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MEDIALAWLETTER

Reporting Developments Through June 28, 2004

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NAA/NAB/MLRC CONFERENCE

SEPTEMBER 29-OCTOBER 1, 2004

ALEXANDRIA, VIRGINIA

BOUTIQUE SESSIONS ON THURSDAY, 4-5:30

At the upcoming NAA/NAB/MLRC CONFERENCE, there will be a new type of session: The Boutique Session. Registrants to the Conference will be able to select one of six boutique sessions to attend. You will be asked to indicate which one you wish to participate in when you register. Below are summaries of three of the boutiques being offered.

Cyber Issues

Moderator: Jonathan Hart, Dow, Lohnes & Albertson, PLLC
Panelists: Cliff Sloan, WashingtonPost/Newsweek Interactive; Chuck Sims, Proskauer Rose, LLP; Nicole Wong, Google.

The LDRC is now the MLRC. With this broader mandate, and the proliferation of new media technologies, MLRC members who have agreed on almost everything for many years, now find themselves on opposite sides of issues on which even enlightened minds can differ. This panel will explore some of the issues that divide us, with particular attention to the increasing tension between the desire of technology companies to empower consumers to acquire, store, manipulate, and exploit content, on the one hand, and the desire of content companies to protect their content from digital reproduction and distribution, on the other.

- We'll explore whether devices that allow consumers to manipulate the play back of stored content violate the exclusive rights of copyright holders.
- We'll look at the promise of contextual advertising and the evils of spyware (recently the subject of both state and federal legislation) and see if we can figure out where the line between the two should be drawn.

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- We'll examine state and federal efforts to regulate spam and ask whether such regulations infringe the commercial speech rights of advertisers.
- We'll address the respective roles of state and federal law in an increasingly borderless world.
- And we'll discuss whether California courts are about to upset what seemed to have been settled law on whether ISPs and websites can be held liable for third party speech.

Mediation

Moderator: Steve Comen, Goodwin Procter, LLP
Panelists: Jonathan Marks, MarksADR, LLC; Jonathan Donnellan, The Hearst Corporation; David Vigilante, Turner Broadcasting System, Inc.

Various recent studies of federal and state courts throughout the country have analyzed the consequences of the fact that fewer than 2% of all civil cases ever go to trial. Numerous studies have also documented the explosive growth of non-binding mediation as the prevailing dispositive dispute resolution process.

While some business executives of media companies have been hesitant to accept mediation as appropriate for their disputes, enlightened counsel have embraced mediation as a better business alternative to traditional litigation. This boutique session is intended to stimulate a dialogue among the participants about how creative advocates for media clients can most effectively use mediation for the avoidance of litigation or early resolution of litigation.

The discussion will be facilitated by panelists who bring all of the appropriate different perspectives. Specifically, Jonathan Marks is one of the most experienced mediators in the country who has undoubtedly seen a wide range of effective mediation advocacy and use of mediation in media cases and others. David Vigilante and Jonathan Donnellan are experienced both in their private practice and as in-house counsel for media companies in the effective use of mediation. Steven Comen has for many years used mediation as a significant process in many different types of cases and has partnered with in-house counsel to resolve cases for media clients and numerous others.

Media Insurance 101

Moderators: Chad Milton, National Practice Leader, Media Marsh; Rick Fenstermacher, Risk Management Solutions, Inc.

A primer and then some, this session will be a look at the rudiments of media insurance business that most affect media and their counsel:

- How does it work and where does the money go?
- What factors affect policy forms and underwriting decisions?
- How are decisions made about defense counsel, defense strategies and settlements?

The July *MediaLawLetter* will contain summaries of the three other Boutique Sessions on Prepublication/Prebroadcast 101, Legislative Issues, and Documents Retention Policies.

Special thanks to Robin Silverman and Golenbock Eiseman Assor Bell & Peskoe LLP

Editors of the MLRC's 50-State Survey: Media Privacy and Related Law 2004-05.

MLRC wishes to extend special thanks to Robin Silverman and her colleagues at Golenbock Eiseman Assor Bell & Peskoe LLP in New York for taking on the editing of the **MLRC 50-State Survey: Media Privacy and Related Law 2004-05.** Robin Silverman, former in-house counsel with MTV Networks, had been assisting us with the MediaLawLetter. But when she recently joined Golenbock Eiseman et al., she volunteered to edit this upcoming **50-State Survey**. MLRC, which has been shorthanded, is deeply grateful to Robin and her colleagues for undertaking this very significant project. The **Survey** is at the printers and will be distributed shortly.

Georgia Trial Court Denies Confidential Source Discovery in Richard Jewell Case

By Michael Kovaka

A Georgia trial court judge has ruled that former Atlanta Olympic bombing suspect Richard Jewell may not discover the identities of confidential sources who provided *The Atlanta Journal-Constitution* with information regarding the Olympic Park bombing investigation. *Richard Jewell v. Cox Enterprises, Inc.*, No. 97 VS 0122804 (Fulton County State Court, Georgia, June 1, 2004). (Mather, J.)

The decision ends a six-year odyssey during which *Journal-Constitution* reporters were initially held in contempt and threatened with jail for refusing to obey a trial-court order compelling disclosure of their sources' identities.

Although Georgia has a shield law, the shield may not be invoked by a party to a defamation suit.

The Georgia Court of Appeals subsequently stayed the contempt order and then reversed the trial court. In a 2001 decision, the Court of Appeals adopted the *Journal-Constitution's* position that, even in the absence of a formal privilege, Rule 26(c) bars wholesale discovery of confidential news sources. *See LDRC LibelLetter*, October 2001 at 3.

Standard for Discovery of Sources

Under the Court of Appeals rule, a court faced with a request for discovery of confidential source identities must first determine whether the plaintiff's libel claims are viable. If not, discovery is barred.

However, if viability can be demonstrated, the plaintiff still can only obtain discovery by showing a specific need for source disclosure that outweighs the "strong public policy in favor of allowing journalists to shield the identity of their confidential sources."

Discovery of Sources Not Warranted

Reconsidering the issue on remand, the trial court's latest decision holds that Jewell failed to satisfy this new standard. The court held that the alleged libels for which Jewell claimed a need for confidential source discovery could be grouped into three categories: (1) statements that Jewell fit an FBI bomber profile; (2) statements that investigators believed Jewell planted the bomb; and (3) statements that investigators believed Jewell placed a 911 call warning authorities of the bomb shortly before it detonated.

As to statements that Jewell matched an FBI profile, the court held that the accuracy of *The Journal-Constitution's* reporting was confirmed by a Justice Department report on the bombing investigation. Discovery therefore was barred because the plaintiff could not possibly show his claims were viable.

Similarly, the court barred discovery of sources for statements reporting that investigators believed Jewell planted the bomb. Evidence in the case showed that even before filing suit, Jewell had repeatedly stated that FBI agents believed he was the bomber.

These admissions, combined with statements in a variety of investigatory records again showed that *The Journal-Constitution's* reporting was accurate and that Jewell's claims therefore were not viable.

As for statements that investigators believed Jewell placed the 911 call, the court ruled that, even assuming the circumstantial evidence relied on by Jewell were sufficient to show a viable claim, source discovery still would be unwarranted. Even if Jewell's theory of the case were accepted, his asserted need for source discovery simply could not outweigh the harm disclosure would cause to the interests served by protecting confidential sources.

Barring any attempt by Jewell to obtain interlocutory review of the trial court's order, the way is now clear for the court to consider a *Journal-Constitution* summary judgment motion, pending since December 1998.

Richard Jewell has been represented in the case by L. Lin Wood and Katherine Ventulett of L. Lin Wood, P.C.; Wayne Grant and Kim Rabren of Wayne Grant, P.C.; and G. Watson Bryant.

Peter Canfield, Michael Kovaka and Tom Clyde of Dow, Lohnes & Albertson have represented The Atlanta Journal-Constitution and its editors and reporters.

First Circuit Affirms $1,000 a Day Contempt Fine Against Reporter

A unanimous First Circuit panel affirmed a $1,000 a day civil contempt fine against Rhode Island television reporter James Taricani for refusing to reveal the source of a leaked law enforcement surveillance tape. *In re Special Proceedings*, Nos. 03-2052, 04-1383, 2004 WL 1380007 (1st Cir. June 21, 2004).

Citing *Branzburg* and First Circuit precedent, the Court, in a decision written by Chief Judge Boudin, joined by Judges Lipez and Howard, held there was no First Amendment basis for Taricani to resist the district court's order to reveal the identity of a confidential source since it was highly relevant to an ongoing criminal investigation into the leak and the government had made reasonable efforts to obtain the information elsewhere. The Court further found that the fine was not punitive, but well in line with efforts to compel compliance with court orders.

Corruption in Providence

This decision arose out of several federal corruption cases against city officials in Providence, Rhode Island, including then Mayor Vincent "Buddy" Cianci, Jr. and his Administrative Assistant Frank Corrente. In the case against Corrente, the government provided him with copies of law enforcement surveillance tapes under a protective order limiting access to defense counsel.

Approximately six months later in February 2001, Taricani obtained a copy of one of the surveillance tapes from a confidential source and portions were broadcast on WJAR Channel 10 in Providence, an NBC owned and operated station. The tape showed a government witness handing Corrente an envelope allegedly containing a cash bribe.

Following a complaint by the defense, the trial court appointed a special prosecutor to investigate the leak. After interviewing approximately 14 people and deposing five potential witnesses, the prosecutor subpoenaed Taricani, who refused to identify the source of the tape relying on the reporters privilege.

District Court Orders Disclosure

The district court granted a motion to compel. *See* 291 F. Supp.2d 44, 32 Media L. Rep. 1075 (D.R.I. 2003). The court found the source's identity was germane to a good faith criminal investigation, and that the government had made reasonable efforts to obtain the information elsewhere. *Citing Branzburg v. Hayes*, 408 U.S. 665 (1972); *Cusumano v. Microsoft Corp*., 162 F.3d 708 (1st Cir.1998); *United States v. The LaRouche Campaign*, 841 F.2d 1176 (1st Cir.1988); and *Bruno & Stillman, Inc. v. Globe Newspaper Co*., 633 F.2d 583 (1st Cir.1980).

Following Taricani's refusal to answer questions about the identity of the source at a deposition in February 2004, the district court held a hearing and found him in civil contempt, imposing a $1,000 a day fine until he complied.

The First Circuit stayed the fine and granted an expedited appeal.

Branzburg and McKevitt

Affirming, the First Circuit first disposed of Taricani's procedural objection that the appointment of a special prosecutor was improper. While acknowledging that "the optimal arrangement for criminal prosecutions is for a government lawyer to take the lead," the Court noted that concerns about conflicts of interest justified the unusual posture of the leak investigation.

Turning to the substantive First Amendment argument, the Court affirmed largely along the lines of the district court. The Court found the information sought "highly relevant to a good faith criminal investigation" and "reasonable efforts were made to obtain the information elsewhere."

The Court noted Judge Posner's recent decision in *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003), which essentially rejected a First Amendment based reporter's privilege, but observed that the First Circuit's "own cases are in principle somewhat more protective."

These cases, *Cusumano v. Microsoft Corp*., *United States v. The LaRouche Campaign*, and *Bruno & Stillman, Inc. v. Globe Newspaper Co*., *supra*, require at least a "heightened sensitivity" to First Amendment concerns. But whether this is a constitutional or merely prudential requirement, remains "unsettled," the Court concluded.

Finally, the Court addressed an ancillary matter, rejecting a request by Taricani and WJAR that it unseal documents relating to the leak investigation and provide Taricani with a transcript of his deposition.

James Taracani was represented by Jonathan Albano, Bingham McCutchen LLP, Boston; William Robinson, Edwards & Angell, LLP, Providence; and Susan E. Weiner and Brande Stellings, NBC.

District Court Delays Decision About Reporter Subpoenas in Lynne Stewart Trial

By Regan Smith

On the eve of a publicized trial of a criminal defense lawyer accused of crossing professional lines and providing material support to terrorists, Judge John G. Koeltl of the U.S. District Court for the Southern District of New York deferred a decision whether to enforce subpoenas calling for the testimony of *New York Times* and *Reuters* reporters at trial.

Judge Koeltl indicated that he may wait until the trial is well in progress to determine whether the reporters' testimony is necessary.

New York Times reporter Joseph Fried, and George Packer, a free-lance journalist who had interviewed Stewart for the *Times*, along with Egyptian-based *Reuters* reporter Esmat Salaheddin, were all subpoenaed by the Government to authenticate quotes made to them by Ms. Stewart. Opening arguments in the trial were Tuesday, June 22, 2004.

Judge Koeltl indicated that he may wait until the trial is well in progress to determine whether the reporters' testimony is necessary.

The Allegations

Lynne Stewart is a lawyer for Muslim fundamentalist cleric Sheik Omar Abdel Rahman, who in 1996 was sentenced to life imprisonment for terrorist conspiracy against the United States. The Government now alleges that she violated her signed pledges to abide by a series of rules (Special Administrative Measures, or "SAMs") governing Rahman's imprisonment, and has charged her with a variety of crimes, including "providing material support" to terrorists.

The Government seeks to offer at trial testimony from reporters who published statements by Stewart on topics including Mr. Rahman, her support of violence, and the World Trade Center attacks, in an effort to demonstrate that she intended to further terrorist acts or violence when she issued a press release by Mr. Rahman withdrawing his support for a cease-fire observed by militant Egyptian Muslims.

Reporters Moved to Quash

The *New York Times* and *Reuters* argued that even though the Government sought the reporters' testimony only to "authenticate" Stewart's statements, the First Amendment reporters privilege, recognized in *Gonzales v. Nat'l Broad. Co.,* 194 F.3d 29 (2d Cir. 1999), nevertheless applied.

The reporters argued that the Government had not met its burden of demonstrating that the information it sought was (1) likely relevant to a significant issue in the case, and (2) unavailable from other sources. Specifically, they argued that the subpoena to Mr. Fried was not "likely relevant" because it called on him to authenticate quotes that were nine years old, the subpoena to Mr. Packer was not "likely relevant" because it would require him to authenticate quotes about Ms. Stewart's general world views, and the subpoena to Mr. Salaheddin was not "likely relevant" because Ms. Stewart had already admitted the quotes contained in his stories.

All three reporters further argued that the Government had failed to make any effort to locate alternate sources of the information, thus requiring the subpoenas to be quashed. Mr. Salaheddin in particular argued that his subpoena should be quashed because it would require him to travel from Egypt, disrupting his work as a Cairo journalist and potentially endangering his safety.

The reporters also argued that the subpoenas should be quashed for the additional reason that Ms. Stewart could seek on cross-examination to broaden the sphere of questioning to include inquiry into confidential and unpublished information. At a minimum, the reporters argued, the court should enter an order limiting the scope of cross examination.

The Government's Position

The Government argued that, since Ms. Stewart's defense was expected to rely in part upon a defense of legitimate lawyering and political activism, testimony from *Times* reporters that she supported terrorist violence was particularly relevant to demonstrating her intent behind her issuance of Mr. Rahman's press release. The Government argued that testimony from the *Reuters* reporter was

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District Court Delays Decision About Reporter Subpoenas in Lynne Stewart Trial

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particularly significant because he had been an "eye-witness to a crime." Mr. Salaheddin reported Stewart's reading of Rahman's press release withdrawing support for the Egyptian cease-fire, which the Government alleges is a violation of a pledge to follow the SAMs that Stewart signed.

The Government argued it met the *Gonzales* standards because the information was highly relevant to Stewart's intent, not reasonably available from other sources, and it would be an unreasonable burden for the prosecution to track down all of Stewart's family and friends to determine if alternate sources even existed. It also stressed that the information sought was published and nonconfidential, lowering the Government's burden.

Defense's Position on the Reporter's Subpoenas

The defense supported the reporters' motions to quash the subpoenas. In an emotionally lively oral argument, Michael Tigar argued that "the Bush-Rumsfeld-Ashcroft administration" has sought to limit the voices of lawyers and reporters, saying "[t]his administration has tried to intimidate, manipulate, harass, and if necessary punish any independent voice that questions its relentless pursuit of power."

Stewart has pledged to testify, and defense argued that the question of reporter's subpoenas could be resolved by having Stewart testify at the trial's opening. The newspapers noted that, should Stewart testify, she would easily be able to verify her quotes, thus completely eliminating the need for reporter's testimony. (The Government asserted that her pledge to testify was meaningless because it could not be enforced. As a criminal defendant, she retained her Fifth Amendment right against self-incrimination.)

The defense, however, opposed the alternative motion to limit testimony, noting that if the Government was allowed to question the reporters, defense should be allowed to fully exploit cross-examination, bringing to light other aspects of Stewart's character that would argue against her intent.

Outlook

At oral argument, Judge Koeltl questioned why the matter had to be decided prior to trial, before saying that it will take "some time" before he decides to lift the subpoenas. He ordered the prosecution and defense not to refer to the articles in opening arguments. He also stressed that the decision to testify at her own trial was entirely up to Stewart, and that she would not be urged by the court to testify for purposes of verifying her quotes.

Assistant United States Attorney Anthony Barkow argued for the prosecution. Stewart is represented by Michael E. Tigar.

Regan Smith is a summer associate at Levine Sullivan Koch & Schulz LLP in New York. The reporters are represented by David A. Schulz and Alia L. Smith of Levine, Sullivan, Koch, & Schulz, L.L.P. in New York.

Magazine Product Tester Is Covered by New York's Reporters Privilege

A New York trial court held that a magazine product tester is protected by the state Shield Law. *In re Huddy*, No. 100431/04 (N.Y. Sup. May 5, 2004). The court quashed a subpoena seeking the tester's testimony as a third party witness in a products liability action against a clothing manufacturer.

The tester for *Good Housekeeping* magazine conducted the laboratory work for an article on flame-retardant sleepwear. The court held the tester was a "professional journalist" within the meaning of the Shield Law, Civil Rights Law § 79-h(6), where she had the "intent to disseminate the results of the tests to the public" and developed the story idea for publication in the magazine.

Madonna's Ex Loses Libel Case, False Accusation of Being Gay Not Defamatory

By Jonathan M. Albano

A federal court in Massachusetts has dismissed a libel suit brought by Madonna's former boyfriend and bodyguard alleging that a biography of Madonna and a *People Weekly* magazine article defamed him by falsely portraying him as gay. *Albright v. Morton*, 2004 WL 1240900 (D. Mass. 2004) (Gertner, J.).

Background – Mistaken Caption

In the early 1990's, plaintiff James Albright was Madonna's bodyguard and lover. According to his Complaint, a biography of Madonna by Andrew Morton contains a photograph of Jose Guitierez ("Guitierez"), a former employee of Madonna's, walking with the star.

The caption underneath the photograph incorrectly states "Jim Albright (with Madonna in 1993) told Morton he felt 'overwhelming love' for her." Time, Inc. published the same photograph in its publication *People Weekly*, along with a similar caption mistakenly identifying Guitierez as Albright. 2004 WL 1240900 *1-2.

Albright alleged that Guitierez, the man pictured with Madonna in the photograph, is an outspoken homosexual who "clearly represents his homosexual ideology in what many would refer to as sometimes graphic and offensive detail."

The complaint asserted that Guitierez appeared in the documentary of Madonna's life entitled *Truth or Dare* and also appeared with Madonna on two worldwide tours. According to plaintiff, Guitierez often appeared on stage dressed as a woman and engaged in acts on stage that "some would find homosexual, sexually graphic, lewd, lascivious, offensive, and possibly illegal." 2004 WL 1240900 *2.

Plaintiff claimed that the publication falsely labeled him a homosexual, a description he alleged defamed him and was detrimental to his business as a bodyguard. The district court held otherwise, ruling that the photograph and caption could not reasonably be read as asserting that Albright was gay and that, even if such an interpretation were reasonable, it was not actionable.

"Who's that [Guy]"

As a threshold legal issue, the court rejected the claim that the photo and caption, read in the context of the entire book, portrayed Albright as gay. The court questioned the logic of the plaintiff's theory, noting that to conclude that Albright was gay, a reader would have to be (1) sufficiently aware of Madonna and her circle to know that the man in the photograph was gay, even though nothing in the photograph communicates that fact; but (2) unaware that the man was Guitierez, not Albright. 2004 WL 1240900 *3.

As an alternative basis for its holding, the court held that even if the photograph and caption somehow stated or implied that the plaintiff was a homosexual, no "considerable and respectable class of the community" in this day and age would find such a statement defamatory.

Assuming that hurdle could be overcome, the court ruled that any suggestion that Albright was gay could not survive a reading of the publications at issue. The book dedicated an entire chapter to the Madonna-Albright affair, describing their sexual encounters, Albright's ex-girlfriend, and the "fling" that Albright had with a "girl at a club" that ended his relationship with Madonna.

The caption in *People Weekly* stated that Albright felt "overwhelming love" for Madonna, and the caption in the book stated that they had planned to marry and had chosen names for their children. "In the context of the chapter and the caption itself," the court held, "it is inconceivable that the audience would assume that Albright was gay." 2004 WL 1240900 *4.

"Justify My [Claim]"

As an alternative basis for its holding, the court held that even if the photograph and caption somehow stated or implied that the plaintiff was a homosexual, no

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Madonna's Ex Loses Libel Case

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"considerable and respectable class of the community" in this day and age would find such a statement defamatory 2004 WL 1240900 *4.

The court acknowledged a split of authority on this issue, but observed that the majority of courts that have found an accusation of homosexuality defamatory per se emphasized that such a statement imputed criminal conduct.

That rationale, according to the court, was extinguished by the United States Supreme Court's ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003) where it held that a Texas statute criminalizing same sex sexual conduct was unconstitutional under the Due Process Clause because individuals have a right to privacy to engage in sexual acts in their homes.

Just as the *Lawrence* Court held that allowing such prosecutions "demeans the lives of homosexual persons," the *Albright* court held that continuing to characterize the identification of someone as a homosexual as defamation *per se* has the same effect. 2004 WL 1240900 *4.

Same Sex Marriage Decision Cited

The court also rejected what it described as the "offensive implication" of plaintiffs' argument that, even without the implicit accusation of a crime, portions of the community feel homosexuals are less reputable than heterosexuals. After citing various statutes prohibiting discrimination based on sexual preference, the court found additional support for its holding in the recent decision of the Massachusetts Supreme Judicial Court striking down under the state constitution restrictions on same sex couples' right to marry. 2004 WL 1240900 *5, *citing, Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003).

Goodridge recognized that "[m]any people hold deep-seated religious, moral, and ethical convictions that ... homosexual conduct is immoral" but emphasized that "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Goodridge*, 440 Mass. at 312, 341-42, 798 N.E.2d at 948, 968 (citation omitted).

Reasoning that a white person wrongfully labeled African-American would not have a claim for defamation even if segments of the community still held profoundly racist attitudes, the *Albright* court ruled that the category "defamation per se" should be reserved for statements linking an individual to the category of persons "deserving of social approbation" like a "thief, murderer, prostitute, etc." 2004 WL 1240900 *6, *citing Hayes v. Smith*, 832 P.2d 1022, 1025 (Colo.Ct.App. 1991) (holding that false charge of homosexuality is not defamatory per se).

The court concluded that "[t]o suggest that homosexuals should be put into this classification is nothing short of outrageous." 2004 WL 1240900 *6.

The court's opinion allowed for the possibility that extrinsic facts might render a charge of homosexuality actionable. "For instance, if an individual was in a business that forbade participation by homosexual individuals, such as the military or the clergy, such an allegation could immediately affect their livelihood." 2004 WL 1240900 *6 n.12.

Because Albright failed to allege the loss of any specific professional opportunities, however, the court found that "he is doing nothing more than trading in the same kinds of stereotypes that recent case law and good sense disparage." 2004 WL 1240900 *6.

"[Un]Lucky Star"

The failure of Albright's defamation claim was also fatal to the assortment of derivative claims asserted in his complaint. The court held that the incidental use of Albright's name in a general interest biography failed to state a misappropriation claim. His false light claim foundered because Massachusetts has not recognized the tort. His publication of private facts claim lacked the essential allegation that a *true* private fact had been disclosed. And, finally, the lack of any defamatory content also required the dismissal of his claims for emotional distress and negligence.

The plaintiff was represented by Jerrold G. Neeff, of The Bostonian Law Group, Boston, MA

Jonathan M. Albano and Aaron Wais of Bingham McCutchen LLP, Boston, MA, represented the defendants together with David Kaye, Holtzbrinck Publishers, N.Y., and Nicholas Jollymore, Time Inc., NY.

Daily Southtown Headline Found To Be A Fair Report

By Damon Dunn

On June 2, 2004, the Circuit Court of Cook County dismissed a defamation case brought against the *Daily Southtown*, its publisher and a reporter after finding that the headline was a fair report of pending litigation. *Garber v. Gadola, et al.,* 04 M5 0027 (Circuit Ct. of Cook County).

The plaintiff, Robert Garber, was the holder of a beneficial interest in a land trust that owned a large multi-unit condominium building in the Village of Worth. Garber's land trust was sued by the municipality over an allegedly illegal water hookup that supplied his building.

He complained of a subheadline that summarized the lawsuit. In particular, the plaintiff alleged that the headline's statement that "[Worth] says he stole water for years," imputed criminal activity, which is defamatory per se in Illinois.

Judge McDonald dismissed the defamation case with prejudice after reviewing a copy of the Village's amended complaint filed in the water case, which alleged that Garber's building had "converted" public water. The Court found that the reporter's underlying article was substantially true and that it negated any potential defamatory implications in the offending headline.

The decision is influenced by *Harrison v Chicago Sun-Times*, 2003 WL 21497271 (Ill. App. June 30, 2003), which was decided in the Illinois appellate court last year. Media defendants notched a significant victory in *Harrison* where the court held that the statement that plaintiff "kidnapped" her daughter was a fair report of a custody dispute.

In *Garber*, the court, considering the headline in isolation, also found that the term "stole" accurately conveyed to a lay audience that the Village had filed a lawsuit for conversion. Even if the term had conveyed that Garber committed the crime of theft, the Court agreed that the headline would be substantially true because the elements of criminal theft were virtually identical to those of the tort of conversion.

The plaintiff was represented by James DeBruyn of DeBruyn, Taylor and DeBruyn.

Damon Dunn of Funkhouser Vegosen Liebman & Dunn Ltd. represented the defendants.

DUES REMINDER!

MLRC members who haven't paid their 2004 dues should contact Debby Seiden of MLRC at 212-337-0200 ext. 204, dseiden@ldrc.com

New York Court Suggests "Homosexual" May No Longer Be Defamatory

This month a New York federal court suggested in dicta that a false accusation of homosexuality may no longer be defamatory. *Lewittes v. Cohen,* No. 03 Civ. 189, 2004 WL 1171261 (S.D.N.Y. May 28, 2004).

In disposing of a defamation claim on statute of limitations grounds, Judge Charles S. Haight Jr. noted in a lengthy footnote that given recent "welcome shifts in social perceptions of homosexuality" an accusation of homosexuality may no longer be defamatory as a matter of law. *Id.* at *3 n.5.

At issue was a website's reference to plaintiff as "that closeted editor of a certain paper." While observing that the statement "may reasonably be found to imply that plaintiff is gay," Judge Haight noted that precedent holding the implication defamatory per se may no longer be reliable. Citing, e.g., Eric K.M. Yatar, *Defamation, Privacy, and the Changing Social Status of Homosexuality: Re-Thinking Supreme Court Gay Rights Jurisprudence,* 12 LAW & SEX. 119 (2003); Rachel M. Wrightson, Notes and Comments: *Gray Cloud Obscures the Rainbow: Why Homosexuality as Defamation Contradicts New Jersey Public Policy to Combat Homphobia and Promote Equal Protection,* 10 J.L. & POL'Y 635 (2002); Patrice S. Arend, *Defamation in an Age of Political Correctness: Should a False Public Statement that a Person is Gay be Defamatory?,* 18 N. ILL. U.L.REV. 99 (1997).

Defamation Claim Against Source Reinstated

Could be Timely Based on Date of Broadcast

The Michigan Court of Appeals reinstated a defamation claim against an on air source, holding that the claim could be within Michigan's one year statute of limitations when measured by the date of broadcast, rather than the date of the interview with the source. *Mitan v. Campbell*, 2004 WL 1124031 (Mich. App. May 20, 2004) (Jansen, P.J., and Markey and Gage, JJ.).

The court reasoned that the television broadcast could have been the natural and probable result of the interview.

Broadcast Interview

Defendant Maura Campbell was interviewed on February 22, 2000 by a television reporter for WXYZ-TV regarding wage claims being made by plaintiff's employees. At the time, defendant was the Public Relations Director for the Department of Consumer and Industry Services, which was handling the employee claims.

Portions of the interview were broadcast on WXYZ-TV on February 25, 2000. The plaintiff filed his defamation complaint one year after the broadcast and the trial court dismissed the complaint as untimely.

Rule of Repetition

Reinstating the claim, the Court of Appeals cited the general rule "that one who publishes a defamatory statement is liable for the injurious consequences of its repetition where the repetition is the natural and probable result of the original publication." Quoting *Tumbarella v. Kroger Co*, 271 NW2d 284 (Mich. App. 1978).

The Court concluded that dismissal was inappropriate because an issue of fact existed whether the broadcast was the "natural and probable result" of the defendant's interview. The court reasoned: "While a reporter need not publish the information received during an interview, one could plausibly argue that publication of the interview or portions of it is a natural and, indeed, the intended result of the interview being conducted in the first place."

One Dollar in Damages Awarded Over "Mafia" Allegation

In a non-media case, a Connecticut jury awarded an Italian-American social club one dollar in damages in a libel suit based on a citizen's letter of complaint to a town board over the granting of a liquor license. *Lega Siciliana Social Club, Inc. v. St. Germaine* (Conn. Super. Jury Verdict June 8, 2004).

The trial court had originally dismissed the case holding that the accusation that the club had "Mafia connections" did not impute a criminal offense nor did it harm the profession of the club and was not actionable absent proof of special damages.

Last year the Connecticut appellate court reinstated the claim, holding that "the Mafia generally is known to be involved in criminal activities such as bribery, illegal gambling, manufacturing of narcotics and other acts" and the accusation was therefore actionable. *Lega Siciliana Social Club, Inc. v. St. Germaine*, 825 A.2d 827 (2003).

Connecticut Newspaper Wins on Fair Report Defense

The Connecticut appellate court affirmed summary judgment to American Lawyer Media, its affiliates, the New York Law Journal and the Connecticut Law Tribune, LLC, and an individual reporter on libel and privacy claims brought by a lawyer. *Burton v. American Lawyer Media*, 2004 WL 1119305 (Conn. App. May 25, 2004).

At issue was an article headlined "Lawyer's Attempt to Hide 19 Violins Results in Sanctions." The trial court held the headline was a fair summary of a judicial decision and therefore protected by the fair report privilege. *See* 2002 WL 31171008, at *1 (Conn. Super. Aug. 16, 2002).

Affirming, the appellate court noted that the majority of statements at issue were direct quotations from a court decision; and the rest were substantially accurate accounts of the decision. Quoting with approval from the Connecticut Supreme Court in *Strada v. Connecticut Newspapers, Inc.*, 477 A.2d 1005 (1984), the appellate court noted, "The author's job is not simply to copy statements verbatim, but to interpret and rework them into the whole.... A fussy insistence upon literal accuracy would condemn the press to an arid, desiccated recital of bare facts."

Plaintiff Nancy Burton appeared pro se. Defendants were represented by Lorin Reisner and Erik Bierbauer of Debevoise & Plimpton in New York.

Columnist's Opinion Defense Wins Appeal in Libel Case

By Damon Dunn

The Illinois Appellate Court for the First District issued a unanimous order in *Brennan v. Kadner*, *et al.*, No. 1-03-1476 (Ill. App. June 9, 2004) (J. Hall) affirming dismissal of a defamation and false light suit against Phil Kadner, columnist for the *Daily Southtown*, and Midwest Suburban Publishing d/b/a *Daily Southtown*.

The case involved a *Daily Southtown* column concerning Dennis Brennan, a former school board attorney who had secretly financed a political committee to oppose an opposition slate of school board candidates. If the opposition slate were elected, Brennan would lose his contract with the school board. An elections board hearing officer found that Brennan violated Illinois election disclosure laws.

Kadner's column, entitled "State's election laws may be a paper tiger," expressed concern whether the election board had the authority to fine the attorney notwithstanding the hearing officer's recommendation to impose the maximum fine and refer the case to the appropriate State Attorney and/or Attorney General of Illinois.

In discussing the available penalties, the column went on to state that "Another source stated that the election board could refer [plaintiff's] case to the U.S. Attorney's Office, claiming that he used the U.S. mail in perpetuating a fraud."

Plaintiff argued that this statement imputed the crime of mail fraud. The trial judge, however, dismissed the complaint on the grounds that the alleged defamation did not convey verifiable facts and was subject to an innocent construction.

Writing for the appellate court, Justice Hall agreed with defendants that the statement constituted non-verifiable opinion:

> The statement was not couched in terms of a factual assertion that the plaintiff committed the offense of mail fraud, but as conjecture as to whether the election board could refer plaintiff's case to federal authorities.

The statement was not couched in terms of a factual assertion that the plaintiff committed the offense of mail fraud, but as conjecture as to whether the election board could refer plaintiff's case to federal authorities.

In particular, the court noted that: "The very word 'could' inherently connotes a subjective judgment."

Although plaintiff argued that one could objectively prove whether the unidentified source had actually made the statement to Kadner, the appellate court rejected this approach. Instead the court held that "[t]he original source of a statement has no bearing on the analysis as to whether the statement is defamatory."

The court explained that defendants could be held liable for publishing a defamatory statement regardless of whether they revealed the original source of the statement. Moreover, while a plaintiff could conceivably establish actual malice by proving that the source did not exist or did not make the statement, the source of the statement is "not a factor" when the statement is a nonactionable opinion.

The appellate court also affirmed dismissal of the false light claim on analogous grounds.

The plaintiff was represented by Patrick J. O'Malley.

Damon Dunn of Funkhouser Vegosen Liebman & Dunn Ltd. represented columnist Phil Kadner and Midwest Suburban Publishing.

Calling Man a "Drifter" Not Defamatory

A Pennsylvania federal court granted a newspaper's motion to dismiss a pro se libel complaint over its description of plaintiff as a "drifter." *Kreimer v. Philadelphia Inquirer, Inc.,* No. Civ. A. 03-CV-6669, 2004 WL 1196258 (E.D. Pa. May 27, 2004). (Surrick, J.)

In addition to finding the complaint time barred, the court concluded that it was also "frivolous." Despite plaintiff's "great lengths" to analogize the term drifter to "hobo" and "vagrant," the court concluded that the term "drifter" is simply not defamatory under Pennsylvania law.

D.C. Circuit Affirms Dismissal of Ex-Congressman's Conspiracy Suit Against Bill Clinton, James Carville and Larry Flynt

The D.C. Circuit Court of Appeals affirmed dismissal of an unusual conspiracy complaint brought by former Georgia Congressman Robert Barr against Bill Clinton, his former political advisor James Carville and Larry Flynt, publisher of *Hustler* magazine. *Barr v. Clinton*, No. 03-7047, 2004 WL 1300144 (D.C. Cir. June 11, 2004) (Tatel, Edwards and Randolph JJ.)

The Court affirmed dismissal as to Clinton and Carville on statute of limitations grounds; and to Flynt, on the ground that Barr failed to allege that the complained of statements were false. Citing to *Hustler v. Falwell*, 485 U.S. 46 (1988), the Court reasoned that Barr could not evade the First Amendment protections for speech by pleading a conspiracy cause of action.

Background

At issue in the case were statements and publications made by Larry Flynt during the Clinton-Lewinsky scandal. In the midst of the scandal, Flynt ran an advertisement in the *Washington Post* offering one million dollars to anyone who would admit having an affair with a member of Congress. The purpose, according to Flynt, was to "expose the hypocrisy of members of Congress."

In connection with these efforts, Flynt appeared on a television news program and stated that Barr "had not told the truth, under oath, in divorce proceedings, and that he had pressured his former wife into having an abortion." Flynt repeated these allegations in an interview with *Salon* and in his self-published "The Flynt Report," detailing the alleged misdeeds of President Clinton's opponents.

Barr alleged that Clinton and Carville leaked confidential FBI files and/or other government information to Flynt as part of a conspiracy to prevent him from performing his official duties, a crime under 42 U.S.C. § 1985 (1).

This section makes it a crime for:

> two or more persons ... [to] conspire to prevent, by force, intimidation, or threat, any person ... from discharging any duties [of public office]; ... or to injure him in his person ... on account of his lawful discharge of the duties of his office.

Last year the D.C. federal district court granted defendants' 12(b)(6) motion, ruling that the suit was untimely, and, in the alternative, that Barr failed to properly allege the agreement element of a conspiracy claim. *Barr v. Clinton*, No. 02-437 (D.D.C. March 19, 2003).

Appeals Court Affirms on New Grounds

The Court of Appeals held that the complaint was time-barred only as to Clinton and Carville since their alleged actions were all outside the three-year statute of limitations for conspiracy. But it held that the complaint was timely against Flynt for his publication of "The Flynt Report."

The Court nevertheless affirmed dismissal on First Amendment grounds. The gravamen of Barr's complaint, according to the Court, "rests entirely on his claim that Flynt's conspiratorial publication ... injured his reputation and mental state." Because Barr did not allege that the statements were false he failed to state a cause of action.

Interestingly, the Court raised at oral argument the issue of whether the First Amendment defense would be affected if Barr had alleged that Flynt obtained the underlying information illegally, citing *Bartnicki v. Vopper*, 532 U.S. 514, 528-29 (2001), for the proposition that the Supreme Court left open the question of whether the First Amendment would permit the punishment of the publication of truthful information illegally obtained.

But finding that Barr had not briefed or pressed the issue on appeal, the Court found no need to address the issue.

Barr was represented by Larry Klayman and Paul Orfanedes of Judicial Watch. Suzanne Woods and David Kendall, Williams & Connolly, represented Bill Clinton and James Carville.

Civil Suits Challenge Kansas Municipal Criminal Defamation Law

By Sam Colville

This month a Kansas editorial writer and a political advertiser threatened with prosecution for criminal defamation filed civil suits challenging the constitutionality of the statute and seeking damages. *How v. City of Baxter Springs, et al.* and *Thomas v. City of Baxter Springs, et al.*

Background

The March 11, 2003 edition of *The Baxter Springs News,* a local Kansas newspaper, contained an editorial by retired New York City lawyer and Baxter Springs son Ronald O. Thomas and a political advertisement by Baxter Springs City Council candidate Charles How on upcoming municipal elections.

In his editorial, Thomas wrote that if mayoral candidate Art Roberts were elected, the City Clerk, Donna Wixon, would run Baxter Springs. In the political advertisement, Charles How stated (albeit erroneously) that Roberts, formerly a member of the City Council, had voted to hire Wixon. He then asked: "You folks want two more years of this hateful City Clerk?"

Two days later, Wixon filed complaints charging How, Thomas and *Baxter Springs News* publisher, Larry Hiatt, with violations of the city's criminal defamation ordinance. The ordinance carries with it a possible fine of $2,500 and a year in jail. It is identical to the Kansas criminal defamation statute, K.S.A. §21-4004.

The charges were prosecuted by City Attorney Robert Myers. The sitting municipal judge recused himself and appointed a special judge from a nearby community. At the arraignment, attorney Myers announced his intention to recuse himself and to appoint a special prosecuting attorney. The Court granted the City thirty days to do so.

City Attorney Vowed to Press Charges

In June 2003, when that term had expired without a special prosecuting attorney having been appointed, upon defendants' motions to dismiss with prejudice, the Court dismissed the charges without prejudice. Myers then publicly announced the City intended to appoint a special prosecutor to re-file the charges and was considering bringing additional charges against each of the defendants.

As of June 2, 2004, the criminal defamation charges had not been re-filed nor had other charges been brought against defendants. On that date, Thomas and How filed lawsuits against the City of Baxter Springs, Wixon and Myers under 42 U.S.C. §1983 for violations of their respective rights under the First and Fourteenth Amendments, for malicious prosecution and for abuse of process.

Plaintiffs seek damages, declarations that the City's criminal defamation ordinance is unconstitutional, both inherently and as applied, and for a permanent injunction against the re-filing of the criminal defamation or any other charges related to their publications. Defendants have just been served and have not yet responded to these complaints.

Sam Colville, a partner in Holman Hansen & Colville PC in Overland Park, Kansas, represents the plaintiffs in these actions.

Appeal of Criminal Libel Conviction Heard in Kansas

On June 16, the Kansas Court of Appeal heard defendants' appeal of a criminal defamation conviction in the case of *Kansas v. Carson*.

In July 2002, a fringe newspaper in the Kansas City area, *The New Observer*, and its publisher and editor were convicted by a jury of multiple counts of criminal defamation for reporting that the Mayor of Kansas City and her husband, a judge, lived outside the county in violation of residency laws. *Kansas v. Carson*, No. 01-CR-301 (Kansas Dist. Ct. Wyandotte County jury verdict July 17, 2002). *See also MLRC MediaLawLetter* August 2002 at 5.

The Court of Appeal refused to consider a brief from media organizations challenging the constitutionality of the Kansas criminal defamation statute. The media organizations are considering raising their constitutional arguments in federal court civil actions against the City of Baxter Springs.

Supreme Court Denies Cert. in Jenny Jones Wrongful Death Case and *Ross v. Santa Barbara News-Press*

The Supreme Court declined to hear an appeal of a Michigan Court of Appeals ruling that reversed and dismissed a $29 million wrongful death judgment against the Jenny Jones talk show and its producers. *Graves v. Warner Brothers*, 656 N.W.2d 195, 31 Media L. Rep. 1255 (Mich App. 2002), 2004 WL 1373288 (U.S. Jun 21, 2004) (No. 03-1508).

At issue was the highly publicized claim that the show was responsible for the murder of Scott Amedure, who had appeared on an episode of the show on "secret crushes." Under the format of the episode, Amedure surprised a male co-worker Jonathan Schmitz, revealing a secret crush on him. Three days after the episode was taped Schmitz shot and killed Amedure.

Reversing the jury verdict, the appeals court held that while the show may be "the epitome of bad taste and sensationalism," the defendants owed no legal duty to protect Amedure from Schmitz and that his murder was not foreseeable.

The Supreme Court also refused to hear an appeal of a $2.25 million dollar jury libel award against *The Santa Barbara News-Press*. *Ross v. Santa Barbara News-Press*, 2003 WL 22220512, 32 Media L. Rep. 1025 (Cal. App. 2 Dist. Sep 26, 2003) (unpublished), *cert. denied,* 2004 WL 595066 (June 1, 2004).

In *Ross*, a California appellate court held that plaintiff's status as a private figure was the law of the case on a retrial and not subject to reexamination on appeal of the second trial. At issue were two lengthy articles that profiled plaintiff, a prominent real estate investor, and his attempt to increase his ownership of a California savings and loan. Plaintiff alleged the articles implied he had been investigated for the same investor fraud for which his former business partner had been jailed. The court affirmed the award on the ground that the newspaper articles were not fair summaries of the prior investigations of plaintiff.

The defendant's petition raised two issues: 1) plaintiff's private figure status; and 2) whether the appellate court should have independently reviewed the jury's finding that the statements at issue were not substantially true.

The Supreme Court also rejected plaintiff's request that it review the appellate court decision that there was insufficient evidence of actual malice which might have entitled plaintiff to an award of punitive damages.

Contract and Negligence Claims Over "Who Wants to Be a Millionaire?" Question Dismissed

A California appellate court affirmed the dismissal of a case brought by a former "Who Wants to Be a Millionaire" contestant who claims he was unfairly tossed from the show after failing to answer an "unanswerable" question. *Rosner v. Valleycrest Productions Ltd. et al.*, 2004 WL 1166175 (Cal.App. 2 Dist. May 26, 2004) (marked not for publication).

Richard Rosner filed negligence and breach of contract claims in Los Angeles County Superior Court against Valleycrest Productions and ABC, Inc. following his 2000 appearance on the popular quiz show in which host Regis Philbin asked Rosner: 'What capital city is located at the highest altitude above sea level?'

The four choices were: (a) Mexico City; (b) Quito; (c) Bogota; and (d) Kathmandu. Rosner picked Kathmandu, which happens to be situated at the lowest altitude of the four options. However, La Paz, Bolivia – which was not an available selection – is the highest capital city in the world.

The appellate court granted Valleycrest's motion for summary judgment on the myriad breach of contract claims based on Rosner's signing a written contract before going on the show that gave the production company an absolute right to interpret questions and answers. The court determined that as a matter of law, "in a game show involving written multiple choice questions…it is…within the reasonable expectation of the parties that issues may arise regarding interpretation." *Id.* at *9.

The court also affirmed the dismissal of a negligence claim, holding that the contractual release barred any claims over defendants' failure to better source their questions.

Plaintiff was represented by René Tovar and David J. Cohen of Tovar & Cohen. Defendants were represented by Oliver & Hedges and Quinn Emanuel Urquhart.

Second Circuit Affirms Right of Access to Docket Sheets

By Stephanie Abrutyn

The First Amendment right of access to court proceedings and papers extends to docket sheets, according to a unanimous decision recently handed down by a three-judge panel of the United States Court of Appeals for the 2nd Circuit. *Hartford Courant Co. v. Pellegrino*, 2004 WL 1244075 (2nd Cir. June 8, 2004). (Katzman, Meskill and Wesley, JJ.).

The Court also reinstated a lawsuit filed by *The Hartford Courant* and *The Connecticut Law Tribune* seeking access to docket sheets for a multitude of cases that appear to have been sealed by Connecticut court administrators.

Court Files Routinely Sealed Without Notice

The suit came about earlier this year, after journalists discovered a memorandum issued by the Office of the Chief Court Administrator for the State of Connecticut documenting a system for the wholesale removal from public view of thousands of court files and dockets. According to Chief Justice William J. Sullivan, who testified in a Connecticut Judiciary Committee hearing called after public disclosure of the practice, this type of sealing started in the 1970's, "when it became an unwritten rule" among Superior Court judges that they would seal an entire file "whenever they felt it was necessary."

Significantly, there is no indication or evidence that the constitutionally-mandated processes for public notice and an opportunity to be heard set forth in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), were followed prior to any files being sealed. In fact, there is no indication that sealing orders actually were entered in the vast majority of cases.

Practically speaking, the absence of public dockets, or any other information about the cases, makes it impossible for anyone to seek to intervene and to unseal any individual files. Where would one file? Who would one serve? Is one seeking access to the file from the clerk because it is being withheld in the absence of a sealing order, or is one seeking to unseal files because whatever order was entered is impermissibly broad?

Even if a motivated party wanted to seek access to some or all of the files, there simply is not enough information available to do so.

Newspapers Sued Court Administrator

Facing the practical problem of being unable to proceed in individual cases, *The Hartford Courant* and *Connecticut Law Tribune* filed a lawsuit against Chief Court Administrator Joseph Pellegrino and Chief Justice William J. Sullivan alleging violation of the First Amendment right of access to court documents and proceedings.

The case seeks injunctive relief requiring the defendants to provide a copy of the docket sheet for each case (whether concluded or ongoing), or to produce such other documents as will disclose the names and status of the parties, the Judicial District and docket number of the case, the nature of the case, and the nature and description of every document in the file of the case. Significantly, the newspapers are not seeking to unseal any substantive case documents or files.

District Court Dismissed

Judge Pellegrino and Justice Sullivan moved to dismiss the complaint on a variety of grounds, and the District Court granted the motion on the basis that defendants do not have "the authority nor the power to provide the plaintiffs with the relief they seek." Neither defendants in their motion nor Judge Goettel in his decision identified who, if not defendants, would properly be empowered to grant the relief. Plaintiffs appealed that decision to the 2nd Circuit.

Second Circuit Finds Right of Access to Docket Sheets

Although the District Court had not decided whether there is a First Amendment right of access to docket sheets, the 2nd Circuit exercised its discretion to reach the issue, which was "argued before but not reached" by the District Court. In a detailed and carefully constructed opinion, Judge Katzmann (who also wrote the recent decision granting access to voir dire in the *Martha Stewart* case) found there to be a qualified First Amendment right of access to docket sheets that only can be overcome by showing that sealing the docket sheet is essential to preserve higher values and is narrowly tailored to serve that interest.

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Second Circuit Affirms Right of Access to Docket Sheets

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"Experience and Logic" Test Favors Access

The Second Circuit analyzed the issue in two ways, finding that both approaches support the existence of a constitutional right of access. First, the Court applied the "experience and logic" test set forth by the United States Supreme Court in *Richmond Newspapers* and its progeny.

The Second Circuit found a long history of public access to docket sheets and their historical counterparts. "Since the first years of the Republic, state statutes have mandated that clerks maintain records of judicial proceedings in the form of docket books, which were presumed open either by common law or in accordance with particular legislation." *The Hartford Courant Co. v. Pellegrino*, 2004 WL 1244075, *9-*10 (2d Cir. June 8, 2004) [footnote omitted].

The Second Circuit found a long history of public access to docket sheets and their historical counterparts…. The Second Circuit also found that logic supports public access to docket sheets, noting that the broad map of the entire proceeding reflected in a docket sheet "greatly enhances the appearance of fairness."

The Second Circuit also found that logic supports public access to docket sheets, noting that the broad map of the entire proceeding reflected in a docket sheet "greatly enhances the appearance of fairness." *Id.* at 11.

Significantly, the Court disposed of *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), by noting that it was decided before the Supreme Court had established a qualified right of access to attend criminal trials and other proceedings. Indeed, the Second Circuit cited *Nixon* in support of the "experience" prong of the *Richmond Newspapers* test, noting that the common law right of access confirmed in *Nixon* demonstrates a history of openness.

The second approach considered by the Second Circuit views the right of access to docket sheets as a corollary of the right of access to the proceedings themselves. Citing plaintiffs' and amici's argument that the right of access to proceedings would be "merely theoretical" if the information contained in docket sheets were not available, the Court found that they "endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment." *Id.* at 17.

Conclusion

After finding there to be a qualified First Amendment right of access to docket sheets, the Court went on to address the specific issue decided by the District Court, namely, whether or not the defendants had the power to grant the relief requested. Finding the record lacked sufficient evidence to determine if the docket sheets in specific cases were sealed by appropriate court order or statute or merely by administrative fiat, the Court remanded the case for further proceedings.

The Connecticut Law Tribune is represented by Robert A. Feinberg, Deputy General Counsel of American Lawyer Media and Daniel Klau of Pepe & Hazard (Hartford, CT). Judge Pellegrino is represented by Carmody & Torrence (Waterbury, CT). Amici in the Second Circuit were represented by David Schulz of Levine, Sullivan, Koch, and Schulz (New York, NY).

Stephanie S. Abrutyn is Sr. Counsel/East Coast Media for Tribune Company, owner of The Hartford Courant. Outside counsel for The Courant in this case is Ralph G. Elliot of Tyler, Cooper, and Alcorn (Hartford, CT).

New York Appellate Court Upholds Ban on Cameras in Courtrooms

In a terse four page decision, a unanimous five judge appeals court panel rejected a constitutional challenge to New York State's statutory ban on televising court proceedings. *Courtroom Television Network LLC v. State of New York*, 2004 N.Y. Slip Op. 05386, 2004 WL 1382325 (N.Y.A.D. 1 Dept. June 22, 2004). *See also LDRC LibelLetter* October 2001 at 47; *MLRC MediaLawLetter* July 2003 at 34.

In the first state appellate court decision on the constitutionality of the ban, the court affirmed summary judgment in favor of the state in a declaratory judgment action, holding that there is no federal or New York State constitutional right to televise court proceedings. The court summarily rejected the argument that the public has a right to observe trials on television without physically attending the proceedings.

Background

New York Civil Rights Law § 52 imposes a per se ban on all broadcast coverage of trial court proceedings, providing in relevant part that:

> No person, firm, association or corporation shall televise, broadcast, take motion pictures or arrange for the televising, broadcasting, or taking of motion pictures within this state of proceedings, in which the testimony of witnesses by subpoena or other compulsory process is or may be taken, ...

A ten year experiment with cameras in courts lapsed in 1997. Nevertheless a number of trial court judges had declared § 52 of the Civil Rights Law unconstitutional under the First Amendment of the U.S. Constitution and Article I, Section 8 of the New York State Constitution. *See People v. Barron*, 30 Media L. Rep. 2120 (Sup Ct. Kings Co. 2002) (holding § 52 unconstitutional and approving television and still camera coverage of the bribery trial against a Brooklyn judge); *People v. Schroedel*, 726 N.Y.S.2d 226 (Co. Ct. Sullivan Co. 2001) ("it is elemental that in a capital case, cameras and photographers ... should be allowed in the courtroom."); *People v. Boss*, 182 Misc. 2d 700, 701 N.Y.S.2d 891 (Sup. Ct. Albany Co. 2000) (camera ban is a barrier to the "presumptive First Amendment right of the press to televise court proceedings, and of the public to view those proceedings on television"); *Coleman v. O'Shea*, 184 Misc. 2d 238, 707 N.Y.S.2d 308 (Sup. Ct. Nassau Co. 2000) (also finding § 52 a violation of the equal protection clause of the Fourteenth Amendment because "no safeguards were included to ameliorate the effect of denying coverage to a segment of the press in the face of consent").

Trial Court Upholds Ban

None of these decisions were reviewed by the New York Appellate Division or the Court of Appeals. Instead in 2001, Court TV initiated a lawsuit seeking a declaratory judgment that § 52 is unconstitutional.

On July 15, 2003, a New York trial level court denied Court TV's motion for a partial summary judgment and granted defendants' cross-motion for summary judgment, holding that § 52 is constitutional under both the First Amendment and New York Constitution. *Courtroom TV Network LLC v. State*, 769 N.Y.S.2d 70 (N.Y. Sup. Ct. 2003).

In a 26 page decision, the court reviewed in detail the history of the statutory ban and the New York experiment with camera coverage, ultimately concluding that it must defer to the legislature's rational basis for enacting the ban.

Appellate Division Summarily Affirms

Affirming, the Appellate Division briefly concluded that the public right of access to trials recognized by the U.S. Supreme Court in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) and *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984), did not include television coverage.

The court reasoned that the value of openness outlined in these cases was grounded "not in how many people actually attend (or watch a broadcast of) a trial, but "in the fact the people not attending trials can have confidence that standards of fairness are being observed," *quoting Press-Enterprise*, 464 U.S. at 508.

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NY Appellate Court Upholds Ban on Cameras in Courtrooms

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Further, even assuming that § 52 restricts speech, the court held the statute to be content-neutral and sufficiently tailored to the state's interest in fair trials. Thus the statute would not be invalid if the state's interest could be served by less restrictive alternatives.

Finally, the court affirmed the statute's constitutionality under the State Constitution, holding that access under state law is no greater than the rights under *Richmond Newspapers*.

Jonathan Sherman of Boies, Schiller & Flexner LLP represented CourtTV.

Lawyer-Novelist's § 1983 Claim Can Proceed Against Brooklyn DA

A federal district court denied summary judgment to Brooklyn District Attorney Charles Hynes in a § 1983 case brought against him by a former prosecutor who claims he was demoted and later fired in retaliation for statements he made to *New York* magazine, and in a book he authored, entitled *Hollowpoint*, about a fictional district attorney's office. *Reuland v. Hynes*, No. 01 CV 5661, 2004 WL 1354467 (E.D.N.Y. June 17, 2004) (Gleeson, J.).

Forced Out Over Quote and Novel

Former Brooklyn homicide prosecutor Robert Reuland alleged that Hynes violated the First Amendment by demoting him in February 2001, following publication of a *New York* magazine article, and then firing him outright approximately five months later.

Hynes allegedly retaliated against Reuland over a quote stating: "Brooklyn is the best place to be a homicide prosecutor…. We've got more dead bodies per square inch than anyplace else." The quote was included in a profile of Reuland, published in a February 26, 2001 article on New York's "young legal guns."

Reuland alleged he was demoted and then fired in retaliation for what Hynes perceived as criticism (or insufficient praise) of his efforts to fight crime in Brooklyn.

Matter of Public Concern

In 2002, the trial court denied a motion to dismiss on grounds of qualified immunity, holding that questions of fact existed as whether the quoted statement and novel involved matters of public interest. The Second Circuit summarily affirmed that ruling. 53 Fed.Appx. 594 (2d Cir. 2002).

On the current motion for summary judgment, Hynes argued that the book and related statements to the magazine did not involve matters of public concern. Interestingly, Reuland had argued that the novel is protected speech regardless of whether it relates to a matter of public concern, relying on a decision by Judge Posner in the Seventh Circuit. *Eberhardt v. O'Malley*, 17 F.3d 1023, 1027 (7th Cir.1994) (distinguishing the case of a government-employee novelist from the case of a government employee "grousing about a raise").

The district court found it "questionable" whether *Eberhardt* is good law in the Second Circuit and instead applied a balancing test outlined by Supreme Court in *Pickering v. Bd. of Educ*., 391 U.S. 563 (1968) (court "must balance the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.").

The court concluded that at this stage, "it is a fair inference" that the novel and *New York* magazine quote involved matters of public concern – such as educating the public about the inner workings of a prosecutor's office and criminal investigations and prosecutions – notwithstanding any financial motive in publishing the novel.

Qualified Immunity

The district court also concluded that accepting plaintiff's allegations as true on summary judgment "no reasonable actor in Hynes's position could have believed his actions were lawful."

Trial in the case was scheduled for July 12, 2004.

Plaintiff is represented by Jane Bilus Gould, of Lovett & Gould, White Plains, New York. Michael Cardozo and Eamonn Foley of the Corporation Counsel of the City of New York represented Charles Hynes.

CNN Sues Florida for Copy of Suspected Felons List

By Johnita P. Due and Rachel Fugate

On May 28, 2004, CNN filed a lawsuit against the Florida Department of State Division of Elections (the "Division") seeking access to the Division's list of approximately 48,000 suspected felons who could potentially be barred from voting in the upcoming presidential election.

CNN was later joined in its lawsuit by several other media organizations, including Media General Operations newspaper Tampa Tribune and stations WFLA-TV (NBC), WMBB-TV (ABC); The New York Times regional newspapers Sarasota Herald-Tribune, The Ledger (Lakeland, FL), The Gainesville Sun, Star-Banner (Ocala, FL); and Gannett newspapers Florida Today (Brevard County), The News-Press (Fort Myers) and Pensacola News Journal. The Tallahassee Democrat and the First Amendment Foundation also intervened. (The "Florida Media").

CNN Denied Access to Voter List

The Division denied CNN's request for the voter list based on a public records exemption enacted by the Florida Legislature in 2001 which precludes citizens from making "copies of or extracting information" from the voter registration information of the State, unless they fall within a protected class, including municipalities, other governmental agencies, political candidates, registered political committees, political parties or officials and incumbent officeholders. Fla. Stat. § 98.0979 (2003).

In its complaint seeking declaratory and injunctive relief, CNN cited an "enormous public interest in scrutinizing the potential disenfranchisement of such a large pool of citizens in what portends to be a closely contested presidential race."

During the 2000 presidential election, which was decided in Florida by only 537 votes, Florida state officials had purged voter rolls of the names of more than 173,000 people identified as felons or otherwise ineligible to vote.

Civil rights organizations, some Florida county elections supervisors and others had challenged the 2000 list of ineligible voters because it contained possibly thousands of inaccuracies. The current suspected felons list has similarly generated concerns about its accuracy.

Ed Kast, who had been named in the CNN suit in his capacity as the director of the Division, resigned on the same day as the summer conference of elections supervisors from all 67 Florida counties convened to discuss, among other things, their concerns about the accuracy of the current suspected felons list.

In its complaint, CNN called the right to access public records a "fundamental right" specifically enumerated in the Declaration of Rights of the Florida Constitution, Fla. Const. art. I, § 24, and challenged the constitutionality of the public records exemption, alleging first that it violates Florida's constitutional right of access to public records and secondly, that it violates the equal protection doctrine.

State Constitutional Right of Access

First, CNN alleged that the public records exemption violates Florida's constitutional right of access because it fails to state with specificity the public necessity justifying the exemption, is broader than necessary to accomplish its stated purpose, and relates to more than a single subject. FLA. CONST. art. I, § 24.

CNN and the Florida Media argue that Section 98.0979 is fatally flawed because it fails to even articulate a statement of public necessity, much less meet the specificity standard required under the Florida constitution.

Further, CNN and the Florida Media argue that the Florida Elections Reform Act of 2001 (Florida Election Reform Act of 2001, Pub. L. No. 2001-40) which created the public records exemption at issue, did not relate to single subject, but instead was a hundred-plus page piece of legislation overhauling various aspects of the Florida electoral process, with the public records exemption buried amongst repeals, amendments, or other alterations of nearly one hundred Florida statutes.

Equal Protection Violation

Second, CNN alleged in its complaint that the public records exemption violates the Equal Protection Clause of the Florida Constitution by "arbitrarily, irrationally and invidiously discriminate[ing] against certain individuals by severely limiting their access to the records, while granting broader access to others. Specifically, the statute allows

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CNN Sues Florida for Copy of Suspected Felons List

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certain government officials, political candidates and certain political committees to access and copy the records, but denies equal access to the news media and the general public."

The Division hired private attorneys from Steel Hector & Davis to respond to CNN's complaint and defend the constitutionality of the statute. The Division's response first focused on procedural aspects of CNN's request for an expedited hearing.

The Division claimed that it had not violated Florida's Public Records Act and therefore the provision in Section 119, Florida Statutes allowing for an expedited hearing was inapplicable. The Division urged that determining the constitutionality of Section 98.0979 should occur under the conditions and time frame of any other case. The Division also suggested that because CNN cited Section 98.0979 in its public records request, it could not then challenge the constitutionality of the statute.

The main thrust of the Division's response, however, was that Section 98.0979 did not implicate the state constitutional requirements of Article I, Section 24, which states that every person shall have the right to "inspect or copy" public records.

The Division asserted that "inspect or copy" must be read in the disjunctive and that because Section 98.0979 allows citizens to inspect the suspected felons list it did not create an exemption to Article I, Section 24 of the Florida Constitution and did not have to comply with its requirements. The Division also claimed that Section 98.0979, by virtue of similar exemptions for county supervisor records, pre-dated Article I, Section 24 and therefore did not fall within its confines.

Substantively, the Division also defended Section 98.0979's constitutionality, asserting among other things that the statute did not violate equal protection guarantees because under a rational basis standard of scrutiny the statute furthers a legitimate interest in protecting privacy rights of registered voters. Finally, the Division claimed that even absent Section 98.0979, the suspected felons list would not be available for copying pursuant to a statute that exempts similar information in the hands of county supervisors.

June 9 Hearing

On June 9, Circuit Court Judge Nikki Clark held an expedited hearing in Tallahassee on CNN's complaint. Judge Clark requested argument on the procedural posture of the case and the substantive arguments of both sides – focusing on whether Section 98.0979 really created an exemption to Article I, Section 24, which grants the right to inspect *or* copy.

On the substantive arguments, Gregg Thomas of Holland & Knight, counsel for CNN, argued that the right of access to public records in Florida has always encompassed the right to inspect and the right to copy. Thomas reasoned that the right to inspect without the right to copy would be meaningless and that Article I, Section 24 should not be read in the disjunctive because it would lead to an illogical result.

Judge Clark questioned Thomas whether Article I, Section 24 is implicated if the "inspect or copy" language is construed in the disjunctive. Thomas responded that Section 98.0979 limited even the right to inspect by providing that information could not be extracted from the records.

Thomas concluded that if the mandates of Article I, Section 24 had been met and the State had articulated a statement of public necessity, then the court would know the reason for the limitation and would be able to conduct an appropriate analysis. However, because the Florida statute contained no statement of public necessity and the Florida Legislature did not even attempt to comply with Article I, Section 24, it was impossible to intuit a meaning to the statute and it was void for failure to comply with the basic threshold requirements of the Florida Constitution.

Counsel for the Division, Joseph Klock, countered that the limitations contained in Section 98.0979 had been in existence in some form for almost 100 years by virtue of similar limitations for voting rolls in the custody of county supervisors of elections. Klock argued that the right of access was subject to the previously created limitations imposed on county supervisor voting rolls.

Klock also stated that the statute was justified to protect the privacy rights of individuals named on the list that might not be felons. However, Judge Clark ques-

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CNN Sues Florida for Copy of Suspected Felons List

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tioned this argument and asked Klock how privacy is at stake when any citizen could visually inspect the list at the Division's office in Tallahassee, and thousands individuals and entities falling within the preferred classes enumerated in the exemption have the right to inspect and copy the list. Klock responded that there is a difference between thousands and millions, implying that once the news media had access to the list, the suspected felons' privacy would be violated on a wider scale.

Judge Clark also questioned CNN about procedural aspects of the case – namely the expedited nature of the proceeding and the relief that CNN sought. Any concerns over the procedural posture, however, were alleviated by Judge Clark's ruling. Judge Clark determined that CNN's complaint on its face stated a cause of action for declaratory relief. Judge Clark directed the Division to file an answer to the complaint within ten days. Judge Clark gave the parties an additional five days after the answer to file any additional briefing, after which she will make her ruling.

Johnita P. Due is senior counsel at CNN and Rachel Fugate is an associate at Holland & Knight, which is representing CNN in this case.

Family Court Judge Unseals "Angel of Death's" Domestic Violence File

By Gayle C. Sproul

The domestic violence file of Charles Cullen, a confessed serial killer and nurse known as "The Angel of Death," has been unsealed by a judge of the Family Part of the Superior Court of New Jersey. *Taub v. Cullen (In re Petition to Intervene and for Access of The Morning Call, Inc.)*, FV 21-481-93 (Chancery Div. – Family Pt., Somerset County, May 20, 2004).

Judge Thomas H. Dilts concluded that, although limited material (prejudicial to Cullen's ex-wife and children) should be redacted, the file was subject to a constitutional right of access and should be released in light of the public's "legitimate interest" in the records.

Defendant Confessed to Killing Patients

Cullen, a nurse whose career spanned more than 16 years, confessed in December 2003 to killing up to 40 of his patients and has pleaded guilty to murder in several of those deaths.

Law enforcement officials in eastern Pennsylvania and New Jersey, where Cullen was employed in at least ten hospitals and nursing homes, have formed an interstate task force to coordinate the continuing investigations into the deaths of his patients.

Cullen's startling confession, taken together with the fact that he moved with impunity as a health care provider from one hospital to another despite the fact that patients unexpectedly and repeatedly died at his hands, has also led state and federal officials to move to shore up procedures for background checks for health care providers.

For example, two New Jersey state legislators have introduced a bill that would loosen restrictions on information shared by hospitals about former employees and would require the State Board of Nursing to check the veracity of license applications.

Pennsylvania officials have taken similar steps. New Jersey Senators John Corzine and Frank Lautenberg have asked for hearings by the Senate Committee on Health, Education, Labor and Pensions on the creation of a federal database that would give hospitals access to information about the work history of prospective employees.

In 1993, in the midst of his killing spree, Cullen became embroiled in a domestic violence matter with his now ex-wife, Adrienne Taub. All of the records related to that matter were sealed pursuant to the state statute governing domestic violence proceedings, N.J.S.A. § 2C:25-33 ("[a]ll records maintained pursuant to this act shall be confidential . . . .").

Newspaper Requested Domestic Violence File Be Unsealed

The Morning Call, a Tribune newspaper based in Allentown, Pennsylvania, learned of the proceeding and

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Judge Unseals "Angel of Death's" Domestic Violence File

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filed a motion to intervene in the matter and requested that the entire file be unsealed.

The Morning Call based its request on the constitutional and common law rights of access to court documents recognized in state and federal courts in New Jersey. In particular, the Supreme Court of New Jersey held in *New Jersey Div. of Youth and Family Services v. J.B.*, 120 N.J. 112, 124 (1990), that the constitutional right to access first articulated in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) is applicable to child custody proceedings.

Moreover, in *Pepe v. Pepe*, 258 N.J. Super. 157, 164 (Chancery Div. – Family Pt., Monmouth County, 1992), the court held, based on *J.B.* and *Richmond Newspapers* and its progeny, that the constitutional right to access is applicable to the sealed court records of domestic violence matters.

The constitutional right of access attaches to records of domestic violence proceedings.

The court in *Pepe* articulated three factors to consider when determining whether to permit access to a sealed domestic violence file: (1) whether release will be "detrimental or potentially harmful to the victim," (2) "whether adverse publicity will be a factor," and (3) whether permitting access to court records "on a case by case basis" will discourage the victim in the present case from coming forward. *Id.* at 165.

The Morning Call also argued that the parties would have to justify their request for continued sealing on a document-by-document basis, pursuant to *Hammock v. Hoffman-LaRoche, Inc.*, 142 N.J. 356, 381 (1995), and that the justification would have to be based on current circumstances, not those present in 1993. *Id.* at 382. Finally, *The Morning Call* argued that all documents reflecting information already in the public Taub/Cullen divorce file should be disclosed.

The motion to unseal the record was opposed by both Taub and Cullen. Taub urged the court to continue the sealing to protect her own privacy and that of her children. Cullen, who was represented in the access proceeding by his criminal lawyer, first cited the effect disclosure might have on the potential jury pool, and then argued that his children's privacy should be a paramount consideration in denying access.

Cullen, who was brought from his current residence at the Somerset County Jail to the oral argument on the motion before Judge Thomas H. Dilts, made an impassioned plea to the court to protect his children from the media. (Shortly thereafter, Cullen entered into a plea agreement, thus mooting his argument regarding the impact of disclosure on the jury pool.)

Judge Dilts then directed attorneys for Taub and Cullen to review the documents in the sealed file and submit to him a list of the documents they believed should continue to be sealed, along with supporting reasons. He then instructed the parties to make available to counsel for *The Morning Call* a redacted version of that list, summarizing the nature of their objections to the disclosure of each document. He directed *The Morning Call* to respond to those summaries.

Right of Access to Domestic Violence Files

After the submission of these documents, in which the parties objected to the disclosure of most of the documents in the file, Judge Dilts concluded that all but a small portion of the documents should be disclosed, ordering that 81 documents numbering more than 400 pages should be turned over.

He agreed with the court in *Pepe* that the constitutional right of access attaches to records of domestic violence proceedings. He then assessed the *Pepe* factors and added one of his own: he considered whether release of the documents in the file would prevent as yet unknown victims of domestic abuse from coming forward. Slip Op. at 5.

Despite finding that release could prove detrimental to Taub and to her children, he concluded that this case was "one of those rare exceptions where the public interest and the press' right to know outweigh the general expectation of privacy accorded to victims of domestic violence." *Id.* at 5.

He also concluded that Cullen's status as a serial killer created true public interest to this file:

> "[I]t is likely that there will be interest by psychologists, scholars and law enforcement in studying Mr. Cullen so as to identify risk factors in the

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Judge Unseals "Angel of Death's" Domestic Violence File

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future to prevent or at least identify at an early stage similar conduct by others." *Id*. at 7.

To protect Cullen's innocent family members, Judge Dilts stated that he redacted those portions of documents whose disclosure would be "extremely prejudicial" to Taub or her children. *Id*. at 6.

Finally, "[b]ecause of the substantial expense incurred by *The Morning Call* to pursue this action," Judge Dilts ordered that the newspaper be given a copy of the file at no charge, two weeks in advance of making that file available to the public. Slip. Op. at 9. After receiving a request from another newspaper for access to the file, Judge Dilts shortened the period of exclusivity to one week. The release of the file to *The Morning Call* resulted in the publication of an in-depth analysis of those domestic violence records: "A Slide into Madness," by Matt Assad and Scott Kraus, May 28, 2004, *The Morning Call*, p. A1.

Gayle C. Sproul is a partner at Levine Sullivan Koch & Schulz, L.L.P.'s Yardley, PA and New York City offices. She represented The Morning Call together with Chad Bowman and Adam Rappaport from the firm's Washington, D.C. office.

Washington Supreme Court Restricts Public Records Act

Imputes General Attorney-Client Privilege Exemption

By Judith A. Endejan

On May 13, 2004, a sharply divided Washington Supreme Court issued a 5-4 decision that seriously restricts access to public records under Washington's Public Disclosure Act, RCW Ch. 42.17 ("PDA"). *Hangartner v. City of Seattle*, 2004 WL 1064829. (J. Alexander).

The majority opinion first held that a Public Disclosure Act ("PDA") request for "all" of an agency's documents was overbroad, thus excusing the agency from complying with the disclosure request. Second, it held that documents covered by a general attorney-client privilege are exempt from PDA requests due to language in the PDA that allows exemptions to be found in "other statutes."

Requests for City Planning Information

This case resulted from two consolidated appeals. The first involved a citizen's request for documents prepared in connection with the development of a light rail system in Seattle and a Seattle City Council measure on establishing alcohol-impact areas in Seattle's Pioneer Square area.

The City of Seattle withheld several documents prepared by City attorneys that contained general legal advice about these topics. No litigation concerning either Council measure was pending at any time. The City asserted that the withheld documents were exempt from disclosure under two exemptions in the PDA.

The first was a general "attorney-client privilege" embodied in Washington's evidentiary code, RCW 5.60.020 (a). The City argued that the PDA recognized exemptions contained in "other statutes," which included the statutory attorney-client privilege. The City also claimed that another exemption known as the "controversy exemption" allowed it to withhold the documents because the City contended that the documents were related to controversial issues, even though no actual or anticipated litigation was present.

In the second case, a citizens' group sent a PDA request to a public agency charged with planning and developing a new monorail line in Seattle, a matter to be voted on in the November 2002 ballot. Initially the citizens' group sent a detailed PDA request to the agency, but upon learning that all of the agency's documents were maintained on unindexed CDs (and in some cases on computers outside the agency), the citizens' group modified its request to ask for all documents of the agency, even though it specified the CDs.

The agency withheld approximately 1,200 documents, claiming they were exempt from production on the basis

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that they were protected by either the attorney-client privilege through the "other statute exemption" or through the controversy exemption.

Initially the citizens' group prevailed at the trial court level, but the agency rushed for a stay, which was granted by the appellate court. None of the withheld documents were ever released. The monorail passed by the second closest vote in Seattle city history.

Washington Supreme Court Decision

The majority decision, written by Chief Judge Alexander, disposed of the appeal cursorily. First, it dismissed the citizens' PDA request in the monorail case on the basis that an agency need not comply with an "invalid request." The citizens' request was "invalid" because it asked for all agency records.

With respect to the second case, the court found that the requested documents were not exempt under the "controversy exemption" because there was no threat or reasonable anticipation of litigation concerning the enactment of the controversial City bills. However, the Supreme Court then found that a general attorney-client privilege applied as a PDA exemption.

Dissent Says Court Ignored PDA's Purpose

In a stinging dissent, Justice Johnson chastised the majority for ignoring the purpose and requirements of the PDA, which mandates broad public disclosure of public records upon request. The dissent found the request for all of the agency's public documents to be appropriate, particularly because the agency clearly understood the request, acknowledged its breadth but never asked for clarification. The dissent noted that there is no "overbreadth exemption" in the PDA.

The dissent also argued that the majority mistakenly incorporated the codified attorney-client privilege into the "other statute" exemption, reasoning that the attorney-client privilege statute is directed at the attorney, not the agency. "While the attorney-client privilege prohibits attorneys from disclosing information, PDA requests are directed at agencies. By ignoring this key distinction, the majority opinion renders ineffectual the PDA's strong mandate to agencies that they must disclose public information."

The citizens' group, Citizens Against the Monorail, has filed a motion for reconsideration. This motion has received *amicus curiae* support from Washington's media organizations, business community and key state legislators.

The principal attorneys involved were Duncan E. Manville, Riddell Williams, Seattle, Washington (for Rick Hangartner); Roger D. Wynne, Seattle City Attorney's Office, Seattle, Washington (for the City of Seattle); Aaron Caplan, American Civil Liberties Union of Washington, Seattle, Washington (for Rick Hangartner); Paul J. Lawrence and Steven A. Smith, Preston Gates & Ellis, LLP (for the Seattle Popular Monorail Authority).

Judith A. Endejan, a partner at Graham & Dunn, in Seattle, Washington represents, Citizens Against the Monorail.

Second Circuit Denies Newspaper's Motion for Access to Appeal Proceedings Involving Grand Jury Investigation of Connecticut Governor John Rowland

By Christian Mensching

On June 22, 2004, the Second Circuit denied the *Harford Courant*'s emergency motion seeking access to the argument and briefs in the appeal of the district court's decision compelling a former legal advisor to the Governor to testify against him before a grand jury. The Court held that opening the proceedings and briefs would reveal secret grand jury information, and that there was no way to structure oral argument to prevent disclosure of secret information.

The Investigation of Governor Rowland

The legal troubles of Connecticut Governor John G. Rowland have received a fair amount of attention in the press. Until his announcement that he would resign as Governor effective July 1, Mr. Rowland was fighting on two fronts: first, the Governor was the object of a federal grand jury investigation into allegations of corruption and bid-rigging.

Following the publication of these allegations and the Governor's admission that he had lied about payments for work state contractors had done on his private cottage, the Connecticut Legislature appointed a select committee to independently investigate these and other events and, if need be, to draft articles of impeachment.

In the course of the ongoing grand jury investigation, prosecutors called a former legal advisor to the Governor, Anne George, to testify. Asserting attorney-client privilege, the Governor moved to quash her subpoena.

In closed proceedings, Chief Judge Robert N. Chatigny of the United States District Court for the District of Connecticut denied the Governor's motion. Governor Rowland appealed that decision to the Second Circuit Court of Appeals. Upon motion by the United States Attorney and with the consent of the Governor's lawyers, the Second Circuit closed the courtroom for oral argument and granted leave to file the briefs under seal.

The Hartford Courant's Motion for Access

The *Hartford Courant* moved to vacate or modify this order. Acknowledging the important values supporting grand jury secrecy, the *Courant* argued that the First Amendment right of access, as established in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980), and *Press Enterprise v. Superior Court of Calif.*, 478 U.S. 1 (1986) (*Press Enterprise II")*, nevertheless applied to the appellate proceedings which, it believed, would focus on legal argument rather than the facts being presented to the grand jury.

Under this constitutional right of access, closure would only be proper if the four elements of the *Press Enterprise II*-test are met: (a) public access to the proceedings will harm a compelling governmental interest; (b) there is no alternative to closure that can adequately protect the threatened interest; (c) closure requested is no broader than necessary to protect threatened interest; and (d) any order limiting access will be effective.

The *Courant* asserted that the mere fact that an appeal concerned a grand jury proceeding was not sufficient – the constitutional analysis still must be performed. Federal Rule of Criminal Procedure 6(e)(5) is not to the contrary, the *Courant* argued, because it merely provides that ancillary grand jury proceedings must be closed "to the extent necessary to prevent disclosure of a matter occurring before a grand jury." Thus, Rule 6(e) does not envision *per se* closure of all ancillary grand jury proceedings. Rather, it calls for a case-by-case assessment of the risk of disclosure of matters occurring before a grand jury.

The *Courant* argued that, under the First Amendment analysis as well as the standard established by Rule 6(e), the briefs and oral argument on appeal in this case (or, at a minimum, portions of it) should be open for at least two reasons. First, facts that were already widely known could no longer be considered Rule 6(e) material. The press had already reported extensively on the Governor's attempt to quash the subpoena and the particular events prosecutors want to question Ms. George about.

Second, to the extent that measures less severe than closure – such as an instruction to counsel to limit their argument in open court to legal positions and to refrain from disclosing facts before the grand jury, the redaction of the briefs, and the bifurcation of oral argument – were available, closure was not necessary. This was particu-

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Newspaper's Motion for Access to Appeal Proceedings Involving Grand Jury Investigation of Rowland Denied

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larly so because appellate proceedings (as opposed to proceedings before the district court) generally do not present the type of danger of disclosure of grand jury matters sufficient to justify complete closure. Consequently, closure should be an option only once those alternatives had been considered and rejected.

The Second Circuit's Rejection of the Motion

The Second Circuit heard oral argument on the *Courant's* motion immediately before the argument in the underlying appeal. Whereas the attorneys representing the office of the Governor did not to take a position, the U.S. Attorney's office maintained that it would be "entirely too cumbersome on the parties" to structure oral argument such as to prevent disclosure of material protected by grand jury secrecy.

The panel consisting of Chief Judge John M. Walker, Judge Dennis Jacobs and Judge Pierre N. Leval shared that view and denied the *Courant's* motion from the bench after a brief conference. Chief Judge Walker recited the general reasons for grand jury secrecy and declared that it would be "administratively unworkable and far too cumbersome, and would impair the ability of the court to carry out its function" if oral argument (and the briefs) were open to the public.

The panel saw no way that it could bifurcate the proceedings and remain able to meaningfully discuss the legal issues raised in the appeal without reference to the facts and individuals at the center of the grand jury investigation. While the panel said it considered the mere risk of the disclosure of matters before the grand jury sufficient to warrant closure, it concluded that in the present case such disclosure would "inevitably" occur, necessitating the closure of the proceedings.

Assistant United States Attorney Eric J. Glover represented the Government.

Christian Mensching is a summer associate at Levine Sullivan Koch & Schulz LLP in New York. The Hartford Courant was represented by David A. Schulz of Levine Sullivan Koch & Schulz in New York.

Supreme Court Vacates and Remands Cheney Energy Task Force Ruling

In a 7-2 decision, the U.S. Supreme Court vacated and remanded a D.C. Court of Appeals decision that would have allowed civil discovery into whether the Bush Administration's 2001 energy policy task force, headed by Vice President Dick Cheney, violated the Federal Advisory Committee Act (FACA), which, among other things, imposes a variety of open-meeting and disclosure requirements on entities meeting the definition of "advisory committee." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 2004 WL 1403028 (U.S. June 24, 2004). *See also MLRC MediaLawLetter* Dec. 2003 at 56; Sept. 2003 at 15.

The decision written by Justice Kennedy held that the D.C. Circuit Court erred in holding that the Administration had to invoke executive privilege before the court could rule on the Administration's mandamus petition seeking review of the lower court's discovery order.

The Court reasoned that special consideration should be given to the Executive's interests in maintaining its autonomy and interest in confidential communications, particularly in the context of discovery in civil cases. The Court noted that there are no checks in civil discovery analogous to the constraints imposed in the criminal justice system to filter out meritless claims – adding that Rule 11 sanctions have been insufficient to discourage such claims against the Executive Branch.

Remanding, the Court directed the Court of Appeals not only to consider whether the discovery order was an abuse of discretion, but also whether it improperly impaired the Executive's constitutional duties. The Court described the district court's discovery order as "unbounded."

Justice Ginsburg, joined by Justice Souter, dissented, arguing that upon objection from the government the district court could have narrowed the discovery requests and therefore mandamus review was inappropriate.

The underlying suit was brought in 2001 by Judicial Watch and the Sierra Club and seeks to determine whether the energy taskforce is subject to FACA's disclosure rules.

One More Bite at the Plum

California Supreme Court Remands Gerawan Again, Requires State To Show Compelled Advertising Program Satisfies Central Hudson

By Eric M. Stahl

A unanimous California Supreme Court has ruled that a state program compelling plum growers to fund generic advertising campaigns is unconstitutional unless the program withstands the intermediate scrutiny typically applied to governmental restrictions on commercial speech. The decision, *Gerawan Farming, Inc. v. Kawamura*, 90 P.3d 1179 (June 3, 2004) is the court's second remand of the 10-year-old case, and affirmed reversal of a judgment on the pleadings for the state.

In applying the *Central Hudson* test to compelled commercial speech cases, the California court parted company with the U.S. Supreme Court, which has held that producers in such cases receive First Amendment protection under the more limited protection afforded by the high court's compelled association case law.

In applying the Central Hudson test to compelled commercial speech cases, the California court parted company with the U.S. Supreme Court, which has held that producers in such cases receive First Amendment protection under the more limited protection afforded by the high court's compelled association case law.

The majority *Gerawan* opinion, by Justice Moreno, held that *Central Hudson* applies only to complaints arising under California's free speech clause. The court held 4-3 that the plaintiff's federal claims were barred by *Glickman v. Wileman Bros. & Elliott, Inc.* 521 U.S. 457 (1997), which found that a similar federal program did not implicate the First Amendment. (Gerawan Farming, Inc. was one of the plaintiffs in *Glickman*). Although a majority in *Gerawan* declined to revisit *Glickman*, as one of the dissenting justices proposed, the U.S. Supreme Court itself may do so in a case that it will decide next term.

Gerawan thus may be a precursor to more stringent scrutiny of compelled generic advertising programs by the U.S. Supreme Court. It also may have broader significance for commercial speech litigants regardless of what the high court decides: at least 30 states have constitutional free speech provisions virtually identical to the California clause, raising the possibility that state law may prove more restrictive than federal law of compelled advertising regulations.

Background

Gerawan Farming brought suit against the California Secretary of Food and Agriculture in 1994, challenging a "plum marketing program" enacted pursuant to a California agricultural statute. The program required that regulated producers and handlers pay a fixed "per box" assessment to fund advertising programs designed to promote demand for plums generically, without reference to any particular brand.

As the *Gerawan* majority noted, such programs (like the "Got Milk?" campaign) arise under Depression-era state and federal statutes that "were rooted in the considered legislative judgment that government intervention in agricultural markets was necessary to preserve the agricultural industry."

The plum program at issue in *Gerawan* is administered by a board made up entirely of producers and handlers of the fruit.

In *Glickman,* the U.S. Supreme Court decided 5-4 that a similar federal marketing program did not implicate the First Amendment, but instead was "simply a question of economic policy for Congress and the Executive to resolve." 521 U.S. at 468.

Glickman also rejected the Ninth Circuit's decision to resolve the case under *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), finding the intermediate-scrutiny test inapplicable because the advertising assessment did not "involve a restriction on commercial speech." *Glickman*, 521 U.S. at 474.

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Instead, the Court held that, had the First Amendment been implicated, the proper test would be cases dealing with compelled funding of associational speech – namely, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) and *Keller v. State*, 496 U.S. 1 (1990). Under those cases (which both involved individual challenges to use of mandatory association assessments to fund political, not commercial, speech), such compelled funding is constitutional, notwithstanding a dissenting member's objections, so long as the speech is germane to the cause which justified compelled association in the first place.

In *Gerawan*, the plaintiff alleged (in an amended complaint filed after *Glickman* was decided) that the plum marketing program compelled it to spend over $80,000 a year to fund commercial speech that it "disagrees" with and "abhors." Plaintiff objected that the generic advertising was "socialistic," wrongly treated all plums as if they were the same, and was "embarrassingly silly, idiotic and/or totally ineffective." The trial court granted the Secretary's motion for judgment on the pleadings, and the state Court of Appeal affirmed, relying heavily on *Glickman*.

Free Speech Rights in California

The California Supreme Court reversed and remanded for further proceedings. *Gerawan Farming, Inc. v. Lyons* 24 Cal.4th 468 (2000) ("*Gerawan I*"). While finding that it was bound by *Glickman* to hold that the plum marketing order did not implicate First Amendment rights, it rejected the Court of Appeal's conclusion that the protection afforded commercial speech under the California constitution is no greater than that afforded under the First Amendment.

In particular, the court expressed considerable skepticism that the California constitution distinguished between commercial and noncommercial speech. Article I, sec. 2(a) of the California Constitution expressly affords protection to speech "on all subjects," a clause that the Court held obviously must encompass commercial speech. *Gerawan I*, 24 Cal.4th at 491.

Citing Justice Souter's dissent in *Glickman*, the California Supreme Court also held that although prior compelled funding decisions such as *Abood* and *Keller* happened to arise in the context of political or ideological speech, nothing in the case law barred their application to commercial speech. *Gerawan I*, 24 Cal.4th at 502.

Gerawan I decided only that the plum marketing program "implicates" plaintiff's state constitutional freedom of speech. It did not reach the question of whether it violated that right, however, instead remanding to the Court of Appeal to determine "what test is appropriate for use in determining a violation." *Gerawan I*, 24 Cal.4th at 517.

On remand, the Court of Appeal did not decide which test to apply, but instead found the marketing program unconstitutional under any applicable test, because the government's asserted interests were not sufficient to outweigh the dissenting plum growers' free speech interests. It based this conclusion largely on the fact that the program was subject to approval by a private association, finding that the lack of compulsion rendered the state's professed interests illusory. 94 Cal.App.4th 665 (2001).

Which Test to Choose?

In its latest opinion, the California Supreme Court again refused to determine whether the compelled advertising program was constitutional – finding that it could not decide the issue on the pleadings – but finally determined that *Central Hudson* was the appropriate test for addressing the question. The court also rejected plaintiff's argument that its First Amendment claim, dismissed in *Gerawan I*, should be revisited in light of a subsequent compelled advertising case, *United States v. United Foods, Inc.*, 533 U.S. 405 (2001).

United Foods invalidated an assessment imposed on producers to fund generic advertising of mushrooms. The Court distinguished *Glickman* on the ground that the mushroom advertising assessment was not ancillary to a more comprehensive program restricting market autonomy.

The Court held the program thus violated the First Amendment test under *Abood* and *Keller*, because the speech the growers were compelled to fund was not germane to a purpose, independent of the speech itself, that justified the compelled association. *Id.* at 414-15.

As the latest *Gerawan* opinion puts it, *United Foods* "modified *Glickman*'s holding in this sense: *United Foods* holds that the compelled funding of commercial speech does not violate the First Amendment *if* it is part of a larger marketing program, such as was the case in *Glickman*, and *if* the speech is germane to the purpose of the program."

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The California Supreme Court took this as a tacit acknowledgement that, contrary to *Glickman*, "compelled funding of commercial speech must be said to implicate the First Amendment, i.e., such compelled funding requires a particular constitutional inquiry along the lines of *Abood* and its progeny."

The California court further opined that in light of *United Foods*, *Glickman* "can now most sensibly be read as simply holding that [the federal marketing order] did not violate the First Amendment because it passed the *Abood* test." (Whether the Supreme Court itself will adopt this reinterpretation of *Glickman*'s rationale remains to be seen; it will have the opportunity to do so in the advertising assessment case it will hear next term.)

The California court also rejected Gerawan's argument that the California plum marketing program violated the First Amendment under *United Foods*. The court held the state regulatory scheme was "not materially different from the one that passed constitutional muster in *Glickman*," in that it "is part of a larger cooperative regulatory program with substantial nonexpressive elements."

The three concurring justices all would have reached the First Amendment question, with Justice Kennard finding that Gerawan had at least pled its way around *Glickman*, and Justice Brown suggesting *Gerawan I* should be revisited in light of *United Foods*.

On the question of which standard to apply to the state constitutional issue, the court reasoned that because the California free-speech clause was more protective of commercial speech than the First Amendment, a more stringent standard than the one applied in *United Foods* (the compelled association standard) was warranted. Specifically, the court held the case was governed by the four-part *Central Hudson* test.

How Central Hudson Might Apply

The court did not determine whether the plum marketing program would be constitutional under *Central Hudson*, but did provide guidance for how the case should be approached on remand.

On the first *Central Hudson* prong, the court found the speech at issue was constitutionally protected, since "the right Gerawan seeks to exercise has nothing to do with untruthful or misleading speech on its part."

In the usual *Central Hudson* case, this prong addresses the government's right to regulate or suppress commercial speech, recognizing that false commercial speech is unprotected from state intervention. The California Supreme Court's articulation of prong one here does not address what "speech" it supposed Gerawan was seeking to exercise, thereby evading the point that this *Central Hudson* prong is a somewhat awkward fit where the government is not trying to restrict speech, but to compel it.

On prong two, whether the government interest is substantial, the court found the government's interest in protecting agriculture sufficiently weighty "in the abstract."

Remand on this point was required, however, because the court could not determine from the existing record whether the goals articulated in the state statute "are in fact the goals of the marketing program at issue in this case, and further factfinding is required to ascertain the nature of the government's actual interest."

As noted above, however, the court rejected the Court of Appeal's finding that the government had undermined any claim of substantial interest by empowering a privately controlled board to administer the advertising program.

The third *Central Hudson* prong – direct and material advancement of the asserted interest – likewise required further factual development, as "there is as yet no evidence in the record to support the government's position that generic advertising is an efficacious means of significantly improving the sale of agricultural products in this state."

The final prong, whether the regulation is no more extensive than necessary to serve the asserted interest, also could not be determined on the pleadings. The court rejected plaintiff's argument "that, as a matter of law, the government always has an alternative means of encouraging plum sales through subsidies drawn from general revenue."

"Moot within a year?"

Gerawan is the latest in a spate of constitutional challenges to generic advertising programs. *See, e.g.*,

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One More Bite at the Plum

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Michigan Pork Producers Ass'n, Inc. v. Veneman, 348 F.3d 157 (6th Cir. 2003) (invalidating pork marketing program under *United Foods*); *Delano Farms Co. v. California Table Grape Com'n*., 318 F.3d 895 (9th Cir. 2003) (because "90% of the assessment money is spent on generic promotional activities" with little other collective action, grape marketing program failed under *United Foods*).

The U.S. Supreme Court recently granted *certiorari* in such a case. The latest *Gerawan* opinion thus may be a precursor of a new, more clearly articulated standard for deciding such cases – or, as Justice Brown predicted in her concurring and dissenting opinion, it may well "be moot within a year."

Justice Brown also noted that "the high court presumably granted the petition for writ of certiorari because the federal Courts of Appeals have apparently recognized 'at least four variations' of the federal constitutional 'standard for determining the validity of laws compelling commercial speech' since *United Foods*."

The U.S. Supreme Court will review an Eighth Circuit opinion involving generic advertising for beef (including the "Beef: It's What's for Dinner" campaign). The case is *Livestock Marketing Ass'n. v. U.S. Dept. of Agric.*, 335 F.3d 711, 717 (8th Cir. 2003), *cert. granted sub. nom. Veneman v. Livestock Marketing Ass'n.*, 72 USLW 3539 (May 24, 2004, No. 03-1164) (consolidated with the related case of *Nebraska Cattlemen, Inc. v. Livestock Marketing Ass'n.*, *cert. granted* 72 USLW 3539 (May 24, 2004, No. 03-1165)).

The Eighth Circuit concluded the beef program was materially identical to the program that was invalidated in *United Foods*. Unlike *United Foods* – but in line with *Gerawan* – the Eighth Circuit applied the *Central Hudson*. The court concluded that the government's asserted interest in protecting the beef industry was insufficient to overcome plaintiffs' First Amendment rights.

In *Gerawan*, attorney Erik Jaffe argued for the plaintiff before the California Supreme Court. Deputy Attorney General Tracy Winsor argued for the state, and Seth Waxman of Wilmer Cutler Pickering argued on behalf of the California Table Grape Commission, which (along with 19 other state agricultural commissions) appeared as *amicus curiae* supporting the state. Steven Brody of King & Spalding submitted an *amicus* brief on behalf of Washington Legal Foundation in support of Gerawan Farming.

Eric M. Stahl is a partner with Davis Wright Tremaine LLP in Seattle.

"America's Favorite Pasta" Claim Is Mere Puffery

The Eighth Circuit affirmed summary judgment dismissing a Lanham Act claim over the advertising slogan "America's Favorite Pasta." *American Italian Pasta Company v. New World Pasta Company,* No. 03-2065, 2004 WL 1237636 (8th Cir. June 7, 2004). The court, in a decision written by Judge William Wiley and joined by Judges Richard Arnold and Michael Meloy, held that the slogan was not a statement of fact, but rather non-actionable puffery.

Background

The American Italian Pasta Company, which manufactures pasta products under the Mueller's brand, brought a declaratory judgment seeking a ruling that the pasta slogan used on its Mueller's products did not violate the Lanham Act. New World Pasta Company, owner of brands like Ronzoni and San Giorgio, counterclaimed that the slogan constituted false and misleading advertising.

The district court dismissed the Lanham counterclaim, holding that the slogan was non-actionable puffery as a matter of law.

Puffery as Commercial Speech

Affirming, the Eighth Circuit outlined the differences between non-actionable puffery and statements of fact. The Court ruled that the phrase "America's Favorite Pasta" was neither actionable as a stand-alone statement, nor when considered in its particular context. The phrase did not make "a specific, measurable claim and [could not] be reasonably interpreted as an objective fact."

The Court reasoned that the slogan – which simply meant that the pasta was "well liked" and "admired" – was "subjective and vague" and could not provide an empirical benchmark for a false advertising claim.

The Court also noted that "[d]efining puffery broadly provides advertisers and manufacturers considerable leeway to craft their statements, allowing the free market to hold advertisers and manufacturers accountable for their statements, ensuring vigorous competition, and protecting legitimate commercial speech."

Consumer Survey Not Relevant

The Court rejected a consumer survey conducted by New World that purportedly showed that a significant percentage of consumers interpreted the slogan to mean that American's pasta products had national distribution and market dominance.

The Court ruled that allowing consumer surveys to determine the benchmark meaning of advertising statements would create "uncertainty in the marketplace."

> A manufacturer or advertiser who expended significant resources to substantiate a statement or forge a puffing statement could be blind-sided by a consumer survey that defines the advertising statement differently, subjecting the advertiser or manufacturer to unintended liability for a wholly unanticipated claim the advertisement's plain language would not support. The resulting unpredictability could chill commercial speech, eliminating useful claims from packaging and advertisements.

American Italian Pasta Company was represented by Robert D. Hovey, Thomas H. Van Hoozer, Scott R. Brown of Hovey & Williams and William R. Hansen of Duane & Morris. New World Pasta Company was represented by Stanley D. Davis, Paula Schaefer, Brent N. Coverdale of Shook & Hardy and Raymond L. Sweigart, Danielle Avolio, Forrest A. Hainline, III, Jennifer J. Starks of Pillsbury & Winthrop.

DUES REMINDER!

MLRC members who haven't paid their 2004 dues should contact Debby Seiden of MLRC at 212-337-0200 ext. 204, dseiden@ldrc.com

ECHR: Photos Taken in Public Can Violate Public Figure's Right to Privacy

In a decision with potentially enormous consequences, the European Court of Human Rights held that Germany violated Article 8 of the European Convention on Human Rights (respect for private life) when it dismissed complaints from Princess Caroline of Monaco over photographs taken of her in public. *von Hannover v. Germany*, No. 59320/00 (June 24, 2004). The decision is available through the Court's website at www.echr.coe.int.

At issue were photographs published in several German tabloid magazines of Princess Caroline in public, including a photo showing her on horseback, on a bicycle, shopping on her own and with her bodyguard at a market, leaving her Parisian residence, and tumbling over a chair at a beach club.

The German Federal Constitutional Court, the highest German court hearing constitutional questions, had ruled that the publication of the photographs was *not* an invasion of privacy. The court recognized that Princess Caroline was entitled to some protection of her private life outside her home – but only if she was in a secluded place out of the public eye "to which the person concerned retires with the objectively recognizable aim of being alone and where, confident of being alone, behaves in a manner in which he or she would not behave in public."

Upholding Princess Caroline's complaint, the ECHR ruled that German law did not adequately protect her from being photographed in public attending to her private business.

No Public Interest in Caroline Photos

The ECHR reasoned that the photographs did not involve the dissemination of "ideas," and that "the situation here does not come within the sphere of any political or public debate because the published photos and accompanying commentaries relate exclusively to details of the applicant's private life." *von Hannover* at ¶ 64.

According to the Court, "the decisive factor" in balancing privacy and free press is "the contribution that the published photos and articles make to a debate of general interest." "It is clear," the Court concluded, "that they made no such contribution since the applicant exercises no official function and the photos and articles related exclusively to details of her private life." *Id.* at ¶ 76.

The *MediaLawLetter* will publish a more detailed analysis on the impact of this decision in the July issue.

UK High Court Refuses to Enjoin Newspaper Reports of Affair

A London High Court last month refused to enjoin two Sunday tabloids from publishing reports that Sebastian Coe, the former Olympic gold medalist and Member of Parliament, and current head of the UK Olympic bid committee, had a 10 year extramarital affair.

The ruling is the first significant media privacy decision handed down following the House of Lords' decision last month in *Campbell v MGN Ltd* [2004] UKHL 22 (6 May 2004). Available online at: www.bailii.org/uk/cases/UKHL/2004/22.html. *See also MLRC MediaLawLetter* May 2004 at 39.

In *Campbell*, the House of Lords reinstated a damage award to model Naomi Campbell for newspaper articles that revealed she was attending Narcotics Anonymous meetings for a drug addiction. While declining to create a new tort of privacy, the House of Lords extended the law of breach of confidence to protect what it deemed the unjustified publication of confidential or private information.

Relying on the decision in *Campbell*, Coe sought to enjoin *The Mail on Sunday* and the *Sunday Mirror* from publishing articles based on paid interviews with his former mistress, Vanessa Lander. In the articles, she described intimate details of their relationship, including that she had an abortion.

In a Saturday night ruling, Mr. Justice Fulford held that any privacy right was outweighed by Lander's right to tell her story to the public and the newspapers' right to publish it.

According to a report in the Guardian Newspaper, the judge found that under the circumstances this was not a situation in which Coe could expect his privacy rights to be protected. Among other things, the judge noted that Coe is a high profile public figure, the relationship was an extramarital affair and some details were already publicly known.

The Bashford Case: A Cause for Dancing in the Streets?

Peter Bartlett & Nadia Banno

In *Bashford v Information Australia (Newsletters) Pty Ltd,* (2004) 204 ALR 193, a divided High Court of Australia opened the door for publishers of subscription services to avail themselves of the defense of qualified privilege in defamation actions.

While one dissenting justice wrote the decision will have far reaching implications, it would be a stretch to see the defense applying to the daily media, even where many readers are regular subscribers. The decision has already been raised and rejected by the trial court hearing the *Gutnick v. Dow Jones* case.

Newsletter Sued for Libel

Information Australia published a subscription newsletter, the *Occupational Health and Safety Bulletin* (the "Bulletin"). In its May 28, 1997 issue, it printed an article which reported that in a Federal Court case, the Court found "R.A. Bashford," rather than R.A. Bashford Consulting Pty Ltd, liable for misleading and deceptive conduct.

Mr Bashford, a director of R.A. Bashford Consulting, instituted defamation proceedings against Information Australia after Information Australia refused to print a correction or offer an apology.

At the defamation trial in the New South Wales Supreme Court, the jury of four found that Information Australia, by publishing a false report of the Federal Court case, defamed Mr Bashford. However, Mr Bashford's claim ultimately failed as Information Australia successfully relied on the defense of qualified privilege. Both of Mr Bashford's appeals to the New South Wales Court of Appeal and the High Court were unsuccessful.

The High Court Decision

In upholding the defense of qualified privilege, there were several factors that the High Court majority identified in support of the existence of a reciprocal duty or interest between Information Australia and its 900 subscribers.

The subject matter of the Bulletin and its readership had a narrow focus. The subscribers to the Bulletin were persons responsible for occupational health and safety in the workplace. By accepting subscriptions, Information Australia "*undertook to publish a periodical of the kind it described - a guide to workplace health and safety*."

The dissemination of information about occupational health and safety to those responsible for it advanced "*the common convenience and welfare of society*" by assisting occupational health and safety practitioners comply with and implement the relevant laws and regulations.

Finally, the reporting of the Federal Court decision was of intrinsic interest to Information Australia's subscribers as the subject matter was evidently connected to occupational health and safety.

Majority Focused on Special Nature of the Publication

It is important to note however that the majority's decision in this case did not signal a significant expansion of the scope of the defense of qualified privilege for the benefit of media defendants. In their joint judgment, Chief Justice Gleeson and Justices Hayne and Heydon emphasized that:

> What set the respondent's Bulletin apart from some other paid publications was the narrow focus of both its subject matter and its readership. Because its subscribers were only those responsible for occupational health and safety matters, and because it dealt only with those subject matters, there was that reciprocity of duty or interest between maker and recipient which attracted qualified privilege. The circumstances were, therefore, very different from those in which the general news media deal with matters of political or other interest.

Dissenter Sees Wider Impact

Justice McHugh, one of the dissenting Judges, believed the majority's judgment had more far reaching implications and was of the view that the decision would apply to at least all subscription journals.

According to Justice McHugh, occasions of qualified privilege may now include:

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1) a medical journal that falsely stated a person had died because of a particular doctor's negligent diagnosis;
2) a legal journal that falsely reported the professional misconduct of a practitioner or judge or the incompetence of a journalist writing on legal matters;
3) any subscription magazine concerning general health and consumer matters if the subscribers are mainly persons who have responsibilities in respect of health and consumer matters;
4) specialist publications concerning companies sent to investors, credit officers and other persons responsible for financial matters;
5) the publication of a trade union or trade association journal to members of organizations responsible for advancing and protecting the interests of those members.

Justice McHugh concluded:

> *It may not cause any dancing in the streets, but it is likely to be celebrated in the offices of the publishers of subscription magazines dealing exclusively with subjects of public interest and it will almost certainly be celebrated beyond that newly privileged group of publishers.*

Bashford Decision Raised in Gutnick Case

The *Bashford* decision was recently raised in the Supreme Court of Victoria in the high profile defamation case of *Gutnick v Dow Jones & Co. Inc. (No. 4)*, [2004] VSC 138.

Justice Bongiorno considered the effect of *Bashford* and emphasised that:

> In Bashford the narrow focus both of the subject matter of the publication and its readership were essential to the High Court's holding that there was the necessary reciprocity of duty and interest between publisher and subscriber to give rise to an occasion of qualified privilege. The decision rests upon the confined nature of the publication and its distribution "… to persons responsible for occupational health and safety, and not to a wider audience."

In applying *Bashford*, Justice Bongiorno concluded that "*full weight must be given*" to the requirement that "*a narrow focus both as to subject matter and audience*" be present.

The subscribers to Dow Jones' publications, *Barron's Online* and *Barron's* included brokers, financial advisers, the media, financial analysts and others connected to or working in the broking, finance, investment, and mining industries.

Justice Bongiorno ultimately found that the potential recipients of the information and the nature of the information conveyed were too broad to establish an occasion of qualified privilege. He compared the publications to two major Australian daily newspapers and a well known periodical, all of which publish business content and are obtainable by subscription, and stated:

> There is nothing in the defendant's [Dow Jones] pleading which would distinguish Barron's in either of its forms from The Age, the Financial Review, or the BRW as far as availability to the general public is concerned…Taken as a whole they [the published subject matters] would define the contents of any newspaper or magazine one could imagine which dealt with business or financial matters.

Conclusion

The narrow approach adopted by Justice Bongiorno in applying *Bashford* to the defense of qualified privilege signifies that there will be no dancing in the streets, at least for the time being.

Although the High Court's decision has opened the door for publishers of subscription services to avail themselves of the defense of qualified privilege in defamation actions, the door has certainly not been left wide open.

Peter Bartlett and Nadia Banno are with Minter Ellison in Melbourne, Australia.

MLRC would like to thank summer interns Adam Mandel, Michigan Law School; Jessie Mishkin, Harvard Law School; Phu Nguyen, Yale Law School and Julie Zando Dennis, Cardozo Law School for their contributions to this month's MediaLawLetter

New Zealand MP and Media Convicted of Contempt for Reports on Child Custody Case

By William Akel

The New Zealand High Court recently issued an interesting contempt decision involving media reports of a contentious family court proceeding. *Solicitor General for New Zealand v Smith, TV3 Network Services Limited & Anor* (March 24, 2004).

As in the UK, the media in New Zealand can be charged with contempt for publishing reports that *might* impact ongoing court cases. Here the court found that "one-sided" news broadcasts improperly impacted a litigant and the public perception of the court process.

MP and Media Reported on Custody Dispute

Nick Smith is a high-profile opposition Member of Parliament and former high-ranking cabinet minister. He is energetic, hardworking and tries to help constituents. However, in this instance he overstepped the mark, and got himself a television channel and a radio broadcaster into difficulty under New Zealand's law of contempt.

The case involved actions by Smith, TV3, and Radio New Zealand relating to a Family Court dispute over the custody of a child between the child's birth parents, and another family member into whose care the parents had put the child.

Smith took up the cause of the child's birth parents who wanted to have the child back. The Family Court held that the child should remain with the caregiver. Smith seemed to think that this was wrong and went public about it on TV3 and RNZ.

Some of Nick Smith's language was extreme. He referred to the court's interim decision as "blatantly wrong" and "a travesty of justice" and the result as almost "state sanctioned child stealing." He described what had happened as "obscene," "a fiasco," and "an indefensible situation." He also referred to a court order as "a warrant for the child to be ripped out of his family's arms."

The Solicitor General charged that Smith, TV3 and RNZ committed a serious contempt of court by improperly pressuring the caregiver "to forego her legal rights, or to alter her approach to the proceeding," and attempting, or having the appearance of attempting, to "improperly influence the Family Court," and diminishing the validity of the Court's decision and standing in the eyes of the public.

This was a decision of two High Court judges sitting together because of the importance of the issues raised and the Court looked at the actions of Nick Smith, TV3 and RNZ separately to see if they had committed contempt.

MP in Contempt for Statements to Media

Nick Smith was found in contempt by putting improper pressure on litigants by a telephone call that he made to the caregiver. The Court said Smith had an "actual intention of persuading the caregiver to give up the case and surrender custody of the child." The Court found his public statements on Radio New Zealand, and his media release were "one-sided, emotive and extreme in terms of their language, and inflammatory and intimidating (particularly of the caregiver) in their effect."

The Court also found that Smith intended to influence the Family Court decision and to lessen public acceptance of its decision on the case. Smith undermined public confidence in the Court by the language he used. It amounted to an assault on the authority and integrity of the Court and the fairness and legitimacy of its decision.

It is important to stress that the focus was on the *probable tendency* of the publication, rather than its actual effect.

TV3 in Contempt for Pressuring Litigant

TV3's *20/20* documentary *Tug of Law* on the custody dispute was found to be in contempt by intending to put pressure on the caregiver to forego her claim to custody.

The Court found that the documentary contained "implicit if not explicit bias" from the outset, citing its opening:

> If you are one of the country's two million parents you might find the following programme disturbing. It is about parents' rights or lack of rights to have custody of their own children ....

The Court also sited the documentary's selection of images and scenes, including 1) a picture of the whole family with the child's face pixillated, and then the removal digi-

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New Zealand MP and Media Convicted of Contempt for Reports on Child Custody Case

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tally of the child leaving a gap in the family group; 2) the depiction of the child relaxing and playing happily with his birth family contrasted with the somewhat barren scenes of the caregiver and a child entertaining itself bouncing a ball down a street. The comparison was seen as deliberately odious.

The Court also found the documentary depicted the birth parents as healthy, hard working and closely knit, versus depiction of the caregiver as a poor parent with quite explicit suggestions that she has seriously neglected the child's education, development and health and exposed him to violence through living with a partner who has criminal convictions for violence. There was an image of an unidentified document in which the caregiver conveyed a threat to shoot the parents if they attempted to take the child.

The Court specifically rejected TV3's attempt to excuse the one-sidedness of the program by relying on the caregiver's refusal to participate in it. The Court said that the caregiver must not be placed in the position of having to make her case on television rather than in Court in an effort to prevent public obloquy.

The Court referred to the fact that television is widely acknowledged to have a more powerful reach than radio or the print media. That follows from its ability to depict people and places in a way that can manipulate the emotions of viewers.

Accordingly the Court found that TV3 also intended to influence the decision of the Court, or at least create a risk of such influence. Although the program may not have intended to undermine public confidence in the Court, it carried a real risk of this.

The public interest defense did not apply. Nor was it a defense to which the Chief Family Court Judge had opened the gate by commenting on the case.

The Court said that the 20/20 *Tug of Law* program was a report of proceedings because "it describes the nature of the dispute, reports on the Court's decision and identifies the parties by their first names. It also identifies the locality of the parties."

Thus TV3 was found to have breached the Guardianship Act which prohibits reporting on the proceedings of Family Court matters, unless leave of the Court is obtained. Nick Smith was also found to have breached the Act.

Finally Radio New Zealand was found to have put improper pressure on the caregiver by broadcasting the interview with Smith. The Judges were critical of Radio New Zealand's program for talking about details of the case, and for the inadvertent release of the name of the child. It also said that there was a real tendency to influence the Family Court in its decision.

Conclusion

The decision is a restrictive one as far as the media are concerned. Contempt by scandalizing the Court is alive and well. The decision also highlights that news reports on controversial cases can be construed as attempting to dissuade a litigant from having a dispute decided by a Court.

On April 2, 2004, the High Court fined Nick Smith $5,000 but also praised his generosity to the birth family and said his intentions were worthy. The Court fined TV3 $25,000. They described its documentary about the Family Court as opportunistic, cynical and wrong. Radio New Zealand was fined $5,000. Its offense was in broadcasting the live interview with Nick Smith.

As a final note, the High Court recently confirmed the Family Court decision that the child should remain with the caregiver but granted generous visitation to the birth parents.

William Akel is a partner at Simpson Grierson, Barristers & Solicitors, in Auckland, New Zealand.

Any developments you think other MLRC members should know about?

Call us, send us an email or a note.

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Canadian Appeals Court Ups Damages in Cyberlibel Case

By Roger D. McConchie

On June 4, 2004 the Ontario Court of Appeal ruled that one of the largest gold mining companies in the world was entitled to $75,000 general damages and $50,000 punitive damages for "a systematic, extensive and vicious campaign of libel" conducted over the Internet. *Barrick Gold Corp. v. Lopehandia*, [2004] O.J. No. 2329. The decision is available online at: www.ontariocourts.on.ca/decisions/2004/june/barrickC39837.htm

The campaign involved the postings of hundreds of false and defamatory statements concerning the corporation on various websites. The lower court judge had awarded only $15,000 in damages, but the Court of Appeal increased damages eight fold.

Default Judgement

When the defendants failed to defend Barrick's lawsuit, the Ontario Superior Court granted the plaintiff default judgment but awarded only $15,000 general damages. Among other things, the lower court reasoned the defendant Lopehandia's statements were unlikely to be taken seriously by a reasonable reader and the defamatory words had not caused any serious damage to the corporation's reputation. The lower court judge also rejected the company's claim for punitive damages.

The lower court judge had awarded only $15,000 in damages, but the Court of Appeal increased damages eight fold.

8x Damages Increase on Appeal

When appellate courts in the common law provinces interfere with damage awards, the result is usually a reduction. This is one of the few cases which go the other direction. In fact, this award skyrocketed.

This case is probably the largest proportionate increase in damages by an appellate court (in a common law province) since the Supreme Court of Canada released its landmark libel damages decision in *Hill v Scientology* in 1995.

Cyberlibel Held To Be Specially Damaging

The decision sends a clear message that Internet defamers will not get off lightly on the theory that website rants are commonplace, expected by Internet users, and therefore less likely to be taken seriously than publications in the mainstream media.

To the contrary, under this decision damages may be increased by the following special factors: "Communication via the Internet is instantaneous, seamless, inter-active, blunt, borderless and far-reaching … Internet defamation is distinguished from its less pervasive cousins [other media of communications] in terms of its potential to damage the reputation of individuals and corporations ... [by] ... its interactive nature, its potential for being taken at face value, and its absolute and immediate worldwide ubiquity and accessibility."

Corporations Receiving Large Awards?

In the common law provinces, there have been very few libel damage awards of any significance to corporations – as opposed to individuals – over the last ten years. Corporations thinking of bringing suit have worried that doing so would be counterproductive – it would merely stir the web community to counteraction by spawning mirror sites that republish the defamation.

A fascinating element of the appeal court's judgment in *Barrick Gold Corp. v Lopehandia* is the following discussion [at paragraph 63]:

> Barrick is not 'the powerful party" in the context of the Internet. The impact of the Internet is to neutralize whatever "power" Barrick may have had, in terms of a communication battle with Mr. Lopehandia. In reality it is Barrick that is vulnerable to publications of this nature, and Mr. Lopehandia who is abusing his power. The Internet is one of the most powerful tools of communications ever invented and, as …[Collins, The Law of Defamation and the Internet] …indicates, it is "potentially a medium of virtually limitless international defamation."

In effect, if you libel a corporation on the Internet, the David v Goliath argument is going to get short shrift in the courtroom. The Internet is likely to enhance defendants' prospects of being tagged with punitive damages.

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Canadian Appeals Ct. Ups Damages in Cyberlibel Case

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Conclusion

Barrick Gold Corp. v Lopehandia makes it clear that it is no longer safe – if it ever was – for individuals or groups in Canada to engage in malicious campaigns of unjustifiable vilification of large corporations on the Internet.

In the past, some may have thought that corporations would not sue either because companies rarely received significant damage awards, the fear of bad publicity in the Internet community was a deterrent, or courts would discount damages awards on the theory Internet attacks have little credibility and therefore cause little damage. These considerations may be outdated in light of this decision.

Mainstream publishers, who are less likely to be stung by findings of persistent malice, should also take notice of the appeal court's comments about the propensity of Internet communications to increase the size of the general damages award.

The reasoning in *Barrick Gold Corp* is almost certain to have an inflationary effect on future awards, in part because more plaintiffs' counsel will consider it worthwhile to plead the companion Internet defamation when suing over hard-copy/normal broadcast publication.

Roger D. McConchie is the head of McConchie Law in Vancouver, Canada.

ACLU Gets Expedited Review of Patriot Act FOIA Request, But Information Is Exempt from Disclosure

The D.C. federal district court reviewing a Patriot Act FOIA request held that while plaintiffs were entitled to expedited processing of their request, the information was properly withheld under FOIA's national security exemption. *American Civil Liberties Union, et al. v. U.S. Dept. of Justice*, No. CIV.A. 03-2522, 2004 WL 1162149 (D.D.C. May 10, 2004) ("*ACLU II*") (J. Huvelle).

The American Civil Liberties Union (ACLU), Electronic Information Privacy Center, American Booksellers Foundation for Free Expression and the Freedom to Read Foundation sued to obtain, on an expedited schedule, records relating to Section 215 of the Patriot Act, an amendment that substantially expands the powers of the FBI under the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. § 1801 et seq.

Procedural History

The ACLU had previously requested information concerning the number of times the DOJ had used various surveillance tools authorized by Section 215 of the Patriot Act. *See ACLU v. DOJ*, 265 F.Supp. 2d 20, 34 (D.D.C. 2003) ("*ACLU I*"). In that case, the court granted summary judgment to the government, holding that the information fell under FOIA's national security exemption.

Section 215 allows the FBI to "make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information…or to protect against international terrorism or clandestine intelligence activities." Patriot Act § 215, codified at 50 U.S.C. § 1861 (a)(1).

The government has provided limited information to the public on its use of 215 (the provision itself prohibits anyone served with a section 215 order from disclosing that fact), and although the total number of secret surveillance warrants sought under the Patriot Act is required to be disclosed annually, the number of applications submitted and approved is shared only in classified form to designated congressional committees. *ACLU II* at *1.

Since the decision in *ACLU I*, Attorney General Ashcroft issued a memorandum declassifying the number of times the DOJ has utilized Section 215, in order to "address the troubling amount of public distortion and misinformation in connection with Section 215." *Id*. at *2 (quoting Mem. for FBI Director Robert S. Mueller from the Attorney General).

The declassification stated that Section 215 had been used zero times, a statistic representing the number of times a Section 215 FISA application was approved by the FISA court and then implemented by the FBI. *Id*. The Attorney General's declassification decision prompted the plaintiffs to renew their prior request, this time requesting the total number of Section 215 requests received by the FBI's National Security Law Unit from FBI field offices between October 26, 2001 and February 7, 2003, as well as any and all records relating to Section 215.

Expedited Processing Analysis

The court held that the FBI erroneously denied plaintiffs' request for expedited processing under FOIA's "Compelling Need" and "Media Interest" standards.

Expedited processing is available for FOIA requests "in cases in which the person requesting the records demonstrates a compelling need," 5 U.S.C. § 552 (a)(6)(E)(iii). A person "primarily engaged in disseminating information," can demonstrate a compelling need by demonstrating an "urgency to inform the public concerning actual or alleged Federal Government activity." *Id.* § 552(a)(6)(E)(v)(II); *see also* 28 C.F.R. § 16.5(d)(1)(ii).

A FOIA request may also be expedited pursuant to DOJ regulation if it involves a "matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." 28 C.F.R. § 16.5(d)(1)(iv).

The court first rejected the government's argument that the plaintiffs failed to exhaust all administrative remedies before bringing suit. The court pointed out that FOIA specifically authorizes judicial review for challenges to "[a]gency action to *deny or affirm denial* of a request for expedited processing," concluding that administrative ap-

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ACLU's Gets Expedited Review of Patriot Act FOIA Request, But Information Is Exempt from Disclosure

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peal is not a "*prerequisite*" for judicial review. *Id*. at *3 (emphasis added) (citing U.S.C. § 552(a)(6)(E)(iii).

The court concluded that plaintiffs demonstrated a "compelling need" for the documents, based on three factors "(1) whether the request concerns a matter of compelling exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity." *Id*. at *4.

Plaintiffs submitted newspaper articles discussing the Patriot Act to show public concern regarding the Act and the ongoing national debate about legislative proposals to renew or amend the Patriot Act before it expires in December 2005.

The court also examined the alternative standard of "media interest" under 28 C.F.R. § 16.5(d)(1)(iv) and found the government's refusal to expedite fails the reasonable test here as well. The court recognized in *ACLU I* that "the Patriot Act has engendered controversy and debate," and noted that even the handful of articles cited by the plaintiffs in their request demonstrate that section 215 is a matter of "widespread and exceptional media interest." *Id*. at *5 (quoting *ACLU I*, 265 F.Supp.2d at 24).

The court also found that the articles illustrated that the requested documents relate to government integrity (such as one article stating: "Ashcroft's defenders challenge skeptics to provide evidence that anyone's rights have been abused by the Patriot Act. But how could anyone tell?"). *Id*. (quoting Editorial, *Ashcroft's Dragnet*, Boston Globe, Sept. 9, 2003, at A14).

FOIA's National Security Exemption

The government argued that res judicata barred the plaintiffs' current request because the issue was litigated in *ACLU I* where it was determined that the information sought fell under the national security exemption.

The court reasoned that res judicata does not preclude claims based on facts not yet in existence at the time of the original action, or when changed circumstances alter the legal issues involved, and the plaintiffs here presented a new issue based on the Attorney General's declassification memo (plaintiffs argued the declassification undermined the justifications previously used for withholding on Section 215). Thus plaintiffs were found to be asking a new question – whether the statistics they sought was "Properly withheld in light of the Attorney General's declassification decision." *ACLU II* at *8.

The court concluded, however, that while plaintiffs' claim was not precluded by res judicata, it could still not overcome the "formidable hurdle erected by Exemption1." *Id*.

In *ACLU I*, the court found that the government had satisfactorily explained that revealing information on the focus of FBI efforts would "enable adversaries to discern whether and to what extent business records and other items in the possession of third parties offered a safe harbor from the FBI"; "enabling our adversaries to conduct their intelligence or international terrorist activities more securely"; and allow terrorist groups to conclude "that it is comparatively safe to conduct certain operations and activities based on the FBI's allocation and direction of resources." *Id*. at *8-10 (quoting 265 F.Supp.2d, at 28.

Moreover, the court noted that the D.C. Circuit had embraced the government's "mosaic argument" in the context of FOIA requests that implicate national security concerns, such that when viewed as a piece of a "mosaic," disclosure of the requested information would likely reveal a significant picture about the FBI's investigative techniques under the Patriot Act. *Id.* at *11 (*citing Ctr. For Nat'l Security Studies v. DOJ*, 331 F.3d 918, 928 (D.C. Cir. 2003)).

The court held that while resolution of this issue is not free from doubt, it is constrained by the binding precedent of Circuit law to uphold the government's claim of exemption because "it is mindful of the 'long-recognized deference to the executive on national security issues,' and the need to accord 'substantial weight' to an agency's" judgment on security issues. *Id.* at *10 (*quoting Nat'l Security*, 331 F.3d at 927-28).

While not equating deference with acquiescence, the court found it was the responsibility of the executive agencies and not the judiciary to determine whether disclosure of information was an unacceptable risk to national security.

Plaintiffs were represented by David L. Sobel, Arthur B. Spitzer, and Jameel Jaffer. The government was represented by Raphael O. Gomez and Elizabeth J. Shapiro, of the U.S. Department of Justice.

LEGISLATIVE UPDATE

Broadcast Decency, Coffin Photos & Sensitive Information

By Kevin Goldberg

The legislative calendar in both houses is dwindling, which means that we have entered a season where all bets are off. Bills will be thrown directly to the floor without hearings or markup in their committee or reference and some may just be tacked on to one of the many appropriations or reauthorization bills that will zip through both Chambers as legislators try to keep the government intact for another two years. The three bills discussed below all have, or are expected to, meet this fate in order to get passed.

Broadcast Decency Enforcement Act of 2004 (HR 3717 and S 2056)

- Representative Fred Upton (R-MI) introduced the Broadcast Decency Enforcement Act (HR 3717) on January 21, 2004. The Telecommunications and Internet subcommittee held a hearing on January 28, 2004. HR 3717 passed that subcommittee on February 11, 2004. Another hearing was held in the Telecommunications and Internet Subcommittee on February 26, 2003.
- The full Energy and Commerce Committee then held a markup session on March 3, 2004 at which the bill was passed by a vote of 49-1 with some significant amendments. As passed by the Energy and Commerce Committee, HR 3717 now allows for a fine of up to $500,000 per violation. There is no longer a $ 3 million ceiling for cumulative violations. Instead, the only "maximum" pertains to the fact that three violations will subject the licensee to a hearing before the FCC as to whether it is operating its license in the public interest.
- Meanwhile, Senator Sam Brownback (R-KS) introduced a companion bill in the Senate. S 2056 was introduced on February 9, 2004 and referred to the Committee on Commerce, Science and Transportation. It passed that committee on March 9, 2004.
- There are still some differences which must be worked out between the two bills before either is presented to the President. These include:
  - HR 3717 provides for a maximum penalty of $500,000 per violation, while S 2506 provides for a maximum penalty of $275,000 for a first violation by a licensee, $375,000 for a second violation by the same licensee and $500,000 for a third or any subsequent violation by that licensee, with an overall cap of $3 million for any one twenty-four hour period or single continuing violation (both specifically authorize the institution of license revocation proceedings after three violations of the indecency rules).
  - S 2506 would allow the industry to begin self-regulation through the institution of a voluntary code of conduct while HR 3717 does not create any form of antitrust or other exemption specifically permitting such action.
  - S 2506 requires the FCC to suspend its recently-passed media ownership rules pending a study of the correlation between media ownership and indecency; HR 3717 does not.
  - S 2506 incorporates the "Children's Protection from Violent Programming Act," which allows FCC regulation of violent programming; HR 3717 does not.
- In an effort to sidestep the conference process, Senator Brownback attached his bill to a most unlikely host: the Department of Defense ("DOD") authorization bill which passed on June 24.

Coffin Photos

- Senator Frank Lautenberg (D-NJ) also sought to use the Department of Defense authorization bill for a more welcome amendment on coverage by the media of the return to the United States of the remains of soldiers killed overseas.
- This has been a controversial issue for several months. The Bush Administration has been aggressively enforcing a policy that prevents the press from covering the repatriation ceremonies at air force bases around the country – the most well-known of which occurs at Dover Air Force base, which handles the majority of these ceremonies.

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Legislative Update

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The controversy flared up during one week in April, when a military contractor was fired for releasing photographs she had taken of a room full of flag-draped coffins. This occurred within days of a federal court ruling that a website known as "The Memory Hole" could have access to similar photos taken by the Department of Defense itself. The Court ruled that FOIA mandates such access.

- On March 11, 2004, Rep. Charles Rangel (D-NY) introduced H. Con. Res. 384, which seeks to remove all restrictions on the ability of the press to cover repatriation ceremonies, stating: "That all restrictions should be removed from the public, the press, and military families in mourning that would prohibit their presence at the arrival at military installations in the United States or overseas of the remains of the Nation's fallen heroes, the members of the Armed Forces who have died in Iraq or Afghanistan, with the assurance that family requests for privacy will be respected." Rangel's resolution has not been voted on by the House.
- On June 7, Senator Lautenberg introduced his amendment to the DOD bill. It requires the Secretary of Defense to "develop a protocol that permits media coverage of the return to the United States of the coffins containing the remains of members of the Armed Forces who are killed overseas." That protocol allows for open repatriation ceremonies, while ensuring that the ceremonies remain dignified and the identities of the actual soldiers whose remains are being returned to the United States are kept confidential. Lautenberg's amendment was defeated on June 21 in the Senate on a 54 to 39 vote.

Sensitive Security Information Held by the Transportation Security Administration

- The term "Sensitive Security Information" ("SSI") first burst on to the scene in the mid-1970s. However, sections of the Homeland Security Act of 2002 which further expanded the definition of SSI and restricted its distribution to the public through the Freedom of Information Act have brought this issue to the forefront of concerns among those in the requestor community.

  A section of a highway funding bill and interim rules issued by the Transportation Security Administration has increased fears that access to this unclassified information will be gone forever.

- Sensitive Security Information is currently defined by the Transportation Security Administration as information that would:

  1) Be an unwarranted invasion of personal privacy
  2) Reveal a trade secret or privileged or confidential commercial or financial information
  3) Be detrimental to the safety of passengers in transportation

  Section 3029 of HR 3550 (the "Safe, Accountable, Flexible and Efficient Transportation Act of 2004") would add the following to the underlined language: "transportation facilities or infrastructure, or transportation employees," thus infinitely broadening the government records that would fall under the definition of SSI. That section would also prevent any state or local government from "enacting, enforcing, prescribing, issuing or continuing in effect any law, regulation, standard, or order to the extent it is inconsistent the SSI definition and regulations."

  Thus, state and local governments would be rendered powerless in fighting threats to the transportation infrastructure.

- This bill is currently before a conference committee, which is ironing out the differences between the versions passed by the House and the Senate (the Senate version of this bill has the offending provisions, while the House does not).
- At the same time, similar changes are being contemplated by the Transportation Security Administration itself, which is accepting comments on interim rules that have made these and other changes to expand the breadth of SSI. Comments can be filed until July 19, 2004.

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

PREPUBLICATION COMMITTEE REPORT

Congress Shall Make No Law Respecting an Establishment of Religion, or Prohibiting the Free Exercise Thereof . . . .

By Alice Neff Lucan

We've been reminded recently of the Supreme Court's reluctance to take on issues that require a decision about religion. In many cases, this is not simply judicial reluctance; such considerations are prohibited by the First Amendment. It is interesting and potentially useful to note the occasions when this prohibition has caused courts to dismiss defamation claims.

The doctrine is called "ecclesiastical abstention" and it requires that civil courts cannot determine the correctness of an interpretation of canonical text or any decision relating to the government of the religious organization.

In March of this year, Judge Kimba Wood of the U.S. District Court in Manhattan dismissed a claim that included a defamation count, brought by a senior associate pastor against the management of her church because they fired her, charged her with conduct unbecoming clergy and repeated vague statements to church members and to prospective employers.

Judge Wood ruled that the establishment clause, quoted above, does not allow courts to "second-guess" a church's determination of who is fit to perform religious duties. Thus the truth or falsity of the facts underlying the defamation claim could not be decided by a civil court.

The action, *Kraft v. The Rector, Churchwardens and Vestry of Grace Church*, 2004 WL 540327 (S.D.N.Y. March 15, 2004) was primarily an employment discrimination action. Judge Wood ruled that the establishment clause, quoted above, does not allow courts to "second-guess" a church's determination of who is fit to perform religious duties. Thus the truth or falsity of the facts underlying the defamation claim could not be decided by a civil court.

This judicial fastidiousness must apply to anyone, not just religious professionals. For example, a publication charged that the Orthodox Jewish plaintiff was "not entitled to any honors or participation in synagogue services and that all possible social sanctions should be placed against him."

The charge was based on allegations that the plaintiff had not granted a Jewish divorce to his wife of nearly thirty years, and yet had remarried himself, claiming special rabbinic permission to do so. In order to determine the truth or falsity of the statements, the court would have to examine ecclesiastical questions, specifically, whether plaintiff had engaged in bigamy within the meaning of the Orthodox Jewish faith. The claim was dismissed for lack of subject matter jurisdiction. *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F. Supp.2d 732 (D.N. J. 1999).

Of course, the pre-publication lawyer can never take this "safe harbor" for granted. When a group of five priests claimed that they had been defamed by a *New York Times* article, the trial court and the Second Circuit both agreed the libel claim should be dismissed, but the dismissal was based on a classic failure to show actual malice by clear and convincing evidence.

One of fourteen statements the priests claimed to be defamatory said that they were in a kind of "canonical limbo," which surely sounds like a question of religious polity. But, not so, said the Second Circuit.

"The phrase 'canonical limbo' is used in a colloquial way, and taken in this light, does not seem unfounded. Nowhere does the article state that the appellants are not ordained priests or suggest that efforts to defrock the priests have ever been initiated." *Contemporary Mission v. New York Times Co.*, 842 F.2d 612, 625 (2d Cir. 1988). Moreover, while "[the reporter] may have been sloppy in places in her writing, there is nothing to suggest that she entertained serious doubts about the truth of the challenged statements." *Id.* at 623.

Even when an organization sued for defamation based on charges that it flouted church doctrine, the Fourth Circuit treated the case as a classic defamation claim brought by public figures. The New Life treatment centers, treat-

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Prepublication Committee Report

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ing dysfunctional behavior in Catholic priests and other religious professionals, sued *The Catholic World Report* based on published statements that New Life treatment centers were nothing more than "Church-run psychiatric gulags, usually operated by theological liberals, often by men who are openly and actively homosexuals."

More than that, religious professionals who had been treated were quoted in the article saying that "counselors at the centers urged patients to flout Church doctrine (particularly the Church's position on homosexuality) and ridiculed patients who expressed belief in or support for Church theology and teachings." *New Life Ctr., Inc. v. Fessio*, 2000 U.S. App. LEXIS 20894 (4th Cir. 2000).

And yet, the words "ecclesiastical abstention" never appear on the pages of the Fourth Circuit decision. Even if neither party raised the issue, the Court would be obliged to consider whether it had jurisdiction over any matter, at any stage that someone thought of the problem.

Instead, the Fourth Circuit held the organization and its priests to be public figures, in part because of the nature of the public controversy surrounding aberrant priests and the Church's responsibility for their behavior.

"Questions about the effectiveness of the treatment provided to offending priests was a significant aspect of the priest-misconduct controversy from the very beginning. For example, many of the lawsuits against the Church and individual priests alleged that the abuse occurred after the priest received treatment or even while the priest was receiving treatment." *Id.* at 14-15.

This is one of those small exceptions, kept in the back of one's mind, that can make a huge difference when it is raised appropriately.

Alice Neff Lucan practices in Washington D.C. and is a member of the Pre-publication / Pre-Broadcast Committee.

Pew Survey Says Bottom Line Pressure Is Hurting News Coverage

A majority of journalists now say that staff reductions and the pursuit of profits are hurting news coverage, according to a Pew Research Center report, issued May 23, 2004. The report, "Bottom-line Pressures Now Hurting Coverage, Say Journalists," is part of *State of the News Media 2004*, an annual report on American journalism co-sponsored by the Pew Research Center for the People & the Press, the Committee of Concerned Journalists, and the Project for Excellence in Journalism.

Financial Pressure in Newsrooms

According to the report, financial pressures have resulted in paying too little attention to complex news stories and stressed newsrooms more prone to factual errors and sloppy reporting.

Traditionally, the press has been criticized as too cynical, but today journalists are more likely to fault the press for being too timid.

The annual survey was conducted March 10th through April 20th among 547 national and local reporters, editors and executives, in both print and broadcast media. The demographic profile of respondents was predominantly white (over 77%), well-educated (90% with college degrees), middle-aged, (median age of 47 years) and experienced (median experience 22 years). Of print journalists, half have a degree in journalism, while communications degrees are more common among local broadcast professionals.

As it has been in previous Pew surveys dating back to 1999, the quality of news coverage is cited as the most important problem facing the profession. The top concerns are sensationalist coverage, a lack of depth, relevance and objectivity, and the need for accuracy. What is new about the most recent survey is that a majority now believe that business and financial factors contribute to poor coverage.

Sizeble majorities of journalists (66% nationally and 57% locally) think "increased bottom line pressure is seriously hurting the quality of news coverage." Fewer than half in the news business felt this way in 1999. For journalists who cover the local news, concern over business and financial factors is up 25% from 1999, and it is mentioned as frequently as concerns over the quality of coverage. Furthermore, journalists see the problem as more "intractable" than they did a few years ago.

"Business" and "financial" pressures are defined by five factors: decline in audience/readership; lack of resources/cutbacks; bottom-line emphasis, corporate ownership and consolidation, and commercial/ratings pressure. Print journalists main economic concern is declining audience, followed closely by reductions in staffing, while broadcast journalists are nearly twice as likely to feel pressure to make profits and to get bigger ratings.

Media Consolidation

Concern over media consolidation has doubled between 1999 and 2004. Given the trend toward consolidation, it's not surprising that journalists today are less likely than in 1999 to mention increasing competition as a problem (17% of national and 15% of local felt competition was a problem in 1999, compared to just 5% of national and 2% of local journalists today).

24/7 News Cycle

The changing media environment, most notably the Internet and the 24-7 news cycle, is having an impact on journalists' workloads. While not all believe that the 24-7 news cycle has decreased the quality of news coverage, those journalists concerned about bottom-line pressures are twenty-four times as likely to cite the 24-hour news cycle as weakening journalism.

Forty two percent of the national media and 35% of the local say the Internet has intensified the deadline pressure they face, increasing factual errors and sloppy reporting. The number of national journalists who view this as a valid criticism has increased steadily from 30% in 1995, to 40% in 1999 to 45% today. All told, the number of journalists who say the Internet has made journalism worse jumped from 8% in 1999 to 18% in 2004.

Alternatively, news people acknowledge the Internet has had a positive impact on journalism, citing timely and fast retrieval of information and more efficient delivery as

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Pew Survey Says Bottom Line Pressure Is Hurting News Coverage

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factors that make more information available to the public. Seventy-two percent of those under 35 years old think the Internet has been good for the profession. Journalists age 35 and older think so by a smaller margin (54% better, 15% worse).

White House Coverage

The report also surveys journalists' perceptions of the coverage of the President and the White House— concluding it is "timid" — and surveys the ideologies and attitudes of journalists.

Traditionally, the press has been criticized as too cynical, but today journalists are more likely to fault the press for being too timid. Fifty-five percent of national reporters feel the press coverage of the Bush administration has been "not critical enough." Forty-six percent of local print journalists agree.

In contrast, local television journalists are two times more likely than local print journalists, and three times more likely than national journalists, to feel that press coverage of the Bush administration has been "too critical."

This discrepancy matches the personal views and values of local, versus national, journalists. Local journalists are more likely to describe their political thinking as "moderate," while national journalists are more likely to describe themselves as "liberal." However, survey analysts argue that one should not infer too much by the "liberal" label journalists use to describe themselves.

Rather, they argue, "answers to [questions about ideology] suggest journalists have in mind something other than classic big government liberalism and something more along the lines of libertarianism." This view is supported by survey results that show more journalists think it is "more important for people to be free to pursue their own goals without government interference" than it is for "government to ensure that no one is in need."

Interestingly, this is true for every demographic except national print journalists, who were slightly more likely to answer that "the government [should] play an active role in society so as to guarantee that nobody is in need."

Social Issues

The survey questioned respondents on two hot-button issues to ascertain their social values: homosexuality and religion. Large majorities in every demographic felt that "homosexuality is a way of life that should be accepted by society" (94% national print; 82% national broadcast; 79% local print; 68% local broadcast), and comparable majorities answered that "it is not necessary to believe in God in order to be moral and have good values" (95% national print; 86% national broadcast; 90% local print; 65% local broadcast).

Journalists views on these subjects are much more accepting than the general public (51% of public agrees that homosexuality should be accepted in society; 40% of public believe that a belief in God is not necessary to be moral).

A copy of the report is available at: http://stateofthenewsmedia.org/journalist_survey.html

ETHICS CORNER

Unintended Consequences in Representing Multiple Media Clients

By Gary Bostwick

"You can learn little from victory.
You can learn everything from defeat."

Christy Mathewson, baseball's first superstar.

Imagine two different scenes. Reporters are calling to tell you that the appellate court has just issued an opinion affirming the summary judgment motion you conceived, wrote and argued in a major media case. You represented a media entity and a contributing writer. One of your clients, the writer, is fielding calls, just as you are, but feeling very different emotions when reporters read to her from the opinion.[1]

This is one thing you both hear:

> "Masson . . . argues that a jury could find actual malice by clear and convincing evidence based solely on the evidence he presented showing that Malcolm had deliberately 'fabricat[ed] quotations ascribed to him.' . . . For the purpose of this appeal, we assume the quotations were deliberately altered." *Masson v. New Yorker Magazine, Inc.*, 881 F.2d 1452, 1453-1454 (9th Cir. 1989).

and

> "It is uncontroverted that Malcolm fictionalized certain quotations and attributed them to Masson." *Id.*

You, of course, are elated. You've won a victory for your client, the threat is quelled. The phrases "deliberately altered" and "fictionalized" are of little concern to you. You know that a court on summary judgment must consider all of the evidence in the light most favorable to the opposing party.

A reporter reads to you portions of the dissent. Your satisfaction is not diminished by hearing, "We therefore start with the assumption that Malcolm altered Masson's statements as he claims she did." *Id.* 1465. Lawyers are accustomed to intoning that syllogistic artificiality, "assuming arguendo, your honor." We all know the assumption is a device, not a concession. It doesn't affect the outcome. You won.

But your client's internal response while listening to the reporters' questions may be very different. She may cringe at hearing the above excerpts read to her, she may wonder if winning is really winning, perhaps wonder why no one notices the most important phrase in the entire opinion:

> "Malcolm claims that Masson made the statements in question precisely as she quoted them." *Id.*

That quote will be lost in the mélange of legal phrases, pooh-poohed, as it were, as just a "claim." Yet it may very well be the clearest truth she knows about the case and her conduct.

In the end, the publication prevailed, she prevailed. You've been the architect of victory.

Was it possible to imagine that those phrases, perhaps harmful to the writer, would appear in legal books in libraries throughout history? Perhaps not. But there's a lot to be learned here about how to conduct oneself before picking a strategy.

We all know that if we are asked to represent several clients jointly, we must examine their interests to determine if an actual or potential conflict exists.[2] More importantly, perhaps, if, in devising a strategic approach to the case, an actual or potential conflict develops, the lawyer must reevaluate the situation and, perhaps, obtain consents from the clients. But how sensitive are we to potential conflicts in media cases? Can we really spot them in advance?

A conflict may exist by reason of substantial discrepancy in positions relating to assertions made in the litigation, different stances with respect to assertions of privileges, discrepancies with respect to willingness to provide discovery or willingness to settle or, perhaps the most severe of conflicts, the decision to risk contempt of court. All of these instances can be particularly troubling since a writer or producer often feels he or she has far more to lose (their reputation, their professional standing, even their sense of worth) than the publication or broadcaster does.[3]

Usually, we litigators view our strategies with one goal in mind: winning. After all, that's what we're hired

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Ethics Corner

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to do. (Settling can, of course, constitute winning.) But that is a remarkably narrow and shortsighted standard for gauging our success. Since any strategy may give rise to a conflict of interest, the question arises: How do you stay alert to the disparate effects a given strategy may have upon the multiple clients that you represent? I just want to say two words to you:[4] Dream and Dialogue. The first word (Dream): you must imagine the worst possible outcome for each client if you decide to take the strategic course you contemplate. Your dreaming cannot be limited to how to win in isolation. It must include the practical, the everyday, the professional, and the psychological.

The second word (Dialogue): simply ask each individual client if he or she is willing to go forward with the strategy, given the imagined outcomes (even horribles) you explain to him or her. (Of course, you cannot do this adequately without describing the probabilities of the outcomes. Some are so unlikely as to be trivial, but they should hear them anyway.) It might be best in some cases to do the asking in writing. However you do it, it will be surprising if their own exercise in imagining doesn't come up with consequences and concerns you never thought of.

Let's consider some examples: A production company films a program on the playground of a public school open to the street. A network broadcasts the program. Litigation ensues. The network is paying the bills.

The network wants to settle, with a confidentiality clause. Imagine what effect this may have on the production company. In the real world, settlement sounds like an admission of liability. How will this affect the production company's ability to do business in the future, its reputation, the morale of its staff, its ability to obtain insurance? Unless you explore all this and much more, "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client."

Consider another example. Here's a quote from *Bartnicki v. Vopper*: "The suit at hand involves the repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue. The persons who made the disclosures did not participate in the interception, but they did know – or at least had reason to know – that the interception was unlawful."[5]

What if the facts change? Let's say the reporter has documents. The court orders defendants, both the newspaper and the reporter, to return the documents. If they do so, the case is over. Only one party wants to turn them over. In this case, you cannot choose a strategy without both parties clearly understanding and consenting to it after hearing all of the consequences.

A cameraman films a demonstration. The broadcaster has possession of the tape. The police want the tape and apply to a court to get it. The court orders its production. It is not difficult to imagine that the two clients may have different views about turning over the tapes. Once you imagine that possibility, you must go through the exercise outlined above. Each client must hear the best of your thinking about what may happen if they take one path or the other.

A final warning: Do not restrict your imagination. Try to imagine the worst. Try to imagine the worst of what the public, judges, colleagues and others will say about your clients' position before you choose to win the case and lose more than you bargained for. If one client feels as if they've lost and been misled to that result, it is hard to say that even the win was a "successful" conclusion.

Gary Bostwick is a partner with Sheppard, Mullin, Richter & Hampton LLP in Los Angeles.

[1] This is not a narration of actual facts. It is imagined, as a demonstrative device for purposes of illustration only.

[2] (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
* * * *
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. ABA Model Rules of Professional Conduct, Rule 1.7.

[3] "Truth is a journalist's stock in trade. To invoke the right to deliberately distort what someone else has said is to assert the right to lie in print. To have that assertion made by The New Yorker, widely acknowledged as the flagship publication when it comes to truth and accuracy, debases the journalistic profession as a whole. Whatever it might have taken to refute Masson's allegations on the merits is not, in my view, worth the unsettling implications left by defeating him on these grounds. Masson has lost his case, but the defendants, and the profession to which they belong, have lost far more." *Masson v. New Yorker, supra* at 1486.

[4] Apologies to Mr. McGuire and Benjamin Braddock in "The Graduate."

[5] *Bartnicki v. Vopper*, 532 U.S. 514, 517-518 (2001).

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TO

TED TURNER

WHO WILL BE INTERVIEWED ON THE OCCASION OF THE AWARD BY

Tom Brokaw
NBC News

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