motion which the judge read over the midday recess following conclusion of the plaintiff's case.

Defendants' brief argued that a statement about a member of the bar should not be defamatory per se unless it imputes to the plaintiff the want of the requisite qualifications to practice law, or corruption, dishonesty, or improper performance of duties as a lawyer. Given that the statement "slip-and-fall lawyer" did not suggest any of the above, the statement was not defamatory per se.

Nor was it defamatory by implication or innuendo. In making that argument, *Philadelphia Magazine* looked to the dictionary meaning of the word "lawyer," which has undertones of honor and respect. Given that the term "slip-and-fall" is a descriptive phrase used (particularly by judges in crafting opinions) to refer to certain types of personal injury cases, it cannot be defamatory when used in conjunction with the word "lawyer" to describe a particular lawyer's practice.

Paul had conceded in his opening statement that, as a mayoral candidate, he was a public figure and was, accordingly, required to prove with convincing clarity that the defendants acted with actual malice. Defendants argued that, particularly in light of Rizzo's testimony, Paul had not made the proper showing. They also argued that, in light of Rizzo's testimony, the privilege of neutral reportage applied.

Defendants also contended that because Paul had admitted in discovery and under cross-examination that he earned income from doing "fall-down" or slip-and-fall cases, the statement was true, even though Paul also handled many other types of litigation .

Why a Trial

Defendants made a deliberate decision to take the case to trial instead of moving for summary judgment. Judges in the Philadelphia court system usually deny summary judgment motions where a plaintiff is suing a media defendant for defamation, even though the record discloses no material facts in dispute or the motion presents a pure question of law such as defamatory meaning. Because pretrial proceedings left Rizzo's testimony unclear, the chances that a motion would be denied were increased.

Accordingly, the risk of an adverse decision that would follow *Philadelphia Magazine* to trial was great. In the view of defense counsel, the preferable course was to withhold the motion until the close of the plaintiff's case, by which time the trial judge would have had an opportunity to assess the case and witnesses and be more favorably disposed to enter judgment for the defendants.

The case was handled for Philadelphia Magazine by a team of lawyers from Schnader Harrison Segal & Lewis LLP: partners Alan Lieberman (who was lead trial counsel) and Carl Solano, and Wendy Beetlestone. Mr. Paul, who maintains a wide-ranging civil and criminal litigation practice, represented himself with the assistance of a colleague from a law firm with which he is associated. He has announced that he does not plan to appeal.

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ALI Adopts "Actual Malice" Standard for Section 174 of the Restatement of the Law Governing Lawyers

At its annual meeting in Washington on May 11-14, the American Law Institute adopted an "actual malice" standard for proceedings within the ambit of Section 174 of the Restatement of the Law Governing Lawyers. Section 174 of the Restatement provides, "A lawyer may not knowingly or recklessly make publicly a false derogatory statement of fact concerning the qualifications or integrity of an incumbent of a judicial or other public legal office or a candidate for election to such an office."

According to the commentary accompanying Section 174, the rationale for the "knowing" and "reckless" requirements is that lawyers are uniquely able to assess the official performance of judges and other judicial and legal officers. Lawyers, therefore, should be given "broad latitude in criticizing such officers."

As indicated in the BNA Conference Report (May 26, 1998), there was some discussion at the meeting as to whether the *New York Times v. Sullivan* standard would or should apply in disciplinary proceedings. Norman Redlich, partner, Wachtell, Lipton, Rosen & Katz, moved that the session amend Section 174 or the accompanying comments to reflect the fact that the *New York Times* "actual malice" standard does apply. After a half-hour debate, a voice vote was had and the members voted to adopt Redlich's position. Jurisdictions are currently divided, however, on the application of *Sullivan* within the context of a disciplinary proceeding.

Subsequent to the meeting, Professor Oscar Gray, Professor Emeritus of Tort Law at the University of Maryland Law School, pointed out that it may still not be clear whether, if the *New York Times* "actual malice" standard applies within the context of disciplinary proceedings, the additional protections created subsequent to *New York Times v. Sullivan* apply within the same context. Professor Gray noted especially the protection for "opinion" and was concerned whether the comments to Section 174 lay out sufficiently clear guidelines for attorneys who may find themselves in the middle of such a disciplinary proceeding. "If 'recklessly' [within Section 174] includes the *New York Times* rule, then all of the other baggage from *New York Times v. Sullivan* may come in as well."

DISAPPOINTING PUBLICITY DOES NOT CREATE A CAUSE OF ACTION

By Richard E. Rassel, James E. Stewart, and Laurie J. Michelson

The United States District Court for the Eastern District of Michigan recently reiterated several fundamental principles of defamation and related tort law in a lawsuit brought by Charlene Johnson, the aunt of NBA superstar Chris Webber.

The lawsuit arose out of a May 6, 1996 report published in *Business Week* magazine, a weekly publication of the Defendant The McGraw-Hill Companies, Inc. *Business Week* was investigating the general subject of the business and asset management of professional athletes. In connection with this investigation, former *Business Week* reporter Willy Stern contacted L. Fallasha Erwin who is the lawyer, accountant, business manager, and agent for Chris Webber. Mr. Erwin has had a long-term personal relationship with Chris Webber's aunt, Charlene Johnson, and was introduced to Webber by Ms. Johnson.

During an interview with *Business Week*, Erwin freely discussed the corporate structure he had set up to handle Webber's income and the other corporations he set up to handle Webber's charities. *Business Week* sent this structure (without identifying Webber or Erwin) to a number of financial planning firms who commented on it. These opinions were summarized in a *Business Week* report, entitled, "Fallasha Erwin In Your Face." The report also disclosed that Erwin and Johnson have a romantic

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Business Week

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relationship and that Johnson is paid a fee to administer Webber's corporate charities.

Charlene Johnson's disappointment that the May 6, 1996 *Business Week* report was not more flattering concerning the representation of Chris Webber by Fallasha Erwin and herself resulted in this lawsuit. The suit, filed in Wayne County Circuit and subsequently removed to the United States District Court for the Eastern District of Michigan, alleged that a few isolated comments in the report were defamatory, placed Ms. Johnson in a false light, and intentionally inflicted emotional distress on her. The District Court granted Defendants' Motion for Summary Judgment and dismissed Plaintiff's Complaint.

Defamation: No Implication

The District Court reiterated that under Michigan law, articles in the public interest are to be accorded maximum protection from frivolous lawsuits in order to "deter . . . forbidden intrusion on the field of free expression." *Johnson v. The McGraw Hill Companies, Inc.* (United States District Court for the Eastern District of Michigan, No. 97-CV-70794, 5/21/98) (citing *Locricchio v. Evening News Association*, 438 Mich 84 (1991), *cert denied* 503 U.S. 907 (1992). The Court further reiterated that a private figure plaintiff who complains about public interest speech has the burden of proving material falsity and that whether plaintiff has carried her burden is a question of law for the Court to decide.

In applying these fundamental principles, the Court rejected plaintiff's efforts to draw defamatory implication and meanings from substantially accurate statements of the facts and the relationships. For example, the Court found that the statement in the article that "the man [Webber] turned to was a Detroit lawyer and CPA named L. Fallasha Erwin, known to Webber because of Erwin's long-time relationship with Webber's aunt," was substantially accurate and did not imply that Erwin was incompetent to be Webber's agent and was only selected because he was romantically involved with Ms. Johnson.

Finally, the Court determined that the statement by one of the financial analysts (asked by *Business Week* to review Webber's corporate structure) that he was uncertain why Webber had two charities rather than one "other than getting additional income to the aunt," was merely the analyst's opinion and was not actionable.

No False Light

The Court's Opinion also struck a blow against plaintiffs who attempt to recast their deficient defamation claim as one for invasion of privacy by false light. The Court reiterated that "the same privileges that are available to defendants under defamation exist under a false light claim" and dismissed the false light claim as well.

No Intentional Infliction of Emotional Distress

Lastly, the Court reiterated that a reporter's thorough investigation of an article and his conduct in writing and publishing the article does not constitute "extreme" or "outrageous" conduct sufficient to make out a claim of intentional infliction of emotional distress. This is the latest in a long series of cases in which the Michigan courts have roundly rejected the attempts of plaintiffs to base an intentional infliction of emotional distress claim on statements made in publications or broadcasts. *See, e.g., Ross v. Burns*, 612 F2d 271 (6th Cir. 1980); *Duran v. Detroit News*, 200 Mich App 622, 630 (1993); *Dietz v. Womeco West Michigan TV*, 160 Mich App 367 (1987); *Fry*.

Richard E. Rassel, James E. Stewart, and Laurie J. Michelson are with the firm Butzel Long in Detroit, MI.

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Gambling with the First Amendment

By Dawn L. Phillips-Hertz

Driving through New Mexico along Interstate 40, formerly known as Route 66, you notice the sign along this Federal Highway that you are entering the Indian Reservation. What you do not see is any warning that should you leave the highway you may well have left your First Amendment guarantees as you know them behind.

U.S. Supreme Court case law indicates that by going onto the reservation and away from the easement of Route 66, you may have submitted your conduct to the jurisdiction of the tribal courts and the laws of the Tribe. And although there is a Indian Civil Rights Act, which provides that "No Indian tribe in exercising powers of self-government shall . . . make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech or of the press, ..." 25 USC § 1302, that statute does not create any remedy in Federal Court should you take exception to the tribal court's interpretation of *New York Times v. Sullivan.*

In short, should you malign a member of the Tribe while standing at the gas pump or while playing Black Jack in the Casino, or if your client distributes its publications, broadcasts signals onto the reservation, puts up billboards on the reservation, it could be subject to a tribal court vision of the First Amendment. There probably is no official proceeding statute in the tribal Code, there is no common law of libel to rely upon, and the teachings of the Supreme Court may not be as persuasive in tribal court as they are in your local state court. Supreme Court decisions are not precedent in tribal court, although tribal courts often give them great deference. The tribal courts are allowed, even encouraged, to develop their own body of law interpreting the freedoms we enjoy in this country. There is great deference to tribal sovereignty.

Most importantly, if you do not feel that the tribal court is treating you fairly, you cannot go to the Federal Court seeking a remedy such as declaratory relief or an injunction. Your remedy, if any, will be to that same tribal court and its appellate court, which often is the tribal council.

> Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers. This aspect of tribal sovereignty, like all others, is subject to the superior and plenary control of Congress. But "without congressional authorization," the "Indian Nations are exempt from suit." (Citations of authority omitted.)
>
> . . . Nothing on the face of Title I of the ICRA purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief.
>
> * * * * * * * *
>
> Similarly, it is irrelevant that the Indian Civil Rights Act, 25 U.S.C. A7 1302, and tribal laws accord certain basic rights to all litigants in tribal court. These rights are not coextensive with constitutional guarantees . . . .

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-60, 98 S.Ct. 1670; 56 L.Ed.2d 106 (1978).(emphasis supplied.)

Congress has expressed a very clear preference for tribal self-government and for non-interference in that self-government by the federal government including the federal courts.

> This commitment to the goal of tribal self-determination is demonstrated [in ICRA]. Section 1302, rather than provid-

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> ing in wholesale fashion for the extension of constitutional requirements to tribal governments, as had been initially proposed, selectively incorporated and in some instances modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments. Thus, for example, the statue does not prohibit the establishment of religion, nor does it require jury trials in civil cases, or appointment of counsel for indigents in criminal cases . . . .

Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-60, 98 S.Ct. 1670; 56 L.Ed.2d 106 (1978)

Fighting Jurisdiction in Tribal Courts: An Uphill Climb

Trying your libel case in tribal court is an unpredictable affair. And -- and this is very important to recognize -- if a judgment is entered against you in tribal court, your state may have court rules or statutes giving full faith and credit to tribal judgments under general rules of comity. In Michigan, for example, the judicial act of a tribal court is "presumed to be valid" absent a showing that the court lacked jurisdiction, or that the act of the court (1) was obtained by fraud, duress, or coercion; (2) was obtained without fair notice or hearing; (3) is repugnant to the public policy of the State of Michigan; or (4) is not final under the law or rules of the tribal court. Michigan Court Rule 2.615(C). [1]

Of course, the clash between the American view of rights of free speech and expression and a foreign nation's view of free speech is not new. Last year the courts of Maryland were asked to recognize and enforce a judgment for libel obtained in a British Court. The highest court in Maryland, the Court of Appeals, refused to grant comity to British libel judgment because the principles governing defamation under British law are contrary to Maryland defamation law and the policy of freedom of the press. *Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997). But waiting to fight the tribal judgment on that basis is pretty courageous stuff. Most of us would prefer to avoid having the judgment entered in the first place.

When faced with an unfriendly forum, one does the predictable: challenge jurisdiction. Such challenges are possible if you are a non-Indian. But telling a tribal court that it does not have jurisdiction over a non-Indian has, to date, not been successful in cases where the actual act of the defendant took place on the reservation.

Moreover, some tribal court litigants have attempted to establish jurisdiction over non-Indians for conduct *off* the reservation which they argue has had impact within the reservation. While a recent Supreme Court decision put some limits on that reach, the scope of jurisdiction of Indian tribal courts is still being argued.

Can You Enjoin a Tribal Proceeding?

Faced with this situation many non-Indian tribal defendants have attempted to obtain relief from the federal courts, seeking an injunction against the tribal proceedings based upon the argument that the tribal court lacks jurisdiction. Until recently, federal courts have refused to protect non-Indian defendants under principals of comity, requiring defendants to exhaust their remedies in tribal court before applying to federal court for protection on the simple issue of jurisdiction.

Finally, in last year's Supreme Court decision in *Strate v. A-1 Contractors*, 117 S. Ct. 1404 (1997), the Court for the first time held out a

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glimmer of hope of limiting the jurisdiction of the tribal courts over non-Indians for actions which had an impact on the Tribe. In *Strate* the non-Indian insured was within the boundaries of the reservation but on the easement of a federal highway at the time of the crash.

Looking back on its recent authorities, and most particularly *Montana v.United States*, 450 U.S. 544 (1981), the Supreme Court started from the premise that absent express authorization from federal statute or treaty, jurisdiction of tribal courts, and indeed the sovereign powers of the tribe, "'do not extend to the activities of nonmembers of the tribe,'" (quoting from *Montana*, 450 U.S. at 565). *Montana* itself involved regulation of the hunting and fishing rights of non-Indians on land on the reservation owned in fee simple by non-Indians. There are two exceptions discussed in Montana and reiterated in *Strate* to this general principle that jurisdiction is lacking: (1) nonmembers who enter consensual relationships with the tribe or its members; and (2) nonmembers whose activities directly affect the tribe's political integrity, economic security, health, or welfare. The discussion of these two exceptions in *Strate* evidenced the narrow interpretation that Court gave them.

Thus in *Strate*, although the truck driver involved in the accident was working for a company that had a landscaping contract with the tribe, there was nothing about this "run-of-the-mill" accident that placed it within the consensual relationship-with-the-tribe exception. And although the tribe certainly had an interest in careful driving on a highway running through the reservation, the second exception envisioned acts that went more directly to tribal authority and self-government, such as the tribe's right to regulate inheritance rules among Indians, to determine tribal membership and like core-tribal matters.

Moreover, the Court stated in a footnote that while it had encouraged federal courts to stay their hands to allow tribal courts first shot at determining their own jurisdiction, abstention to allow tribal courts to rule on the issue of jurisdiction was not appropriate where the lack of jurisdiction was clear. 450 U.S. at FN 7.

Strate Applied

In a recent case, *Hornell Brewing Co. v. The Rosebud Sioux Tribal Court,* Nos. 97-1242, 1243, 124, 1998 WL 9176, at *1 (8th Cir. 1998), the Estate of Crazy Horse sued Hornell Brewing Company in tribal court alleging defamation, violation of the right of publicity held by the Estate of Crazy Horse, and negligent and intentional infliction of emotional distress for the sale and distribution of an alcoholic beverage called "The Original Crazy Horse Malt Liquor." The Estate asked the tribal court to enjoin the use of the name Crazy Horse and sought damages. Even though Crazy Horse Malt Liquor was not distributed on the reservation, the tribal parties attempted to establish jurisdiction because Hornell did distribute beverages other than Crazy Horse Malt Liquor on the reservation and advertisements of the Brewing Company for other products appeared on the Internet. *Id.* at *5.

Hornell appealed to the federal courts for an injunction but, in a pre-*Strate* decision, was directed to exhaust tribal remedies. The tribal trial court actually found no jurisdiction over Hornell but was reversed by the tribal appellate court. Hornell returned to federal court and for the first time got a hearing in federal court on the issue of jurisdiction. In the Eight Circuit, the Circuit from which *Strate* had come, the court found that the tribal court had no jurisdiction over Hornell because it had never sold the product on the reservation.

> Following the admonition of the Supreme Court in *Strate*, we think it plain that the Breweries' conduct outside the Rosebud Sioux Reservation does not fall within the Tribe's inherent sovereign authority. We

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Gambling

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> deem it clear the tribal court lacks adjudicatory authority over disputes arising from such conduct. We emphasize that our decision in this case does not turn upon the merits of the claims asserted by the Estate. The Estate and other interested parties may assert these claims in federal district court. Our holding relates solely to the adjudicatory authority of the tribal court. *Hornell*, 1998 WL 9176, at *5-6.

On the other hand, a recent case in the Michigan federal courts suggests that federal courts cannot always be relied upon, even post-*Strate*, to protect against the initial reach of tribal court litigation. A non-Indian lawyer representing a minority faction of the Keweenaw Bay Indian Community in and around L'Anse, Michigan found himself a defendant in an action brought by the tribal attorney, the former Chairman of the Tribe, and 16 of the former Chairman's supporters for invasion of privacy, and intentional infliction of emotional distress for statements he allegedly made off the reservation including alleged statements to the media and the filing of a bar grievance against the tribal attorney. The tribal chairman was convicted in federal court of taking illegal kick backs in the sale of gaming equipment to the Tribe and is currently serving a three year term in Federal Prison. Nonetheless, this lawsuit was filed against the lawyer because he allegedly revealed this "embarrassing and private conduct."

The federal courts refused to play the role of the cavalry. In the *Keweenaw* case, the federal judge, in a post-*Strate* decision, refused to grant an injunction and directed the non-Indians to exhaust their tribal court remedies although he did retain jurisdiction. The Sixth Circuit refused a stay. *Clarke v. Keweenaw Bay Tribal Court*, No. 97-2293 (6th Cir. 1998)

Be Aware of the Risks

Distribution of speech on a reservation has implications for liability for libel and invasion of privacy, among other claims, in the tribal system. Newsgathering on reservations may subject the reporter to tribal jurisdiction for newsgathering claims as well. This is not to say that tribal courts are inherently bad or not well intentioned. But they are not bound by the case law or statutes of the rest of the United States, and the rules and law in tribal court often bear little resemblance to English common law and do not recognize certain Constitutionally-based concepts of free speech.

In short, when you gamble on the reservation, you are gambling more than money.

Endnote

1. MCR 2.615: The judgments, decrees, orders, warrants, subpoenas, records, and other judicial acts of a tribal court of a federally recognized Indian tribe are recognized, and have the same effect and are subject to the same procedures, defenses, and proceedings as judgments, decrees, orders, warrants, subpoenas, records and other judicial acts of any court of record in this state, subject to the provisions of this rule.

Dawn L. Phillips-Hertz is with the firm Hackett, Maxwell & Phillips P.L.L.C. in Troy, MI.

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ABC Not Responsible for Tele-psychic's Death

Lack of Causation Fatal

Finding "no evidence to demonstrate a causal connection between ABC's alleged negligence and [the plaintiffs' son]'s death," the U.S. District Court for the Central District of California granted summary judgment in a wrongful death suit filed against ABC in one of the several suits arising out of a hidden camera investigation of a tele-psychic counseling service. *Kersis v. American Broadcasting Cos., Inc.*, No. 95-0848, slip op. at 6 (C.D. Cal. June 9, 1998). The suit, brought by the parents of Naras Keris, a.k.a. Paul Highland, alleged the ABC *PrimeTime Live* report, that included surreptitiously recorded videotape of their son, a recovering alcoholic, caused his relapse into drinking and subsequent death, just two days before a California state jury completed its deliberations in his suit against the network.

The decision marks the second time the district court has dismissed the wrongful death claim. In November 1996, the U.S. Court of Appeals for the Ninth Circuit reinstated the claim following a district court dismissal. *Kersis v. American Broadcasting Cos., Inc.*, 1996 WL 675879 (9th Cir., November 11, 1996). The appellate court ruled that "[w]hile the Kersises may ultimately be unable to prove a casual connection between the defendants' negligence and Highland's injury under California law, we cannot say that appellants fail to state a cause of action under California substantive law." *Id.* at *1.

Reexamining the case on a summary judgment motion, the district court held that lack of causation was, in fact, fatal to the plaintiffs' claim. The court found that that the plaintiffs "have not offered any sort of expert or medical evidence which would suggest a causal link between ABC's taping of Highland and Highland's death." *Kersis*, No. 95-0848, slip op. at 6. Nor did the plaintiffs provide "any testimony from any person who spent time with Highland during the seven pivotal days between the jury verdict and Highland's death." *Id.* The court was left with "no explanation as to where Highland was, what he was doing, or what types of substances he ingested during that period." *Id.*

Sanders v. American Broadcasting Cos., 25 Media L. Rep. 1343 (Cal. App. 1997), the case in which Highland, himself, was a plaintiff, is currently before the California Supreme Court.

LDRC would like to thank the following summer interns for their contributions to this month's *LibelLetter*:

Beth Gunn, Columbia University Law School

Harris Hartman, University of Michigan Law School

Amy Tridgell, Columbia University Law School

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Eighth Circuit Rejects Fourth Amendment Challenge to Search and Seizure From Media Follow-Along

Upholding a drug possession conviction, the U.S. Court of Appeals for the Eighth Circuit rejected an attempt to suppress evidence police obtained in execution of a search warrant because of a media "follow-along." *United States v. Appelquist*, 1998 WL 276281 (8th Cir., June 1, 1998). Vickie Gail Appelquist, arrested for possession of marijuana, alleged that the presence of a local television station's cameraman at and in her home at the time of her arrest violated her Fourth Amendment rights.

The station's bureau chief learned of the search from the local prosecutor, who was notified by police officers executing the search warrant. The bureau chief, also a cameraman, went to the scene and videotaped Appelquist as she was escorted to a police car. Following the search, police invited the cameraman and a newspaper photographer into Appelquist's home to film and take photos of the seized drugs.

After rejecting Appelquist's other search and seizure violation claims, the court dismissed the challenge premised upon the media's presence. The court explained that "[a]lthough we do not encourage or condone such conduct, it is undisputed that the police invited the two private photographers into Appelquist's home only after the police completed the warrant search." Consequently, they agreed with the district court that media presence cannot be a basis for suppressing evidence seized in what was already "a valid and completed search."

UPDATE: "Natural Born Killers" Defendants Seek Louisiana Supreme Court Review

Following the May 15, 1998 Louisiana Court of Appeal decision reinstating claims of negligence against them, attorneys for Time Warner, Oliver Stone and other companies involved in the production of "Natural Born Killers," have filed a petition for review with the Supreme Court of Louisiana. *Byers v. Edmondson*, No. 97-CA-0831 (La. Ct. App. May 15, 1998); *see LDRC LibelLetter* February 1997 at p. 9, May 1998 at p. 17.

The petition argues that the Louisiana Court of Appeal's decision, that reinstated claims that the makers of "Natural Born Killers" should be held responsible for a crime spree which was allegedly inspired by the film, erroneously imposed a duty on filmmakers to prevent audience members from imitating fictional movie violence. Further, the defendants argue that the appellate court mistakenly relied on the Fourth Circuit decision in *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), *cert. denied*, 118 S. Ct. 1515 (1998), both because *Rice* is "factually a very distinct and unique case," and because the Fourth Circuit did not follow *Brandenburg*'s "incitement" doctrine in reaching its decision.

Defendants are supported in their petition by several amici, including the Motion Picture Association of America, the Association of American Publishers, the National Association of Broadcasters, CBS, Fox, and NBC.

The brief was submitted by Jack Weiss of Correro Fishman Haygood Phelps Weiss Walmsley & Casteix, LLP who along with Stone, Pigman, Walther, Wittmann & Hutchinson, L.L.P., George Donaldson & Ford, L.L.P., and Cashe, Lewis, Moody & Coudrain is representing the defendants. The amici brief was submitted by Robert Vanderet of O'Melveny & Myers LLP.

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ACCESS

PUBLIC HAS RIGHT TO OBTAIN CONTEMPORANEOUS COPIES OF EVIDENCE INTRODUCED IN A CRIMINAL TRIAL

By Guylyn Cummins

In a case of first impression in California, the Fourth District Court of Appeal has ruled that the public has a common law right to obtain contemporaneous copies of evidence introduced in a criminal trial absent a showing that such access would impair the integrity of the evidence. *KNSD Channels 7/3, KGTV Channel 10, v. Superior Court* 98 Daily Journal D.A.R. 5031 (1998) ("KGTV/KNSD").

In KNSD/KGTV, six defendants were arrested and charged with the murder of an elderly gentleman for $5.00. Because of considerable community interest in the case, KNSD/KGTV covered the trial. Reporters were in the courtroom when the prosecution offered an audiotape conversation/confession between two of the defendants from the back of a patrol car after their arrest. The news media thereafter requested access to copy the audiotape. The trial court denied the request, stating only that, given the substantial publicity, this "jury has been bombarded with the opportunity to violate its promise to me not to be exposed to these matters they should not consider. And I will do nothing further to fuel that possibility."

First Amendment Right of Access Rejected

In upholding a public right of access to copy trial evidence, the Fourth District Court of Appeal first rejected the argument that there is a First Amendment right of access to trial evidence from judicial proceedings, citing *Nixon v. Warner Communications, Inc.* 435 U.S. 589, 608-610 (1978). The court found instead that such a right exists as a continuation of the common law right to inspect and copy judicial records. In so ruling, the court reiterated that the right of access "serves the important functions of ensuring the integrity of judicial proceedings in particular and of law enforcement process more generally."

Level of Common Law Protection Afforded Access Right

The KNSD/KGTV court acknowledged that "the fundamental nature of the [common law right of access] gives rise to a 'presumption' in favor of public access" (relying on *Richmond Newspapers, Inc. v. Virginia* 448 U.S. 555 (1980)), but found that diverse levels of protection were extended to the right by federal courts. For example, in *United States v. Criden* 648 App.2d 814, 823 (3d Cir. 1981), the Third Circuit found a "strong presumption" of accessibility to trial evidence, such that a trial court must state articulable facts, rather than conjecture, to support a denial. In *Application of National Broadcasting Co., Inc.* 635 F.2d 945, 952 (2d Cir. 1980), the Second Circuit found "compelling circumstances" were required to overcome the presumption. The District of Columbia Circuit ruled in *In re National Broadcasting Co., Inc.* 653 F.2d 609, 613 (D.C. Cir. 1981) that access may be denied only where the court concludes that "justice so requires." And in *Belo Broadcasting Corp. v. Clark* 654 F.2d 423, 430 (5th Cir. 1981), the Fifth Circuit found no strong presumption of access, and instead ruled the trial court is entitled to deference in determining whether to deny access. (Accord, *United States v. Webbe* 791 F.2d 103, 106 (8th Cir. 1986)(same).)

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Right to Criminal Evidence

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Application of California Law

The KNSD/KGTV court next looked to the presumption of accessibility to judicial records under California law. Access is required unless it would undermine the sense of security for individual rights -- whether of personal liberty or private property -- which is injurious to the public or the public good. (*Craemer v. Superior Court* 265 Cal.App.2d 216, 222 (1968); compare *Estate of Hearst* 67 Cal.App.3d 777, 785 (1977) (in a civil case, the trial court may preclude public access to judicial records "under exceptional circumstances and on a showing of good cause").) The KNSD/KGTV court then balanced the defendants' due process rights to a fair trial against free speech and access rights. It found resolving the conflicting fundamental rights to be not difficult.

While the KNSD/KGTV court agreed that excessive prejudicial publicity might impair a defendant's fair trial rights, where the evidence has already been presented to a jury, the court found a defendant's interest in precluding access is substantially diminished, if not eliminated altogether. Relying on *Oklahoma Publishing Co. v. District Court* 430 U.S. 308, 310 (1977), the KNSD/KGTV court further found that the public's interest in obtaining access to evidence presented in an open court before a jury is particularly strong.

Accordingly, the KNSD/KGTV court ruled that absent a showing that access would create a significant risk of impairment to the integrity of the evidence, a trial court must make evidence previously presented to a jury reasonably available to the public.

Guylyn Cummins is with the firm Gray Cary Ware & Freidenrich in San Diego, CA and represented KNSD/KGTV in this matter.

UPDATE: Lewinsky Agrees to Provide Book Purchase Info to Independent Counsel

The dispute over whether the Office of Independent Counsel can obtain records of Monica Lewinsky's book purchases from Kramerbooks was resolved by an agreement between all three parties. According to an Associated Press report, Kramerbooks provided Ms. Lewinsky with the requested records and she in turn handed them over to the OIC.

Kramerbooks, a Washington D.C. bookstore, challenged a subpoena from the OIC seeking records of all Ms. Lewinsky's purchases from November 1995 to the present. In an April 6th ruling, U.S. District Court Judge Norma Holloway Johnson ruled that the subpoena to Kramerbooks, as well as one to an area Barnes & Noble store, raised First Amendment concerns such that the OIC would have to show a compelling need to obtain the information sought. See *LibelLetter* April 1998 at 25. The court thereafter held an *ex parte* hearing with the OIC on this issue.

On May 26th, the district court ruled, in a sealed opinion, that the OIC had a compelling need for the book purchase records held by Kramerbooks, albeit with a narrower time frame than in the original subpoena. However, there was no compelling need for the Barnes & Noble records. Kramerbooks had asked for a stay pending appeal to the D.C. Circuit.

With regard to access to filings made in this matter, on June 2nd Judge Johnson unsealed over a hundred pages of motions and previously sealed orders relating to the challenged subpoenas.

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Ninth Circuit: Limits on Public Access To Executions Does Not Violate The First Amendment

By Rex S. Heinke and Michelle H. Tremain

On April 28, the Ninth Circuit ruled in *California First Amendment Coalition v. Calderon*, 138 F.3d 1298 (9th Cir. 1998), that a California prison procedure, which excludes witnesses from viewing some portions of executions by lethal injection, does not violate the First Amendment rights of either the press or the public.

California executed William Bonin on February 23, 1996. It was the state's first execution performed by lethal injection. Witnesses were allowed to enter the observation room adjoining the execution chamber only after the condemned had been strapped to the gurney and the intravenous ("IV") tubes had been inserted into his arms. The witnesses did not hear the execution order. After several minutes in the observation room, the witnesses were told that the prisoner was dead.

The California First Amendment Coalition and the Society of Professional Journalists sued in the Northern District of California to enjoin prison officials from imposing on witnesses to future executions the limitations that were imposed at the Bonin execution, on the grounds that the limitations violated the First Amendment.

Used to Be Public Hanging

Before 1858, California had public hangings. In 1858, the California Legislature passed a statute moving executions inside county jails and requiring "at least 12 reputable citizens" to be in attendance. The current witness statute, Cal. Penal Code § 3605, is virtually identical to the 1858 statute. Although neither § 3605 nor the 1858 statute makes mention of the press, members of the press have attended executions in California from the 1860's until the present.

Until California abandoned hanging as a method of execution in 1936, witnesses could view executions in their entirety. Similarly, when California switched to lethal gas in 1937, witness observation of executions began from the time the condemned was escorted into the gas chamber until pronouncement of death.

California began using lethal injection as a means of execution in 1992. At that time, new prison regulations were issued limiting witness observation of the execution. San Quentin Procedure No. 770 ("Procedure 770") provides that witnesses in the observation room are not to view the condemned until all IV's have been inserted and the execution team has left the execution chamber.

Concern for Prison Staff

The defendant Arthur Calderon, the warden of San Quentin, asserted that Procedure 770 was adopted out of concern for staff safety and institutional security. While lethal gas executions expose the prison staff for approximately one minute, it can take the staff up to twenty minutes to prepare the condemned for execution by lethal injection. Calderon argued that twenty minutes of exposure to witnesses would increase the likelihood of identifying execution team members subjecting them to harassment and compromising their safety.

However, Northern District Judge Vaughn R. Walker held that despite these interests, the First Amendment requires that witnesses, including the press, be able to view the prisoner "at least from the point in time just prior to the condemned being immobilized, that is strapped to the gurney or other apparatus of death, until the point in time just after the prisoner dies." *California First Amendment Coalition v. Calderon*, 956 F. Supp. 883, 890 (N.D. Cal. 1997).

The district court tested Procedure 770 under those cases dealing with a right of access "to government-controlled sources of information related to the criminal justice system." *Id.* at 886. The court therefore applied the historical and functional analysis used in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 106 S. Ct. 2735, 2740 (1986) ("Press-Enterprise II"), reasoning that "[w]hile the cases from which the court fashioned these elements of decision concerned the trial phase of the criminal justice process,

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Limits on Public Access To Executions

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there is no reason to believe that the Court's analytical framework would not apply equally to the punishment phase." *Id.*

Under this analysis, the district court concluded that access to the early portions of executions had historically been allowed, and that this access is essential for witnesses to serve their function as the public's eyes and ears at executions. *Id.* at 889.

> "[C]apital punishment indisputably represents the ultimate exercise of state power. When the state chooses to wield authority in this way, the people must have confidence that it does so within the boundaries prescribed by law. " *Id.* at 888-89. However, "[l]imitations of the sort present at the Bonin execution sharply reduce the utility of having witnesses present and require an unacceptable reliance on information provided by officers of the state." *Id.* at 889.

The district court therefore applied the strict scrutiny test, and concluded that although the safety of the prison staff was a compelling state interest, the regulation was not narrowly tailored to serve that interest, because other methods could be used to protect the identities of the staff. *Id.* at 890. Summary judgment for the plaintiffs was therefore granted, and an injunction entered. *Id.*

Ninth Circuit Looks at Prison Cases

The Ninth Circuit reversed. 138 F.3d at 1304. Unlike the district court, which based its analysis on cases involving access to the judicial process, the Ninth Circuit focused on cases involving media access to prisons and prison inmates, reasoning that "the protections of the First Amendment are [not] dependent upon the notoriety of the death penalty." *Id.* at 1302. The Ninth Circuit relied principally on *Pell v. Procunier*, 417 U.S. 817, 94 S. Ct. 2800 (1974) (upholding regulations limiting media selection of a particular inmate for interview) and *Houchins v. KQED*, 438 U.S. 1, 98 S. Ct. 2588 (1978) (upholding denial of media requests for special inspection of facilities and interviews of inmates), which applied rational basis-type tests to the prison regulations at issue. *Id.* at 1302-03.

Pell as Precedent

Pell provides that "'challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law.'" *Id.* at 1303 (quoting *Pell*, 417 U.S. at 822, 94 S. Ct. at 2804). The Ninth Circuit noted that no court other than the district court has held that the First Amendment assures public or press access to view executions, and that "whatever First Amendment right might exist to view executions, the 'right' is severely limited" under *Pell* and *Houchins*. *Id.*

The Ninth Circuit therefore applied the test set forth in *Pell*: "The procedures surrounding an execution 'are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.'" *Id.* at 1303-04 (quoting *Pell*, 417 U.S. at 827, 94 S. Ct. at 2806.)

The court concluded that "Procedure 770 allows for some access and observation, while it minimizes the exposure of the members of the execution team to the media or other witnesses, out of a concern for staff safety and institutional security," and that there was not substantial evidence indicating an exaggerated response. *Id.* Therefore, "[w]hatever First Amendment protection exists for viewing executions, it is not violated by Procedure 770." *Id.* at 1304.

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UNSOLICITED FAXES: FEDERAL OR STATE COURT JURISDICTION?

By Rex Heinke and Lisa Gordon

In 1991, Congress passed the Telephone Consumer Protection Act, 47 *U.S.C.* § 227 ("TCPA"). The TCPA provides, among other things, that "[i]t shall be unlawful for any person within the United States . . . . to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). The TCPA creates a private right of action for an injunction and to recover damages or $500, whichever is greater, for each violation. § 227(b)(3). The damage award may be trebled if the violation is found to be willful or knowing. *Id.* The private right of action may be filed "if otherwise permitted by the laws or rules of court of a State, . . . in an appropriate court of that State." *Id.*

Which courts have subject matter jurisdiction over such private enforcement actions? There are few decisions interpreting the TCPA's provisions, but several federal courts have decided this jurisdictional issue. Four federal courts, including three circuit courts, have concluded that Congress vested state courts with exclusive subject matter jurisdiction over TCPA actions filed by private citizens. One federal district court, however, has held that federal courts have concurrent subject matter jurisdiction over TCPA actions filed by private citizens.

Kenro v. Fax Daily, 904 F. Supp. 912 (S.D. Ind. 1995), was the first decision addressing such jurisdiction. It is the only decision holding that federal courts have jurisdiction over TCPA actions filed by private citizens. Relying on the "well pleaded complaint rule," the *Kenro* Court reasoned that since the "complaint presented a violation of the TCPA, a federal law . . . [and] the TCPA expressly provides for a private cause of action," the federal courts have federal question jurisdiction over the TCPA actions. *Id.* at 913. The court rejected the argument that "by explicitly providing for actions in state court, Congress meant to revoke federal question jurisdiction." *Id.* at 914. Instead, the court found it persuasive that "the TCPA contains no language which prohibits bringing an action in federal court." *Id.* at 914.

Nearly two years later, the Fourth Circuit "reach[ed] the somewhat unusual conclusion that state courts have exclusive . . . subject matter jurisdiction over private actions authorized by [the TCPA]." *Int'l Science & Technology Inst., Inc. v. Inacom Comm.*, 106 F.3d 1146, 1150 (4th Cir. 1997). Adopting the Fourth Circuit's reasoning, both the Fifth and Eleventh Circuits, as well as a District Court in New York, have subsequently held that state courts have exclusive subject matter jurisdiction over TCPA actions filed by private citizens. *Nicholson v. Hooters of Augusta*, 136 F.3d 1287 (11th Cir. 1998); *Chair King v. Houston Cellular Corp.*, 131 F.3d 507 (5th Cir. 1997); *Foxhall Realty Law Office v. Telecom. Premium Serv.*, 975 F. Supp. 329 (S.D. N.Y. 1997).

The courts holding that state courts have exclusive subject matter jurisdiction have relied on statutory interpretation, legislative history, and congressional intent to reach their conclusions. These courts acknowledged the TCPA's silence as to whether there is a grant of concurrent jurisdiction to federal and state courts or whether the express jurisdictional grant is exclusively vested in the state courts. *Chair King*, 131 F.3d at 511. In resolving the apparent ambiguity, these courts have noted that the Act explicitly provides state courts with jurisdiction and "under usual circumstances, mentioning state courts is unnecessary to vest them with concurrent jurisdiction." *Technology Inst.*, 106 F.3d at 1151. Therefore, despite the "common phenomenon" of concurrent jurisdiction, the courts have concluded that "the specific authorization of state court jurisdiction was intended to do more than a confirmation of concurrent jurisdiction."

Unlike the *Kenro* Court, these courts found it significant that Congress expressly provided federal courts exclusive subject matter jurisdiction over other types of actions under the TCPA and explicitly provided for concurrent jurisdiction in certain parts of the Communica-

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UNSOLICITED FAXES

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tions Act but did not do so in 47 U.S.C. § 227(b)(3). These jurisdictional distinctions led the courts to conclude that Congress made a conscious decision not to provide the federal courts jurisdiction in 47 U.S.C. § 227(b)(3). *Technology Inst.*, 106 F.3d at 1152. The TCPA's legislative history and purpose provided further support for exclusive state court jurisdiction. *Id.* These courts rejected the argument that federal courts have exclusive jurisdiction over interstate communications. *Id.* Likewise, the contention that the general federal questions jurisdiction statute (28 U.S.C. § 1331) is sufficient to confer jurisdiction on the federal courts has been rejected. *Nicholson*, 136 F.3d at 1289. Arguments that granting state courts exclusive jurisdiction over the TCPA's private cause of action violates the Equal Protection Clause of the Fourteenth Amendment or the Tenth Amendment have also failed. *Technology Inst.*, 106 F.3d at 1156-58.

These federal court decisions only address private enforcement actions under 47 U.S.C. § 227(b). The TCPA also authorizes enforcement by the state attorneys general and the Federal Communications Commission, and expressly provides exclusive federal court jurisdiction over such actions. 47 U.S.C. § 227(f)(1)-(2). These decisions also do not deal with the TCPA's prohibitions on certain unsolicited telephone calls.

The next issue in private citizen actions will be whether state courts automatically have jurisdiction or whether state courts must expressly take jurisdiction over private fax cases. At least one circuit has noted that state court jurisdiction over private TCPA fax actions is subject to their consent and that "states thus retain the ultimate decision of whether private TCPA actions will be cognizable in their courts." *Technology Inst.*, 106 F.3d 1158.

Rex Heinke and Lisa Gordon are with the firm Gibson, Dunn & Crutcher in Los Angeles. Their firm was involved in Chair King v. Houston Cellular Corp.

A BOOK NOTE:

Free Speech in its Forgotten Years by David Rabban
(Cambridge University Press 1997)

In this recently published book, ***Free Speech in its Forgotten Years,*** David Rabban, a law professor at the University of Texas at Austin, traces the historical development of First Amendment jurisprudence with specific focus on free speech after the Civil War to World War I. These are the so-called forgotten years of the book's title, a period of supposed quietude in free speech litigation.

According to Rabban, however, there was substantial litigation and popular debate on free speech issues during this era, often concerning labor unions, obscenity and the advocacy of "free love." With little success, free speech in these areas was defended as a matter of progressive social change, as opposed to a matter of right. In fact, constitutional rights, *Lochner v. New York* for example, were considered barriers to social change. The suppression of antiwar speech during and after World War I highlighted the dangers of relying on the government for social change, leading to the development of a "rights" based defense of political speech which generally glossed over prior judicial hostility to free speech.

Rabban's interesting historical critique concludes with an equally interesting contemporary parallel. According to Rabban, today's "rights talk" critics of the First Amendment (Cass Sunstein for example) are missing an important lesson learned by the prewar progressives. Whether with respect to campaign contributions, pornography, or hate speech, critics should not so easily abandon First Amendment protections in these areas in pursuit of social change -- not without risking the protection of dissent in our democracy.

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German Court Convicts Ex-CompuServe Manager for Failure to Block Online Porn

In late May, a German criminal court in Munich convicted Felix Somm, the former manager of CompuServe in Germany, for failing to block pornography on its subscriber newsgroups. Somm was sentenced to a two-year suspended prison sentence and fined 100,000 marks ($56,070). The decision was widely criticized in Germany, particularly because at the relevant time it was technically impossible for CompuServe to filter the content of its newsgroups. In fact, even the prosecutors asked for an acquittal, conceding that CompuServe could not have blocked out the offending material.

This case grew out of a December 1995 search of CompuServe's offices by German prosecutors who were investigating Internet pornography and other potentially illegal content such as Nazi-themed computer games. This search led to a widely-reported worldwide shutdown by CompuServe of its newsgroups. In February, 1996 CompuServe restored access to most of its newsgroups and introduced filtering software to allow subscribers to block unwanted material.

According to a report in the *Wall Street Journal*, the court's decision will not be available until mid to late July, but the report quoted the judge in the case as saying that CompuServe "let protecting the young . . . take second place to maximizing profits" and that he wanted the verdict to deter other Internet-access providers from disseminating pornography 'into Germany's nurseries.'" *Wall Street Journal*, May 29, 1998 B7.

Somm has already filed an appeal. A German news service reported that prosecutors may also appeal the conviction. One issue on appeal is the effect of a 1997 German multimedia law that provides that Internet service providers are only liable for illegal material on the Internet if they are aware of the content and are technically able to block it. The trial court rejected the argument that the law, which went into effect after Somm was charged, shielded him from liability.

UPDATE: Certiorari Denied by Supreme Court in *Zeran* Suit Against AOL

Upholding the ruling by the Court of Appeals for the Fourth Circuit that exempts computer service providers from liability for information originated by third parties, the U.S. Supreme Court, without comment, denied the certiorari petition filed by Kenneth Zeran in his case against America Online (AOL). *Zeran v. America Online Inc.*, No. 97-152 (4th Cir., Nov. 12, 1997), *see LDRC LibelLetter* Nov. 1997 at 15. Zeran alleged a negligence claim against AOL after his name and phone number were posted on an on-line bulletin board by an unknown third party advertising t-shirts with offensive slogans about the Oklahoma City bombing.

Zeran argued that § 230 of the Communications Decency Act does not provide computer service providers blanket protection from liability. Instead, Zeran contended that the provision is intended to encourage providers to eliminate illegal content, and that providers should be subject to liability if they have knowledge of illegal or libelous material and fail to remove the information. In November 1997, the court of appeals affirmed summary judgment for AOL finding that § 230 precludes treating computer service providers as publishers. The decision was the first at the federal appellate level.

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LDRC ANNUAL DINNER

NOVEMBER 11, 1998

The Waldorf Astoria

THIS YEAR'S DINNER PROGRAM WILL REFLECT ON THE ROLE OF JOURNALISM AND THE CIVIL RIGHTS MOVEMENT
THE KEYNOTE SPEAKER WILL BE CONGRESSMAN JOHN LEWIS
INTRODUCTION BY WALTER CRONKITE

IN ADDITION, THERE WILL BE A PANEL OF JOURNALISTS WHO COVERED THE CIVIL RIGHTS MOVEMENT TALKING ABOUT THEIR EXPERIENCES.

The Dinner will be preceded by a cocktail party sponsored by Media/Professional Insurance and Scottsdale Insurance Company

LDRC Defense Counsel Section
Annual Breakfast Meeting
November 12, 1998
Crowne Plaza Manhattan