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LDRC Libel Defense Resource Center

LIBELLETTER

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LDRC FORUM ON ENGLISH LIBEL AND PRIVACY LAW

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Oprah Wins Beef Disparagement Trial

By Charles L. Babcock

Last month a twelve-person jury (8 women/4 men) in Amarillo, Texas returned a unanimous defense verdict in three consolidated cases styled *Texas Beef Group, et al. v. Oprah Winfrey, et al.* The lawsuit and the verdict attracted widespread attention because the plaintiffs' case against the Oprah Winfrey Show was brought under the recently enacted Texas False Disparagement of Perishable Food Act – the so-called veggie libel law. Additional claims were made for common law business disparagement, defamation and negligence. The case became a referendum on the First Amendment and, to a lessor extent, Oprah Winfrey herself.

The federal court jury victory in the heart of cattle country was, as the *New York Times* described it, "smashing" but left some followers of the case disappointed because the trial judge did not decide the constitutionality of the Texas statute. Ironically, the court side-stepped the constitutional issue holding that live cattle are not perishable food products despite one plaintiff's amusing testimony that cows are just like peaches.

What follows are some of the strategic issues that arose during the course of the litigation that lasted a year and eight months (so far). The case took six weeks to try.

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The Broadcast

The suit arose from an April 16, 1996 Oprah Winfrey Show entitled "Dangerous Food" ("The Program"). The first segment of The Program dealt with Mad Cow Disease, described the March 20th announcement of the British Health Minister that the disease had "most likely" crossed the species barrier from cows to humans and asked the question "Could It Happen Here?"

Oprah's staff assembled three knowledgeable people to discuss that issue - Dr. Will Hueston of the United States Department of Agriculture, Dr. Gary Weber of the National Cattlemen's Beef Association and Howard Lyman of The Humane Society. Lyman, who was also a defendant in the suit, is a former cattle rancher turned vegetarian.

Lyman opened the debate by agreeing, "absolutely," that a Mad Cow scare in the United States could make AIDS look like the common cold. He went on to describe a feeding practice in the U.S. where "rendered" cattle is turned into cattle feed.

Upon hearing that cows were being fed to other cows Oprah exclaimed that, "It has just stopped me cold from eating another burger. I'm stopped." Cattle futures on the Chicago Mercantile Exchange went down the limit the day of the broadcast. Some members of the media described this as the "Oprah Crash."

During the editing process approximately 75% (by time) of Weber and Hueston's comments were omitted. The Program did not mention the plaintiffs, their specific cattle or Texas.

Preliminary Motions

Initially there were two law suits brought against Oprah, HARPO Productions, Inc. which produces the Oprah Winfrey Show, King World Productions, Inc. which distributes the show and Lyman. One case was brought in federal court in Amarillo, Texas while the other was brought in state court in Potter County which includes Amarillo. Defendants decided to remove the state court case to federal court as there was diversity of citizenship. This decision was not clear-cut as there is a right of interlocutory appeal from denial of summary judgment in state court and the jury pool in state court would have been comparatively urban as opposed to the eighteen county Amarillo federal division which is predominately rural. Some argued that limiting the jury pool to one relatively urban county favored the defendants.

Once removed, the defendants moved to dismiss both cases on grounds of personal jurisdiction, improper venue and failure to state a claim. The part of the motion that attacked the claims challenged the constitutionality of the statute emphasizing that the failure to require that the Program be "of and concerning" the plaintiffs or their specific property was fatal to the case. United State District Judge Mary Lou Robinson gave notice to the Texas Attorney General that the constitutionality of the statute had been questioned but the Attorney General declined to participate in the case. The defendants also argued that under Texas choice of law rules Illinois law should apply to this action and, since Illinois does not have a comparable perishable food act, the plaintiffs' claim in that regard should be dismissed.

The court denied the motions to dismiss without explanation. Answers were filed, thus joining issue, in the late fall of 1996. Since little or no discovery had been done prior to defendants' answers, the parties (with one plaintiff objecting) presented the court with an agreed revised scheduling order extending the discovery deadline by four months. The court denied the motion. Therefore, written discovery was exchanged but virtually no depositions were taken prior to the close of discovery in February 1997. The court on its own motion opened discovery for a limited period and the parties took thirty-three days of depositions within forty-five business days all over the country during the summer of 1997. As a result, many of the witnesses at trial had never been deposed, including some experts.

The Oprah defendants objected to production of the unedited program on the grounds of privilege, both constitutional and statutory based on the Illinois reporter's privilege. The United States Magistrate Judge granted plaintiff's motion to compel the unedited tape and that decision was affirmed by the district judge.

Motion for Summary Judgment

The motion for summary judgment deadline arose before the court re-opened limited discovery. Accordingly, the mo-

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tion focused on the constitutionality of the Perishable Food Act and again emphasized the "of and concerning" element of the plaintiffs' causes of action. In addition, defendant King World Productions, Inc. argued in its motion that it was merely the distributor of the Oprah Winfrey Show and had no input whatsoever into the production of the program. The court, without explanation, overruled the motions for summary judgment.

Settlement

It was reported by several national media on the day the jury received the case that Oprah had offered $2.5 million to settle the case. These reports were false. I was the only attorney for the Oprah defendants authorized to settle the case and I never offered the plaintiffs any money.

Trial-Related Motions

During discovery the defendants learned that the plaintiffs were attempting to claim damages to cattle that they did not own. The plaintiffs, once this defect was revealed, asserted their claims through assignments from the true owners of the cattle (and, alternatively,) under a bailment theory. Defendants objected by motion in limine which was granted. Accordingly evidence of all the assigned claims was not allowed. The effect of this ruling was that two plaintiffs were left completely without damages (because they owned no cattle) and the remaining plaintiffs' losses were greatly reduced (in the millions of dollars).

The defendants also filed a motion in limine arguing that neither the Court nor the jury is entitled to second guess the editorial judgments of the HARPO Productions' staff when they deleted certain statements from the final version of the program. The court denied the motion but gave an instruction to the jury at the beginning of the case and repeated it in a stronger form in the jury charge. This was an important instruction because the plaintiffs tried the case largely on the theme of negligent editing.

Approximately one month before the trial, the court, on its own motion, entered a broad gag order. King World, which was at best a nominal defendant, asked the court to modify the gag order so that the news programs of its subsidiaries, *Inside Edition* and *American Journal*, could report on the trial. The trial court declined to modify the gag order but gave notice that it intended to reconsider her denial of King World's motion for summary judgment. Several days later, the court granted King Worlds' summary judgment and relieved it from the gag order.

At the same time the defendants renewed their motion to change venue, arguing that justice required it. This was based on a number of factors: (1) When one deplanes at the Amarillo International Airport it is hard to miss the sign of greeting which states "Welcome to Cattle Country. Amarillo - Supplying Over 25% of America's Beef;" (2) It is also hard to miss the 20-foot mural in the lobby of the Federal Courthouse depicting a cattle drive; (3) Shortly before trial the president of the Amarillo Chamber of Commerce authored a memo which stated that the Chamber would not be rolling out the red carpet or giving the keys to the city when Oprah arrived and that all staff members were prohibited from attending her show. (He later retracted that memo.); (4) There were bumper stickers all over town saying "The only mad cow in America is Oprah;" (5) T-shirts were being sold at the local high school with a picture of Oprah with a red line across it. There were also anti-Oprah buttons; (6) Pretrial research indicated that 60% of the prospective jurors would favor the cattle industry over a national talk show host regardless of the evidence; (7) The court itself had cited negative pretrial publicity as a basis for the gag order. One op-ed piece in the *Amarillo Daily News* went so far as to criticize the local newspaper's editorial stance that the jurors should be fair and impartial. The op-ed author argued that the cattle industry supported the livelihood of virtually everyone in the community and that the jurors, therefore, should not be unbiased but rather should vote for the home industry.

The motion to transfer venue and the motion to vacate the gag order were part of the same motion. Defendants argued that if the proffered support for the gag order was valid then the case of necessity should be transferred. The court denied the motion to transfer stating that defendants could select a fair and impartial jury in Amarillo.

Jury Selection

The court gave each side six peremptory strikes and called a panel of sixty-five prospective jurors. There were no

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African-Americans on the jury panel, and a large majority of the prospective jurors had ties to the cattle industry, either directly or indirectly. A number of jurors volunteered that they could not be fair to the defendants and were excused. Two prospective jurors revealed that they were Oprah fans and probably would be biased in her favor. The court was liberal in sustaining objections to a juror for cause. The jury voir dire lasted most of the day with the court doing the majority of the questioning. Each side was allotted 30 minutes to ask questions.

The plaintiffs used their challenges for cause to strike six women. The defendants cut five men and one woman. Left on the jury was a retired government worker who spent her career at the United States Department of Agriculture. Five other jurors had direct ties to the cattle industry, including a male who told reporters afterward that he was "stunned" that he was left on the jury inasmuch as he raised cattle. It turned out that this juror was perhaps the staunchest First Amendment advocate on the jury.

Opening Statement

The court allowed 30 minutes per side for opening statements. The Oprah defendants wanted to clearly define this as a First Amendment case and to make sure the jury was aware that Oprah was not anti-beef and was not anti-cattlemen, rather, wanted to have a debate on the issue of whether the mad cow disease in Britain could happen in the United States. The plaintiffs characterized themselves as family farmers and ranchers who had lost millions of dollars because of the allegedly false and malicious statements on the Oprah Show that implied the U.S. beef supply was unsafe.

The Evidence: The Plaintiff's Case

The Plaintiffs themselves testified as well as three bovine spongiform encephalopathy ("BSE") experts, two members of the Chicago Mercantile Exchange (who said that cattle futures dropped the limit because of the Oprah Show), two damage experts, Oprah, as an adverse witness, four HARPO employees and an ex-HARPO employee.

The highlight of the plaintiffs' case was when their BSE expert cried on the witness stand. This same witness also gave what is perhaps my all-time favorite response to a series of questions, as follows:

> Q: Would you please answer my question, how Oprah Winfrey is supposed to know, when you don't use [a scientific term] on her program and your own committee doesn't use it in their press release, how is she supposed to know? Just answer that question.
>
> A: What type of answer are you looking for?
>
> Q: A truthful answer and responsive answer.
>
> A: Okay. I'm sorry, I don't know whether you're trying to get me to answer a yes, no – say yes, no, or whatever – I mean, . . . it's difficult for me to know how to answer your question.

The plaintiffs' also called Howard Lyman and attempted to paint him as a radical vegetarian activist (with some success). The plaintiffs' theme was that this was an irresponsible program put together by people who knew nothing about the science and that the industry and government guests had the scientifically valid information while Lyman was diabolical and biased against the beef industry.

The Motion for Judgment as a Matter of Law

At the close of plaintiffs' case, the defendants moved for judgment as a matter of law and the court excused the jury and set aside an entire day for argument. The arguments were at a very sophisticated level, the court having thoroughly informed itself on the pertinent cases. The judge seemed to have great reservations about the constitutionality of the statute and when the court granted the motion with respect to the Perishable Food Act the defendants were hopeful that her opinion would in fact declare the statute unconstitutional. Instead, she relied on two grounds: first, that live cattle are not a perishable food product and therefore not subject to the statute and, second, that there was no evidence that the defendants knowingly made a false statement of fact on the program, an element of the act. She dismissed plaintiffs' defamation claim on "of and concerning" grounds. She disposed of the negligence cause of action on Texas common

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law grounds (because the state does not recognize an independent cause of action for negligent publication). The court denied the motion with respect to the plaintiffs' claim for common law product disparagement.

The Defendant's Case

The defendants called a reporter from an alternative weekly paper in Baltimore named *City Paper*. The reporter had written an article about the rendering industry but, more importantly, taken photographs at a rendering plant. Inasmuch as plaintiffs challenged as false Lyman's statement on the program that road kill and euthanized pets were put into rendering plants and then turned into cattle feed, defendants argued, over objection, that the jury should be entitled to see pictures of road kill and euthanized pets being placed in the rendering process. The court allowed the testimony and the pictures. Defendants also called Dianne Hudson the executive producer of the Oprah Winfrey Show, the CEO of the National Cattlemen's Beef Association, the media advisor for the National Cattlemen's Beef Association and three damage experts. Defendants did not call BSE experts on the theory that the case was about the First Amendment, not about whether the United States has mad cow disease.

The Jury Charge

The jury charge was First Amendment friendly. I have put together a package of materials including the charge, the jury verdict form, the court's written opinion on the motion for judgment as a matter of law, and part of my closing argument. Anyone interested can write or call and we can send you a copy of the materials.

Closing Statements

Independent observers say that the closing statements were of high caliber. The plaintiffs emphasized their theme that defendant Lyman was a renegade and that the HARPO people were irresponsible. The plaintiffs made a strategic decision to take on Oprah and one of the plaintiffs' lawyers called her a liar.

The defendant emphasized the First Amendment, stressing that in this country everyone has the right to express his or her opinions. The defendants also discussed the talk show format and differentiated it from other journalistic endeavors such as news magazines and newspapers. The First Amendment issues obviously resonated with the jury.

The Verdict

The verdict was unanimous, as required by the Federal Rules. The jury answered no to the first question (in Texas the practice is to submit the case to juries on special interrogatories). Jury Question No. 1 was:

> Did a below-named Defendant publish a false, disparaging statement that was of and concerning the cattle of a below-named Plaintiff as those terms have been defined for you?

Conclusion

In the aftermath of the verdict the plaintiffs' spin was that Oprah was too powerful a personality to overcome. She was certainly a forceful and articulate spokesperson for her position but that does not completely explain the verdict. The jurors truly put aside their personal biases in favor of the local industry and decided the case on First Amendment grounds pursuant to the court's instructions. As Oprah wrote, it was a "bright and shining moment."

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LDRC April 1998 Bulletin on Agricultural Disparagement Laws

The highly publicized case brought by Texas cattlemen against Oprah Winfrey focused a spotlight on a new trend in defamation law -- agricultural disparagement laws. LDRC BULLETIN 1998 Issue No. 2, to be published at the end of April, will be a timely and practical examination of this trend, including a review of state disparagement laws, an analysis of their constitutionality and an examination of the legal weaknesses in the elements of this newly created statutory cause of action. In addition, the BULLETIN will contain tales from the front — firsthand reports from attorneys involved in agricultural disparagement cases.

Jury Verdict for *Time* in Simpson-Related Case

By Bob Vanderet

A jury hearing a libel case in Los Angeles, returned a verdict on March 16, 1998 in favor of TIME Magazine in a case involving TIME's reporting on the O.J. Simpson criminal trial. The libel action had been brought by Rachel Ferrara, the former girlfriend of Kato Kaelin who had been on the phone with Kaelin when he heard the now-famous "thumps" on the wall of his guesthouse on the Simpson estate.

An August 1996 article in TIME reported that two friends of Ferrara told police that she and Kaelin had not told the whole truth in their testimony at the Simpson preliminary hearing, and that Ferrara had related to them a critically different version of the events at the Simpson estate the night of the murders than the one she and Kaelin testified to in court. According to the story told to police and prosecutors by Ferrara's friends, and reported by TIME, Kaelin encountered Simpson right outside his guesthouse when he opened the door after first hearing the thumps, not fifteen minutes later leaving for the airport, as the pair had testified.

Ferrara sued for libel, alleging that the article falsely summarized her testimony, falsely reported that the version her friends told contradicted her testimony, and falsely implied that she had committed perjury.

Returning a special verdict in the liability phase of the trial, following five days of testimony, the jury found that three of the four statements plaintiff alleged were libelous were in fact true, and that the fourth one, though false, was not libelous. The jury also found that TIME's report was privileged as a fair and true report of judicial proceedings and statements made to law enforcement officials, notwithstanding minor errors in detail.

The trial featured opposing versions of the friends' statements to prosecutors, with former Simpson prosecutor Marcia Clark testifying as a surprise witness for plaintiff, and former colleague William Hodgman for the defendants.

TIME was represented at the trial by Bob Vanderet and Neil Jahss of O'Melveny & Myers, and Douglass Maynard of Time Inc.'s legal staff. Robin Bierstedt, Time's Deputy General Counsel, supervised the winning defense team.

Jury Awards Nearly $4 Million Over Rollercoaster Report

A Kentucky state jury trial has resulted in a $3.975 million verdict against WHAS-TV for allegedly defaming Kentucky Kingdom, an amusement park, in a series of reports concerning a 1994 accident on one of the amusement park's rides.

Plaintiffs contended that contrary to WHAS-TV's reports, inspectors found that while operator error caused two cars to collide in 1994, injuring a 7-year-old girl, the ride, itself, was safe. Plaintiffs also argued to the jury that no one had testified to telling the station that the ride was dangerous and, in fact, several state inspectors testified that they had not told the station that the ride was dangerous and did not know of anyone else who had.

The jury, in awarding $1.475 million in compensatory damages and $2.5 million in punitive damages, found three statements in the reports were false — the ride "malfunctioned," state inspectors thought it was "too dangerous," and Kentucky Kingdom "removed" a "key component" of the ride.

According to Kentucky's *Courier-Journal*, however, WHAS reporter Doug Proffitt is sticking by the reports stating, "We set out to tell the truth. I believe that the truth came out in these stories."

WHAS has stated that it will appeal the verdict.

Public School Principal Held Public Figure

A New York court recently ruled that a public school principal is a "public official," and then proceeded to dismiss the principal's libel suit against the *New York Post*. *Jee v. The New York Post. Co., Inc., et al.*, Index No. 3994/91 (N.Y.Sup. Ct., March 6, 1998). This is the first time that a New York court has squarely addressed the question of a public school principal's status for purposes of libel law.

Plaintiff Jee brought suit after the *New York Post* ran three articles concerning Jee's performance as the principal of the Livingston School, a New York public high school. The articles reported that the Board of Education was investigating Jee in connection with charges of corporal punishment and other misconduct at the school, and that Jee had been removed from control of her school. The alleged misconduct included the handcuffing of students, harassment of teachers, and the diversion of school resources for the possible operation of a private business.

Defendants sought summary judgment on the basis that plaintiff is a public official and that she had not demonstrated that the statements at issue were made with actual malice. Jee disputed the public official designation, but the court found that public school principals can be said to "have substantial responsibility for or control over the conduct of governmental affairs," such that they are considered public officials under *Sullivan*. Slip op. at 7 quoting *Rosenblatt v. Baer*, 383 U.S. 75, 85. "The importance of education to society and the legitimate concern that the public has in seeing that the educational process is properly administered cannot be disputed. Public school principals play an important role in shaping and administering the educational process. They supervise teachers and other staff as well as bear the ultimate responsibility for the welfare of the students at their school during the school day." *Jee*, slip op. at 10.

The court was also guided by an earlier New York Supreme Court finding that a candidate for public school principal is a public official. *Jiminez v. United Federation of Teachers*, NYLJ 4/9/96, p. 26 at col. 2 (1996). That decision was based on the finding that the process of appointing a principal requires a high degree of public debate in terms of both the school board's nominating process and the interaction of parents in the selection process. *Jee*, slip op. at 7. The *Jee* court noted that *Jiminez* had been affirmed. *Jiminez v. United Federation of Teachers*, 657 N.Y.S.2d 672, 673, *app. dism'd*, 90 N.Y.2d 890 (1997). Though *Jiminez* did not conclude that public school principals were public officials under all circumstances, the court said that "it would appear logical that one who is a public official during the process of appointment, remains such after appointment, while serving as a principal." *Jee*, slip op. at 10.

The court also noted that a district court in Minnesota and the Supreme Court of Vermont had both found that a public school principal is a public official. *Johnson v. Robbinsdale Ind. School Dist.*, 827 F. Supp. 1439 (D. Minn.); *Palmer v. Bennington School Dist.*, 615 A.2d 498, 501 (S. Ct. Vt.).

With the plaintiff deemed a public figure, the court found that "[m]ovants have shown that their reports were not published with actual malice. Jee has not set forth any evidence which would demonstrate a triable issue of fact as to whether any of the statements complained of were published with actual malice." *Jee*, slip op. at 12.

Virginia Supreme Court Holds Dummy Copy Not Defamatory

The Supreme Court of Virginia, in agreement with the trial court, has held that the offending phrase "Director of Butt Licking" cannot support an action for defamation. The appellate court, in a 7-2 decision upholding the dismissal of the action on demurrer, held that the phrase was void of any literal meaning, and that it would be unreasonable to interpret the phrase as conveying any factual information about the plaintiff, a Virginia college administrator. *Yeagle v. Collegiate Times*, No. 971304 (Va. Sup. Ct. Feb. 27, 1998).

Sharon Yeagle sued the college newspaper for $850,000 after the newspaper listed Ms. Yeagle, a vice-president of the school, as the "Director of Butt Licking." The incorrect title was a dummy copy the college students used to fill the space of the correct job title, which was supposed to be corrected before it went to print. It remained in the paper, according to defendants, by accident.

The court rejected the argument that the interpretation of the phrase imputes to her a criminal offense involving moral turpitude or that the phrase is actionable defamation because it injures her reputation.

New York Magazine v. Metropolitan Transportation Authority: A Mixed Result on Appeal

By Victor A. Kovner

The highly publicized journey of *New York* Magazine's advertisement on the outside of city buses continues on its rocky road through the federal courts. A panel of the Second Circuit has affirmed, in a 2-1 decision, a preliminary injunction against New York's Metropolitan Transit Authority ("MTA") barring the MTA from refusing to run the ads on the buses. *New York Magazine v. Metropolitan Transit Authority*, 1998 WL 49166 (2d Cir. (N.Y.), Jan. 22, 1998).

New York's most famous magazine advertisement (the "Ad") included the logo of *New York* Magazine next to the words:

> "Possibly the only good thing in New York Rudy hasn't taken credit for."

The Ad was submitted last November to TDI, the agency representing the MTA, and TDI promptly approved it without comment. The Ad, which was scheduled to appear on the sides of 75 buses, had appeared on eight buses when, after articles about the Ad appeared in the local press, a Deputy Mayor called the MTA asking that the Ad be removed. The Mayor's press representative stated that the objection was based upon the use of the Mayor's name to "promote a commercial product." Sections 50-51 of the New York Civil Rights Law prohibits use of the name or likeness of a living person for purposes of advertising or trade without prior written consent.

The MTA has certain "Advertising Standards" governing the acceptability of advertising on the buses. Among them is a ban on ads that violate §§ 50-51. After the Deputy Mayor's call, the MTA discontinued the display of the Ads, citing this standard.

The magazine asserted a § 1983 claim and sought a preliminary injunction enjoining the MTA and the City from interfering with the exercise of the plaintiff's First Amendment rights by refusing or limiting the display of the Ad and, on December 1, 1997, in a scholarly opinion, Judge Shira Scheindlin granted the injunctive relief on the grounds that loss of First Amendment freedoms for even minimal periods of time constitutes irreparable injury and that the plaintiff had demonstrated a substantial likelihood of success on the merits, because those who impaired its First Amendment rights were governmental actors and the speech in issue was entitled to First Amendment protection. *New York Magazine v. Metropolitan Transit Authority*, 1997 WL 738610 (S.D.N.Y. 1997). *See LDRC LibelLetter*, December 1997 at 11.

Characterizing the language of the Ad as "commercial speech," notwithstanding the political commentary included therein, the district court applied the *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980) standard, which required the government to show it had a substantial interest in regulating the speech and that its regulation directly advanced that interest and was no more intrusive than necessary to accomplish the goal.

The court found that the exterior side of a bus was a limited public forum, as opposed to a non-public forum, because the MTA had previously permitted both political and commercial advertising on the outside of its buses. Since it was a limited public forum, the court declined to apply the more permissive reasonableness standard applicable to a non-public fora.

With respect to the MTA's stated reason for exclusion of the Ads, the alleged violation of §§ 50-51 of the New York Civil Rights law, the district court found that two common law exceptions to the statutory prohibition barred application of the law to the Ad. First, the court found that the "incidental use" exception, which permits publishers to use names or likenesses when promoting the nature of the contents of their publications, precluded application. Secondly, the public interest or "newsworthiness" exception precluded application of the statute where the name or likeness was used in connection with a newsworthy event or a subject of public interest.

The district court found that the satiric comment about the Mayor illustrated a just recently published cover story by *New York*, which discussed the possibility that Mayor Giuliani might run for President and explicitly noted his "penchant for claiming credit for New York's successes," the very subject of the advertisement in suit.

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The Second Circuit Majority

The holdings of the Second Circuit were clear:

> We affirm the district court's order granting preliminary injunctive relief against MTA, but we vacate the order to the extent it applies to the City, and dismiss New York Magazine's claims against the City as failing to present a case or controversy.

Judge Oakes, however, joined by Judge Calabresi, issued a complex decision. *New York Magazine v. Metropolitan Transportation Authority*, 1998 WL 49166 (2d Cir. 1998). Since the City, through the Office of the Mayor, had merely requested the removal of the Ad, the court concluded that the plaintiff did not have standing to seek injunctive relief against the City, as no continuing action or threat by the City was alleged by the plaintiff.

With respect to the claim against the MTA for violation of the magazine's First Amendment rights, the court reached the same conclusion as the district court, although it followed a somewhat different path. First, the court analyzed the status of the forum in question, that is, advertising space on the outside of MTA buses. It agreed that the district court's conclusion that the space was a designated public forum because the MTA had accepted both political and commercial advertising in such locations. The court explicitly rejected the MTA argument that its regulations restricting access for ads which violated §§ 50-51 evidenced an intent not to create a public forum, because

> it cannot be true that if the government excludes any category of speech from a forum through a rule or standard, that forum becomes ipso facto a non-public forum, such that we would examine the exclusion of the category only for reasonableness. This reasoning would allow every designated public forum to be converted into a non-public forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content . . . . We cannot interpret the Supreme Court's jurisprudence such that it would eviscerate the Court's own articulation of the standard of scrutiny applicable to designated public fora.

Having found the space to be a designated public forum, the court then viewed the MTA's action under its regulations as a prior restraint which of course bears a heavy presumption of unconstitutionality. Not only must a prior restraint to be lawful come within one of the narrowly defined exceptions to the bar on prior restraints, but there must have been adequate procedural safeguards in place to avoid suppression of protected speech. Though the court noted that commercial speech was accorded a somewhat lowered scrutiny in the context of government restrictions on commercial transactions, it also noted that the Ad, which contained political elements, defied easy categorization.

In the end, the panel declined to decide whether contents of the Ad constituted commercial speech or "core-protected" speech. The court found that the absence of sufficient procedural safeguards in the context of a prior restraint precluded application of such restrictions even to commercial speech. Indeed, it concluded that procedural safeguards "should not be loosened even in the context of commercial speech." *Id.* at p. 22.

Like the district court, the majority then applied the *Central Hudson* test applicable to commercial speech in a designated public fora, *i.e.*, "whether the regulation . . . is not more extensive than necessary to serve the governmental interest." They concluded that the restriction failed that test because the MTA had obtained an indemnity from the advertiser and was thus protected from §§ 50-51 liability.

Without adopting or rejecting the holding of the district court regarding the common law exceptions to §§ 50-51, the court simply noted that, *if* it does apply to use of the Mayor's name, he himself (as opposed to the governmental entities) could seek redress under § 51.

The Dissent

Judge Cardamone rejected the principal reasoning of both the district court and the majority. With respect to the public forum issue, he agreed that the sides of buses were a limited public forum, but concluded, apparently contrary to the weight of authority, that the reasonableness test should be applicable to the MTA regulations for this forum, just as they would to a purely non-public forum. He characterized

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the majority's standard as "strict scrutiny," even though the majority was applying the *Central Hudson* intermediate standard applicable to commercial speech in a designated public forum.

Even more troubling, the dissenter found the Ad "plainly violates § 50" and gave short shrift to the district court's reasoning regarding §§ 50-51 and found that neither the "incidental use" nor the "newsworthiness" exceptions were available. Describing the "incidental use" exception as for "fleeting, *de minimis*" uses, the dissenter overlooked the long line of authorities cited by the district court including, *Groden v. Random House*, 61 F.3d 1045 (2d Cir. 1995); *Lerman v. Flynt Distributing Co.*, 745 F.2d 123 (2d Cir. 1984); *Namath v. Sports Illustrated*, 371 N.Y.S.2d 10 (1st Dep't 1975), *aff'd*, 386 N.Y.S.2d 397 (1976); *Velez v. VV Publishing Corp.*, 524 N.Y.S.2d 186 (1st Dep't 1988); *Stern v. Delphi Internet*, 626 N.Y.S.2d 694 (Sup. Ct. N.Y. Co. 1995), which make clear that the purpose of this exception is to permit the media to promote the contents of their own materials.

Moreover, the dissenter ignored the broad view of the "newsworthiness" exception also recognized in a long line of New York authorities cited by the district court, and instead relied on what appears to be a distinguishable authority, *Beverley v. Choices Women's Medical Center Inc.*, 579 N.Y.S.2d 637 (1991), involving a commercial health provider's use of a likeness in a promotional calendar, rather than the authorities involving the news media.

The dissent leaves the question as to the manner in which *New York Magazine v. MTA* may be cited in future §§ 50-51 litigation. In my view, the common law exceptions to the New York statute raise some novel questions of New York law, as to which federal courts provide relevant, but not dispositive authority. Were an adversary to cite the unfortunate dissent, I would respond by noting that the district court's opinion was, in fact, affirmed, albeit on other grounds, and note that the dissenter's rejection of Judge Scheindlin's reasoning did not elicit any support from the other members of the panel.

Further light may be shed in the near future since the MTA has petitioned for a rehearing and/or for an *en banc* consideration. The MTA is justifiably concerned that the majority decision threatens their regulatory structure, which authorizes the agency to reject advertisements on subjective grounds, such as recently used to reject some widely publicized sexually explicit advertisements which now are displayed on enormous billboards in Times Square. The governmental interest supporting such restrictions would, of course, not be obviated by the presence of the advertiser indemnity. In any event, the MTA petition is *sub judice*, but counsel to the MTA has informed me that, if that relief is not granted, he has been authorized to file a *certiorari* petition with the United States Supreme Court.

Victor A. Kovner is a partner with the firm Lankenau Kovner Kurtz & Outten, LLP in New York City.

SAVE THE DATES FOR THE FOLLOWING LDRC EVENTS:

LDRC Forum on English Libel and Privacy Law
May 11-12, 1998

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LDRC Annual Dinner
November 11, 1998

****

LDRC Defense Counsel Section Annual Breakfast
November 12, 1998

LDRC would like to thank Cynthia Conde, Benjamin N. Cardozo School of Law, Class of 1998, and Danthu Thi Phan, Columbia School of Law, Class of 1998 for their contributions to this month's *LibelLetter*.

First Circuit Finds No Jurisdiction Over French Magazine In Smoking Ad Case

By Joshua M. Rubins

Can a publisher who does not generally "do business" in a jurisdiction be dragged into court there by a resident libel plaintiff? The answer is yes, sometimes. But, in *George F. Noonan and Ann Marie Noonan v. The Winston Company*, (No. 97-1132, February 2, 1998), the First Circuit confirmed that the plaintiff has a hefty burden in demonstrating that jurisdiction is warranted.

At the center of the case was the photograph of a uniformed Boston policeman on horseback, used by a Paris advertising agency in a 1992 French magazine advertisement. The client was R.J. Reynolds France, a French cigarette manufacturer, and the ad was designed to publicize both the Winston brand and an interactive service providing information about dining and entertainment in France.

The photo had come to the French ad agency from the files of an English book packager, with no strings attached. So the agency had no way of knowing that the unnamed policeman in the photo had allegedly never signed a release when his picture was taken back in 1979. Worse yet, the agency had no idea that the man in the photo, Detective George Noonan, was a longtime anti-smoking advocate who would sue not only for violation of his right of publicity but for defamation as well.

Noonan and his wife brought suit on home turf, in U.S. District Court in Boston, naming as defendants the British book packager, the Paris-based ad agency, and R. J. Reynolds France, along with various RJR affiliates in America. All defendants moved for dismissal for lack of personal jurisdiction.

In the district court proceedings, the Noonans conceded that there could be no general jurisdiction over the ad agency or the French cigarette company, which had no regular business activities in America. They argued, however, that Massachusetts could assert specific jurisdiction over the French defendants, without offending due process, because their contacts with the state allegedly constituted "purposeful availment" of the benefits of Massachusetts' laws. To meet the "purposeful availment" test -- an absolute constitutional prerequisite for specific jurisdiction -- a defendant must be shown to have acted toward the forum state with sufficient intent to make the defendant "reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

According to the Noonans, the French defendants' "purposeful availment" was demonstrated by two lines of contact with Massachusetts. First, the ads were placed in major French magazines that might be expected to have an international circulation; unbeknownst to defendants, a few hundred copies did, in fact, turn up on newsstands in the Boston area. Second, since it was obvious from the photograph that the man on horseback was a Boston police officer, it could be anticipated that any tortious effect on him from the publication would be felt in Massachusetts.

In support of this contention, the Noonans pointed to *Calder v. Jones*, 465 U.S. 783 (1984), and *Gordy v. The Daily News*, 95 F.3d 829 (9th Cir. 1996), in which California residents Shirley Jones and Berry Gordy were permitted -- under the so-called "effects test" -- to bring home-town defamation suits against out-of-state reporters and publishers. The defendants in these cases published allegedly damaging articles about celebrities who were known to be living in California -- and who could be expected to feel a "severe impact" there from the publications. The Jones article appeared in *The National Enquirer*, several hundred thousand copies of which are routinely sold in California; the *Daily News* had about 18 California subscribers. In both cases, the courts found that the defendants had "truly targeted" California in publishing and distributing the articles.

The district court in *Noonan*, however, found no such evidence of "targeting," and the First Circuit agreed, affirming dismissal as against all defendants. Both courts acknowledged that it probably was foreseeable that an advertisement *might* turn up in Massachusetts if placed in French magazines with international circulations. But, consistent with the general proposition that foreseeability alone does not give rise to "purposeful availment" (*see, e.g., Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102), the First Circuit refused to infer the requisite "intent to reach Massachusetts" -- particularly given the fact that the ad was indisputably aimed solely at the French consumer market. The relatively small number of magazines that circulated in Massachusetts -- about 300 -- was held to be significant, though not dispositive. The courts distinguished *Gordy* by emphasizing that *The Daily News* had full knowledge and intent as to

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No Jurisdiction Over French Magazine Ad

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arrival of those 18 newspapers -- via regular subscriptions to forum addresses -- in California.

Would the First Circuit have reached a different conclusion if the ad agency had known for certain that some of the magazines in question were destined to reach Massachusetts? Perhaps. Unlike the district court, the First Circuit was unimpressed by the argument that the *Noonan* defendants -- in striking contrast to the celebrity-stalkers in *Calder* and *Gordy* -- had no idea who Noonan was and did not intend to affect him in any way when they published his picture. "In our view," the Court of Appeals noted, "this argument implies too high a jurisdictional hurdle." Thus, the "effects test," although reined in by this and other post-*Calder* decisions, remains very much alive, and a potential headache for out-of-forum publishers.

Robert M. Callagy and Joshua M. Rubins, partners at Satterlee Stephens Burke & Burke LLP in New York, represented the French and American defendants in the Noonan case.

Spahn Dormant but Not Dead

A district court in Manhattan recently refused to grant summary judgment in a privacy case brought under §§ 50-51 of the New York Civil Rights Law, holding that the newsworthiness exception to the statute could be defeated by a showing that the use of the plaintiff's photograph was "infected with material and substantial falsity," provided that the defendant acted with the requisite degree of fault. *Messenger v. Gruner + Jahr USA Publishing*, 97 Civ. 0136 (LAK) (S.D.N.Y. February 23, 1998). New York's recognition of privacy claims is limited to commercial appropriation, and only to claims within §§ 50-51. This holding resurrected a line of cases, the leading one of which is *Spahn v. Julian Messner, Inc.*, 21 N.Y.2d 124 (N.Y. Ct. App. 1967), *app. dism'd*, 393 U.S. 1046 (1969), which held that there is a fictionalization limitation on the newsworthiness privilege. The *Spahn* court held that a star professional athlete would be entitled to recover for the use of his name in an unauthorized biography to the extent that the defendant culpably falsified or fictionalized aspects of his life.

Plaintiff Messenger, a professional model, sued after her posed photographs were used in defendant's *YM* magazine. The photos were used to illustrate an advice column that featured a letter from "Mortified" who admitted to having had sex with three boys and then having been ostracized by her peers. The column was illustrated with three photos of the plaintiff in suggestive poses, and the page prominently featured a headline that read, "I got trashed and had sex with three guys." Plaintiff alleged that defendants falsely created the impression that she was the author of the letter from "Mortified." Defendants asserted that the use of models to illustrate magazine columns is standard in the industry and that no reasonable reader could conclude that the model pictured was actually that teenager who wrote the anonymous letter.

New York Civil Rights Law §§ 50-51 creates a cause of action for the commercial or trade use of one's name or picture without one's consent. The statute has been narrowly construed to protect countervailing free speech interests. Courts have consistently held that publication concerning matters of public interest are not trade or advertising uses. Under that rule, the use of a photograph to illustrate an article on a topic of public interest is not actionable unless the photograph has no real relationship to the article or unless the article is an advertisement in disguise. *See Murray v. New York Magazine Co.*, 27 N.Y.2d 406, 409 (1st Dept. 1957).

Though *Spahn* has limited the newsworthiness privilege in the past, the defense argued that the fictionalization limitation was no longer New York law, saying that *Spahn* and its progeny had been overruled by a series of more recent cases, most notably *Finger v. Omni Publications, Int'l Ltd.*, 77 N.Y.2d 138 (N.Y.Ct.App. 1990). The *Finger* court held that the use of a photograph of a large family to illustrate a story on fertility and new fertilization techniques was not actionable despite the fact that the children in the photograph were not conceived by such methods. The *Messenger* court found that *Finger* had not overruled *Spahn* because the *Finger* court may have concluded that the use of the photograph was not substantially fictionalized or it may have accepted the defendants's argument that the implication that the plaintiffs were conceived through new fertilization methods was not offensive and therefore not actionable.

The *Messenger* court also relied on the fact that the Second Circuit issued a 1984 decision relying on *Spahn* (*Lerman*

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Spahn Dormant But Not Dead

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v. Flynt Distributing Co., 745 F.2d 123 (2d Cir. 1984). Because that Second Circuit case post-dates all cases, with the exception of *Finger*, that defendants had relied upon to show that *Spahn* had been overturned, the *Messenger* court found that it had only to distinguish *Finger*.

With *Spahn* still active law, the *Messenger* court found that though the subject of the column was a matter of public interest and the use of the plaintiff's photographs was reasonably related to it, a reasonable juror could find that the presentation of the photos with the letter created the false impression that plaintiff had written the letter. Thus, summary judgment was denied.

The court also decided that defendant's request to apply Florida law would not help its case. The Florida statute governing the claim (Fla.Stat.Ann. 540.08 (West 1997)) codifies the newsworthiness exception that in New York is a product of case law. But, found the court, "the difference is one of form alone." The Florida law does not "confer a license to engage in the culpable promulgation of falsehood" any more than New York case law does. *Messenger*, 97 Civ. 0136, slip. op at 12.

Sixth Circuit Enjoins City From Releasing Police Officers' *Personnel Information*

Finds Informational Privacy Protected By The Constitution

By Dawn L. Phillips-Hertz

In an unprecedented opinion, the Sixth Circuit Court of Appeals held that undercover police officers who had testified under their own identities have a constitutional right of privacy in their home addresses, home telephone numbers, names and addresses and phone numbers of immediate family members; the names and addresses of personal references; the officers' banking institutions and corresponding account information, including account balances; their social security numbers; responses to questions regarding their personal life asked during the course of polygraph examinations and copies of their drivers' licenses, including pictures and home addresses. The City of Columbus had released the information to a defense attorney pursuant to a request under the Ohio public records laws. The case is *Kallstrom v. City of Columbus*, No. 96-3853; available at www.law.emory.edu/6circuit/feb98.

The court found that the Supreme Court has recognized two areas of personal privacy that are of constitutional dimension: an individual's interest in independent decision making in important life-shaping matters and an individual's interest in avoiding disclosure of highly personal matters. (Citing *Whalen v. Roe*, 429 U.S. 589, 598-60 (1977)).

Kallstrom has already been cited by a municipality to deny reporters access to personal information about a police officer accused of soliciting sex in exchange for avoiding arrest.

The case appears to be a question of bad facts making for bad law. The plaintiffs worked as undercover officers within a very violent gang in Columbus. Although not relied upon in the opinion, the officers claimed that they had been promised confidentiality of this information when they were hired. The defense counsel for gang members obtained the information and apparently admitted giving it to their clients. Although the plaintiffs could not point to a single incident of harm from gang members to their families or themselves, the court accepted their affidavits that the officers were sure that the information would lead to harm in the future. The Court read the affidavits as substantiating an infringement on the right to life guaranteed under the Constitution.

The court said:

> In finding that the City's release of private information concerning the officers to defense counsel in the Russell case rises to constitutional dimensions by threatening the personal security and bodily integrity of the officers and their family members, we do not mean to imply that every governmental act which intrudes upon or threatens to intrude upon an individual's body invokes the Fourteenth Amendment. But where the release of private information places an individual at substantial risk of serious bodily harm, possibly even death, from a perceived likely threat, the "magnitude of the liberty deprivation . . . strips the very essence of personhood." . . . Under these circumstances, the governmental act "reaches a level of significance suffi-

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Sixth Circuit Protects Informational Privacy

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cient to invoke strict scrutiny as an invasion of personhood."

The decision puts government in a difficult position of measuring the entity that requests information and determining whether the release of the information to that entity could harm any person identified in the information. And not only must government evaluate the requester, but any entity with whom the requester might share the information. Thus, the case contravenes several precepts of access to government information: first, that constitutional privacy does not extend to information such as addresses and telephone numbers, and second, that the identity of the requester changes the right of access.

The court also issued an injunction against the City releasing personal information from the officers' personnel files unless the city first notifies the officers of its intentions to release such information. The court also said that the City can be held liable for damages under the state-created danger theory. The court specifically held that the City's actions placed the officers and their family members in "special danger" by substantially increasing the likelihood that a private actor would deprive them of their liberty interest in personal security.

Clearly this opinion will chill access to information in the hands of government. In fact, the decision is so broad in its reading that much more than personnel files will be removed from public scrutiny. As General Counsel for the Michigan Press Association, I am concerned that when faced with the choice between a lawsuit for failing to disclose under a public records law and the potential liability to a member of the public who fears retribution from some quarter by release of the same information, public entities are sure to opt for the statutory breach.

A brief has been filed by David Marburger and Lisa Hammond-Johnson of Baker & Hostetler's Cleveland office supporting the petition of the City of Columbus for an *en banc* rehearing before the Sixth Circuit. The brief is on behalf of *The Plain Dealer*, *The Akron Beacon Journal*, *The Toledo Blade*, the *Cincinnati Enquirer*, *The Cincinnati Post*, *The Columbus Dispatch*, *The Canton Repository*, *The Youngstown Vindicator*, WCPO-TV and WEWS-TV of Ohio, The Ohio Newspaper Association, The Oakland Press in Michigan and The Michigan Press Association, Kentucky Press Association and Tennessee Press Association. Briefs were filed March 12, 1997. The brief discusses at length the unprecedented leap from traditional notions of constitutional privacy in procreation to a new "informational" privacy. In particular the brief of the amici notes that a land title examiner was able to obtain virtually the same information through other public records in a matter of minutes. Despite their affidavits of impending doom over the release of this information, the officers in question took no precautions to conceal their identities during the trial or during their testimony in the prosecution of the gang members. The "constitutionally private" information was obtained in some twenty minutes from other public sources such as the register of deeds and court records. The private information is not so private. Although the court seems to limit the case to extreme situations, it is unclear how public bodies are to make the determination of the degree of harm which will emanate from a release of public information. Public bodies in the Sixth Circuit will surely turn a cold shoulder to requests for personnel file information after this decision.

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Reminder:

We are currently posting web site links for our Defense Counsel Section and Media Members on our web site at www.ldrc.com.

If you would like your firm or organization's web site to be listed on our links page please contact:

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Personal Privacy Act Proposed in California

California State Senator Charles Calderon recently introduced legislation seemingly aimed at curbing the paparazzi, but the bill clearly has the potential to harm all media.

SB 1777, the Personal Privacy Act, proposes that every person has a reasonable right to privacy and that the privacy right is violated if a person does any of several enumerated acts "with the intent to obtain information about, or photographs of, another, or to print, publish, or broadcast the information or photographs, without the written or verbal consent of the other."

The statute takes aim directly at reporters, making the people who violate the statute personally liable for damages, including emotional distress, economic loss, and attorney fees and costs. Punitive damages can be awarded if the conduct "rises to a level of malicious intent or reckless disregard, such that it results in physical injury." A person is subject to liability when he or she intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or upon his or her private affairs or concerns, if the intrusion would be "highly offensive" to a reasonable person. A physical intrusion is presumed highly offensive if a photographer "does not withdraw to a distance of at least 20 feet upon request from the person or persons being photographed . . . ." The term "seclusion" includes a private residence and its immediate surroundings, and also public places where the person is in an area that is closed off in such a manner that a reasonable person would expect privacy in conducting his or her affairs in that place. Harassment, stalking, assault, battery, and false imprisonment also give rise to liability under the proposed statute.

Calderon's bill also aims to change the law of defamation. The proposed bill seems to take aim at weekly magazines and other media not "engaged in the immediate dissemination of the news." It does so by proposing that those members of the media not covered by Civil Code Section 48a, a statute that requires plaintiffs to request a correction from a media defendant prior to filing suit for certain damages, be subjected to increased liability for defamation. The call for increased liability proposes to subject to personal liability, i.e., liability that cannot be indemnified by an employer, the person responsible for the final decision to publish a story with actual malice and with the knowledge that valuable consideration had been given in exchange for the information. This portion of the statute is particularly troublesome because a court has already found that the *National Enquirer* is not covered under Section 48a, and the status of other weekly newspapers or media not "engaged in the immediate dissemination of the news" is not clear.

Calderon's legislation also proposes that plaintiffs suing media not subject to Section 48a not have to demand a retraction prior to seeking general or exemplary damages. The legislation proposes further to make those who engage in a "pattern or practice" of defamatory conduct liable to a civil penalty of up to $250,000. These actions may be brought by the Attorney General, a district attorney, or city attorney.

In another section of the Calderon's bill, he proposes to narrow the "news" exception to the current law prohibiting the use of another's name or likeness without consent. Under the proposed legislation, only those members of the media covered by Civil Code Section 48a could avail themselves of the "news" exception. Potentially, the *National Enquirer* and other weekly magazines such as *Time* and *Newsweek* would face potential liability for using the name or likeness of a person in a news article without that person's consent.

The proposed bill would also severely curtail the ability of television shows to cover on-scene rescues. The bill's proposals seem aimed directly at the case now pending before the California Supreme Court, *Shulman v. Group W. Productions*, in which plaintiff sued for an invasion of privacy that she alleged occurred when a television show taped and broadcast her rescue from a serious car accident. Under the proposed legislation, no emergency service personnel could use hidden microphones or cameras for the purposes of capturing the voice or image of that person for the purpose of broadcast in electronic media. The bill would also require written authorization prior to broadcasting the victim's voice or likeness. Finally, the bill would prohibit police and other rescue professionals from allowing camera operators to accompany them in the line of duty, unless the media agree in writing to obtain releases, to respect the wishes of those not wishing to be photographed or recorded, and to refrain from videotaping, photographing, or recording on private property without the written consent of the owner or person with possessory interest in the property.

Fifth Circuit Rejects Reporter's Privilege Involving Nonconfidential Material in Criminal Case

By Luther T. Munford and Tania Tetlow

In *United States v. Smith*, 1998 WL 72107 (5th Cir. 1998), the U.S. Court of Appeals for the Fifth Circuit reversed a district court's application of the First Amendment newsreporter privilege to a criminal trial subpoena, and questioned whether such a privilege could be applied to nonconfidential material. While the Fifth Circuit recognized a privilege against disclosure of confidential sources in civil trials in *Miller v. Transamerican Press, Inc.*, 621 F. 2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), the *Smith* panel refused to extend this privilege to criminal trials, and expressed doubts that the privilege could ever protect nonconfidential sources.

The Source as Suspect

In March of 1996 a fire destroyed the enormous MacFrugal Regional Distribution Center in New Orleans, Louisiana, prompting a federal arson investigation. A MacFrugal employee, Frank Smith, contacted reporter, Taylor Henry of WDSU-Television, Inc., claiming to have information about the fire. In a taped interview with Henry, Smith accused his managers at MacFrugal's of setting the fire at the direction of corporate headquarters. Hours after taping the television interview, Smith relayed the same information in a tape-recorded interview with the New Orleans Fire Department Superintendent. The next day, ATF agents also taped an interview with Smith concerning his allegations.

Several days later, the government arrested Frank Smith himself on federal arson charges. After the arrest, WDSU broadcast a small portion of its interview with Smith, prompting the government to subpoena the entire WDSU-TV interview as relevant "false exculpatory" statements. Smith joined in that subpoena. WDSU-TV produced the broadcasted portion of the interview, but moved to quash the subpoena insofar as it sought the untelevised portions of the videotape.

The district court applied a qualified First Amendment privilege to the subpoena request and granted WDSU-TV's motion to quash. The district court reasoned that the prosecution and defense had little need of material obviously cumulative of the government's other tape-recorded statements of Smith. The government filed an interlocutory appeal from this order. Because the district court ruled without inspecting any of the recordings, however, the government and WDSU-TV agreed to dismiss the appeal without prejudice in order to allow the district court to examine the tapes. After *in camera* inspection, the district court reaffirmed its earlier ruling, and the government again brought an interlocutory appeal. Frank Smith did not join these appeals.

The Fifth Circuit Reverses

A Fifth Circuit panel, made up of Chief Judge Politz, and Judges Higginbotham and DeMoss, vacated and remanded, holding that the Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972), rejected the application of a broad newsreporter privilege to criminal proceedings. In his opinion for the panel, Judge Higginbotham interpreted *Branzburg* as offering protection only against the "harassment of newsmen" in criminal proceedings. *Smith* also cited *dicta* in more recent Supreme Court cases interpreting *Branzburg* as rejecting a broad newsreporter privilege in criminal cases. *United States v. Smith*, 1998 WL 72101 (5th Cir. 1998), *citing*, *University of Pennsylvania v. EEOC*, 493 U.S. 182, 201 (1990); *New York Times Company v. Jascalevich*, 439 U.S. 1301, 1302 (1978) (White, J., in Chambers) (denying stay).

Before *Smith*, the Fifth Circuit had squarely addressed the newsreporter privilege only twice. Both cases said reporters had a qualified privilege not to disclose confidential sources in civil trials. In *Miller v. Transamerican Press*, 621 F.2d 721 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981), the Fifth Circuit followed the trend of circuit courts of appeals and interpreted the Supreme Court's divided opinion in *Branzburg v. Hayes*, 408 U.S. 665 (1972), as requiring the application of a First Amendment newsreporter privilege. *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983), reiterated that *Miller* interpreted *Branzburg* as establishing a qualified newsreporter privilege. *Smith*, however, argued that *Miller* and *Selcraig* applied a newsreporter privilege to *civil* cases only by distinguishing *Branzburg*'s refusal to apply a privilege to a *criminal* case.

The *Smith* panel reasoned that criminal cases invoke the more important public interest in the prosecution of criminals, as discussed by the Supreme Court in *Branzburg*, and the pub-

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Fifth Circuit Rejects Reporter's Privilege

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lic has less interest in the outcome of civil trials. *Smith* further found no meaningful distinction between grand jury subpoenas and criminal trial subpoenas. The panel reasoned that the public's interest in prosecuting criminals is at least as great as the *Branzburg* public interest in indicting criminals.

The panel also rejected the arguments for application of a qualified privilege to the nonconfidential source in *Smith* as even less compelling than the arguments made against disclosure of confidential sources in *Branzburg*. The danger that sources will dry up is less substantial when a source comes to the media with the intention to air his story. *Smith* rejected WDSU-TV's argument that sources will avoid a media that has become a routine arm of the prosecution in criminal cases. "WDSU-TV's fears that non-confidential sources will shy away from the media because of its unholy alliance with the government are speculative at best." A disclosed source understands that the government will see a media report.

Smith also rejected the argument that responding to constant discovery requests will take time away from news reporting. *Smith* cited as a general proposition that the media receives no special protection from generally applicable laws.

The *Smith* panel explicitly rejected application of a newsreporter privilege to nonconfidential sources only in the criminal context. In distinguishing *Miller*, however, the *Smith* opinion recognized it both as a civil case and as applying a privilege to confidential sources. In *dicta*, the court stated that "the existence of a confidential relationship that the law should foster is critical to the establishment of a privilege," *citing ACLU v. Finch*, 638 F.2d 1336, 1344 (5th Cir. 1981). "We have never recognized the privilege for a reporter not to reveal nonconfidential information. In fact, this court has theorized that confidentiality is a prerequisite for the newsreporter's privilege." The court stopped short, however, of explicitly precluding a nonconfidential source privilege in civil cases.

Luther T. Munford and Tania Tetlow are with the firm Phelps Dunbar in Jackson, MS.

THE LDRC FORUM ON ENGLISH LIBEL AND PRIVACY LAW
May 11th and 12th in London, England

By now, everyone should have received their invitation to the LDRC Forum on English Libel and Privacy Law to be held in London on May 11th and 12th.

The first day of the conference will be held at the Freedom Forum European Center on Stanhope Place. There will be moderated sessions on prepublication review, jurisdiction, the European Court and trial practices. Conducted in a roundtable setting, we hope to achieve open and constructive dialogues akin to the break out sessions at the biennial Libel Conference.

The second day the conference will be held at the Law Society at 113 Chancery Lane. Moderated panels of distinguished media law experts, journalists and scholars will reflect -- with our comments and questions -- on the state of the law and how trends and pending initiatives are combining to shape the law. The conference will conclude with an evening debate between US and English lawyers.

We hope to stimulate a practical dialogue between American and English lawyers not only on preventing and defending libel suits in English courts; but also, on a more normative level, to reflect on the current state of English media law, the trends for the development of the law, and the role of the media and the media law bar in shaping the development of the law.

We have received a very enthusiatic response to the Forum and expect to have over twenty LDRC members and friends from around the country attending. If you are interested in attending but have not yet registered, we suggest you do so as soon as possible to ensure your place. For your convenience we have included an additional registration form.

Getting There

To accomodate individual schedules and points of departure, we have arranged for a travel agent to assist attendees in making travel arrangements. Joe Petrillo at Travel Media in New York at 212-757-8566 is available to book an individual discount air and hotel package or hotel only reservation for Forum attendees. Of course, attendees are free to make their own arrangements, but many will be staying in the Strand Palace, a moderately priced hotel located on the edge of Covent Garden in the West End of London.

North Carolina Supreme Court to Hear Reporter's Privilege Case

Two Recent Cases Raise Privilege Question

In re Andrew Curliss

The North Carolina Supreme Court recently agreed to hear a case that promises to clarify the existence and contours of the reporter's privilege in North Carolina. *In re Andrew Curliss*, Case No. 88P98 (Supreme Court North Carolina).

The underlying case is the murder prosecution of Derrick Allen, a nineteen-year-old charged with sexually assaulting and then murdering his girlfriend's toddler. Allen granted a jailhouse interview to reporter J. Andrew Curliss of *The News and Observer* of North Carolina. Assistant D.A. Freda Black is seeking Curliss' notes, hoping that they will help with the prosecution. The *News and Observer* has refused to turn the notes over, claiming that they are privileged information under the First Amendment. Judge Orlando Hudson, after reviewing the notes, determined that they should given to the state because they could be useful in prosecuting Allen. At the request of the *News and Observer*, the judge stayed his order for one week as the paper sought review of the decision. Defendants appealed directly to the state Supreme Court because the underlying case is a capital one, and in North Carolina interlocutory appeals in capital cases are heard directly by the state Supreme Court.

In re Sarah Lynn Owens

The *Allen* case comes shortly after the North Carolina Court of Appeals addressed for the first time whether North Carolina recognizes the reporter's privilege and, if so, to what extent. The Court of Appeals held that no constitutional privilege applies when representatives of news organizations are subpoenaed in a criminal case to testify about nonconfidential information obtained from nonconfidential sources. *In re Sarah Lynn Owens*, No. COA97-519 (N.C. Ct. App. February 17, 1998).

Television reporter Sarah Lynn Owens had appealed her conviction for criminal contempt for refusing to answer a prosecutor's questions concerning an interview with the lawyer of an indicted murder suspect. The prosecutors were attempting to have the contents of the interview entered into evidence to show that the suspect made inconsistent statements regarding the crime for which he was under suspicion.

When Owens refused to cooperate with the prosecutor's inquiry, the trial judge found her in contempt and sentenced her to thirty days in jail. At the conclusion of the evidentiary hearing, the judge reduced Owens' sentence to two hours, at which point she was released from jail.

The appeals court opinion is narrow in scope and does not discuss the privilege in any other context, except to note that a qualified privilege had been widely recognized in civil cases, and that the privilege often deals with reporters asked to divulge confidential sources or materials. In its decision the court does not define "nonconfidential" information, but it does note that "none of the information sought to be compelled from [Owens] was of a confidential nature or from a confidential source. The State merely sought confirmation from Owens of statements made by [the suspect's lawyer] in a previously broadcasted interview." *In re Sarah Lynn Owens*, No. COA97-519 (N.C. Ct. App. February 17, 1998). Given the court's language, it appears that "nonconfidential information" refers only to information that has been published or broadcast.

Counsel for Sarah Owens has stated that she will petition the North Carolina Supreme Court for discretionary review.

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Indiana Supreme Court Orders Disclosure of Jailhouse Interview
Rejects Constitutional Qualified Privilege

Stating that "the decisions construing *Branzburg* to recognize a qualified reporter's privilege . . . have misread Supreme Court precedent," the Indiana Supreme Court ordered an Indianapolis television station to turn over for *in camera* review a videotape of an interview, including outtakes, of a 16-year-old girl charged with the murder of her daughter. *WTHR-TV v. Cline*, 1998 Ind. LEXIS 12 (Ind. Feb 23, 1998). Rather than apply the jurisprudence that has developed in the wake of *Branzburg*, the court ruled that the third party discovery request was to be resolved under the Indiana Rules of Trial Procedure.

A Jailhouse Interview

Following her July 7, 1997 arrest for the murder of her daughter, 16-year-old Krista Cline was interviewed in jail by at least one Indianapolis television station, which subsequently broadcast portions of the interview on the local news. While it was unclear from the record who arranged and conducted the interview and exactly what was discussed, Cline's court-appointed attorney, Mark Earnest, was not present and did not give his consent to the interview.

Following the broadcast, Earnest served subpoenas on two Indianapolis stations, WTHR-TV and WRTV-6, demanding the following materials:

> Videotaped copies of all news footage and tapes (which have not been previously destroyed or reused), aired and unaired, edited and unedited, regarding the death of [Cline's] daughter, Alexis Cline, and regarding the questioning, apprehension, arrest and court appearances of Krista Cline or any other individuals who may have knowledge of this matter.

Following a hearing at which the stations opposed the request, the trial court ordered the stations to produce "any unaired footage pertaining to [this] cause," for *in camera* inspection and indicated that the tapes would be turned over to Earnest if the court found the material to be relevant or likely to lead to the discovery of admissible evidence. The trial court also ruled that any constitutional privilege that might exist did not apply under these "limited circumstances." The trial court issued a stay, however, permitting the stations to appeal.

A Matter of Last Resort

On appeal the Indiana Supreme Court, while noting that the parties and supporting amici based their arguments "largely on claimed constitutional privilege," stated that "[t]his court normally decides constitutional questions as a matter of last not first resort." 1998 LEXIS at *7. Thus, the court first addressed whether the Indiana Trial Rules "permit the enforcement of Cline's subpoena." 1998 LEXIS at *7.

Under the state's discovery rules, the court continued, "in the context of a defendant's discovery request in a criminal case, the following test has been applied to determine whether the information is discoverable: (1) there must be sufficient designation of the items sought to be discovered (particularity); (2) the items requested must be material to the defense (relevance); and (3) if the particularity and materiality requirements are met, the trial court must grant the request unless there is a showing of 'paramount interest' in nondisclosure." 1998 LEXIS at *10

The court noted, however, that the requirements "reflect a broader range of considerations that bear on permissible uses of discovery." 1998 LEXIS at *11. "Ultimately," the court continued to state, "these factors involve a balancing test that includes evaluation of the relevance of the material, its availability from other sources, the burden of compliance measured in terms of difficulty, and the nature and importance of any interests invaded. This test, as will be seen, begins to look suspiciously like the three-part test some courts find rooted in the United States Constitution when discovery is sought from newsgatherers. Resolution of this case, however, turns only on the application of general principles of discovery, particularly for third parties, to the peculiar interests of a newsgathering organization." 1998 LEXIS at *15-*16.

Interview Discoverable

Applying the discovery rules to Cline's request, the court affirmed the trial court's order with respect to the interview at the jail but reversed the disclosure order for all the other requested material. The court found that, with the exception of the interview, Cline failed to specify what she hoped to gather from the stations. Thus, the court stated, "aside from the interview, her request amounts to the 'fishing expedition' held

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Indiana Sup. Ct. Rejects Reporter's Privilege

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to be impermissible under the discovery rules . . . ." 1998 LEXIS at *17.

With respect to the interview, however, the court found that Cline offered "a number of valid reasons for wanting [the] information," including its potential introduction by the state as admissions by a party opponent or the insights it may yield into how to present Cline's defense. 1998 LEXIS at *20. And while the court noted that "[w]here a media organization is subpoenaed, the Trial Rules require sensitivity to any possible impediments to press freedom," it continued to state that the stations "have not established a paramount interest in non-production of Cline's interview," as "there is no chilling effect on press informants that would inhibit the flow of information on issues of public concern," because the source's identity is already known. 1998 LEXIS at *22.

Stating that "this case involves the defendant's entitlement to information in the hands of a third party that may be relevant to the search for the truth in this case," the court held that, subject to in camera review, the videotape of the interview should be made available to Cline. 1998 LEXIS at *23.

No Qualified Constitutional Privilege

While noting that "today's decision voices no opinion on whether a privilege of any kind exists with respect to [reporter's notes or other records]," and that, "[r]ead most favorably to the stations, *Branzburg* may leave the door open for a qualified reporter's privilege under some circumstances," the court ultimately refused to recognize a qualified Constitutional privilege. 1998 LEXIS at *25, *28. In fact, the court stated that "the decisions construing *Branzburg* to recognize a qualified reporter's privilege in our view have misread Supreme Court precedent." 1998 LEXIS at * 34-*35.

In reaching this conclusion the court rejected the press' arguments that without the privilege the flow of information on matters of public concern would be chilled by pointing out that, "[n]ot long after *Branzburg* was decided, an unprecedented era of aggressive investigative reporting, beginning with the Watergate scandal, was born." 1998 LEXIS at *36. In addition, the court found the argument that compelled disclosure might lead to the prompt destruction of data unpersuasive as it seemed that the press was seeking to "assert a right to keep the information from the public in the name of preserving it." As the court reasoned, "[i]f it is never to see the light of day, it is difficult to see the public value in its preservation." 1998 LEXIS at *35.

Further, the court found that the suggestion that disclosure "will reveal insights into the minds of television editors and chill reporting of crimes of public concern," to be speculative and under *Herbert v. Lando*, not a basis for a First Amendment right. Rejecting the argument that compliance with discovery subpoenas will be a drain on resources and time, the court stated, "[i]f the claim is that somehow the media are exempt from the obligations of citizenship because compliance may distract them from a higher calling, we reject that just as we reject similar claims from public officials, clergy, and others." 1998 WL at *39, citing *Clinton v. Jones*, 520 U.S. __, 117 S.Ct. 1636 (1997).

Finally, responding to fears that defense lawyers will use the media "as a short cut to criminal discovery," the court cautioned that "trial courts should be sensitive to any claim of improper purpose when a newsgatherer objects to a discovery subpoena. But this must be done on a case by case basis; the possibility of abuse does not justify immunity from discovery that the stations seek. Unless and until this horrible shows up at a real parade we are unwilling to assume it as a basis for decision." 1998 LEXIS at *40.

A Companion Case And An Opposite Result

In a companion case decided the same day, the court once again applied the Trial Rules to a discovery order seeking "all news footage, aired and unaired, edited and unedited," regarding the murder of a man and the subsequent "questioning, apprehension, arrest and arraignment" of his wife. *WTHR-TV v. Milam*, 1998 Ind. LEXIS 10 (Ind. February 23, 1998). In *Milam*, however, the court rejected the disclosure request "due to non-compliance with Trial Rules' requirement of reasonable particularity and materiality." 1998 LEXIS at *1.

The court went on to state that while the Trial Rules presumptively entitle a defendant to discover any evidence from any party or non-party that will assist in the preparation of a defense, the "discovery rights do not entitle a criminal defendant to commandeer the efforts of third parties as a substitute for independent defense investigation. Nor do the Trial Rules allow the defendant to rummage through the files of third parties, particularly the press, for information whose materiality is only a matter of pure supposition." 1998 LEXIS at *5-*6.

California Newspapers Win Access Victory

Trial Court Order Prohibiting Press Contact With Former Jurors Held Unconstitutional

By Nicole Wong

The criminal prosecution of a county supervisor in Northern California ended with a remarkable order from the bench. At the conclusion of the trial, in which the jury found the local public official guilty on nine felony political corruption and perjury charges, the judge issued a blanket order prohibiting the press from contacting the discharged jurors based only on the jurors' purported *preference* not to speak to reporters.

Thus, in a case which held the attention of the local community for more than a year, the press was prohibited from speaking to the jurors who convicted a public official involved in one of the county's biggest political scandals in recent history. Indeed, the press was prohibited from even asking the jurors for an interview. Contra Costa Newspapers, owned by Knight Ridder, and its chain of daily newspapers, including the *Contra Costa Times*, petitioned the state appellate court to reverse or vacate the trial court's order.

In a case of first impression in California, the Court of Appeal issued a peremptory writ ordering the trial court to vacate its unconstitutional order. *Contra Costa Newspapers, Inc. v. Superior Court*, No.A081220 (Cal. Ct. App. 2/20/98).

The People v. Bishop

The investigation and trial of former Contra Costa County Supervisor Gayle Bishop for forcing her county-paid office staff to perform work for her re-election campaign and private law practice, and for lying to the grand jury investigating the charges, attracted enormous local public attention. Ms. Bishop maintained in public meetings and in interviews with the press that the investigation was a "witch hunt" conducted by her political enemies. The locally-elected District Attorney recused himself after Bishop charged that her prosecution was politically motivated. Upon the defendant's motion, the entire Contra Costa County bench also was recused.

When the case went to trial, the defense counsel complained that the case was "sold to the jury as a lesson in ethics." Ms. Bishop's case was presided over by a visiting judge who, during the course of the trial, attempted to gag not only the trial participants, but *all* county employees from *any* discussions about the case or *any* matter *arguably related* to the case, an order later narrowed.

Finally, after the jury rendered its verdict, the trial judge issued an oral order to the members of the press present in the courtroom at the time. He based his order solely on the jurors' purported preference at the time not to discuss their deliberations:

> Before I send the jury out, I'd like to make it clear to anyone from the press, the jurors have told me that they do not choose to discuss their deliberations or how they reached a verdict. So I'm assuming everyone here has already received a 'no' from each of the jurors.
>
> If any juror disagrees with that, please raise their hand.
>
> That is my understanding. The jurors have not raised their hands. That means they are not to be contacted by the press, because they have already stated their preference not to be contacted.

Counsel for the newspaper wrote a letter brief to the trial judge and, when the judge declined to consider the letter, sought a hearing to have the order withdrawn. The trial judge refused to hear the matter.

The trial court's order was made all the more egregious when, seven months after the verdict, the defendant filed a motion for new trial based in part on allegations of jury misconduct. The press was able to report the contents of the court-filed declarations from two jurors accusing certain jurors of failing to disclose their pre-existing relationships with material witnesses in the trial and improperly offering evidence during deliberations. The trial judge's order, however, barred the press from seeking a denial or any response from those accused -- a typical and expected journalistic practice.

Contra Costa Newspapers filed a Petition for Writ of Mandate to reverse or vacate the trial court's order.

Court of Appeal Finds Order Unconstitutional

The California Court of Appeal reviewed the trial court's blanket order in light of both the state statutory provisions governing access to jurors and the constitutional right to gather news.

As a beginning point, the Court recognized the long line of cases establishing a qualified First Amendment right of access to criminal trials, including the right to gather news about such

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Juror Interview Ban Held Unconstitutional

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proceedings. The Court found that any inhibition against news coverage of a trial carries a heavy presumption as an unconstitutional prior restraint.

Next, the Court analyzed the order under California Code of Civil Procedure section 206 which provides that jurors have "an absolute right to discuss or not to discuss the deliberation or verdict with anyone." Section 206 also specifically prohibits any unreasonable contact with jurors by the defendant, his or her attorney, the prosecutor, or their representatives.

The Court held that the statute did not authorize the trial court's order as it clearly grants jurors the unimpeded right to discuss the deliberation with *anyone*, including the press, and makes no reference to restraining anyone from contacting the jurors other than the parties and their representatives.

Finally, the Court found that the trial court order could not withstand constitutional scrutiny as it failed to articulate any compelling government interest in keeping the press away from the jurors, and was not limited in time or scope so that it encompassed every possible juror interview situation.

In opposition to the Petition, the California Attorney General argued that the jurors' expressed desire to be left alone outweighed the First Amendment interests. According to the Attorney General, the state's interest in the administration of justice is tied to ensuring jurors' privacy because of "the very real danger that citizens will be unwilling to serve on juries if their privacy is not respected." The Attorney General relied on cases discussing contact with jurors by the defendant or his or her attorney.

The Court, however, distinguished the Attorney General's authorities from cases dealing with juror contact by the media. The trial court's sweeping order, based on nothing more than the jurors' failure to raise their hand and disagree with the judge's conclusion that they should not be contacted by the press, "impinges upon constitutional rights, including not only the defendant's right to move for a new trial, but also the rights of jurors and the media."

James Brelsford, Rachel Silvers and Nicole Wong of Hosie, Wes, Sacks & Brelsford, LLP, in San Francisco are counsel for Contra Costa Newspapers, Inc.

Newspaper Seeks Supreme Court Review of Fifth Circuit Ruling Barring Post-Trial Juror Interviews

Capital City Press, publisher of the *Baton Rouge Advocate* newspaper, and its reporter, Joe Gyan, are seeking U.S. Supreme Court review of the Fifth Circuit's decision upholding a post-trial order prohibiting news organizations from conducting post-verdict interviews of jurors regarding any aspect of the jury's "deliberation" in the absence of a "special order" issued by the district court. *United States v. Cleveland*, No. 97-30756 (5th Cir. October 29, 1997); *petition for cert. filed sub nom, In Re Capital City Press and Joe Gyan* (no number yet assigned); *see also LDRC LibelLetter*, November 1997, p. 23. Petitioners motion for a rehearing *en banc* was denied.

According to the Fifth Circuit panel's decision, the district court's order was a permissible restraint on speech in part because the court interpreted the order as barring the press from interviewing jurors about their deliberations but not as limiting the jurors from discussing anything, including deliberations, "on their own initiative."

Petitioners contend that the order is a content-based prior restraint on speech. Petitioners say that the Fifth Circuit abandoned its duty to apply strict scrutiny analysis to post-trial orders restricting juror interviews, a standard set by *In Re The Express-News Corp.*, 695 F.2d 807 (5th Cir. 1982). In place of that standard, petitioners argue, the Fifth Circuit has adopted a loose, discretionary standard that conflicts with precedent set in the Fifth, Ninth and Tenth Circuits.

In *United States v. Sherman*, 581 F.2d 1358 (1978), the Ninth Circuit held unconstitutional a district court order that, among other things, ordered everyone, including the press, to "stay away" from the jurors and that forbade jurors from discussing the underlying criminal case with anyone. The Ninth Circuit treated the order as an impermissible prior restraint on the press. Similarly, in *Journal Publishing Co. v. Mechem*, 801 F.2d 1233 (1986), the Tenth Circuit invalidated an instruction to jurors that "[y]ou should not discuss your verdict after you leave here with anyone. If anyone tries to talk to you about it, or wants to talk to you about it, let me know. If they wish [to] take the matter up with me, why, they may do so, but otherwise, don't discuss it with anyone." The Tenth Circuit treated this directive as a prior restraint directed at

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Cert. Sought in Juror Interview Ban Case

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both the jurors and the press, and applied prior restraint analysis.

The petitioners also argue that the Court should invalidate the ban because it is ineffective in protecting the secrecy of jury deliberations, a rationale offered for the ban by both the district court and the Fifth Circuit. Petitioners argue that the Court has consistently invalidated restrictions on First Amendment freedoms that are ineffective in protecting countervailing interests. *Cf. Smith v. Daily Mail Pub. Co.*, 443 U.S. 97 (1979) (Court invalidated state statute restricting only newspapers from publishing names of juvenile defendants, while permitting television, radio and other discussion and publicity because statute did not accomplish stated purpose).

The rationale offered for the ban here focuses on the idea that by protecting the secrecy of the deliberations process, the court increases the likelihood that jurors will debate more freely than if they were in fear that their comments might someday be made public. Petitioners point out, however, that the ban does not effectively protect the secrecy of the deliberation process because though the press must refrain from conducting "interviews" of jurors, the jurors themselves remain free to talk to family, friends, school, church and civic groups, to write letters to the editor, even to publish books and to appear on talk shows, "on their own initiative." Under the ruling, petitioners point out, jurors can even discuss the performance of fellow jurors who do not wish to reveal their votes and thoughts.

Case Updates:

Reporter Fined for Criminal Contempt

A U.S. District Court judge in North Carolina recently fined Kirsten B. Mitchell, Raleigh bureau chief of the *Morning Star* of Wilmington, $1,000 after finding her in criminal contempt for opening a sealed settlement agreement given to her inadvertently by a court clerk. The maximum penalty Mitchell faced was six months in prison and a $5,000 fine. Judge Earl Britt agreed to withhold imposition of the fine while the newspaper appeals to the Fourth Circuit Court of Appeals in Richmond, Va.

In the related civil case reported in the *LDRC LibelLetter* last month (p. 10), Judge Britt awarded $500,000 to Conoco, Inc. for damages it claimed it suffered as a result of the ensuing press report that disclosed the terms of the confidential settlement into which the company had entered to end a toxic tort case. *Ashcraft v. Conoco, Inc. et al*, No. 7:95-CV-187-BR(3), slip op. (E.D.N.C January 21, 1998). According to undisputed testimony, credited by the judge, the newspaper had learned about the settlement from confidential sources and would have published the news about the settlement even without Mitchell's information. Mitchell, a reporter at the time for the Wilmington *Morning Star* and the New York Times Regional Newspaper Group, was held joint and severally liable, along with the *Morning Star*, for civil contempt for willfully violating a court order that sealed the terms of the settlement.

The civil contempt verdict is also being appealed to the Fourth Circuit Court of Appeals, and it is expected that the cases will be consolidated.

Ninth Circuit Denies Rehearing in Berger

The U.S. Court of Appeals for the Ninth Circuit has denied CNN's motions for rehearing and rehearing *en banc* in *Berger v. Hanlon*. In November 1997, the appeals court held that media members who filmed and recorded sound as federal agents searched plaintiffs' ranch acted jointly with the government, and hence "under color of state law," sufficient to be held liable for violating the plaintiffs' civil rights under *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *Berger v. Hanlon*, 25 Media L. Rep. 2505 (9th Cir. 1997); *see LDRC LibelLetter*, November 1997 at p. 21. The appellate court did, however, grant a stay in the case permitting the defendants to petition the U.S. Supreme Court for review. The petition for *certiorari* is due on May 26.

Hit Man Publisher Seeks Cert.

Arguing that the Fourth Circuit's "reformulation of Brandenburg will expose to civil liability a broad range of expression that has heretofore enjoyed constitutional protection," the publishers of *Hit Man: A Technical Manual for Independent Contractors*, have petitioned the U.S. Supreme Court to review a Fourth Circuit decision reversing summary judgment on an aiding and abetting claim under Maryland law.

Media Groups Sue For Access to Court Filings in Clinton Cases

With mixed results, media organizations have recently sought access to sealed documents in the Paula Jones case and in the Independent Counsel's grand jury investigation of the President. The access motions are particularly interesting given the extraordinary circumstances surrounding the two cases, including the intense focus on the quality of the media's reporting, or lack thereof, and the controversy surrounding leaked information. The judge in the Paula Jones case, Susan Weber Wright, issued a stinging rebuke to the media in denying a motion to gain access to pretrial depositions -- going so far as to accuse the media of "often inaccurate media coverage of virtually every aspect" of the case. *Jones v. Clinton*, No. LR-C-94-290, slip op. at 1 (E.D. Ark Mar. 9, 1998). And one Washington Post columnist has suggested that, as a matter of public interest, media organizations should investigate each other to reveal their rivals' sources, since the sources of leaks and their agendas have become a prominent issue affecting both cases. W. Raspberry, Washington Post, March 13, 1998, A25.

President's Contempt Motion Unsealed

Taking the successful motion first, Time, Inc. and Dow Jones moved separately to unseal the highly-publicized contempt motion against Kenneth Starr over alleged leaks of secret grand jury testimony to the media. The contempt motion is based, in large part, on the publicly released letter from the President's personal lawyer, David Kendall, to Starr complaining of leaks. The contempt motion was sealed because of a local rule in the District of Columbia requiring all motions made in connection with a grand jury proceeding to be filed under seal. This rule creates the somewhat absurd procedural prospect of multiple, or if taken to the extreme, never ending, access motions. Here, for example, Judge Norma Holloway Johnson's order to unseal the motion remains under seal, apparently subject to a motion to unseal, which if successful may create another sealed order.

Local Rule Requires Sealing

The media argued that the Local Rule did not require the continued sealing of the President's contempt motion and that it should therefore be unsealed under the common law right of access to judicial proceedings and the First Amendment. Local Rule 302 states that a "motion or application filed in connection with . . . matter[s] occurring before a grand jury . . . shall be filed under seal." But Rule 302 goes on to state that such motions "may be made public by the Court on its own motion or on motion of any person upon a finding that continued secrecy is not necessary to prevent disclosure of matters occurring before the grand jury." Rule 302 is quite possibly unconstitutionally overbroad in that it requires automatic sealing without regard to content. Additionally, although Rule 302 permits a court to make material public on its own initiative, thereby providing some review as to whether or not secrecy is warranted, it does not appear that Judge Johnson, the supervisory judge over the grand jury, is conducting any review of the sealed filings for that purpose.

With respect to Rule 302, the media argued that in so far as the contempt motion complains of alleged leaks to the media, almost by definition the motion does not reveal secret matters before the grand jury. Similarly, the complaint over press leaks would not be subject to grand jury secrecy under the relevant provisions of the Federal Rules of Criminal Procedure because the contempt motion involves matters of public knowledge. Thus, where there is no interest in preserving grand jury secrecy, the traditional common law and First Amendment presumption of access should prevail. In fact, the Office of the Independent Counsel filed a response stating that it had no objection to unsealing the motion. The President's lawyers also apparently did not object. At this point, we do not know the basis for the judge's ruling to unseal the motion. Her decision granting Dow Jones' motion is sealed, but she released her order denying Time's motion. This two paragraph decision merely states that Time's motion is denied as moot because relief was granted on Dow Jones' motion. Media groups had also asked for -- and been denied -- access to the hearing on the contempt motion held on March 12th.

Also under seal is a decision by Judge Johnson denying a motion by ABC, CBS, NBC, The New York Times and Washington Post requesting access to any motion papers filed in support of claims of executive privilege by any White House officials or personnel. Several news organizations, however, have reported that the basis for denial is that no papers had yet been filed.

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Media Groups Seek Access In Clinton Cases

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A motion by the Associated Press, Los Angeles Times, Newsday, USA Today and CNN for access to any transcripts of hearings on executive privilege -- as opposed to motion papers -- was subsequently denied. Also denied was a request for access to documents relating to the invocation of attorney client privilege by Monica Lewinsky's first defense lawyer asserted in response to a subpoena by the Independent Counsel, as well as a request that D.C. District Court Chief Judge Johnson establish some procedures to handle the increasing number of access requests. Among other things, this latter motion proposed that the court at least make public a docket sheet of filings. The orders denying these motions are all under seal. In fact, their existence came to light circuitously on March 18, 1998 when the D.C. Circuit Court denied a writ of mandamus filed by the media groups on the grounds that Judge Johnson had already decided -- and denied -- the motions. The media groups have filed a notice of appeal to the D.C. Circuit and their appeal could be heard as early as March 25th.

The Paula Jones Case: No Access to Pretrial Discovery

The judge in the Paula Jones civil case dismissed motions by a large coalition of media entities, as well as that of a conservative legal organization, that she rescind or modify the 1997 protective order entered on consent of all parties so that the movants could have access to pretrial discovery, including President Clinton's deposition. *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark Mar. 9, 1998). The Judge essentially reaffirmed the rationale of the 1997 order, that a protective order covering pretrial discovery is necessary to insure a fair and impartial jury and to limit prejudicial pretrial publicity, adding protecting the privacy interests of individuals who might be subject to embarrassing discovery as an additional ground. According to Judge Wright "the saturation of the public (including the possible jury pool) in recent weeks with salacious details that are purported to have originated in this case have only served to confirm that the Order prohibiting dissemination of information concerning discovery was necessary to protect this vital interest." Slip op. at 5.

Judge Condemns Media's Poor Reporting and Deems Access Request Disingenuous

The most interesting aspect of the decision are the sharp words Judge Wright has for the media. In response to the argument that unsealing pretrial evidence would be the best antidote to the rumors and self-serving leaks swirling around the case, Judge Wright blamed the media for reporting rumors in the first instance. "It is, after all," wrote Judge Wright, "the media themselves who are providing a vehicle for the dissemination of alleged leaks of information and rumor and deeming such matters to be newsworthy. [Unsealing discovery] would be to reward the violations of the Order and the media's profiting therefrom . . . . Moreover, the movants' 'antidote' for curing their own misreporting assumes that any information that is unsealed would be accurately reported, an assumption the Court simply is not willing to make given the previous reporting of materials that are not under seal." *Id.* at 5-6. Judge Wright goes on to say:

> Driven by profit and intense competition, gossip, speculation and innuendo have replaced legitimate sources and attribution as the tools of the trade for many of these media representatives. Stories are apparently no longer subjected to critical examination prior to being printed. Indeed, the printing of a story in one publication is itself now considered newsworthy and justification for its reprinting in other publications, without critical examination for accuracy and bias. Thus, stories without attribution and based on gossip, speculation, and innuendo fly through media outlets with blinding speed only later to be placed in context or subjected to clarification and/or retraction, as the case may be. *Id.* at 6-7.

Whether or not any of what Judge Wright says in the quoted paragraph is true, and she cites no examples in her opinion, inaccurate reporting by her so-called media "monolith" is an unusual, if not misplaced, concern in weighing an access request. Moreover, it is not clear how granting access would reward violators of the protective order, namely the parties to the lawsuit bound by it. The intended beneficiaries of access, at least in traditional First Amendment analysis, would be the public and its interest in obtaining true information on matters of important public concern.

Ken Starr, The Press, and The Subpoenas:
The First Amendment and Obstruction of Justice

There is ultimately a lengthy article to be researched and written about the many ways in which the press interacts with the Independent Counsel. There are seemingly limitless journalistic issues to be discussed, but there are serious First Amendment ones as well. In recent years, the press has experienced a number of subpoenas from Ken Starr's investigation (as well, it is rumored, from other independent prosecutors' offices) for testimony, notes, and outtakes. Very little has been said or written about these matters.

In addition, and with a great deal more publicity, in response to critical reports about Ken Starr and individual members of his staff, Starr's office subpoenaed White House communications aide, Sidney Blumenthal, to testify before the grand jury about what he said to reporters and they to him about Starr and his staff. Starr's office also subpoenaed investigators working for President Clinton's law firm, and investigators who, two years ago, were working for the *National Enquirer*, to question them about the criticism of Starr and his staffers.

Obstruction of Justice

Concerned about news stories reporting past legal problems of some on his staff and what he saw as numerous inquiries on other negative matters, Ken Starr struck back with, among other things, a subpoena to Sidney Blumenthal, former journalist for the *New Yorker* and the *Washington Post* and currently a member of the White House staff as a communications advisor, and, presumably a source for these stories.

> Ken Starr: "The First Amendment is interested in truth, and our office has been subjected, over recent weeks, to an avalanche of lies. It's the appropriate purpose of the grand jury to inquire into whether that activity is part of an effort to impede its investigation."

Suggesting that a question of obstruction of justice was at issue, Starr subpoenaed Blumenthal to appear on February 26 before the federal grand jury and, according to reports, asked him to turn over "any and all documents referring to the Office of the Independent Counsel" or to "any contact directly or indirectly with a member of the media which related or referred to the OIC or attorneys or other staff members of the OIC."

His lawyer, Jo Marsh, moved to quash the subpoena for abuse of authority. The judge ruled against Blumenthal and said that prosecutors were entitled to question him and to obtain relevant notes. The scope of the subpoena, however, was narrowed so that it encompassed only the materials he compiled after joining the White House (All Things Considered, 2/24/98; The News & Observer 2/25/98).

Geraldo Rivera reportedly obtained the questions asked before the grand jury from Blumenthal and they were as follows: (1) Do you know anything about private investigators hired by the White House? (2) Do you know anything about Terry Lenzer, Jack Palladino, Anthony Pellicano [an investigator]?; (3) What did you tell reporters about Ken Starr's prosecutors, including Michael Emmick and Bruce Odolf?; (4) What did reporters tell you about Starr's prosecutors?; (5) Who were the reporters?; (6) Did you and the First Lady or the President ever discuss the Office of the Independent Counsel?; (7) Did the First Lady or the President ever ask you to disseminate information about the OIC or his staff?; (8) Did the First Lady, the President or others at the White House ever ask you to take actions or steps against the OIC?; (9) Did you ever leak testimony from the grand jury in an effort to damage the OIC?; (10) Have you ever said anything positive about Kenneth Starr? (Rivera Live; 2/27/98)

Blumenthal certainly came out of the grand jury telling reporters that he had been asked to identify all of his contacts with reporters. In an interesting side-note to the Blumenthal subpoena, a reporter who apparently broke one of the stories about a OIC lawyer told in her column how she had obtained the story that she now understood was the basis of some of Starr's inquiries.

On the day of Blumenthal's scheduled visit to the grand jury, *Atlanta Constitution* columnist Martha Ezzard wrote that her initial column reporting on Bruce Udolf, one of Starr's senior attorneys, was, instead, the result of her own reporting, calls she made to law professors and legal experts on the question of the independent counsel law generally. One of the lawyers she called, as chance would have it, was one of the lawyers who represented Ronald Reeves in the successful civil action against OIC prosecutor Udolf for violating Reeves' civil rights. Udolf had Reeves arrested on a phony stolen gun charge and held him in jail for five days in an effort to coerce

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his testimony. Reeves was awarded $50,000, $2,500 in compensatory and $47,500 in punitive damages against Udolf. This matter has subsequently been reported widely.

The "obstruction of justice" probe led Rep. John Conyers (D.Mich) to call on Attorney General Janet Reno to put limits on the Independent Counsel's activities. In a letter from Conyers and other Democrats, they complained that Starr was running afoul of free speech protections in his investigation of negative comments about his staff.

After Blumenthal Came Terry Lenzner

In addition to Blumenthal, Starr subpoenaed Terry Lenzner, a private investigator whose firm, Investigative Group Inc. (IGI) was working with Williams & Connolly, lawyers for President Clinton. Lenzner told the press that he would not discuss the details of his firm's work for Williams & Connolly, but did say that if his investigators were looking into the backgrounds of members of Starr's staff, it would pertain to public and professional conduct and there would be nothing inappropriate about it.

And the Investigators for the National Enquirer

Starr also subpoenaed two Arkansas private investigators whom the *National Enquirer* said it dispatched in October 1996 to check out rumors that Starr was having an extramarital affair. One of the investigators took photos outside of the home of a prominent Arkansas heiress, Jane Hunt Hardin, but the *National Enquirer* never published anything on this allegation. (Washington Post, 2/28/98). The two men were O.H. "Bill" Mullenax, 61, head of the company and Tommy Goodwin, former Vice President of Mullenax's company. (USA Today, 2/27/98) They received their subpoenas on February 26th.

Goodwin and Mullenax said that the subpoenas directed them to supply "any and all documents including communications and billing records and invoices" relating to Clinton, his personal lawyer, Mickey Kantor, Blumenthal and Monica Lewinsky. Significantly, the OIC also directed Mullenax and Goodwin to provide "documents referring or relating to the Office of the Independent Counsel including records relating to any contact directly or indirectly with a member of the media, which related or referred to the OIC or attorneys or other staff members of the OIC." Neither man knew he was working for the *Enquirer* because they were hired through a third party. *TIME* speculated that the OIC may have become suspicious because both the *National Enquirer* and Clinton share the same lawyer, David Kendall. (3/9/98) An editorial in the *National Law Journal* questioned how the *National Enquirer* or the two investigators could have obstructed justice two years before the Lewinsky case even started. (National Law Journal, 3/3/98).

Subpoenas to the Press

Blumenthal told the reporters who covered his grand jury appearance that they would be next. In fact, there is reason to believe that a number of news organizations have already been subpoenaed to appear over the years before this grand jury, albeit not about news stories on Starr's staff. There was the well publicized dispute between ABC News and the Independent Counsel when, in 1996, the OIC sought to subpoena videotaped outtakes of Diane Sawyer's interview with Susan McDougal, portions of which were broadcast on ABC's *Prime Time Live* on September 4, 1996. *Starr's subpoena to ABC* followed the court's finding Ms. McDougal in contempt for her refusal to testify before the grand jury. Starr's rationale for seeking to subpoena the outtakes was that McDougal alluded to matters under investigation in the aired portion of the interview and that there was reason to believe that she may have disclosed more relevant information off-camera "for which the grand jury has a compelling need." (Associated Press Political Service, 10/13/96).

ABC produced the transcript and tape of the aired interview but tried to quash the subpoena for the outtakes.

District Court Rejects Privilege

Judge Susan Weber Wright denied ABC's motion to quash the subpoena on November 6, 1996 and ordered the network to fully comply with the terms of the subpoena within 10 days of the date of entry of her opinion. *See, In re Grand Jury Subpoena Am. Broadcasting Cos., Inc.*, 947 F. Supp. 1314 (E.D. Ark 1996). Judge Wright found no applicable First Amendment-based privilege, no relevance to the state law privilege, nor to DOJ guidelines on such subpoenas.

The court rejected ABC's argument that the First Amendment gives journalists a qualified privilege, holding that such

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a privilege is foreclosed by the Supreme Court's opinion in *Branzburg v. Hayes*. *In re Grand Jury Subpoenas*, 947 F. Supp. at 1317. As justification for rejecting the 3-part privilege test (though the opinion later declares that ABC's motion would fail even if the 3-part test was applicable), she stated that it would only invite procedural delay and detours. The opinion does acknowledge, however, that *Branzburg* did not foreclose any and all First Amendment challenges to a grand jury subpoena, mentioning that when grand jury investigations are conducted in bad faith or for purposes of harassment and disruption of a reporter's relationship with her news source, First Amendment protections may apply.

Judge Wright also rejected ABC's argument that the court should look to Arkansas's shield law in applying the First Amendment journalist's privilege because state law privileges do not apply to a federal grand jury subpoena.

And importantly, the court held that the Independent Counsel is not bound to follow Department of Justice guidelines, and specifically those governing issuance of press subpoenas, because to do so would be inconsistent with the purpose of the statute authorizing the OIC (28 U.S.C. § 594 (f)). Department of Justice guidelines requiring authorization of the Attorney General would be contrary, she found.

ABC gave the Independent Counsel a transcript and video tape of its complete interview with Susan McDougal on November 15, 1996. Teri Everett, spokeswoman for ABC News stated that "It was a difficult decision. We decided to turn it over. We never like to do that." ABC News decided not to appeal the district court decision for fear that the appeals court would make a ruling that would hurt the media for years. (Electronic Media, 11/25/96) An ABC spokesperson said "the most prudent course of action was to turn them over. Losing the case, which appeared likely given recent cases in that circuit would have made worse law." David Bartlett, president of the RTNDA, disagreed saying that "every time . . . a news organization gives into an unwarranted subpoeana, it's one more nail in the coffin of our very important right to resist that intrusion into the editorial process by the government."

William Morrow & Co.

And there was the equally well-publicized subpoena to William Morrow & Co. last summer for notes, manuscripts and other materials concerning Webster Hubbell's memoir. *See LDRC LibelLetter*, September 1997 at p. 17. Morrow offered to provide OIC with certain financial documents, but rejected a proffer of editorial materials. They moved to quash in the Southern District of New York, arguing that a qualified privilege applied and the subpoena was in violation of DOJ Guidelines, and a hearing was scheduled before Judge Denny Chin. But before Judge Chin could hear the case, and in the face of a great deal of press attention to the matter, the OIC settled with Morrow. OIC agreed to take financial documents only and limited testimony on the financial arrangements.

WPEC-Channel 12

Kenneth Starr issued a subpoena on February 4, 1998 to WPEC-Channel 12 and a number of other media outlets in Palm Beach County directing them to "[p]roduce the video tape or tapes depicting President William Jefferson Clinton with Ms. Monica Lewinsky on a trip President Clinton made to Florida during which he visited with golfer Greg Norman." (Orlando Sentinel, 2/7/98) No such footage was found and Norman categorically denied that Lewinsky was there. WPEC General Manager Bill Peterson speculated that the catalyst for the subpoena may have been recent inquiries that were made by WPEC and the Palm Beach Post in Washington, DC.

WPEC's lawyer, Robert Rivas, was quoted as saying that he laughed when he first saw the subpoena. "I took it seriously, but it was funny as hell in this sense: If Channel 12 had such footage, don't you think the station would have aired it the minute they found it? It would've been a hell of a story."

He later noted: "One day it will be a badge of shame not to have been subpoenaed by Kenneth Starr. If you don't get a subpoena, it's going to prove you're a nobody."

* * * * * *

It has been suggested -- and indeed, Jim Goodale of Debevoise & Plimpton wrote in the New York Law Journal in December -- that a fair number of other major news organizations have received subpoenas from OIC. Little has been said or written about these subpoenas or their outcome. American Journalism Review has a reporter out looking into this issue and she is hoping to write something on it for the April issue. It may be that an airing of the issue -- such as in AJR -- will have a salutary effect of opening up the matter to public scrutiny and debate, or, at a minimum, press scrutiny and debate.

Fred Friendly Died This Month And Journalism in the Clinton/Jones/Starr/Lewinsky Affair Comes in for Questions

By Sandy Baron

Fred Friendly died on the evening of March 2. An extraordinary man -- some would say a force of nature -- he generated a seemingly endless number of great ideas and concepts into broadcast journalism, public television, education, First Amendment analysis, and the Fred Friendly Seminars. Fred will be celebrated and memorialized much over the next weeks and months, and I am glad that we at LDRC honored him last November. I know that it brought him great pleasure, as did reviewing the videotape and photographs we made of the evening.

But at a recent Columbia Journalism School First Amendment Leaders Breakfast, Floyd Abrams noted that had Fred been well over the last months, he would have been outraged over matters of the coverage of President Clinton, Monica Lewinsky, Ken Starr. He would have been angered by the rush to judgment of many in the press -- those who had the President resigning, if not impeached, within days of the first words on the story -- by the mixing up of pundits and reporters to the point where the public barely distinguishes the two, by the concerns that the imperative to be first may have overcome the imperative to be right all too often.

Whether one agrees with that assessment or not, the coverage of the Lewinsky episode has generated considerable comment.

Columbia Journalism School First Amendment Breakfasts

Columbia Journalism School has had two Breakfasts, one in January and one in March, that dealt with this coverage. I want to mention these breakfasts, not only because I owe them a debt of gratitude for including me on the roster, but because I urge you to read the transcript of the one held on January 28, entitled *Gossip and Journalism.* The transcript can be found on the Columbia Journalism website and I am told that the transcript for the subsequent Breakfast will go up at a future date. The website is: www.cjr.org/html/press_releases.html.

Gossip, Journalism and The President

Gossip and Journalism was scheduled long before the Lewinsky scandal broke. But it was fortuitous. Four truly professional and respected purveyors of gossip spoke about their concerns that amateurs were entering the field in the guise of Washington coverage. They were: Neal Travis of the Murdoch organization and creator of *Page Six* of the *New York Post*, one of New York's premiere gossip pages; Caroline Miller, editor in chief of New York magazine; Richard Stolley, senior editorial advisor of Time, Inc. and founding managing editor of People magazine; and Sally Quinn, former reporter for The Washington Post Style Section.

In March, the Breakfast was entitled *The President and the Media*, and the panelists were Richard Kaplan, President CNN/USA; Mara Liasson, White House Correspondent for NPR; and Walter Isaacson, Managing Editor of Time. Isaacson was ill and arrived late into the discussion.

On the Two-Source Rule

An issue that came up early and often at the Breakfasts: what did the two-source rule mean in the context of the core allegations in this story, and most particularly in the earliest days of the coverage.

That was the question that Dick Tofel of the Wall Street Journal gamely put first to Sally Quinn who had offered that the two-source rule was the requirement at the Post, and that it had resulted in some very tepid gossip columns. As Dick pointed out, the only two people who really knew what transpired between Lewinsky and Clinton were the two of them, and neither were sources for the news stories. And as Quinn conceded, no one had, in fact, seen them in an intimate moment together. Clinton denied it. Ms. Quinn, I think it is fair to say, was unable to really get her hands around this one. She talked of the tapes and Linda Tripp and Kathleen Willey and how if someone had tapes such as existed here, you wouldn't need two sources.

But the question was re-asked at the March breakfast, and in fairness to Quinn, neither journalist in March was better able to answer. What was said had to do with how their news organizations were glad they didn't run certain stories because they didn't have two sources for a given piece of information.

The answer that emerged from both panels was more or less that because people in Washington believed that the President

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had a sexual relationship with Lewinsky, her saying so on a tape with Tripp was enough to give substance to the story. The March panelists said even more clearly than those in January that the inside-the-Beltway take on the Clinton/Lewinsky story was that, at a minimum, the sexual allegations were true and Clinton's denial was untruthful. As a result, they both said, all of the sources for their reporters in Washington at the White House and on the Hill, at least in the early days of the story, were predicting the demise of President Clinton's tenure. That in turn informed the reporting on the story. Indeed, the panelists note, until the polls came out, inside Washington thought that the American people were going to be exercised about this relationship, as the Washington insiders apparently were, and that the President was vulnerable, as the White House and Congressional sources initially felt, and so the story played itself out in those early days as a serious threat to Clinton's presidency. As the public weighed in through polling by the news organizations themselves, the reporters saw a change in attitude among their sources in Washington, and the story itself, like a great ocean liner, began to turn.

From the earliest moments of the Clinton crisis, the press routinely intermingled reporting with opinion and speculation -- even on the front page -- according to a new systematic study of what and how the press reported. The study raises basic questions about the standards of American journalism and whether the press is in the business of reporting facts or something else.

— Committee of Concerned Journalists

Was the punditry, particularly when engaged in by beat reporters, wrong? Yes, said the panelists. Was the endless repeated use of the Monica/Clinton hug tape wrong? Yes, and particularly so when used or analyzed to suggest more than it was, which was one hug of 79 on that particular line. Whatever may be said of Clinton, it is clear to Washington insiders that he hugs, meaningfully, everyone.

But the panelists refused to accept the characterization that the press was gleeful with having a big story to report, or with the thought of being able to bring down a presidency. No, they said, the public is confusing glee with giddiness and adrenalin. Reporters were not happy; simply overstimulated.

Martin London, of Paul, Weiss, Rifkind, Wharton & Garrison, often a press opponent on libel and privacy matters, questioned the March panel about why the press had not expressed outrage over the subpoena to Sidney Blumenthal and the notion that a U.S. prosecutor could conceive of a right to charge those who criticize him and his staff with obstruction of justice or any criminal act, and, moreover, proceed to subpoena witnesses to testify about who said what to whom in the press about the prosecutor's office. There will be more on the prosecutor, was the answer from the journalists. And, in one of the frankest answers of the morning, Walter Isaacson said that it is hard for the press to take on the office that is responsible for so much information.

Isaacson, of Time, arrived very late, and quite unwell. But he was very responsive to the questions and candid in his answers. He decried the excesses of print journalists when they go on television, the tendency to talk in extremes and soundbites. Rick Kaplan agreed that soundbite vs. substance and the tendency to give opinion rather than facts, were pitfalls for the journalists on talk shows.

Caroline Miller, in the *Gossip* panel, noted the number of print journalists on television in the early days of the story "promoting their publications and their every tips and their breakthroughs." One cannot blame the public, she said, if they look at these reporters and editors and think that they look a lot like Harrison Ford pushing their latest movies.

Caroline Miller later noted that one reason the public might view the press's coverage with deep suspicion, was a sense that the content of the story and the packaging of the story didn't match. The story was sex, gossip, but the packaging was high minded, political, legal. She suspected that the public saw hypocrisy.

And Sally Quinn concluded that this story has been "very gratifying for true believers in responsible journalism who deplore gossip but also find themselves gratified by really salacious quote news unquote on the front pages of their paper every morning . . . . I once quoted a psychiatrist as saying you get what you want in life and I think that we all, given the current climate of news and gossip and journalism, have gotten what we want."

The Committee of Concerned Journalists Poll

Leaving the psychoanalysis to others, the Committee of Concerned Journalists issued a study in February which

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opened:

> From the earliest moments of the Clinton crisis, the press routinely intermingled reporting with opinion and speculation -- even on the front page -- according to a new systematic study of what and how the press reported. The study raises basic questions about the standards of American journalism and whether the press is in the business of reporting facts or something else.

The Clinton Crisis and the Press: A New Standard of American Journalism? (Issued February 18, 1998)

The Committee is headed by Bill Kovach, Curator, Nieman Foundation, and Tom Rosenstiel, Director, Project for Excellence in Journalism. LDRC reported on their proposed *series of open meetings in the LDRC LibelLetter* in November 1997, p. 35.

The Committee studied network and CNN nightly newscasts, prime time magazines and specials, and relevant segments of Larry King and Charlie Rose, Nightline, the morning news shows, the front page coverage of the New York Times, Los Angeles Times, St. Louis Post Dispatch, the Washington Post, the Washington Times, the Sunday network talk programs, and the Monday news magazines, Time and Newsweek -- all from Wednesday January 21 through Saturday January 24. It tried to measure the key assertions inside the stories.

The key findings:

* Four in ten statements were not factual reporting at all -- here is what happened--but were instead journalists offering analysis, opinion, speculation or judgment. The survey found that "the most common statement by journalists in the first days of the story was interpretive: that Clinton was in big trouble. Most often -- more than a third of the time -- reporters based this conclusion on their own opinion or speculation. Roughly a quarter of the time, journalists offered this as an analysis but cited some reporting to support it. Only 17% of the time did journalist cite named sources for this conclusion. Eleven percent of the time it was cited to another media source." (p.1, 4)

The study found that, following the reporting of the core allegations and his denial, the "next two most common statements by journalists were also conclusions: that the President was dissembling and that impeachment was a possibility. (p. 1)

* Fifty-six percent of the factual reporting was based on anonymous sources (35%) or another news outlet (21%). Forty percent of all reporting based on anonymous sourcing was from a single source. Only one statement in a hundred was based on two or more named sources.

* "As the story unfolded, the reliance on named sources and factual reporting tended to rise and the level of commentary and speculation dropped. But that also highlights the insistence to jump to conclusions, especially by news organizations that have the fewest facts." (p. 1-2)

* "The fact that almost half of all the reporting was punditry and analysis may be one reason the public is irritated with the press. Public opinion polls such as those by the Pew Research Center for the People and the Press showed that 80% of the public felt there was too much commentary in the coverage." (p. 2)

The Committee study breaks the reporting down by individual news organization, as well as by type of assertion, and the various levels of sourcing. LDRC has a copy of the survey, but it can also be obtained from the Committee of Concerned Journalists, 202-293-7394, (www.journalism.org/concern).

No doubt the coverage of this story will continue to be critiqued over the ensuing months. The extent to which we will see concerns about press coverage of this matter reflected in other arenas -- judicial decisions or jury verdicts that impact on press matters -- is, of course, unknown and unknowable.

Barnes & Noble Faces Criminal Prosecution For Selling Allegedly Obscene Photography Books

By Holly Barnard

Barnes & Noble is in trouble in Alabama for selling books by photographers Jock Sturges, David Hamilton, and Sally Mann that contain photographs of nude juveniles. Criminal cases are pending against the bookseller in Montgomery and Jefferson (Birmingham) Counties charging Barnes & Noble with violation of Alabama Code section 13A-12-191 (1994), which is entitled "Dissemination or public display of obscene matter containing visual reproduction of persons under 17 years of age involved in obscene acts."

According to the Alabama attorney for Barnes & Noble, Bobby Segall, the photographs in all of the challenged books have serious artistic value, are not lewd or obscene, and do not violate the juvenile obscenity statute. Segall says that Sturges's photographs, for example, have previously appeared on exhibition in the Museum of Modern Art and the Metropolitan Museum of Art, among others.

Two grand juries in the State apparently were not impressed. Grand juries called by the Attorney General of Alabama, Bill Pryor, and the District Attorney of Jefferson County, David Barber, issued indictments of Barnes & Noble under the juvenile obscenity statute on February 6, 1998, with both Pryor and Barber claiming to have acted independently of each other. Anti-obscenity prosecutions are popular in Alabama--and 1998 is an election year.

The Attorney General's case was filed in the State's capital, Montgomery, on February 18, 1998, after service of the indictment on Barnes & Noble. The indictment contains 32 counts, roughly half of which are in reference to the David Hamilton book "The Age of Innocence" and half in reference to the Jock Sturges book "Radiant Images." Otherwise, the counts are identical except for the dates and times on which Barnes & Noble is charged with having committed the allegedly criminal act of selling the Hamilton and Sturges books.

Jefferson County case files and indictments are not available to the public until after the pretrial conference, despite the fact that those documents typically are available in other counties in Alabama after the indictment has been served and returned to the courthouse. Both the Jefferson County and Montgomery County cases allege violation of Alabama Code section 13A-12-191 (1994), however, and are likely to be identical in substance. The Jefferson County indictment reportedly contains charges regarding sale of an additional book of photographs by Jock Sturges and one by Sally Mann entitled "Immediate Family," both of which feature photographs of nude juveniles.

The pertinent statute consists of one sentence: "Any person who shall knowingly disseminate or display publicly any obscene matter containing a visual reproduction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity, genital nudity, or other sexual conduct shall be guilty of a Class B felony." Not leaving anything to the imagination, the Alabama Legislature defined twelve of the operative words of the statute in some detail: knowingly, disseminate, display publicly, obscene, matter, sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity, genital nudity, and other sexual conduct. Alabama Code section 13A-12-190 (1994). The sentence for a Class B felony under Alabama law is "not more than 20 years or less than 2 years." Alabama Code section 13A-5-6 (1994).

Recent local news articles have reported that the State Attorney General has moved to join the prosecution of the Jefferson County case, which has been assigned to Circuit Court Judge J. Richmond Pearson. The case is scheduled for arraignment/pretrial conference on April 17, 1998, at 9 a.m. At the request of the attorney for Barnes & Noble, no settings have been made in the Montgomery County case, which has been assigned to Circuit County Judge William A. Shashy.

Holly F. Barnard is with the firm, Johnston, Barton, Proctor & Powell, LLP in Birmingham, AL.

Public Libraries Emerge As New Arena For First Amendment Battles Over Indecency and the Internet

By Gregory P. Magarian

In the ongoing conflict over adult material in cyberspace, the battle lines have shifted to the user level, particularly toward the primary institutions that provide free Internet access to anyone who wants it -- public libraries. This shift follows the Supreme Court's decision last summer in *Reno v. ACLU*, 117 S.Ct. 2329 (1997), which struck down a federal statute criminalizing circulation of "indecent" material on the Internet and thus stifled efforts to censor online content providers.

Now, as most major public library systems offer computer terminals that provide library patrons access to the Internet, libraries in many communities are coming under increasing pressure from politicians and antipornography activists to block patrons' access to adult material by outfitting their terminals with "filtering software." This software, offered in myriad forms by numerous manufacturers, allows computer owners to block access to disfavored material online. Free speech advocates, as expected, have opposed use of filtering software on the ground that it violates the First Amendment.

Filtering opponents already have filed one lawsuit. The decision to filter in Loudon County, Virginia recently prompted a court challenge from local citizens on the ground that the county had imposed an impermissible content-based restriction on speech in violation of the First Amendment. The Loudon library board voted in October 1997, by a slim 5-4 majority, to implement a "Policy on Internet Sexual Harassment," purportedly designed to prevent public Internet usage from creating a Title VII "hostile environment" in the library. That policy requires the use of filtering software on all the library system's computer terminals, for adult users as well as children, to block all access to "child pornography and obscene material (hard-core pornography)" and "material deemed Harmful to Juveniles under applicable Virginia statutes and legal precedents (soft-core pornography)." The policy also mandates placement of all Internet terminals and printers "in close proximity to, and in full view of, library staff," to aid enforcement. The board member who proposed the policy has stated that he received drafting assistance from the National Law Center for Children and Families, a far-right anti-pornography group.

A coalition of parents, library patrons, and Internet users, calling itself Mainstream Loudon, challenged the Loudon Internet policy in the U.S. District Court for the Eastern District of Virginia on December 22, 1997. The lawsuit alleges that the library board, in its rush to eradicate pornography, has blocked a substantial amount of speech that is constitutionally protected for adults, as well as speech that is protected even for children. The suit attacks the board's insistence on placing Internet access terminals in plain view, a practice that the plaintiffs charge chills patrons' willingness to access sensitive content and undermines the board's stated purpose of protecting unwitting viewers from exposure to offensive images. The plaintiffs note that other libraries have addressed similar concerns effectively by installing "privacy screens" to shield Internet users' materials from public view -- exactly the opposite of Loudon County's approach. Finally, the Mainstream Loudon complaint claims the board's policy is unconstitutionally vague. The suit seeks a permanent injunction against the policy.

A central theme in the Loudon challenge is that filtering software, although a useful tool for individual parents in the home, cannot draw the distinctions between protected and unprotected speech that the First Amendment demands in public libraries. Filtering software works based on blocking criteria set by its manufacturers. Some products are designed to block only sexually oriented material; others block material in additional categories, such as hate speech and illegal drugs. Some manufacturers use part-time workers or automated search engines to identify World Wide Web sites and other Internet content that fit their blocking criteria. Others design programs that automatically block access to Web addresses or other content containing certain key words, regardless of their context. Because manufacturers jealously guard their blocking criteria and methodologies as trade secrets, filtering software users generally cannot know exactly what their software is blocking, or how.

The filtering software used in Loudon County's libraries, which is manufactured by an Anaheim, California firm, blocks access based on a combination of identified sites and key words. According to the Mainstream Loudon complaint, the library board's own test of the software revealed that it blocked many non-pornographic sites, including the Web sites

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Library Filtering Software

of the AIDS quilt and the Society of Friends. Even after the manufacturer adjusted the Loudon software, the plaintiffs found that it blocked numerous innocuous sites, such as the Web site of the Yale graduate school of biology and a Mormon Church site that counsels against masturbation. Conversely, according to a news report, the software failed to block access to *Playboy* magazine's Web site and other adult material. These failings substantiate Mainstream Loudon's claim that the board's policy "improperly limit[s] adults to even less information than is fit for children" and also "fails to promote its purported objectives."

At the time of this writing, Loudon is the only library system in court over filtering software, but libraries across the country are embroiled in controversy. Local officials in Kern County, California, after determining that filtering software was incapable of distinguishing between protected and unprotected speech, recently staved off a threatened ACLU lawsuit by agreeing to maintain one filter-free terminal at each of the county's libraries. The ACLU also has refrained from challenging Orange County, Florida's use of filtering software, because it has concluded that the county is blocking primarily commercial pornography sites. Installation of filtering software has fueled ongoing debate from Boston to Austin to Salt Lake City. Some communities, including Boston after an initial outcry, have implemented compromise policies that permit unrestricted Internet access for adults. Others have chosen not to install filtering software on any of their terminals. Because libraries stand in an uncomfortable position in which virtually any decision they make will provoke fervent opposition, further litigation seems inevitable.

In addition, library filtering issues may soon be highlighted by activity on the legislative front. In mid-February, several United States Senators -- John McCain (R-Ariz.), Ernest Hollings (D-S.C.), Dan Coats (R-Ind.), and Patty Murray (D-Wash.) -- introduced legislation that would deny federal funding for Internet access to any library that did not install filtering software on at least one of its Internet terminals. The bill, which would apply even to libraries that have only one Internet terminal, would leave the criteria for filtering to local communities. State legislatures are considering similar bills in Indiana, Kansas, Tennessee, and Virginia.

The library filtering controversy presents questions the Supreme Court has yet to resolve. *Board of Education v. Pico*, 457 U.S. 853 (1982), which restricted content discrimination in a school library, may suggest a disinclination to permit the type of censorship demanded by filtering software advocates. However, the Court's sharp division on the subject and its less than emphatic opinion, as well as the quite different composition of the Court today, caution against assumptions. Further, the Court in *Reno* did not confront the questions presented by government-funded public access to cyberspace.

There is one lower court case from Oklahoma, which arose on somewhat similar facts, in which the court rejected a first amendment challenge to Internet content restrictions at a public university: *Loving v. Boren*, 956 F. Supp. 953 (W.D. Okla. 1997). The University of Oklahoma had removed certain Internet newsgroups from the university's news server, based on concerns that the newsgroups might be obscene. The university's action resulted in removal of some nonobscene sites. The university subsequently refined its policy to permit unrestricted newsgroup access for "academic and research purposes." Judge Wayne E. Alley concluded that no harm had been proved under the initial, more restrictive policy, and that the modified policy did not violate the First Amendment. These restrictions, however, blocked only limited content, on a single Internet medium, for uses outside the university's educational mission. Thus, the relevance of the lower court *Loving* decision to the constitutionality of a public library's employing a particular type of filtering software is not clear.

People who cannot afford home computers but want access to cyberspace must depend largely on public libraries. The controversy over filtering software, as it unfolds in Loudon County and in library systems around the country, may be the most important test yet for what the Supreme Court in *Reno* called "the vast democratic fora of the Internet." Filtering software litigation may well have significant consequences for First Amendment jurisprudence. Further, if legislation such as the pending U.S. Senate bill is enacted, challenges likely will provide courts with opportunities to address the complicated interaction between the Spending Clause and the First Amendment.

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