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LDRC Libel Defense Resource Center

LIBELLETTER

March 1996

Eighth Circuit Panel Holds Punitive Damages Award Unconstitutional In Opinion by *Retired Justice Byron White*

While the Supreme Court continues its inconclusive flirtation with imposing meaningful constitutional limits on punitive damages, a former Justice, sitting by designation in the Eighth Circuit, has made a useful application of due process requirements in a recent nonmedia case alleging invasion of privacy. The decision, written by retired Supreme Court justice Byron White, reversed and remanded a punitive damage award as violative of the Due Process Clause of the Fourteenth Amendment. *See* Pulla v. Amoco Oil Company, 1995 WL 747259 (8th Cir. 1995).

The $500,000 punitive damages award in *Pulla* was supported by only $2 in actual damages from an invasion of privacy claim. Justice White noted that while the Constitution does not impose any precise ratio between punitive and actual damages, the punitive award must bear some reasonable relationship to the

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LDRC and Other Media Organizations File Comments on Proposed FRCP 26(c)

LDRC, joined by The Associated Press, Dow Jones & Company, Inc., Magazine Publishers of America, National Association of Broadcasters, Newspaper Association of America, Radio-Television News Directors Association and Society of Professional Journalists, filed comments before the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States opposing proposed changes in Rule 26(c) of the Federal Rules of Civil Procedure. Those changes would eliminate the requirement of a "good cause" determination in the authorization of protective orders for discovery and, instead, permit protective orders on stipulation of the parties.

The comments were drafted by Laura Handman and Robert Balin of Lankenau, Kovner & Kurtz, Peter Canfield and James Kimmell, Jr. of Down, Lohnes & Albertson, and Robert Lystad of Baker & Hostetler, with assistance from LDRC staff.

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Sixth Circuit Reverses Business Week *Prior Restraint*

By Robert D. Balin and Laura R. Handman

In perhaps the most closely watched media case of the year, the Court of Appeals for the Sixth Circuit, on March 5th, resoundingly reversed a district court judge who had temporarily and then permanently enjoined Business Week magazine from publishing an article based on sealed court records that had been leaked to Business Week. *Proctor & Gamble Co v. Bankers Trust Co., et al.*, No. 95-4078 (6th Cir. March 5, 1996). In an opinion authored by Chief Judge Gilbert Merritt, the Sixth Circuit ruled that the prior restraints issued by the lower court were "patently invalid and should never have been entered." (*Slip Op.* at 2)

The Sixth Circuit decision, which has produced an audible sign of relief from the media bar, eloquently reaffirms the "bedrock First Amendment principle that the press shall not be subjected to prior restraints" absent "the most exceptional circumstances." (Slip Op. at 2, 10) Additionally, the Court of Appeals articulated clear and stringent guidelines to prevent future issuance of constitutionally offensive temporary restraining orders. Finally, noting that the lower court's prior restraints were based on a stipulated protective order that had permitted the parties to unilaterally file pleadings and motions under seal without any prior judicial approval, the Sixth Circuit roundly condemned this increasingly common practice.

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AND FOR OTHER PRIOR RESTRAINT AND GAG ORDER CASES SEE PAGE 15.

Minnesota Supreme Court Requires Harm to Reputation Before Defamation Plaintiffs Can Recover for Emotional Distress

Analysis of *Richie v. Paramount Pictures Corp.*

By John P. Borger

Unless they can establish either constitutional "actual malice" or actual damage to reputation, persons suing for defamation in Minnesota cannot recover damages for emotional distress, the Minnesota Supreme Court held on February 23, 1996.

The court's decision in *Richie v. Paramount Pictures Corp.*, Nos. CX-94-2249 and C5-94-2501, reverses a 1995 decision of the Minnesota Court of Appeals and reinstates 1994 trial court orders granting summary judgment to all defendants. The pictures of plaintiffs James Richie and Karen Gerten had been mistakenly shown during a syndicated television talk show and identified as the images of the parents of a young woman whose father had sexually abused her for years while her mother did nothing to prevent the abuse. They claimed that

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HENRY KAUFMAN JOINS SESAC AS GENERAL COUNSEL

Henry R. Kaufman has joined SESAC, a music licensing society, as its General Counsel. Henry will be working out of SESAC offices in New York City.

Henry has agreed, however, to continue to edit the LDRC BULLETIN and the outlines for the LDRC 50-STATE SURVEYs. Henry is hoping to be able to continue to keep his experienced hand in libel and privacy issues, at the least, through his editorial involvement with these LDRC publications.

We wish Henry well in his new post, and are delighted that he is ready, willing and able to continue to assist LDRC on publications with which Henry is so familiar and capable.

Brown & Williamson Subpoenas to CBS Quashed By New York Trial Court

In a decision issued on February 28, a Supreme Court Justice of New York County quashed subpoenas sought by tobacco company Brown & Williamson against CBS and a number of its employees, including the CBS General Counsel, an in-house attorney, a former CBS News President, the company's current President and CEO Peter Lund, *60 Minutes* correspondants Mike Wallace and Morley Safer, and *60 Minutes* producers Don Hewitt and Lowell Bergman. *Brown & Williamson Tobacco Corp. v. Wigand*, Index No. 101678/96 (NY Co. February 28, 1996)

B&W sought the depositions and the documents and information from CBS -- including outtakes of a CBS *60 Minutes* interview and legal memoranda drafted by CBS counsel -- to support its breach of contract, fraud and theft claims against D. Jeffrey Wigand filed in November 1995 in a Kentucky state court. CBS successfully relied upon the New York State reporter's shield law and the attorney-client and attorney work product privileges.

Wigand, a former B&W executive, asserted in an interview with CBS *60 Minutes* that B&W had longstanding knowledge of the harmful effects of cigarettes, and implied that B&W executives lied when they told a Congressional committee otherwise. At the time of the interview, Wigand was under contract with B & W not to disclose information he may have learned while working for the company.

CBS reportedly delayed the broadcast of the interview from its original November 1995 air date, at least in part, out of fears the network would be held liable for interfering with this contract. After the interview was delayed, correspondents Mike Wallace and Morley Safer discussed CBS counsel's advice to the network to delay the interview on a PBS talk show and in other media. Additionally, the *New York Daily News* obtained a copy and published what purported to be excerpts from the transcript of the delayed interview. Ultimately, CBS ran the interview last month.

B&W sued Wigand in a Louisville, Kentucky court, alleging breach of contract, fraud, and theft. As part of this suit, B&W sought enforcement in New York of Kentucky subpoenas against CBS and eight employees seeking twenty different items. CBS responded by offering to provide B & W with a videotape and transcript of the *60 Minutes* interview as broadcast, a videotape of its two correspondents' appearance on the "Charlie Rose Show", and a transcript of a speech by producer Don Hewitt to the National Press Club describing the interview. The network moved to otherwise quash the subpoenas.

The Test

Justice Lippmann, in an extensive opinion, granted CBS' motion to quash the subpoenas. (New York Law Journal, March 1, 1996). First, Lippmann noted that New York's general rule governing discovery -- that all evidence necessary in the prosecution or defense of an action should be disclosed -- does not directly apply when discovery is sought from third party news media.

Instead, Lippmann wrote, the New York Court of Appeals had held that parties seeking discovery from news organizations as third parties must meet a more stringent, three-part test. This test, as articulated in *O'Neal v. Oakgrove Const.*, 71 NY 2d 521 (1988), shifts the burden of proving need to the party seeking the information, instead of placing the burden of protecting the information on the third party. The three parts of the test the litigant must prove include a showing that the information sought is:

(1)"highly material and relevant,

(2)"critical or necessary to the litigant's claim or defense," and

(3)"not obtainable from any alternative source."

In 1990, the State Legislature codified the *O'Neal* test as Section 79-h(b) of the Civil Rights Law as part of the Reporter's Shield Law.

Turning to the first part of the test, Lippmann held that most of the material B&W sought would only be relevant if the action had been brought against CBS. The subpoenas failed not only under the *Oakgrove* test, but under the test applied by New York's civil practice rules, CPLR 3101, limiting the scope of permissible discovery from any nonparty to that which is "material and necessary."

Not Even Material

Noting that B&W is essentially suing a former employee for breach of contract, and because B&W had already admitted that the interview with Wigand "provide[d] a visual and auditory record of Wigand in the act of breaching his confidentiality agreement," most of the CBS materials would not be material or relevant under the general CPLR 3101 test, let alone meet "highly material and relevant" *O'Neal* standard governing third-party mews media disclosure.

The court also rejected B & W's argument -- based mostly on criminal cases -- that the newsgathering privilege can be overcome in some circumstances. The court distinguished those cases because B&W's case "entails no constitutional questions or State interest" sufficient to outweigh the journalist's privilege.

Even if the materials sought were highly relevant and necessary, thus meeting the first part of the test, plaintiffs could not meet the second prong. Lippmann found the subpoena in question was not "critical or necessary" to the action because B & W had already admitted it had sufficient evidence to prove its claim against Wigand. Any information it received from CBS would be "duplicative and therefore cumulative."

The court also rejected B&W's claim that the information was "not obtainable from any other source" -- the third prong of the test. B & W argued that it was suing Wigand for fraud, that he was inherently dishonest and untrustworthy;

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Brown & Williamson Subpoenas to CBS Quashed By New York Trial Court

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therefore, it needed to get information about Wigand from CBS. Lippmann wrote that the court was not expected to accept B&W's allegations about Wigand's character, "as yet untried and unproven." Doing so, Lippmann said, would end the need for the three-prong test since "all that would be required to defeat the journalist's protection would be to allege, without more, that the alternative non-journalistic source is dishonest."

No Waiver

B&W also argued that CBS waived its right to protection under the reporter's shield law, Section 79-h of the New York Civil Rights Law, because CBS had disclosed some of the information to other non-party sources through the leaked transcript of the Wigand interview printed in the New York Daily News. While Civil Rights Law 79-h(g) does provide a waiver of the shield law when the journalist discloses the protected information to other parties, the court held that the waiver must be narrowly limited only to what the journalist disclosed. Essentially, the court said B&W could not use the partial disclosure of facts about the Wigand interview as a basis for full disclosure of every item CBS had or to depose the reporters on the subject.

In a similar vein, while Lippmann agreed with B&W that CBS had partially waived its attorney-client privilege by "approving or tacilty consenting" to Wallace, Safer and Hewitt's "widespread and ongoing public airing" of the legal basis for the network's decision not to run the Wigand interview, Lippmann held that this waiver must also be narrowly construed, and limited it to the already-disclosed information only.

Relying in part on two well-known cases, *In re Von Bulow*, 828 F2d 94 (2nd Cir. 1987) and *Farrow v. Allen*, 194 AD2d 40 (1st Dep't. 1993), Lippmann found that Wallace, Safer, and Hewitt's public discussions were extrajudicial disclosure which "do not constitute an open sesame to all the attorney-client communication that lies behind closed doors and inaccessible as privileged information."

Extra-judicial disclosures do not create any risk to the litigants of legal prejudice unless and until they are used in litigation by the privilege holder. That not being the case here, there was no basis for extending the waiver of the privilege beyond that which was already disclosed.

The same analysis held for the arguments B&W made that CBS had waived any attorney work product privilege.

TALK SHOW DUTY OF CARE TO GUESTS: RESPONSIBLE FOR MURDER?

In a decision evidencing no regard for the First Amendment or existing authority, a Michigan Circuit Court has held that a television talk show may owe a duty of care to its in-studio guests seemingly against harm caused by one another -- even harm caused after the participants have left the studio. In *Amedure v Schmitz, et al.*, case No. 95-494536 NZ (February 28, 1996), the Michigan circuit court for Oakland County denied defendants', television producers, motion for summary disposition for failing to state a claim in a wrongful death action.

The plaintiff is the representative of the estate of Scott Amedure, who was killed by defendant-Jonathan Schmitz three days after they appeared as guests on the "Jenny Jones" show. The defendants are Warner Bros., Jenny Jones Show and Telepictures, in addition to Schmitz.

The theme of the show was "secret crushes" and plaintiff alleges that Schmitz was not willing to appear on the show if his secret admirer was of the same sex. During the taping of the show (which has never been broadcast) in Chicago, never been broadcast) in Chicago, Amedure revealed himself as Schmitz' admirer. Plaintiff claims in the lawsuit that Schmitz murdered Amedure in Detroit three days later because Schmitz had allegedly been humiliated by decedent's romantic interest.

Acknowledging the case was one of "first impression," the court ruled that a special relationship existed between the Amedure and the television defendants that created a duty of care which could make defendants liable for Schmitz' criminal conduct. According to the court's analysis, Amedure was a "business invitee" of the television defendants.

Assuming the facts of Plaintiff's amended complaint were true, the court stated that the issue became one of causation -- whether the actual shooting, three days after the show in a different state, was too far remote in time to have been caused by defendants' show. These facts would have to be developed during discovery for trial.

The court rejected defendants' contentions that any duty of care which may have been owing ceased when the decedent left the defendants' premises. The court analogized to a dram shop action, where it is no defense "that the intoxicated person was off premises at the time the third party was injured." *Slip. op. at 5.*

Finally, the court dismissed defendants' position that an imposition of a duty to prevent Schmitz' criminal conduct would threaten defendants' freedom of speech and expression and could have a chilling effect on defendants' and similarly-situated entities. "If that happens," said the court, "so be it." *Slip. op. at 6.* The court also stated during oral argument that television talk shows such as defendants' were "not the media" and were therefore not entitled to First Amendment protection. *Slip. op. at 6*

Richard E. Rassel and Michael Huget, of Butzel Long, represent the television defendants in this action.

Speculation About Death of Russian Dissident Artist Dismissed as Opinion

Judge Kaplan of the Southern District of New York held this month that speculative statements regarding the mysterious death of a noted Russian dissident artist, Evgeny Rukhin, were nonactionable as "opinion" under New York law. *Levin v. McPhee*, No. 95 Civ. 5179 (LAK) (S.D.N.Y. Mar. 1, 1996).

The statements that gave rise to the suit were contained in an article on the activities of a collector of Russian dissident art entitled *The Ransom of Russian Art*, written by John McPhee for the *New Yorker* and subsequently published in longer form by Farrar, Strauss & Giroux as a book. In a chapter of the book discussing the death of Rukhin and his friend, Ludmila Boblyak, both of whom died in a mysterious fire at Rukhin's studio, McPhee offered five different speculative accounts attributed to various parties.

The Accounts

One of the accounts, attributed to Sarah Burke, an American who had been romantically linked to Rukhin, suggested that the plaintiff might have killed Rukhin: "Some people think Ilya Levin did it for [the KGB], that he was 'politically inspired.' It's a possibility." She also provided two other possible explanations, however, suggesting that the fire might have been an accident (given "the studio full of vodka, cigarettes, and chemically soaked rags") or that Rukhin's wife had killed him because Rukhin intended to emigrate.

Another version, attributed to Kuzminsky (otherwise unidentified), "perhaps the most colorful of the tales," suggested that Levin, Rukhin, and Boblyak had been engaged in a *menage a trois* when the fire broke out. According to this account, when the prudish KGB arrived, they would have been revolted by the scene that confronted them and have said

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SEVENTH CIRCUIT JUDGE POSNER FINDS "CRANK" IS NOT DEFAMATORY

In upholding a motion to dismiss in *Dilworth v. Dudley*, 1996 U.S. App. Lexis 1169, Judge Richard Posner of the Seventh Circuit Court of Appeals found that calling an academic a "crank" was not defamatory when the term referred to a person's ideas. Posner wrote for a three-judge panel of the court in a decision released on January 29, 1996.

"A crank is a person inexplicably obsessed by an obviously unsound idea--a person with a bee in his bonnet," Posner said. "To call a person a crank is basically just a colorful and insulting way of expressing disagreement with his master idea, and it therefore belongs to the language of controversy rather than the language of defamation." 1996 Lexis at *4-5.

The suit arose out of publication of the book *Mathematical Cranks*, written by Underwood Dudley. In it, Dudley, a mathematics professor, said engineer William Dilworth was a crank for writing an academic article in which he sought "to prove that Cantor's diagonal process is a snare and a delusion."

The lower court found the term "crank" was not actionable because it was rhetorical hyperbole. Posner explained that there are two types of rhetorical hyperbole: statements which are too vague to be false and those which are sure to be understood as a label for underlying assertions, which themselves may or may not be defamatory.

He noted that courts have found that rhetorical hyperbole covered terms such as "scab," "traitor," "scam," and "fake," where the terms have both literal and figurative meanings and any defamatory meaning is dependent on context. Here the term "crank" was meant as an insult, Judge Posner said, an "insulting way of expressing disagreement with his master idea." 1996 Lexis at *5. It insults the ideas, not the character of a person. 1996 Lexis at *4. While the term conceivably

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LIBEL: "OPINION" WINS THE DAY

AND TWO MORE VICTORIES ON "OPINION" FROM HAWAII

By Jeffrey Portnoy

A State Court Claim

A State judge on the Island of Maui, granted summary judgment on behalf of *The Honolulu Advertiser* (a Gannett newspaper) on claims asserted against it arising out of a fascinating land dispute between the plaintiffs in the libel case and ex-Beatle George Harrison. *Gold and Whitney v. George Harrison, Gannett Pacific Corporation dba The Honolulu Advertiser and Edwin Tanji*, Civil No. 95-0554(2) (Haw. 1995)

The lawsuit arose out of comments made by Mr. Harrison during a recess in a 1993 civil trial in which Mr. Harrison's neighbors were fighting over easements crossing over Mr. Harrison's property. Mr. Harrison was quoted in *The Honolulu Advertiser* as having stated, "Have you ever been raped? I'm being raped by all these people." The plaintiffs in the libel case alleged that Mr. Harrison either accused them of the crime of rape or the newspaper had misled its readers to believe that Mr. Harrison was commenting on the plaintiffs' lawsuit rather than on the media attention the lawsuit was engendering

The Honolulu Advertiser argued that the words at issue were rhetorical hyperbole and therefore not legally actionable. The court, citing *Greenbelt Pub. Co. v. Bresler*, *Letter Carriers v. Austin*, and *Partington v. Bugliosi* agreed.

Perhaps as important, however, the court also dismissed plaintiffs' claims for intentional infliction of emotional distress finding that that claim was derivative of their claims for defamation and false light invasion of privacy. The court said that that claim must fail since the statement

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"Opinion" From Hawaii

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sued upon is protected by the First Amendment, regardless of the form of tort alleged, citing *Partington v. Bugliosi*, *Moldea v. New York Times*, and *Basilius v. Honolulu Pub. Co.*

Plaintiffs, whose libel claim against Mr. Harrison still remains (service has not yet been made upon Mr. Harrison) have indicated that they will appeal the decision once a Final Judgment is entered.

A Federal Court Claim" Applying *Partington v. Bugliosi*

The second case was decided by Federal Judge David Ezra, the same judge who decided the *Partington v. Bugliosi* case, subsequently affirmed by the Ninth Circuit Court of Appeals. *Partington v. Bugliosi*, 56 F.3d 1147, 23 Media L. Rep. 1929 (9th Cir. 1995), See *LibelLetter*, July 1995 at p. 1.

In this case, the former Mayor of Honolulu, Frank F. Fasi, brought a defamation claim against the *Honolulu Star-Bulletin* for an editorial in which the *Star-Bulletin*, in commenting on efforts by the Mayor to obtain "a donation" of land in return for approval of a rezoning application, entitled its editorial, "Blackmail Incorporated" and stated that, "Frank 'The Extortionist' Fasi is at it again." *Fasi v. Gannett Company, Inc., Liberty Newspapers Ltd., Phillips Media Services, Rupert Phillips*, Civil No. 95-00585 DAE (U.S. Dist. Ct. Haw. 1995)

The defendants moved to dismiss the Complaint on the basis that it failed to state a claim in that the allegedly defamatory comments were clearly statements of opinion, not fact. The Mayor argued that the statements were libelous on their face because they accused him of the crimes of extortion and blackmail.

The court, in a ringing endorsement of the rights of the press to editorially comment on the conduct of public officials, found that none of the statements in the editorial were actionable. Citing *Greenbelt Cooperative Publishing Ass'n v. Bresler*, the court found that the statements in the editorial were no more than rhetorical hyperbole, and were clearly comments of protected opinion. Citing *Milkovich v. Lorain Journal Co.* and *Partington v. Bugliosi*, the court said that it must ask as a threshold matter "whether a reasonable fact-finder could conclude that the contested statement implies an assertion of objective fact." The court said that in examining the publication as a whole, the specific context in which the statements were made, and the statements themselves, the court could not find that a reasonable fact-finder could conclude that the statements imply a false assertion of objective fact.

Mr. Fasi argued that accusations of criminal activity, even in the form of opinion, were not constitutionally protected citing *Cianci v. New York Times Publishing Co.* 639 F.2d 54 (2d Cir. 1980) The court, while not disputing that proposition, stated that it could not reasonably conclude that the editorial accused Fasi of criminal activity.

The court, reasserting the importance of evaluating the "general tenor" of a work (citing *Moldea v. New York Times*), agreed with the defendants that the statements were made in a forum where readers generally anticipate subjective views, i.e., the editorial page, and that all of the underlying facts forming the basis for the article were disclosed. The court said that readers of the article were able to understand that the authors were highly critical of the Mayor, but were free to form their own opinions based on the facts presented. The court further concluded that the terms "extortionist" and "legalized blackmail" were examples of rhetorical hyperbole and "imaginative expression" protected by the First Amendment.

The court concluded by stating that while it was true that the editorial page is no longer a safe harbor for otherwise actionable libel, the First Amendment still provided broad parameters upon which comment upon public issues and public officials may safely be made.

The court, having found in favor of the defendants on the defamation claim, also dismissed Mr. Fasi's invasion of privacy and intentional infliction of emotional distress claims citing *Partington* and *Hustler Magazine v. Falwell.*

Mr. Fasi has filed an appeal to the Ninth Circuit Court of Appeals.

Jeffrey Portnoy is with DCS member firm Cades Schutte Fleming & Wright in Honolulu, Hawaii. The firm represented Gannett Pacific Corporation, dba The Honolulu Advertiser and its reporter Edwin Fanji, in the Harrison case and Gannett Company, Inc. in the Fasi case.

"CRANK" IS NOT DEFAMATORY

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could be used in a defamatory manner, Judge Posner suggests that it would be unlikely, at least in a dispute over the validity of an idea or position taken.

The cause of action would be allowed, however, if a publication made allegations against the character of a scholar, by falsely accusing him, for example, of plagiarism or sexual harassment, Posner said. 1996 Lexis at *5.

Plaintiff Was Public Figure

Posner also noted that the plaintiff, otherwise an "obscure engineer," was a limited public figure for the purposes of the debate on his article and ideas. Those who publish their work should expect to be criticized for their theories, he said. "By publishing your views you invite public criticism and rebuttal; you enter voluntarily into one of the submarkets of ideas and opinions and consent therefore to the rough competition of the marketplace," Posner wrote. 1996 Lexis at *4. Posner suggested that scholars also have a greater ability to publish rebuttals because of their access to academic journals.

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something nasty, leading to a fight. Rukhin would have defended Boblyak but Levin and Boblyak's husband, Esaulenko (who, according to Kuzminsky, was also present) would have behaved as a "selfish cowards." *Id.* at 4–5.

Neither the Burke nor Kuzminsky version was included in the *New Yorker* article.

One version was attributed to Rukhin's wife, Galina. She claimed that she was awoken late at night by the police, who informed her of the fire. Going to the scene of the fire, she was told by the crowd that had gathered that two men had escaped the fire by climbing down a ladder. When someone in the crowd asked for Galina's address, one of the men, whom she believed was Esaulenko, said not to "bother [Galina] for twenty more minutes." *Id.* at 5.

After identifying the bodies at the morgue, Galina went to the K.G.B., who "described to her a lewd, orgiastic scene," to which she responded that she knew that her husband had been murdered. She claimed that she'd been informed by a medical student, who'd found needle marks on Rukhin's thigh, that Rukhin had been killed before the fire was set. Galina hypothesized that "Ludmila probably rebelled and was choked when she refused to cooperate with the murders" and that the studio had then been burned in order to cover up the crime. *Id.* at 5–6.

Defamtory?

Levin brought claims for defamation and intentional infliction of emotional distress. Judge Kaplan began his analysis of the defamation claim by rejecting the defendants' argument that the book was not defamatory as a matter of law, noting that Burke's statement "Levin did it for them" was a "classic example of a defamatory statement." *Id.* at 10. In addition, the work as a whole contained an implication that some believe the plaintiff had assisted in murder.

The court rejected the argument that because there were numerous different versions of Rukhin's death and the overall impression conveyed by the book was one of mystery and uncertainty, no reasonable person would conclude that Levin had helped the K.G.B. to murder Rukhin. Judge Kaplan held that the article could reasonably be construed as defamatory; whether it was or not was a question for the jury. *Id.* at 10–12.

Although the *New Yorker* account omitted Burke's and Kuzminsky's versions, Judge Kaplan concluded that a strained, but not implausible reading of the other accounts yielded the requisite defamatory meaning. *Id.* at 12–13.

Judge Kaplan also rejected application of the neutral reportage defense (*Edwards v. National Audubon Society*, 556 F.2d 113 (2d Cir.), *cert. denied*, 434 U.S. 1002 (1977)), because, at least on the record before the court, the "controversy" was not newsworthy, as it involved events that took place 18 years prior to publication of the book, and the sources for the story were not all "responsible, prominent organization[s]." *Id.* at 13–15.

Fact or Opinion?

In analyzing whether the allegedly libelous statements were constitutionally protected opinion, as opposed to potentially actionable statements of fact, Judge Kaplan applied the factors set forth by the New York Court of Appeals in *Gross v. New York Times Co.*, 82 N.Y. 2d 146, 603 N.Y.S.2d 813 (1993), noting that the New York Court of Appeals has held that opinion receives greater protection under the New York than under the U.S. Constitution.

The fact-opinion analysis from *Gross* examines "whether (i) the language has a readily understood meaning, (ii) the statement is incapable of being proven false, and (iii) the specific text or the social context signals to the reader that the statement is opinion rather than fact." *Id.* at 15.

Although Burke's statement that "*Levin did it for the[K.G.B.]*" was capable of being proven false, it was both preceded and followed by language that "signals to the reader that what is being expressed is no more than speculation." The statement was prefaced by the comment "some people think" and followed by the conclusion, "It's a possibility." Moreover, in addition to the alternative explanations provided in the other accounts, Burke herself went on to offer the alternative theory that the fire "could have been an accident." *Id.* at 16–17.

Nor was there any suggestion that Burke had relied on unstated facts in drawing her conclusions. Because all predicate facts were set forth fully, leaving readers free to agree or disagree with her conclusion that the plaintiff might have been involved in Rukhin's murder, Judge Kaplan ruled that Burke's statement was a "non-actionable expression of opinion." *Id.*

Although concluding that Burke's statement was protected opinion, Judge Kaplan went on to consider whether *McPhee's overall composition (which* he had previously held could convey to a reasonable reader that Levin had been involved in Rukhin's death) amounted to a defamatory assertion of fact or a non-actionable expression of opinion. Under *Gross*, Judge Kaplan noted that an imputation of criminality presented as a hypothesis drawn from stated facts could not reasonably be viewed as an assertion of fact because the author had not vouched for its truthfulness. *Id.* at 18.

Judge Kaplan concluded that such was the case in *Levin*, for McPhee had not suggested he possessed facts unknown to the reader. Moreover, he had provided various (and inconsistent) accounts of the fire, had declared that the truth would never be known, and "[a]t most" had implied that he

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considered it possible that Levin was involved. Thus the suggestion that Levin had been involved in Rukhin's death was "indefinite and surrounded by textual signals suggesting that it is opinion rather than fact." *Id.* at 19.

These textual signals were also sufficiently clear to overcome any contrary impression that might have been conveyed by the context of the publication. Although statements made in a history of Russian dissident art collecting published by a respected publisher were more likely to be viewed as factual than would statements made in more opinionated fora such as a letter to the editor or a critical review, "McPhee's signals were clear enough to alert readers that his discussion of the fire at Rukhin's studio contained speculation derived from the facts presented." *Id.* at 19-20.

At worst, Judge Kaplan concluded, "a reasonable reader could conclude only that McPhee was of the opinion, based on the facts presented, that plaintiff might have been involved with the K.G.B. in causing Rukhin's and Boblyak's deaths. The expression of that opinion is not actionable." *Id.* at 20.

Intentional Infliction of Emotional Distress Claim Dismissed

Finally, Judge Kaplan also dismissed Levin's claim for intentional infliction of emotional distress on several grounds. First he noted that the claim was duplicative, insofar as it fell "well within the ambit of other traditional tort liability" (namely defamation). Second, New York courts also reject attempts to circumvent the constitutional protections available to libel defendants by recasting claims as intentional infliction of emotional distress. Finally, the plaintiff failed even to satisfy the common law elements of the tort of intentional infliction of emotional distress, for the defendants' conduct was not so "extreme and outrageous" as to exceed the "bounds of decency." *Id.* at 20-23.

No Personal Jurisdiction for Source or Online Videotape Distributor

The Tennessee Court of Appeals in *Gibbons v. Loretta Schwartz-Nobel* (C.A. No. 01A01-9507-CH-00316), affirmed the grant of motions to dismiss for lack of personal jurisdiction in favor of several media defendants in a libel and misappropriation suit, including a source and an online videotape distributor.

The case arose from the publication and dissemination of a book, The Baby Swap Conspiracy, and a related television mini-series, Switched At Birth. Both were accounts of a highly publicized case involving the switching of appellee - Regina Twigg's child with another infant in the hospital where her child was born. The plaintiff, Twigg's sister, sued various publishing companies, television producers, and video distributors for libel, invasion of privacy, and violation of Tennessee's Personal Rights Protection Act alleging the materials contained inaccurate accounts of her childhood.

Appellee PMSC was a distributon company that had provided videotapes of the television show to two libraries in Tennessee. In ruling that personal jurisdiction could not be obtained over PMSC, the court noted that PMSC is a California corporation, its only office is in California, and it has no "sales representative, office, telephone or other listing or 'any other presence' in Tennessee." Slip op. at 2. The court further stated that the record was devoid of any evidence demonstrating that PMSC intended to serve the Tennessee market. While PMSC markets and distributes its videotapes through computer transfers of information to subscribing public libraries in Tennessee, this conduct was insufficient to establish the requisite minimum contacts between PMSC and Tennessee.

The court also held that personal jurisdiction could not be obtained over appellee Twigg, who had provided some of the information for the book. Twigg, a Florida resident, did not participate in the publication or production of either the book or video tape. In addition, the record failed to establish that Twigg "maintained continuous and systematic activities in Tennessee." Slip op. at 4.

Finally, the court affirmed a motion to dismiss for lack of personal jurisdiction in favor of the author but it did not provide supporting reasons.

Douglas R. Pierce and Mary M. Collier of King & Ballow represented defendants Loretta Schwartz-Nobel, Villard Books, Random House, Inc., Walden Book Company, Inc., Columbia TriStar Home Video, Inc., Mark Sennett, and Columbia Pictures Industries. Inc.

"Tacit Quotation" Trips Up New York's Opinion

Paper Sued On Editorial

Holding that the statement in an editorial that "[plaintiff] admits he doesn't expect to win and is relieved by the prospect," to be reasonably understood as a factual account of a statement made by plaintiff, New York's Appellate Division, First Department, reversed a grant of summary judgment in favor of the defendant, Newsday. *Millus v. Newsday*, 1996 WL 73802 (Feb. 15, 1996 N.Y. App. Div., 1st Dep't).

The court found that the statement should be subject to jury examination to determine if it is, in fact, a "tacit quotation," understood, despite the lack of quotation marks, to be conveying plaintiff's own words. If so, according to the court's interpretation of *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991), this would create liability if the jury found that the statement resulted in a "material change" in the plaintiff's intended meaning. 1996 WL at *3.

Background

The statement, which appeared on January 24, 1992 on Newsday's "Viewpoints" editorial page, as part of an endorsement editorial, concerned the campaign of Albert J. Millus, the then Republican-Conservative candidate for New York State's 44th Assembly District seat. In a district where registered Democrats outnumber registered Conservatives and Republicans nearly 8 to 1, Millus conceded that he told reporter Willa Appel, that he knew he had little chance of winning the election.

Millus also did not deny that "when asked what he would do if he won, he responded that he had two children in college, and that it would be a tremendous financial sacrifice for him, given the low salary of an assemblyman." 1996 WL at *6 (Rosenberger, J., dissenting).

Millus did deny, however, that he ever said he would be "relieved" not to win, and charged that attributing such a statement to him was defamatory. A prior draft had read "Plaintiff seems neither to want to win nor expects to win." The editorial endorsement went on to give its support to Millus' opponent stating that "[Millus] hasn't a clue about government," and that he "seems more concerned about the moral standards of TV shows like 'Dallas.'"

Addressing the threshold question of whether a statement is a protected opinion or a potentially actionable statement of fact, the Appellate Division found that the use of the word "admits" clearly conveyed to a reasonable reader that defendants were giving a factual account of a statement actually made by plaintiff, rather than offering their own opinion of plaintiff's attitude." 1996 WL at *1.

A Quote?

Further, despite the fact that the statement appeared in a newspaper endorsement editorial, which admittedly contained other statements which "were clearly opinion," the court ruled that "[n]othing about the context in which this statement was published indicated that the fact that the admission was made was anything other than objective fact." 1996 WL at *1. The court reasoned that it could not "accept that the public's perception of journalism has become so cynical that it assumes that apparent statements of fact made in the editorials of a widely published and respected newspaper are fabrications." 1996 WL at *2.

To attribute the "admission" to him was sufficiently capable of defamatory meaning as to present a jury question.

Also for the jury was to be the issue of actual malice. The court suggests two issues. One, did the defendants "know, or [have] reason to know" that they had falsely attributed a statement to plaintiff. Second, "if the defendants informed the reader that they were actually quoting the plaintiff, a much stricter standard must apply than if the defendants only informed the reader that they were offering their own

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Pape Applied

By Robert J. Dreps

The Wisconsin Court of Appeals has just relied on the rational interpretation doctrine established in *Time, Inc. v. Pape*, 401 U.S. 279, 290 (1971), to rule, on an interlocutory appeal, for The Milwaukee Journal/Sentinel in a public official's defamation action. *Torgerson v. Journal/Sentinel, Inc.* 1996 WL 56655 (Wis. App.). The Court held that the reporter's rational interpretation of "highly ambiguous" letters containing the state Ethics Board's advice to the public official precluded a finding of actual malice, even though the news article at issue did not fully disclose the content of those letters. The appellate court dismissed the case, reversing the trial court's denial of the newspaper's summary judgment motion.

The action was brought by John Torgerson, who served as Wisconsin's Deputy Commissioner of Insurance while he also was half-owner and an officer of a title insurance agency. The newspaper disclosed that potential conflict of interest in January, 1993, when Torgerson sought a promotion to the Insurance Commissioner position, along with the Ethics Board's advice that Torgerson should avoid situations of potential conflict between his public duties and his private interests.

Torgerson acknowledged that his private business interests could create the appearance of conflict with his public duties but said, in an interview, "that appearance of conflict is extremely easy to avoid [because] the amount of effort this agency expends on the title insurance industry is extremely limited."

The Ethics Board concluded that Torgerson was ineligible for the top post because state law imposed stricter ethical standards on the Insurance Commissioner than on the Deputy Commissioner.

The reporter testified that he understood Torgerson's comments to mean that he had stayed out of title insurance matters altogether as Deputy Commissioner. Ten months after

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"Tacit Quotation"

(Continued from page 9)

interpretation of the meaning of plaintiff's words." 1996 WL at *3.

If the statement is intended to relay what the plaintiff actually said, then the "party alleging that he or she was falsely quoted must show that the alteration in his or her words 'result[ed] in a material change in the meaning conveyed by the statement.'" 1996 WL at *3, citing *Masson v. New Yorker Magazine*, 501 U.S. 496, 517 (1991). On the other hand, if the defendants signal that the statement is only their interpretation of the plaintiff's words, then liability would only attach if the defendants' statement was not a "rational interpretation" of the plaintiff's actual words.

Addressing the fact that in the case at hand quotation marks were not used, the court relied on the fact that, "in Masson, the Court referred to claims which are 'analogous' to fabricated quotations and indicated that the real standard is not whether quotation marks are used, but whether a reasonable reader would understand that the author was making 'nearly verbatim reports of statements made by the subject, rather than his or her 'own interpretation of an ambiguous source.'" 1996 WL at *3, *citing Masson v. New Yorker Magazine*, 501 U.S. 496 (1991).

In dissent, Judge Rosenberger echoed the trial court's holding, arguing, "Since the challenged statement is a simple recasting of the plaintiff's words, not altering their plain meaning to the reasonable reader; appeared within an editorial; concerned a concededly public figure; was not grossly irresponsible; and finally, was not defamatory, the grant of summary judgment to the defendants was entirely appropriate." 1996 WL at *7.

Defendants plan to file a motion for leave to appeal with the New York Court of Appeals. An *amicus* brief will also be filed by The New York Times, The Daily News, and the Wall Street Journal.

Pape Applied

(Continued from page 9)

Torgerson had returned full time to his title insurance business, however, the reporter learned that Torgerson had initiated a rule change as Deputy Commissioner that exempted title insurers from filing public notice of discounts from their filed rates. The newspaper reported that development in an October, 1993 article headlined "Torgerson Cut Rule Despite Ethics Warning," which described the Ethics Board's letters to Torgerson as "warnings . . . to avoid a conflict of interest by staying out of title insurance regulation."

Torgerson's defamation suit alleged that the October, 1993 article falsely reported that he had violated constraints imposed on him by the Ethics Board and falsely implied that he had initiated the rule change to further his private interest at the expense of the public interest. The trial court held that the article falsely implied that the Ethics Board had absolutely prohibited Torgerson from involving himself in title insurance regulation.

Moreover, the trial judge found clear and convincing evidence that the reporter knew that implication was false based upon the January, 1993 article, which more fully described the Ethics Board's guidelines permitting Torgerson's involvement in title insurance regulatory matters that did not directly involve his company. The trial court rejected the newspaper's rational interpretation argument, among its other defenses, finding that the Ethics Board's letters unambiguously permitted Torgerson's limited involvement in title insurance matters.

The Court of Appeals granted the newspaper's petition for permissive appeal less than four weeks before the scheduled trial. The trial court erred in applying the rational interpretation doctrine, it said in a unanimous opinion, by finding the Ethics Board's letters unambiguous and by failing to consider those letters in conjunction with Torgerson's public comments on avoiding even an appearance of conflict.

The court emphasized that "*Pape* grants the press considerable leeway in making conscious and deliberate choices of `truthful' interpretation [because any] `departure from full direct quotation of the words of the source, with all its qualifying language, inevitably confronts the publisher with a set of choices.'"

Id. at *4, quoting *Pape*, 401 U.S. at 286. It concluded that "[t]he rationale underlying *Pape* resonates in the present lawsuit:"

The ethics board's letters and other comments about them in this case are abundantly ambiguous on the key question. It can be conceded that the letters do not state in so many words that Torgerson must "stay out of title insurance regulation," and Torgerson did not expressly advise the Journal/Sentinel that he had "stayed out." However, the letters, read in their entirety and considered along with [Torgerson's] comments about them . . . may reasonably be interpreted to suggest that is what was meant.

Id. at *5.

The decision highlights a critical distinction between the actual malice standard and the common law's fair report privilege in news articles based on official sources -- under the First Amendment, "[t]he newspaper is under no legal obligation to present a balanced view and cannot lose its constitutional protection because the plaintiff believes it failed to do so." *Id.* at *8. As a result, a reporter's rational interpretation of ambiguous statements or official records -- fair or not -- can preclude a finding of actual malice, even if the news article contains a partially complete or even inaccurate summary of their content.

Robert Dreps is a partner at LaFollette Sinykin in Madison, Wisconsin, whcih represented The Mikwaukee Jouranl/Sentinal in this matter.

SURREPTITIOUS VIEWING BILL IN MARYLAND

By Nathan E. Seigel

Privacy and newsgathering in Maryland may be headed for a collision as a result of an unusual bill recently introduced in the Maryland legislature. House Bill 273 attempts to apply the same penalties commonly found in statutes barring secret sound recording to photography of persons anywhere inside a private residence or other defined "private" areas. The bill has raised serious concerns among journalists and media counsel and may presage a nationwide trend towards expanding privacy-related statutes.

Ironically, the impetus for the bill had nothing to do with the media. It was drafted in response to a highly-publicized local incident in which a man became obsessed with his neighbor's wife and secretly installed a camera in the radiator vent of their bathroom. The bill demonstrates how society's growing concern for privacy and the technological sophistication of concealed cameras can inadvertently impact newsgathering.

The Bill

House Bill 273 makes it a misdemeanor to engage in "deliberate, surreptitious observation of another by any means," in (1) any place inside a private residence, or (2) any bedroom, dressing room or bathroom in any "place of public use or accommodation," specifically including hotel and motel rooms. Within a private residence, such observation is permitted with the consent of a resident. In addition to criminal penalties, the bill provides for a civil cause of action, including recovery of attorney's fees.

While the scope of the bill is probably similar to existing common-law civil actions for intrusion, the criminalization of tort claims would represent a dramatic extension of privacy law. Secret photography of phenomena like nursing home abuses

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CNN WINS RIDE-ALONG IN MONTANA CASE

A U.S. District Court in Montana recently dismissed several claims brought against CNN resulting from its videotaping of the execution of a federal search warrant by Fishing and Wildlife Service agents and Montana agents. *Berger v. CNN and Hamann*, CV94-46-BLG-JDS, (D. Mont., February 26, 1996.

As part of an investigation against rancher Paul Berger, who was accused of poisoning eagles and other predators, agents searched his home and ranch on March 24, 1993. The agents gave CNN reporter Jack Hamann permission to accompany them and videotape the search. The footage was later used in a news story about ranchers killing predators.

Berger and his wife brought a litany of claims against CNN and Hamann: violation of their Fourth Amendment rights against unreasonable searches and seizures, violation of the Federal Wiretapping Act, trespass, conversion and intentional infliction of emotional distress. They also sought an injunction against further broadcast of the videotaped footage.

The court granted CNN's motion for summary judgment as to all the claims and denied the injunction.

The court found that the Bergers were barred from their Fourth Amendment claims because of collateral estoppel, since the claim had previously been decided against Mr. Berger in the criminal case against him when he had sought to suppress evidence obtained in the search. Mrs. Berger, not a party in the criminal action, was, in effect, bound by the same results. Moreover, the claim also failed because CNN was not acting under color of law. "When a private party, such as CNN, is present during a search as a means of furthering its own interests, it is not acting under color of law and is not liable under *Bivens*," the court said. Slip Op. at 6.

The videotaping did not violate the Federal Wiretap Act because CNN had the agents' permission to tape. The law provides an exception which allows a third person to intercept an oral conversation with permission of one of the parties, as long as the interception is not for a criminal or tortious act. The court found CNN's acts fit within the exception and were not tortious because they were made "for the purpose of producing a news story and for the defendants' commercial gain." Slip. Op. at 7.

The conversion claim accused CNN and Hamann of wrongfully seizing and appropriating statements and images of the Bergers, their premises and possessions. While Montana courts had not ruled on the susceptibility of recorded sounds and images to conversion, the district court found that other courts had concluded that they were not (citing Seventh and Ninth Circuit, Ohio, and New York courts.) CNN, not the Bergers, held the property ownership of the videotapes, the only tangible chattel at issue. Slip Op. at 9-10.

Finding that the ranch was under the temporary control and possession of the federal agents during the time of the execution of the warrant and that they gave CNN permission to videotape, the court held that the claim for trespass could not lie. The court also found that Mr. Berger, who was present during the search, was aware of the cameras, but did not object to them, rejecting as well the plaintiffs' argument that they did not know the crew was a news crew. Slip Op. at 11.

The court also rejected the claim for intentional infliction of emotional distress because CNN and Hamann had committed no tortious acts and the Bergers' emotional distress was not reasonably foreseeable. Slip Op. at 12-13.

The Bergers' request for an injunction also failed because they could not prove their case was "exceptional" to justify the prior restraint. The court noted the "heavy presumption against (a prior restraint's) constitutional validity." Slip Op. at 8.

PRIVACY

In Case You Missed It . . .
Ride-Along Does Not Support 1983 Claim

On October 31, 1995, United States District Judge Donald J. Stohr, sitting in the Eastern District of Missouri, Eastern Division granted summary judgment to defendant Multi-Media KSDK, Inc. on 42 U.S.C. Sec. 1983 claims arising out of the defendant's filming and subsequent broadcast of the execution of a search warrant at the plaintiffs' residence. *Parker v. Clarke*, 905 F.Supp. 638 (E.D. Mo. Oct. 31, 1995), *order clarified*, 910 F.Supp. 460 (E.D. Mo. Nov. 6, 1995).

After dismissing the federal claims, Judge Stohr declined to exercise jurisdiction over the state law tort claims brought against KSDK. The defendant - KSDK crew had sought to report on law enforcement activities on illegal weapons. The KSDK reporter was notified of an investigation that he could cover. The execution of the search warrant was subsequently authorized in the investigation.

The Big Test

In order to recover under Sec. 1983, the court stated, plaintiffs would have to "demonstrate that KSDK violated plaintiffs' constitutional rights under color of state law," Judge Stohr applied the two-prong test laid down by the Supreme Court in *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982). First, "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Id.*, at 957. Second, "the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.*

Turning to the facts of the case, Judge Stohr found plaintiffs' claims to be lacking under either prong. First, the court found that "KSDK's allegedly unconstitutional conduct -- entry into plaintiff's home and the recording and broadcasting of objects and events inside the home -- met none of the criteria for the first prong. Rather, the court held, "At most, KSDK's acts were committed parallel to and contemporaneous with the police officers' exercise of privileges under state law in the execution of a lawfully obtained warrant." *Parker*, at 642.

Further, under the second prong, Judge Stohr followed the Eighth Circuit's requirement that private party liability based upon Sec. 1983 must be predicated upon "'a mutual understanding, or a meeting of the minds, between the private party and the state actor.'" *Parker*, at 642, *citing Mershon v. Beasley*, 994 F.2d 449, 451 (8th Cir. 1993).

In the case at hand, KSDK's television crew were invited along with Mobile Reserve Unit officers during their shift, and when the decision to execute the warrant was made the crew merely came along. Judge Stohr stated, "the passivity of this circumstance demonstrates the absence of any affirmative agreement between KSDK and the police concerning the particular conduct of KSDK which plaintiffs now challenge." *Parker*, at 642.

Overall, Judge Stohr distinguished KSDK's newsgathering activity from the concurrent state action being carried out by the police officers. "The entirely distinct purposes of the two groups bolster this conclusion, as well as the Court's ultimate determination that the allegedly unconstitutional conduct was not joint. The KSDK personnel were present for the purpose of gathering news and preparing a report for broadcast. The police were engaged in the conduct of law enforcement activity." *Parker*, at 642.

Ayeni Applied To Police

Implicit in Judge Stohr's distinction between the police and press activities is the fact that the police officers involved in the search were not as fortunate as KSDK under the court's analysis. Rather, the judge applied the reasoning of the Second Circuit in *Ayeni v. Mottola*, 35 F.3d 680 (2nd Cir. 1994), to find "that the officers responsible for the KSDK personnel's presence in the plaintiffs' home are not entitled to qualified immunity, but yield further the determination as a matter of law that plaintiffs are entitled to summary judgment as to liability on their Fourth Amendment claim under Sec. 1983." Parker, at 643-44.

In a November 6, 1995 clarification order Judge Stohr made clear that the parties could take appeal from the October 31 order. The case is currently pending in the Court of Appeals for the Eighth Circuit.

Auvil Plaintiffs Seek Supreme Court Cert.

The plaintiffs in *Auvil v. CBS "60 Minutes,"* filed a petition for certiorari to the United States Supreme Court on February 26, 1996. *Auvil v. CBS "60 Minutes,"* 64 U.S.L.W. 3605 (2/26/96, No. 95-1372). The petition stems from the Ninth Circuit affirmance of a summary judgment motion granted in favor of CBS in the United States District Court for the Eastern District of Washington. *Auvil*, 67 F.3d 816 (9th Cir. 1995). Plaintiffs', Washington state apple growers, allege claims of product disparagement arising out of a 1989 "60 Minutes" segment which dealt with daminozide, a chemical growth regulator sprayed on apples. The plaintiffs, formerly represented by a Portland, Oregon firm, are being represented on the petition by the Washington Legal Foundation, which filed an *amicus* brief on the appeal to the Ninth Circuit Court of Appeals.

LDRC wishes to acknowledge spring interns John Maltbie, Cindy Moy, Christine O'Donnell, Jennifer Hampton and William Schreiner for their contributions to this month's *LDRC LibelLetter*.

Civil Sexual Assault Plaintiff May Not Litigate Anonymously

A federal district court judge in the Sourthern district of New York has refused to permit the plaintiff, the victim of a sexual assault, to proceed anonymously in a civil damage sexual assault suit against rapper Tupac Shakur. *Doe v. Shakur*, 1996 WL 23155 (S.D.N.Y. Jan. 22, 1996).

Despite the fact that the plaintiff had obtained an order *ex parte* from Judge Sprizzo, sitting as a Part I judge, sealing the complaint and permitting the plaintiff to file a substitute complaint using a pseudonym in place of her real name, District Court Judge Chin held that the order "merely allowed plaintiff to file the complaint under seal," and was not intended to permit the plaintiff to "prosecute the entire lawsuit as a pseudonym." 1996 WL at *1.

Noting that allowing plaintiff to proceed anonymously was within the court's discretion, Judge Chin indentified several factors to be considered, including, "(1) whether the plaintiff is challenging governmental activity; (2) whether the plaintiff would be required to disclose information of the utmost secrecy; (3) whether the plaintiff would be compelled to admit his or her intention to engage in criminal conduct, thereby risking criminal prosecution; (4) whether the plaintiff would risk injury if identified; and (5) whether a party defending against a suit brought under a pseudonym would be prejudiced." 1996 WL at *1, *citing James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993); *Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992); *Doe v. Bell Atlantic Business Sys. Servcs., Inc.*, 162 F.R.D. 418, 420 (D.Mass. 1995); *Rowe v. Burton*, 884 F.Supp. 1372, 1386 (D.Alaska 1994); *Doe v. University of Rhode Island*, Civ. A. No. 93-0560B, 1993 WL 667341, at *2.

Judge Chin quoted the Eleventh Circuit on the balancing process:

"The ultimate test for permitting a plaintiff to proceed anonymously is whether the plaintiff has a substantial privacy right which outweighs the 'customary and constitutionally-embedded presumption of openness in judicial proceedings.' It is the exceptional case in which a plaintiff may proceed under a fictitious name."

Frank, 951 F.2d at 323.

Judge Chin then ruled that the factors weighed in the defendant's favor, holding that the planitiff was not entitled to proceed with her action anonymously. First, Judge Chin noted that "the plaintiff has chosen to bring this lawsuit," thus fairness demands that she "stand behind her charges publicly." 1996 WL at *2.

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OHIO SUPREME COURT RULES 911 TAPES ARE PUBLIC RECORDS

In a decision handed down on March 6, the Ohio Supreme Court ruled that 911 tapes were public records from the moment that they were made; they were subject to no exceptions under the state Public Records Act, R.C. 149.43. *The State ex rel. Cincinnati Enquirer v. Hamilton County, Ohio* (Nos. 95-675, 95-677, 95-686, and 95-843 March 6, 1996) The court found that at the time they were created, they were not made as investigory records, there was no expectation of privacy by the caller, they were not trial preparation records and no state or federal law prohibited their release. As a result,the court held, the tapes were not exempt from disclosure and it was irrelevant to the analysis whether they could contain the identity of an uncharged suspect or of a witness, trade secrets, etc.

Alabama Supreme Court Affirms "Public Interest" Privilege Against Juvenile's Privacy Claim

The Alabama Supreme Court ruled unanimously in a recent decision that summary judgement in an invasion of privacy suit was correctly awarded to WALA-TV, a Mobile, Alabama television station which both identified a juvenile runaway by name and face in a news broadcast. *J.C. and C.C. v. WALA-TV, Inc.*, 1996 Ala. LEXIS 6 (January 12, 1996).

The Plaintiff, a 15-year-old runaway named Shauna Cooley, was the owner of a puppy that had been tortured by neighborhood thugs. The report on the abused animal had become a local cause celebre and became the focus of extensive media coverage in the South. WALA located Cooley, the owner of the dog, and filmed and broadcast an interview with her, as well as footage of neighborhood people threatening Cooley if she talked to police about the abuse of the puppy. After the interview, plaintiff made contact with her parents who in turn notified both WALA and local authorities of her status. Shauna was picked up and placed in the custody of a youth center, a fact also reported by WALA. Cooley's parents sued WALA on her behalf for common-law invasion of privacy.

Despite the fact that the plaintiff was a juvenile, citing *Campbell v. Seabury Press*, 614 F.2d 395 (5th Cir. 1980), the Court found the broadcast protected by the privilege of "legitimate public interest," and noted that "the privilege extends to information concerning interesting phases of human activity and embraces all issues about which information is needed or appropriate so that individuals may cope with the exigencies of their period." *Campbell* at 397. The court concluded by stating that "The broadcast, being one concerning matters of legitimate public interest, was not an improper intrusion into private activities and was not therefore actionable under our tort law as an invasion of privacy." *WALA*, at *5.

— *Charles Glasser, Jr.*

SURREPTITIOUS VIEWING BILL IN MARYLAND

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and unscrupulous home-based businesses would become a criminal offense. All "ride-alongs" would similarly become crimes absent the consent of a resident.

Moreover, the bill could be interpreted to go beyond the common law in specific situations. For example, the bill outlaws surreptitious "direct sight surveillance" as well as the use of cameras. Thus, merely watching, from outside a home, something occurring inside might violate the statute. At a minimum, it might create a jury issue on whether such observation is "surreptitious" under the circumstances of each case. Furthermore, in areas like hotel rooms or nursing home rooms, a resident may not consent to observation of anyone else, such as a physician or other employee.

The codification of intrusion law also inhibits the development of common-law newsgathering or other defenses. For example, some courts have held that the press has customary, implied consent to enter private property in emergency situations. This defense might be unavailable under this bill. The bill would also add to the existing legal confusion faced by journalists who on any given day may have to race in and out of Maryland, the District of Columbia, and Virginia in pursuit of a story.

HB 273 was recently passed by the Maryland House of Delegates and is now being considered by the State Senate. Media organizations both locally and nationwide are mobilizing to combat the emerging threat to newsgathering.

Nathan E. Siegel of Venable, Baetjer and Howard, LLP, which represents Westinghouse/CBS affiliate WJZ-TV in Baltimore, is organizing a group of local and national broadcasters to oppose and/or modify the bill. If you are interested in participating, or would like more information, please call Nathan at 410-244-7498.

New York Court Reaffirms Outer Boundaries of Absolute Privilege for Attorneys

Does telling another lawyer that his client is "unstable or on drugs" just after a judicial conference qualify for protection under the absolute privilege protecting the speech of attorneys? A New York appellate court held in February that just such conversation is privileged in *Caplan v. Winslett*, 1996 N.Y. App. Div. LEXIS 1531 (1st Dep't. 1996).

The slander case at issue here stemmed from a breach of loan agreement case brought by Coffee Trade Services against two grain companies. During discovery in that case, tape recordings of phone conversations in which an employee for one of the grain companies counseled Coffee Trade to refuse to accept his employer's settlement offer because a better one would be forthcoming surfaced. While leaving the courthouse after a pretrial conference where these tapes were reviewed, a lawyer for the grain companies told a lawyer for Coffee Trade that "I thought Caplan (the employee) was on Coffee Trade's payroll; when we heard the tapes, it was apparent that Caplan was unstable or on drugs." Id. at 3.

The employee who made the statements brought an action for slander against the grain companies' lawyer and his firm, Thacher Proffitt & Wood. The trial court granted defendants' motion to dismiss but denied their motion for sanctions against the plaintiff.

Judge Wallach, in a unanimous decision, briefly reviewed the breadth of the absolute privilege protecting attorneys, ultimately finding that "[a]s a matter of policy, attorneys should be given absolute freedom in the quest for justice for their clients." Id. at 7-8.

So long as the statement was made in connection with a judicial proceeding and relates to the litigation, Wallach wrote, it does not have to be made in a judicial proceeding itself to be protected. Indeed, he wrote, a broad privilege for attorneys tends to encourage communication between them, thus conserving judicial and client resources - behavior which "if anything, should be encouraged." Id. at 8.

Court Disallows Civil Sexual Assault Plaintiff to Proceed Anonymously

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Further, the fact that the action "is a civil suit for damages, where plaintiff is seeking to vindicate her own interests," distinguishes the case at hand from criminal sexual assault prosecutions which provide anonymity to the victim through rape shield laws. 1996 WL at *2.

In addition, the court pointed out, the fact that Shakur has been publicly accused would be place him at a "serious disadvantage" if he were "required to defend himself publicly while plaintiff could make her allegations from behind a cloak of anonymity." 1996 WL at *2.

Finally, Judge Chin cited the public's right of access to the courts, pointing out that "'lawsuits are public events and the public has a legitimate interest in knowing the facts involved in them. Among those facts is the identity of the parties." 1996 WL at *2, *citing Doe v. Deschamps*, 64 F.R.D. 652, 653 (D.Mont. 1974).

Turning to plaintiff's specific arguments, Judge Chin ruled that the plaintiff's "claims of public humiliation and embarrassment . . . are not sufficient grounds for allowing a plaintiff in a civil suit to proceed anonymously," especially in light of the fact that in the present case the press has known her name, her address and her place of employment for some time. 1996 WL at *3. Further, addressing the alleged death threats which the plaintiff claimed she has been subjected to, Judge Chin concluded that "the plaintiff has not shown that the use of her real name in court papers would lead to harm," since "those who presumably would have any animosity toward her already know her true identity." 1996 WL at *3.

GAG ON LITIGANT-NEWSLETTER IN OREGON

SEALED COURT FILE SOUGHT BY MEDIA

On March 5, a state court judge in Portland, Oregon, on an *ex parte* motion by plaintiff adidas American, granted an order against the defendant, a newsletter publisher, barring it from disclosing the substance of the complaint and unspecified trade secrets, and sealing the existing court record in the just-filed suit filed by adidas against the publisher. *adidas America, Inc. v. Sports Management News, Inc.*, No. C 960245CV (Cir.Ct.Wash.Co. 1996) The defendant received notice of the complaint and the gag by fax from plaintiff's counsel.

The defendant is Sport Management News, Inc., publisher of a well-read weekly newsletter on the athletic shoe trade, "Sports Goods Intelligence", published out of Glen Falls, Pa.

A week later, on March 12, another Oregon trial judge lifted the order, but imposed another one. This second prior restraint bars the defendant newsletter from publishing any information it may have from a report identified as "the proprietary booklet" and specifically, the section entitled "Footwear Technology for the Spring of 1997 and Forward" without a prior judicial *in camera* inspection and determination by the court as to whether or not the information is a protectable trade secret.

A writ of mandamus, filed with the Supreme Court of Oregon after entry of the first order, will be amended by defendant to reflect the new order. The Supreme Court has already indicated that it will issue an expedited briefing schedule in the case. The Court has also granted the motion of The Oregonian, Dow Jones, and the Newsletter Publishers Association to intervene, and has unsealed the Supreme Court files in the case.

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COURT GRANTS SCHOOL BOARD REQUEST FOR SELF-IMPOSED GAG ORDER IN DESEGREGATION CASE

The United States Court of Appeals for the Fifth Circuit has agreed to an expedited appeal sought by media intervenors of an extraordinary gag order issued by Louisiana Federal District Court Judge John V. Parker directing the School Board and employees of the East Baton Rouge Parish School System not to discuss publicly any aspect of a draft school desegregation plan due to be presented to the court in the next months. *In re: Capital City Press, et al.*, No. 96-30153 (5th Cir.)

The gag order, issued on February 6, 1996, was requested by counsel for the School Board and was issued by the district court summarily and without notice and, at least initially, without any findings or reasons from the court. *Davis and United States v. East Baton Rouge Parish School Board*, Civil Action No. 56-1662A (M.D. La.)

The effect of the gag order is to prevent any further public inquiry into or scrutiny of the initial process by which a desegregation plan for the Parish schools is devised. There is no doubt that the desegregation plan is one of extreme interest to the citizens of East Baton Rouge Parish. Indeed, the fact that there are so many different interested citizens and groups within the Parish, some with adverse interests, is cited by the court seemingly as a basis for its determination that the School Board, an elected body, should be allowed to work on the proposed plan without the distraction of having to answer to the press and public about the process.

The School Board has been directed to file its brief with the Fifth Circuit by Tuesday, March 12; the media intervenors are to file by Thursday, March 14. An amicus brief in support of the media is being written by Thomas Leatherbury and Andrew Logan of Vinson & Elkins, and James Grossberg and Curtis E. von Kann of Ross, Dixon & Masback.

Capital City Press, publisher of the Advocate, Louisiana Television Broadcasting Corporation, which operates WBRZ-TV, and Bill Pack, reporter for the Advocate, local media outlets represented by Jack Weiss and Mark Holton of Stone, Pigman, Walther, Wittmann & Hutchinson, moved to intervene in the proceeding and to vacate the Order. The district court granted the motion to intervene but denied the motion to vacate at a hearing held on February 22. The court issued "Supplemental Reasons" for its denial on February 26.

The Court's Rationale

In its supplemental reasons, the court recited the tortured history of the now 40 year old litigation regarding desegregation of the East Baton Rouge Parish School System, the fact that the new School Board is apparently sincere, for the first time in that history, in resolving the issues, that it needs time to consult within the School System in order to formulate the plan it will propose to the court for that resolution and that a gag order would facilitate the efforts of the School Board to produce a satisfactory proposal. The plan under consideration is not final, the court noted, and will be subject to public hearings by the Board and the court before it is rendered final.

While finding that the news media has sufficient interest to intervene, the court then stated that the news media is actually attempting to assert the First Amendment rights of others, those who would presumably want to speak to the press about the process. It found, despite stipulated evidence to the contrary, that there was no "willing speaker" from the School Board whose rights are being violated. This is not a prior restraint on the media, the court

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GAG ORDERS AND A PRIOR RESTRAINT

COURT GRANTS SCHOOL BOARD REQUEST FOR SELF-IMPOSED GAG ORDER IN DESEGREGATION CASE

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found, because the press is not the party gagged. And while it could be argued that if there were no willing speakers a gag order was unnecessary, "the School Board persuasively argues that the order allows the Board members to get on with the business at hand rather than having to constantly explain that they are acting on advice of counsel [in not speaking] and the nature of that advice." *Slip op* at 9.

The court accused the intervenors of trying to sabotage the progress of the School Board in its efforts to arrive at a proposal without the interference of outsiders. It cited the equitable powers of the court in desegregation cases. And it noted that this is an "extraordinary case" which vests the federal court with the authority required to accomplish the end result of validating the constitutional rights of black citizens.

The Media Appeal

In its Emergency Motion for Expedited Appeal, the media intervenors argue that by his Order, the court has effectively nullified the rights and remedies afforded the public under the Louisiana Open Meeting Law and the Louisiana Public Records Act, as well as clearly interfering with basic First Amendment and Louisiana State Constitutional rights of the press to gather and report and of the public to be informed about the processes of government.

Media Intervenors argue that the effect of the Order is to insulate the School Board and other key personnel from scrutiny, perhaps forever, on the deliberations and decisions that will go into the proposed plan. While prior to the Order information about the school plan was available to the public and press, now no one can speak about it for fear of contempt.

The brief filed by the Intervenors argues that the district court judge not only failed to articulate an interest sufficient to justify the entry of the Order, but failed to ensure that the Order was not overbroad or whether less restrictive means were available -- all of which were clearly required under constitutional law.

Intervenors also argue that the entry of the Order was procedurally defective, having been entered without appropriate prior notice to the public, without affording interested parties a hearing prior to entry of the Order, without a statement of the reasons why the Order was entered and without specific findings supporting the Order being made.

The media brief points out that in the civil context, gag orders are evaluated pursuant to classic prior restraint analysis, even when the objector is not the direct speaker. The belated reasons given by the court for entering the order -- its desire to facilitate the ability of the School Board to craft an acceptable desegregation plan -- while noble, are insufficient to meet the requirements for a prior restraint. Further, no evidence was submitted in support of that interest, even if it were sufficient. Ultimately, the trial court cited no standard that it felt that it had to meet in order to issue the order beyond the equitable powers of the court in a desegregation case.

While some courts, Intervenors note, have adopted less stringent standards than prior restraint analysis when media challenge gag orders in criminal cases, even that standard was unmet in this case. That "lesser standard" requires findings of a reasonable likelihood of prejudicing the administration of justice, that there are no less restrictive alternatives, and that the gag would be effective.

The court's attempt to rely on some notion of a "willing speaker" who must exist in order for the media to overturn a gag order is unsupported by the case law, Intervenors find. While a small number of courts have used such a rationale in order to deny media standing to intervene in gag order cases, no court has used it as a substantive basis for denying the relief requested.

Moreover, the cases indicate that evidence that those gagged by the order previously have spoken on the gagged subject matter was sufficient to show that they would speak if ungagged. Such a showing was made here on stipulation. In addition, because the gagged party is public body subject to the state Public Records Act and Open Meeting Law, it would be required to speak consistent with those laws, whether "willing" or not.

Acting in a manner that could leave even experienced media counsel speechless, on Friday, March 8, without notice to the media intervenors, the district court, on application of the School Board, issued a further order authorizing private meetings between the School Board, the staff, consultants and attorneys and with representatives of other litigants in the case, to discuss the litigation and the preliminary draft of the plan. The order provides that such "private sessions" and all preliminary drafts were to remain confidential until further order of the court. Intervenors learned of the order and on Friday afternoon sought and obtained a stay of the order from the Fifth Circuit. The School Board, as a result, cancelled the weekend meetings it had scheduled in anticipation of the order on private sessions.

It is hoped, of course, that the Fifth Circuit will quickly and resoundingly reverse the district court on all efforts to prevent public discussion and reporting on this clearly noteworthy process to desegregate in Baton Rouge.

California Superior Court Denies Motion For A Protective/Gag Order in Fertility Clinic Case

By James E. Grossberg and Eric M. Jaffe

On March 8, a California Superior Court rejected a request for a sweeping protective order that would have barred public access to much or all pretrial discovery documents and deposition transcripts, and gagged all participants, in the dozens of lawsuits arising from the fertility clinic scandal that has racked the University of California at Irvine (UCI) and drawn international press attention.

The proposed protective order would have sealed all discovery materials deemed by any party to be "confidential," automatically sealed all deposition transcripts, and prevented the parties, their counsel, or "any other person" from using, disclosing, or disseminating any information deemed to be "confidential." Documents subject to the protective order would have remained sealed even if filed with the court in conjunction with a motion or other pleading.

The Orange County Register, which broke the fertility clinic story in May of last year, was joined by NBC, the Los Angeles Times, and virtually every other party to the litigation in opposing the Regents' motion. Opponents noted that the language of the proposed protective order could be construed even to prohibit the news media from reporting information subject to the order.

The fertility clinic cases arise from allegations that three members of the University's faculty improperly operated UCI's nationally-renowned Center for Reproductive Health by, among other things, conducting unauthorized research and misusing patient embryos.

In their motion, the Regents conceded they were required to meet the California Code of Civil Procedure's "good cause" standard for issuance of a protective order. They argued, however, that good cause was demonstrated in this instance because public dissemination of pretrial discovery materials might taint prospective jurors, prejudice the Regents' fair trial right, intimidate witnesses and distort their testimony, and violate the privacy rights and physician-patient privilege of former fertility clinic patients who are not parties to the litigation.

According to the Regents, press coverage of the fertility clinic litigation had already created a "circus" atmosphere at the recent deposition of the lead defendant in the litigation, Dr. Ricardo H. Asch, in Tijuana, Mexico. The Regents also claimed that the names of non-party fertility clinic patients contained in the transcript of the Asch deposition were released to the press despite the parties' agreement to seal the transcript.

The Register and other press organizations argued that to meet the good cause standard, the Regents were required to present to the court specific facts showing a clearly defined, serious injury that would result from dissemination of the information at issue. Instead, the media organizations argued, the Regents relied on mere conclusory assertions of alleged harm. The media entities also pointed out that the "circus" atmosphere allegedly surrounding the Asch deposition had little to do with news coverage of the deposition.

Opponents of the proposed protective order argued that it was overly broad and that the Regents had failed to demonstrate that less restrictive alternatives would not prevent the injury feared by the Regents. The opponents noted that a narrowly drawn protective order requiring the redaction of the identities of non-party patients from all discovery documents would fully protect those patients' privacy interests. The opponents also argued that the sweeping proposed protective order violated the public's and press' Constitutional and common law rights of access to judicial documents and constituted an unconstitutional prior restraint.

At the March 8 hearing, Superior Court Judge Leonard Goldstein concluded that the Regents had failed to demonstrate the need for the proposed order. Although Judge Goldstein observed that the press had, in his view, acted responsibly in its coverage to date of the fertility clinic scandal and had been careful to preserve the privacy of fertility clinic patients, he warned that he would not hesitate to take tough measures (which he did not specify), if patients' privacy interests are compromised in the future.

Lopsided Punitive Verdict inTexas Libel Case

As reported in *The Wall Street Journal* and other newspapers, a federal jury in Texas found Sony Corp.'s TriStar Television, distributor of the TV newsmagazine program "TV Nation," had libelled Merco Joint Venture, a New York biosolids company in a report broadcast in 1994. The seven-member jury found actual damages of $1, but ordered TriStar to pay $4.5 million dollars in punitive damages. Hugh B. Kaufman, an employee of the Environmental Protection Agency (EPA) who was interviewed on the program, was also assessed $1 in actual damages, but $500,000 in punitive damages. Merco's suit claimed "TV Nation" falsely portrayed the landfill as an illegal operation despite having contrary information; the complaint against Kaufman included charges that he misrepresented himself as a spokesman for EPA. Mr. Kaufman was an investigator for EPA, who was looking into the Merco operation in Texas. Sony and Mr. Kaufman plan to appeal the verdict.

GAG ON LITIGANT-NEWSLETTER IN OREGON SEALED COURT FILE SOUGHT BY MEDIA

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adidas' Complaint

On Wednesday March 6, Sports Management News, Inc. received a copy of the complaint in a trade secrets suit under Oregon law, along with a copy of the *ex parte* order. The complaint alleges that defendant, in its publication of February 19, disclosed adidas's trade secrets, which were found "among other places" in the so-called "Proprietary Booklet." That "Booklet" is characterized in the complaint as a highly confidential documents intended for and distributed only within adidas, which contains information about future research projects, concepts, etc.

The complaint alleges that adidas takes great pains to maintain the confidentiality of its shoe research and development and imposes confidentiality agreements on all of its employees who might have access to the "Proprietary Booklet." It accuses defendant of knowingly publishing adidas trade secrets, and having obtained them through unspecified "improper means." According to the complaint, the published material at issue is one sentence reported on page 8 of the newsletter.

adidas seeks, among other things, the identity of the newsletter's source for the information, "an accounting of all adidas's confidential and trade secret information defendant has obtained, the return of such information.

Removal Denied

Defendant immediately sought to remove the case to federal court in Oregon. The Oregonian, Dow Jones and the Newsletter Publishers Association sought to intervene, wanting access to the court documents. The federal court denied the removal motion, finding that the amount alleged to be in controversy was less than $50,000.

The case returned Friday afternoon, March 8, for a late-in-the-day hearing before a Washington County Circuit Judge seeking to have the order lifted. The Oregonian, Dow Jones and the NPA again sought to intervene. At the hearing the judge indicated that she wanted further briefing from the newsletter-defendant and from the intervenors. Arguments to the effect that the existing order constituted an on-going prior restraint, with each day constituting a violation of First Amendment rights, did not convince her to rule on Friday. As noted above, however, she did rule on Tuesday, March 12.

Friday night, Sports Management filed a writ of mandamus with the Oregon Supreme Court.

Sports Management News, Inc. is represented by Lee Levine and Daniel J. Standish of Ross, Dixon & Masback.

LDRC 1996-97 50-STATE SURVEYS: MEDIA PRIVACY AND RELATED LAW AND MEDIA LIBEL LAW

The order forms for *LDRC's 1996-97 50-State Survey* companion volumes have been mailed out. Please return your orders, preferably with payment, as soon as possible. The price for *Media Privacy* remains $125 until May and the price for *Media Libel Law* remains $125 until October. The prices reflect the shipment schedule of the books. We prefer that if you plan on ordering the set please pay for both books at the same time, before the May deadline, to help us avoid the need for a constant stream of invoices.

Those who wish to change their order status to **standing order** should indicate this by checking off the appropriate box on the form. You also have the option of adding the companion book to your current single book purchase or ordering more than one of each book, or set. The combinations are endless!

LDRC also wants to take this opportunity to acknowledge the hard work and efforts of the *50-State Survey* preparers. We rely on and are grateful for your submissions each year. We are proud to say that feedback on the books has been very positive since undergoing the transformaton to two volumes. The books have never looked better, been easier to utilize, or been of more use to counsel and other legal media scholars.

Lawsuits Challenging Internet Indecency Provisions Promise to Chart Course of First Amendment in Cyberspace

By Sean H. Donahue

Two recently filed challenges to the new Telecommunications Act are likely to yield the most informative delineation to date of the First Amendment's application in "cyberspace."

Title V of the Telecommunications Act of 1996, designated the Communications Decency Act (CDA), contains a range of measures designed to restrict the exposure of minors to sexually explicit images and language on the Internet, over the telephone, and on cable and broadcast television.

Section 501, among other things, makes it a felony punishable by up to two years' imprisonment to communicate obscene or "indecent" messages via "telecommunications device" with knowledge that the recipient is under 18 years old.

Section 502 criminally prohibits the use of an "interactive computer service" to "display in a manner available to a person under 18 years of age" any material "that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs."

The Act creates affirmative defenses for an entity that merely provides access to a facility, network or system controlled by others, or that takes "good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors" to prohibited communications, as by "requiring use of a verified credit card, debit account, adult access code, or adult personal identification number." (§ 502, to be codified at 47 U.S.C. § 223(e)).

Two large groups of plaintiffs filed challenges last month in federal court in Philadelphia, seeking declaratory judgments that these provisions are unconstitutional. Both actions challenge the indecency restrictions on the grounds that they violate the First Amendment and are void-for-vagueness; neither challenges the Act insofar as it applies to obscenity, child pornography, or online harassment.

In *American Civil Liberties Union v. Reno*, Civ. No. 96-0963 (E.D. Pa.), plaintiffs include the ACLU, the Electronic Frontier Foundation, electronic publishers, and a variety of public interest and human rights organizations that use the Internet. The other action, *American Library Association v. Reno*, Civ. No. 96-1458 (E.D. Pa.), is brought by a coalition composed of major online service providers (America On-Line, CompuServe, Microsoft, and Prodigy), associations of librarians, booksellers, publishers and journalists, a group representing thousands of internet users, and a variety of entities dedicated to free expression in cyberspace.

The First Amendment Challenge

The *ACLU* and *ALA* plaintiffs allege that, although putatively designed to restrict only minors' access to indecent material, the CDA is in effect a comprehensive ban on posting "indecent" or "patently offensive" material on the Internet at all. They contend that such a broad, content-based prohibition cannot survive the strict First Amendment scrutiny applicable to restrictions on indecent speech, which can be restricted only by measures narrowly tailored to serve a compelling governmental interest. See *Sable Communications v. FCC*, 492 U.S. 115 (1989) (applying strict scrutiny and striking down statute

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CYBERSPACE

SIXTH CIRCUIT AFFIRMS CONVICTIONS IN ONLINE OBSCENITY CASE

By Michael Kovaka

In a decision that raises serious concerns for online publishers and distributors, the Sixth Circuit has ruled that the obscenity or non-obscenity of online materials may be judged under the community standards of any jurisdiction in which they are made available -- at least when the originator has knowledge of and control over who the specific recipients will be. Upholding criminal convictions handed down in Tennessee against a husband and wife for distributing sexually explicit images over their California-based bulletin board system, the court declined to adopt a new definition of "community" in online obscenity cases. *United States v. Thomas*, Nos. 94-6648 & 94-6649, 1996 U.S. App. LEXIS 1069 (6th Cir., Jan. 29, 1996).

Although the court emphasized that its ruling was limited to the facts before it -- facts demonstrating that the plaintiffs had the ability to identify and control which specific individuals would be given access to their computer files -- the decision suggests that at least some online services must either tailor all of their offerings to the standards of the nation's most prudish communities or risk federal criminal prosecution.

Touting their computer bulletin board system as the "Nastiest Place On Earth," Robert and Carleen Thomas began operating the Amateur Action Computer Bulletin Board ("AABBS") from their Milpitas, California home in February 1991. Among the offerings available on AABBS were computer files containing scanned images of bestiality, oral sex, sado-masochistic abuse, and incest that users could access, transfer, and download to their own computers.

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SIXTH CIRCUIT AFFIRMS CONVICTIONS IN ONLINE OBSCENITY CASE

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Because AABBS was a commercial service, access to files was limited to paying members. Members received a password allowing access after submitting a $55 membership fee along with a signed application stating the applicant's age, name, address, and telephone number.

Access to AABBS required a computer, modem, and telephone line. A modem in the Thomases' home received calls to the bulletin board system. Once a member proved membership by typing in a password, files containing images from the AABBS could be selected, copied, and transferred to the member's home computer. There the member could view the images on the computer screen and print out hard copies.

Problems began for the Thomases when a United States Postal Inspector, Agent David Dirmeyer, received a complaint about AABBS from a citizen residing in Western Tennessee.

Agent Dirmeyer looked into the complaint by dialing into the system on the AABBS telephone number. As a non-member Dirmeyer was able to peruse listings containing graphic descriptions of the images available to members in the system's files.

Using an assumed name, Dirmeyer paid his $55 and submitted an AABBS membership application. Robert Thomas contacted Agent Dirmeyer at his Memphis, Tennessee telephone number and provided him with a personal password permitting access to AABBS and its files. Dirmeyer used the password to download graphic AABBS files to his computer in Memphis.

The images in those downloaded files served as the basis for a federal criminal prosection against the Thomases in the Western District of Tennessee. Carleen and Robert Thomas were each convicted on multiple counts including conspiracy to violate federal obscenity laws and six counts each for transporting obscene materials using a facility and means of interstate commerce. Applying the test set out in *Miller v. California*, 413 U.S. 15 (1973), the District Court permitted the Tennessee jury to apply contemporary standards from their own community in deciding whether the images in the AABBS computer files were obscene.

Were the Files Sent to Tennesee or Retrieved from California

On appeal, the Thomases argued that they had not transported the AABBS files in interstate commerce. Rather, Agent Dirmeyer had used the phone lines, along with his own computer system, to access the files in California and download them to his own Tennessee computer. The Electronic Frontier Foundation described the situation in their amicus brief as "operationally indistinguishable from one in which a Tennessee resident travels to California and purchases a computer file containing adult-oriented materials that he brings back to his home."

This portrayal is consistent with the Sixth Circuit's statement of the facts in which it describes the Thomases' system as one in which "members could . . . select, retrieve, and instantly transport [AABBS] files to their own computer." Nonetheless, the court rejected the argument without ever squarely addressing the question of who actually had caused the transmission of the AABBS files into Tennessee.

The court eventually ruled that Tennessee community standards could be applied because under *Miller* "juries are properly instructed to apply the community standards of the geographic area where the materials are sent." But again, the court never directly addressed the critical issue of whether the AABBS files were *sent* to Tennessee by the Thomases or were retrieved and imported there by Agent Dirmeyer.

Indeed, the court's language seems almost purposefully vague in discussing the actual act of transmission. In one passage, explaining that venue is proper "in any district into which the materials are sent," the court's ambiguous language fails to identify who the sender was: "members located in other jurisdictions could access and order [AABBS] files which then would be instantaneously transmitted in interstate commerce." This language, sidestepping the crucial issue of who caused the transmission, is mirrored by the court's equally vague explanation of Robert Thomas' culpability: "Thomas knew of, approved, and had conversed with an AABBS member in [Tennessee] who had his permission to access and copy [AABBS] files that ultimately ended up there."

Having nonetheless attributed the actual act of distribution to the Thomases, the court next rejected their argument that application of the geographic community standards test in the online context would cause a constitutionally impermissible chill on speech by subjecting users nationwide to the standards of the least tolerant communities.

Focusing on the ability of the Thomases to know the specific localities from which their files would be accessed, the court held that they, like mail-order distributors, could simply choose not to make their materials available in communities with less tolerance for explicit adult materials. Because the Thomases required an application identifying the applicant's address before issuing a password, they had the ability to foresee where their materials might be transmitted and could have chosen not to do business in communities with intolerant standards.

While the court took pains to limit its decision to situations where the host can foresee and control the specific locales in which his materials will be accessed, the court's ruling at best postpones for another day the question of whether application of the traditional, geographic community standards rule might be inappropriate in other online contexts.

Lawsuits Challenging Internet Indecency Provisions Promise to Chart Course of First Amendment in Cyberspace

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banning commercial "dial-a-porn" messages).

While courts have upheld certain carefully drawn efforts to keep indecent material from minors, it is well established that the government may not, even in the name of protecting children, effectively prevent adults from receiving constitutionally protected material. Justice Frankfurter characterized the effect of one such law as "burn[ing] the house to roast the pig." *Butler v. Illinois*, 352 U.S. 380, 383 (1957).

The *ACLU* and *ALA* plaintiffs contend that, statutory defenses notwithstanding, no practicable means exist for most Internet content or service providers to restrict children's access to "indecent" materials in cyberspace short of removing the material altogether. Because of the global accessibility that is one of the Internet's fundamental characteristics, most material that is posted anywhere on the Internet is "available to" minors, thereby subjecting those who posted it to criminal liability.

Anyone who posts anything on the Internet -- including ordinary individuals who send e-mail, participate in discussion groups, or set up a Web site -- is treated under the Act as a content provider subject to criminal penalties.

Although the scope of the statutory definitions of "indecent" and "patently offensive" is far from clear, these concepts definitely embrace material as ubiquitous as profane language. Plaintiffs maintain that no speech restriction ever enacted by Congress has swept in such a extensive category of communications or speakers.

Many interactive computer services (such as Internet listservs and newsgroups) lack any central authority capable of monitoring content for indecency; for such services, plaintiffs contend, implementing the CDA defenses would be impossible even in principle. Even those entities with the capacity to put in place adult access codes or other screening mechanisms, implementing the defenses would entail heavy financial burdens. Widespread use of access codes, moreover, would make it practically impossible for adult users to "browse" sites that contain any "patently offensive" material. Plaintiffs argue that the CDA's stiff criminal penalties will cause content and service providers to resolve all doubts in favor of removing all potentially indecent or patently offensive material from the Internet.

Plaintiffs in the *ACLU* and *ALA* cases also contend that far less restrictive means exist to protect minors from potentially harmful material, namely, user-based controls such as software that blocks access to material that parents deem inappropriate for their children (controls that are roughly comparable to the "V-chip" mechanism that Section 551 of the Act requires for new televisions). User-based controls would be more effective than the CDA scheme because they are able to block sexually explicit material posted on the Internet from overseas. At the same time, such controls would not impose a rigid, "one-size-fits-all" standard on all Internet users based upon what is deemed appropriate for the youngest users. Furthermore, reliance upon user-based controls would eliminate the dangers that attend a system of public censorship.

The Government Response

The Government's initial response in the *ACLU* case suggests its primary arguments in support of the indecency provisions will be that (1) the statutory defenses, patterned on restrictions that have been approved in other areas such as commercial "dial-a-porn" services, are in fact workable, and will allow adults reasonable access to constitutionally protected material, and (2) the Act's prohibitions against "indecent" and "patently offensive" communications will not apply to material with serious literary, artistic, scientific or other value, as plaintiffs claim, but will instead be limited to extremely objectionable material.

The Government maintains that limitations that the FCC has fashioned in its applications of the its broadcast indecency rules will carry over to CDA prosecutions as well, and will serve to confine the reach of the terms "indecent" and "patently offensive" as used in the new statute. The Government regards interactive computer services as analogous to broadcast, where a greater-than-normal level of government content regulation has been permitted on the theory that the medium intrudes upon unwilling and underage audiences. See *FCC v. Pacifica*, 438 U.S. 726 (1978) (upholding administrative sanction for daytime broadcast of George Carlin's "Seven Filthy Words" monologue).

Indecent But Not Obscene

The *ACLU* and *ALA* cases highlight the special problems posed by the anomalous category of "indecent but not obscene" speech. Congress's adaptation of the indecency concept in the CDA creates new doubts in this already uncertain area. For example, the CDA's legislative history says that material cannot be "patently offensive" unless the creator intended to offend, yet neither the text of the statute nor the FCC cases cited in the legislative history contain an intent requirement.

Also unclear is the meaning of "community standards" standards in a medium in which most postings are accessible from anywhere, or how, if national community standards apply, real-world juries are to divine and apply them. In these and other respects, plaintiffs argue that the CDA's definitions of "indecent" and "patently offensive" are impermissibly vague.

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Lawsuits Challenging Internet Indecency Provisions Promise to Chart Course of First Amendment in Cyberspace

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The Information Gap on Cyberspace

Plaintiffs in the Philadelphia actions insist that the CDA reflects a fundamental legislative misunderstanding of how the Internet actually works. This information deficit allowed Congress to wager the CDA's constitutionality on provider-based controls that, while possibly feasible in other areas of indecency regulation such as cable television and "dial-a-porn," are either completely unworkable or extremely burdensome in the radically decentralized universe of cyberspace.

Thus, plaintiffs have submitted a great deal of evidence designed to inform the three-judge court about the operation of interactive computer services and the impact of alternative schemes for restricting children's access to potentially harmful material. To the extent that the court relies on the absence of close congressional attention to and understanding of the complex and novel problems posed by content regulation of the Internet as a factor that undermines the CDA's claim to constitutionality, its decision may have a salutary effect on any future attempts to regulate speech in cyberspace, whether by statute or by application of common law tort doctrines.

Plaintiffs in *ACLU* and *ALA* also emphasize that cyberspace has an unmatched potential to fulfill the fundamental policies of the First Amendment because it allows ordinary individuals to communicate with millions of others and puts massive stores of information at their fingertips, all at unprecedentedly low cost. Because of its immense potential to enrich public and private life, and because of the absence of any special characteristics such as those found to justify less rigorous First Amendment standards for broadcasting, plaintiffs are asking to court to establish a standard of First Amendment review for cyberspace at least as protective as that governing the time-honored print media. If the Supreme Court ultimately agrees -- in a case involving "indecent" and "patently offensive" speech – it will have laid a strong foundation for freedom of speech on the Internet generally.

In last month's *LibelLetter*, Bruce Johnson discussed the CDA provisions that are perhaps of the most immediate importance for defamation law, namely, the seemingly very broad provisions protecting interactive computer services from being treated as "publishers" for purposes of state defamation law merely because they exercise editorial control over material they consider obscene, excessively violent, or otherwise objectionable. See CDA § 509 (to be codified at 47 U.S.C. 230(c), (d)(3)). These provisions are not as yet directly involved in the Philadelphia actions, although questions might conceivably arise as to their severability if the CDA indecency provisions are struck down.

Statute Section Enjoined

In the *ACLU* case, Judge Ronald Buckwalter issued a temporary injunction against enforcement of the challenged portion of Section 501 on the ground that the term "indecency" is too vague, but declined to issue a TRO against the far broader "display" provision.

The *ACLU* and *ALA* cases have since been consolidated, and a preliminary injunction hearing is scheduled for late March and early April before a special three-judge district court (Sloviter, C.J., Buckwalter, and Dalzell, JJ.) convened pursuant to the Act. The CDA creates a right of direct appeal to the U.S. Supreme Court. At least two other cases challenging the CDA have been filed in federal courts in New York, but these narrower challenges appear unlikely to proceed to judgment as quickly as the Philadelphia cases.

Sean H. Donahue is an attorney at Jenner & Block, Washington, D.C., which represents the plaintiffs in American Library Association v. Reno.

Federal Judge Allows Cameras in His Court

A federal judge in the Southern District of New York ruled that Court TV may record pre-trial arguments in a government case against New York City's Child Welfare Agency. U.S. District Judge Robert Ward found that Local Rule 7 of the Southern and Eastern Districts of New York empowers judges to grant written permission to televise a civil proceeding.

Ward recognized Rule 53 instituted by the Judicial Conference of the United States, the policymaking body of the federal courts, but held the rule banning cameras in court not dispositive. The judge found the social, political and legal issues raised in the instant case to merit television coverage.

Judge Ward's decision may influence federal judges in districts with similar local rules to use their discretionary power to permit cameras in their courtrooms. Rule 53 has also created controversy among survivors of the Oklahoma City bombing, who have unsuccessfully petitioned to have closed-circuit cameras at the trial of Timothy McVeigh so that all survivors could view the trial without traveling to Colorado. Attorney General Janet Reno said the Justice Department is considering whether to recommend Rule 53 be changed to permit closed-circuit coverage.

MASS. BAR ON CAMERAS IN MURDER TRIAL REVERSED

A justice of the Supreme Judicial Court of Massachusetts has modified a Superior Court decision upholding an order banning cameras during a murder trial. *The Hearst Corporation, et al. v. Justices of the Superior Court*, No. SJ-960076 (Sup. Jud. Ct., Suffolk Co., February 29, 1996). A provision in the Code of Judicial Conduct permitting a judge to limit or suspend media coverage which creates "a substantial likelihood of harm to any person or other serious harmful consequence" controlled the decision. The justice held, contrary to the court below, that "[b]ecause the rule favors coverage by the broadcast media, indeed creates a strong presumption in that direction, any limitation of coverage must have a well-documented showing of a substantial likelihood of harm or harmful consequences." *Slip op.* at 3. The court found no special circumstances justifying such limitations.

Justice John M. Greaney vacated two parts of the Superior Court decision which banned television cameras and recording devices from the trial and limited such coverage to opening statements, closing arguments, charge, verdict and sentencing. However, the decision granted the trial judge the right, after hearings and proper findings, to invoke any limitation authorized by the Code if the "substantial likelihood of harm" standard is met.

Judge Greaney rejected the lower court's rationale that the proximity of the television camera to the jury would "take the case out of the ordinary in the minds of the jurors." *Slip op.* at 5. Instead, the Justice held that the remedy was to repeatedly instruct the jury on its role and responsibilities and make the camera as unobstrusive as possible.

Nor did the fear that the witnesses would violate the sequestration order by watching the testimony of other witnesses on television merit a banning of cameras, according to the justice. The force of the judicial instructions and the prosecution's effort to keep the trial error-free in the event of an appeal would forestall such a problem. Furthermore, Justice Greaney pointed out, a ban on television coverage would not prevent potential violators of the sequestration order from learning of actual testimony through the newspaper and other media.

The trial was scheduled to begin March 6. David R. Clark, the defendant, will be tried on an indictment charging him with murder in the first degree of a Massachusetts state trooper.

CAMERAS IN COURTROOMS

U.S. Judicial Conference On Cameras

The Judicial Conference of the United States recently approved a proposal sponsored by Second Circuit Judge Jon O. Newman authorizing audiovisual coverage of federal appellate court proceedings. Except for a three-year experiment which ended in 1994, the ruling marks the first time such coverage has been allowed since 1937.

While cameras will be permitted in appellate proceedings subject to the discretion of the 13 federal Courts of Appeal, the Judicial Conference reaffirmed its view that cameras were to be banned in U.S. trial courts. In doing so, the Judicial Conference indicated its disapproval of the very recent decision by Judge Robert Ward of the Southern District of New York to permit Court TV to televise a pretrial proceeding in a civil case. Ward held Judicial Conference Rule 53 was merely persuasive, and that local court rules determined whether camera coverage would be permitted. See article on this page. The civil case, *Marisol A. v. Giuliani*, is a lawsuit seeking the appointment of a receiver for New York City's Child Welfare Agency. Judge Ward characterized it in his ruling as a suit raising "profound" legal and social issues. Clearly unpersuaded the Judicial Conference called for all local court rules that conflicted with their decision to be struck down by the appellate courts.

LDRC and Other Media Organizations File Comments on Proposed FRCP 26(c)

(Continued from page 1)

The comments argue that the trend toward greater secrecy in litigation is a troubling one, leaving the public, the press, the government and other litigants in the dark about events that may be of significant public interest. We cited cases both where secrecy granted hurt the public interest and where secrecy denied aided the public interest. Press coverage, we noted, is essential in maintaining the public confidence in the judicial system. Indeed, the Supreme Court has recognized that press coverage enhances both the fairness of the process and the appearance of fairness, essential to public confidence in the judicial system.

Seattle Times Requires Good Cause

We argue that *Seattle Times v. Rinehart*, 467 U.S. 20 (1984) authorized restrictions on documents and information acquired in discovery only upon a showing of "good cause" for the limitations. Unfettered discretion residing in the litigants would raise serious constitutional questions. While the First Amendment rights of a party to disclose material obtained in discovery are implicated "to a far lesser extent than would restraints on information in a different context," the Court in *Seattle Times* nonetheless subjected the state analog to Rule 26(c) at issue in the case to intermediate constitutional scrutiny. Justice Brennan, in his concurrence in *Seattle Times*, noted that the Court "today recognizes that pretrial protective orders, designed to limit the dissemination of information gained through the civil discovery process, are subject to scrutiny under the First Amendment...."

The comments cite cases that have followed *Seattle Times* in requiring a judicial determination of good cause in order to satisfy First Amendment concerns.

Judicial Function to Protect Public Interest Should Not Be Delegated

The protection of the public's interest in access to information is inherently a judicial function that cannot and should not be delegated to the litigants, we state. Litigants, of course, may have various self-interests in protecting the discovery process from public disclosure and scrutiny. Media simply cannot always know what cases are worth intervention and, particularly small media, cannot afford to intervene on speculation.

The comments suggest that for courts to exercise the appropriate oversight, they need not get bogged down in a review of every document in every litigation. Courts can, for example, require the parties to advance evidence and reasoning to support a determination of good cause for specific categories of documents. With guidelines from the court in hand, the parties can make the initial designation of what is within the categories of confidential information established by the court. Parties can be required to submit a log, like a privilege log, describing the specific documents designated as "confidential." in order to allow parties and non-parties to evaluate whether the designations warrant judicial review.

Sealing Leads to Limited Access to Judicial Records

The comments also argue that the automatic sealing of discovery material leads to impairment of the public right of access to judicial records. Notwithstanding the case law, which requires any party seeking a protective order for documents filed with the court to overcome the presumption of access, parties commonly insert into stipulated protective orders a provision requiring the filing under seal of any motion or pleading which annexes or makes reference to protected discovery.

We cite for the Judicial Conference the history, and the ultimate reversal in the Sixth Circuit, of the prior restraint on *Business Week*, issued to prevent the publication of documents filed with the court as part of a motion for leave to amend the complaint, but originally produced in the litigation under a broad stipulated protective order.

We urge the Committee to adopt rules forbidding any provision in a protective order that permits the sealing of court records based on the mere stipulation of the parties. Prior to any sealing of materials in court documents, the party seeking confidentiality should be required to satisfy the compelling interest standard of *Press-Enterprise* and non-parties offered an opportunity to intervene.

The Amendment Procedure

The Advisory Committee that suggested the rule changes is to meet in April to review any submitted comments and the testimony elicited at the various hearings held by the Committee around the country on Rule 26(c) and the other rules subject to proposed changes. If it determines that it should proceed with the proposed rule change it will submit the amendment to the Standing Committee on Rules of Practice and Procedure. If the Standing Committee approves the rule change, it will transmit the amendment to the Judicial Conference with a recommendation for approval, accompanied by the Advisory Committee's reports and the Standing Committee's own report on the modifications.

If the Judicial Conference approves -- and it usually considers proposed amendments at its September sessions -- the amendments are sent to the Supreme Court. The Supreme Court has until May 1 of the following year in which to propose any such amendments to Congress. Congress has a statutory period of 7 months within which to act on any rule proposals received from the Court. The Congress must act by enacting legislation rejecting, modifying or deferring the rules or such rules take effect as a matter of law on December 1 of the year in which they were proposed.

BOOK REVIEW

Editor's Note: *Monroe Price, Danciger Professor of Law in the Benjamin N. Cardozo School of Law at Yeshiva University, New York, published a new book this month on global telecommunications and the risk and challenges for governments from the extraordinary and fast-changing technologies. Professor Price, a long-standing friend of LDRC and its activities -- among other things, he assists us in finding excellent law student interns -- wanted us to take a look at his theories.*

I asked Corydon B. Dunham, currently Counsel, Cahill Gordon & Reindel, and formerly Executive Vice President and General Counsel of NBC, who I know has given a great deal of thought not only to global telecommunications issues, but to the problems of government regulation and intervention in telecommunications, to prepare a review. -- Sandra Baron

Television, The Public Sphere, and National Identity
by Monroe E. Price/Oxford University Press, 1995

Review by Corydon B. Dunham

Prof. Price has written an informed and insightful survey of the state of global telecommunications in an effort to "rediscover and redefine justifications for public intervention in the market-place of ideas." He does not identify in detail what practical steps should be taken but warns us: "Much is at stake in the transition from the national to the global - most important, perhaps, the continued capacity of the state to engage in the ancient task of nation-building."

Price is concerned that globalization has "the potential of creating its own public sphere, outside and, potentially, against the domain of the nation state." The result may put democratic principles at risk. Price theorizes that if national control of communications no longer can create and maintain the imagery which determines "national allegiances, loyalty and cohesive attitudes towards place, family, government and state, partly because of the content of the new global mass communication, then without concrete loyalties, the apparatus of public life may be too weakened to support the democratic values of an open society."

Price's book is both an exhaustive review of mass media in the United States, England and Western Europe and the developing television structures in the republics of the former Soviet Union. It examines the possible repressive political dangers as well as the great opportunities of the new communications world.

No review can begin even to touch on the many facets of Prof. Price's impressive work, its fund of information about the emerging foreign communications systems, the problems of restraint and access in the U.S. and the public interest issues surrounding what will be a dominating presence in world experience and sociological challenges. He urges us to rethink the historical view of our own First Amendment, its distrust of government intervention in the delivery of information and its reliance on the market place.

"The most important consequence of the shift in the infrastructure of communications is its impact on the machinery of representative democracy. The balance between open [public] and closed [private and splinter] terrain manifests itself significantly in the meaning of the First Amendment for the political system . . . . Already, the national networks, in the face of competition, and seeing their public function diminish, no longer necessarily carry political conventions, or presidential addresses. . . ."

Price fears, as do others, that the growing use of common space in the media for essentially mercantile purposes and the establishment of "splinter channels" for those of "intense affinities," could undermine a democratic society. He says "The open terrain of dialogue has, traditionally, required some notion of common ground, some point of joint aspiration. As these ideas of common ground diminish, fractious, first competitive and then destructive national identities emerge."

He warns, correctly I think, that governments will intervene and the new technologies will not be immune from attempts at government censorship. Nor will computers or Internet access make censorship difficult or impossible, as some think. Laws can reach media use, whatever the technology. As Price says, censorship will not be "rendered obsolete by the technologies of abundance (since) the architecture of electronic delivery of information permits innovation and efficiency in policing the sending and receiving of messages." He goes on to warn that the more concentrated the press, the easier it is for the government to affect their behavior. And while a highly decentralized press can be a mark of a free society, "if the thousands have to pass through the eye of a single needle, the effect may be similar."

Nonetheless, Prof. Price comes down on the side of greater state participation and would not leave it to the people to find their own way on their own in the new telecommunications world. He suggests public television receive greater support to withstand the competition of pay services and their popular programming. He wants campaign time for political candidates. Beyond that, he concludes the government should see there is more civic use made of the communications media. "It should not be a violation of constitutional or human-rights principles for a government to establish an infrastructure that advances democratic processes and helps achieve an idealized public sphere." This final leap to a benign government as a solution for the future of the media's content seems somehow misplaced.

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BOOK REVIEW

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Certainly, nothing Prof. Price writes suggests the government has been successful in creating free expression in the past. Nor does he detail what these new infrastructures might be or how they would work. He also does not resolve the perennial problem that a government agency with the power to affect communication content may hold views which are offensive or even destructive of the common weal, and might not provide the contribution society seeks or needs. In addition, as he warns, in the new environment, "governments, never loathe to censor, will be surprisingly resilient. And those passionate enough to press for general conformity to their views will employ the machinery of the state to aid them in their crusade."

Prof. Price's analysis of the present state of the media is both fascinating and thoughtful. It is worth reading and the book's range and depth challenges and provokes. It deals with visions of the future of communications on a global scale and represents a major contribution to the important debate the Professor urges to have.

Corydon B. Dunham was formerly Executive Vice President and General Counsel of NBC and is now Counsel, Cahill, Gordon & Reindel. He is currently working on a book about the defiance of Congress and the Nixon Administration in 1971 by Dr. Frank Stanton, President of CBS, to defend the independence of television news from U.S. government oversight and interference.

Eighth Circuit Panel Holds Punitive Damages Award Unconstitutional In Opinion by Retired Justice Byron White

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harm suffered or likely to be suffered. In *Pulla*, not only was there a shocking disparity between punitive and actual damages but the defendant's behavior was not so offensive or dangerous as to justify such a divergence.

The *Pulla* suit was brought by an employee against Amoco for age discrimination under the Age Discrimination in Employment Act ("ADEA") and state law claims for breach of contract and invasion of privacy. Pulla, who was 48 years old and a supervisor in Amoco's new accounts department, brought the suit after he was asked to consider early retirement, transferred to another department, and demoted. After learning that a co-worker had checked his personal credit card records, Pulla amended the complaint to include an invasion of privacy claim. *Id.* at *1.

The search of his credit card records resulted from the resentment of a co-worker, who frequently had to cover for Pulla when he called in sick. The co-worker examined Pulla's personal credit card records to determine whether Pulla, who had missed nearly two months of work during the course of the year, had been abusing the company's sick leave policy. When she reported to a supervisor that Pulla had used his credit card at various restaurants and bars on days that he had called in sick, the supervisor admonished her and warned her not to repeat her actions but did not otherwise discipline her. *Id.* at *2.

The supervisor then instructed another Amoco employee to print out Pulla's records, which he gave to the personnel departmen. The records (with the days Pulla had called in sick underlined in red) were placed into Pulla's personnel file. In a subsequent evaluation of Pulla, the supervisor referred to the absence problem and instructed Pulla that in the future he would be required to obtain a doctor's note before submitting claims for sick leave. *Id.*

The district court granted summary judgment to Amoco on the contract claim but submitted both the ADEA and invasion of privacy claims to the jury, which found for Amoco on the ADEA claim but awarded Pulla $2 in actual damages and $500,000 in punitive damages on the privacy claim. After the district court denied Amoco's post-trial motions for judgment as a matter of law, a new trial, or a remittitur, Amoco filed an appeal. *Id.* at *2-*3.

The Eighth Circuit affirmed the trial court's ruling that Amoco had failed to preserve its argument that it was entitled to judgment as a matter of law by failing to reassert it at the close of evidence. *Id.* at *5. The appellate court also held that the district court had not abused its discretion in finding that there was sufficient evidence to support the jury verdict and in thus refusing to order a new trial, with the exception that it had erred in failing to recognize that the punitive damages award violated the Due Process Clause of the Fourteenth Amendment. *Id.* at *6.

Constitutional Review of Punitive Damages Award

While conceding that the analytical framework for reviewing punitive damages awards "is not always easy to clearly discern," Justice White observed that "the Supreme Court has twice stated that punitive damages awards must comply with the Due Process Clause's "'general concern for reasonableness.'" *Id.* at 8 (*citing Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 18 (1991) *and TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S.Ct 2711, 2720 (1993)).

In turn, the reasonableness of a punitive damages award may be determined by consideration of four factors that Justice White distilled from the Supreme Court's most recent pronouncement regarding potential constitutional restraints of punitive

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Eighth Circuit Panel Holds Punitive Damages Award Unconstitutional In Opinion by Retired Justice Byron White

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damages: "(1) the harm inflicted on the plaintiff; (2) the reprehensibility of the defendant's conduct; (3) the likely potential harm to others arising from the complained of conduct; and (4) the wealth of the defendant." *Id.* (*citing TXO*, 113 S.Ct. at 2721-23 (1993)). *Id.*

In measuring the harm resulting from the defendant's behavior, the Supreme Court had, in *Haslip*, indicated that courts were to consider not only the harm that had actually occurred but the harm likely to result. In *TXO*, the plurality had explained that potential harm includes not only the damage actually incurred but the potential injury to plaintiff had defendant's scheme succeeded, as well as the potential harm to future victims if such behavior were not deterred. To illustrate the nature of the "harm likely to result" inquiry, in *TXO* the Court had provided the example of a man who fires wildly with a gun into a crowd but only breaks a person's glasses. *Id.* at *9.

Summarizing the Supreme Court's standards, Justice White wrote that "the touchstone is the potential harm that would have likely resulted from the dangerousness inherent in defendant's actual conduct." Thus, a court "may not justify the award of punitive damages in a particular case by overlooking the actual events and focusing on potential victims of similar hypothetical torts." *Id.*

In *Pulla*, the trial court had departed from *TXO* by failing to consider whether the potential harm was likely to occur. Rather the court had based its holding on speculative damage without any foundation in the evidence that had been presented, imagining that "'[w]ere Amoco or others similarly situated to be undeterred from intruding on the privacy of employees' credit cards to check up on their use of sick leave or for any other purpose, the aggregate invasion of privacy into sensitive matters would be enormous indeed.'" *Id.* at *9 (*citing* district court opinion).

Yet Pulla had offered no evidence to suggest that Amoco's examination of his credit card records was anything but "an isolated and rare" instance that was unlikely to affect other parties. By contrast, in *TXO* there was ample evidence, including previous lawsuits resulting from similar acts by the defendant, that parties other than the plaintiff were at risk if the defendant was not deterred. Moreover, in sharp contrast to the defendant's pattern of egregious behavior in *TXO*, which involved "a deliberate plan of trickery and deception," the instant case had resulted from "the resentment of a single employee and the perhaps understandable reaction of the supervisor that he should pass on the fact of Pulla's abuse of his sick leave to Amoco's personnel department." *Id.* at *10.

Finally, Justice White concluded that the trial court had paid insufficient attention to the fact that the plaintiff had suffered only limited actual harm from the defendant's actions. Pointing to Pulla's failure to present evidence that other parties were at risk, the panel concluded that Amoco's single intrusion into Pulla's records was "a one-time occurrence justifying a limited award of punitive damages." *Id.*

While acknowledging that "the Constitution does not impose any precise formula or ratio between punitive and actual damages," Justice White emphasized that "the amount of punitive damages must bear 'some proportion' and a 'reasonable relationship' to the harm that actually occurred." *Id.* Given the limited offensiveness and the small likelihood of any serious harm resulting from Amoco's actions, the panel concluded that the 250,000:1 ratio between punitive and actual damages was constitutionally excessive. *Id.*

Placing *Pulla* in Perspective

In recent years, the Supreme Court has flirted with the possibility that a "shocking disparity" between the size of the punitive and actual damages awarded in a case might violate substantive due process. Despite its suggestion in *Haslip* that a punitive damages award of four times the compensatory damages "may be close to the line," in *TXO* the Court affirmed a punitive award that was 526 times the size of the actual damages.

The Court explained that the "shocking disparity between the punitive award and the compensatory award . . . dissipates when one considers the potential loss to respondents." Yet as Justice Scalia noted in his concurrence, even basing the constitutional equation on "potential" harm and "calculating that potential harm very generously," the ratio of punitive damages to potential actual damages in *TXO* was 10:1.

As perhaps the first decision to strike down a punitive damages award as constitutionally excessive, *Pulla* is to be applauded. Given that the ratio of punitive to actual damages was nearly 500 times greater than the 526:1 upheld in *TXO*, and there was no evidence of additional harm to either the plaintiff or others similarly situated beyond that resulting from the single search of the credit card records, it seems likely that the Eighth Circuit's decision will not be overturned, if indeed it is even reviewed by the Supreme Court.

Minnesota Supreme Court Requires Harm to Reputation Before Defamation Plaintiffs Can Recover for Emotional Distress

Analysis of *Richie v. Paramount Pictures Corp.*

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they were "shocked" and "crushed" by the telecast, and that they continually wondered if people were staring at them because they had seen the Show.

The Supreme Court summarized its own decision in these words: "We have determined that it would violate the First Amendment to allow Gerten and Richie to recover based on presumed damage to their reputations. We have also held that respondents' defamation claim cannot succeed based only on humiliation or other types of emotional harm. Thus, respondents must be able to show actual harm to their reputations. Because the trial court was not clearly erroneous in finding that neither Gerten nor Richie suffered actual harm to their reputations, we hold that neither Gerten nor Richie's defamation action can succeed."

In other significant parts of the *Richie* decision, the Supreme Court:

* Held that plaintiffs had not presented evidence of actual harm to reputation, despite testimony that their friends and family members had inquired about the telecast and that, a year after the telecast, a normally friendly employee at a fast-food restaurant served Richie three raw hamburgers.

* In direct reversal of the Court of Appeals, held that the requirement of demonstrating actual injury to reputation applied at the summary judgment stage, and not just at trial.

* In its first direct ruling on the question since *Hendry v. Conner*, 226 N.W.2d 921 (Minn. 1975), confirmed Minnesota's rejection of any cause of action for invasion of privacy.

* Held that the same defamation rules apply to individuals who communicate through the news media as apply to the news media themselves.

* Held that discussions of the sexual abuse of children by their parents and legal recourse available to the abused child are "certainly of public concern."

National background and Perspective

Richie illustrates the continuing ripple effects upon state defamation law created by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and by its superimposition of federal constitutional principles on state law.

At common law, plaintiffs in cases of slander per se or libel benefitted from a legal rule that the words used were so likely to cause harm that plaintiffs did not have to present any evidence at all of actual injury, although they could increase their odds of a substantial recovery if they did offer proof. Emotional distress damages -- such as wounded feelings, mental anguish, embarrassment, humiliation, and resulting physical pain and illness -- could be recovered in addition to harm to reputation. Damages for both harm to reputation and emotional distress in these cases were "presumed" from the fact of publication and the nature of the words used.

In slander cases that did not fall into one of the "slander per se" categories (accusations of a crime, statements impugning someone in their business or trade, accusations of loathsome disease, or imputing sexual unchastity to a woman), special damages had to be pleaded and proven before the action could proceed. The point was to prevent courts from being overwhelmed, and speech from being silenced, by lawsuits whenever a communication wounded the feelings of its subject.

For example, in *Terwilliger v. Wands*, 17 N.Y. 54 (1858), a farmer was wrongfully accused of repeatedly engaging in illicit sexual intercourse with a married woman. He fell into deep melancholy, but the courts refused to allow him to pursue a slander claim based solely upon his mental distress and resulting physical suffering. New York's highest court held: "It is injuries affecting the reputation only which are the subject of the action. * * * Where there is no proof that the character has suffered from the words, if sickness results it must be attributed to apprehension of loss of character, and such fear of harm to character, with resulting sickness and bodily prostration, cannot be such special damage as the law requires for the action."

In 1974, the United States Supreme Court exploded the whole field of presumed damages in defamation cases, holding in *Gertz* as a matter of First Amendment law that unless they proved intentional falsehood or reckless disregard for truth or falsity (that is, "actual malice" in the constitutional sense first used in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)), defamation plaintiffs in cases involving matters of public concern could recover only "actual damages" supported by adequate evidence of actual harm, and could not rely upon the common-law doctrine of presumed damages. The court did not define actual damages, but did list customary types of harm compensable in defamation actions, including out-of-pocket losses, impairment of reputation, and mental anguish.

Two years later, in a case arising in Florida, the court allowed recovery in a defamation action based solely on mental anguish. The plaintiff in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), had abandoned all claims for damage based on injury to reputation, but received $100,000 for her mental distress from the magazine's misdescription of the grounds for her divorce. *Firestone* thus made clear that there was no constitutional bar to recovery for a defamation claim based solely on emotional damages.

Firestone's result came in for considerable criticism by legal commentators, who pointed out that the traditional purpose of defamation law was to provide a remedy for injury to

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Minnesota Supreme Court Requires Harm to Reputation Before Defamation Plaintiffs Can Recover for Emotional Distress

Analysis of *Richie v. Paramount Pictures Corp.*

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reputation, and not to salve tender feelings. *See, e.g.*, Anderson, *Reputation, Compensation, and Proof*, 25 Wm. & Mary L. Rev. 747, 749 (1984); Ashdown, *Of Public Figures and Public Interest -- the Libel Law Conundrum*, 25 Wm. & Mary L. Rev. 937, 948 (1984); Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349, 1438-1439 (1975); Keeton, *Prosser and Keeton on The Law of Torts* 844-845 (5th ed. 1984); R. Smolla, *The Law of Defamation*, § 9.06[4][b] (Release #6, 1/93). But that was now an issue for each state to determine under its own law.

States reacted differently. Some declined to limit defamation plaintiffs to any particular type of damage, and allowed recoveries based solely on emotional distress. *E.g., Keohane v. Stewart*, 882 P.2d 1293, 1304 n.16 (Colo. 1994); *Miami Herald Publishing Co. v. Ane*, 458 So.2d 239 (Fla. 1984); *Hearst Corp. v. Hughes*, 297 Md. 112, 466 A.2d 486 (1983).

Other jurisdictions required defamation plaintiffs to prove reputational harm before they could recover emotional distress damages. *E.g., Garziano v. E.I. DuPont De Nemours & Co.*, 818 F.2d 380, 395 (5th Cir. 1987) (applying Mississippi law); *Little Rock Newspapers, Inc. v. Dodrill*, 660 S.W.2d 933, 936-937 (Ark. 1983); *Cua v. Ramos*, 418 N.E.2d 1163, 1167 (Ind. App. 1981), *aff'd.*, 433 N.E.2d 745, 749 (Ind. 1982); *Gobin v. Globe Publishing Co.*, 649 P.2d 1239, 1243 (Kan. 1982).

New York courts were among the first to take this approach of requiring proof of harm to reputation, *France v. St. Clare's Hospital and Health Ctr.*, 82 A.D.2d 1, 441 N.Y.S.2d 79 (N.Y. App. Div. 1981); *Salomone v. McMillan Publishers, Inc.*, 77 A.D.2d 501, 429 N.Y.S.2d 441 (N.Y. App. Div. 1980), although two later cases raised some uncertainty, *see Matherson v. Marchello*, 100 A.D.2d 233, 473 N.Y.S.2d 998 (N.Y. App. Div. 1984); *Hogan v. Herald Co.*, 84 A.D.2d 470, 446 N.Y.S.2d 836 (N.Y. App. Div.), *aff'd.*, 444 N.E.2d 1002 (N.Y. 1982). *But see Dalbec v. Gentlemen's Companion, Inc.*, 828 F.2d 921, 926-927 (2d Cir. 1987) ("New York does not permit compensatory damages to be recovered absent proof of injury to reputation or malice.").

Arguably internally conflicting decisions also could be found in Texas. *See Finklea v. Jacksonville Daily Progress*, 742 S.W.2d 512, 516-517 (Tex. App. 1987, writ dism'd w.o.j.), *distinguishing Outlet Co. v. International Security Group, Inc.*, 693 S.W.2d 621 (Tex. App. 1985, writ ref. n.r.e.). *See generally*, Anno., *Proof of Injury to Reputation as Prerequisite to Recovery of Damages in Defamation Actions -- Post-*Gertz *Cases*, 36 ALR 4th 807 (1985).

In 1987, Minnesota appeared to take a permissive approach, allowing presumed general damages (including mental distress, with no proof of actual harm to reputation) based on a defamation per se claim. *Becker v. Alloy Hardfacing & Engineering Co.*, 401 N.W.2d 655, 661 (Minn. 1987). That case, however, involved a private plaintiff suing a private defendant on a matter that was not of public concern; it was a dispute between an individual and his former employer. This type of defamation is not subject to First Amendment limitations. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985). Thus, the impact of *Gertz* was yet to be felt.

The History of *Richie*

The November 5, 1992, telecast of the Maury Povich Show, a nationally syndicated talk show, contained an interview with Denise Richie. Ms. Richie described her trauma from years of sexual abuse by her father, while her mother did nothing to stop the abuse. Not only had her father been criminally convicted for the abuse, but Ms. Richie had obtained a civil trial judgment against both of her parents.

As part of the background to be presented during the interview, the Show asked for a picture of Denise's parents. Kathy Tatone, who represented Denise in her civil suit and acted as her representative in dealing with the Show, provided a photograph of Denise standing between a man and a woman. Ms. Tatone identified the persons in the photograph as Denise's parents. Based upon this assurance from an apparently knowledgeable and reliable source, the Show's producers used the picture at several points during the interview (Povich himself was not aware of the photograph being used). The names of Denise's parents -- Dennis and Lanell -- were mentioned more than once during the Show. Unfortunately, the photograph used on the Show actually depicted Denise with her godparents, who were her paternal uncle, James Richie, and her maternal aunt, Karen Gerten -- a fact not made known to the Show until after the program had been broadcast. The mistake surprised everyone.

Neither Karen Gerten nor James Richie saw their pictures used during the original telecast, but each learned of the Show from family or friends and eventually watched a videotape of the interview. Each received a few inquiries or comments from family and friends registering either curiosity or sympathy about their inclusion in the Show.

In May 1993, Mr. Richie and Ms. Gerten brought claims for defamation and for false light invasion of privacy against attorney Tatone, Paramount Pictures (which produced the Show), MoPo Productions (which supplied the services of host Maury Povich), and Hubbard Broadcasting (which owned and operated the Minnesota station that broadcast the

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Show locally, and was dismissed by stipulation early in the case). Each plaintiff testified to personal distress from the situation. Ms. Gerten was embarrassed, got "butterflies" in her stomach, and became "cautious about going places and doing things." She "may have looked tired," but displayed no other outward signs of her distress. She did not seek counselling or treatment for her distress. James Richie said he felt "sick" when he watched the videotape. He testified that he was shocked, stunned and humiliated, and that he has "a certain amount of paranoia" about how others treat him, and has occasional difficulty sleeping and occasional upset stomach. He did not seek any professional therapy.

More than a year after the telecast, neither plaintiff could identify a single person, at work or in their community, who saw the Show, recognized plaintiffs, and believed that James Richie or Karen Gerten had abused Denise Richie or had approved of that abuse. Plaintiffs incurred no special damages as a result of the broadcast in question and suffered no injury to reputation. Both admitted that they cannot point to "any specific evidence that [my] reputation has been affected by the broadcast of the picture on the show."

All defendants moved for summary judgment at the close of discovery in 1994, arguing privilege, lack of fault, and plaintiffs' lack of reputational injury. Minnesota District Court Judge Robert G. Schiefelbein granted defendants' motions for summary judgment on the grounds that defamation plaintiffs in Minnesota cannot recover damages based only on evidence of emotional distress, in rulings on July 12 and November 17, 1994. Plaintiffs appealed.

On May 30, 1995, the Minnesota Court of Appeals reversed the summary judgment. The Court of Appeals agreed with the district court and with defendants that the "primary purpose of defamation actions is to impose liability on a defendant for injuries to reputation" and that "[d]amages for emotional distress can be recovered, but only when the plaintiff has established a valid claim for defamation." *Richie v. Paramount Pictures Corp.*, 532 N.W.2d 235, 240 (Minn. Ct. App. 1995). However, it reversed the summary judgment on the grounds that the seriousness of the statements allowed "[a]t least 'some' actual injury to ... reputation[] [to] be assumed" -- "at least for purposes of withstanding a motion for summary judgment." (The judgment dismissing the false light invasion of privacy claim remained undisturbed on appeal, due to plaintiffs' failure to pursue the issue.)

In dissent, Judge Davies warned that by permitting plaintiffs to survive summary judgment without producing evidence of harm to their reputations, the majority was inadvisably relying on the assumptions of the doctrine of defamation per se to open the door to emotional distress damages; he wrote that, particularly in a case such as this, where the Show correctly identified the actual offenders by name, plaintiffs should have been required to produce evidence that *someone* actually mistakenly understood them to have been Denise Richie's parents.

All defendants petitioned for review of the decision of the Court of Appeals, specifying the issues on which the Court of Appeals had reversed the grant of summary judgment. Plaintiffs opposed the petition for review, but did not file a conditional petition for review on that part of the decision holding that plaintiffs at trial must show that their reputations have suffered, and that, if they do not, they should not recover damages under their claims for defamation. The Minnesota Supreme Court granted the defendants' petitions for review on July 20, 1995, heard oral arguments on December 5, 1995, and issued its decision reinstating the summary judgments on February 23, 1996.

The court acknowledged that it had never squarely addressed the issue of whether Minnesota allowed defamation claims based exclusively on mental anguish and humiliation, distinguishing its earlier decision in *Becker* because that case had not involved the First Amendment limitations of *Gertz*. It opted to impose the reputational-injury requirement for three reasons.

First, it pointed out Minnesota's historical acknowledgement of the purpose of defamation actions as compensating private individuals for wrongful injury to reputation. Similar historical statements of purpose can be found in decisions of many other state courts. *E.g.*, *Greenlee v. Coffman*, 171 N.W. 580, 581 (Ia. 1919).

Second, the Minnesota Supreme Court noted that it has "exercised 'historical caution regarding emotional distress claims'" and saw nothing inherent in defamation claims that should inhibit that caution.

Third, it noted that while defamation claims focus upon injury to reputation, invasion of privacy torts compensate for mental distress. It reasoned that allowing emotional harm to form the basis for liability in a defamation action "would be the practical equivalent of allowing a plaintiff to bring an invasion of privacy claim." That, in turn, would have been inconsistent with the Minnesota Supreme Court's longstanding rejection of invasion of privacy claims. (Even in states that recognize invasion of privacy claims, media counsel could argue for the same result of requiring reputational injury in defamation actions, in order to preserve the distinction between the two legal theories.)

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Sixth Circuit Reverses Business Week Prior Restraint

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FACTUAL BACKGROUND

The facts underlying the Business Week case are briefly as follows:[1]

In October 1994, Proctor & Gamble filed a complaint against Bankers Trust claiming a loss of over $100 million due to alleged fraud by Bankers Trust in the sale of corporate derivatives to P&G. The parties subsequently entered into a "so ordered" stipulation that allowed them to unilaterally designate discovery documents as "confidential" without any particularized showing of good cause. The stipulated protective order further permitted the parties to file under seal -- without prior judicial approval -- any motion or pleading that incorporated or referred to confidential discovery materials.

In early September 1995, P&G filed a motion for leave to amend its complaint to add RICO claims against Bankers Trust. The supporting memorandum of law, as well as a proposed amended complaint and a RICO case statement -- all of which referred to discovery documents that the parties had marked confidential -- were filed by P&G under seal, pursuant to the terms of the protective order.

Based on a tip from a spokesman for P&G, Business Week's Cleveland Bureau Chief (Zack Schiller) attempted, unsuccessfully, to secure the motion papers from the court house. Unaware of any sealing, Schiller asked a Business Week colleague in New York City, Linda Himmelstein, to see if she could obtain a copy of the papers from one of her sources.

Himmelstein then contacted a confidential source who was a partner at a New York law firm representing Bankers Trust. Unaware of the sealing, Himmelstein simply asked for a courtesy copy of the motion papers and the partner (who was also unaware of the sealing) provided them to her. Far from containing any trade secrets, the "confidential" discovery materials referred to in the motion papers were in large part embarrassing tape recordings in which Bankers Trust brokers boasted of having duped clients.

After obtaining the motion papers, Ms. Himmelstein learned for the first time that the papers had been filed under seal. Business Week subsequently prepared an article based on the motion papers and called Bankers Trust for comment on September 13, 1995.

Within hours, lawyers for Bankers Trust and P&G, without even attempting to contact Business Week, made an *ex parte* application to Judge John Feikens for an order restraining publication of the planned Business Week article. Shortly before six o'clock on September 13, again without notice or a hearing, Judge Feikens faxed an order to The McGraw Hill Companies, Inc. (the publisher of Business Week) prohibiting it from publishing the sealed records without prior consent of the court. Although the order stated that the parties would "suffer irreparable harm" if the sealed documents were disclosed, it did not set forth any findings of fact or reasons for this conclusion or set a hearing date or explain the need for an *ex parte* proceeding -- in short, it had none of the requirements and none of the earmarks of a TRO. Facing a nine o'clock publishing deadline and unable to either reach Judge Feikens or to secure an emergency stay from a Sixth Circuit judge, Business Week obeyed the order and pulled the story from publication.[2]

On September 21, Judge Feikens commenced what would be a two day hearing (spread out over a two week period) to determine whether the restraint should be converted to a permanent injunction.[3] At the hearing, neither of the parties presented any evidence of any injury that would result from publication of the sealed materials (let alone the type of grave injury to national interests necessary to support a prior restraint). Instead, the hearing focused exclusively on how the documents had been obtained by Business Week (despite Business Week's repeated objection that, under well-established law, the method by which information is acquired is not legally relevant to the issuance of a prior restraint).

On October 3, three week after its initial TRO, the district court entered two contradictory orders. In one order, Judge Feikens concluded that *Business Week* had "knowingly violated the protective order" in obtaining the sealed documents and was therefore permanently enjoined from publishing the documents in its possession. In the other order, the court ruled that there was no "substantial government interest" in keeping the motion papers confidential and that, accordingly, the seal should be lifted and the documents made available for public access.

Business Week immediately published a story based on the now unsealed documents, and appealed the permanent injunction decision, obtaining an expedited briefing schedule. Amici briefs were also filed on behalf of numerous media organizations and the ACLU.

THE COURT OF APPEALS DECISION

Although Judge Feikens' unsealing order enabled Business Week (and other media) to finally publish the content of the motion papers, the Sixth Circuit, by a vote of 2 to 1, held that Business Week's appeal from the TROs and the permanent injunction was not moot. More specifically, Judge Merritt, joined by Judge Boyce Martin, held that the short-lived TROs were "capable of repetition yet evading review", a well-recognized exception to the mootness doctrine. In addition, the majority held that because the permanent injunction was technically still in effect, it too survived a mootness challenge. Judge Bailey Brown dissented solely on the question of mootness, arguing that the availability of mandamus made the

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orders not "evading review." However, Judge Brown noted that he had "no quarrel with the majority's analysis of the law generally prohibiting prior restraints." (Slip Op. at 18)

A. The Permanent Injunction

Turning to the merits of the permanent injunction, Judge Merritt stated in his opinion that "at no time . . . did the District Court appear to realize that it was engaging in a practice that, in all but the most exceptional circumstances, violates the constitution: preventing a news organization from publishing information in its possession on a matter of public concern." (Slip. Op. at 10). As recognized by the Chief Judge, prior restraints are wholly impermissible except in that "'single narrow class of cases'" where publication would pose "a grave threat to a critical government interest" (such as troop movements in time of war) or to a constitutional right "more fundamental than the First Amendment itself." (Id. at 10, 9, 13) (quoting, in part, *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971)(Brennan, J. Concurring)).

Since the sealed documents in the Bankers Trust case were nothing more than "standard litigation filings" in a private commercial dispute, the Sixth Circuit determined that Judge Feikens had committed palpable error in enjoining publication. As stated by Judge Merritt:

"The private litigants' interest in protecting their vanity or their commercial self interest simply does not qualify as grounds for imposing a prior restraint. It is not even grounds for keeping the information under seal, as the District Court ultimately and correctly decided. . . . The permanent injunction, therefore, was patently invalid and should never have been entered."

(Slip Op. at 10).

Finally, in perhaps the most significant aspect of its permanent injunction decision, the Sixth Circuit held that the question of how Business Week obtained the sealed motion papers was legally irrelevant and could not support the entry of a prior restraint. In this regard, the Court chastised Judge Feikens for:

"holding hearings on issues that have no relation to the right of Business Week to disseminate the information in its possession. Weeks passed with the 'gag order' in effect, while the [District] Court inquired painstakingly into how Business Week obtained the documents and whether or not its personnel had been aware that they were sealed. While these might be appropriate lines of inquiry for a contempt proceeding or a criminal prosecution, they are not appropriate bases for issuing a prior restraint."

(Slip Op. at 9). This aspect of the Sixth Circuit decision will undoubtedly prove important the next time a party seeks to enjoin publication based on an allegation that the media has improperly obtained information.

Having held that the manner in which Business Week obtained the sealed motion papers was legally irrelevant, the Sixth Circuit was not required to determine whether Ms. Himmelstein knew of the sealing and, if so, whether this would constitute "unlawful" violation of a protective order to which Business Week was not even a party. Nonetheless, applying a de novo standard of review, Judge Merritt made factual findings entirely consistent with Ms. Himmelstein's testimony, noting that neither she nor her source "appeared to know that the motion was under seal. The journalist simply asked for the documents, and the partner obtained copies and gave them to her." (Slip Op. at 5).

B. The Temporary Restraining Orders

Having held that the lower court's permanent injunction was a constitutionally offensive prior restraint, Judge Merritt ruled that the two temporary restraining orders were improper "[f]or the same reason." (Slip Op. at 10). In addition, the Court pointed out procedural defects in the TROs that also rose to the level of constitutional violations. In so doing, Judge Merritt articulated stringent procedural criteria that will hopefully be followed by lower courts faced in the future with applications for TROs upon dissemination of speech.

First, Judge Merritt raised the important question of whether a district court, presented with an emergency petition to enjoin publication, "may grant a TRO simply in order to give the problem due consideration." (Slip Op. at 11) Following the lead of the First Circuit in *In re Providence Journal, Co.*, 820 F.2d 1342, modified on reh'g, 820 F.2d 1354 (1st Cir. 1986), Judge Merritt held that, while such an approach may be appropriate in an ordinary TRO proceeding under Rule 65, it is "not allowed", "absent the most compelling circumstances, when that approach results in a prior restrain on pure speech." (Id.) (quoting *Providence Journal*, 820 F.2d at 1351). As explained by Judge Merritt:

"the purpose of a TRO under Rule 65 is to preserve the status quo so that a reasoned resolution of a dispute may be had. Where the freedom of the press is concerned, however, the status quo is to 'publish news promptly that editors decide to publish. A restraining order disturbs the status quo and impinges on the exercise of editorial discretion.' . . . Rather than having no effect, "a prior restraint, by . . . definition, has an immediate and irreversible sanction."

(Slip Op. at 12)(citations omitted).

Second, while Rule 65 permits TROs to be granted *ex parte* under certain circumstances, Judge Merritt reiterated the firm rule that "there is no place for such [*ex parte*] orders in the First Amendment realm 'where no

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showing is made that it is impossible to serve or to notify opposing parties and give them an opportunity to participate.'" (Slip. Op. at 12)(quoting, in part, *Carroll v. President & Comm'r of Princess Anne*, 393 U.S. 175, 180 (1968)). Since neither the parties nor the district court attempted to contact Business Week before the initial TRO was entered, the Sixth Circuit found this to be another reason for holding the TRO constitutionally offensive.

Third, Judge Merritt noted that while a TRO may be issued in an ordinary civil dispute upon a showing of likelihood of success on the merits and threat of irreparable injury, the "hurdle is substantially higher" in a prior restraint case -- requiring a threat to "an interest more fundamental than the First Amendment itself." (Slip Op. at 13).

Finally, in his concurring opinion, Judge Martin pointed out that the district court had "absolutely no jurisdiction over Business Week" at the time it faxed its TRO and that this lack of jurisdiction "essentially subjected Business Week to the modern day equivalent of a star chamber." (Slip Op. at 15).

C. The Protective Order

In vacating the prior restraints, the Sixth Circuit also harshly criticized the stipulated protective order that had permitted the parties to unilaterally designate documents as confidential and to file motions under seal without any court approval or oversight. As explained by Chief Judge Merritt:

"The District Court cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public. It certainly should not turn this function over to the parties, as it did here. . . . The protective order in this case allows the parties to control public access to court papers, and it should be vacated or substantially changed."

(Slip Op. at 14)

This finding is particularly timely given the proposed amendment to Fed. R. Civ. P. 26(c), presently before the Judicial Conference, that would allow parties to merely stipulate to protective orders without any judicial finding of "good cause" (as is currently required).[4] The facts of the Business Week case, in which the parties simply decided for themselves what court filings would and would not be public, highlights the potential danger posed by the proposed amendment.

CONCLUSION

The ultimate importance of the Sixth Circuit decision in Business Week is its strong reaffirmation of the "first principles" that prohibit prior restraints in all but the most exceptional circumstances.

1 For a more extensive discussion of the factual and procedural history of the Business Week case, see LDRC Libel Letter, September 1995 at 1 and LDRC Libel Letter, October 1995 at 1.

2 The very next day, on September 14, 1995, Business Week filed a notice of appeal and motion for a stay pending appeal with a motions panel of the Sixth Circuit. The byzantine procedural history of that ultimately unsuccessful motion is recounted in the LDRC Libel Letter, October 1995 at 15.

3 On September 22, ten days after his issuance of the original restraining order, Judge Feikens entered another TRO extending the restraint for another 10 day period.

4 LDRC, along with the Associated Press, Dow Jones & Company, Inc., Magazine Publishers of America, National Association of Broadcasters, Newspapers Association of America, Radio-Television News Directors Association and the Society of Professional Journalists submitted comments on March 1, 1996, to the Judicial Conference urging that the requirement of good cause be retained.

The authors along with Victor A. Kovner and Edward J. Klaris of the firm of Lankenau Kovner & Kurtz represented Business Week. Frost & Jacobs acted as local counsel and Kenneth Vittor participated as General Counsel to The McGraw-Hill Companies, Inc.