

MILRC

Media
Law
Resource
Center

MEDIA LAW LETTER

Reporting Developments Through June 29, 2007

MLRC

Ethics	Prohibitions on Extrajudicial Speech Under the Rules of Professional Conduct <i>What Sorts of Speech Should the Rules be Considered to Prohibit?</i>	45
---------------	--	-----------

LIBEL / PRIVACY

N.D. Ill.	Publisher and Columnist Sue State Judges for Federal Civil Rights Violations <i>Media Plaintiffs Seek Declaratory Judgment and Injunction</i> Shaw Suburban Media Group, Inc. v. Thomas	3
Mass.	Boston Herald Pays \$3.4 Million in Libel Damages to Judge <i>Payment Followed State Supreme Judicial Court's Denial of Motion for Reconsideration</i> Murphy v. Boston Herald, Inc.	4
Kan. Dist. Ct.	Update: Kansas Court Vacates Libel Damages After Plaintiff's Death <i>Damage Award for Outrage Survives</i> Valadez v. Emmis Comm'cs, Inc.	4
Ohio	Supreme Court Expressly Recognizes False Light Invasion of Privacy <i>Potential Harm of Online Speech Cited in Support of Recognizing Tort</i> Welling v. Weinfeld	5
Idaho	Newspaper Wins Summary Judgment Over Alleged Misquote <i>No Evidence that Reporter Subjectively Doubted Accuracy of Quote</i> Clark v. Spokesman Review	6
Va.	Supreme Court Affirms Summary Judgment in Libel Suit Over Campaign Editorial <i>Editorial Was Published Without Actual Knowledge of Falsity or Recklessness</i> Jackson v. Hartig	7
Tenn. App.	Tennessee Appeals Court Analyzes Public Figure and Fair Report Issues <i>Libel Plaintiff an Involuntary Public Figure</i> Lewis v. Newschannel5	8
5th Cir.	Fifth Circuit Affirms Dismissal of Private Facts Lawsuit <i>Lawyers' Sex Blackmail Scheme a Matter of Public Concern</i> Lowe v. Hearst Comm'cs, Inc.	9
2d Cir.	Court Asks for Guidance on Jurisdiction Issue in <i>Ehrenfeld v. Bin Mahfouz</i> <i>Plaintiff is Seeking Declaration that UK Libel Judgment is Unenforceable</i> Ehrenfeld v. Bin Mahfouz	11
2d Cir.	Court Affirms No Jurisdiction Over Consumer Gripe Website <i>Judge Sack Gives Detailed Analysis of Jurisdictional Issues</i> Best Van Lines, Inc. v. Walker	12
Cal. Ct. App.	Online Retailer's Libel Action Over Financial Reports Survives Anti-SLAPP Motion <i>Court Rejects Opinion and Lack of Actual Malice Defenses</i> Overstock.com, Inc. v. Gradient Analytics, Inc.	15
S.D.N.Y.	Descendible Right of Publicity Rejected for Marilyn Monroe Estate <i>Death Occurred Before Right Was Created by Statute</i> Shaw Family Estate v. CMB Worldwide	17

N.Y.	New York Considers New Right of Publicity Law Proposed Bill Would Create Retroactive Perpetual Right	18
Cal. Ct. App.	Libel Case Over Web Forum Postings Reinstated <i>Discussion of Soccer Coach Not a Matter of Public Interest</i> Joyner v. www.socialsoccertalk.com	21
N.Y. App. Div.	Dismissal of Libel Suit Against Newspaper and Columnist Affirmed <i>Article Was Opinion, but False Imputation of Homosexuality can be Defamatory</i> Kleptko v. Reisman	22
N.Y. App. Div.	New York Appeals Court Bounces Sprewell’s Libel Suit <i>Decision Victory for Media’s Ability to Invoke State Shield Law and Still Obtain Dismissal</i> Sprewell v. New York Post Holdings	23
<u>COPYRIGHT / TRADEMARK</u>		
2d Cir.	Court Considers Enforceability of French Copyright Judgment <i>Remands for Further Fact Finding</i> Sarl Louis Feraud Intern. v. Viewfinder, Inc	13
C.D. Cal.	Court Dismisses Carol Burnett’s Suit Over Family Guy Cartoon Episode <i>Reference to Comedienne is Fair Use</i> Burnett v. Twentieth Century Fox Film Corp.	19
11th Cir.	National Geographic CD-ROM Collection a Permitted Revision <i>Overrules Prior Ruling in Light of Tasini Decision</i> Greenberg v. Nat’l Geographic Soc’y	31
<u>REPORTER’S PRIVILEGE</u>		
N.J.	New Jersey Supreme Court Rules Reporter Waived Shield Law <i>Authentication to Prosecutor Waived Privilege in Libel Suit</i> In re Verified Petition of Venezia	25
<u>BROADCAST</u>		
2d Cir.	Second Circuit Reverses FCC’s “Fleeting Expletives” Policy <i>Court “Doubtful” That FCC Will Overcome Broadcast Networks’ Legal Arguments on Remand</i> Fox Television Stations, Inc. v. FCC	28
<u>SUPREME COURT</u>		
U.S.	Court Rejects Student’s First Amendment Case <i>School Could Discipline Student for “Bong Hits 4 Jesus” Banner</i> Morse v. Frederick	33
<u>ACCESS / FREEDOM OF INFORMATION</u>		
Pa.	Court Finds First Amendment Right of Access to Juror Names <i>Right Does Not Extend to Jurors’ Addresses</i> Commonwealth v. Long	35
Ohio	Concealed Weapons / Concealed Permits <i>Controversy Over Access in Ohio</i>	37
11th Cir.	Appellate Court Tells FEMA To Hand Over Addresses <i>Cloud Over 2004 Hurricane Relief Aid Finally Lifts</i> Sun Sentinel v. U.S. Dept. Homeland Security	39

Publisher and Columnist Sue State Judges for Federal Civil Rights Violations

By Steven P. Mandell and Brendan J. Healey

After years of litigating against the Chief Justice of the Illinois Supreme Court in the state court system he oversees, an Illinois paper and its former columnist have shifted the battle to the federal court system. *Shaw Suburban Media Group, Inc. v. Thomas*, No. 07C-3289 (N.D. Ill.)

Shaw Suburban Media Group, Inc., which publishes the *Kane County Chronicle*, and Bill Page, former columnist for the *Chronicle*, spent years defending Illinois State Supreme Court Justice Bob Thomas's defamation and false light lawsuit. In November, a jury returned a \$7 million verdict, which the trial judge reduced to \$4 million on post-trial motions. The state court case is now on appeal. See "Judge Reduces Illinois Supreme Court Chief Justice's Defamation Award," Apr. 2007 MediaLawLetter, "Illinois Jury Awards Chief Justice \$7 Million in Libel Suit Against Newspaper," *MediaLawLetter* Nov. 2006.

Not surprisingly, procedural irregularities marred the Chief Justice's lawsuit in his court system. As the case proceeded toward a second appeal – a previous appeal led an Illinois appellate court to become the first court in the history of American jurisprudence to create an absolute privilege for judicial deliberations – it became clear that a bad situation would only get worse.

It was also clear that the newspaper and columnist had no viable second layer of appeal – every other citizen of the State of Illinois has the ability to petition to the Illinois Supreme Court for discretionary review – because Plaintiff and four of his Supreme Court current colleagues testified on his behalf.

Accordingly, on June 12, Shaw and Mr. Page brought a four-count complaint against the trial judge, the seven Justices on the Illinois Supreme Court, and the appellate panel that heard the first appeal (and is slated to hear the second appeal). Plaintiffs allege they have been denied an impartial judicial forum, independent appellate review, appellate rights and access to courts, and their Constitutional right to prove truth. Shaw and Mr. Page bring all four counts under 42 USC § 1983.

This publication has run several articles detailing procedural irregularities about the *Thomas v. Page* case, and there is no need to recount the litany. See, e.g., "Battle of

the Privileges in Illinois Supreme Court Justices Lawsuit", Oct. 2005 MediaLawLetter, "Skirmishing Continues in Illinois Supreme Court Chief Justice Defamation Suit," Dec. 2005 MediaLawLetter.

Nonetheless, one colloquy between defense counsel and the trial judge regarding a Petition for Leave to Appeal, which was not previously published herein, illustrates the situation the defendants faced:

THE COURT: Who is going to hear [Defendants' Petition for Leave to Appeal to the Illinois Supreme Court]?

MR. MANDELL: I think the Supreme Court would make the decision to disqualify themselves as being –

THE COURT: That's what I mean, but do we have a second Supreme Court in Illinois besides what I already know that we have seven sitting up there now? Who will act as a Supreme Court if they grant your motion to recuse?

* * *

I'm not taking a position on whether it is or it isn't, but let's assume they agree that it's inappropriate to hear it. Who is going to hear it? . . . [I]f one analyzes your viable appeal, you don't have a viable appeal because there is no second Supreme Court.

MR. MANDELL: Well, then we don't have due process.

THE COURT: Well, that's something you'll have to reserve for another day.

That other day has arrived, and Shaw and Mr. Page seek, among other relief, a declaratory judgment that Chief Justice Thomas's defamation judgment is repugnant to the U.S. and Illinois Constitutions and cannot be enforced, a declaratory judgment that any further proceedings in the state court while Chief Justice Thomas and his colleagues remain in office is constitutionally repugnant, and an injunction against further state court proceedings while Chief Justice Thomas and his colleagues remain state court judges.

(Continued on page 4)

Publisher and Columnist Sue State Judges for Federal Civil Rights Violations

(Continued from page 3)

Less than a week after the complaint was filed, the assigned judge, Blanche Manning, recused herself. Judge Manning, a long-time judge on the state trial and appellate benches, noted her relationships with several of the defendants and stated that “[g]iven the complaint’s allegations of judicial collusion, it is possible that these relationships could cause a reasonable person to question the court’s impartiality.” The case has been reassigned to Judge Ruben Castillo.

Defendants have waived service and are to answer or otherwise plead in July.

Steve Mandell, Steve Rosenfeld, Steve Baron and Brendan Healey of Mandell Menkes LLC and Bruce Sanford, Lee Ellis and Bruce Brown of Baker & Hostetler represent Shaw Suburban Media Group, Inc. and Bill Page. Joseph A. Power, Jr. and Todd A. Smith of Power Rogers & Smith, P.C. represented Chief Justice Thomas in the original action. The office of Illinois Attorney General Lisa Madigan represents the judges in this matter.

Boston Herald Pays \$3.4 Million in Libel Damages to Judge

Following the Massachusetts Supreme Judicial Court’s denial of a motion for reconsideration, the Boston Herald this month paid \$3.4 million in damages and interest to Massachusetts Superior Court Judge Ernest Murphy.

In May, the Supreme Judicial Court unanimously affirmed a libel verdict in favor of the judge over articles reporting that the judge made an insensitive remark to a young rape victim, telling her to “get over it.”

On June 4, the Herald’s motion for reconsideration was denied without comment. *See Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746 (Mass. May 7, 2007).

Libel Trial Update: Kansas Court Vacates Libel Damages After Plaintiff’s Death Damage Award for Outrage Survives

On post-trial motion, a Kansas trial court this month vacated the libel portion of a \$1.1 million jury damage award following the death of the plaintiff. *Valadez v. Em-mis Comm’cs, Inc.*, No. 2005 CV 142 (Kan. Dist. June 8, 2007) (Clark, J.).

Last year a Kansas jury returned a verdict against Kansas television station KSN-TV over a series of news broadcasts reporting on a search of plaintiff’s home and his subsequent arrest in connection with the police investigation into the BTK serial killer case. Although the broadcasts were literally true, the jury found that the broadcasts falsely implied that plaintiff was the notorious killer. *See MLRC MediaLawLetter* Oct. 2006 at 19.

On post-trial motion, the trial court held that under K.S.A. 60-1802 plaintiff’s death abated the cause of action for libel – or any other related cause of actual for invasion of privacy. K.S.A. 60-1802 states in relevant part: “No

action pending in any court shall abate by the death of either of both the parties thereto, except an action for libel, slander, malicious prosecution....” Thus the court vacated the jury’s \$300,000 award for damage to reputation.

The court denied a motion to dismiss the outrage damage award based on insufficiency of evidence and/or plaintiff’s death. The court found sufficient evidence to support the verdict for outrage based on the repeated use of plaintiff’s name in the course of broadcasts about his arrest and proof of injury at trial. In addition, the claim for outrage did not abate because it was based on “an injury to the person” and survives death.

But the court reduced the \$800,000 award to \$250,000 under the Kansas statute that caps non-economic losses in personal injury actions to that amount. *See K.S.A. 60-19a02.*

Plaintiff is represented by Craig Shultz of Wichita, Kansas. Defendants are represented by Bernard J. Rhodes of Lathrop & Gage L.C.

Ohio Supreme Court Expressly Recognizes False Light Invasion of Privacy

By **Kenneth A. Zirm**

The Ohio Supreme Court, for the first time, recognized a claim for false light invasion of privacy. *Welling v. Weinfeld*, 113 Ohio St.3d 464 (June 6, 2007). *Welling* was a non-media case arising out of a dispute between neighbors, and the distribution of a flier by one neighbor that allegedly placed the other neighbor in a false light.

The facts involved a long-running dispute between the neighbors. When someone threw a rock through the Plaintiff's plate glass window, she responded by printing and distributing the following flier:

\$500.00

REWARD

for any information which leads to the conviction of the person(s) responsible for throwing a rock through the window of Lakeside (enter Banquet Hall) (also known as the "Party Center") In the Dee Mar Allotment, in Perry Township in on Monday, May 8 or Tuesday, May 9, 2000

**Any tips will be kept confidential
Call the Perry Township Police
Departments Detective Bureau at
478-5121**

Reward will be paid in cash

Even though the Defendant neighbor was not named or identified in the flier, plaintiff posted the flier at the plant where defendant and his son worked, and at the schools attended by defendant's children. Posting of the flier at these locations was the basis for the defendant's false light counterclaim.

The jury entered a verdict in favor of the defendants on their invasion of privacy counterclaim, but it was unclear whether it was based upon a false light or seclusion theory (defendants had also alleged that plaintiff surreptitiously videotaped their private activities). The jury awarded \$5,412.38 in compensatory damages, and \$250,000 in punitive damages. When defendant would

not accept the trial court's remittitur of \$35,000 in punitive damages a new trial was ordered on the invasion of privacy claim.

Both parties appealed, and the intermediate Court of Appeals punted on the false light question, indicating that it needed guidance from the Ohio Supreme Court which had previously neither adopted nor rejected such a claim.

Court Recognizes False Light

The Ohio Supreme Court's decision compared and contrasted two recent false light decisions from other states: *West v. Media General Convergence, Inc.* (Tenn. 2001), 53 S.W.3d 640, which recognized the claim, and *Denver Publishing Co. v. Bueno* (Colo. 2002), 54 P.3d 893, which declined to recognize the claim.

Agreeing with the Tennessee Court, the Ohio Supreme Court held that, although there may be some overlap between false light and defamation, there was a need to recognize a tort to protect hurt feelings separate and apart from damaged reputation because, in the age of the internet, "the barriers to generating publicity are slight, and the ethical standards regarding the susceptibility of certain discourse have been lowered."

Dismissing any First Amendment concerns, the Court pointed out that false light defendants enjoy protection at least as extensive as defamation defendants, including the actual malice standard which the Ohio Supreme Court adopted for all false light plaintiffs, acknowledging that "a statement that is not defamatory is less apt to be a red flag for editors and checked for accuracy." The Court also observed that a false light claim will be difficult to prove because it requires falsity, publicity as opposed to mere publication, and a misrepresentation that is highly offensive to a reasonable person.

Even though the false light claim at issue in the case was based upon an old fashioned method of communication - posting of written handbill like fliers - it is clearly the ease of internet communication, and its effect on personal privacy, which prompted the Ohio Supreme Court's new position on false light. "As the ability to do harm has grown, so must the law's ability to protect the innocent."

Kenneth A. Zirm is a partner at Walter & Haverfield LLP in Cleveland.

Newspaper Wins Summary Judgment Over Alleged Misquote

No Evidence That Reporter Subjectively Doubted Accuracy of Quote

The Idaho Supreme Court unanimously affirmed summary judgment in favor of a newspaper and reporter in a libel and false light case over an alleged misquotation. *Clark v. Spokesman Review*, No. 32565, 2007 WL 1501356, 35 Media L. Rep. 1737 (Idaho May 24, 2007) (Burdick, Schroeder, Trout, Jones, Reinhardt, JJ.).

The court held that there was no evidence that the reporter subjectively doubted the accuracy of the quote at the time of publication, particularly where the quote matched the reporter's notes.

Background

In 2001, *The Spokesman Review*, in an article by reporter Thomas Clouse, reported that Bob Nonini, a prominent local businessman running for state senate, had been arrested 17 years earlier for possession of cocaine and later acted as a confidential informant for a major undercover drug operation. Nonini withdrew from the election, but the local Republican Party fired back at the newspaper, issuing a press release that criticized the article calling it "an attempt to smear Nonini's good name."

Trent Clark, then the Idaho Republican Party Chairman, then participated in a telephone interview with Clouse to defend Nonini. The interview was not recorded, but the reporter took notes. Following the interview, the newspaper published another article by Clouse entitled "Republicans back Nonini, rip coverage." Quoting from the interview, that article stated in relevant part:

"As Bob [Nonini] tells this story, he is very guilty of a very serious mistake: He grew up with and was friends with the wrong crowd," Clark said. "You probably cannot find an African American male on the street in Washington, D.C., that hasn't been arrested or convicted of a crime."

"Of all the evidence you've got, nothing contradicts what Bob has already confessed to – he hung around with the wrong crowd."

Clark sued the newspaper, its editor and Clouse for libel and false light, alleging that he had been misquoted and thus appeared to be making a racist statement. Instead Clark alleged he said:

"You probably cannot find an African American male on the street in Washington, D.C. *who doesn't have friends* who have been arrested or convicted of a crime."

The trial court granted summary judgment to the defendants for lack of evidence of actual malice or falsity.

Idaho Supreme Court Decision

Idaho Supreme Court affirmed summary judgment for lack of actual malice. Although plaintiff insisted he referred to "friends who have been arrested" in the interview, the published version was consistent with the reporter's recollection and his interview notes. Thus even if the quotation was incorrect, there was no evidence that the reporter subjectively doubted the accuracy of the quote.

The plaintiff had also argued that the newspaper's failure to issue a correction and the reporter's anger at being criticized for the initial news report were evidence of actual malice. Both of these claims were rejected. The refusal to issue a correction was a post-publication event and not relevant to the defendant's state of mind at publication. And the allegation that the reporter was "very upset" at having his work criticized was not probative of actual malice under the circumstances.

Finally, the court affirmed dismissal of the false light claim which requires proof of actual malice under Idaho law.

The newspaper defendants were represented by Duane Swinton, Witherspoon, Kelley, Davenport & Toole, P.S., Coeur d'Alene, Idaho. Plaintiff was represented by Richard Hearn, Racine, Olson, Nye, Budge & Bailey, Pocatello.

SAVE THE DATE

November 7, 2007

MLRC ANNUAL DINNER

New York City

Virginia Supreme Court Affirms Summary Judgment in Libel Suit Over Campaign Editorial

In a 5-2 decision, the Virginia Supreme Court this month affirmed summary judgment in favor of the *Virginia-Pilot* newspaper and individual editor in a libel suit over an editorial opposing plaintiff's candidacy for state office. *Jackson v. Hartig*, No. 061505, 2007 WL 1651252 (Va. June 8, 2007) (Kinser, Hassell, Keenan, Koontz, Agee, JJ.).

The editorial slammed plaintiff for his role in a school budget scandal. But five years earlier the newspaper had endorsed plaintiff for elected office, stating that he had been "exonerated." Notwithstanding the contradictions between these publications, the Virginia Supreme Court held the editorial was published without actual knowledge of falsity or recklessness.

Background

The plaintiff, Timmy Jackson, was a former Virginia Beach school board member. In 1996, he was indicted for misdemeanor malfeasance for budget overruns at the school board. Jackson was acquitted and continued to serve on the School Board until the end of his term. In 1998, he ran unsuccessfully for election to a seat on the Virginia Beach City Council. The *Virginian-Pilot* endorsed Jackson in the election, stating he would be "a strong voice for education" and was "a man of integrity" who was "exonerated" on the charge of malfeasance.

Jackson made another bid for public office in 2003, seeking election to the Virginia House of Delegates. This time the *Virginian-Pilot* published an editorial opposing Jackson and endorsing his opponent. The editorial stated:

[W]e have deep misgivings about Jackson's qualifications.... Jackson, a former police officer and Republican, was honored to be among the first citizens elected to the Virginia Beach School Board. It turned out badly. It was on his watch that the schools went millions of dollars in the red, a disaster that took years to overcome. Jackson was indicted for malfeasance, but was exonerated, then resigned. Jackson has given us no reason why voters should forgive this blot on his record. Now he wants voters to trust him to oversee a state budget 200 times as large as the School Board's. That's asking too much.

Plaintiff sued the newspaper for libel, arguing that even though the editorial reported his acquittal, it implied he was guilty of malfeasance and unfit for office.

Following discovery, the Circuit Court granted summary judgment to the defendants for lack of evidence of actual malice.

Virginia Supreme Court Decision

The Virginia Supreme Court affirmed. The majority reviewed in detail plaintiff's proffered evidence of actual malice. This included the newspaper's original news coverage of the school budget scandal, its report of plaintiff's acquittal, and the prior endorsement, as well as the fact that the editorial board member who wrote the complained of editorial had previously served as the newspaper's managing editor at the time of its coverage of the school budget scandal. Plaintiff also argued that notes from the editorial board obtained in discovery showed that the newspaper was aware that plaintiff had served his full term on the school board and had not resigned – as was misreported in the editorial.

Viewing these facts in the light most favorable to plaintiff, the majority concluded that they were insufficient as a matter of law to establish actual malice. "The mere presence of news stories in a newspaper's files containing information that contradicts an allegedly defamatory statement by the news organization is insufficient to establish actual malice," the Court concluded.

Moreover, there was no evidence that the newspaper entertained any serious doubt about its conclusions that the school budget scandal was a "blot on [Jackson's] record" and that he bore at least some responsibility for the scandal notwithstanding his acquittal.

Finally, the Court noted that statements made by the newspaper to plaintiff after publication were not probative of actual malice, since it did not speak to state of mind at the time of publication.

Dissent

The dissent, though, found "an abundance of evidence" for a jury to find actual malice. In particular, the statement in the editorial that plaintiff had resigned his office "impliedly in disgrace" which "was demonstrably false" in face of the editorial board's notes and prior description of plaintiff as a "man of integrity." Thus summary judgment here was "singularly inappropriate."

Tennessee Appeals Court Analyzes Public Figure and Fair Report Issues

Libel Plaintiff an Involuntary Public Figure

In a very detailed and scholarly decision, the Tennessee Court of Appeals affirmed summary judgment for a television news station, holding that plaintiff was an involuntary public figure who failed to present any evidence of actual malice. *Lewis v. Newschannel 5 Network, L.P.*, No. M2005-00458, 2007 WL 1585163 (Tenn. App. May 31, 2007) (Koch, Cain, Welles, JJ.).

At issue in the case was a series of investigative reports about misconduct in the Nashville Police Department, including officers associating with convicted felons. The reports focused in particular on Carl Dollarhide, a police patrol commander, who intervened to ensure that his brother-in-law, Brad Lewis, would not be arrested after being stopped with a sawed off shot gun, gambling slips and a large amount of cash.

The news reports were based on numerous tips and confirmations from other police officers and recordings of police department calls. Prior to broadcast, the Nashville Police Department issued a press release announcing it had suspended Dollarhide and was investigating him. Dollarhide and Lewis both sued the station for libel and false light. The trial court granted summary judgment to defendants.

Dollarhide conceded he was a public official and the court held there was no evidence of actual malice. The trial court ruled that Lewis was a private figure, but held there was no evidence of negligence to support his claims. The court also held that the news broadcasts were protected by the fair report privilege. Only Brad Lewis appealed the trial court ruling.

The Tennessee Court of Appeals first held that the fair report privilege did not apply to the broadcasts because they went beyond the press release and were based largely on the anonymous tips, private conversations with police officers and transcripts of police calls that had not been released to the public. “The prevailing view,” the Court stated, “is that the fair report privilege should not be extended to apply to the ‘myriad types of informal reports and official and unofficial investigations ... of law enforcement personnel ...’”

The Court then conducted a detailed review of Supreme Court case law on public figure status to conclude that Lewis was not a private figure – but an involuntary public figure because of his role in an important public controversy involving a public official. The Court cited with approval Justice Byron White’s concurring opinion in *Rosenblum v. Metromedia, Inc.*, 403 U.S. 29 (1971) stating that “discussion of the conduct of public officials cannot ... be subjected to artificial limitations designed to protect others involved in an episode with officials from unfavorable publicity.”

Thus although plaintiff did not inject himself into a public controversy “defendants had a right” to report on Dollarhide’s suspension and Lewis’s role in the matter. And the Court found no evidence of actual malice to support plaintiff’s libel or false light claims.

Jon D. Ross and Ronald G. Harris, Neal & Harwell, Nashville, represented Newschannel 5. Robert Delaney, Nashville, represented plaintiff.

Fifth Circuit Affirms Dismissal of Private Facts Lawsuit

Lawyers' Sex Blackmail Scheme A Matter of Public Concern

The Fifth Circuit Court of Appeals recently affirmed dismissal of a private facts lawsuit over a newspaper's accurate reports about a bizarre sex blackmail scheme perpetrated by husband and wife lawyers in Texas. *Lowe v. Hearst Comm'cs, Inc.*, No. 06-50269, 2007 WL 1430218 (5th Cir. May 16, 2007) (Jones, Jolley, Stewart, JJ.).

Reaffirming the broad scope of the newsworthiness defense to private facts claims, the Fifth Circuit held that the couple's alleged criminal scheme was a clear matter of public concern. And the newspaper was entitled to report both the details of the scheme and background facts about the couple. Moreover, the court swept aside plaintiff's argument that the newspaper wrongfully obtained the information from a sealed court file.

Background

At issue was an article published in 2004 in the *San Antonio Express-News* headlined, "Sex, lawyers, secrets at heart of sealed legal case." The article described how Ted Roberts and his wife Mary, prominent local lawyers, had blackmailed several men out of tens of thousands of dollars.

According to the article, Mary ran a personal ad on the Internet seeking "erotic and intellectual" relationships with men. Her husband Ted would later present draft complaints to his wife's sex partners, naming them as potential defendants and threatening them with legal action that would publically expose their affairs.

As many as five men entered into "settlement agreements" netting Roberts up to \$155,000. The article also contained comments from legal scholars on the merits and ethics of Ted Roberts threatened lawsuits, comment from the local prosecutor, and background details on the Roberts, including their purchase of a \$655,000 house in a San Antonio suburb, the fact that they had an eight-year-old son, and the fact that Mary Roberts was the daughter of a Lutheran minister.

The blackmail scheme was discovered by Ted Roberts' former law partner who introduced copies of the draft complaints in a separate legal dispute between the two of them. Over objections from the press, these documents were sealed.

After the *San Antonio Express-News* article appeared the Roberts declared bankruptcy. John Patrick Lowe, a bankruptcy trustee in the Western District of Texas, sued for pub-

lication of private facts, alleging that the newspaper improperly received copies of the sealed documents.

In 2005 the federal district court initially denied the newspaper's motion to dismiss for failure to state a claim, ruling that a private facts claim over a newsworthy publication could survive a motion to dismiss where plaintiff alleged the information came from sealed documents covered by a protective order. But the trial court quickly granted a motion for reconsideration, withdrawing its earlier opinion and ruling that because the article was newsworthy, the plaintiff was unable to establish a prima facie claim for publication of private facts.

Fifth Circuit Decision

Affirming dismissal, the Fifth Circuit emphasized the broad scope of the newsworthiness defense to private facts claims, particularly with regard to reports about alleged criminal activity. The Court noted that reports of both criminal prosecutions and *suspected* criminal activity are of public concern.

The newspaper was also entitled to include additional personal details about the Roberts since these details were substantially related to the story and "communicated that this person was a real person with roots in the community." *Quoting Ross v. Midwest Comm'cs, Inc.*, 870 F.2d at 274 (5th Cir. 1989) (noting that "courts should not make editorial decisions for the media regarding ... matters of public concern").

The Court also rejected plaintiff's argument that the decision to seal the documents constituted "res judicata" on the issue of public concern. The test for sealing documents in discovery, the court explained, "is quite different" from the newsworthiness / public concern analysis.

Finally, as to the allegation that the newspaper obtained documents in violation of a court order, the Court held that any alleged illegality could only be considered if plaintiff established a prima facie case. Thus, "even accepting Lowe's allegation that Hearst obtained the information in the article in violation of the court order, there can be no liability for invasion of privacy if the information is a matter of public concern."

Hearst was represented by in-house counsel Jonathan R. Donnellan and Kristina E. Findikyan. Plaintiff was represented by Deborah A. Pearce of Powell & Pearce, Austin.



MLRC London Conference September 17-18, 2007 International Developments in Libel, Privacy, Newsgathering and New Media Law

MLRC's London Conference 2007 on September 17-18, 2007 is a two-day event for media lawyers and press experts to discuss the latest developments in media law and practice.

Delegates from around the world will gather to participate in a series of facilitated discussions on developments in media libel law, privacy law, newsgathering laws and the challenges posed by the new digital media environment.

Among the highlights of the London Conference are a roundtable discussion with UK libel judges on the challenges of press litigation in the 21st century. Justice Henric Nicholas of the Supreme Court of New South Wales will comment on the Asian media law landscape from a Commonwealth law perspective. And Alan Rusbridger, editor of *The Guardian*, and Richard Sambrook, Director BBC Global News, will discuss the impact of the new digital media environment on journalism and the business of journalism.

The closing session of the conference is an Oxford-style debate on privacy law, with English and American lawyers facing off on the difficult question of the boundary between freedom of expression and privacy: What should be private? Who should decide what is private?

The conference also includes a delegates dinner on Sunday night September 16th and a breakfast meeting on September 19th for in-house media counsel.

The London Conference is a unique opportunity to meet colleagues from around the world. Space is limited, so we urge you to register early to ensure a place. We hope you will join us!

Contact londonconference@medialaw.org for more information.

The MLRC London Conference is presented with the support of:

Chubb Insurance, Covington & Burling LLP, Davis Wright Tremaine LLP, Finers Stephens Innocent LLP, Jackson Walker LLP, Media/Professional Insurance, Miller Korzenik & Sommers LLP, Prince Lobel Glovsky & Tye LLP and Reynolds Porter Chamberlain LLP

Second Circuit Asks for Guidance on Jurisdiction Issue in *Ehrenfeld v. Bin Mahfouz*

Plaintiff Is Seeking Declaration That UK Libel Judgment Is Unenforceable

Noting the First Amendment interests at stake, and the impact on foreign litigants, the Second Circuit Court of Appeals has asked the New York Court of Appeals for guidance on the scope of the state's long arm statute to determine whether it has personal jurisdiction to hear a case involving the enforceability of a UK libel judgment. *Ehrenfeld v. Bin Mahfouz*, No. 06-2228, 2007 WL 1662062 (2d Cir. June 8, 2007) (Feinberg, Leval, Cabranes, JJ.).

Background

The plaintiff, Rachel Ehrenfeld, is the author of *Funding Evil: How Terrorism is Financed and How to Stop It*. The book, published only in the U.S., alleges that Khalid Salim a Bin Mahfouz, a Saudi Arabian billionaire, financially supported Al Qaeda in the years preceding the September 11, 2001, terrorist attacks. Bin Mahfouz sued Ehrenfeld in London, obtaining a default judgment and declaration of falsity.

Ehrenfeld brought an action in federal court in New York seeking a declaratory judgment that the UK libel judgment is unenforceable in the U.S. Last year the district court dismissed, holding that it had no personal jurisdiction over Bin Mahfouz. *See* No. 04 9641, 2006 WL 1096816 (S.D.N.Y. Apr 26, 2006).

New York's long-arm statute provides for jurisdiction over out-of-state defendants who transact business within the state where the cause of action arises out of defendant's New York actions. *See* New York C.P.L.R. § 302 (a)(1). Ehrenfeld argued that Bin Mahfouz's activities in New York in connection with his UK libel action satisfied the statute. She alleged that as part of a scheme to infringe her First Amendment rights, Bin Mahfouz and/or his agents sent Ehrenfeld cease and desist letters demanding she correct and/or withdraw her book, as well as numerous e-mails and letters regarding the status of the UK libel case. She argued that these, together with his website announcing the developments in the action against Ehrenfeld,

amounted to transaction of business in New York with a substantial relationship to her cause of action.

The district court disagreed, finding that "Courts in New York have consistently refused to sustain personal jurisdiction ... solely on the basis of a defendant's communication, by telephone or letter, from outside New York into the jurisdiction." *Citing, e.g., Fort Knox Music, Inc. v. Baptiste*, 139 F. Supp. 2d 505, 511 (S.D.N.Y. 2001) (multiple cease-and-desist letters insufficient to support personal jurisdiction under New York law).

The district court also rejected Ehrenfeld's alternative claim that personal jurisdiction could be supported under a separate prong of the New York long-arm statute for a tortious act committed outside of New York with impact in New York. *See* New York C.P.L.R. § 302(a)(3).

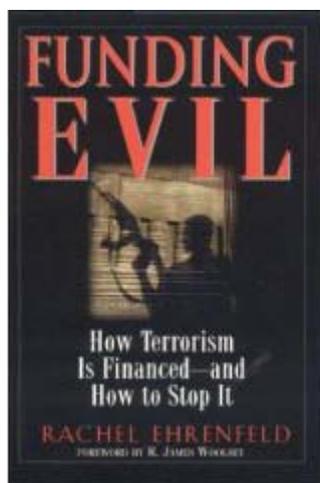
This argument failed, according to the court, because the English libel action did not constitute a "tortious act."

Second Circuit Decision

The Second Circuit, in a decision written by Judge Feinberg, found that New York courts had not addressed whether this combination of facts amounted to the transaction of business for purposes of exercising personal jurisdiction. The Court noted that a single transaction in New York could suffice for personal jurisdiction if the defendant's activities are purposeful – but added that the resolution of the question raised important questions that should be resolved by New York's highest court.

"The question is important to authors, publishers and those, like Mahfouz, who are the subject of books and articles. ... The issue may implicate the First Amendment rights of many New Yorkers, and thus concerns important public policy of the State. Because the case may lead to personal jurisdiction over many defendants who successfully pursue a

(Continued on page 12)



Second Circuit Asks for Guidance on Jurisdiction Issue in *Ehrenfeld v. Bin Mahfouz*

(Continued from page 11)

suit abroad against a New York citizen, the question before us is also likely to be repeated.”

Finally, the Court did agree with the district court ruling that rejected personal jurisdiction over Bin Mahfouz for committing a tortious act outside of New York with impact in New York. This argument failed, according to the court, because the English libel action did not constitute a “tortious act.”

There is, however, no limiting principle to this argument. Any time a plaintiff considered himself wronged for whatever reason, even if no legally cognizable right of action existed,

personal jurisdiction would exist over the defendant in a declaratory judgment suit. ... we have seen no New York case law that ascribes such a broad meaning to “tortious act.”

Rachel Ehrenfeld is represented by Mark Platt of Kornstein Veisz Wexler & Pollard, LLP, of New York. Khalid Salim Bin Mahfouz is represented by Geoffrey Stewart of the New York office of Jones Day, Stephen Brogan of the Washington, D.C. office of Jones Day, and Michael Nussbaum of Bonner, Kiernan, Trebach & Crociata of Washington, D.C. Kurt Wimmer and Jason Criss, Covington & Burling Washington, D.C., coordinated a media amicus brief to the Second Circuit in this case.

Second Circuit Affirms No Jurisdiction Over Consumer Gripe Website Judge Sack Gives Detailed Analysis of Jurisdictional Issues

In a detailed decision, the Second Circuit Court of Appeals affirmed that New York courts do not have jurisdiction to hear libel claims against the out-of-state operator of a consumer website. *Best Van Lines, Inc. v. Walker*, No. 04-3924 (2d Cir. June 26, 2007) (Kearse, McLaughlin, Sack, JJ.). The website was not targeted at New York and thus defendant did not “transact business” in New York, within the meaning of the state’s long arm statute.

Plaintiff is a New York moving company. The defendant is a resident of Iowa and the operator of the website www.movingscam.com which provides information, and often derogatory comments, about moving companies. Defendant included plaintiff in its “Black List Report” and stated that plaintiff was not licensed to perform interstate moves and was not insured as required by law. Defendant also repeated these allegations in response to a query posted on his site, and advised a consumer “DO NOT USE THEM.”

Best Van Lines sued over both statements. The district court dismissed for lack of personal jurisdiction over the defendant. In a lengthy opinion written by Judge Sack that analyzes the relationship between New York’s limited long arm statute and federal constitutional law, the Second Circuit affirmed. The Court affirmed that the posting of defamatory material on a website accessible in New York does not, without more, constitute “transacting business” for purposes of New York’s long arm statute. Defendant’s statements were not directed to New York, but rather a national audience. And the solicitation and receipt of donations through the website was entirely unrelated to the complained of statements.

The defendant appeared pro se. Slade Metcalf and Katherine Bolger, Hogan & Hartson, LLP, in New York were appointed by the Court as amicus counsel for the defendant. Plaintiff was represented by Thomas Freedman, Oved & Oved, NY.

The screenshot shows the homepage of MovingScam.com. At the top, there is a navigation bar with links for Home, The True Story, The Scam, The Black List, The Links, Comments, and Message Board. Below the navigation bar is a quote: "Never doubt that a small group of thoughtful, committed citizens can change the world" - Margaret Mead, 1901 - 1978. The main content area is divided into several sections: "Quick Links" with links to "How to Find a Reputable Moving Company", "Wholesale Moving Boxes & Supplies", "Book Your Move Online with ABF U-Pack Moving", "Need a Full-Service Mover? Customers Recommend Movers, Inc.", and "Consumers praise Golden Key Express Auto Transport"; "The History of MovingScam" which details the site's founding in 2001 and its mission; and a "Message Board" section. The footer includes the name of the founder, Tim Walker.

Second Circuit Considers Enforceability of French Copyright Judgment *Remands for Further Fact Finding*

The Second Circuit this month reversed and remanded a district court ruling that a French copyright judgment was unenforceable in the United States as repugnant to the First Amendment. *Sarl Louis Feraud Intern. v. Viewfinder, Inc.* No. 05-5927, 2007 WL 1598057 (2d Cir. June 5, 2007) (Pooler, Raggi, Sand, JJ.). The Court held that the district court failed to engage in sufficiently detailed analysis of U.S. fair use law and French intellectual property law to determine whether the judgment impinged on First Amendment rights.

Background

The plaintiffs, two French clothing design companies, sought to enforce a default judgment issued by a French court against Viewfinder, a self-styled online fashion magazine which posts photographs from designer fashion shows, including photographs from plaintiffs' fashion shows.

In January 2001, the plaintiffs sued Viewfinder in France for unauthorized use of intellectual property and unfair competition. Viewfinder was properly served in the U.S. but did not respond to the complaint. A French court issued a default judgment against Viewfinder, finding that the publication of photographs from plaintiffs' shows violated French intellectual property law and constituted "parasitism" because it had "taken advantage of plaintiff's reputation and commercial efforts creating confusion between the two companies."

In 2004, a French appellate court affirmed a 1,000,000 franc (approximately \$150,000 U.S.) judgment against Viewfinder. In December 2004, plaintiffs brought suit in federal court in New York to collect the judgment under New York's Uniform Foreign Money Judgment Recognition Act.

The district court declined to enforce the judgment, finding that the fashion shows at issue were public events and Viewfinder had a First Amendment right to publish the photographs at issue. See 406 F.Supp.2d 274, 285 (S.D.N.Y.2005) ("First Amendment simply does not permit plaintiffs to stage public events in which the general public has a considerable interest, and then control the way in which information about those events is disseminated in the mass media."). The district court also stated that to the extent plaintiffs' designs were protected by copyright, "the copyright law similarly provides, as a matter of First Amendment necessity, a 'fair use' exception for the publication of newsworthy matters." *Id.* at 284.

Second Circuit Decision

The Second Circuit, in a decision written by Judge Pooler, began by acknowledging that foreign judgments that impinge on First Amendment rights are "repugnant" to public policy and unenforceable in the United States. Citing, e.g., *Bachchan v. India Abroad Publ'ns Inc.*, 154 Misc.2d 228, 585 N.Y.S.2d 661, 662 (N.Y.Sup.Ct.1992). But held that the district court failed to perform a full analysis for the Court to affirm its decision.

The district court's decision appears to rest on the assumption that if Viewfinder is a news magazine reporting on a public event, then it has an absolute First Amendment defense to any attempt to sanction such conduct. The First Amendment does not provide such categorical protection. Intellectual property laws co-exist with the First Amendment in this country, and the fact that an entity is a news publication engaging in speech activity does not, standing alone, relieve such entities of their obligation to obey intellectual property laws.

Instead, the district court should have first determined the level of First Amendment protection Viewfinder would be entitled to under New York law and policy. Then the district court should have determined whether French intellectual property law provides comparable protections.

The Court admonished the district court for concluding that "Viewfinder's use was necessarily fair use because it was publishing 'newsworthy matters.'" Instead the district court should have considered all the fair use factors because "whether the material is newsworthy is but one factor in the fair use analysis."

Both parties had asked the Court to resolve the fair use issue, but the Court found the record insufficient to make a determination. For example, the record was unclear as to the percentage of plaintiffs' designs that were posted on Viewfinder's site. The Court further observed that if the sole reason that Viewfinder's conduct would be permitted under U.S. copyright law is that plaintiffs' dress designs are not copyrightable in the U.S., this difference in substantive law would not appear to be repugnant.

Viewfinder, Inc., was represented by Steven J. Hyman and Paul H. Levinson of McLaughlin & Stern, L.L.P., in New York. Sarl Louis Feraud International and S.A. Pierre Balmain were represented by James P. Duffy, III of Berg and Duffy, L.L.P., in New York.

Now Available

Basic Guide to Employment Defamation and Privacy Law

Prepared by the Media Law Resource Center Employment Law Committee, this pamphlet provides a practical overview of defamation and privacy issues in the workplace and is intended to assist non-lawyers – supervisors and human resource professionals – who face these issues on a daily basis.

Each member firm has already received one printed copy of the pamphlet, with additional printed copies available for purchase from MLRC. The pamphlet is also available to MLRC members in electronic form on the MLRC web site at no cost.

MLRC members will find the pamphlet beneficial both for their own use and for distribution to their clients.

ORDER FORM

QUANTITY	TITLE	PRICE	TOTAL
	Basic Guide to Employment Defamation and Privacy Law	\$ 3 each	
		Sales Tax (New York State orders only)	
		Total	

Name: _____

Firm/Organization: _____

Address: _____

City: _____ State: _____ Zip: _____

Telephone: _____ Fax: _____ E-mail: _____

Make check payable and send order to:

Media Law Resource Center

520 Eighth Ave., North Twr. 20th Fl.

New York, NY 10018

Online Retailer's Libel Action Over Financial Reports Survives anti-SLAPP Motion *Court Rejects Opinion and Lack of Actual Malice Defenses*

By Thomas Burke

A California appellate court has allowed a libel action brought by an online closeout retailer to proceed against a publisher of financial reports on publicly-traded companies. *Overstock.com, Inc. v. Gradient Analytics, Inc.*, No. A113397, 2007 WL 1545611 (Cal. App. 1 Dist. May 30, 2007) (Reardon, Ruvolo, Rivera, JJ.).

The lawsuit brought by Overstock.com against Gradient Analytics, Inc. survived a challenge under California's anti-SLAPP statute, which allows for the early dismissal of lawsuits involving First Amendment-protected activities. The lawsuit is being closely watched because of the implications the case may create for business journalists.

Background

In 2005, Overstock.com sued Gradient Analytics and a hedge fund for libel, intentional interference with prospective economic advantage and violation of California's unfair competition law. Overstock's complaint alleged that Gradient's "knowing and intentional dissemination of negative reports on Overstock containing false and/or misleading statements" caused the company's stock price to drop.

Gradient filed an anti-SLAPP motion insisting that the financial analysis it provided to its subscribers reflected its opinion – based on fully disclosed facts – about Overstock's internal operations and therefore protected. It also argued that as a publicly-traded company, Overstock could not prove that its reports were published with actual malice.

The trial court denied Gradient's motion finding that Overstock had demonstrated a probability of prevailing on its claims by finding not only that Gradient published reports with reckless disregard for the truth, but that its reports could reasonably be construed as statements of fact.

Court of Appeal Decision

In a lengthy opinion, the appellate court affirmed the trial court's ruling and squarely rejected Gradient's opinion and lack of actual malice defenses at this preliminary stage of the litigation.

Analyzing Gradient's opinion defense, the Court of Appeal noted that although the company's reports were "liberally couched in terms of opinion," the "use of interrogative language alone does not entitle statements to constitutional protection where, as here, they otherwise can be understood as implying defamatory fact." *Weller v. Am. Broad. Cos., Inc.*, 232 Cal. App. 3d 991, 1004 (1991).

The Court of Appeal found that "without question, the reports reasonably could be understood as implying that Overstock ... was 'cooking the books' and manipulating accounting procedures to boost the price of its stock. These implications are strengthened by the sheer flurry of negative reports, as well as by the stylistic emphasis placed on key phrases."

The Court's rejection of Gradient's opinion defense was pointed:

"There is a right or wrong answer to whether in multiple reports Gradient made false statements of fact that are objectively verifiable and provably false, for example, that Overstock's accounting violated GAAP [Generally Accepted Accounting Principles], with the implication that Overstock falsified its financials to mislead investors. That is what this lawsuit is all about."

Gradient fared no better in arguing that Overstock lacked clear and convincing evidence of actual malice. Indeed, although it's the rare libel case where an admitted public figure can prove malice – Overstock persuaded both the trial and appellate court that it possessed such evidence. The Court of Appeal highlighted evidence that Gradient allowed its subscribers to prepared targeted reports about particular companies, including Overstock, "that contained more negative information, or emphasized specific negative facts and downplayed positive facts."

The Court of Appeal observed that this evidence was contrary to Gradient's public assertion that its reports were "independent and objective."

"Gradient colluded with [the hedge fund defendants] to publish reports that met the negative expectations of the

(Continued on page 16)

Online Retailer's Libel Action Over Financial Reports Survives anti-SLAPP Motion

(Continued from page 15)

[hedge fund] in order to please [the hedge fund] and drive down the value of Overstock's stock," citing to *Suzuki Motor Corp. v. Consumers Union of U.S.*, 330 F.3d 1110, 1135 (9th Cir. 2003).

Gradient intends to seek review this month in the California Supreme Court. If review is not granted, the case will be remanded to the trial court for discovery and trial.

Thomas R. Burke, a partner with Davis Wright Tremaine LLP in San Francisco, was co-counsel on a media amici brief in this case. Overstock.com is represented by Stein & Lubin LLP and Freitas, McCarthy, MacMahon & Keating. Gradient is represented by Kecker & Van Nest, LLP and DLA Piper LLP. Rocker is represented by Lowenstein Sandler PC and Paul, Hastings, Janofsky & Walker LLP.

MLRC Calendar

PLEASE VISIT www.medialaw.org FOR MORE INFORMATION

September 17-18, 2007

MLRC London Conference

International Developments in Libel, Privacy, Newsgathering & New Media

Stationers Hall, London.

September 19, 2007

MLRC London Conference

International In-House Counsel Breakfast

Reynolds Porter Chamberlain
Tower Bridge House, St Katharine's Way, London

November 7, 2007

New York City

MLRC ANNUAL DINNER

November 9, 2007

New York City

Defense Counsel Section Breakfast

Descendible Right of Publicity Rejected for Marilyn Monroe's Estate

Actress's Death Occurred Before Right was Created by Statute

A federal district court in New York dismissed a right of publicity complaint filed by Marilyn Monroe, LLC, a company developed by one of Marilyn Monroe's heirs that purported to hold the actress's intellectual property rights. *Shaw Family Archives, LTD v. CMB Worldwide, Inc.*, No. 05CIV3939, 2007 WL 1413381 (S.D.N.Y. May 7, 2007) (McMahon, J.). Analyzing Indiana, California, and New York law, the court held that Monroe did not own the right to publicity in her name and likeness at the time of her death and was unable to bequeath such a right to any heirs.

Background

This case stems in part from the alleged sale of a "Marilyn Monroe" t-shirt in an Indianapolis Target store. The image of Monroe that appeared on the tee-shirt was credited to the Shaw Family Archives.

The Shaw Family Archives is New York-based limited liability company, which owns and manages the photographs of the late photographer Sam Shaw. The photograph collection includes a series of Monroe shots, many of which are considered to be "canonical." Shaw's daughters apparently own the copyrights in these photographs.

Marilyn Monroe died testate in 1962, at which time she was arguably domiciled in New York or California. Monroe's will did not expressly bequeath any right of publicity, but it did include a residuary clause:

SIXTH: All the rest, residue and remainder of my estate, both real and personal of whatsoever nature and whatsoever situate, of which I shall die seized or possessed or to which I shall be in any way entitled, or over which I shall possess any power of appointment by Will at the time of my death, including any lapsed legacies, I give, devise and bequeath as follows:

- (a) To MAY REIS the sum of \$40,000 or 25% of the total remainder of my estate, whichever shall be the lesser.
- (b) To DR. MARIANNE KRIS 25% of the balance thereof, to be used by her as set forth in ARTICLE FIFTH (d) of this my Last Will and Testament.
- (c) To LEE STRASBERG the entire remaining balance.

Shaw Family Archives, 2007 WL 1413381, at *3.

Anna Strasberg, the widow of the above-mentioned Lee Strasberg, created the Delaware company Marilyn Monroe, LLC (MMLLC), in order to manage the Monroe-related intellectually property rights allegedly left to her husband (and later bequeathed to her) via this residuary clause.

When MMLLC discovered the sale of the t-shirt in Target, it sued Shaw Family Archives (SFA) in the Southern District of Indiana. The suit was also based upon allegations that through its website SFA sold licenses to use Monroe's photograph and likeness on commercial items.

Indiana enacted a right of publicity statute in 1994 which "creates a descendible and freely transferable right of publicity that survives for 100 years after a personality's death." See Ind. Code §§ 32-36-1-1 to -20. The Indiana statute appears to apply to an act or event that occurs within Indiana, regardless of a personality's domicile, residence, or citizenship.

Before SFA was served with MMLLC's Indiana complaint, it filed a motion for declaratory judgment in New York, asking for a determination as to whether a postmortem right of publicity exists. The MMLLC sought a dismissal, stay or transfer of the declaratory judgment motion; ultimately the Indiana case and the declaratory judgment motion were consolidated before the Southern District of New York.

S.D.N.Y. Decision

The Southern District made three major points in granting summary judgment to SFA. First, the court held that the Marilyn Monroe's residuary clause could not function to bequeath a right of publicity to Strasberg and the MMLLC because "Ms. Monroe did not have the testamentary capacity to devise property rights she did not own at the time of her death." *Id.* at *4.

When Monroe died in 1962 there were no statutorily-recognized descendible postmortem publicity rights in Indiana, California, or New York. Indiana trust and estate law requires application of the law of the testator's domicile at the time of death. For Monroe, this was either California or New York, but a conclusive determination of domicile was not necessary: both states are clear that a testator may only bequeath property she owns at the time of death.

(Continued on page 18)

Descendible Right of Publicity Rejected for Marilyn Monroe's Estate

(Continued from page 17)

Since California and New York laws did not exist to allow a “right of publicity” to be passed on by will, any right Monroe would have had (possibly through common law at the time) would have died with her. Thus, MMLLC could not claim that SFA violated its right to publicity in Marilyn Monroe’s image.

The court’s second point came in response to MMLLC’s argument that it was Monroe’s intent to bequeath a right of publicity. MMLLC cited Monroe’s residuary clause language that she wished to pass on real and personal property “to which I shall be in any way entitled” as evidence of her intent to pass on publicity rights. The court did not agree: “[i]n the absence of any other evidence concerning Ms. Monroe’s intent, this boilerplate language is much too slender a reed on

which to hang a devise of postmortem publicity rights that did not come into being until 22 years after her death.” *Id.* at 8.

Finally, the court looked to Indiana and California law to determine that even if Monroe’s right of publicity could be conjured postmortem, “neither of the statute that arguably bestowed that right allows for it to be transferred through the will of a ‘personality’ who, like Ms. Monroe, was already deceased at the time of the statute’s enactment.” Both Indiana and California laws require that one transfer the right of publicity via a will, trust, or other means, or it will descend according to the intestacy statute.

Since Monroe did not include publicity rights in her will, and since Strasberg would not have been an heir under the intestacy statutes, MMLLC had no right in the image and likeness being distributed by SFA.

New York Considers New Right of Publicity Law

The New York State Assembly this month considered a bill to amend New York’s misappropriation statute to include a retroactive and perpetual right of publicity. New York’s misappropriation statute, Civil Rights Law §§ 50-51, prohibits the use of name or likeness of a living person for purposes of trade or advertising without that person’s consent. It does not provide for the survivability of the rights granted by the statute.

In part a response to the *Shaw* decision, a “right of publicity” bill was introduced in the state legislature on May 31. The bill would amend §§ 50-51 to create a retroactive, perpetual right of publicity for deceased individuals who died after 1938, and would make the use of such deceased person’s “name, portrait, voice, signature, or picture” “for advertising purposes, or for the purposes of trade,” without consent from the person’s heirs, subject to criminal and civil penalties.

As introduced, the bill contains no exemption for news or for works of artistic or political expression. It would effectively restrict not only future works, but also place existing works into a state of legal limbo. Supporters of the legislation include Al Pacino, Yoko Ono and the estate of Marilyn Monroe.

The Senate bill, S.6005, was introduced by Senator Martin Golden (R-Brooklyn) and the Assembly bill, A.8836, was introduced by Judiciary Committee Chairwoman Helene Weinstein (D-Brooklyn). The Assembly bill was subsequently amended to exempt certain expressive works, but works containing “a use in connection with a product, article of merchandise, good, or service” were carved out from the exemption if “the claimant proves that this use is so directly connected with a product, article of merchandise, good, or service as to constitute an act of advertising, selling, or soliciting purchases of that product, article of merchandise, good, or service by the living or deceased personality without prior consent.”

A number of news organizations and media groups submitted letters in opposition to the amendment. Though the legislature adjourned without acting on the amendment, it is likely to re-emerge during a special session, possibly as soon as mid-July.

While the media will continue to oppose any legislation that would amend §§ 50-51, lobbyists advised the media to draft a counter proposal. As such, MLRC has created a task force to work on drafting a counter proposal. The Assembly bill is available online at: <http://assembly.state.ny.us/leg/?bn=A08836&sh=t>

The Senate bill is available online at: <http://assembly.state.ny.us/leg/?bn=S06005&sh=t>

Court Dismisses Carol Burnett's Suit Over *Family Guy* Cartoon Episode Reference To Comedienne Is Fair Use

By Jean-Paul Jassy

On June 4, 2007, the U.S. District Court for the Central District of California granted, without leave to amend, a Rule 12(b)(6) motion to dismiss Carol Burnett's lawsuit against Twentieth Century Fox Film Corporation ("Fox") stemming from an episode of the animated television program *Family Guy*. *Burnett v. Twentieth Century Fox Film Corp.*, 2007 WL 1662343 (C.D. Cal. 2007) (Pregerson, J.).

The Court dismissed copyright and Lanham Act claims brought against Fox by Burnett and her company, Whacko, Inc. The Court declined to exercise supplemental jurisdiction over the plaintiffs' state law claims for violation of the statutory and common law rights of publicity, and the Court denied as moot Fox's special motion to strike the state law claims under California's anti-SLAPP statute.

Background

Family Guy is a half-hour, animated, comedy television program broadcast on primetime and geared toward an adult audience. The show borrows heavily from popular culture, following the exploits of the Griffin family and friends in the fictional suburb of Quahog, Rhode Island. *Family Guy* routinely puts cartoon versions of celebrities in awkward, ridiculous and absurd situations in order to lampoon and parody those public figures, and also to poke fun at society's general fascination with celebrity and pop culture.

On or about April 23, 2006, Fox aired an episode of *Family Guy* entitled "Peterotica." Near the beginning of the episode, the Griffin family patriarch, Peter Griffin, enters a "porn shop" with his friends. Upon entering, Peter remarks that the "porn shop" is cleaner than he expected. One of Peter's friends explains that "Carol Burnett works part time as a janitor."

The screen then switches for less than five seconds to an animated figure resembling the "Charwoman" from *The Carol Burnett Show*, mopping the floor next to seven "blow-up dolls," a rack of "XXX" movies, and a curtained room with a sign above it reading "Video Booths." The Complaint alleged that, as the "Charwoman" mopped, a "slightly altered

version of Carol's Theme [from *The Carol Burnett Show*] [was] playing."

The scene then switches back to Peter and his friends. One of the friends remarks: "You know, when she tugged her ear at the end of that show, she was really saying goodnight to her mom." Another friend responds, "I wonder what she tugged to say goodnight to her dad," finishing with a comic's exclamation, "Oh!," and a vaudevillian jig. The entire reference to Burnett, from start to finish, lasts approximately 18 seconds.

Plaintiffs sued Fox for copyright infringement, violation of the Lanham Act and for violation of the statutory and common law rights of publicity.

In response to Plaintiffs' Complaint, Fox brought a Rule 12(b)(6) motion to dismiss each of Plaintiffs' claims. Fox also brought a special motion to strike the state law right of publicity claims under California's anti-SLAPP statute. Fox asked

the Court to take judicial notice of the episode at issue.

No Copyright Infringement

The Court ruled that Fox had demonstrated that Plaintiffs' copyright claim was barred by the doctrine of fair use. The Court took each fair use factor in turn, finding that they "weigh[ed] strongly in favor of a finding of fair use and that plaintiffs' first claim for relief for copyright infringement should be dismissed without leave to amend."

The Court ruled that the purpose of Fox's use was transformative and parodic in nature. Plaintiffs argued that the use was not a parody in a "strict legal sense" because it parodied Burnett and not the "Charwoman."

Fox countered that the fair use doctrine was not so strict and that the use parodied many things, including Burnett, her public figure status, her eponymous television show, its theme music and the "Charwoman." The Court agreed with Fox and held that "a parodic character may reasonably be perceived."

Because the use was parodic, the Court accorded little weight to the second fair use factor, the nature of the copyrighted work.

The Court ruled that the third fair use factor, the amount and substantiality of the use, weighed in Fox's favor because

"No reasonable viewer would mistake the Charwoman or Carol Burnett as anything other than the target of a Family Guy parody."

(Continued on page 20)

Court Dismisses Carol Burnett's Suit Over Family Guy Cartoon Episode

(Continued from page 19)

Family Guy's brief evocation took "just enough of the imagery and accompanying theme music to make" its depiction "recognizable" to its viewers.

The fourth factor, the effect of the use on the potential market for the work, also weighed in Fox's favor. The Court held that Fox was "correct that the market demand for a non-parodic use of the Charwoman would not be fulfilled by a use that has the character in front of 'blow-up' dolls and 'XXX movies.'"

Lanham Act Claim Dismissed

The Court also dismissed the Lanham Act claim without leave to amend. Fox moved to dismiss this claim on several grounds, but the Court focused on two arguments in particular.

The Court held that, despite Plaintiffs' contentions, there was no reasonable likelihood the viewers of Family Guy would be confused as to sponsorship or endorsement by Plaintiffs: "no reasonable viewer would mistake the

Charwoman or Carol Burnett as anything other than the target of a Family Guy parody."

The Court also ruled that Plaintiffs' dilution claim could not stand because "[a] dilution action applies to purely commercial speech," but "Fox's artistic and parodic work is considered noncommercial speech and, therefore, not subject to a trademark dilution claim."

Right of Publicity

With the federal claims gone, the Court declined to exercise supplemental jurisdiction over the state law right of publicity claims. The Court also denied Fox's anti-SLAPP motion (which targeted the right of publicity claims) as moot.

Jean-Paul Jassy and Gary L. Bostwick of Bostwick & Jassy LLP in Los Angeles, CA represent Twentieth Century Fox Film Corporation. Marvin G. Burns and Robert W. Denton of Lurie Zepeda Schmalz & Hogan in Beverly Hills, CA represent Plaintiffs.



50-STATE SURVEYS

Pre-order your 2007-08 edition now!



Media Privacy and Related Law 2006-07

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

Edited by the Media Law Resource Center, Inc.

MEDIA PRIVACY AND RELATED LAW

(published annually in July)

The 2006-07 edition is currently available.

- TOPICS INCLUDE: False Light • Private Facts • Intrusion • Eavesdropping • Hidden Cameras • Misappropriation • Right of Publicity • Infliction of Emotional Distress • Prima Facie Tort • Injurious Falsehood • Unfair Competition • Conspiracy • Tortious Interference with Contract • Negligent Media Publication • Relevant Statutes

For a preview of the MLRC 50-State Survey outlines, or ordering information, please check the MLRC web site at www.medialaw.org

Libel Case Over Web Forum Postings Reinstated

Discussion of Soccer Coach Not a Matter of Public Interest

Taking a very narrow view of the public interest prong of California's anti-SLAPP statute, a California appellate court reinstated a libel claim over web postings criticizing a high school soccer coach. *Joyner v. www.socalsoccertalk.com et al.*, No. G037181, 2007 WL 1697486 (Cal.App. 4 Dist. June 13, 2007) (Aronson, Moore, Fybel, JJ.).

Although the coach was the subject of about 2,000 postings on a web forum with 600 users, the court concluded the postings concerned a matter of significance to only a small group of players and family and thus the case involved no issue of public interest.

Background

The plaintiff, Jeffrey O. Joyner is a professional soccer coach who has organized and managed teams for teenage girls in Southern California. The defendant started a website called socalsoccertalk.com, that provides online forums on local soccer issues.

Beginning in December 2004, unidentified users, believed to be parents of players Joyner had coached, began posting criticisms of Joyner's actions in managing his soccer teams.

According to Joyner's complaint, some of these statements falsely accused him of "stealing team funds," described him as "a cheater and a thief," and asserted he intentionally ran one of his teams "into the ground."

Joyner sued the website operator and its web hosting company for libel and related claims. The trial court initially

granted plaintiff a preliminary injunction ordering the removal of certain web postings. But the trial court later dismissed the complaint in its entirety under the California anti-SLAPP statute, Cal. Civ. Code § 425.16.

To prevail on an anti-SLAPP motion, the movant must first make a threshold showing that the challenged cause of action arises from an act in furtherance of the right of petition or free speech in connection with a public issue.

Court of Appeals Decision

Reinstating the claims, the Court of Appeals reasoned that the postings did not concern the public at large, but involved only "a limited, definable portion of the public – the approximately 600 Soccertalk members interested in local soccer issues." Moreover, the incident that triggered the defamatory statements was plaintiff's merger of two soccer teams. Thus the original controversy, according to the court, involved an even smaller group of people – i.e., the members of the teams and their families.

The court relied primarily on the case *Du Charme v. International Brotherhood of Electrical Workers*, 110 Cal.App.4th 107 (2003) – an employment case involving an alleged defamatory posting on a union website. The posting stated that a manager had been fired for financial mismanagement.

The court in *Du Charme* held that while the posting might have been of interest to union members it was not a matter of public interest. Rather it was an isolated statement unconnected to any existing debate or controversy.

The court in *Joyner* acknowledged that the web postings at issue were not isolated, but part of an ongoing discussion that generated over 2,000 postings that had been viewed over 84,000 times. Nevertheless, the court concluded that "public interest does not equate with mere curiosity.... To be a matter of public interest, the issue must have public significance."

(Continued on page 22)

Topic Title	Replies	Topic Starter	Views	Last Action
HS players in public	2	-Guest-	56	Today, 07:30 AM Last post by: -Guest-
FRAM/CRSC	1,011	-Guest-	34,928	Today, 06:21 AM Last post by: -Guest-
Axtec-Glendora-Arsenal merger??	254	-Guest 66-	8,260	Today, 12:24 AM Last post by: -unregistered-
The new FRAM G16 for 2005-06 ...a thread that they can call their own	133	-Guest-	6,238	Yesterday, 11:02 PM Last post by: -Guest-
Full90 not allowed?	13	-guestomatic-	318	Yesterday, 10:07 PM Last post by: -guest-
Homer Clubs Which club is the worst?	47	-Guest-	1,752	Yesterday, 10:04 PM Last post by: -Eagle Bridesmaids-
All State Cup Games Cancelled!	32	-Crossbar-	1,568	Yesterday, 09:32 PM Last post by: -Guest-
Heinricks is a quoner! It's official. She's resigning.	12	-cobiwan-	394	Yesterday, 09:31 PM Last post by: -Guest-

Libel Case Over Web Forum Postings Reinstated

(Continued from page 21)

Interestingly, the web hosting company defendant had argued that some of the postings about plaintiff concerned the possibility of inappropriate relationships between coaches and players and therefore the speech involved the public interest as a matter of law. The court agreed that postings about inappropriate relationships would be a matter of public interest, but noted that plaintiff was only suing over allegations of financial impropriety and mismanagement. “These general comments did not implicate Joyner in any sexual improprieties, and thus cannot convert a discussion of private concern to a matter of public significance.”

Section 230 Immunity

Because all the statements at issue were made by third parties, the defendants also argued that they are immune from suit under § 230 of the Communications Decency Act. The court did not address this presumably dispositive issue, except to note that defendants could seek relief under § 230 by other procedural means, such as demurrer or summary judgment.

Plaintiff is represented by the Law Offices of Lenore Albert. Defendants www.socalsoccertalk.com and Jerry Lazzareschi are represented by Timothy Walker of Ford, Walker, Haggerty & Behar. Proxy, Inc. is represented by Raymond Loughrey Preston Gates & Ellis.

Dismissal of Libel Suit Against Newspaper and Columnist Affirmed Article Was Opinion, But False Imputation of Homosexuality Can Be Defamatory

In a short decision, a New York appellate court affirmed dismissal of a libel claim against the *Journal News*, a suburban New York-area daily newspaper, and a columnist, on opinion grounds. *Kleptko v Reisman*, No. 21247/05, 2007 WL 1704465 (N.Y. App. Div. 2d Dep’t June 12, 2007) (Schmidt, Santucci, Skelos, Lifson, JJ.).

At issue was a September 2005 column describing an incident in which the columnist’s dog was attacked by two pit bulls named “Liberty” and “Freedom.” Entitled “Dogs’ attack spotlights human irresponsibility” the column detailed the facts of the incident and stated in relevant part:

After a little checking in the neighborhood, I found the dogs’ owners - *two middle-aged guys who lived together* in a house not far from Sarah Lawrence College. Their dogs were notorious. I went back to the home of the mugger dogs. This time, the other guy came to the door. I had a feeling he knew I was going to show up with the [medical] bill. He said his *cowardly friend* had “gone to Egypt.” I gave him the bill and I was prepared for a fight. But he paid it on the spot, without any questions.... Liberty and Freedom - that said it all about the *idiotic menace* I was dealing with. In the wrong hands, those words only add up to selfishness and irresponsibility.

Plaintiff sued over statements in the column calling him “cowardly,” and an “idiotic menace,” and also alleged the column falsely implied he is a homosexual. In January 2006, the trial court granted a motion to dismiss for failure to state a claim, holding the column was protected opinion as a matter of law.

In a typically short decision, a New York appellate court affirmed. The column was “pure opinion” and was supported by a recitation of the underlying facts. Moreover “the statements amounted to no more than name-calling or a general insult, a type of epithet not to be taken literally and not deemed injurious to reputation.”

In dicta, though, the court went on to add that a “false imputation of homosexuality is reasonably susceptible of a defamatory connotation.” But the court found that the statement in the column that plaintiff lived together with another middle-aged man did not readily connote a sexual relationship, particularly when viewed in the context of a column concerning irresponsible dog owners.

Plaintiff was represented by James J. Mahon, Helms & Greene, LLC, NY. Defendants were represented by Mark Fowler, Satterlee Stephens Burke & Burke, LLP, NY.

New York Appeals Court Bounces Sprewell's Libel Suit

By Jason P. Conti

The New York Appellate Division, First Department has reversed a lower court decision and dismissed a defamation lawsuit brought against the *New York Post* by former NBA basketball star Latrell F. Sprewell. *Sprewell v. New York Post Holdings*, 2007 N.Y. Slip Op 05369 (N.Y. App. Div. 1st Dep't June 19, 2007) (Tom, Sullivan, Williams, Buckley, Malone, JJ).

The decision is a significant victory for the media's ability to invoke the New York Shield Law and still obtain dismissal on summary judgment.

Background

Sprewell, a former member of the New York Knicks, commenced a defamation action against the *Post* and its reporter Marc Berman in October 2002 stemming from a series of articles relating to an injury to Sprewell's hand. The four complained-of articles published in early October 2002 concern the cause of a fracture Sprewell sustained while on his boat in September 2002.

Sprewell objected to two points in the articles: how the hand injury occurred and the timing of his reporting of the injury to the Knicks. The first article discussed two possible explanations as to the cause of the injury: one (given by Sprewell's agent) that he hurt his hand while taking his boat out into the choppy waters of Lake Michigan (the agent later backed away from this explanation), and the other that he hurt it in an altercation at a party on his boat while docked at his marina. In his deposition, Sprewell offered a third explanation, claiming that he broke the bone in his hand after he fell down while inebriated on the deck of his docked boat. However, Sprewell's spokesperson originally had told the *Post* reporter that Sprewell had no idea how he injured his hand.

The *Post*, relying on two confidential eyewitnesses, reported that Sprewell was on his boat in September 2002 hosting a party, when he argued with the boyfriend of a woman who had vomited on the boat's white carpet, then took a swing at the boyfriend, missed, and hit the wall of the boat instead. The articles also noted that Sprewell did not report his injury to Knicks management until he arrived at the Knicks training facility on September 30, 2002 – many days after he fractured his hand.

Sprewell's complaint alleged that the articles were false and defamatory for two reasons: first, for suggesting that he injured his hand while trying to assault someone, and second, by insinuating that he violated his players' contract by deliberately concealing the injury from team management until the start of training camp. The lower court had previously denied a motion to dismiss on the ground that the passage was still capable of a defamatory *per se* meaning even though Sprewell was well-known for having been suspended for attempting to choke his professional basketball coach.

After extensive discovery, the *Post* and Berman filed a motion for summary judgment on the grounds that Sprewell could not prove constitutional malice and that the complained-of statements regarding Sprewell's failure to report his injury were substantially true. From the beginning of the case, defendants consistently invoked New York's Shield Law to protect the identities of the two confidential sources. Because of the defendants' reliance on the Shield Law, Sprewell filed a motion seeking to preclude the defendants from relying on the two confidential sources in determining the summary judgment motion. In connection with that motion the defendants submitted to the court deposition testimony of two witnesses who heard shouting (consistent with the altercation) on the evening of the party at issue, and observed certain people (including an obviously inebriated woman) leaving the boat. Defendants argued that this corroborating evidence provided further support for allowing the *Post* to rely upon the confidential sources.

In April 2006, the lower court issued a decision dismissing the portions of the libel claims pertaining to statements made in the articles that Sprewell concealed an injury. However, the court denied that portion of the summary judgment motion pertaining to the other statements in the articles related to the cause of Sprewell's hand injury. In granting Sprewell's motion to preclude defendants' reliance on the two confidential sources, the court cited authority suggesting that the Shield Law does not offer "complete immunity from all legal consequences of refusing to disclose evidence relating to a news source."

The court stated that the defendants were impermissibly putting the confidential sources at issue by relying on them to disprove the existence of any constitutional malice. The court therefore concluded that without the two sources, the defendants could not prevail on summary judgment.

(Continued on page 24)

New York Appeals Court Bounces Sprewell’s Libel Suit

(Continued from page 23)

Appeals Court Decision

In a decision and order dated June 19, 2007, the First Department reversed the lower’s court’s decision, rejected the notion that the *Post* should be precluded from relying on the confidential sources, and granted summary judgment for the *Post*. In the decision, the court first provided a very lengthy and detailed factual account of the complained-of articles and all of the efforts the *Post* reporter took in order to investigate the story.

The court noted that “The information was not reported as incontrovertible fact, but rather cautioned the reader that it was based on two confidential witnesses and was denied by plaintiff.” The court also pointed out that the *Post* “did not rely exclusively on the informants’ accounts”, and that the reporter sought comment from numerous other individuals including Sprewell’s agent, his publicist, three sources with the Knicks, three doctors, and three additional sources in Milwaukee. The court stated that the information provided by the doctors interviewed by the *Post* confirmed that Sprewell’s injury, commonly referred to as a “boxer’s fracture”, could have been caused by the errant punch described in the articles.

These “investigatory efforts demonstrate that Berman did not deliberately fail to seek confirmatory information or otherwise act with reckless disregard for the truth.” As a result of Berman’s diligent reporting, the court concluded that “Plaintiff has not presented any evidence to raise a triable issue of fact concerning actual malice, let alone sufficient evidence to establish actual malice by clear and convincing evidence, the standard applicable even on a summary judgment motion.”

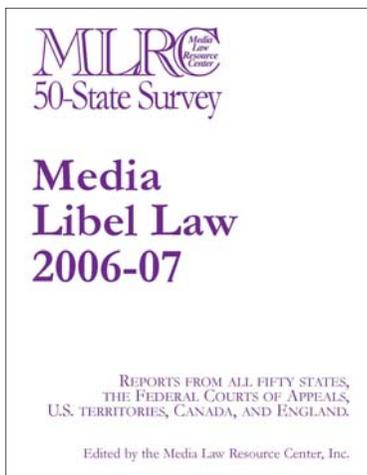
The decision is noteworthy in that the First Department rejected the lower court’s decision to penalize the *Post* by disregarding any information provided by the confidential sources in deciding the summary judgment motion. As such, the decision provides a powerful tool for defendants to argue that they can rely on information from confidential sources in order to buttress their summary judgment argument regarding the lack of any actual malice.

The decision provides a powerful tool for defendants to argue that they can rely on information from confidential sources.

Slade R. Metcalf and Jason P. Conti of Hogan & Hartson LLP, New York City represented NYP Holdings, Inc., the publisher of the Post, and reporter Marc Berman. The plaintiff Latrell Sprewell was not represented by counsel on the appeal.



50-STATE SURVEYS



2006-07 EDITION NOW AVAILABLE!

MEDIA LIBEL LAW

(published annually in November)

- TOPICS INCLUDE: Defamatory Meaning • Opinion • Truth/Falsity • Fault • Republication • Privileges • Damages • Motions to Dismiss • Discovery Issues • Trial Issues • Appellate Review • Remedies for Abusive Suits • Retraction • Constitutional/Statutory Provisions • Summary Judgment

For a preview of the MLRC 50-State Survey outlines, or ordering information, please check the MLRC web site at www.medialaw.org

New Jersey Supreme Court Rules Reporter Waived Shield Law Authentication to Prosecutor Waived Privilege in Libel Suit

By Kathleen A. Hirce & Bruce S. Rosen

In its first review of the nation's strongest shield law in 18 years, the New Jersey Supreme Court has unanimously held that a reporter waived his right to protection under the State's shield statute when he assisted county prosecutors and a borough attorney by authenticating information he had included in a published article. *In re Verified Petition of Venezia*, No. A-63-05, 922 A.2d 1263 (N.J. June 13, 2007).

The Court said that reporters could not "play peek a boo" with the shield law and anything that was disclosed to prosecutors would have to be repeated in a deposition and notes underlying those disclosures would have to be provided.

The Court drew a line at requiring the reporter to provide only that which was already disclosed and said counsel for the reporter could make the first cut at redacting the reporter's notes, with the court to examine the redactions if there is a dispute. In addition, while the Court declined to adopt defendant's defense that his discussions were done in furtherance of newsgathering, the Court acknowledged that reporters do not necessarily waive the privilege when they discuss privileged information with sources.

Background

Andrew Glazer, who was at the time a reporter for *The Record* of Hackensack, published by North Jersey Media Group Inc., (NJMG) had been writing extensively on how the mayor of Leonia, N.J. fired Michael Venezia, a probationary patrolman who was the son of a sitting superior court judge. Venezia had challenged the borough after he was fired, and the parties ultimately entered into a settlement agreement.

A few months later, in December 2004, after the mayor was indicted for pressuring a subordinate to breach the confidentiality of Venezia's personnel file, Glazer wrote an article about how the mayor, Laurence Cherchi, believed he was being unjustly vilified and quoted Cherchi as saying Venezia's termination had occurred "because he 'had been convicted of an undisclosed crime.'" Glazer wrote that he independently checked and was unable to find a conviction for Venezia on public databases.

Cherchi responded that he had been misquoted in the article and that as far as he knew Venezia had not been convicted

of anything. Cherchi also wrote a letter to the editor to this effect, claiming that he never made the attributed statement to Glazer and asking that a correction be published. The letter was published with a statement from the managing editor that the paper "[stood] by the original story."

Soon after publication, local prosecutors began an additional investigation to determine whether Cherchi unlawfully disclosed Venezia's confidential personnel file. The prosecutor's office told NJMG it would subpoena Glazer for testimony about his article unless he appeared voluntarily. NJMG entered into a "verbal agreement" with the assistant county prosecutor that Glazer would be allowed to "authenticate 'the information published in the December 28, 2004 article' provided that the prosecutor's office refrained from enforcing the subpoena or 'asking questions [of Glazer] which went beyond authentication.'" *Id.* slip op at 6.

According to the Supreme Court decision, NJMG certified that: "[b]ecause the information contained in the December 28 article had already been published and the source of the information was clearly identified in the article, *The Record* determined that authentication was a viable option in this instance to avoid a potentially costly legal battle with the prosecutor's office." *Id.* slip op. at 7.

Prosecutors subsequently interviewed Glazer, about his reporting duties generally and, more specifically, his conversation with Mayor Cherchi regarding the Venezia affair. The interview filled ten transcript pages. Glazer stated that he interviewed Cherchi and a former mayor by telephone, that Cherchi gave the information and made the statements attributed to him in the article, and that the interviews were "on the record." Glazer also indicated that he took notes of his interviews and that he had obtained "documents" to support some of the factual statements in the article. Glazer did not bring these papers to the interview.

Meanwhile, Venezia's defamation claim against the mayor and the borough was ongoing. A few months after the above-described interview, the Leonia Borough attorney approached Glazer about the December 2004 article as well. Following a conversation, the Borough attorney wrote to the Borough insurer:

(Continued on page 26)

NJ Supreme Court Rules Reporter Waived Shield Law Authentication to Prosecutor Waived Privilege in Libel Suit

(Continued from page 25)

I believe [Glazer] confirmed that he presently agreed that the information printed regarding this issue [of whether Venezia was convicted of a crime] was false although I do not believe he stated that he realized the information was false at the time he wrote the article.

However, he was very definitive that he had written the article based upon the oral statements of Mayor Cherchi and he stood by his story.

Id. slip op. at 11.

Glazer received a pre-action subpoena to preserve his testimony and immediately asserted the shield law. Soon after, Venezia filed a petition in the New Jersey Superior Court, Law Division, asking the court for permission to depose Glazer in connection with the defamation claim. Venezia also asked the court to direct that Glazer divulge any notes from or recordings of the interview with the mayor.

Procedure

The Superior Court judge, unaware of the specifics of any alleged waiver except the newspaper publishing a statement that “it stood by its story” and ignoring established precedent and the law itself, ruled that Glazer and *The Record* had waived the newsgatherer’s privilege when they published Glazer’s December article and when *The Record* published statements that its editors stood by the article. Glazer was ordered to appear for a deposition and to produce the requested material.

NJMG filed an emergent appeal before the Appellate Division, requesting a stay of the deposition. The court granted the stay and later issued an unpublished opinion vacating the Law Division’s order and dismissing Venezia’s petition. It held that the shield law protected Glazer and *The Record* from disclosing Glazer’s interview notes, identity of any sources used, and “any other information obtained by Glazer ‘in the course of pursuing his professional activities whether or not it is disseminated.’” *Id.* slip op. at 12, quoting N.J.R.E. 508(a). The Appellate

Division did not specifically address the alleged waivers, although some information concerning the alleged waivers was submitted to the Court.

Following this decision, Venezia filed suit against *NJMG* and Glazer, alleging defamation and false light, among other things. Venezia later amended the suit to include Cherchi and the Borough of Leonia. Venezia also petitioned the Supreme Court of New Jersey for certification on the Appellate Division decision; the Court granted that petition.

NJ Supreme Court Decision

The Court first acknowledged the strength of New Jersey’s shield protection, and then addressed the waiver doctrine, framing the current issue as follows: “whether a news reporter’s repeated disclosures of non-confidential information through non-privileged channels constitute a waiver of the privilege.”

Id. slip op. at 14.

Id. slip op. at 14.

A reporter, the Court ruled, “may lose the sweeping protections of the Shield Law if the reporter abandons the privilege by disseminating information outside of the newsgathering and news reporting process.” *Id.* slip

op at 19. Glazer did not waive the privilege simply by publishing the December article, as the Law Division had ruled. Nor did *The Record* waive the privilege by publishing the editor’s reactions to Cherchi’s letter. Based solely on publication, “Glazer could not have been compelled to testify concerning the contents of his article.” Slip op at 23. That he assisted in the investigation of Cherchi, however, changed the outcome.

The Court ultimately held that the conversations with the county prosecutors and the borough attorney constituted a “dissemination outside the newsgathering and news reporting process.” Glazer and *The Record* had argued that by assisting in the investigation Glazer was engaging in newsgathering; these government figures were “potential news sources themselves who must be cultivated for future reporting opportunities.” *Id.* slip op. at 15.

The Court declined to adopt this argument, noting that it was contradicted in the record by *NJMG*’s certification, ex-

(Continued on page 27)

A reporter “may lose the sweeping protections of the Shield Law if the reporter abandons the privilege by disseminating information outside of the newsgathering and news reporting process.”

NJ Supreme Court Rules Reporter Waived Shield Law Authentication to Prosecutor Waived Privilege in Libel Suit

(Continued from page 26)

cerpted above. The Court determined that the newspaper had released Glazer to speak with the investigators “because there were no anonymous sources to be protected in Glazer’s article and because the potential expense of invoking the privilege was not worth the effort. . . .” *Id.* slip op. at 26.

In addition, the Court appeared reluctant to “accept the argument that every reporter’s disclosure to another should be viewed as a bona fide attempt to curry favor with a potential future source, and therefore as a newsgathering opportunity.” Slip op. at 28. The Court did, however, articulate the necessity of protection for the newsgathering process, detailing the reporter’s right to discuss privileged information with sources while reporting.

Of apparent ultimate importance to the Court was that “Glazer’s assertion of the privilege deprives Venezia of the same information previously disclosed to the investigators and, to a lesser extent, the borough attorney.” Slip op. at 27. The information Venezia sought “is the heart of [his] defamation case.” *Id.*

While holding that disseminations such as Glazer’s constitute a waiver, the Court made the following final observation:

We understand that as a result of this ruling, a journalist may be forced to decide between cooperating with the government or preserving the privilege. But the purpose of the Shield Law is not to protect journalists from having to make difficult decisions, but to safeguard their ability to maximize “the free flow of information” to the public.

[Slip op. at 30 (citations omitted).]

Scope of the Waiver

The Court again identified the strength of New Jersey’s shield law in determining the scope of Glazer’s waiver. As its starting point, the Court noted “that Glazer’s waiver must be narrowly construed to conform to the overarching purposes of the Shield Law.” Slip op. 30. Following the State evidence rule regarding waiver, as well as the narrow waiver provision within the Shield statute, the Court held that “Glazer cannot be compelled to answer questions or provide documents on matters not previously disclosed by him to the investigators or borough attorney.” *Id.*

Thus, Venezia’s discovery may include “the same questions posed by the investigators to which Glazer provided an answer – but nothing more.” Slip op. at 31. The Court found the Law Division’s order regarding discovery to be “overly broad” and instead instructed that Glazer “provide testimony regarding the information actually imparted in his meetings with the investigators and borough attorney.”

Though Glazer did not bring his notes to the interviews with investigators, he must divulge any interview notes “that reflect whether Cherchi made the statements attributed to him in the article.” Slip op. at 32. This, the Court reasoned, was required of Glazer as it would be of any other witness who had waived a privilege of protection from discovery. Glazer could, however, redact privileged material from the notes. Should there be a dispute, Venezia would be required to show good faith for an in camera review.

Still, the Court warned: “Glazer may be questioned only about *specific* information that he has already disclosed; this limited inquiry is not a license to conduct a fishing expedition.” Slip op. 37

Bruce S. Rosen, a partner with McCusker, Anselmi, Rosen, Carvelli & Walsh, Chatham, NJ, represents reporter Andrew Glazer. Kathleen Hirce is MLRC’s Legal Fellow. North Jersey Media Group was represented by Louis Pashman, of Pashman Stein. Thomas J. Cafferty and Nomi I. Lowy, Scarinci & Hollenbeck, submitted a brief on behalf of amici curiae, New Jersey Press Association, The Star-Ledger, The Associated Press, Philadelphia Newspapers, Inc., NYP Holdings, Inc., ABC, Inc., Gannett Co., Inc. and The New York Times Company. Plaintiff is represented by Ralph J. Lamparello, Chasan Leyner & Lamparello.

Any developments you think other MLRC members should know about?

Call us, or send us a note.

Media Law Resource Center, Inc.
80 Eighth Ave., Ste. 200
New York, NY 10011

Ph: 212.337.0200,
medialaw@medialaw.org

Second Circuit Reverses FCC's "Fleeting Expletives" Policy

By Robert Corn-Revere and Ronald London

The Second Circuit this month issued a decision, vacating and remanding the Federal Communications Commission's recently adopted policy of enforcing its broadcast indecency policy strictly against fleeting, isolated and unintended expletives. *Fox Television Stations, Inc. v. FCC*, 2007 WL 1599032 (2nd Cir. Jun 4, 2007) (Leval, Pooler, Hall, JJ.). The case involved FCC enforcement actions taken against two broadcasts of the Billboard Music Awards that aired on the Fox television network in 2002 and 2003.

This is the first court decision to invalidate an FCC enforcement action on indecent broadcasts since the 1977 D.C. Circuit decision in *Pacifica Foundation v. FCC*, 556 F.2d 9 (D.C. Cir.1977). That case involved George Carlin's "filthy words" monologue, and it led to the 5-4 Supreme Court decision reversing the D.C. Circuit and narrowly upholding the FCC's constitutional authority to regulate indecent broadcasts. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978).

The Second Circuit opinion in *Fox Television Stations, Inc. v. FCC* was written by Judge Rosemary Pooler and joined by Judge Peter Hall. Judge Pierre Leval dissented. The majority opinion rested on the narrow ground that the decision violated the Administrative Procedure Act because the FCC had failed to explain its change in policy.

However, the holding was applied more broadly to encompass the FCC's general policy of enforcing the law against "fleeting expletives," and was not limited to the two broadcasts at issue. The opinion also included an extended discussion, in dictum, of the First Amendment problems raised by the FCC's approach to enforcement. It remanded the matter to the FCC, but added "we are doubtful that by merely proffering a reasoned analysis for its new approach to indecency and profanity, the Commission can adequately respond to the constitutional and statutory challenges raised by the Networks."

Background

The decision in *Fox v. FCC* arose from an effort begun by the FCC in 2004 to strengthen enforcement of 14 U.S.C. § 1464, which prohibits the broadcast of "obscene, indecent or profane language." In 2003, the FCC's Enforcement Bureau had dismissed an indecency complaint filed against the *Golden Globe Awards* show, after U-2's lead singer Bono

unguardedly exclaimed it was "fucking brilliant" his band won an award. In March 2004, the Commission reversed the Bureau's decision to dismiss the *Golden Globe Awards* complaint.

In doing so, it reversed a long line of FCC precedent that had held that "fleeting" or "isolated" expletives were not actionable, particularly when uttered in live settings. A broad coalition of broadcasters and other entities filed petitions for reconsideration of the *Golden Globe Awards* decision in April 2004, but the FCC has not acted on them.

In the meantime, the FCC issued an "omnibus" indecency order in February 2006 that addressed several dozen shows against which indecency complaints had been filed over a three-year period. *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005*, 21 FCC Rcd. 2664 (2006) ("*Omnibus Order*"). The Commission intended the *Omnibus Order* to "provide substantial guidance ... about the types of programming that are impermissible under [the] indecency" rule. It expanded on, and explained the change in policy in *Golden Globe Awards*, proposing fines against six programs on various networks, finding a few dozen more not indecent, and finding four other shows were indecent and profane but not subject to fine because they aired before the 2004 *Golden Globe Awards* decision.

The four programs in this category included the 2002 and 2003 *Billboard Awards* on Fox (on which, respectively, Cher and Nicole Richie uttered unscripted expletives), episodes of *NYPD Blue* on ABC (that included various iterations of "bullshit"), and a December 2004 *Early Show* on CBS (in which the interviewee in a news segment used the term "bullshitter").

The programs in this final category led to the petitions for review in *Fox Television Stations, Inc. v. FCC*. The major broadcast networks and their affiliates filed petitions that were consolidated in the Second Circuit. After a brief mid-appeal remand in which the FCC reversed its decisions regarding the *Early Show* and *NYPD Blue*, the appellate proceeding continued with the Commission's decisions regarding the *Billboard Music Awards* still at issue. Following the remand, the Court imposed an expedited briefing schedule and heard oral argument in late December last year.

(Continued on page 29)

Second Circuit Reverses FCC's "Fleeting Expletives" Policy

(Continued from page 28)

Second Circuit Decision

The Second Circuit did not limit its review to the *Billboard Award* holdings, but rather invalidated the FCC's creation of the new "fleeting expletives" policy. The court rejected "the FCC's contention that our review here is narrowly confined to the specific question of whether the two Fox broadcasts of the *Billboard Music Awards* were indecent and/or profane. The Remand Order applies the policy announced in *Golden Globes*. If that policy is invalid, then we cannot sustain the indecency findings against Fox."

The majority opinion found the policy arbitrary and capricious because it represented a significant break with positions the FCC had previously taken, and it failed to adequately explain the radical departure from the previously restrained interpretation of the indecency rule. The court observed that "[f]or decades broadcasters relied on the FCC's restrained approach to indecency regulation and its consistent rejection of arguments that isolated expletives were indecent," and held the FCC must provide a reasoned basis for any change in policy.

It suggested the FCC must show that indecent speech is harmful in some way, noting the FCC's order was "devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation. Such evidence would seem to be particularly relevant today when children likely hear this language far more often from other sources than they did in the 1970s when the Commission first began sanctioning indecent [broadcast] speech."

The court rejected several bases on which the FCC defended its change in policy. First, to the extent the FCC had argued the change was necessary to protect children from suffering the "first blow" of hearing even a single expletive (the "first blow" language comes from the Supreme Court's 1978 *Pacifica* decision), the court held the FCC provided no reasonable explanation for changing its perception that fleeting expletives were not harmful "first blows" for nearly 30 years between *Pacifica* and *Golden Globe Awards*. It also faulted the extent to which the current rule gives the FCC *carte blanche* to excuse "first

blows" in, for example, newscasts, or in movies the FCC finds artistically worthy, like *Saving Private Ryan*.

Because the majority decided that the FCC's decision was arbitrary and capricious, it held it was unnecessary to reach the constitutional issues raised by the networks. However, the court issued nearly nine pages of *dicta* expressing "skepticism" whether "the Commission can provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster." The court "question[ed] whether the FCC's indecency test can survive First Amendment scrutiny."

Expressing sympathy with "the Networks' contention that the FCC's indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague," the majority added: "We can understand why the Networks argue the FCC's 'patently offensive as measured by contemporary community standards' indecency test coupled with its 'artistic necessity' exception fails to provide the clarity required by the Constitution [and] creates an undue chilling effect on free speech."

Citing the Supreme Court decision in *Reno v. ACLU* that invalidated as unconstitutionally vague a test for indecency nearly identical to the FCC's rule for broadcasting, the court said: "we are hard pressed to imagine a regime that is more vague than one that relies entirely on consideration of the otherwise unspecified 'context' of a broadcast indecency." The majority opinion also stated the FCC's test raises "the separate constitutional question of whether it permits the FCC to sanction speech based on [the agency's] subjective view of the merit of that speech."

It added, "the FCC's current indecency regime" of requiring that "broadcaster[s] ... demonstrate to the satisfaction of the Commission, under an unidentified burden of proof, that the expletives were 'integral' to the work ... gives too much discretion to government officials" under the First Amendment.

Additionally, after noting that "all speech covered by the FCC's indecency policy is fully protected by the First Amendment," the Court stopped short of saying broadcasting should be subject to the same strict First Amendment

(Continued on page 30)

The FCC's order was "devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation."

Second Circuit Reverses FCC's "Fleeting Expletives" Policy

(Continued from page 29)

scrutiny that applies to all other mass media. At the same time, the court observed that it is getting extremely difficult to describe broadcasting as "uniquely pervasive" as a justification for subjecting broadcasters to less First Amendment protection than other media.

The Second Circuit cited the Supreme Court's decision in *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 822-23 (2000), to suggest strict scrutiny may soon apply to broadcasting, and noted the availability of less restrictive means of avoiding the perceived harm of indecency, *e.g.*, the V-chip. The court concluded that "the FCC is free to regulate indecency, but its regulatory powers are bounded by the Constitution. If the *Playboy* decision is any guide, technological advances may obviate the constitutional legitimacy of the FCC's robust oversight."

The Court also briefly discussed the FCC's reinvigoration of Section 1464's profanity prong as banning "personally reviling epithets naturally tending to provoke violent resentment or denoting language which under contemporary community standards is so grossly offensive ... as to amount to a nuisance."

After noting the wealth of precedent holding that "profanity" involves blasphemy or sacrilege "and nothing more," the Court observed "the FCC's definition of 'profane' ... would substantially overlap with the statutory term 'indecent'" in a manner "so extensive as to render the [latter] term ... superfluous." Consequently, to the extent that "on remand, the FCC may desire to explain its gloss on the definition of 'profane,'" the Court held that whatever deference is owed agency construction of such terms, "the FCC must still demonstrate that its construction is reasonable, particularly in light of Congressional intent, the canons of statutory construction, and the historical view of the plain meaning of this term."

Dissent

Judge Leval issued a dissenting opinion on grounds he felt the FCC adequately explained its policy change, and the majority simply had a "difference of opinion" on the FCC's direction in altering course. He characterized the reversal on "fleeting expletives" as a "small change ... by the FCC in its [indecency] standards" that merely "diminished the significance of the fact that the ... expletive was not repeated."

The dissent found the change in position justified by the FCC's "sensible, although not necessarily compelling" explanation that "the 'F-Word' – inherently has a sexual connotation" and "is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language." This was sufficient, the dissent argued, under the deferential standard of review afforded agencies and their right to effectuate changes in policy. The dissent declined to address the constitutional implications of the FCC's new policy.

Conclusion

The FCC has several options in the wake of the majority decision. It could conduct proceedings on remand in an attempt to remedy the failure to sufficiently justify its change of position. However, the resulting decision likely would be appealed to the same court that has raised grave doubts that the change in policy could survive First Amendment review. The FCC also could seek rehearing *en banc* by all judges in the Second Circuit rather than just the panel of three who heard the case originally. Finally, the FCC could petition for review by the Supreme Court, which has the discretion to accept or decline to hear the case. The FCC has not yet indicated how it plans to respond to the decision.

Robert Corn-Revere is a partner and Ronald London is of counsel in Davis Wright Tremaine LLP's Washington D.C. office. They represent CBS Broadcasting Inc. in Fox Television Stations, Inc. v. FCC.

SAVE THE DATE

November 9, 2007

New York City

Defense Counsel Section Breakfast

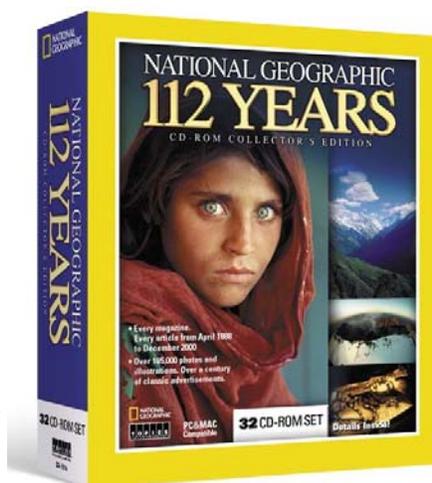
National Geographic CD-ROM Collection a Permitted Revision

Eleventh Circuit Reverses Prior Ruling in Light of *Tasini*

The Eleventh Circuit this month held that a digital compilation of National Geographic magazines on CD-ROM is a permissible revision of a collected work under § 201(c) of the Copyright Act. *Greenberg v. Nat'l Geographic Soc'y*, No. 05-16964, 2007 WL 1693056 (11th Cir. June 13, 2007) (Barkett, Kravitch, Trager, JJ.) (“*Greenberg II*”). The decision overrules the Eleventh Circuit’s 2001 decision in the same case which had held that the compilation infringed the copyright of a freelance photographer whose work appeared in the magazine. See *Greenberg v. Nat'l Geographic Soc'y*, 244 F.3d 1267 (11th Cir. 2001) (“*Greenberg I*”).

The Eleventh Circuit reasoned that it was bound to overrule its prior decision in light of the Supreme Court’s decision in *New York Times Co. v. Tasini*, 533 U.S. 483 (2001). In *Tasini*, the Supreme Court held that an electronic database of periodical articles was not a permissible revision under the Copyright Act, distinguishing the database from microfiche and microfilm compilations which present material in its original context.

Writing for a unanimous panel, Judge Trager announced that “*Tasini* creates a new, post-*Greenberg I* framework for analyzing the § 201(c) privilege.”



Revisions of Collected Works

Section § 201(c) of the Copyright Act permits the owner of a collective work to produce “revisions” of the work. The Eleventh Circuit reasoned that in evaluating § 201(c) post-*Tasini*, the court should ask “whether the original context of the collective work has been preserved in the revision.” Here, National Geographic created “a digital compilation that contains exact images of past magazine issues.” The CD-ROM preserved that context, and so did not infringe the copyrights of freelance photographers whose photos it reproduced.

In *Greenberg I*, by contrast, the Court had separated the digital compilation into three components: a brief introductory sequence of morphing magazine cover images,

the original magazine reproductions, and the program by which users accessed the material. The Court assumed, without discussion, that § 201(c) protected the extant digital reproductions of the magazine issues, but ruled that the navigation program and the introductory sequence were separately copyrightable elements. Thus, the CD-ROM editions was a new product “in a new medium, for a new market that far transcends any privilege of revision or other mere reproduction envisioned in § 201(c).” *Greenberg I* at 1273.

Impact of *Tasini*

In concluding that *Tasini* required *Greenberg I* be overruled, the Court looked to a Second Circuit decision involving a nearly identical copyright infringement claim decided after *Tasini*. In *Faulkner v. National Geographic*, 409 F.3d 26 (2d Cir.), cert. denied, 126 S.Ct. 833 (2005), the Second Circuit held that *Tasini* gave “tacit approval to microfilm and microfiche,” as privileged media under § 201(c), because they preserve the original context, and that this privilege should extend to CD-ROMs as well. *Faulkner* at 35.

Furthermore, the Second Circuit court ruled that “the *Tasini* approach so substantially departs from the *Greenberg* analysis that it ... render[s] application of collateral estoppel inappropriate.” *Id.* at 37.

The Eleventh Circuit then evaluated the relationship between the introductory sequence and the reproductions that make up the bulk of the CD-ROM under *Faulkner*’s post-*Tasini* rationale. Drawing upon the legislative history of the Copyright Act, the Court held that “the addition of new material to a collective work will not, by itself, take the revised collective work outside the privilege.” *Greenberg II*.

National Geographic was represented by Kenneth Starr, Kirkland & Ellis, LLP, Washington, DC; Stephen N. Zack, Boies, Schiller & Flexner, LLP, Miami, FL; and Robert G. Sugarman, Weil, Gotshal & Manges, LLP. Plaintiff was represented by Norman Davis, Squire, Sanders, & Dempsey, LLP, Miami, FL.

Speakers Bureau on the Reporter's Privilege

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

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

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

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

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

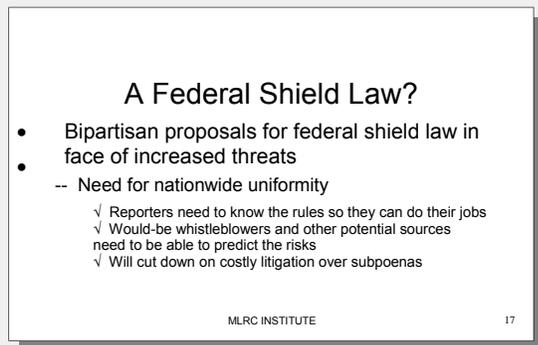
If you are interested in joining the speakers bureau or in helping to organize a presentation in your area, please contact:

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



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

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



U.S. Supreme Court Rejects Student's First Amendment Case

School Could Discipline Student for "Bong Hits 4 Jesus" Banner

In a highly publicized student speech case, the U.S. Supreme Court this month ruled that a former Alaska high school student had no First Amendment right to unfurl a 14-foot banner that read "BONG HiTS 4 JESUS" at an off campus Olympic torch parade. *Morse v. Frederick*, 2007 WL 1804317 (U.S. June 25, 2007).

The limited constitutional rights of students while in school, coupled with the government's interest in curbing drug abuse were sufficient to justify the punishment of speech that could reasonably be regarded as promoting illegal drug use.

Writing for a majority, Chief Justice Roberts rejected the Ninth Circuit's application of the "substantial disruption" analysis adopted in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Instead, the Court drew on *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), to conclude that the school principal's confiscation of the banner and suspension of the student were reasonable.

Background

In January, 2004, the Olympic Torch Relay was scheduled to pass through Juneau, Alaska and in front of Juneau-Douglas High School, where Joseph Frederick was a student. Frederick was not in school prior to the beginning of the parade, when his peers were released from classes to watch the festivities. Some students participated in the relay itself, while others fought, threw snowballs and generally acted the fool. Frederick stood on the opposite side of the street from the school, alongside a number of classmates.

As the torch approached, and in an effort to get himself on television, Frederick unfurled his now infamous banner. Frederick's principal, Deborah Morse, crossed the street immediately and demanded that the banner be discarded. When Frederick refused that request, she confiscated the sign and subsequently suspended him. Frederick's suspension was upheld both by the Juneau School District superintendent and the district's Board of Education.

Frederick filed suit under 42 U.S.C. § 1983, claiming his First Amendment rights had been violated both by the school district and by Morse.

The Alaska federal district court granted summary judgment in favor of the school district holding that Morse's interpretation that the banner promoted illegal drug use was reasonable, and that to suppress that message was in step with the school district's recorded policy on illegal drugs.

Ninth Circuit Decision

The Ninth Circuit reversed, holding that the case should be analyzed under *Tinker*. As such, the Ninth Circuit held that the high school was only entitled to punish Frederick's speech if it could show "a reasonable concern about the likelihood of substantial disruption to its educational mission." *Frederick v. Morse*, 439 F.3d 1114, 1123 (9th Cir. 2006) (Hall, Kleinfeld, Wardlaw, JJ.).

The panel held that no such concern existed and that, because the law was clearly established in this area, and the principal and school officials were not entitled to qualified immunity. The Ninth Circuit distinguished Frederick's facts from

(Continued on page 34)



U.S. Supreme Court Rejects Student's First Amendment Case

(Continued from page 33)

those found in *Fraser*, where a student's First Amendment complaint was dismissed on the grounds that the content of his speech to his middle school colleagues was indecently lewd and offensive. Here, however, the Ninth Circuit determined that Frederick's banner was "funny, stupid, or insulting, depending on one's point of view, but it is not 'plainly offensive' in the way sexual innuendo is."

Further, the Court refused to apply the holding from *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1998). Unlike the facts in *Kuhlmeier* that involved a school-sponsored student newspaper, the Court noted that Frederick's banner was neither sponsored, endorsed, nor otherwise intertwined with an official school activity.

Instead, in applying the holding from *Tinker*, the Court relied on the school district's own assertion of why Frederick's banner was removed. Morse testified that the reason for the sign's removal was that it conflicted with the board's mission of discouraging drug use. That reason, the Ninth Circuit said, was not sufficient under *Tinker* because it is not demonstrative of a reasonable concern that the banner would cause a substantial disruption to the school's educational mission.

Supreme Court Decision

At the outset, the Supreme Court spent some time attempting to discern the meaning of Frederick's banner. While deeming it "cryptic," Chief Justice Roberts recognized that the banner was "no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all." More important, however, was the Supreme Court's decision that the school principal's interpretation of the slogan was a reasonable one – if not *the* reasonable one.

Morse, Frederick's principal, had testified that she instinctively believed those viewing the sign would take it as a promotion of illegal drug use. As a result, the Court framed the question before it as "Whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use." In a 5-4 split, Chief Justice Roberts and Justices Scalia, Thomas, Kennedy and Alito Court answered in the affirmative.

In *Tinker*, the Court had previously held that student speech might only be suppressed where school officials reasonably conclude that the speech would lead to a material and substan-

tial disruption to the smooth running of the school. Here the Court rejected that analysis, citing the example of *Fraser* as an earlier instance where it had declined to follow *Tinker* in a student speech case. In addition, the Court employed *Fraser* to show that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."

The Court modified this statement with reference to a number of Fourth Amendment cases that stand for the proposition that students are not bereft of constitutional rights while in school but merely enjoy "the nature of those rights [that are] appropriate for children in school."

It was this combination of case law that led to the Court's ultimate holding: "The 'special characteristics of the school environment' and the governmental interest in stopping student drug abuse – reflected in the policies of Congress and myriad school boards, including JDHS – allow schools to restrict student expression that they reasonably regard as promoting illegal drug use."

Justice Thomas noted in a separate concurrence that he would "dispense with *Tinker* altogether" because "Local school boards, not the courts, should determine what pedagogical interests are legitimate and what rules reasonably relate to those interests."

Justice Alito, joined by Justice Kennedy, joined in the result with a separate concurrence stating that the decision "(a) goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'"

Justice Breyer concurred in the judgment only to the extent that it implied that qualified immunity barred the student's claims. And he dissented from the Court's First Amendment analysis. Justice Stevens, joined by Justices Ginsberg and Souter, dissented, finding that while qualified immunity might apply, there was no First Amendment basis to punish Frederick's speech – which had a "nonsense message" and did not advocate drug use.

Kenneth Starr, Kirland & Ellis LLP, represented the Alaska school officials before the Supreme Court. Frederick was represented by the Douglass Mertz and the Alaska ACLU.

Pennsylvania Supreme Court Finds First Amendment Right Of Access To Names Of Criminal Trial Jurors

Right Does Not Extend to Jurors' Addresses

By David A. Strassburger

In a unanimous decision authored by Chief Justice Cappy, the Supreme Court of Pennsylvania held that the First Amendment provides a qualified right of access to the names of jurors impaneled in a criminal trial, ending a nearly four-year long campaign by two media outlets to gain access to juror information. *Commonwealth v. Long*, 2007 WL 1574157 (Pa. May 31, 2007).

Background

The prosecution of Karl Long, a podiatrist, arose following the death of his wife, Elaine, in their home. According to the prosecution, Dr. Long killed Elaine by suffocating her with a dry cleaning bag. The trial sparked widespread media attention in part because the Longs lived in Ligonier, a tony suburb about an hour east of Pittsburgh, which rarely experiences violent crime, and in part because of the marquee expert forensic pathologists who testified – Cyril Wecht for the prosecution and Henry Lee for the defense.

During *voir dire*, the trial judge referred to the potential jurors by number only, and instructed counsel to do the same. After closing arguments, while the jury deliberated, a newspaper owner and television station owner – Tribune-Review Publishing Company and WPXI, Inc. – requested and were refused copies of the list of seated jurors. The media then moved to intervene and demanded access to the list. The trial judge deferred hearing the matter until the jury returned its verdict.

The jury returned a verdict of third-degree murder against Dr. Long. The trial judge thereafter heard argument of the media but again deferred decision. Three months after the jury returned its verdict, the court held a hearing, calling its own witnesses and entering its own evidence into the record. Dissatisfied with the process, the newspaper requested juror payroll records from the county controller's office under Pennsylvania's open records law, and was able to deduce from the size of the checks written the names of the fourteen jurors who sat on the jury.

On December 31, 2003, the trial judge denied the media relief. According to the judge, neither the common law nor the First Amendment provided a right of access to the names and addresses of jurors impaneled in a criminal case.

The media appealed to the Superior Court of Pennsylvania. In a published opinion, the Superior Court affirmed the decision of the trial court. *Commonwealth v. Long*, 871 A.2d 1262 (Pa. Super. 2005). Relying on *Gannett Co. v. Delaware*, 571 A.2d 735 (Del. 1990), and rejecting *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 781 N.E.2d 180 (Ohio 2002), the Court concluded that the First Amendment provides only a right to attend the proceeding, and not a right to gather information historically disclosed during the proceeding. The Court also rejected the media's common law claim of access to the jury list.

The media then sought discretionary review in the Supreme Court of Pennsylvania, which was granted. The Court also asked the Administrative Office of the Pennsylvania Courts to file a brief on behalf of the Commonwealth.

Pennsylvania Supreme Court Decision

In its opinion, the Court began with jurisdiction, and held that the appeal was not moot, even though the newspaper had deduced the names of jurors, because the issues raised were capable of repetition yet evading review and involved matters important to the public interest.

Next, the Court addressed the common law claim in an effort to avoid the constitutional question. The Court defined broadly the right of access to judicial records to include not only those documents that are filed with the court, but also "those that are used by the judge in rendering a decision."

This language directly undermined the Superior Court's ungenerous interpretation of the common law right. *Long*, 871 A.2d at 1275 (citing *Commonwealth v. Crawford*, 789 A.2d 266, 271 (Pa. Super. 2001) (holding that briefs that are not docketed are not judicial records)).

(Continued on page 36)

Pa Supreme Court Finds First Amendment Right Of Access To Names Of Criminal Trial Jurors

(Continued from page 35)

Nevertheless, the Court concluded that the common law right of access did not extend to jurors' names and addresses because any list containing the names and addresses of jurors: (1) is not entered into evidence; (2) is not required to be kept under any Rule of Criminal Procedure; and "[m]ore importantly" (3) the names and addresses are not the type of information upon which a judge bases his or her decision.

Turning then to the First Amendment question, the Court reviewed the test of experience and logic arising from *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) and its progeny. Applying that test, the Court provided the deepest analysis to date of the historical practice in criminal trials of making known the names of jurors, concluding that in England, in colonial America, and following the adoption of the First Amendment, the practice has been to "call" the jurors forward by name either during *voir dire* or as they were seated. The Court found no similar historical practice of revealing a juror's address.

Considering next the "logic" prong of the First Amendment inquiry, the Court agreed with the media that public access to names of jurors seated in a criminal case ensures the fairness, and the appearance of fairness, of the criminal justice system. Armed with the knowledge of juror names, said the Court, "the public can confirm the impartiality of

the jury, which acts as an additional check upon the prosecutorial and judicial process."

The Court also agreed with the media that access would diminish the risk of perjury during *voir dire* if jurors knew that their identities would be public, and therefore their answers subject to scrutiny and verification. Nevertheless, the Court did not believe that any of these considerations warranted access to juror addresses.

The Court cautioned that the right of access is qualified. If the trial court makes specific findings on the record demonstrating a real, as opposed to speculative, concern that jurors might be at risk of harm, tampering or harassment, then the trial court may deny access to the

jurors' names. Because the trial judge did not make specific findings, and because there were no grounds to support any such findings, the judgment of the Superior Court was reversed. The trial judge subsequently complied with the mandate and filed with the clerk of courts a list of the names of the trial jurors.

David A. Strassburger of the Pittsburgh firm of Strassburger McKenna Gutnick & Potter, P.C. represented Tribune-Review Publishing Company, and Walter P. DeForest, III of the Pittsburgh firm of DeForest Koscelnik Yokitis Kaplan & Berardinelli represented WPXI, Inc., in the Long case.

The Court provided the deepest analysis to date of the historical practice in criminal trials of making known the names of jurors.

Registration Materials Available Now

**MLRC London Conference
September 17-18, 2007**

International Developments in Libel, Privacy, Newsgathering and New Media Law

Concealed Weapons / Concealed Permits Controversy Over Access in Ohio

By John C. Greiner

In 2004, the state of Ohio passed legislation allowing citizens to obtain a permit to carry a concealed weapon. See Ohio Revised Code Section 2923.125. In the debate leading up to the passage of the bill, many proponents of the concealed carry law fought to make the permits exempt from the Public Records Act. Ultimately, the legislature compromised and allowed a “journalist’s exception” to the Concealed Carry Act.

Thus, while county sheriffs (the custodians of these records) may not release the names of permit holders to the general public, they may allow “journalists” to view the name, county of residence and date of birth of the permit holders.

Having failed to completely block access via legislation, pro-gun lobbyists set their sites on Ohio’s courts in an effort to shoot down the legislation (puns intended). Jeffery Garvas, the head of Ohioans for Concealed Carry (“OCC”) requested permission to inspect concealed carry permits in all of Ohio’s 88 counties. Garvas made the request as a journalist, because he produces a newsletter and podcast on behalf of the OCC.

Sheriffs Bring Declaratory Judgment Lawsuits

In three counties – Erie, Mercer and Clermont – the sheriffs filed remarkably similar lawsuits seeking some form of declaratory relief clarifying their obligations in responding to

journalists’ requests. Garvas was named a defendant in all three suits.

In the Erie and Clermont County cases, Gregory Korte, a reporter for *The Cincinnati Enquirer* who had also requested the information, was also named a defendant in the sheriffs’ suit. The Clermont County case included claims that the journalist exception was unconstitutional on equal protection grounds. The Erie County case did not contain constitutional claims, but did make an argument, taken directly from the OCC Website, that the statute was internally inconsistent, such that a sheriff who complied with the journalist exception would violate a statutory prohibition against maintaining a list of permit holders.

In the Mercer County case (as in the Erie and Clermont county cases), the Sheriff contended that declaratory judgment was necessary because if he denied Garvas’s request he could be the subject of a mandamus action, but if he granted Garvas’s request and Garvas was later deemed to not be a journalist, the Sheriff would be liable criminally for improper release of the information.

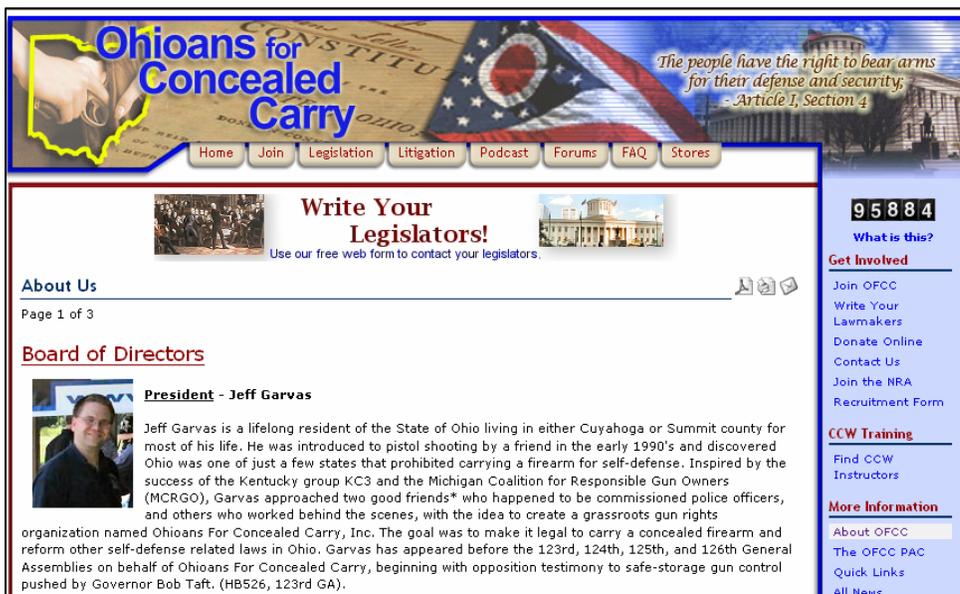
Gun Rights Advocate a Journalist Under the Law

The Mercer County court decided the case in less than a month, finding that Garvas was a journalist under the statute, since “defendant satisfies the definition of journalist contained in R.C. 2923.129(B)(2)(b) in that defendant is a person engaged in, connected with, or employed by a news medium or similar medium for the purpose of gathering, processing, compiling, editing, and disseminating information to the general public.”

Suit Against Reporter Dismissed

In the Erie and Clermont county cases, Gregory Korte filed motions to dismiss. On June 4, the Erie County Court granted the motion to dismiss. In its ruling, the Erie County court first noted that the argument that the statute was inconsistent –in that it mandated providing access to a journalist, while

(Continued on page 38)



Concealed Weapons / Concealed Permits

(Continued from page 37)

prohibiting the maintenance of a list of permit holders—simply reflected an erroneous reading of the statute. While the statute mandates the destruction of records related to the criminal and competency checks on permit applicants, it in no way prohibits the maintenance of a list of permit holders.

The court also rejected the sheriff's contention that he was at risk of criminal prosecution if he provided the information to a person who was later deemed to not be a journalist. The court noted that, in order to comply with the statute, the sheriff need only obtain a written statement from the journalist indicating the journalist's name and title, name and address of the journalist's employer, that the disclosure would be in the public interest and that the journalist is connected with a news medium.

As the court noted, "[i]f there is a fraud perpetrated upon the sheriff to obtain this information the Sheriff will not be held liable . . . as long as the prerequisites are fulfilled. Nothing in the above statute is vague."

Because the Erie County Sheriff was not in any imminent risk of prosecution, and because he presented no reason to deny the requested information, the declaratory judgment action was not ripe, and the court dismissed on this basis. While the Erie County court did not expressly rule whether Garvas was a journalist, its statement that "nothing in the . . . statute is vague" suggests that it is satisfied with the definition of journalist presented in the statute.

Pending Suit Raises Equal Protections Issue

The Clermont County case has not yet been decided. It is the only one of the three that raises a constitutional issue. The Sheriff contends that the statute violates his equal protection rights because, while he is limited as to whom he can provide the information, a journalist (and only a journalist) can share the information with the world.

While the court has not ruled on this argument, its prospects are not good. First, access to public records is not a constitutionally fundamental right. Thus, the applicable standard is a rational basis. It is not irrational to allow some limited access to the records. Second, persons who acquire information due to the position they hold frequently are prohibited from disclosing that information. Such a prohibition does not violate the First Amendment.

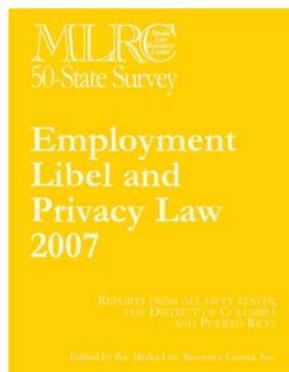
Assuming the Clermont Court rules consistently with the Mercer and Erie courts, the legal challenges to the Ohio Concealed Carry statute should cease.

While the fight is primarily an intrastate battle, the courts' apparent willingness to find that Garvas – essentially a blogger – qualifies as a journalist may be instructive as Congress struggles to define the term as it considers federal legislation on the reporter's privilege.

John C. Greiner, a partner at Graydon Head & Ritchie, and Jeff Allison, an associate in the firm, represented Gregory Korte in the proceedings.



50-STATE SURVEYS



2007 EDITION AVAILABLE NOW!

EMPLOYMENT LIBEL AND PRIVACY LAW

(published annually in January)

TOPICS INCLUDE:

- Publication • Compelled Self-Publication • Fault Standards • Damages • Recurring • Fact Patterns • Privileges and Defenses • Procedural Issues • Employer Testing of Employees • Searches • Monitoring of Employees • Activities Outside the Workplace • Records • Negligent Hiring • Intentional Infliction of Emotional Distress • Interference with Economic Advantage • Prima Facie Tort

Cloud Over 2004 Hurricane Relief Aid Finally Lifts as Appellate Court Tells FEMA to Hand Over Addresses

By Rachel E. Fugate & Deanna K. Shullman

The public interest in access to addresses of individuals who requested disaster relief from the Federal Emergency Management Agency (“FEMA”) in the wake of Florida’s 2004 hurricane season outweighs any privacy interest in the information, the Eleventh Circuit Court of Appeals, ruled. *Sun-Sentinel Co. v. U.S. Dep’t of Homeland Security*, Case No. 06-13306, 2007 WL 1793049 (11th Cir. June 22, 2007) (Carnes, Marcus, Kravitch, JJ.).

2004 Hurricane Season & Its Aftermath

In the summer of 2004, Florida became the first state in more than 100 years to find itself in the path of four hurricanes in a single year. Charley, Frances, Ivan, and Jeanne each, packed sustained winds greater than 115 miles per hour, and the winds of Ivan, which twice struck the Sunshine State, packed a punch in excess of 165 miles per hour.

These four historic storms crisscrossed the four corners of the state in little over a month’s time, their paths cutting lines across the map that too closely resembled the air traffic pattern of the busiest of airports. The storms left destroyed property and shattered lives in their wake. FEMA was dispatched to the storm-ravaged region, and billions of dollars in federal relief poured into the state.

Soon after clean-up efforts began, accusations of fraud and abuse in the aid distribution process cast a dark cloud over FEMA and its recovery efforts. Reporting by the *South Florida Sun-Sentinel* revealed serious flaws in FEMA’s disbursement process, including allowing millions of dollars of federal taxpayer money to be released to people in areas that were not impacted by the storms and hiring ineptly trained inspectors, many with serious criminal backgrounds. An investigation quickly ensued at all levels of government.

These investigations further determined FEMA improperly trained its contractors, failed to provide needed oversight, and neglected to implement quality controls that could protect the integrity of the aid distribution process.

Storm Over Access To FEMA Records

As FEMA faced tough questions regarding its disbursement process, the *Sun-Sentinel* sought answers. The *Sun-*

Sentinel made a series of requests for information under the Federal Freedom of Information Act (“FOIA”). The *Sun-Sentinel* asked for the database that is used to track aid requests and disbursements, the names of inspectors, quality control sheets that detail the results of FEMA’s re-inspection process, and correspondence between FEMA’s top official and others about the disbursements.

The *Sun-Sentinel* also asked for database information from 27 additional disasters. FEMA responded to the *Sun-Sentinel*’s attempts to shed light in these areas by asserting a number of FOIA exemptions and insisting that these materials, including the names and address of disaster claimants, be sheltered from public view.

The *Sun-Sentinel* filed suit in the United States District Court for the Southern District of Florida against FEMA seeking access to the information it requested.

To justify its withholding of the names of disaster claimants and addresses for which damages were claimed, FEMA asserted FOIA exemption 6, which protects the disclosure of information that would constitute a clearly unwarranted invasion of privacy. In turn, the *Sun-Sentinel* argued that any privacy interest in the information was clearly outweighed by the public interest in disclosure.

The public interest inquiry focuses on whether disclosure would shed light on the operations or activities of government and the public’s right to be informed about what their government is up to. All parties agreed that the massive response and recovery efforts after the 2004 hurricane season tested FEMA’s programs and operations like never before and that in the midst of this response, several questions emerged concerning whether FEMA passed those tests and appropriately handled applications for disaster relief.

The *Sun-Sentinel* argued that names and addresses of hurricane relief applicants would shed light on the activities and operations of FEMA and allow the *Sun-Sentinel* – and the public – to determine whether and to what extent ineffective controls, inefficient processing, and wasteful spending infected the disaster relief disbursement process in Florida.

For example, one of the central concerns raised in the aftermath of the 2004 hurricane season was whether and

(Continued on page 40)

Cloud Over 2004 Hurricane Relief Aid Finally Lifts as Appellate Court Tells FEMA to Hand Over Addresses

(Continued from page 39)

to what extent FEMA allocated taxpayer resources to individuals who did not qualify for federal disaster relief. Providing access to disaster claimants' addresses would allow the paper to map the claimed damage locations and compare payments made in neighborhoods where winds were relatively light and flooding minor with payments made in neighborhoods taking a direct hit from the storms.

The *Sun-Sentinel* could then investigate the propriety of the payments made in those neighborhoods with the most claims or investigate whether FEMA released too little aid in areas of great need. Although the *Sun-Sentinel* argued there was a public interest in access to disaster claimants' names as well, it acknowledged the two were separable and that the most direct public interest was in access to addresses because those provide the location of claimed damage.

Divergent Paths

As the *Sun-Sentinel* litigation was making its way through the summary judgment process in the district court, a related case was also proceeding in the United States District Court for the Middle District of Florida. In that case, three newspapers, *The News-Press*, *Florida Today*, and *Pensacola News-Journal*, similarly sued FEMA for access to the names and addresses of disaster aid claimants from the 2004 hurricane season. The district court in the *News-Press* case held that both names and addresses were exempt from disclosure under Exemption 6. *The News-Press v. U.S. Dep't of Homeland Security*, Case No. 2:05CV102FTM29DNF, 2005 WL 2921952 (M.D. Fla. Nov. 4, 2005).

But even in the wake of the *News-Press* case, the district court in the *Sun-Sentinel* case took a different path. In determining whether FOIA required disclosure of claimants' names and addresses, the district court heeded the *Sun-Sentinel's* suggestion and separately considered the respective interests in access to names and access to addresses as distinct issues.

With respect to disclosure of addresses, the district court concluded that the release of the addresses where damages were claimed raised a substantial privacy interest. That finding, however, did not end the court's inquiry. The next step was a determination whether release of the information would pose a clearly unwarranted invasion of personal privacy.

The district court concluded that disclosure of disaster claimants' addresses would "shed light on the activities and operations of FEMA; namely, the extent to which ineffective quality controls and processing of aid applications may have resulted in wasteful spending of taxpayer dollars by FEMA," and would not constitute a clearly unwarranted invasion of personal privacy. *Sun-Sentinel Co. v. U.S. Dep't of Homeland Security*, 431 F. Supp. 2d 1258 (S.D. Fla. 2006).

Although the court found that release of addresses would not constitute a clearly unwarranted invasion of privacy, the court reached the opposite conclusion with respect to access to claimants' names. The court again found that there was a substantial privacy interest implicated in release of claimants' names. This time, however, the public interest was not so strong as to outweigh the privacy interest.

Eleventh Circuit Clears Cloud of Secrecy

By the time the *Sun-Sentinel* court rendered its decision, the newspapers in the *News-Press* matter had already appealed the decision from the Middle District of Florida to the Eleventh Circuit of Appeals. FEMA likewise appealed the decision from the Southern District of Florida; however, the *Sun-Sentinel* did not appeal the denial of access to names. The cases were then consolidated in the Eleventh Circuit.

In beginning its analysis, the Eleventh Circuit noted the unique procedural posture of the case – two district court judges reaching opposite results on the same issue. Therefore, the court first determined the appropriate standard of review, which was particularly important given the divergent rulings.

The court noted that its own case law on the standard of review in Exemption 6 balancing cases had yielded differing results. The court took the opportunity to unequivocally hold that the *de novo* standard of review is applicable to the balancing analysis under FOIA Exemption 6 when the facts are not in dispute.

Applying the *de novo* standard, the Eleventh Circuit affirmed the *Sun-Sentinel* decision and reversed the *News-Press* decision with respect to disclosure of addresses of claimed disaster damage locations. The court opined:

In light of FEMA's awesome statutory responsibility to prepare the nation for, and respond to, all national incidents, including natural disasters and terrorist attacks,

(Continued on page 41)

Cloud Over 2004 Hurricane Relief Aid Finally Lifts as Appellate Court Tells FEMA to Hand Over Addresses

(Continued from page 40)

there is a powerful public interest in learning whether, and how well, it has met this responsibility. Plainly, disclosure of addresses will help the public answer this question by shedding light on whether FEMA has been a good steward of billions of taxpayer dollars in the wake of several natural disasters across the county, and we cannot find any privacy interest here that even begin[s] to outweigh this public interest.

As to disclosure of names of disaster claimants, the court agreed with the reasoning of the Southern District of Florida and rejected the *News-Press* appeal seeking this information.

Public Interest

In considering the public interest, the Eleventh Circuit “easily” concluded that the asserted interest in learning whether FEMA properly handled billions of taxpayer dollars after the 2004 hurricane season goes to the core purpose of FOIA, which is to shed light on the operations and activities of government.

The court stressed that the newspapers had “put forth ample evidence that FEMA’s response to Hurricane Frances in Miami-Dade County may have been plagued with fraud, waste, or abuse.” Because the court found that release of the requested information would directly serve the public interest, the burden then shifted to FEMA to demonstrate that the information already released adequately served the public interest.

The court soundly rejected FEMA’s argument that the public interest had already been served. First, FEMA argued that the government already performed a thorough investigation of its activities and that no further light could be shed on its performance. The court, however, noted that FEMA itself disputed the government’s findings and the significance of the systemic problems uncovered during the investigation.

Moreover, the government investigation was extremely limited. It covered only three percent of awards in Miami-Dade County in response to only one of the four hurricanes. The court also looked to FEMA’s own testimony during the investigations that extrapolations of problems found in Miami-Dade to other areas of the State could lead to incorrect conclusions.

The court summed up, “[a]fter FEMA so vigorously disputed the prior investigations’ findings and urged that no extrapolations be made from them, we are not disposed to hear FEMA tell us that these same investigations are sufficient to allow the public to satisfy its interest in knowing whether, in general, FEMA appropriately distributes disaster relief.”

Second, FEMA argued that the public interest was adequately served by its production of a zip-code breakdown of disbursement data. In rejecting this argument, the court agreed with the *Sun-Sentinel* district court that zip codes, which can cover a large piece of geography in certain areas, were still too indiscriminate to allow a thorough review of FEMA’s disbursements.

Even in small communities, one house may be damaged because it is by a river, while other houses are left untouched. It was also important to the court that in order to put FEMA’s performance in context, the *Sun-Sentinel* had requested disbursement data from other disasters, such as tornadoes, which often destroy one home while leaving a neighbor’s house intact.

Interestingly, the court noted that the newspapers found support for their arguments from an “unlikely source: FEMA itself,” and again considered FEMA’s own testimony regarding its response to the hurricanes. During the government investigation, FEMA claimed county-by-county comparisons led to faulty conclusions. Rather, each household must be analyzed individually – which is why FEMA does not disburse aid simply by zip codes and why the Court found information by zip code would likewise lead to faulty conclusions.

The court concluded its public interest analysis by finding:

In short, the public interest in determining whether FEMA has been a proper steward of billions of taxpayer dollars is undeniable and powerful. FEMA’s responses to the various investigations of its disbursement in Miami-Dade county following Hurricane Frances have produced more questions than answers. The addresses, however, will go a long way in resolving the factual disputes that exist between FEMA, on the one hand, and [the government investigations], on the other. Thus, we readily find that the addresses would further a powerful public interest.

(Continued on page 42)

Cloud Over 2004 Hurricane Relief Aid Finally Lifts as Appellate Court Tells FEMA to Hand Over Addresses

(Continued from page 41)

This finding, however, did not end the court's inquiry. It still had to determine whether the privacy interest in the addresses trumped the compelling interest in disclosure.

Privacy Interest

"[A]n agency's burden under Exemption 6 of showing that disclosure 'would constitute a clearly unwarranted invasion of personal privacy' is an onerous one." Whether disclosure of a list of addresses constitutes a clearly unwarranted invasion of personal privacy hinged on the characteristics revealed by virtue of being on the particular list and the consequences likely to ensue.

Therefore, the court first had to determine precisely what information would be revealed if it ordered disclosure of the addresses. The only type of personal information disclosed along with the addresses are Small Business Administration loan status, ownership status, and insurance status.

After determining the type of information that would be revealed through disclosure, the court meticulously debunked the privacy interests asserted by FEMA. First, disclosure of the information would not reveal details regarding applicants' personal property because FEMA awarded aid not based upon actual damage, but for predetermined, generic amounts. The court noted property was simply described as "'clothing,' not 'Gucci heels' or 'Keds;' 'television,' not 'high definition plasma' or 'black and white set from 1974' . . ." Disclosure of the information would not reveal anything about the specific kind or quality of property the applicant possessed.

Second, disclosure would not cause "public embarrassment or stigma" because unlike many government benefits program, there is no "means test" for receiving FEMA assistance. Even individuals with insurance can recover FEMA aid if their losses are not fully covered. The court acknowledged that some applicants may be identifiable as having lacked insurance to cover a specific item and may be identifiable as home renters rather than owners.

Although this may cause some stigma, the legislative history of Exemption 6 disfavored privacy claims by those receiving government benefits. In the end, the slight chance for stigma was not a significant factor and did not come close to outweighing the crucial role played by release of the addresses.

Third, the court found no evidence in the record to support assertions of potential identity theft and actual theft. At oral argument, counsel for FEMA conceded there was no support to conclude that applicants might be subject to identity theft. As to actual theft, the court found the disbursements of "generic" amounts was not sufficient evidence that thieves may be enticed to target aid applicants. Recipients of aid were not required to spend the aid money on any particular item and the passage of time rendered the information virtually useless to potential thieves.

Fourth, the court rejected the contention that applicants' privacy may be violated if they were contacted by the newspapers. "[I]ndividuals are under no obligation to speak to reporters, and on balance, the modest annoyance of a 'no comment' is simply the price we pay for living in a society marked by freedom of information laws, freedom of the press, and publicly-funded disaster assistance." Applicants simply did not have a legitimate expectation of privacy in their addresses that would preclude their release.

Finally, because disclosure to the newspapers would also require FEMA to disclose the information to any requestor, FEMA argued that the possibility that applicants might receive uninvited commercial solicitations warranted withholding of the information. The court again turned to the passage of time in rejecting this argument and found that in any event, "to the extent that . . . recipients experience slightly more commercial solicitation than the average American, this too, is a modest intrusion, at most."

Balancing

The Eleventh Circuit considered the balancing of the respective interests to be a fairly easy task.

Quite simply, the disclosure of the addresses serves a powerful public interest, and the privacy interest extant cannot be said even to rival this public interest, let alone *exceed* it, so that disclosure would constitute a "clearly unwarranted" invasion of personal privacy. On this record we do not find the balancing calculus to be particularly hard.

The court acknowledged the privacy interests at stake in releasing addresses of disaster damage locations; however, given the "enormous" public interest involved, FEMA did not even "come close to meeting its heavy burden" to justify application of Exemption 6.

(Continued on page 43)

Cloud Over 2004 Hurricane Relief Aid Finally Lifts as Appellate Court Tells FEMA to Hand Over Addresses

(Continued from page 42)

Conclusion

The Eleventh Circuit's opinion finally provides the public a mechanism to fully evaluate FEMA's failures in the disbursement process in the aftermath of the 2004 hurricane season, not the least of which was the potential waste of millions of dollars in taxpayer money. This is precisely the situation for which FOIA was designed – to allow the public to know what its government is up to.

In the court's own words: "The public interest in evaluating the appropriateness of FEMA's response to disasters is not only precisely the kind of public interest that meets FOIA's core purpose of shedding light on what the government is up to; the magnitude of this public interest is potentially enormous." The Eleventh Circuit did justice to the spirit and purpose of FOIA and its decision in this case is of great benefit to the press and public.

Rachel E. Fugate and Deanna K. Shullman, with the law firm Thomas & LoCicero PL, and David Bralow, Tribune Company, represented the South Florida Sun-Sentinel in this matter. Charles D. Tobin, David C. Borucke, Timothy J. Conner, and Stephen L. Brannock, Holland & Knight LLP, Washington D.C., Tampa, FL, and Jacksonville, FL, represented the News-Press, Pensacola News Journal, and FLORIDA TODAY. Talbot D'Alemberte, Thomas R. Julin and Patricia Acosta, Hunton & Williams LLP, Miami, FL, for amici curiae Media General Corp., E. W. Scripps Company, The Associated Press and Tribune Company.

MLRC MediaLawLetter Committee

Jay Ward Brown (Chair)

David Tomlin (Chair)

Dave Heller (Editor)

Robert D. Balin

Katherine M. Bolger

Thomas M. Clyde

Robert J. Dreps

Jon Epstein

Rachel E. Fugate

Michael A. Giudicessi

Charles J. Glasser

Richard M. Goehler

Karlene Goller

Shelley M. Hall

S. Russell Headrick

Russell T. Hickey

David Hooper

Jonathan Katz

Leslie Machado

John Paterson

Deborah H. Patterson

Bruce S. Rosen

Indira Satyendra

©2007

MEDIA LAW RESOURCE CENTER, INC.
520 Eighth Ave., North Tower, 20 Fl.
New York, NY 10018

BOARD OF DIRECTORS

Ralph P. Huber (Chair)

Peter C. Canfield

Dale Cohen

Stephen Fuzesi, Jr.

Henry S. Hoberman

Marc Lawrence-Apfelbaum

Karole Morgan-Prager

Kenneth A. Richieri

Elisa Rivlin

Susan E. Weiner

Kurt Wimmer

STAFF

Executive Director: Sandra Baron

Staff Attorney: David Heller

Staff Attorney: Eric Robinson

Staff Attorney: Maherin Gangat

MLRC Fellow: Kathleen Hirce

MLRC Institute Fellow: John Haley

Legal Assistant: Kelly Chew

MLRC Administrator: Debra Danis Seiden

MLRC Calendar

PLEASE VISIT www.medialaw.org FOR MORE INFORMATION

September 17-18, 2007

London, England
MLRC London Conference

International Developments in Libel, Privacy, Newsgathering & New Media

Stationers Hall, London.

September 19, 2007

London, England
MLRC London Conference

International In-House Counsel Breakfast

Reynolds Porter Chamberlain
Tower Bridge House
St Katharine's Way
London

November 7, 2007

New York City
MLRC ANNUAL DINNER

November 9, 2007

New York City
Defense Counsel Section Breakfast

ETHICS CORNER

What Sorts of Extrajudicial Speech Should the Rules of Professional Conduct Be Considered to Prohibit?

By Kip Purcell

If the life of the law has been experience, experienced lawyers have often been the life of the party in the media's coverage of American courts. As their clients' designated champions, and as the high priests of a profession that the public frequently finds fascinating, lawyers are an irresistible source for journalists seeking insight into the intricacies of civil and criminal justice.

Some attorneys, of course, want nothing to do with the limelight; but many others regard media relations as an inescapable facet of full-service lawyering. To what extent do the rules of professional conduct permit lawyers to cooperate with the media, or even court media attention, concerning a pending case?

Rules Governing Lawyers' Speech

Lawyers understand that their speech can never be completely free. Scattered throughout the rules of professional conduct are references to communications in which lawyers cannot engage under any circumstances, whether within or without the courtroom, via the media or otherwise.

Thus, for example, the rules categorically condemn disclosures of "information relating to the representation of a client" that are neither authorized by nor for the benefit of the client,¹ "knowingly ... false statement[s] of material fact or law,"² "false or misleading communication[s] about the lawyer or the lawyer's services,"³ false statements (made knowingly or with malice) "concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer,"⁴ and communications that "state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law."⁵

But aside from forbidding lawyers to spill client confidences, to lie, to indulge in deceptive self-promotion, to defame judicial officers, and to brag about their ability to game the system,⁶ what limits do the rules place on a lawyer's out-of-court speech about an ongoing case?

The relevant Model Rule is 3.6, entitled "Trial Publicity." Its central commandment is contained in paragraph (a):

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Lawyers who long for clear boundaries – who would be perfectly happy, for example, with an inventory of the seven words that a lawyer can never say on television – are likely to be disappointed by this formulation. Far from supplying bright-line proscriptions, the rule requires a lawyer to become an oddsmaker: she must calculate whether her words "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."

It is a speech-chilling task, but one that the Supreme Court has found to be entirely constitutional.⁷ At least 45 states, and about half of the nation's federal judicial districts, require lawyers to edit themselves in accordance with this standard.⁸

And prosecutors must be even more circumspect. Because they have professional obligations not only to represent their government clients zealously, but also to see that justice is done – and because the government regulates them not only as citizens, but also as employees – prosecutors are enjoined to "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused," "except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and serve a legitimate law enforcement purpose."⁹

To be sure, Rule 3.6 incorporates a number of safe harbors for extrajudicial speech, and it provides loquacious lawyers with substantial comfort in other respects as well. First, by addressing itself to "lawyer[s] who [are] participating or ha[ve] participated in the investigation or litigation

(Continued on page 46)

ETHICS CORNER*(Continued from page 45)*

tion of a matter,”¹⁰ the rule enables pundits and other legal commentators to ply their trade without fear of professional reproach, provided that they remain uninvolved with the “matter” in question. (But no such immunity is available to the participating lawyers’ partners and associates, to all of whom the expressive disability imposed by paragraph (a) is imputed.)¹¹

Second, paragraph (b) of the rule sets forth a laundry list of topics that a litigator may tackle extrajudicially “[n]otwithstanding paragraph (a)” – in other words, even if the lawyer “knows or reasonably should know” that their public dissemination “will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.” Among these free shots are “information contained in a public record,”¹² “a request for assistance in obtaining evidence and information necessary thereto,”¹³ and “a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest.”¹⁴

Finally, and also “[n]otwithstanding paragraph (a),” the rule creates a qualified privilege of proportional response to recent extrajudicial chatter that the lawyer reasonably believes would otherwise cause “substantial undue prejudice[e]” to the client, as long as lawyer and client themselves did not initiate the publicity.¹⁵

Outside these refuges, however, a lawyer contemplating the possibility of expressing herself extrajudicially is thrown back upon the question whether her speech “will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”¹⁶ How should she go about answering it?

Extrajudicial Communications

Legal ethics authorities have identified two principal ways in which extrajudicial communications might “materially prejudice an adjudicative proceeding.” First, a lawyer’s statements to the press might “influenc[e] or intimidat[e] a prospective witness.”¹⁷ It is easy enough to envision how a mob lawyer, for example, might run afoul of the rule by publicly proclaiming his intention to ferret out the identities of the informants against his client and hold them accountable for their malicious lies.¹⁸

Suppose, however, that in the course of decrying the weakness of the government’s case against her client, a lawyer disparages the government’s star witness and vows to destroy his credibility on cross-examination. Would this statement be substantially likely to accomplish any material incremental intimidation beyond the terrors that the courtroom itself holds? Analogously, when an athlete grabs the microphone to talk trash before the game, does he gain any additional psychological edge over his adversary, or does he merely heighten public anticipation of the main event? No rule of professional conduct can or should prohibit attorneys from encouraging the audience to tune in to the trial itself.

The more commonly articulated concern about permitting lawyers to discuss their ongoing cases with the media is that they will unfairly influence the decisionmakers outside the carefully controlled confines of the courtroom. Again, however, except in extreme cases, no one should lightly assume that the decisionmakers are the contemporary lawyer’s intended audience.

In a society as complex as ours, lawyers speak through the media to their clients’ customers, creditors, shareholders, regulators, present and prospective employers and business partners, and potential litigation adversaries, among others – all of them clamoring for progress reports in real time. Gone are the days, if they ever existed, when a lawyer’s only job was to win the case. The court of public opinion demands at least a portion of the lawyer’s attention.

In what circumstances, then, should a lawyer anticipate that his public statements outside the courtroom “will have a substantial likelihood of materially prejudicing an adjudicative proceeding” by swaying the decisionmakers?

ABA commentary on Rule 3.6 identifies “certain subjects that are more likely than not to have a material prejudicial effect,” including (among others) “the character, credibility, reputation or criminal record of a party,” “the performance or results of any examination or test,” “any opinion as to the guilt or innocence of a defendant,” and, in general, “[prejudicial] information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial.”¹⁹

But the context of any such extrajudicial statement is surely critical to its propriety. When the press asks defense counsel for comment on the recent indictment of his client,

(Continued on page 47)

ETHICS CORNER

(Continued from page 46)

no one expects him to say, “I guess we’ll just have to wait for the verdict, won’t we?” In some settings, a lawyer’s self-restraint may do his client a grave disservice without contributing anything to the fairness of trial.

Consider four situations. In the first, the case will be tried to the bench. Day in and day out, we trust judges to compartmentalize – to consider whether evidence is admissible, to rule that it is not, and to remain impartial regardless. In bench trials, we routinely expose them to evidence that a jury would never be allowed to hear, and we still expect them to decide the whole case fairly at the end of the day.²⁰

Then why should we worry that their judgment will be hijacked by something that a lawyer says to a journalist? While recognizing that the prospect of prejudice is remote when a judge serves as the adjudicator, the ABA insists that Rule 3.6 “still place[s] limitations on prejudicial comments in these cases.”²¹ But the circumstances in which the rule might come into play are difficult to imagine.²²

Next, consider a case that has just begun, and in which the parties have demanded a jury. What should the lawyers “reasonably know” about the “likelihood of material[] prejudic[e] [to] an adjudicative proceeding” if they talk to the press at that juncture? They know, first of all, that adjudication itself is substantially unlikely: plea bargains are probable in prosecutions for all but the most heinous crimes, and civil lawsuits are overwhelmingly resolved by settlement.²³

They know that newspaper readership is declining, and that a substantial majority of households have more than 500 cable and satellite channels among which to surf.²⁴ They know that even with respect to legal affairs that manage to penetrate the public consciousness, memories are notoriously short.²⁵

They know that in the unlikely event that their case captures and holds the public’s attention, they themselves wield little power to pollute the jury pool; as Hazard and Hodes put it, “[i]n a sea of pretrial publicity, the droplets of information contributed by the lawyers are in fact very unlikely to materially prejudice a trial.”²⁶ And they know, as an empirical matter, that adverse publicity almost never affects the fairness – or even the cost or convenience – of an adjudicative proceeding.²⁷

Voir dire almost always suffices to filter out its injurious effects. Granted, the Supreme Court has declared that voir dire itself “entail[s] serious costs to the system”²⁸ – but if so, they appear to be the costs of doing judicial business in an information age. With or without lawyer speech, the system would still need to incur them.

Consider a third scenario: a jury is seated, and trial is in progress. Should a lawyer know that if she talks to the press during trial, her words will have “a substantial likelihood of materially prejudicing” the proceeding? At least if the jury is sequestered, she should be able to speak freely. But even if the jury’s only protection against outside influences is the judge’s admonition not to read the newspapers or watch TV, the lawyer should be able to bank on the jury’s compliance. We routinely “adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions.”²⁹ Why should we assume otherwise here?

Plainly, the most substantial likelihood of material prejudice surrounds remarks that a lawyer makes on the eve of trial – and before the jurors have been instructed not to listen to them – on subjects that could never come into evidence. In that situation, professional discipline seems justified, not only because the fairness of the proceeding is imperiled, but also because it is hard to avoid the conclusion that an unfair advantage is exactly what the lawyer aims to gain.³⁰

But the less strongly a lawyer’s extrajudicial speech resembles an eleventh-hour end run around the rules of evidence, the more readily we should absolve him of professional misconduct. Even lawyers have First Amendment rights.

Kip Purcell is with Rodey, Dickason, Sloan, Akin & Robb, P.A., Albuquerque, New Mexico.

¹ Model Rules of Prof’l Conduct R. 1.6(a) (2004).

² Model Rules of Prof’l Conduct R. 4.1(a) (2004).

³ Model Rules of Prof’l Conduct R. 7.1 (2004).

⁴ Model Rules of Prof’l Conduct R. 8.2(a) (2004).

⁵ Model Rules of Prof’l Conduct R. 8.4(e) (2004).

⁶ To this list it is tempting to add “engag[ing] in conduct intended to disrupt a tribunal.” Model Rules of Prof’l Conduct R. 3.5(d) (2004). But the better view is that Rule 3.5(d) speaks exclusively to courtroom decorum and tells us nothing about the accept-

(Continued on page 48)

ETHICS CORNER

(Continued from page 47)

ability of extrajudicial speech. “If a lawyer takes action outside a courtroom setting, it is virtually impossible that it could ‘disrupt’ a tribunal or be intended to do so, and Rule 3.5(d) should not apply.” 2 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyer-ing § 31.6, at 31-8 (3d ed. 2007).

⁷ See Gentile v. State Bar, 501 U.S. 1030, 1065-76 (1991) (holding that “the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press,” and therefore rejecting contention that nothing short of “clear and present danger” would justify professional discipline).

⁸ United States v. Wecht, 484 F.3d 194, 206 nn.11-12 (3d Cir. 2007).

⁹ Model Rules of Prof’l Conduct R. 3.8(f) (2004).

¹⁰ Model Rules of Prof’l Conduct R. 3.6(a) (2004).

¹¹ See Model Rules of Prof’l Conduct R. 3.6(d) (2004).

¹² Model Rules of Prof’l Conduct R. 3.6(b)(2) (2004). The scope of this protection, however, may be subject to some dispute. See, e.g., Attorney Grievance Comm’n v. Gansler, 835 A.2d 548, 567, 569 (Md. 2003) (construing “information contained in a public record” as matter of first impression to include “anything in the public domain, including public court documents, media reports, and comments made by police officers,” but warning that it would henceforth refer only to “public government records – the records and papers on file with a government entity to which an ordinary citizen would have lawful access”).

¹³ Model Rules of Prof’l Conduct R. 3.6(b)(5) (2004). This provision could conceivably encompass paid advertisements soliciting witnesses. Cf., e.g., Rodriguez v. Feinstein, 734 So. 2d 1162, 1164-65 (Fla. Dist. Ct. App. 1999) (per curiam) (invalidating broad gag order in medical malpractice action, notwithstanding plaintiff’s counsel’s advertising aimed at locating defendant doctor’s other patients).

¹⁴ Model Rules of Prof’l Conduct R. 3.6(b)(6) (2004).

¹⁵ Model Rules of Prof’l Conduct R. 3.6(c) (2004).

¹⁶ Model Rules of Prof’l Conduct R. 3.6(a) (2004).

¹⁷ Restatement (Third) of the Law Governing Lawyers § 109(1) (2000).

¹⁸ Cf. United States v. Megale, 235 F.R.D. 151 (D. Conn. 2006) (suggesting that criminal defense attorney had violated Rule 3.6 by supplying cooperating witness’s surname to the press after an open hearing in which he had gratuitously disclosed witness’s first name and nickname).

¹⁹ Model Rules of Prof’l Conduct R. 3.6 cmt. 5 (2004).

²⁰ See, e.g., Fed. R. Evid. 103(c), 104(a), 403.

²¹ Model Rules of Prof’l Conduct R. 3.6 cmt. 6 (2004).

²² In Mississippi Bar v. Lumumba, 912 So. 2d 871 (Miss. 2005), the court held that a lawyer who had told a newspaper reporter that a judge “had the judicial temperament of a barbarian” – at a time when the judge had the lawyer’s posttrial motions under advisement – had not only impugned “the qualifications or integrity of a judge” in contravention of Rule 8.2(a), but had also violated Rule 8.4(d) by engaging in “conduct that is prejudicial to the administration of justice.” 912 So. 2d at 875, 881-86. Prejudice to “the administration of

justice” is a concept far more expansive, and more subjective, than prejudice to a particular “adjudicative proceeding” under Rule 3.6; it has the capacity to cover any conduct that a disciplinary board finds distasteful.

²³ In Mississippi Bar v. Lumumba, 912 So. 2d 871 (Miss. 2005), the court held that a lawyer who had told a newspaper reporter that a judge “had the judicial temperament of a barbarian” – at a time when the judge had the lawyer’s posttrial motions under advisement – had not only impugned “the qualifications or integrity of a judge” in contravention of Rule 8.2(a), but had also violated Rule 8.4(d) by engaging in “conduct that is prejudicial to the administration of justice.” 912 So. 2d at 875, 881-86. Prejudice to “the administration of justice” is a concept far more expansive, and more subjective, than prejudice to a particular “adjudicative proceeding” under Rule 3.6; it has the capacity to cover any conduct that a disciplinary board finds distasteful.

²⁴ See George F. Will, Fraudulent “Fairness”, Newsweek, May 7, 2007, at 72; see also, e.g., Carter v. Chicago Police Officers, No. 95 C 3402, 1996 WL 446756, at *1-2 (N.D. Ill. Aug. 1, 1996) (observing that Sunday Chicago Tribune, with circulation of more than 1,000,000, had reported plaintiff’s counsel’s revelation of defendants’ \$350,000 settlement offer two days before jury selection, but “[p]erhaps because we live in a busy world with limited reading opportunity, only one of the over forty prospective jurors used in this case ever acknowledged reading the ... article”).

²⁵ See, e.g., Guerrini v. Statewide Grievance Comm., No. CV-000503192, 2001 WL 417337 (Conn. Super. Ct. Apr. 3, 2001) (finding no basis for disciplinary committee’s conclusion that in civil case in which plaintiff alleged finger injury from falling headboard during sex with girlfriend, defense counsel’s statement to the press several years before trial – to the effect that plaintiff must have engaged in “some serious acrobatics” – had created substantial likelihood of material prejudice).

²⁶ 2 Geoffrey C. Hazard, Jr. & W. William Hodes, supra note 6, at 32-9. But see Gentile v. State Bar, 501 U.S. at 1074 (“Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers’ statements are likely to be received as especially authoritative.”).

²⁷ Readers with a few hours to kill may wish to try this experiment: search Westlaw for all cases within the past year containing the phrase “pretrial [or pre-trial] publicity”; examine the first 100 of these cases dealing with the merits of a claim that such publicity necessitates or necessitated a change of venue, a continuance, more extensive voir dire, a gag order, a retrial, or some other protective measure; and see how often the claim is sustained. When the undersigned counsel conducted such a search on May 26, 2007, he found one case granting a motion for change of venue (but not because of anything a lawyer said), one case empaneling an anonymous jury (but mostly because of the defendant’s alleged dangerousness), and 98 cases rejecting the claim, in several of which cases the publicity included lawyers’ extrajudicial speech.

²⁸ Gentile v. State Bar, 501 U.S. at 1075.

²⁹ Francis v. Franklin, 471 U.S. 307, 324 n.9 (1985).

³⁰ Cf., e.g., Maldonado v. Ford Motor Co., 719 N.W.2d 809, 821-22 (Mich. 2006) (holding that plaintiff’s counsel in sexual harassment case had violated Rule 3.6 shortly before trial by publicizing defendant supervisor’s expunged conviction for indecent exposure – which the court had previously ruled inadmissible – and by proclaiming that local judges were biased in favor of Ford Motor Company).