LDRC Libel Defense Resource Center

# LIBELLETTER

Reporting Developments Through March 19, 1999

*In This Issue . . .*



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## Georgia Supreme Court Reverses Trial Court's Order Compelling Reporter to Answer Interrogatories in Criminal Case

**By Thomas M. Clyde**

On March 8, 1999, in a unanimous decision, the Supreme Court of Georgia reversed a trial court that had ordered a Savannah Morning News reporter to answer interrogatories in a murder case. *In re Keith Paul*, 1999 Ga. LEXIS 264 (Ga. 1999). For the first time, the Court explicitly held that Georgia's statutory reporter's privilege applies to both confidential and non-confidential information and that a reporter ordered to disclose such information is entitled to an immediate, direct appeal to the Georgia Supreme Court.

The case arose from the prosecution of Arthur Hill for the 1989 murder of Annie Geohaghan. Eight years after Geohaghan's partially clothed body was found dumped near a Savannah industrial park, Hill walked into a police station and confessed to the crime. In the days after his arrest, Hill was not reluctant to discuss the details of the murder. To the contrary, at the time he said that he believed confessing was the only way to end memories of the slaying that had tormented him for years. In addition to various audiotaped statements, Hill twice gave detailed confessions to police by videotape. He also accepted

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## Georgia Supreme Court Reverses Trial Court's Order

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Morning News reporter Keith Paul's request for a jailhouse interview and again confessed his guilt.

### *Subpoena Issued to Reporter*

Months later, Hill's defense counsel moved to suppress all confessions to law enforcement on the grounds that they had been given involuntarily. For the *Jackson-Denno* hearing on the motion to suppress, the State issued a subpoena to Paul, which in turn led to a motion to quash under Georgia's statutory privilege, O.C.G.A. § 24-9-30.

After a failed effort to reach a stipulation regarding the interview, the trial court ordered the parties to prepare and the Morning News to answer written interrogatories on the matter. Although the State originally contended that it wanted Paul's testimony only on the voluntariness issue, the 93 interrogatories eventually issued by the State and the defendant sought a far broader range of information, including confidential sources and nonconfidential newsgathering information unrelated to the Hill interview. Over objection, the trial court ordered the Morning News to respond to the majority of these interrogatories.

In addition to filing a discretionary appeal to the Georgia Court of Appeals, the Morning News filed a direct appeal to the Georgia Supreme Court relying on the collateral order exception to the final order doctrine. On rare occasions, the Georgia Supreme Court had recognized the viability of direct appeals of collateral orders, but had never before ruled on the application of this principle to a reporter privilege matter. In its decision, the Court embraced this route to review.

> [T]he public interest in a free press would be irreparably harmed if review of the order compelling disclosure had to await a jury verdict in the murder case. Either the reporter would have already revealed the information or been imprisoned for failing to obey the disclosure order."

### *Order to Respond Reversed*

After favorably resolving the jurisdictional issue, the Court proceeded to reverse the trial court's determination that the parties had made a sufficient showing to overcome the qualified privilege. At the outset, the Court rejected the trial court's unusual "premise" that Hill's interview with Paul was tantamount to a custodial interrogation by a law enforcement officer. Not surprisingly, the Court held that reporter Paul was acting solely in his capacity as news reporter during the interview, not as an agent of the State, so the only relevance of the interview, if any, was as circumstantial evidence of Hill's general willingness to confess his crime. The Court then held that the vast majority of the interrogatories issued to Paul had no bearing on this issue. For the few interrogatories that were directed to the voluntariness issue, the Court held that the State already had alternative sources to reveal Hill's state of mind, including his demeanor on videotaped confessions and expert testimony from a forensic psychiatrist.

Although the Georgia Supreme Court had once before affirmed a trial court's order refusing to compel a reporter to disclose source information, *In re Keith Paul* marks the Court's first decision in circumstances where a reporter had been ordered to disclose information. Although implicit in the language of the statute, the Court's explicit recognition that the privilege extends to confidential and non-confidential information and to both civil and criminal cases is a welcome confirmation of the scope of the law.

*Thomas M. Clyde is an associate at Dow, Lohnes & Albertson in Atlanta, which filed an amicus brief on behalf of The Atlanta Journal-Constitution in support of the Savannah Morning News' appeal.*

# Subpoena for Reporter's Phone Records Held Improper

**By A. Bruce Jones and Alan N. Stern**

In a capital murder case, a Denver District Court judge ruled that the defendant improperly subpoenaed records of a TV news reporter's phone calls from the TV station's telephone carrier.

## *A Taped Confession*

To the utter surprise of news personnel at KMGH Channel 7, AT&T Wireless Services ("AWS"), without notice to its customer, waived proper service and turned over the reporter's cellular phone records to a criminal defendant in response to a faxed subpoena. Contrary to the policies of its parent, AT&T, the policy of AWS is *not* to inform its customers either of its receipt of a subpoena or AWS' compliance. In this case, defense counsel's possession of the telephone records only came to light when the information from the records was used during a suppression hearing.

In the case of *State of Colorado v. Nathan Thill*, No. 98-CR-621 (Dist. Ct. Colo. 1998), the defendant, an alleged white supremacist, is accused of murdering an African immigrant while the victim was waiting for a bus in downtown Denver in November 1997. While being held in jail, the defendant confessed to the police. He later repeated his confession, on videotape, in a jailhouse interview with reporter Julie Hayden of KMGH-Channel 7, which is owned and operated by McGraw-Hill Broadcasting Company, Inc.

During preliminary hearings in the spring and summer of 1998, the defendant's attorneys attempted to subpoena Ms. Hayden, along with her notes and records concerning the interview. The defendant's attorneys appeared to be pursuing a theory that Ms. Hayden had been acting as a police "agent," and therefore the defendant's confession to her was in violation of his constitutional rights. However, at a hearing on KMGH's motions to quash, Judge Federico Alvarez found that Ms. Hayden and her materials were protected under the Colorado press shield statute, C.R.S. § 24-72.5-101 *et seq.* and § 13-90-119.

Several months later, the defendant's attorneys moved to have the confessions—to both the police and the news reporters—suppressed.

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## NEWS MEDIA BE AWARE:

### YOUR NEWSGATHERING PROCESS AND SOURCES CAN BE DETERMINED THROUGH YOUR TELEPHONE AND OTHER RECORDS.

***Check Telephone Carrier Policies on Subpoenas***

***Review Contracts With Vendors On This Issue***

It was a shock to the station, the reporter, and to the parent corporation, McGraw-Hill, that the policy of AT&T Wireless Service ("AWS") was to produce subscriber phone records when subpoenaed, without any notice whatsoever (either of the subpoena or of the compliance) to the subscriber. Indeed, AWS was willing to waive proper service of the subpoena.

The AWS policies and practices are not those of its parent corporation, AT&T, which has long had the policy of notifying the subscriber of any such request or subpoena except in instances when it is expressly prohibited from doing so by law.

LDRC understands that some media handle this extremely important issue by agreement with their carriers requiring notice of any requests for their telephone records. It would be advisable for all media entities to review their agreements with their carriers -- and other vendors used by reporters, such as credit card companies -- to see if this matter is covered. If it is not, it is worth attempting to get the appropriate guarantees. Similar issues can arise with airlines, hotels, and rental car companies. At a minimum, reporters should be made aware of the potential problem. No better way to track down the confidential sources of a reporter, not to mention his/her entire newsgathering process, than through the paper trail left by modern commerce and communications.

## Subpoena Held Improper

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During the hearing on this motion, the defendant's attorney began questioning a police officer about telephone calls he had received from Ms. Hayden around the time of the defendant's confession to police. The defense attorney then produced records of Ms. Hayden's telephone calls made on her cell phone during the week the murder took place. It was later revealed that the records had been produced by AT&T Wireless Services ("AWS"), in response to a subpoena that had been faxed to its facility in West Palm Beach, FL.

Upon being alerted of this development, KMGH's attorney requested to be heard immediately and asked the Judge to prohibit further use of the telephone records until arguments could be raised on whether access to the records was prohibited under the First Amendment and the Colorado press shield statute. The Judge granted the request, pending a hearing on the matter three days later.

### *KMGH: Impermissible End Run*

At the hearing, KMGH argued that the defendant was attempting an impermissible "end run" around the Judge's earlier ruling that Ms. Hayden's confidential news information was protected by the Colorado press shield statute. KMGH noted that the subpoena of a reporter's telephone records—which may document contacts with confidential sources—directly threatens the newsgathering process and contravenes the policies furthered by the First Amendment, the Colorado Constitution, and the Colorado press shield statute.

KMGH cited a Colorado Supreme Court case, *People v. Corr*, 682 P.2d 20, *cert. denied*, 469 U.S. 855 (1984), which held that telephone customers have a privacy interest in their records, despite the fact that they are in the custody of a third party. KMGH also pointed to a Tenth Circuit case, *In re Grand Jury Subpoena to First National Bank*, 701 F.2d 115 (10th Cir. 1983), which held that if a subpoena of non-party records implicates First Amendment interests, then the subject of the records has standing to challenge the subpoena based on a First Amendment balancing test.

KMGH also cited case law in other jurisdictions – such as *Phillip Morris Co. v. American Broadcasting Co.*, 23 Media L. Rep. 1434 (Va. D. Ct., Jan. 26, 1995), which held that a party to a lawsuit may not get around the newsgathering privilege by subpoenaing a reporter's hotel, credit card and telephone records. The *Phillip Morris* Court had noted that, while it is theoretically possible for a reporter to gather news without leaving a paper trail—for example, by using pay telephones and making all purchases in cash—such measures were unduly burdensome and would hamper the free flow of information.

KMGH also pointed to federal statutory provisions as establishing its proprietary interest in the records. Section 222 of Title 47 of the United States Code, enacted in 1996 and entitled "Privacy of Customer Information", defines "customer proprietary network information" to include information contained in a telephone customer's bills, *see* § 222(f)(1)(B), as well as information relating to the destination and amount of use of a telecommunications service by a customer, § 222(f)(1)(A). The section further deems such information to be confidential and imposes a duty on telecommunications carriers to protect the confidentiality of the customer's information, § 222(a).

KMGH's position was strengthened by the fact that the defendant's attorneys had failed to provide notice of the subpoena to the prosecution, in direct violation of Rule 17(c) of the Colorado Rules of Criminal Procedure. In response, the defendant's attorneys argued that because the subpoena on AWS was faxed rather than properly served in accordance with the Rule, their own subpoena was invalid, and therefore no notice was necessary.

### *Court Rules For Reporter*

In a ruling from the bench, Judge Alvarez rejected all of the defendant's arguments. He found that KMGH's telephone records were both private and proprietary, and that their disclosure was fully protected under both the First Amendment and the Colorado press shield statute. He found that the subpoena, even if not

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## Subpoena Held Improper

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validly served, was the reason the records were produced by AWS, and therefore that the defendant's attorneys had violated Rule 17(c) by failing to notify the prosecution. Also, because the defendant's attorneys were well aware of KMGH's earlier vigorous assertions of privilege, their failure to notify KMGH of the subpoena violated Rule 4.4 of the Colorado Rules of Professional Conduct. Rule 4.4 states that "In representing a client, a lawyer shall not . . . use methods of obtaining evidence that violate the legal rights of [a third person]."

The Judge ordered that all of the telephone records be delivered to the court and sealed pending appellate review. A few days later, he again quashed the defendant's latest subpoena to Ms. Hayden and refused to allow the defendant to call her as a witness in the suppression hearing.

At the end of the suppression hearing, Judge Alvarez found that the police had not adequately advised the defendant of his right to counsel and suppressed his confession to the police. However, the Judge ruled that the defendant's confessions to the media could be used at trial, which is scheduled for April 1999.

### *AT&T Wireless No-Notification Policy*

Of particular interest in this case was the position taken by AWS. AWS insisted that its response to the subpoena was a routine matter, even though it did not insist on proper service, nor sign the form on the bottom of the subpoena indicating it waived proper service. Instead, AWS asserted that its act of producing the records revealed that it was waiving proper service. Moreover, AWS indicated that its policy was not to notify a customer of either its receipt of a subpoena requesting the customer's records, or of the fact that it had produced records in response to a subpoena.

AWS' no-notification policy is in sharp contrast with the policy of its parent company, AT&T, which provides notification to its customers of all requests for customer phone records unless expressly prohibited by law from doing so. AWS insisted that its position was justified by case law, federal statutes, and its customer contracts. In fact, when Judge Alvarez ruled that KMGH had a proprietary interest in the phone records, AWS' counsel requested that the Judge reconsider this finding. The Judge expressly refused to do so.

AWS refrained from citing specific statutes or case law to the Court. Later, however, AWS revealed that its policy was based on both 18 U.S.C. § 2703, and *Reporters Committee for Freedom of the Press v. AT&T Co.*, 593 F.2d 1030 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949 (1979). The latter case found no Fourth or First Amendment interests were violated by subpoenas of third-party telephone records. The D.C. court's reasoning was rejected by the 10th Circuit in *First National Bank*, 701 F.2d at 118, on First Amendment grounds.

The statute referenced by AWS would also appear to be distinguishable. Section 2703 governs governmental access to phone records, and provides immunity to a provider of electronic communication services for producing information to the government in accordance with the statute. Subsection (c) of the statute also states that a company may disclose "a record or other information pertaining to a subscriber to or customer of such service . . . to any person other than a governmental entity." It over extends this subsection to argue that it affirmatively exonerates a phone company for production of records or information to a private party, regardless of the circumstances. Indeed, nothing in the statute suggests that it overrides case law or other statutes that may restrict the release of such information to private parties.

As a post script, in response to a request by McGraw-Hill, AWS and AT&T attorneys are currently reviewing their inconsistent customer notification policies to determine whether modifications should be made to the AWS policy.

*Bruce Jones and Alan Stern of Holland & Hart LLP, Denver, Colorado, represented KMGH-Channel 7.*

# Nevada Court Quashes Subpoena for Reporter's Testimony at Criminal Trial

A Nevada criminal court quashed a prosecutor's subpoena to a television reporter seeking her testimony at a murder trial. *State v. Bazile*, CR98-0388 (Washoe Cty. Feb. 19, 1999). The reporter, Victoria Campbell of KRNV-TV, conducted a non-confidential jailhouse interview with a murder suspect, John Bazile. In a rare published opinion by a Nevada criminal trial court, Washoe County District Court Judge Peter Breen issued a strong pro-press opinion holding that the Constitution and Nevada's shield law both protect against compelled disclosure of nonconfidential information even in criminal cases.

## *Case Related to Newsroom Searches*

An interesting backdrop to this case is its relationship to an incident reported on in January's *LibelLetter*, involving the same Washoe County prosecutor, Richard Gammick. In January 1999, Gammick raided several newsrooms, including KRNV-TV, in search of outtakes of interviews with another criminal suspect, Christopher Merrit. One day before Gammick raided these newsrooms in search of interview outtakes of Merrit, he had received KRNV-TV's response to a subpoena for its outtakes of Campbell's interview with Bazile. KRNV-TV's response noted that the outtakes sought no longer existed -- which led Gammick to seek the reporter's testimony at trial. Gammick later justified the newsroom raids, in part, on the ground that in prior instances the media was erasing tapes before he could subpoena them, an apparent reference to KRNV-TV.

## *Branzburg Requires Balancing Test*

As for the substance of the decision, relying on *Branzburg v. Hayes*, 408 U.S. 665 (1972), the court rejected the Fifth Circuit's recent decision in *U.S. v. Smith*, 135 F.3d 963 (5th Cir. 1998), holding that no privilege applies to nonconfidential information in criminal cases. According to the Nevada court, *Branzburg* and other Ninth Circuit cases still require the application of a balancing test. Here the state's interest in prosecuting the defendant did not justify compelling testimony from a reporter where there was otherwise ample evidence. That evidence includes, among other things, eyewitness testimony against the defendant and a sheriff's testimony that the defendant confessed. Moreover, a jail guard was present when the defendant made inculpatory statements in his jailhouse interview.

## *Nevada Shield Law*

The court also held that the plain language of Nevada's shield law, N.R.S. 49.275, provided grounds to quash the subpoena. In relevant part it provides:

> No . . . employee of any . . . television station may be required to disclose any published or unpublished information obtained or prepared by such person in such person's professional capacity in gathering, receiving or processing such information for communication to the public . . . in any . . . trial . . . before any court.

In crediting the plain language of the statute, the court accepted KRNV-TV's argument that two Nevada Supreme Court cases that took a more narrow view of the shield law were based on dictum. *See Las Vegas Sun v. District Court*, 761 P.2d 849 (Nev.1988); *Newburn v. Howard Hughes Medical Institute*, 564 P.2d 1146 (Nev. 1979). In fact, the court stated that "of the states that have enacted such reporter's privileges, Nevada's appears to be the strongest." (quoting with approval from *Laxalt v. McClatchy*, 116 F.R.D. 438 (D. Nev. 1987).

The prosecutor announced that he will not appeal this decision. In addition, after this decision was

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## Nevada Court Quashes Subpoena

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handed down the prosecutor returned all evidence seized in his newsroom raids.

### *Prosecutor Requests Media / Law Enforcement Cooperation*

In an interesting postscript to the newsroom searches and this case, the prosecutor, Richard Gammick, arranged a meeting with the Nevada media and asked for greater media cooperation in investigations. Specifically, he asked the media to adopt a policy of preserving all outtakes and notes of interviews with crime suspects and related reports for possible use in investigations or trials. The material could be subpoenaed if needed by the prosecutor, subject to a motion to quash. In addition, he asked that law enforcement officials always be present during any jail house interview.

KRNV-TV attorney Dominic Gentile, who attended the meeting, raised the objection that such a policy could turn the media into an agent of law enforcement, providing criminal suspects with grounds to try and suppress published interviews as evidence absent a Miranda warning before an interview. Gammick acknowledged that he had not thought of the proposed policy's potential impact on prosecutions and the objection may cause him to reconsider a policy of media and law enforcement cooperation.

The ultimate background to these incidents may be the remarkable ability of the Nevada media to obtain newsworthy interviews with suspects in high-profile crime incidents, a talent which may inevitably clash with the state's interest in controlling or tailoring the flow of information in such circumstances.

Dominic P. Gentile of Las Vegas, Nevada represented Victoria Campbell and Sunbelt Communications, owner of KRNV-TV, in this case.

## Massachusetts Appeals Court Vacates Contempt Sanctions Over Confidential Sources

**By Jonathan M. Albano**

The Massachusetts Appeals Court has vacated a potentially multi-million dollar fine against The Boston Globe and its reporter Richard Knox for refusing to obey an order to disclose confidential sources. *Ayash v. Dana-Farber Cancer Institute, et al.*, 1999 Mass. App. LEXIS 244 (Feb. 26, 1999). The trial court had imposed the fines as a contempt sanction in a libel case brought by Lois Ayash, M.D. against the Globe and Knox. The decision marks the first time a Massachusetts state appellate court has reversed an order compelling the disclosure of confidential sources.

### *Overdose Articles Lead to Libel Suit*

Ayash's law suit arose from the accidental and fatal overdosing of former Globe health columnist Betsy Lehman while enrolled in an experimental breast cancer treatment protocol at the Dana-Farber Cancer Institute. Ayash was the Study Chairperson of the experimental protocol. In its initial story on the overdoses, the Globe reported that Ayash had countersigned the overdose orders and was the "leader of the team" treating Lehman. A series of over 20 articles on the overdoses followed, including reports on the investigations into the overdoses and reforms instituted at Dana-Farber and elsewhere as a result of the tragedy.

Ayash sued the Globe and Knox for libel and invasion of privacy. Her suit also includes claims against Dana-Farber for sex discrimination and for unlawfully leaking to the Globe information concerning confidential hospital investigations into the overdoses.

Ayash's libel claims against the Globe alleged that she was defamed by the statement that she countersigned the overdoses (a report later corrected by the Globe) and by the description of her as the "leader of the team," a term that Ayash claims overstated her responsibility for the overdoses. The Globe did not use any confidential sources for either of the two

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statements.

Ayash also alleged that the Globe violated her privacy by publishing information concerning the confidential hospital and regulatory investigations concerning her role in the overdoses. Those claims were dismissed prior to the trial court's order compelling disclosure of confidential sources.

### *An Order to Disclose Sources*

The trial court ordered the Globe to disclose all 24 confidential sources used in preparing the eight month series concerning the overdoses. The trial court, without explanation, found that the sources' identities were central to Ayash's libel claims, despite Knox's testimony that he had no confidential sources for the two allegedly defamatory statements sued upon.

When the Globe refused to comply with the disclosure order, the trial court found both the Globe and Knox in contempt and imposed a series of escalating fines. The Globe was fined $1,000 per day, to increase by $1,000 with each passing week until disclosure was made. Knox was separately fined $100 per day, increasing by $100 each week thereafter. Had the fines not been stayed pending appeal, by the end of 1998 they would have totaled over $1 million and likely would have exceeded $5 million by the time the case was reached for trial.

### *Common Law Test Protects Reporter's Privilege*

Massachusetts courts have not recognized any constitutional privilege for confidential sources. Instead, Massachusetts has developed a common law test that requires a party seeking to avoid disclosure to first "make some showing that the asserted damage to the free flow of information is more than speculative or theoretical." *Sinnott v. Boston Retirement Board*, 402 Mass. 581, 586, 15 Media L. Rep. 1608, 1611, *cert. denied*, 488 U.S. 980 (1988); *In the Matter of a John Doe Grand Jury Investigation*, 410 Mass. 596, 599, 19 Media L. Rep. 1091, 1093 (1991). If, and only if, that threshold test is met, the court is then required to balance "the public interest in every person's evidence and the public interest in protecting the free flow of information" in order to determine whether disclosure must be made. *Id.*

The Appeals Court held that the trial court erroneously ruled that the Globe had not satisfied its threshold burden of demonstrating that the harm from disclosure of the confidential sources was more than speculative and theoretical. The trial court had based its ruling on three factual findings: the reporter's sources were not continuing to provide him with information, the reporter was not involved in a continuing investigation, and the stories concerned an "isolated incident," i.e., the accidental overdosing of two cancer patients.

The Appeals Court found that the subsidiary findings on which the judge based his ultimate conclusion were not supported by the evidence. At the outset, the Court observed that the reporter's relationships with his sources must be viewed in the context of his 27 years as a medical reporter, cultivating numerous sources in the medical community, including persons who agreed to provide information only upon the promise of confidentiality. The Court concluded that if Knox were unable to keep such promises, "his future ability to gather and published information from these and other sources who wish to remain anonymous would suffer." Slip op. at 11; 1999 Mass. App. LEXIS 244 * 8.

The Court also rejected the trial court's finding that the investigation into the overdoses was over. It noted that a state regulatory investigation of Ayash's role in the incidents remained pending and that, as those proceedings unfold, the reporter "will in all likelihood report on further developments and may well turn to his earlier confidential sources for information." Slip op. at 12; 1999 Mass. App. LEXIS 244 *8.

Finally, the Appeals Court rejected the trial court's finding that the information provided to Knox merely

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## Contempt Vacated

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concerned an "isolated incident" of malpractice. To the contrary, the Court noted that a report issued by Dana-Farber documented numerous quality assurance deficiencies at the hospital and prompted reforms in health care institutions throughout the country.

The Court concluded that the Globe had met its threshold burden by demonstrating that the reporter would not have received the information he obtained if he had not promised anonymity to his sources and that his future newsgathering ability, both generally and in the case being investigated, would be impaired if he violated his promises.

### *Disclosure Order Not Justified*

The Appeals Court next reviewed the trial court's alternative ruling that the balancing of competing interests required disclosure of the sources. Under Massachusetts law, that test requires a weighing of the interest in obtaining every person's evidence against the interest in protecting the free flow of information. Although the plaintiff had sought disclosure of all 24 of the Globe's confidential sources, the Appeals Court noted that her arguments had focused upon the identity of one confidential source who telephoned Knox *after* the publication of the article at issue and told him he mistakenly identified Ayash as having countersigned the overdoses.

Subsequent to the judgment of contempt, the plaintiff herself identified that confidential source as a friend and former colleague. Because that source was now disclosed, and because Knox had not claimed confidentiality for any of his sources for the two statements in the article which Ayash claimed defamed her, the Appeals Court found no justification for the disclosure order or the ensuing judgment of contempt. It therefore remanded the case to the trial court for a determination whether, as to the libel claim, the reporter's disclosure of additional confidential sources would achieve more than the "needless disclosure of confidential relationships." Slip op. at 14-15; 1999 Mass. App. LEXIS 244 *9.

The Court also addressed the plaintiff's alternative argument that she was entitled to disclosure of the confidential sources in order to pursue her other claims in the case, including those against the hospital for leaking confidential medical peer review information about her. Because the trial court had made no findings as to whether disclosure was needed in order for Ayash to pursue those claims, the Appeals Court held that, on remand, the trial court must perform the required balancing test and make findings as to whether disclosure is required with regard to the other counts of the plaintiff's complaint.

The plaintiff is expected to renew her motions for disclosure before the trial court later this month in order to press these alternative arguments for disclosure. Although a battle has been won, the war is not yet over.

*Jonathan M. Albano is a partner in the Boston law firm of Bingham Dana LLP and is counsel to the Boston Globe and Richard Knox in Ayash v. Dana-Farber Cancer Institute, et al.*

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## BEWARE...YOUR STATE LEGISLATURE MAY BE IN SESSION!

### AGRICULTURAL DISPARAGEMENT LAW ALREADY INTRODUCED IN ARKANSAS

It is worth noting that many state legislatures are currently in session. We want to point out the possibility of an agricultural disparagement law being introduced in the dead of night.

That has been the case in all too many jurisdictions, and it happened in Arkansas recently. A bill was introduced and passed by the General Assembly before any of the media were aware of its existence. Fortunately, in the face of strong opposition, LDRC has learned that the bill apparently failed in the Arkansas State Senate on March 16, 1999, although press organizations will continue to monitor the bill until the Legislature ends its current session.

## Motion to Televise Trial Proceedings Denied in New York

**By Michael J. Grygiel**

In an application raising constitutional questions of first impression having obvious statewide significance, Clear Channel Communications, Inc. ("CCCI"), the owner of WXXA-TV/Channel 23 in Albany, moved to intervene to provide audio-visual coverage of trial proceedings in *People v. McKenna and Bonanni*, a controversial and high profile criminal case in the Capital District. The case involves two City of Albany police officers charged with felonious assault arising from their altercation with and subsequent arrest of a local college basketball star.

The last of New York's various statutes authorizing "experiments" with courtroom camera coverage was allowed to lapse in 1997. CCCI's application, based on Article I, § 8 ("liberty of speech") and Article I, § 11 ("equal protection under the laws") of the New York State Constitution, challenged the constitutionality of New York Civil Rights Law § 52, which prohibits audio-visual coverage of proceedings (including trials) in which testimony will be taken through compulsory process. No reported case has addressed these issues in New York State.

In a March 3, 1999 Decision and Order, Albany County Court (Hon. Larry J. Rosen) granted CCCI's motion to intervene but denied its application to televise trial proceedings in the case. Despite stating that § 52 is "hopelessly anachronistic and needs a permanent shelving," and that it could "hardly envision any serious argument that a rational basis can be crafted to justify what appears to be clear discrimination against the electronic media," the court upheld § 52 — albeit "with sincere and considerable reluctance" — principally on the ground of avoiding a potential due process challenge by the defendants on appeal based on the presence of cameras in the courtroom.

CCCI is presently attempting to take a direct appeal to the New York Court of Appeals, New York's highest court, by-passing the intermediate appellate courts.

*Michael J. Grygiel of McNamee, Lochner, Titus & Williams, P.C. of Albany, New York, is representing CCCI in this matter.*

## Place Your Orders for the 1999-2000 LDRC 50-State Surveys

The order forms for the 1999-00 LDRC *50-State Surveys: Media Privacy and Related Law* and *Media Libel Law* have been mailed.

**LDRC 50-State Suvey 1999-2000: Media Privacy and Related Law**
The editing process on the *Privacy Law Survey* is underway. The Survey is due to be published in June 1999.

**LDRC 50-State Suvey 1999-2000: Media Libel Law**
The latest LDRC *Media Libel Law Survey* is scheduled to be published in October 1999.

**LDRC 50-State Suvey 1999: Employment Libel and Privacy Law**
LDRC's newest 50-state survey, covering employment libel and privacy law, is currently available and may be ordered for immediate delivery.

The price for each 1999-2000 book is $125 if paid before the print run. Please call 212-889-2306, or visit LDRC's web site at www.ldrc.com to place your order.

If you are a standing order subscriber please remember that if payment is not received within 30 days of shipment, the price of each book goes up to $150. Please pay early to save $25 per book.

# Florida Court of Appeal Reverses $40,000 Libel Verdict

Finding that the trial court erred by refusing to instruct the jury on substantial truth, a Florida District Court of Appeal reversed a $40,000 libel judgment against John Hopkins University professor Wayne Smith for statements made in the PBS documentary, "Campaign for Cuba." *Smith v. Cuban American National Foundation*, 1999 WL 44168 (Fla. App. 3 Dist. February 3, 1999). In addition, the appellate court found that the trial court failed to provide the jury with a context for the substance of Smith's statement by refusing to show the jury the entire documentary.

## *Following the Money Trail*

The documentary examined the anti-Castro movement in the Cuban-American exile community, focusing on the activities of the Cuban American National Foundation ("CANF"), the Cuban American Foundation ("CAF"), and the Free Cuba PAC ("PAC"). The program described the political influence of the three organizations, which are all controlled by the same person, and their role in shaping U.S. policy towards Cuba. In particular, the program noted that the PAC was the single largest contributor to the late U.S. Congressman Dante Fascell's campaign, who was, in turn, instrumental in the creation of the federally funded National Endowment for Democracy ("NED"), which awarded about $900,000 in grants to the CANF.

The documentary then showed Professor Smith stating:

> It's interesting that the National Endowment for Democracy has contributed to the Cuban American National Foundation, and it, in turn, through its-its-its own organization, through its PAC, has contributed to the campaign funds of many Congressmen, including some who have been involved with the National Endowment for Democracy, from whence they got the money in the first place, including Dante Fascell.

1999 WL 44168 at *1.

CANF subsequently brought suit against Smith alleging that his statement implied that CANF was involved in criminality or corruption, and in particular, that the statement asserted that the organization used money granted to it by the NED to contribute to the campaigns of those U.S. Congressmen who provided the NED grants to CANF. Following trial, the jury returned a verdict of no compensatory damages, $10,000 in nominal damages, and $30,000 in punitive damages.

On appeal, Smith asserted that the trial court erred by 1) excluding from evidence all portions of the documentary other than the one statement by Smith which CANF alleged to be false and defamatory and four other documentary excerpts which showed other portions of the interview with Smith; and 2) failing to instruct the jury on the issue of substantial truth.

## *Trial Court Erred on Substantial Truth and Context*

The appellate court agreed with Smith in both respects. First, the court held that the trial court failed to provide the jury with an appropriate context in which to judge whether the statement was defamatory. According to the court:

> The documentary in this case explains that the three organizations are separate and distinct, although they are controlled by the same individual. Furthermore, the context of the broadcast cannot be irrelevant, because the average viewer would have been watching the entire broadcast, not merely a twenty second clip, or even two minutes of clips interspersed throughout the program. There is no way to determine the "gist" or "sting" of the publication in the mind of the average viewer without examining the statement in context.

1999 WL 44168 at *3.

With respect to substantial truth, the appellate court found no basis for the trial court's finding that substantial truth was intentionally excluded from Florida's standard jury instructions in public figure cases because public figures have the burden to prove falsity. While the Florida standard jury instructions on defamation do not explicitly include an instruction on substantial truth, the appellate

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## Florida Court Reverses Libel Verdict

*(Continued from page 11)*

court found that the Florida "Supreme Court did not abrogate existing law on substantial truth by publication of the standard jury instructions." 1999 WL 44168 at *5.

Second, and more importantly, the appellate court noted that the U.S. Supreme Court's decision in *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991), decided subsequent to the publication of the standard jury instructions, "specifically addresses substantial truth, and brings it into the ambit of constitutional law." 1999 WL 44168 at *5. Thus, the appellate court held that "even assuming that the Supreme Court of Florida had intended to alter the substantive law of defamation by doing away with the substantial truth doctrine, the U.S. Supreme Court's holding in *Masson* would make any such action unconstitutional as a violation of the First Amendment." 1999 WL 44168 at *5.

> According to the U.S. Supreme Court and Florida case law, falsity only exists if the publication is substantially and materially false, not just if it is technically false. Whether this is encompassed as a "defense" or as part of the plaintiff's burden of proving falsity, it should have been explicitly explained to the jury.

1999 WL 44168 at *5.

In conclusion, the court examined the record in conjunction with its "context" and "substantial truth" analyses, finding "that there would not be a different effect in the mind of the viewer watching the documentary with the Smith statement than there would be without the Smith statement," and that "the failure of the documentary to point out that the CANF passes the grants on to another organization does not make this statement substantially untrue." 1999 WL 44168 at *6. Accordingly, the appellate court reversed the judgment and remanded with instructions to enter a judgment in favor of Smith.

The defendant was represented on appeal by the Miami office of Jorden Burt Boros Cicchetti Berenson & Johnson, LLP.

## Newspaper Denied Right to Depose "Substantial Truth" Witnesses by N.Y. Appellate Division

In a decision that one can only hope is reversed or ignored, a mid-level New York appellate court has held that defendants may not depose witnesses to plaintiff's criminal conduct when the defamation at issue is whether plaintiff pled guilty or not to committing that conduct. *Fraser v. Park Newspapers of St. Lawrence Inc.* (App.Div.3d Dep't 1/28/99).

Defendant-newspaper reported that plaintiff had pled guilty to a charge of public lewdness. In fact, plaintiff had been granted an adjournment in contemplation of dismissal, which would result in ultimate dismissal of the charges "in furtherance of justice" within six months of the court's order provided the defendants met any conditions imposed by the court (e.g., attendance in alcohol program, no further criminal charges). [The statute authorizing ACDs, as they are known, specifically states that an ACD shall not be deemed to be a conviction or an admission of guilty, although the court in this matter does not note that point. N.Y.Criminal Procedure Code § 170.55]

Defendants sought to depose four nonparty witnesses to plaintiff's conduct. In response to plaintiff's objection and motion for an order of protection with respect to the depositions, defendants contended that the testimony of these witnesses would be relevant both to substantial truth of the article at issue, and to the damage levels in light of plaintiff's reputation in the community. The appellate panel, and apparently the trial court, rejected both of defendant's contentions.

The court simply would not accept that evidence proving that plaintiff did commit acts of public lewdness would be relevant to a published statement that plaintiff pled guilty to the crime. As to general reputation, evidence of specific acts was not admissible. Finally, the panel held that "more than mere relevance or materiality must be shown to obtain disclosure from a nonparty witness."

Defendant plans to seek leave to appeal to the Court of Appeals, New York's highest court.

Defendants are represented by Bond, Schoeneck & King.

# Federal Court Strikes Libel Suit Under State Anti-SLAPP Law

**By Roger R. Myers and Rachel E. Boehm**

In the first case of its kind, a federal district court judge in San Francisco has granted a motion by The Hearst Corporation, dba *San Francisco Examiner*, to strike a defamation lawsuit under California's anti-SLAPP legislation. The court's ruling establishes that the anti-SLAPP statute, an important tool used by media defendants to fight libel actions in state court, may also be used in a federal diversity action after removal by the defendant. *Sanders v. The Hearst Corporation, dba San Francisco Examiner*, __ Media L. Rep. __ (N.D. Cal. Feb. 22, 1999).

## *Confusion Over FEMA Assistance Leads to Libel Suit*

The libel suit arose out of a July 10, 1998 article published in the *Examiner* concerning a press conference in which the Federal Emergency Management Agency admitted that it had made a mistake in leading Bay Area residents to believe that FEMA would be offering financial assistance to victims of the 1997-98 El Nino landslides – financial assistance that the agency had not, in fact, decided to provide. At the time, plaintiff was FEMA's Lead Congressional Liaison Officer for El Nino issues, responsible for working with members of Congress whose constituents were disaster victims.

On July 9, 1998, a memorandum written by plaintiff was faxed to selected staff members of California's congressional delegation. The memo announced that a "draft application" had been prepared for landslide victims to seek buyout or relocation assistance from FEMA and California's Office of Emergency Services. Wasting no time, two members of the California congressional delegation issued press releases announcing that FEMA had agreed to offer buyout/relocation assistance.

The next day, however, top FEMA officials held a telephonic press conference in which they announced that the buyout/relocation policy had not been finally approved. In the press conference and in a press release issued that same day, FEMA blamed the premature announcement directly on plaintiff's memo. Later that day, the *Examiner* reported FEMA's admission that the announcement of the program had been premature. The article included FEMA's explanation that plaintiff's draft memo was to blame.

As a result of the snafu over the memo, plaintiff lost his job at FEMA. Plaintiff then sued the *Examiner* for libel, alleging that members of Congress had jumped the gun in announcing the assistance program and that FEMA was blaming him to cover up for these representatives, whom he alleged had not received his memo prior to issuing their press releases.

## *Anti-SLAPP Law Asserted in Federal Court*

The *Examiner* removed the case to federal court, which raised an issue of first impression as to whether a media defendant who removes a case on diversity grounds thus forfeits the ability to bring a motion to strike under California's anti-SLAPP statute, Code of Civil Procedure § 425.16. This statute provides the media with a powerful method of disposing of libel cases. In any case that qualifies for the statute's protection, the plaintiff must prove a probability of success on the merits at the outset of the case or the case must be stricken. An award of attorneys fees is also mandatory under the statute.

In its motion to strike, the *Examiner* argued that the California's anti-SLAPP statute barred plaintiff's lawsuit unless he could prove, at the outset, a probability of prevailing. The *Examiner* argued that because the statute protects and creates state substantive rights, and is intended to encourage the public's exercise of federal as well as state constitutional rights to speak and write on matters of public concern, it must be applied in a diversity action in federal court to prevent forum-shopping from negating these rights.

The *Examiner* argued that in this case, the plaintiff

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## Anti-SLAPP Law

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could not show a probability of prevailing for several reasons. First, the *Examiner* argued that the article was substantially true; taking advantage of the ability to present evidence on the motion to strike, the *Examiner* submitted declarations from Congressional staffers explaining that the *Examiner* had accurately described the chronology of events.

In addition, the *Examiner* argued that the article was privileged under California's statutory immunity for reports of government proceedings (the "fair report" privilege), the statutory privilege for reports of public meetings, and under California's right of fair comment.

Finally, the *Examiner* argued that as FEMA's liaison on a critical issue such as El Nino disaster relief, plaintiff was a public official or a public figure for purposes of an article about the controversy over FEMA's El Nino disaster relief and the role his memo played in that debate, but plaintiff had not alleged facts showing that the *Examiner* published the article with "actual malice." The *Examiner* also filed a motion to dismiss on these grounds under Federal Rule of Civil Procedure 12(b)(6).

### *Motion to Strike Granted*

After a hearing, the court issued an order granting not only the *Examiner*'s motion to dismiss, but also its motion to strike, on multiple grounds. First, the court ruled that the *Examiner*'s article was protected under California's absolute privilege for fair and true reports of government proceedings. The court also held that the article was privileged as a fair and true report of a public meeting, rejecting plaintiff's contention that the privilege did not apply because the press conference was called for an allegedly unlawful purpose – *i.e.*, to unlawfully slander plaintiff. Finally, the court held that the *Examiner* had made "a sufficient showing that plaintiff, in his capacity as FEMA's Lead Congressional Liaison Officer, was a public official," and plaintiff's allegation that the *Examiner* had not called the plaintiff to verify the story was inadequate as a matter of law to establish malice, either under California's right of fair comment or under the First Amendment's actual malice test. For these reasons, the court ruled that plaintiff had "not made the requisite showing under section 425.16 of the California Code of Civil Procedure to overcome a motion to strike."

*Mr. Myers and Ms. Boehm, who are with Steinhart & Falconer LLP in San Francisco, CA, represented The Hearst Corporation, dba San Francisco Examiner, in this matter.*

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## Anonymous Yahoo! Users Sued in Case of Internet Slander

Wade Cook Financial Corp. ("Wade"), one of the country's leading financial education seminar and publishing companies, has filed a defamation suit in a Washington State United States District Court against "John Doe #1-10", anonymous users of Yahoo!, the Internet service provider.

The complaint alleges that the information published by the individuals on the Yahoo! Internet site negatively impacts the integrity and business practices of Wade and its chairman. The suit also claims that Wade may lose future shareholders and customers over the published information due to a decrease in public confidence. In trying to squelch future Internet slander, Kiman Lucas, general counsel for Wade stated to the Associated Press, "We believe that our course of action is the only way to stop these individuals from hiding behind a computer screen and filling cyberspace with lies as big as the Internet itself."

Wade is seeking an injunction that would require the defendants to remove the attacks already on the Internet as well as prevent any future false information from being published.

# *Desnick* Revisited: Summary Judgment Granted on Actual Malice; Conditional Privilege Recognized as to Private Figure Plaintiffs

by Michael M. Conway

In a comprehensive 35-page ruling, a federal court has granted summary judgment in favor of American Broadcasting Company, correspondent Sam Donaldson and producer Jon Entine on a libel claim brought by a cataract surgery center based upon a 1993 *PrimeTime Live* broadcast. *Desnick v. American Broadcasting Co.*, No. 93C6534 (N.D. Ill Jan. 2, 1999) Judge John A. Nordberg of the United States District Court for the Northern District of Illinois ruled that, as a matter of law, plaintiff J.H. Desnick Eye Services, Ltd. was a public figure and could not establish by clear and convincing evidence that the ABC broadcast was published with actual malice. (N.D. Ill. Jan. 26, 1999). In doing so, the court relied heavily on two D.C. Circuit opinions, *McFarlane v. Esquire Magazine*, 74 F.3d 1296 (D.C. Cir.), *cert. denied*, 117 S.Ct. 53 (1996), and *McFarlane v. Sheridan Square Press, Inc.*, 91 F.3d 1501 (D.C. Cir. 1996), in holding that an allegation of a source's unreliability is not evidence of actual malice.

The ruling also granted the media defendants partial summary judgment on claims brought by two private figures — surgeons employed by the center — holding that their libel claims for presumed and punitive damages were barred by the absence of actual malice. Specifically, the court ruled that since the libel claim of Dr. Mark Glazer and Dr. George Simon was based upon "inference or innuendo," these plaintiffs had to prove — and could not — that ABC intended the defamatory implication to relate specifically to them in order to satisfy the actual malice requirement for presumed and punitive damages.

While the district court denied summary judgment on the doctors' libel claims for actual damages, the court recognized the applicability of an Illinois-based conditional privilege to report about matters involving a "recognized interest of the public", *i.e.* Medicare fraud and allegations of unnecessary surgery. As a result, the district court ruled that these plaintiffs must meet a higher burden than the negligence standard generally applied in Illinois to private figure plaintiffs, and are required to prove at trial that defendants recklessly disregarded their rights to defeat the Illinois qualified privilege.

The ruling was limited to the sole remaining count — a claim for defamation — arising from the original seven-count complaint. Newsgathering claims for trespass, invasion of privacy, violation of federal and state eavesdropping statutes, and fraud were dismissed in 1994 and the Seventh Circuit affirmed in a noteworthy decision in 1995 by Judge Posner. *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345, 23 Media L. Rep. 1161 (7th Cir. 1995). *See also LDRC Libel Letter* January 1995 at 1. That decision was recently applied in Oklahoma. *See* page 35. The Seventh Circuit in that same opinion reversed the district court's dismissal of the libel claim.

## *"20/20 Vision"*

The case arose out of an ABC *PrimeTime Live* broadcast entitled "20/20 Vision" that examined the practices of a Chicago cataract surgery center, Desnick Eye Center. According to the district court, the broadcast reported that Desnick Eye Center recommended and performed unnecessary cataract surgery on Medicare-eligible patients, costing taxpayers millions of dollars in unjustified expenses; that Desnick Eye Center physicians including Drs. Simon and Glazer recommended cataract surgery without personally explaining the medical risks; that Desnick Eye Center altered patient records to indicate that cataract surgery was warranted; that Desnick Eye Center physicians misdiagnosed patients; that Desnick

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## *Desnick* Revisited

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Eye Center targeted minority and disadvantaged patients; and that Dr. Desnick resigned from the American Academy of Ophthalmology to avoid an investigation of his medical practice. Plaintiffs defamation claim was not based upon any of these statements.

What plaintiffs did sue upon was a one-minute segment of the 16-minute broadcast. The challenged portion shows Dr. Paddy Kalish, an optometrist and a former Desnick Eye Center employee, rigging an autorefractor — a device which measures the effect of glare on vision — and testing correspondent Sam Donaldson on the rigged autorefractor machine. Dr. Kalish informed Donaldson that as a result of the rigging, Donaldson had the symptoms of a cataract. Dr. Kalish indicated that this testing procedure was routinely performed on older patients who came in for free eye exams.

The remainder of the broadcast showed interviews with former patients and a undercover videotape of some of the seven undercover patients sent to two Desnick offices in Wisconsin and Indiana. The undercover patients were examined by Dr. Glazer or Dr. Simon. Of the seven, two were told that they did not need cataract surgery. These patients were both under 65 and therefore not eligible for Medicare. Four of the remaining five patients (all of whom were 65 or older) were told that they did need cataract surgery. This was in contrast with independent eye examinations which reported that none of the persons should have cataract surgery. Drs. Simon and Glazer were depicted in the undercover videotape excerpts.

### *No Showing of Actual Malice*

Plaintiffs asserted eight different bases in contending that defendants acted with *New York Times* actual malice. These related to criticisms of defendants' reliance upon Dr. Kalish's demonstration and his interview statements about the autorefractor rigging. Plaintiffs also furnished expert testimony, by a journalism professor at Northwestern University, that the broadcast was a severe departure from professional standards and this departure was itself evidence of actual malice.

After noting that plaintiffs' allegations "resembled" the arguments made, and found insufficient, in the *McFarlane* opinions, the district court meticulously analyzed each of the eight bases and found each wanting as proof of actual malice. While finding that the defendants had no duty to corroborate Dr. Kalish's statement, the court found that ABC had interviewed other employees who confirmed that elderly patients routinely failed the glare test. The district court also found persuasive that Dr. Kalish had made similar allegations in a whistleblower lawsuit filed in federal court.

The district court similarly rejected claims that the editing of the interview in the broadcast was proof of actual malice. The court said that while the outtakes do not portray a flattering picture of Dr. Kalish, the outtakes do not contradict the information aired. The court also noted that the broadcast explicitly revealed Dr. Kalish' bias against Dr. Desnick and the fact that a defamation judgment in favor of Dr. Desnick had been entered against Dr. Kalish.

Finally, the court found the plaintiffs' expert opinion testimony about journalism standards to be of no assistance to the court in determining the issue of actual malice, since even shoddy reporting would not constitute actual malice. In so ruling, Judge Nordberg expressly approved of a similar ruling by Judge Harry Leinenweber in *Russell v. American Broadcasting Company, Inc.*, 1997 WL 598115 (N.D. Ill. 1997).

### *J. H. Desnick Eye Services, Ltd. Was A Public Figure*

The district court found the Desnick-owned corporation to be a limited purpose public figure. Specifically, the court applied a Fifth Circuit formulation focusing on "the notoriety of the corporation to the average individual in the relevant geographical area . . . [and] the frequency and

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## *Desnick* Revisited

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intensity of media scrutiny that a corporation normally receives." *Slip op.* at 19.

With respect to the "notoriety factor," the court cited evidence that the Desnick Eye Center was "well known throughout the Chicagoland area" and had engaged in "extensive public advertising of its services, and had hired a national public relations firm for that purpose." *Slip op.* at 20. The court also noted that the Eye Center's "telemarketing techniques and volume cataract surgery practices were controversial," thereby inviting "public attention, comment and criticism." *Id.*

On the issue of the frequency and intensity of media scrutiny, the court cautioned that "a plaintiff should not . . . be considered a limited-purpose public figure absent the existence of a predefamation public controversy in which the plaintiff has become directly involved." *Id.* Desnick Eye Center, however, had received "extensive public attention," including numerous articles in the Chicago Tribune and broadcasts on WBBM-TV prior to the ABC broadcast. Indeed, the corporation previously had taken out a newspaper advertisement to rebut earlier investigative reports by reporter Pam Zekman on WBBM-TV. The court also observed that the corporation had held a press conference after the *PrimeTime Live* broadcast to announce the filing of this lawsuit.

Having found the Desnick corporation to be a public figure, the court entered summary judgment against it.

### *Effect on the Claims of Drs. Simon and Glazer – Partial Summary Judgment*

The defendants did not contend that Drs. Simon and Glazer were public figures, but did move for summary judgment on their claims for presumed and punitive damages. The court granted that request on the authority of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) since even a private figure must establish actual malice to recover presumed or punitive damages.

Of particular interest was the district court's finding that the individual doctors could not establish actual malice since the record did not contain evidence to show with convincing clarity that ABC, Donaldson and Entine knew or intended the autorefractor rigging allegations to be aimed at these doctors. Rather the broadcast stated that a technician tampered with the machine and, even though the allegation could be viewed as "of and concerning" Drs. Simon and Glazer, this was not enough to support an actual malice finding.

### *The Illinois Conditional Privilege*

The district court accepted ABC's argument that a conditional privilege applied under Illinois law because allegations of Medicare fraud were a matter of public concern. The court relied upon an Illinois Supreme Court decision *Kuwik v. Starmark Star Marketing and Administration, Inc.*, 156 Ill. 2d 16, 619 N.E.2d 129 (1993), in finding that such a privilege exists. The court's inquiry continued, however, to determine if the conditional privilege had been abused and therefore lost. Judge Nordberg said that the privilege could be lost by any reckless act showing disregard for the defamed parties' rights.

Since this conditional privilege requires more rigorous proof than the normal negligence standard, but less rigorous proof than the "daunting" standard of actual malice, the court ruled that an issue of fact existed to be decided at trial. For this reason the actual damage claims of Drs. Simon and Glazer were not dismissed.

### *Other Legal Issues: Substantial Truth, Incremental Harm, And "Of and Concerning"*

The district court analyzed several other positions raised in the summary judgment motion, but held that material issues of fact existed which precluded entry of judgment on these bases.

***Substantial truth:*** On the issue of substantial truth, Judge Nordberg held that the inquiry focused on the truthfulness of the autorefractor rigging allegation, not the overall truthfulness of the broadcast regarding unnecessary surgery. Accordingly, Judge Nordberg

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## *Desnick* Revisited

held that the "gist" or "sting" of the autorefractor allegation itself had to be substantially true before summary judgment could be granted on this ground. After reciting conflicting evidence in the record whether the autorefractor machine could be, and was, rigged at the Desnick Eye Center, the court held that a genuine issue of material fact remained as the truth or falsity of this assertion.

***Incremental harm:*** The district court refined the doctrine of incremental harm, recognized earlier in the Seventh Circuit appeal, to distinguish it from the substantial truth defense. In doing so the court cited with approval a recent federal court decision in *Jewell v. NYP Holdings Inc.*, 1998 WL 684444 (S.D.N.Y. 1998) explaining the distinction between the incremental harm analysis and the substantial truth defense.

The district court also found that the allegations about the autorefractor were not so subsidiary from the unchallenged allegations of unnecessary surgery to be non-actionable. In doing so the court stated that it was bound by the Seventh Circuit holding that the autorefractor allegation was distinct from the other statements in the broadcast:

> This court is bound by the Seventh Circuit's holding. If free to decide, the court questions whether the autorefractor tampering is substantially different from the overall allegations of unnecessary surgery. (*Slip* op. at. 12, n. 11)

***"Of and Concerning"***: On the issue of "of and concerning," the court noted that "[a] defamatory publication need not specifically name the plaintiff - - it is enough if the audience would be likely to think that the defendant was talking about the plaintiff." *Slip* op. at 18. Holding that a reasonable viewer would conclude that the broadcast was "of and concerning" the plaintiff doctors because each is shown in the broadcast examining patients and recommending cataract surgery, the court held as a matter of law that the allegations were "of and concerning" Drs. Simon and Glazer.

Because the ruling did not dispose of all claims, the remaining claim for actual damages is pending in the district court.

*Michael M. Conway and Mary Kay Martire of Hopkins & Sutter, Chicago, IL, along with Jean Zoeller of the ABC Legal Department, are representing ABC in this case.*

# California Court Partially Dismisses "Tailwind" Libel Suit

**By Robin Bierstedt**

A California district court partially dismissed a libel suit arising out of the controversial "Tailwind" report. *Sheppard, et al. v. Cable News Network, Inc., et al.*, (N.D. Cal. March 9, 1999). The CNN "NewsStand" broadcasts and Time magazine article alleged that in a 1970 U.S. military operation in Laos (known as Operation Tailwind) deadly sarin nerve gas was used and American defectors were targeted. Both CNN and Time retracted the report, following an investigation by Floyd Abrams that concluded there was insufficient evidence to support it.

The case was brought by six individual plaintiffs who participated in the Tailwind mission, five of whom were named or pictured, and five "class" plaintiffs who were neither named nor pictured and who sued on behalf of a class of forty to fifty servicemen who were involved in the mission. CNN and Time moved to dismiss on three grounds: (1) the California retraction statute bars recovery; (2) the report was not "of and concerning" the plaintiffs; and (3) the report was not capable of a defamatory meaning.

## *Retraction Statute*

The court held that the California retraction statute (Cal. Civil Code § 48a) applied to the CNN broadcasts and barred plaintiffs' claims against CNN for general damages; he gave them leave to amend to allege special damages with greater specificity. The judge (Jeremy Fogel) concluded reluctantly that, even though the statute was enacted to protect breaking news (the Tailwind report was the result of an eight-month investigation), the plain language of the statute addressed television broadcasts.

In the case of Time, the court noted that the California cases are split as to whether the retraction statute applies to magazines and adopted the "persuasive" reasoning of *Burnett v. National Enquirer, Inc.*, 144 Cal. App. 3d 991 (1983) — that application of the statute depends on the publication's role in disseminating breaking news. Moreover, although the Tailwind report was not itself breaking news, the relevant issue is the nature of the publication as a whole, as opposed to a particular article. Finding that he did not have enough information before him to decide the issue, he denied application of the statute to Time on this motion, but "without prejudice."

## *"Of and Concerning" Requirement*

Judge Fogel ruled that the Tailwind report was "of and concerning" only those plaintiffs who were named, pictured, or interviewed, and dismissed claims by plaintiffs who were not specifically depicted. He rejected plaintiffs' group libel arguments. He also rejected defendants' argument that the report was an impersonal attack on government operations under the holding of *New York Times v. Sullivan*, 376 U.S. 254 (1964), for plaintiffs named, quoted or pictured.

## *Defamatory Meaning*

The court concluded without discussion that the report could reasonably be construed as defamatory to the individual plaintiffs who were specifically depicted. He said: "Considering the sensational nature of the reports and the emphasis on the use of sarin nerve gas against American defectors and civilians, the Court concludes that the reports reasonably could be construed as defamatory to the individual plaintiffs named, quoted and pictured therein."

## *Privacy and Emotional Distress Claims*

The judge held that plaintiffs' claims for invasion of privacy and emotional distress were superfluous and dismissed them.

There are three other libel suits arising out of the Tailwind report. The two other federal cases, which were brought in Florida and California by former servicemen, have been consolidated with the *Sheppard* case by the Judicial Panel on Multidistrict Litigation. The one non-federal case, brought by a retired Army Major General, is in D.C. Superior Court, where defendants' motion to dismiss is pending.

*Robin Bierstedt is Vice President and Deputy General Counsel of Time Inc. CNN and Time are represented in all Tailwind cases by Nicole Seligman and Kevin Baine of Williams & Connolly.*

# Federal District Court Dismisses Complaint, Strengthens Fair Report Privilege Under Pennsylvania Law

**By Stephen J. Del Sole**

Relying on the fair report privilege, the United States District Court for the Western District of Pennsylvania has adopted a Magistrate Judge's recommendation and dismissed a defamation claim based upon an allegedly erroneous newspaper report of a plaintiff's criminal conviction and imprisonment for land fraud. Reilly v. North Hills News Record, No. 98-1058 (W.D. Pa, Dec. 1, 1998).

## *An Arrest and an Article*

Thomas J. Reilly brought suit against the *North Hills News Record,* a suburban Pittsburgh paper, after a June 19, 1997 newspaper article that recounted Reilly's involvement in a failed real estate investment scheme. Reilly had been indicted by a grand jury for his involvement in a real estate scam resembling a "Ponzi" scheme in which a portion of the $57 million received from 2,500 real estate investors was used to make payments to earlier investors. The remainder of the "investments" were converted to the use of the defendants. Reilly was convicted and imprisoned on 23 federal counts including mail fraud, conspiracy to defraud the Internal Revenue Service, and assistance in the preparation of false income tax returns — all committed to further the fraudulent scheme.

Shortly before Reilly's release from prison, the *North Hills News Record* published the article that referred to his conduct as "embezzlement." Despite various uncontested portions of the article describing the real estate investment scheme and his criminal convictions, Reilly's sole complaint was the statement characterizing his offense as "embezzlement." Thus, Reilly did not challenge the article's reports that:

- he was selling worthless deeds to real estate;
- in 1993, a federal judge sentenced to him to six years in prison and fined him $2 million;
- at the time the article was written, he was in federal prison for fraud and tax evasion;
- following his criminal conviction, the United State Bankruptcy Court formed a development company to take over the real estate development and attempt to return money to investors, and had returned $10 million of the $58 million lost, and;
- Reilly still maintained his innocence at the time of the article and claimed that he was misled by his former accountants.

## *Paper Moves to Dismiss*

Although originally filed in the Pennsylvania State Court system, the newspaper removed the case based on diversity jurisdiction. The newspaper filed a motion to dismiss on the basis that the alleged defamation was subject to the fair report privilege. Under Pennsylvania law, news reports of potentially defamatory statements made in judicial or official proceedings enjoy a conditional privilege. All that is required of the report is a "summary of substantial accuracy," meaning that that the report is not defamatory if, on the whole, it accurately captures the "gist" or "sting" of the plaintiff's conduct and subsequent criminal conviction.

The *News Record* also asserted that because Mr. Reilly was convicted following two highly publicized trials in the Western District of Pennsylvania, he was "libel proof" as to press reports of his crimes.

In response, Reilly contended that the underlying facts of his conviction merely demonstrated a technical violation of the tax code committed in attempting to assist investors. He maintained that the *News Record*'s characterization of his actions as "embezzlement," however, carried a far greater "sting" than the truth of his actual crimes (as he defined them). Reilly also maintained that, under Pennsylvania law, the conclusory allegations of malice contained in his complaint precluded dismissal.

The District Court rejected Reilly's self-serving descriptions of his criminal conduct. District Court Judge Gary L. Lancaster, without separate opinion, adopted Magistrate Judge Kenneth J. Benson's Report and Recommendation and dismissed the libel lawsuit

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## Federal District Court Dismisses Complaint

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with prejudice.

### *Fair Report Not Lost by Malice*

Although the Magistrate acknowledged that Reilly was neither charged nor convicted of any offense entitled "embezzlement," the Court nevertheless found that the article accurately conveyed the "gist" or "sting" of the conduct alleged by the grand jury, which formed the basis for the convictions. The Court found that the use of the term "embezzlement" in such a situation, while not technically accurate in a legal sense, captured the essence of the indictment and the convictions and constituted a "summary of substantial accuracy" under Pennsylvania's fair report law.

Significantly, the Court rejected Reilly's assertion that under Pennsylvania law, the conditional privilege of fair report had been abused and, as such, lost because the article had been published with malice. The Court held that once it is established that the article was a substantially accurate account, there is no underlying defamation upon which to sue and the malice inquiry becomes irrelevant.

The sole question, in the words of the Court, was whether the newspaper "got it right," *i.e.*, whether the statement it made was a "substantially accurate summary" of the indictment. Because truth of a statement is an absolute defense to defamation in Pennsylvania, once substantial accuracy is established, there is no need to then examine the newspaper's knowledge or motivation in printing the article.

The Court also rejected Reilly's procedural argument that the *News Record's* reliance upon the grand jury indictment and criminal docket sheet were improper on defendants' Motion to Dismiss under Fed.R.Civ.P. 12(b)(6). The Court found that certain matters which are not part of, or attached to, the complaint may nevertheless be properly considered if the plaintiff's claims are based upon those documents. The Court reasoned that due to the nature of plaintiff's claims, the complaint "relied upon" the undeniably authentic indictment and docket sheet of the criminal case and, as such, they may properly be considered.

The Court's finding that the article was protected by the privilege of fair report obviated the need for adjudication of the defendants' "libel-proof" plaintiff argument.

Reilly filed an Objection to the Magistrate's Report and Recommendation, which the District Court Judge rejected. Reilly did not appeal the dismissal.

*W. Thomas McGough, Jr. and Stephen J. Del Sole of Reed Smith Shaw & McClay LLP, Pittsburgh, represented the North Hills News Record with assistance from Charles D. Tobin, in-house counsel at Gannett Co., Inc. in Arlington, Va.*

## A Tale of Dismissal, or, How the Case Was Won by Niceness

**By Patricia Fields Anderson**

"I was tricked, judge!"

Thus did the frantic plaintiff's lawyer argue against dismissal of his client's $300 million libel suit against a newspaper. The "trick" in question is Florida Rule of Civil Procedure 1.420(e), dismissal for failure to prosecute. How could such a thing happen?

Many states provide that a case languishing and inactive on a court docket will be dismissed after a specified period of time, by administrative act of the court or clerk. Most, however, give fair warning in advance that dismissal may be imminent. Florida's rule is not so solicitous of the dallying plaintiff. Here, usually the first time a plaintiff's lawyer realizes big trouble has arrived is when the motion to dismiss comes in the mail. And by then it's too late. The rule is an excellent reason for a foolproof calendaring system.

### *Florida's Failure to Prosecute Rule*

The Florida rule provides that the court "shall" dismiss an action in which no record activity has occurred for one year, absent: 1) stipulation of the parties for a stay; 2) entry of a stay order during the one year period; or, 3) "good cause" shown in writing. The vigilant defendant's motion

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## A Tale of Dismissal

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to dismiss normally is filed shortly after expiration of the one year period. Two lines of cases have developed under this rule: What is "record activity"? And what is "good cause"?

The Florida Supreme Court has observed, somewhat airily, that not everything put into a court file constitutes "record activity." Taken as a whole, these cases represent one of the great mysteries of the law. For example, neither a judge's order requesting a status conference nor the status conference is "record activity," nor is an unheard motion for abatement, the gratuitous filing of deposition transcripts by a court reporter, or even a notice of deposition. The deposition itself is not "record activity." A request for documents, however, would be a "record activity," as would interrogatories, or a motion for summary judgment. The "record activity" cases truly are a trap for the unwary and result in some strange outcomes.

"Good cause" under the rule must be "compelling" and meet a "high threshold" to avoid dismissal. "Good cause" arguments come in many forms, but perhaps the most engaging and interesting cases are those in which the plaintiff's lawyer is incapacitated, either emotionally or physically. For example, the "professional paralysis" of a lawyer whose ex-wife was busily trying to line up his contract murder — while she, herself, was on house arrest for his attempted murder — was held to be good cause sufficient to excuse his failure to take any action in the case for more than a year. Likewise, a lawyer who had been severely injured in an auto accident and ultimately had a leg amputated had shown good cause.

"Good cause" may take a more prosaic form, as well. A plaintiff's lawyer who had entered into a payout agreement with the defense lawyer forestalled dismissal when a new defense lawyer entered the case and filed one of these motions. Short of some sort of extreme circumstance, however, getting a judge to find "good cause" under this rule is a nail-biting experience for the plaintiff's lawyer.

Moreover, what makes this rule so frightening is its effect after trial. There are a number of Florida opinions *reversing jury verdicts* where a motion to dismiss for failure to prosecute had been improperly denied in the trial court. These cases are not remands: they are outright reversals. So, like the Chinese proverb about being careful in what you ask for, the plaintiff's attorney who staves off a failure-to-prosecute dismissal may be forestalling malpractice liability only temporarily, and he may face a day of reckoning after trial.

### *The Doctor and the Doctor's Counsel*

Now, back to our libel plaintiff, Dr. Alfred O. Bonati, a very wealthy and successful surgeon. Dr. Bonati was most displeased about a newspaper story detailing something about his past, his present, and his intent to buy a local acute-care hospital. His complaint said the story made him look "greedy" and money-motivated.

What made the case so energizing (for the defense lawyer, that is) was the page 1-A, six-inch, boxed, above-the-fold correction that ran one spring Sunday morning a few weeks after the story had been published. Seems the doctor had not YET been sued 13 times (as reported), nor did he own 20 ACTIVE corporations (ditto). And so forth. Years after the story ran, by 1996 or so, he had been sued some 35 times for malpractice. But that correction certainly made for some tough sledding. One fact in the story that Dr. Bonati did not dispute was his annual gross — $10 million — and he seemed prepared to spend a fair chunk of it on this lawsuit.

One would not expect a big libel case like this one to wither away. But perhaps the plaintiff's reliance on out-of-state counsel, unschooled in the byzantine corridors of Florida's procedural law, was his first big mistake. Dr. Bonati had hired one of America's best-known defamation plaintiff's lawyers — perhaps you've seen him on Court TV — Jonathan Lubell, a kindly and clever gentleman from Manhattan. Depositions were taken. Interrogatories were answered. Documents were produced. In one grueling week in 1993, the defense lawyer took ten depositions in five states and the District of Columbia. The trial court denied the defense's attempt to have the plaintiff declared a limited-purpose public figure. The battle raged.

Somewhere in the third year of the case, however, the plaintiff and his lawyer found themselves having to watch other legal pots. The state's regulatory body had filed administrative charges against the doctor, seeking to revoke his license to practice medicine. Also, the number of medical malpractice suits filed against him reached a critical

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## A Tale of Dismissal

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mass. (The doctor, of course, claimed these suits — every, single one — were the fault of the newspaper.) The libel case got put onto the back burner.

One patient's suit went to trial in federal court, shortly after the last record activity in the libel case (which, by then, was in its fifth year). In between the jury's rendition of a verdict in favor of the patient and the time jurors were to reconvene to consider an award of punitive damages, Dr. Bonati filed for bankruptcy protection, hoping to foreclose an unfavorable outcome. The bankruptcy judge allowed the jury to consider the issue, however, and a rather substantial punitive damages award was levied against the doctor and one of his corporations (a co-defendant). A number of post-trial motions were filed, argued and, eventually, ruled upon.

### *The Clock Was Ticking*

Meanwhile, the one-year clock was ticking away in the libel case. The nationally-known Manhattan lawyer, Lubell, twice had been too busy to produce a damages witness for deposition in the libel case. Pressing matters elsewhere. Federal trial. Dr. Bonati's post-trial motions and regulatory complaints. In fact, the very last record activity in the libel case was the third (unsuccessful) notice of deposition of a damages witness, filed by the defense lawyer.

More than eight months later, Lubell informally advised he "would like" to take the deposition of a particular witness, Mr. X. After that deposition, he said, he thought he might be ready to try the case.

Mr. X had been an editor at the newspaper at the time of publication, some five years earlier. Since then, he had moved on to become editor-in-chief of a statewide newspaper in a scenic and hard-to-reach-by-airplane western state. During the preceding three years, the eminent Manhattan lawyer, Lubell, had on several occasions expressed his desire to take the deposition of this selfsame witness, Mr. X. Usually, his desires came in the form of a written inquiry, followed by silence when offered available dates. On one occasion, the deposition date was so firm the defense lawyer had even traveled to the distant state to prepare Mr. X for his testimony. Shortly before the deposition date arrived, however, Lubell canceled.

So, in June 1997, when Lubell once again said he "would like" to take this deposition, the defense lawyer may be forgiven for looking upon this request with something of a weary and jaundiced eye. Nonetheless, in the spirit of professionalism, cooperation, good manners and Southern hospitality that marked the case, the defense lawyer said she once again would contact Lubell with available dates. Unbeknownst to her, Mr. X again had changed jobs, and he never returned her phone call seeking his availability. She forgot about the matter and heard nothing further from either Mr. X or Lubell. And the clock continued ticking.

At this point, some 83 days remained before the expiration of the one-year period of no record activity. Ten days would be plenty of time to take some step constituting record activity, one Florida court had ruled. After all, filing a single interrogatory, a single request for admission, or a request for the production of a single piece of paper is indisputable record activity and re-sets that dismissal clock. It is not as though the rule imposes an onerous burden. Nonetheless, those 83 days passed without event.

### *Time Runs Out*

The last record activity in the case had occurred September 30, 1996. One year and one week later — after an alert secretary noticed the one year deadline had passed — the defense lawyer filed the motion to dismiss for failure to prosecute and set the motion for hearing six weeks later. At this point, it was too late for Lubell to file record activity: he had to travel on the facts as they existed. The rule requires a written showing of "good cause," and it must be filed at least five days before the hearing on the motion.

What anticipation, waiting for those papers! Would the Manhattan lawyer claim he had been ill? Would he claim his client's bankruptcy somehow prevented record activity? Would he claim his office had burned to the ground? (The last seemed unlikely, given Lubell's midtown location in a tall building.)

Lubell made several arguments. First, the case had been hotly litigated, for a time, and a lot of money and effort had been expended. Second, he had been very, very busy handling these others matters for Dr. Bonati during the one-year period. Third, dismissing the case would punish Dr. Bonati, unfairly. Fourth, the defense was estopped from

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## A Tale of Dismissal

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moving for dismissal because of the promise to produce Mr. X for deposition. That promise lulled Lubell into inactivity, he said, and was downright trickery.

Also, wrapped up in the estoppel argument was a dinner attended by Lubell, Dr. Bonati, and the defense lawyer, during March of the one-year period. The defense lawyer had initiated this dinner to advise the plaintiff, in his lawyer's presence, that it might be a good idea to just declare victory, dismiss the libel case, and go on home. "Oh, no," said Dr. Bonati. "I need to fight for what's right." Lubell later in court characterized this dinner as a "settlement negotiation;" but, even there, Florida law was against him. Failed settlement negotiations do not amount to "good cause" under this rule. So, even if this little dinner had been a table-banging, blood-pressure-raising, no-holds-barred true negotiation, it mattered not.

The trial judge was unimpressed with these "good cause" arguments. After a hearing that spread over two days in December 1997, he dismissed the case. Lubell was grayish and grim-faced leaving the courthouse that day.

### *An Appeal Without Avail*

Precisely one year later, the appellate court heard oral argument on Dr. Bonati's appeal from the dismissal. Questioning was lively. Lubell, wisely, had hired a Florida lawyer (a nice young man who was hobbled by the, you know, facts) to prepare the appellate briefs and do the oral argument, but he was in the courtroom, listening (still a little grayish and grim-faced) as the appellate judges dissected his arguments. Those arguments on appeal had become a bit more refined but no more persuasive.

About a month later, the court's decision arrived in the morning mail: affirmed, without opinion. The motions for rehearing, rehearing *en banc*, clarification, and for certified question also were rejected, without opinion. Under Florida appellate law, that means no appeal can be taken to the Florida Supreme Court. The next step is to petition the United States Supreme Court for review, which seems unlikely to involve itself in a matter of state procedural law.

### *Postscript and Lessons to Learn*

There is one interesting postscript to the case, however. When Dr. Bonati filed for bankruptcy, there was a meeting attended by him, his entourage, his bankruptcy lawyers, and Lubell. "How much is the libel case worth for purposes of listing it as an asset on the bankruptcy schedule?" asked the bankruptcy lawyers. "No less than 30 million dollars," answered Lubell, the Manhattan lawyer. Now, those who keep up with defamation verdicts would recognize immediately that such a figure would be an extraordinary recovery, but Lubell's audience perhaps is not in that group which tracks these things.

In any event, three months ago, Dr. Bonati's corporation — the one that had been a co-defendant in the federal case and that was still in bankruptcy — sued Lubell and his law firm for all the fees paid on the libel case over the years. "In excess of $480,000" is the way the suit reads.

**There are a number of lessons here.**

First, get to know your state's failure to prosecute rule and keep track of your cases' dockets.

Second, if you are in Florida, consult local counsel.

Third, it doesn't cost anything to be nice, and it might take the wind out of the plaintiff's lawyer's sails and cause him to lose interest in the fight. Dishearten him, so to speak.

Fourth, certainly don't file something in your case just to be filing it.

Fifth, do not make ridiculous promises of a huge success to your client; it might come back to haunt you.

Sixth, even the biggest, most hotly-contested, most high-profile defamation case can just die off for lack of interest.

Seventh, if you are appearing *pro hac vice* as lead counsel in a foreign state's courts, you might consider reading the rules. Even if you're an eminent Manhattan lawyer.

*Patricia Fields Anderson, with Rahdert, Anderson, McGowan & Steele in St. Petersburg, represented the defendant in this lawsuit.*

# False Light Plaintiff Must Have Expert Evidence for Emotional Distress Claim But May Seek Nominal Damages

**By W. Thomas McGough, Jr. and Daniel P. Lynch**

In a mixed blessing to media defendants, the Pennsylvania Superior Court has ruled that, in an action for false light invasion of privacy, a plaintiff cannot recover for alleged emotional distress absent expert medical testimony supporting that claim but can, even in the absence of any injury whatsoever, pursue a claim for nominal damages. *Wecht v. PG Publishing Co.*, 1999 WL 68909, 1999 PA Super LEXIS 120. (Pa. Super.)

## *Damages Without Injury*

Cyril H. Wecht, the well-known Coroner of Allegheny County, Pennsylvania, filed this action against PG Publishing, publisher of The Pittsburgh Post Gazette, in 1984 and alleged therein ten causes of action for defamation and false light invasion of privacy. At issue were five different publications — three cartoons and two written articles. Initially, the trial court dismissed all ten causes of action. In Dr. Wecht's first appeal to the Superior Court, it affirmed the dismissal of the defamation claims, but remanded the case to the trial court for further findings on the false light invasion of privacy claims. *Wecht v. PG Publishing Co.*, 510 A.2d 769 (Pa. Super. 1986), *appeal denied*, 522 A.2d 559 (Pa. 1987) ("*Wecht I*").

On remand, the trial court granted summary judgment on the false light claims as to four of the five publications. In regard to the remaining article, the Pennsylvania Superior Court had already held in *Wecht I* that it was "inconceivable" that it "besmirched" Wecht's reputation. Because this ruling precluded a claim for reputational injury, and because Dr. Wecht had already stipulated that he had suffered no economic harm, his claimed injury was limited to the emotional distress he supposedly suffered as a result of the article. Discovery had revealed, however, that Dr. Wecht had no expert medical testimony to support that claim.

## *Experts Needed*

Ultimately, the trial court granted the Post-Gazette's motion in limine to preclude Dr. Wecht's claim for emotional distress. Looking principally to *Kazatsky v. King David Memorial Park, Inc.*, 527 A.2d 988 (Pa. 1987), the trial court held that "the exercise of sound discretion in this case militates in favor of requiring expert testimony in support of [Dr. Wecht's] emotional distress claim."

In *Kazatsky* the Pennsylvania Supreme Court held that a claim for intentional infliction of emotional distress could not proceed without expert medical testimony to establish the emotional distress. In particular, the Pennsylvania Supreme Court stated:

> It is basic tort law than an injury is an element to be proven. Given the advanced state of medical science, it is unwise and unnecessary to permit recovery to be predicated on an inference based on the defendant's "outrageousness" without expert medical confirmation that the plaintiff actually suffered the claimed distress. Moreover, the requirement of some objective proof of severe emotional distress will not present an unsurmountable [sic] obstacle to recovery. Those truly damaged should have little difficulty in procuring reliable testimony as to the nature and extent of their injuries.

*Kazatsky*, 527 A.2d at 995.

Noting that Dr. Wecht could not, as a matter of law, show that he sustained any injury -- economic, reputational, or emotional -- as a result of the challenged article, the trial court granted summary judgment for the Post-Gazette. According to the trial court, allowing the case to proceed to trial only for nominal damages "would be a great misuse of court time and resources."

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## Pennsylvania Superior Court

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### *A Partial Affirmative on Appeal*

On appeal, the Pennsylvania Superior Court affirmed in part and reversed in part. *Wecht v. PG Publishing Co.*, 1999 WL 68909, 1999 PA Super LEXIS 120 ("*Wecht II*"). It upheld the trial court's decision regarding the necessity of medical expert testimony to support Dr. Wecht's claim for emotional distress damages. Like the trial court, the Superior Court looked initially to *Kazatsky*. It further reasoned:

> [I]n order to establish a compensable injury for emotional distress, [Dr. Wecht] must establish not only "mental distress" but a certain type of mental distress, i.e., "mental distress of a kind that normally results from" the invasion of privacy. Restatement (Second) of Torts § 652H. Although it is conceivable that a plaintiff could testify to the mental distress symptoms he or she suffered, a lay witness could not make the necessary connection between those symptoms and the type of distress that "normally results from" invasion of privacy. Therefore, we agree with the trial court that expert medical testimony is necessary in order to show both the emotional distress itself and that the plaintiff's particular distress is the kind that normally results from the particular invasion of privacy.

*Wecht II* at ¶13. The Superior Court predicted that "[r]equiring expert medical testimony will also ensure that fraudulent or exaggerated claims or a 'flood of litigation' will not ensue." *Wecht II* at ¶14.

### *Nominal Damages Allowed*

The Superior Court reversed the entry of summary judgment, however, disagreeing that a trial for nominal damages would be a waste of time. According to the Superior Court, Pennsylvania courts have "awarded nominal damages in various cases, particularly in cases where there is a technical tort but no actual damage." *Wecht II* at ¶16. *(Stevenson v. Economy Bank of Ambridge,* 197 A.2d 721 (Pa. 1964) (bank refused to allow plaintiff access to safe deposit box which was leased to the plaintiff); *Grabowski v. Quiggley*, 684 A.2d 610 (Pa. Super. 1986) (alleged battery, plaintiff had not consented to surgery, albeit successful surgery, by a substitute surgeon); *Aquino v. Bulletin Company,* 154 A.2d 422, 426 (Pa. Super. 1959) (dictum that a plaintiff in an invasion of privacy case need not suffer either pecuniary loss or physical harm, and that nominal, compensatory or punitive damages may be awarded in the same way in which general damages are awarded in defamation); *Harris v. Easton Publishing Company*, 483 A.2d 1377, 1385 (Pa. Super. 1984) (same)).

### *Weighing the Consequences*

From the media's standpoint, the Superior Court's holding on emotional distress represents a significant victory. Plaintiffs bringing actions for false light invasion of privacy frequently seek damages for supposed emotional distress, often in the absence of any tangible economic injury. The Superior Court's requirement that such litigants provide expert medical testimony in support of such allegations should indeed help weed out "fraudulent and exaggerated claims" at an early juncture in the litigation.

Of equal importance is the prospect that the holding in *Wecht II* can be carried over to defamation cases as well as other invasion of privacy cases. Nothing in the Superior Court's reasoning would seem to limit this expansion.

As for the Superior Court's holding on nominal

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damages, the impact on the media is less clear. Dr. Wecht has already announced his intention to try the case for those low stakes, and may set an example for other public officials and public figures who want to pursue actions against the media even in the absence of any provable economic, reputational, or psychic injury.

In this regard, the Superior Court appears to have confused the distinction between damages and injury, and has also slighted the special constitutional protections afforded those who speak out regarding public officials. In defamation and invasion of privacy cases, "actual injury" is a required element. See *Gertz v. Robert Welch,* Inc., 418 U.S. 323, 348-50 (1974); *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1092 (5th Cir. 1984) (holding that *Gertz* applies equally to false light and defamation cases), *cert. denied*, 469 U.S. 1107 (1985). In *Gertz*, the Court explained:

> The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinions rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the State had no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

*Id.* at 349 (emphasis added). The Court did not define "actual injury," but asserted: "[T]he more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Id.* at 350-51.

The constitutional requirement that an actual injury must be established is applicable to claims of false light invasion of privacy. As provided in the Restatement (Second) of Torts:

> It seems likely that the holding of *Gertz v. Robert Welch, Inc.*, (1974) 418 U.S. 323, to the effect that the First Amendment requires that recovery for defamation be confined to compensation for "actual injury" and cannot be extended to "presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth," will be held applicable to actions for invasion of privacy based upon . . . § 652E.

Restatement (Second) of Torts § 652H cmt. c; *see also Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1092 (5th Cir. 1984).

On a more practical level, in this era of over-crowded dockets, jurors unwilling to serve and vacancies on the bench, jury trials are a precious commodity. These factors militate against giving a jury trial to a plaintiff with only hurt feelings and the financial or political resources to litigate.

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# Eighth Circuit Bars Privacy Claim Based on Corpse Photographs

by Mark Sableman

A ruling by the Eighth Circuit late last year addressed privacy in an unusual context – the claimed privacy right of a decedent's relative with respect to photographs of the decedent's body. In the decision, *Riley v. St. Louis County*, 153 F.3d 627 (8th Cir. 1998), the court affirmed dismissal of the plaintiff's claim that a police photograph of her son's body violated her "right of sepulchre."

The decedent, Anthony Riley, committed suicide at the age of 18. The boy's mother, Sharon Riley, claimed that on the day of the funeral, the funeral home allowed a police officer to photograph the deceased as he lay in his coffin. The resulting photographs, she claimed, were later displayed at a public gathering, where police officers commented that the boy's gang-related activities had caused his death.

Ms. Riley filed a three-count. Complaint against the police and the funeral home, alleging federal civil rights violations against the police, and state common law causes of action for breach of contract and negligence against the funeral home. The District Court dismissed the civil rights count for failure to state a cause of action, and declined to exercise supplemental jurisdiction over the state law claims. The Eighth Circuit affirmed in a unanimous decision written by Judge Floyd R. Gibson.

Initially, the Court considered Ms. Riley's argument for a constitutionally protected property interest, based on the Missouri common law right of sepulchre. Sepulchre is the common law right that prohibits physical intrusion, mishandling or manipulation of a decedent's body.

The court rejected this sepulchre-as-constitutional-privacy-right for two reasons. First, since no physical handling of the body was alleged (only the taking and displaying of photographs), the facts alleged did not raise a sepulchre violation. Second, Ms. Riley's "substantive due process" argument for a violation of sepulchre, based on the taking and display of the photographs, went too far. The court noted that substantive due process is violated only where the state infringes on a fundamental liberty interest by shocking the conscience or offending judicial notions of fairness and human dignity. The facts of the case showed no such outrageousness, the court concluded.

Specifically, the court found that while the police acted "inappropriately," their actions did not violate Ms. Riley's right of privacy. Since her son's remains were displayed at the funeral home visitation, Ms. Riley had no legitimate expectation that they would be kept confidential. Finally, Ms. Riley's claimed right to a dignified memory of her son, unmarred by the unauthorized photographs and the post-mortem slanderous remarks of the police, did not have a basis in constitutional rights.

Obviously this was an unusual case in an unusual legal setting. Because it arose in a civil rights context, in which the plaintiff had to prove a *constitutional* right, the decision will not automatically bar common-law privacy claims against the media in similar situations. However, the court's focus on the lack of a legitimate expectation of privacy, and its reluctance to extend the sepulchre right beyond the traditional physical handling limitations, ought to translate into the media-law area, and discourage similar claims against the media.

*Mark Sableman is with Thompson Coburn in St. Louis, MO.*

**Ed. Note:** Interestingly, in October 1998 four consolidated cases with similar but more egregious facts led the Washington Supreme Court to recognize common law invasion of privacy for the first time. In *Reid v. Pierce County*, 961 P.2d 333 (Wash. 1998), the court found that the families of four decedents could maintain invasion of privacy claims against Pierce County based on allegations that county Medical Examiner's Office employees took or obtained photos of their next of kin and showed them to others. *See LDRC LibelLetter* October 1998 at p. 29.

# Broadcast Reporters Face Criminal Charges for "Staged News"

**By Brett J. DelPorto**

Two television news reporters who taped and broadcast interviews of minors chewing tobacco may be charged with contributing to the delinquency of the minors, according to a recent 2-1 opinion by the Utah Court of Appeals. *State v. Krueger*, 1999 WL 93222 (Utah App.).

"Under the circumstances presented in this case, we find no imposition on the rights of free press protected by the First Amendment . . . " wrote Presiding Judge Michael J. Wilkins for the majority. "As important as a free and unfettered press is to the survival and prosperity of a free society, under these facts defendants may not insulate their actions under the cloak of the First Amendment."

The decision, unless appealed, means television news reporter Mary Sawyers of KTVX, Channel 4, in Salt Lake City, and cameraman Joseph Krueger must go to trial on the charges. They face a possible maximum penalty of up to six months in jail and a $1,000 fine.

***"As important as a free and unfettered press is to the survival and prosperity of a free society, under these facts defendants may not insulate their actions under the cloak of the First Amendment."***

## *"Staged" News?*

Ironically, the charges stem from a news story on the dangers of chewing tobacco and its use by teenagers. On February 18, 1997, Sawyers and Krueger responded to a media advisory from a Utah high school inviting reporters to attend an assembly aimed at addressing the problem of chewing tobacco use by the school's students. The assembly featured a lecture by Richard Bender, a speaker who tours the country in hopes of discouraging the use of chewing tobacco. During the assembly, which Sawyers and Krueger attended and filmed, Bender told the students he began using chewing tobacco as a youth and eventually contracted cancer. Several surgical procedures ultimately removed the cancer, but left him so disfigured that he refers to himself as "the man without a face."

After attending the assembly, Sawyers and Krueger interviewed Bender, then interviewed students who were identified by a school official as users of chewing tobacco. Sawyers and Krueger asked the students if the assembly and the speaker had convinced them to quit. The students said they were concerned about the dangers, but stated that they had no immediate plans to quit. In fact, the students chewed tobacco during the interview.

The students who were interviewed were identified by name on the newscast and, as a result, were issued citations for possession of chewing tobacco. Because the students claimed that the reporters asked them to chew the tobacco on camera -- a claim Sawyers and Krueger deny -- prosecutors also filed charges against Sawyers and Krueger for contributing to the delinquency of minors.

The reporters moved to dismiss the charges. In order to properly present the legal questions to the court, the reporters assumed for the purpose of the motion only that the students' version of events was correct -- that the students were asked to chew their own tobacco during the interviews. The trial court denied the motion to dismiss, and the reporters appealed.

On appeal, the reporters made several arguments. First, the statute under which the minors were charged regulates possession, not use, of chewing tobacco, so even if the reporters did ask them to chew tobacco already in their possession, that would not in any way further the students pre-existing state of delinquency. Second, the statute is unconstitutionally vague as applied to the conduct

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## "Staged" News

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of the reporters. Third, the prosecution of the reporters violates First Amendment protections for news gathering.

### *Contributing to Delinquency*

Each of these arguments was rejected by the majority opinion of the Utah Court of Appeals. First, the majority stated that the definition of "delinquent" under Utah law was not limited to actions by minors that are in themselves illegal. In other words, an adult may be charged with contributing to the "delinquency" of a minor even if the minor has not broken any laws.

Citing another section of the Utah contributing statute that prohibited actions by adults that "tends to cause minors to become or remain delinquent," the majority adopted a plurality opinion from a 1970 Utah Supreme Court opinion defining delinquency as either contrary to law or "so contrary to the generally accepted standards of decency and morality that its result will be substantially harmful to the mental, moral or physical well-being of the child." *State v. Tritt*, 463 P.2d 806 (Utah 1970). Under this definition, the majority stated, a jury could find that the reporters "prolonged" the time in which the students were committing the violation, thus causing the minors to "remain delinquent" under the statute.

It is very difficult to make sense of this argument. The students were clearly in violation of the law by possessing tobacco; in fact, it was the only law they could have violated because use of chewing tobacco is not a separate offense. Whether the students had the chewing tobacco in their pockets or in their mouths, they are still guilty of possession. Accordingly, Sawyers and Krueger argued that even assuming that they asked the students to chew tobacco on camera, which they emphatically denied, chewing tobacco already in their possession does not "prolong" their pre-existing state of delinquency.

Dissenting Court of Appeals Judge James Z. Davis accepted this reasoning, noting that there was no allegation that any of the students were "in the process of dispossessing themselves of the [chewing tobacco], but were encouraged by defendants to keep the tobacco. Regardless of whether the students were merely possessing the tobacco by having it on their person, or were possessing the tobacco by chewing it, the fact remains that the students were 'remaining delinquent' without the help of the defendants."

### *Vagueness Rejected*

The majority also rejected the vagueness challenge. The majority stated that the language prohibiting adults from doing anything that "tends to cause minors to become or remain delinquent . . . provides adequate notice to the ordinary reader of the prohibited conduct." The majority then went on to cite in support four cases from other jurisdictions (two of which dated back into the 1920s; the most recent was decided in 1949) in which courts had upheld language similar to that of the Utah statute against a vagueness challenge.

Significantly, none of the cases cited by the majority dealt with a contributing to the delinquency of a minor statute in a First Amendment context. This is important because the U.S. Supreme Court has repeatedly stated that although vague laws are always subject to a due process challenge, such laws must be even more closely scrutinized when they implicate First Amendment rights. *See, e.g., Ashton v. Kentucky*, 384 U.S. 195, 200-01 (1966).

In fact, Sawyers and Krueger cited one of the only reported cases in which language identical to the Utah statute was analyzed within a First Amendment context. In *Entertainment Ventures, Inc. v. Brewer*, 306 F. Supp. 802, 820 (M.D. Ala. 1969), prosecutors attempted to apply the Alabama contributing statute to drive-in movie theater owners showing allegedly obscene films. The Alabama statute stated: "It shall be unlawful for any parent, guardian, or other person to aid, encourage,

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## "Staged" News

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or cause any child under eighteen years of age to become or remain dependent, neglected or delinquent . . ." The court permanently enjoined prosecution of the theater owners under the statute, noting that "[p]hrases such as 'to cause any child to become delinquent,' 'to induce, aid or encourage any child,' . . . cannot meet the strict standard of specificity required in a criminal statute affecting expression protected by the first amendment."

### *No First Amendment Protection*

Finally, the majority also rejected Sawyers' and Krueger's argument that their prosecution under the statute infringed on First Amendment protections for news gathering. Sawyers and Krueger argued that effective news coverage of an important public health story required visual images to illustrate the story. In this case, videotaping minors engaged in chewing tobacco seemed the most obvious illustration. The reporters pointed out, once again, that they did not supply the tobacco, that the students already possessed it and were regular users. Accordingly, they did nothing to induce or encourage use of tobacco by any student who was not already a user.

The majority did not find this argument any more persuasive than the others.

> Krueger and Sawyers are not being prosecuted for simply *reporting on* the activities of the children or for *recording* video images of the children. These are clearly protected activities under the First Amendment. Rather, Krueger and Sawyers are being prosecuted for allegedly *setting up* the "visual images to illustrate the story" that they claim is "essential to television journalism." . . . Presumably, if they had come upon children *already* chewing tobacco, they could have collected visual images with impunity. . . . It was in asking the children to chew the tobacco, if that is in fact what happened, that defendants stepped beyond [First Amendment protections].

The reporters have until the end of March to decide whether to appeal to the Utah Supreme Court.

*Brett J. DelPorto is an associate with Watkiss, Dunning & Skordas in Salt Lake City, Utah, which represents defendants in this matter.*

## No Privacy Rights Exist in Driver's License Photos

Holding that no privacy rights exist in driver's license records, including photographs, under either the South Carolina Constitution or the U.S. Constitution, a South Carolina trial court has denied the South Carolina Attorney General's motion for a temporary injunction to enjoin the Department of Public Safety from selling digitized drivers' license photos to a private company for the purpose of preventing fraud and verifying identity. *Condon v. Image Data, LLC*, Civ. Action No. 99-CP-40-0290 (Ct. C.P. Feb. 12, 1999)

In January 1998, the South Carolina Department of Public Safety ("DPS") entered into a contract with Image Data whereby Image Data purchased digitized license and state identification card photographs from DPS. Image Data used the information to create an identification checking system to prevent credit card fraud. A term of the contract between DPS and Image Data provided that the photographs could only be used in accordance with the law. The law provided that "photographs obtained pursuant to the contract can be used only for purposes of preventing fraud and identity verification." *Slip op.* at 2.

The Attorney General, seeking ultimately to void the contract between DPS and Image Data,

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## Driver's License Photos

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sought a temporary injunction against the sale of the photographs, alleging that the sale was in violation of the privacy clause in the South Carolina Constitution. The South Carolina Constitution provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated . . . ." *Slip op.* at 3 (citing S.C. Const. Art. I, s.10).

### *State Constitution Provides No Greater Privacy Protection*

The court rejected the Attorney General's position that the South Carolina constitution afforded South Carolina citizens greater privacy protections than the U.S. Constitution:

> The Attorney General argues that the federal and state constitutions differ in the extent to which they protect the right of privacy, alleging that the state right is broader. The basis for this proposition is that the state right is specifically written into the constitution while the federal right is not. The plaintiff cites no authority, and this Court has found none, which supports this position.

*Slip op.* at 7.

In fact, the court put forward ample authority to the contrary--the U.S. District Court for the District of South Carolina, the Fourth Circuit Court of Appeals and the South Carolina Attorney General have all held that there is no reasonable expectation of privacy with respect to driver's license photos.

Important to the court was *Condon v. Reno*, 972 F. Supp. 977 (D.S.C. 1997), *aff'd*, 155 F.3d 453 (4th Cir. 1998), in which the Attorney General of South Carolina challenged the constitutionality of the Driver's Privacy Protection Act. In its analysis, the District Court in *Condon* cited five items in which an individual had no reasonable expectation of privacy: name, driver identification number, address, phone number and photograph.

> These are clearly not the type of intimate maters for which individuals have a "reasonable expectation of confidentiality" that the Constitution protects. . . . [A]n individual can claim no privacy interest in his appearance, which is of course, reflected in [his] photograph.

*Slip op.* at 9-10 (quoting *Condon v. Reno*, 972 F. Supp. at 991).

The *Condon* court also noted that a driver's license was a common form of identification. *Slip op.* at 9-10.

### *Little Chance of Success on the Merits*

The court, concluding that it was unlikely that the Attorney General could demonstrate a privacy interest in driver's license photos, or if he could, that it was an "unreasonable" invasion, determined that the Attorney General had little chance of success on the merits. Nor would the citizens of South Carolina suffer irreparable harm in the absence of an injunction. Here, the court relied in part on an "opt-out" provision that Image Data established, whereby citizens could request that their photograph not be used in the database. The court, balancing the equities, determined that the temporary injunction should be denied.

A curious postscript to this case is that in *Condon v. Reno*, the same South Carolina Attorney General argued that there could be *no* constitutional right of privacy in state driver or motor vehicle records. *Slip op.* at 10.

# NY Federal Court Rules "Perp Walk" Violates 4th Amendment Privacy Right

A federal court in New York hearing an arrestee's §1983 action against the city held that the "perp walk" -- the police practice of deliberately walking an arrestee outside the station house at the request of the media so that the suspect can be photographed, filmed or questioned -- constitutes a violation of an arrestee's privacy and personal rights under the Fourth Amendment. *Lauro v. City of New York*, (S.D.N.Y. February 25, 1999) (granting plaintiff partial summary judgment on liability). The decision, by Southern District Court Judge Allen Schwartz, contains a generous view of the privacy rights of arrestees, as well as strong hints of potential media liability for publishing the images obtained in perp walks. The decision has led the New York City Police Department to suspend, pending appeal, its practice of parading criminal suspects before the media -- a practice which has had a long and colorful history in New York crime reporting.

## *Plaintiff Arrested for Burglary*

The plaintiff, John Lauro, was a Manhattan building doorman who in 1995 had been asked by a tenant to collect mail and water plants during the tenant's vacation. The tenant had installed a small wireless "baby camera" to monitor his apartment during his absence. Lauro was captured on tape opening and closing closet, dresser and cabinet drawers and touching some items, though he was not seen taking anything from the apartment. The tenant contacted local news stations regarding the video and licensed the videotape to Fox 5 News for $200. The tenant also reported Lauro to the police who arrested him for burglary.

In response to a request from Fox 5 News, the police department's public information office directed the arresting officer to take Lauro on a "perp walk." As described in the decision:

> Plaintiff was handcuffed, walked . . . down the stairs, out the front door, and outside the precinct; then placed into an unmarked car, driven around the block, and walked back into the precinct.

Fox 5 News videotaped Lauro being led out of the station and later broadcast portions of the "perp walk" and babycam video footage in its news reports about the arrest.

Criminal charges against Lauro were ultimately dismissed. He subsequently brought a §1983 action alleging numerous constitutional violations, as well as claims under New York state law.

## *Perp Walk is Illegal Seizure*

According to the decision, the parading of the plaintiff before the media and the broadcast of his image constituted an illegal "seizure" under the Fourth Amendment. First, the police exercised significant physical control over plaintiff's body. The decision quotes from the plaintiff's deposition testimony that he was dragged by the arresting officer in such a manner that the officer could "fix his tie while looking at the camera." Second, "intangibles such as plaintiff's own image and sound of his voice were also seized in a manner that implicates the Fourth Amendment." (citing *Ayeni v. Mottola*, 35 F.3d 680, 22 Media L. Rep. 2225 (2d Cir. 1994).

The Second Circuit in *Ayeni* held that a Fourth Amendment claim was stated against a federal agent who permitted a CBS news crew to videotape the search of a private apartment. Although the *Ayeni* opinion does state that the media's taping of individuals within the private apartment constituted a "seizure," the opening sentence of the decision states that the case involves "the right of privacy of those inside a home." In the instant case, though, Judge Schwartz reads *Ayeni* broadly as centering on the fact that "images and sounds of the Ayenis were intended

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## Perp Walk

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for public viewing by television audiences across the country." Thus, the court here found a privacy right which apparently extends to public settings and involves, at bottom, the right not to have one's arrest publicized.

In this connection, the decision acknowledges that the plaintiff was lawfully arrested, but holds that the Fourth Amendment still requires that the police action be reasonable. Citing to cases involving the constitutional rights of prisoners, it holds that there must be a rational connection between the treatment of the arrestee and a legitimate law enforcement objective. The perp walk, according to the court, "fails even this basic test of constitutionality."

> The publication of plaintiff's arrest by means of the perp walk had the effect only of humiliating plaintiff, assisting the media in sensationalizing the facts of his case, and allowing the [arresting officer] to appear on television. None of these effects qualifies as a legitimate interest of law enforcement officers - whose obligation is not to provide titillating entertainment to the public but rather to enforce the laws of the state in a meaningful and prudent manner.

### *Potential Media Liability*

Plaintiff did not bring a claim against Fox for broadcasting the perp walk and the statute of limitations for a §1983 claim against Fox has lapsed. Plaintiff's lawyer stated that a claim against Fox would be "misdirected" because even though the station had a right to ask for a perp walk, the police should not have complied. See B. Weiser, *Journalists Fear Ruling Could Hinder Coverage of the Police*, New York Times 2/27/99.

The decision, though, seems to hint otherwise. In a concluding footnote, it notes that the media is potentially liable for constitutional violations if it acts as a willing participant in joint activity with the state *(citing*, e.g., *Berger v. Hanlon*, 129 F.3d 505, 514 (9th Cir. 1997), *cert. granted*, (1998)). It is not clear whether a media request that an arrestee be taken on a perp walk for purposes of newsgathering would constitute "joint action" with the state, though, the decision's generally anti-media tone, e.g., characterizing the public interest in seeing arrestees as "titillating entertainment," certainly suggests that such a conclusion is possible.


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**LDRC would like to thank intern Lara Schneider, Cardozo Law School, Class of 2000, for her contributions to this month's *LDRC LibelLetter*.**

# Oklahoma Appellate Court Follows *Desnick*
## Affirms Dismissal of Newsgathering Tort Claims

**By Jon Epstein**

The Oklahoma Court of Civil Appeals, adopting the analysis of the Seventh Circuit Court of Appeals in *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345 (7th Cir. 1995), affirmed the trial court's dismissal of various news gathering claims asserted against an Oklahoma City television station based upon a series of investigative reports on the state of local child day care. *Willis/Kids on Broadway, Inc. v. Griffin Television, L.L.C.*, Case No. 91,812 (Okla. Ct. Civ. App. 3/5/99). Plaintiffs were one of the featured day care centers, a parent of children who attended that center, and one of the center's employees.

The news gathering claims arose out of the undercover reporting of the station's reporters, who represented themselves as parents in need of day care, obtained a tour of the premises, and surreptitiously videotaped scenes inside the facility. The plaintiffs' petition included defamation, invasion of privacy, misappropriation of likeness, fraud, trespass, and interception of communications claims. However, on the station's motion, the trial court dismissed all of plaintiffs' claims.

On appeal, while the Court of Civil Appeals reversed the dismissal of the defamation and false light claims on the grounds that the plaintiffs' petition met the minimal pleading requirements, it affirmed the trial court's holding that the reporters' peaceful and nondisruptive news gathering methods did not support any of the plaintiffs' news gathering tort claims.

### *Desnick v. Restatement*

The Court relied extensively on *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345 (7th Cir. 1995), wherein the 7th Circuit held that journalists who posed as patients in the course of an investigation were not liable on trespass, invasion of privacy, or illegal interception of oral communications claims arising from the reporters' misrepresentations. Recognizing that the Restatement of Torts suggests that a claim for trespass may lie when consent to enter on to property has been obtained through misrepresentation, the Oklahoma court adopted instead the *Desnick* conclusion that trespass protects an interest in property and without an injury to that interest no claim should properly stand. The Oklahoma Court explained its decision by quoting *Desnick*, 44 F.3d at 1352-53:

> Without [this result] a restaurant critic could not conceal his identity when he ordered a meal, or a browser pretend to be interested in merchandise that he could not afford to buy. Dinner guests would be trespassers if they were false friends who never would have been invited had the host known their true character, and a consumer who, in an effort to bargain down an automobile dealer, falsely claimed to be able to buy the same car elsewhere at a lower price would be a trespasser in the dealer's showroom . . . . The fact is that consent to an entry is often given legal effect even though the entrant has intentions that, if known to the owner of the property, would cause him for perfectly understandable and generally ethical, or at least lawful, reasons to revoke his consent . . . . The defendants'. . . . gained entry into the plaintiffs' premises by misrepresenting their purposes . . . But the entry was not invasive in the sense of infringing the kind of interest of the plaintiffs that the law of trespass protects; it was not an interference

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## Oklahoma Appellate Court Follows *Desnick*

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with the ownership or possession of land.

In relying on *Desnick*, the Oklahoma Court of Civil Appeals held that the plaintiffs stated no viable claims for fraud, trespass, or interception of communications arising from the station's news gathering activities even though the reporters misrepresented their identities and surreptitiously videotaped scenes of the interior of the facility, including children engaged in various activities.

### *Promos Not Misappropriation*

Also of note was the Court's refusal to find that the appearance of the individual plaintiffs, taken from the undercover videotape, in promotions for the investigative series violated the Oklahoma commercial misappropriation statute. The Supreme Court of Oklahoma has noted that the commercial misappropriation statute in Oklahoma is similar to that of New York. Relying upon New York precedent, the Court held that use of plaintiffs in promotions that only illustrate the content of a news report(s) on newsworthy events or other matters of public interest is not actionable.

It is unknown whether the plaintiffs will seek review of this decision by the Oklahoma Supreme Court.

*Jon Epstein is a partner in the Oklahoma City office of Hall, Estill, Hardwick, Gable, Golden & Nelson. Epstein, his partner Robert D. Nelon, and Lorinda G. Holloway, serve as counsel for Griffin Television, L.L.C. in the litigation.*

## AOL Found to Have Immunity Under 37 U.S.C. § 230 With Regard to Botched Stock Quotes

A United States District Court in New Mexico has granted America Online's ("AOL") motion for summary judgment in a case where AOL was sued for defamation and negligence by Ben Ezra, Weinstein, and Company ("BEW") for inaccurately quoting plaintiff's stock prices on its Internet service. *Ben Ezra, Weinstein, and Company v. America Online, Inc.* No. CIV 97-485 LH/LFG (Dist. Ct. N.M. Mar. 3, 1999). AOL had received the stock quotes from its vendors, ComStock and Townsend. AOL claimed that it was immune from suit under § 230 of the Communications Decency Act, and therefore, could not be held liable for any stock information it published because that data was provided by third-party "information content providers."

The court used reasoning similar to that found in the opinion of *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998); *See LDRC LibelLetter*, April 1998 at p. 1. The Court in *Drudge* found that despite AOL having a licensing agreement with on-line gossip columnist Drudge to provide content for their Internet subscribers, AOL was nothing more than an interactive computer service on which Drudge's content was carried. As such under § 230, AOL was immune from liability.

In this case, the court found that there was no evidence that ComStock and Townsend, AOL's stock quote vendors, had not provided all of the information displayed on AOL's interactive computer service nor that AOL had produced any content themselves. Again, the court found that AOL had immunity under the CDA and ultimately, granted their summary judgment motion.

# Victory for Freedom of Internet Speech

**By R. Bruce Rich and Elizabeth S. Weiswasser**

Judge Reed of the District Court for the Eastern District of Pennsylvania recently reaffirmed the importance of the free and unfettered flow of speech on the Internet, holding that Congress' most recent effort to regulate Internet speech is likely unconstitutional under the First Amendment. The law at issue in *American Civil Liberties Union v. Reno* is the Child Online Protection Act (COPA), which makes it a crime for certain entities defined as "commerical" under the Act to transmit material over the World Wide Web (one component of the Internet) which might be perceived in some undefined community as "harmful to minors."

COPA provides certain affirmative defenses to those subject to prosecution under the Act, the availability of which require proof by the speaker that he or it took certain steps to verify the adult status of those seeking access to its content. As such, the affirmative defenses essentially require speakers on the Web to create "adults only" zones by placing their covered speech behind an adult verification screen.

## *COPA Follows CDA*

By way of background, the Supreme Court over the years has addressed in a variety of contexts the issue of Congress' ability to regulate speech which may be inappropriate for minors, but which is protected as to adults. The principle that has decisively emerged is that under the First Amendment, Congress cannot act to restrict minors' access to speech when such restriction would have the effect of suppressing adult access to such speech as well. "Surely to do so," the Supreme Court long-ago recognized, "is to burn the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

Against this backdrop, Congress, twice in the past three years, has enacted legislation designed to regulate the content of speech on the Internet by criminalizing the dissemination of certain material deemed inappropriate for minors. Congress' first such law was the Communications Decency Act of 1996 (CDA), which sought to sanction the dissemination of speech over the Internet which could be viewed as "patently offensive" or "indecent" from the perspective of a minor. The CDA was struck down in June 1997 by the United States Supreme Court as violative of First Amendment rights of free speech insofar as it had the effect of restricting adult access to speech constitutionally protected as to them. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 117 S. Ct. 2329 (1997).

COPA represents Congress' effort to cure the constitutional infirmities of the CDA. A group of plaintiffs led by the American Civil Liberties Union brought suit against Janet Reno, in her official capacity as Attorney General of the United States, seeking an injunction against enforcement of COPA on the grounds (among others) that COPA is invalid on its face and as applied under the First Amendment for burdening speech that is constitutionally protected for adults.

On November 20, 1998, the date COPA was to take effect, Judge Reed entered a temporary restraining order against enforcement of the Act. Subsequently, on February 1, 1999, following a six-day evidentiary hearing, Judge Reed preliminarily enjoined the enforcement of COPA, concluding that there was a likelihood that a full trial on the merits would reveal the Act to be an unconstitutional restraint on free speech.

## *Internet Post-Reno v. ACLU*

In so ruling, Judge Reed had the benefit of the Supreme Court's decision concerning the CDA, which was significant in a number of respects. First, it represents the first, and only, case in which the Court has considered First Amendment interests in the context of the Internet. In that regard, the Court conclusively determined that the Internet is a wholly unique medium of communication which is entitled to the highest degree of protection under the First Amendment. Likening the Internet to what have traditionally been regarded as core First Amendment fora, the Court explained: "Through the use of chat rooms, any person with a phone line can

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## Internet Speech Victory

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become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer. . . . [T]he content on the Internet is as diverse as human thought."

Second, the Supreme Court reaffirmed the principle that non-obscene speech is entitled to full constitutional protection as to adults and that Congress cannot, in the interest of protecting minors from speech deemed harmful to them, restrict adults' access to non-obscene speech, and thereby reduce the level of adult discourse to that appropriate for children. Third, the Court concluded that the CDA's affirmative defenses -- which are substantively identical to those contained in COPA -- "do not constitute the sort of 'narrow tailoring' that will save an otherwise patently invalid unconstitutional provision."

Finally, in considering the availability of less speech-restrictive alternatives, as required under strict scrutiny analysis, the Court expressly recognized that rapidly-developing user-based technology for restricting minors' access to certain material on the Internet provided a reasonable, far less restrictive alternative through which to effectuate the government's interest in protecting minors from accessing sexually explicit material. The user-based technology to which the Court referred encompasses a variety of "filtering" and "blocking" technologies that enable parents to control and/or monitor their children's access to material on the Internet deemed inappropriate for them. Importantly, since the Supreme Court's CDA decision, user-based technology has developed at a rapid rate and is today far more effective in effectuating Congress' stated aims. This fact has been a focal point of the COPA litigation.

### *COPA Did Not Fix CDA*

COPA differs from the CDA in only two substantive respects: the standard for determining speech covered by the law (COPA is directed to speech "harmful to minors," while the CDA applied to "indecent" and "patently offensive" speech); and the speakers whom the law targets (the CDA applied to all speech on the Internet, while COPA applies to "communications for commercial purposes" "by means of the World Wide Web"). From a constitutional standpoint, these differences are irrelevant.

The harmful-to-minors standard clearly covers speech that is fully protected as to adults, and the principles discussed above thus apply equally to it. As to COPA's "commercial purposes" limitation, it has long been recognized by the Supreme Court that the fact that a speaker may operate for profit, or make a profit from the sale of speech, in no way limits the First Amendment protection to which the speaker or the speech is entitled. Judge Reed expressly recognized this principle, stating "[t]he protection afforded by the First Amendment in this context is not diminished because the speakers affected by COPA may be commercial entities who speak for profit."

Following the Supreme Court's earlier decision, Judge Reed recognized the important First Amendment value of the Internet, explaining that "[i]n the medium of cyberspace, . . . anyone can build a soap box out of web pages and speak her mind in the virtual village green to an audience larger and more diverse than any the Framers [of the Constitution] could have imagined."

### *Affirmative Defenses Don't Save It*

The focus of Judge Reed's decision was on the affirmative defenses contained in COPA, and specifically, on the economic and technological ability of Web site operators to comply with COPA. He emphasized that, while the economic burden imposed on Web site operators seeking to satisfy the affirmative defenses of COPA is significant, the magnitude of such burdens would not be dispositive of the constitutionality of the Act. Judge Reed importantly held that "the relevant inquiry is determining the burden imposed on the *protected*

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## Internet Speech Victory

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*speech* regulated by COPA, not the pressure placed on the *pocketbooks or bottom lines* of the plaintiffs."

In that regard, the court found that users would likely avoid accessing Web sites requiring identification because of concerns with protecting their anonymity and because identification requirements would adversely impact the "flow" of "traffic" on the Internet. The court thus concluded that "[t]he plaintiffs have shown that they are likely to convince the Court that implementing the affirmative defenses in COPA will cause most Web sites to lose some adult users to the portions of the sites that are behind screens," and that by deterring users from accessing content, speakers will be deterred from providing it. Such a result, the court held, would be an unconstitutional burden on the receipt and distribution of constitutionally-protected speech.

Judge Reed also focused on whether COPA would be effective in addressing the Congress' stated interest and whether there were less restrictive alternatives available to Congress which might further that interest. While Judge Reed accepted the government's argument that "Congress has a compelling interest in the protection of minors, including shielding them from materials that are not obscene by adult standards," he found that COPA would not be effective in furthering that interest because of the availability of "harmful materials" on foreign websites, non-commercial websites, and on other non-Web based sources.

Judge Reed further found that based on the present record, "it is not apparent . . . the defendant can meet its burden to prove that COPA is the least restrictive means available to achieve the goal of restricting the access of minors to [covered] material." In that respect, the court concluded: "The record before the Court reveals that blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposed on adult users or Web site operators. Such a factual conclusion is at least some evidence that COPA does not employ the least restrictive means."

### *The Next Step*

At this juncture the government has three options. It can agree to entry of a permanent injunction against its enforcement of COPA or proceed to a full trial on the merits or appeal the preliminary injunction decision to the Court of Appeals for Third Circuit. Whatever the next phase of this case, the developing portrait of the First Amendment Internet landscape is an ever-fascinating one.

*Mr. Rich is a partner and Ms. Weiswasser a senior associate at New York's Weil, Gotshal & Manges LLP. The authors served as counsel to a group of twenty media and technology trade associations and entities opposed to COPA.*

## ABC Wins Gag Order Battle

Extensive publicity and a hung jury in a related criminal trial do not by themselves justify imposition of a gag order in a civil case, Montgomery County, Maryland, Circuit Court Judge D. Warren Donohue ruled on February 17. *Aron v. Aron*, Civil No. 98-187644 (Cir. Ct. Md. Feb. 17, 1999).

### *Murder For Hire*

In June 1997, prominent Maryland real estate developer, former Republican candidate for Senate, and libel plaintiff Ruthann Aron was arrested after she allegedly tried to hire a hit-man to kill her husband, Dr. Barry Aron. Trial on the criminal charges stemming from the alleged murder-for-hire commenced in March 1998, after Mrs. Aron pled not guilty by reason of insanity. Mrs. Aron's arrest and her trial were covered daily by all of the major media in the Washington-Baltimore corridor. Over two weeks into its deliberations, the jury announced that it was deadlocked – eleven jurors believed Mrs. Aron was guilty, but a single juror who had personal experience with the mentally ill believed Mrs. Aron was not legally responsible for her actions - and a mistrial was declared. The holdout juror's background had not come to light during voir dire, and the judge and prosecutor stated in various interviews that the

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## ABC Wins Gag Order Battle

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individual should never have been empaneled in the first place.

Mrs. Aron's second trial began in July 1998. After three weeks of evidence, just hours before the second jury was set to begin deliberating, Mrs. Aron withdrew her not guilty plea and pled no contest to the charges pending against her. She was later sentenced to three years in county jail. Again, the trial and the outcome were covered regularly by the local media. Despite the widespread coverage and frequent interviews given by attorneys involved in the case, Mrs. Aron never spoke directly to any journalist.

### *Gag Order Sought and ABC Intervenes*

Not content to let the criminal courts have the last word, Mrs. and Dr. Aron also filed civil suits against each other. She alleges that he committed medical malpractice by prescribing medication for her that was improper, unnecessary, and ultimately resulted in her diminished capacity; he claims that she caused him extreme mental anguish by attempting to hire a hit man to kill him.

In February 1999, Dr. Aron learned that Mrs. Aron had agreed to be interviewed by ABC's Barbara Walters. Almost immediately, he asked the court presiding over the civil case to enter an order preventing any of the parties or their attorneys from speaking publicly, claiming that his right to a fair trial in the civil case would be jeopardized if ABC broadcast Mrs. Aron's remarks to a national audience.

ABC successfully moved to intervene for purposes of opposing the gag order, and a hearing was held on February 17, 1999. Dr. Aron's attorneys argued that the extensive publicity the case already had garnered would make it difficult to empanel an impartial jury, and that a national television broadcast would put them "over the top" and make it impossible. Specifically, they noted that voir dire would not be an effective alternative, as proven by the first trial that ended in a hung jury because a biased juror was empaneled. Dr. Aron's attorneys also pointed out that, in their view, Dr. Aron was the victim in the case and that his desire for privacy should take precedence over the "minor" restriction he was seeking. Finally, Dr. Aron's counsel emphasized that he was not seeking to "gag" the press in any way, as they could continue to attend the proceedings and report on them.

ABC countered by observing, first, that the restriction sought was not "minor", as it would restrict Mrs. Aron's constitutional right to speak and the rights of the public and the media to listen. ABC then argued that before entering such an order, *Keene v. Abate*, 608 A.2d 811 (Md. App. 1992), requires that a specific and exacting standard be met, and here it had not been. Specifically, ABC noted that the burden was on Dr. Aron to prove that, absent a gag order, there was a reasonable probability that an impartial jury could not be empaneled. As Dr. Aron had offered only argument and no evidence, he had not met his burden.

ABC then urged that extensive voir dire was a far less restrictive alternative, and one that would work in this case. Indeed, unlike in many circumstances where the court must make a decision without any specific experience to refer to, here there were two criminal trials in which impartial jurors were found despite extensive pretrial publicity in the community. (And, pretrial publicity had nothing to do with the juror problem in the first trial.) Lastly, ABC argued that to the extent jurors might be affected by pre-trial publicity, the community already was so saturated that a gag order would not have a material impact on the ability to empanel an impartial jury.

### *Gag Order Denied*

After hearing nearly an hour of argument, Judge Donohue ruled from the bench that, "[A] gag order in this case would have a substantial effect on Mrs. Aron's First Amendment rights and perhaps also on the rights of the press." He then found that voir dire would be effective in identifying potential jurors who are biased, and he therefore denied the motion for gag order.

*ABC was represented by Stephanie S. Abrutyn, General Attorney, ABC, Inc.*

# Quicken Software Forms Constitute Unauthorized Practice of Law

**By Thomas S. Leatherbury**

In an disturbing, clearly result-oreiented opinion, Senior Judge Barefoot Sanders of the Northern District of Texas held, on cross-motions for summary judgment, that Parsons Technology, Inc.'s Quicken Family Lawyer (QFL) violated the Texas Unauthorized Practice of Law statute and enjoined distribution of the Parsons' software in Texas. *Unauthorized Practice of Law Committee v. Parsons Technology Inc.*, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999).

Parsons is in the business of developing, publishing, and marketing software products, including the legal materials at issue. Quicken Family Lawyer offers over 100 different legal forms, including employment agreements, real estate leases, health care directives, and will forms. Among other things, QFL's packaging represents that it is "valid in 49 states" and is "developed and reviewed by expert attorneys." QFL's packaging also states that QFL will "interview you in a logical order, tailoring documents to your situation."

The packaging contains no disclaimers; however, the first time a user accesses QFL, a disclaimer warns, "We cannot and do not provide specific information for your exact situation . . . . Because we cannot decide which forms are best for your individual situation, you must use your own judgment and, to the extent you believe appropriate, the assistance of a lawyer." Based on the user's answers to a few, short questions, QFL suggests certain documents to the user. When the user accesses particular documents, QFL again asks the user a series of questions relevant to the specific form and provides explanations of particular features.

## *Statutory Arguments Rejected*

The court first rejected several statutory challenges to the State Bar of Texas Unauthorized Practice of Law Committee's claims.[1] Parsons argued that the mere selling of books or software cannot violate the statute because some form of personal contact beyond that between a publisher and a consumer is required by a plain reading of the statute. The court rejected Parsons' argument in light of two prior Texas appellate cases involving the sale of will forms and a "Do-It-Yourself" manual and a Texas Supreme Court case that held that "the mere advising of a person as to whether or not to file a form requires legal skill and knowledge" and constitutes the practice of law. Applying these precedents, "QFL falls within the range of conduct that Texas courts have determined to be the unauthorized practice of law."

The court also held, alternatively, that one section of the statute gave the court "authority to determine that services provided to the public as a whole, as opposed to a singular client, qualify as the practice of law."

The Court declined Parsons' invitation to depart from the holdings of prior Texas cases because of "generally accepted notions of federal-state comity."

## *Constitutional Challenge: O'Brien Applied*

In analyzing the constitutional questions, the court looks at such fundamental concepts as "content neutrality" and "injunction" with an analysis simply out of line with basic First Amendment principles. Were it not clear where the court sought to conclude, the seemingly off-center perspective on these substantial issues would be mystifying, at best.

The court initially addressed the issue of whether the statute was a content-neutral or a content-based restriction of speech in order to determine the appropriate level of scrutiny. The court held that the "[s]tatute at issue is aimed at eradicating the unauthorized practice of law. The statute's purpose has nothing to do with suppressing speech. . . . [D]iscrimination between [law-related and non-law-related] products does not evidence a disagreement with the message of Parsons' software," which, with the

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## Quicken Software

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"underlying purpose behind the statute, . . . determines content neutrality." The court, thus, held that the statute was content-neutral, subject only to intermediate scrutiny, and analyzed its constitutionality under the four part test of *United States v. O'Brien*, 391 U.S. 367 (1968).

### *Texas Constitution Satisfied*

The court held that the Texas Unauthorized Practice of Law statute passed the *O'Brien* test with ease. The court found that the statute is within the constitutional powers of the state and that it furthers an important government interest. Because the court had previously found that the statute was content-neutral, the court had no trouble finding that the government interest furthered by the statute was unrelated to the suppression of free expression.

On the fourth prong of *O'Brien*, whether the incidental restriction of speech is no greater than is essential to the furtherance of the governmental interest, the court found the question "close." However, the court held that the statute did not "substantially burden" more speech than necessary and that the government's interest would be achieved less effectively absent the regulation.

> Absent the regulation, . . . the State's ability to combat the unauthorized practice of law in the computer age would be hindered. The State possesses an interest in protecting the uninformed and unwary from overly-simplistic legal advice.

The court also held that the statute did not fail the "more stringent" test under the Texas Constitution. Even if the statute functioned as a prior restraint, the State Bar had made a "sufficient showing of immediate and irreparable harm to the citizens of Texas from the sale and publication of QFL that the heightened [Texas constitutional] standard" had been met. In what might be seen by some as calling a thorn by some other name, the court deemed its injunction against sale and distribution of the Quicken Family Lawyer software in Texas not a prior restraint because the versions of QFL enjoined had already been published.

Finally, the court rejected Parsons' argument that the statute was unconstitutionally vague as applied. The court recognized that the statute is "not a model of clarity," but found that the statute and the caselaw "set forth a core of prohibited conduct with sufficient definiteness to guide those who must interpret it." The court held that "Parsons had fair warning that the publication of QFL was potentially illegal in Texas."

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### *Endnote*

1 Tex Gov't Code § 81.101 defines the practice of law, as follows: (a) In this chapter the "practice of law" means the preparation of a pleading or other document incident to an action or special proceeding or the management of the action or proceeding on behalf of a client before a judge in court as well as a service rendered out of court, including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument, the legal effect of which under the facts and conclusions involved must be carefully determined. (b) The definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and the adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.

# AMERICAN WEREWOLF IN LONDON?

*Mark Stephens, London solicitor, reviews the implications of the forthcoming changes to the Civil Justice System in the UK being introduced by Lord Justice Woolf.*

The feeling of growing unease in the room was almost tangible. Many of the solicitors present were from large city firms and from their age, were undoubtedly partners. This was one of the first tranche of seminars that were organised to discuss and explain what are known amongst litigators as the "Woolf Reforms".

It is easy to be cynical when adjectives such as "revolution" and "wholesale change" are being banded about, with reference to the British legal system. All those senior litigators who sat in that room with me last December, were rather hoping that what they would discover was that Master of the Rolls, Lord Justice Woolf, and his team had really only "tinkered" with the existing rules that come in to effect on April 26th 1999, and that civil litigation would continue as it had for many years previously. The growing unease was caused by the realisation that there was actually going to be a wholesale change. So root and branch are those changes that many Judges are taking the opportunity of retiring - so no more Judge Popplewell of *Osicom* and *Beresovsky* fame - out also from the Court of Appeal goes Lord Justice Hirst of *Reynolds* and *Beresovsky* fame.

The driving force behind the changes is the view of the Judiciary and in particular Lord Woolf that the cost of civil litigation in the UK has become disproportionate to the value of the disputes that the courts are being asked to decide. Indeed for the first time judges will be allowed - in fact exhaulted - to award costs in proportion to the value of the claim (or counterclaim) and as a percentage of the overall success of the claim. So if you take three alternative arguments and win the case on one but lose the other two points you will receive one-third of your costs and the losing party will receive two-thirds of their costs.

You may recognise some of the terminology, which has come from the study that Lord Justice Woolf and his team made of the American civil process.

The three key principles of the reforms are:

1. proportionality of costs to claim,
2. discouraging litigation through a combination of diplomacy, mediation and costs disincentives,
3. and ultimately, the view of moving to a US "no costs" (sic) rule.

There will be three "tracks" into which cases will be allocated, dependent upon primarily their monetary or claimed value:

- claims below £5,000, the "small claims" track,
- claims between £5,000 and £15,000 the "fast track",
- claim above £15,000 will be allocated to the "multi track."

The most significant change and one which will undoubtedly impact upon defamation proceedings is the clear intention behind the rules of "front ending" litigation. The days when a plaintiff rushed off a "letter before action" setting out in the vaguest of terms the complaint, imposing absurdly short time limits after which he fired off a writ, are gone.

The first tool of the "front end" litigator is the "pre-action protocol". This will consist of a proscribed series of steps that any plaintiff must take prior to the issue of proceedings. It is anticipated that a defamation protocol will come into existence within the next 12 to 18 months. It is likely to provide that:

* Claimant to send a letter of claim in long form with a good degree of specificity about the claim.

* Defendant has three months to investigate and

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## American Werewolf

*(Continued from page 43)*

provide a comprehensive response. The Defendant has the opportunity to request that the claimant clarify his position/case.

* Limited discovery (now known as "standard disclosure"). You must disclose all documents which support or are adverse to your claim provided the cost of doing so is proportionate to the claim - a potential rogues charter? And still no cross examination of witnesses in the disclosure phase.

* Exchange of witness statements containing the evidence you intend to rely on at trial (should it occur.)

(If possible) negotiations and consideration of Alternative Dispute Resolution. (And then and only then) issue of proceedings! Woolf says: "Proceedings should not be issued until after three months from the letter of claim, unless there is a limitation problem and/or the plaintiff's position needs to be protected by early issue".

How many claimants' blood will still be hot, three months after the allegedly defamatory piece appeared, when matters have been long since forgotten and he has not even had a sniff of a courtroom.

Failure to follow the pre-action protocol is penalised in costs - not something that will cast much fear into the heart of the wealthy or very angry claimant.

So often in defamation proceedings there is an initial flurry of rapid correspondence, followed by an equally rapidly issued Writ: the plaintiff's blood is pumping, he feels able to say he will be vindicated as his proceedings are afoot, and he thinks he has got the publisher on the back foot. How will the claimant feel when he is advised by his lawyer that his Claim Form, (the "trusty sword of justice" as the disgraced Cabinet Minister Jonathan Aitkin would no doubt have described it), is not available to him until he has fought through the marshmallow of a period of standard, sensible and frustratingly unaggressive correspondence.

The potential for extending the length of time spent on pre-action jousting with requests for further clarification, arguments about the availability of various defences, would seem endless!

What will the claimant have achieved: a large legal bill without potential of a court order to recover it! Unless the claim goes to litigation, no costs will be paid.

What of the new form of proceedings? As you will see from the side bar everything has different names. The form and contents of the statement of case are no longer dictated by archaic rules. A copy of the defamatory article may be appended to - no longer re-typed into - the statement of case that will not contain only pleadings of law but also evidence. The Statement of Case, must contain a "statement of truth" signed by the claimant personally, meaning that he or she understands it and stands by it on pain of perjury!

The defence must be comprehensive - a defence of justification or fair comment must be fully particularised and be filed

### "Werewoolf" Speak

| *Out* | *In* |
|---|---|
| Plaintiff | Claimant |
| Defendant | Defendant |
| Defence | Defence |
| - | Pre-action Protocol |
| Interrogatories/request for further & better particulars | Further Information |
| Statement of Claim | Statement of Case |
| - | Pre-action Discovery |
| Writ | Claim Form |
| - | Statement of Truth |
| Calderbank offer | Part 36 offer to settle |
| Affidavit | Evidence (witness statement verified true) |
| Discovery | Standard Discovery |
| - | Allocation Questionnaire |
| Pre-trial review | Case management conference |
| ex parte | Without notice |
| Inter parties | With notice |
| In camera | In private |
| Mareva | Freezing Injunction |

**No More Latin by Order of the Woolf**

## American Werewolf

*(Continued from page 44)*

and served within 28 days of receipt of the statement of case (a further extension of 28 days can be obtained by agreement but no longer!). So defendants will have to use the pre-action period for evidence gathering as they are unlikely to have the time to do it after the statement of case is served.

Upon receipt of the Defence the court will serve on each party an "Allocation Questionnaire". It is at this point in defamation proceedings that submissions should be carefully formulated on the question of which "track" the case should be placed although it is anticipated that defamation will nearly always be muliti-track. Because of the limits placed on the the parties' ability to recoup costs and a desire to see some cases come on quickly, there may be strong incentive in some instances to chose the fast track.

Disclosure, no matter in what track your case has been placed, is - even by UK standards - now radically restricted. Moreover, a party can answer a challenge that his disclosure has not been full and frank, by arguing that the cost of undertaking the exercise is disproportionately expensive. The Court has the ability to order pre-action disclosure and is therefore unlikely to be favourably disposed to a defendant who seeks an order for post issue specific disclosure that has the merest hint of being a fishing expedition. It is a basic tenet of the new procedure that parties will obtain all the information they need in advance of the filing of the claim. How a defendant is to know what the plaintiff has or should have in its possession at that extremely early stage is only one of the issues these new procedures do not address in any realistic fashion.

The general view that defamation proceedings will usually go into the multi-track, although the rules do not specifically say so, but will be displaced and sent to fast track if the trial is not going to last longer than a day. It will be heard before a judge sitting alone. (Multi-track cases will still be heard by juries.) The case will also go into the fast track if the claimant does not have "deep pockets". Fast track will result in a trial within 34 weeks from the issue of the claim form. Judges may award plaintiffs no more than £15,000 in fast track cases.

The other major issue that arises with regard to fast track cases is the limited ability to order costs. The maximum amount of costs that the Court can award in respect of the trial itself (if damages awarded are between £10,000 and £15,000) is £750!

Additionally either party can apply to a Judge sitting in private (in chambers, in old terms) for an order determining whether or not the words are capable of bearing the meaning attributed to them, in the statement of case.

**What then is the practical effect of these changes?**

Front loading means full preparation pre-issue. Witnesses must be located, proofed and on board as soon as there is the first sniff of a complaint. The days when witnesses could be proofed and pulled out of a hat at the last minute are over, and in any case the plaintiff may have found him or her already.

What of existing cases? A "Woolf audit" is necessary. The aim being, to ensure that the new rules can be used to the best tactical advantage.

The opportunities that these new rules present are there to be grabbed. Their future interpretations by the Courts will largely depend upon the ability of parties' lawyers to argue their practical application. These arguments will need to encompass the driving forces behind the changes and will be influenced by the behaviour of the parties during the litigation. Collation and preparation of evidence at this stage must be a priority, as well as the early involvement of lawyers, so as to ensure that the appropriate strategy is adopted. Perhaps the learned Lord Justice is an American Were"Woolf" in London!

*Mark Stephens is a partner in Stephens Innocent Solicitors, London, England.*

## Serious Media Restrictions in New U.K. Legislation

**by Marietta Cauchi**

The Youth Justice and Criminal Evidence Bill currently going through Parliament contains a vast range of provisions that will restrict media reporting in a number of significant areas. The Bill's stated aim is to help vulnerable - young, disabled, intimidated - complainants and witnesses (not the accused) give evidence in court proceedings by enabling prosecution and defence to apply for any number of "special measures directions" ostensibly designed for this purpose.

These directions include practical matters such as the provision of screens and communication aids including an intermediary and the admission of pre-trial video-recorded evidence, examination and cross-examination. However the Bill also and most worryingly provides a direction ejecting press and public from the court at any time so that the evidence can be heard in private.

The clear effect of such a direction will be contrary to the desired and necessary transparency and public accountability of the court system with the press representing the public interest in our judicial process. Although the Bill includes the certificate required under the Human Rights Act that the proposed legislation is compatible with the European Convention rights, there seems ample potential for defeating Articles 6 (right to a fair trial), 10 (freedom of speech) and 13 (right to an effective remedy).

Further, the removal of press and public so that hearings can be private deprives the media of statutory and common law defences which it enjoys in defamation and contempt when fairly and accurately reporting proceedings in open court.

The Bill also introduces specific provisions presumably designed to extend the protection of anonymity afforded to children. The current legislation restricts reporting to protect the anonymity of any child involved in an offence (whether accused, victim or witness) from the time of court proceedings. The proposed legislation extends this protection backwards to the time an allegation is made. However "allegation" is not defined so could refer to an informal complaint and in these circumstances how will the media know when an allegation has been made and the prohibition triggered? This potential injustice is compounded by the lack of any defence on the basis of no knowledge. Anonymity in court proceedings, as opposed to the period from allegation to such proceedings, is not subject to a blanket ban - the court may make a direction - and is limited to criminal proceedings.

The protection of minors is not an unreasonable objective but these over broad provisions are likely to operate against the interest of many witnesses and complainants as well as the friends and families of victims. Police appeals to the public for help and media disclosure of wrongdoing will be severely curtailed by these measures.

*Marietta Cauchi is an Associate with Stephens Innocent, London, England.*

## Spanish Reporter Punished for Revealing Prisoners' HIV Status

An unusual punishment was meted out to a Spanish reporter convicted of violating the privacy rights of two prison inmates by revealing they have AIDS. The Associated Press reported on March 4th that Cristobal Penate, a stringer for Diario de las Palmas, a newspaper in the Canary Islands, was barred from journalism for one year. In addition, he was given a one year suspended prison sentence, and ordered to pay the prisoners $13,000 each.

Drawing attention to an alleged health risk, Penate reported that two inmates on the kitchen staff of a local prison had AIDS, identifying the prisoners only by initial. In fact, the prison officials provided Penate with the information for the article -- a list of prisoners with AIDS and a list of prison kitchen workers. The newspaper will appeal the decision to the Constitutional Court, Spain's highest court.

# U P D A T E S

## *CERT. DENIED: NATURAL BORN KILLERS*

On March 8, the United States Supreme Court denied certiorari in *Time Warner Entertainment Co. v. Byers*, 712 So. 2d 681 (La.Ct. App. 1998), *cert. denied*, 67 U.S.L.W. 3556 (U.S. Mar. 8, 1999) (No. 98-1091), the so-called Natural Born Killers case.

Time Warner sought review of a Louisiana Appellate Court's ruling that reinstated claims against the makers of the film for inciting a copycat crime. The petition argued that even if a speaker subjectively intended to produce lawless action, that standing alone, does not provide a sufficient basis for liability, absent an objective threat to imminent lawless activity.

The case arose out of an armed robbery of a convenience store during which Patsy Ann Byers was shot and seriously wounded. Byers sued the alleged shooter, Sarah Edmondson, and her boyfriend, Benjamin Darrus and later amended her complaint to add claims against Time Warner. According to Byers' amended lawsuit, Edmonson and Darrus were inspired to commit violence by viewing the movie *Natural Born Killers* shortly before their alleged crime spree. The amended petition asked that Time Warner be held jointly liable with Edmondson and Darrus for the latter's intentional criminal acts.

Byers specifically alleged that Time Warner was liable for producing and distributing a film they "knew, intended, were substantially certain, or should have known would cause or incite persons such as" Edmondson and Darrus "to begin, shortly after repeated viewing" of the film, "crime sprees such as that which led to the shooting of Patsy Ann Byers."

## *DECISION FOR BROADCASTER IN TEXAS WIRETAP CASE AFFIRMED*

On February 20, 1999, Chief Judge Jerry Buchmeyer in the Dallas Division of the Northern District of Texas fired the latest shot in a series of cases across the country in which news organizations and others have challenged the constitutionality of the federal wiretap statute, when he adopted a Magistrate's recommendation and entered judgment in favor of WFAA-TV and its reporter, Robert Riggs, and against former Dallas school board member Dan Peavy and his wife. *Oliver v. WFAA-TV, Inc.*, No.3-96-CV-3436-L (N.D. Tx. Feb. 20, 1999). In October, 1998, Magistrate Judge Jeff Kaplan had recommended dismissal of the Peavy's federal and state wiretap claims on constitutional grounds and dismissal of the Peavy's state law claims. Peavy's claims were based on the interception and recording of his phone calls by neighbors, who subsequently handed the tapes over to WFAA-TV, which in turn, broadcast an investigative report examining Peavy's business dealings. For a discussion of the facts of the case and the details of the Magistrate's ruling please *see* the October 1998 *LibelLetter*, page 31. A companion case brought by one of Peavy's former business associates and his wife is still pending before another Dallas judge. In entering judgment for WFAA and Riggs, Judge Buchmeyer also awarded court costs. Peavy has filed an appeal with the Fifth Circuit.

## *JOURNALIST SENTENCED TO 18 MONTHS FOR ACCESSING CHILD PORN*

Larry Matthews, an award-winning veteran reporter, was sentenced to eighteen months in prison for trafficking in child pornography on the Internet. Matthews contended he was distributing and receiving the material in the course of researching a report on child pornography on the Internet. *See LDRC LibelLetter* July 1998 at p. 21.

Matthews had previously prepared, without incident, a three-part radio report on child cyber-porn that was broadcast in 1995. In mid-1996, Matthews undertook research in this area for a possible magazine article. Although his investigations involved transmitting and receiving pornographic material, he maintained frequent contact with the FBI and local law enforcement, and

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# UPDATES

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informed them of his findings.

In December 1996, without any warning that he was a suspect, federal authorities served a search warrant on Matthews' home, seizing all of his and his family's computer equipment. Matthews was indicted in July 1997 on fifteen counts of violating the Protection of Children Against Sexual Exploitation Act, 18 U.S.C. § 2252, even though Matthews had been in close and continuous contact with the FBI regarding his research. U.S. District Judge Alexander Williams, Jr. of the District of Maryland denied Matthews' motion to dismiss and granted the government's motion *in limine*, holding that a news reporter cannot raise the First Amendment as a defense to criminal charges that he was engaged in trafficking child pornography on the Internet. After the court's ruling, Matthews entered a conditional plea of guilty to allow him to take the constitutional issue to the Fourth Circuit.

## *Anti-Abortionists Barred From "Wanted Posters"/Website*

***Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists (D. Ore. 1999)***

Following a jury verdict in the Federal District Court in Portland, Oregon in February against twelve anti-abortion activists and in favor of four physicians and two clinics, the federal district judge has issued an injunction against the defendants barring them from contributing to an anti-abortion website and from publishing "wanted" posters featuring doctors who perform abortions. *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, (D. Ore. 1999). According to reports of the Associated Press, the judge wrote in his injunction that the materials produced by defendants were not legitimate, lawful exercises in free speech, but were "blatant and illegal communication of true threats to kill." The AP reported that the website at issue in the litigation, while not specifically under the control of the defendants (although contributed to by them) was shut down by its Internet provider. The injunction provides for fines of up to $1000 day in the event defendants violate its terms.

As was reported in last month's *LDRC LibelLetter*, and extensively in the popular press, the jury in the case found that the defendants had threatened bodily harm to doctors and health clinics for the purposes of intimidating them and interfering with their decision to supply reproductive health services in violation of the Freedom of Access to Clinic Entrances Act (FACE) and the Racketeering Influenced Corrupt Organizations Act (RICO). The jury awarded plaintiffs $108 million in compensatory and punitive damages.

# Toot, Toot, Tootsie, Don't Cry: *Hoffman v. Los Angeles Magazine*

**By Joel McCabe Smith**

Last January, after a 4-day court trial, the Honorable Dickran Tevrizian, United States District Court Judge for the Central District of California, determined that *Los Angeles Magazine* (which celebrates life in the city of the same name) had "crossed over the line between editorial content and advertising" when it used the name and likeness of -- and I quote the Court -- "truly one of our country's living treasures, actor Dustin Hoffman" for what the Court found to be commercial exploitation without his permission. *Hoffman v. Capital Cities/ABC, Inc.*, CV 97-3638DT (MCX) (C.D. Cal. Jan 22, 1999).

The fight was over a still photo of the Dorothy Michaels' "Tootsie" character from the Columbia film of the same name that appeared on page 118 of the March 1, 1997 issue of *Los Angeles Magazine* in which the "red sequined dress" worn by the character in the original photo had been digitally replaced with a "butter-colored silk gown . . . and . . . heels."

The Court found that, by publishing the photo, the Magazine had violated Hoffman's common-law right of publicity, Hoffman's statutory right of publicity (California Civil Code § 3344), Section 43 of the Lanham Act (which prohibits the use of celebrities' identities without their consent and in a manner which makes it appear that the celebrities are associated with, sponsoring or endorsing commercial activities when, in fact, they are not) and California's statutory unfair competition law (California Business & Profession's Code § 17200) (which prohibits any conduct deemed, you guessed it, "unfair"). The Court awarded Hoffman compensatory damages of $1.5 million, punitive damages of $1.5 and $270,000 in attorneys' fees.

There doesn't seem to have been a lot of disagreement between the parties about the facts, only as to their meaning and what interpretation to give them.

The Court described the matter in dispute as follows:

> . . . *Los Angeles Magazine* published a photograph of Mr. Hoffman as he appeared to have appeared in the successful 1982 motion picture *Tootsie* [in a red sequined dress], and through a process of technology employing computer imaging software, manipulated and altered the photograph to make it appear that Mr. Hoffman was wearing what appeared to be a contemporary silk gown designed by Richard Tyler and high-heeled shoes designed by Ralph Lauren. [The photo was accompanied by] the following text: "Dustin Hoffman isn't a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels." (Findings, p. 4, line 18 to p. 5, line 3.)

The parties principally wrestled over three issues: was the photo a part of an editorial piece or was it an advertisement; was there "falsity"; was there actual malice?

## *Was It An Ad Or An Editorial?*

The Court found that, with the publication of the photo, Hoffman had been "robbed [of his] dignity, professionalism and talent [and had been] violated by technology." (Findings, p. 12, lines 13-16.) However, those findings seem less sound when the digitally altered Tootsie photograph is not viewed in isolation -- as Hoffman urged -- but in the context of the article and the magazine -- as the Magazine urged. When the broader analysis is employed, there are a number of factors that seem to suggest that the photo was, indeed, editorial in nature, and not an advertisement.

**1. The Magazine Cover:**

Just above the logo "*Los Angeles Magazine*" on the cover appeared the following: "Fabulous Hollywood Issue!" Four sections of the magazine were then touted on the cover:

- "Young Hollywood, The 40 Most Important People Under 40, by Nancy Griffin and Holly Sorensen";
- Exclusive: Katherine Hepburn and George Cukor, A Long Last Conversation";
- "The End of Hollywood As You Know It, by Howard Stern" and
- "The Ultimate Fashion Show Starring Grace Kelly, Marilyn Monroe and Darth Vader" -- housing among others, the Tootsie photo.

No advertisements were touted on the cover of the magazine.

**2. The Editorial Table of Contents:**

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## Toot, Toot, Tootsie, Don't Cry

*(Continued from page 49)*

Five of the magazine's articles were described on the "Features" (table of contents) page, including the article on page 104: "Grand Illusions: By using state-of-the-art digital magic, we clothed some of cinema's most enduring icons and fashions by the hottest designers." On the page was a digitally created photograph of Humphrey Bogart and Ingrid Bergman from *Casablanca* in contemporary fashion. Next to that picture appeared the following: "On this page: fashion photography by Alberto Tolot. Digital composite by ZZYZX. *See 'Shopping Guide' on page 147 for details."*

**3. The Editor's Page:**

On page 10, the Editor In Chief gave a preview of "the issue at hand." At the bottom of the second column of the page appear the following:

> The movie stills in our refashioned fashion spectacular, "Grand Illusions" (page 104) *have* appeared before - in fact, they're some of the most famous images in Hollywood history. But you've never seen them quite like this. Cary Grant, for example, is still ducking that pesky plane in *North By Northwest*, but now he is doing it as a run way model, wearing a suit from Moschino's spring collection."
>
> We know purists will be upset, but who could resist the opportunity to produce a 1997 fashion show with mannequins who have such classic looks?

**4. The Contributors Page:**

On the "Contributors" page, page 12, the following appeared:

> Alberto Tolot picked up a camera in 1977 and hasn't put it down yet. Born near Venice, Italy he has shot for some of the best monthly fashion magazines in America, including *GQ* and *Elle*. Tolot's most challenging image on this month's Hollywood fashion layout "Grand Illusions," was the photo of Jane Russell from *The Outlaw*. "It's *impossible* to find someone with the same body," he laments.
>
> "With computers," says Elizabeth Cotter of ZZYZX, "you can transfer anything -- even the past." She proved it by using the latest in computer software to give old movie stars make overs for "Grand Illusions." Drew Glickman, the company's operations manager, abandoned his business degree to become involved in this cutting-edge industry. "It's the kind of software that takes two years to learn and a lifetime to master," he says. "And they're always making revisions."

**5. The Article:**

The "Grand Illusions" article on page 104 contained the following description adjacent the title:

> With the help of digital magic and today's hottest designers, we present the ultimate Hollywood Fashion Show - starring Cary Grant, Marilyn Monroe, Rita Hayworth and the Creature From The Black Lagoon.

Then followed photographs of the characters played by Cary Grant in *North By Northwest*, Darth Vader in *The Empire Strikes Back*, Jane Russell in *The Outlaw*, Harold Lloyd in *Safety First*, Marilyn Monroe in *The Seven Year Itch*, John Travolta and Karen Lynn Gorney in *Saturday Night Fever*, Jimmy Stewart and Grace Kelly in *Rear Window*, Vivian Leigh in *Gone With The Wind*, Elizabeth Taylor in *Butterfield 8*, Elvis Presley in *Jailhouse Rock*, Julie Adams in *The Creature From The Black Lagoon*, Susan Sarandon and Gena Davis in *Thelma & Louise*, Rita Hayworth in *Gilda*, Judy Garland (and the Scarecrow) in *The Wizard Of Oz*, Marlene Dietrich in *Blonde Venus* and -- last but not least -- Dustin Hoffman in *Tootsie*. In all of the photos, the characters were shown wearing 1997 fashions.

**6. The Shopping Guide:**

On page 147 in the magazine was a section denominated "Shopping Guide" where the various fashions used in the photos (in the Article on pages 104 through 118) were discussed: the designer, where they could be purchased and the price. Regarding the Tootsie photo, the following

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## Toot, Toot, Tootsie, Don't Cry

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appeared:

> Richard Tyler gown ($1,995) at Tyler Trafficante; Neiman-Marcus. Ralph Lauren shoes ($295) at Polo/Ralph Lauren, Beverly Hills; Bloomingdale's; Saks Fifth Avenue.

The fact that the "Grand Illusions" article referenced a "Shopping Guide" (that appeared 28 pages after the end of the article) that provided "price and store information for the clothing used in the magazine article" appears to have been an important consideration by the Court in determining that the article was an advertisement, and not editorial. *See* Findings, p. 5, lines 14-17. While that might be an understandable initial reaction, there was apparantly testimony offered at the trial with respect to the "Shopping Guide" that supports a conclusion that the article is still not an advertisement, despite the "Shopping Guide."

First, apparently there was testimony that a monthly magazine ordinarily has a particular structure. Part of that structure is what is called the "editorial well," containing the month's editorial articles and features, and not advertising. The "well" in the particular issue of *Los Angeles Magazine* began on page 66 and ran through 128, *i.e.*, without any apparent advertisements. The "Grand Illusions" article was in the "well," occupying pages 104 through 119.

Secondly, it is apparently customary for price and store information to be included in fashion editorial pieces as a service to consumers, but not in product ads. The "Shopping Guide" was comprised of price and store information.

Thirdly, it is also apparently customary for fashion advertisements to contain the designers' logos or the retailers' logos. For example, in the two dozen or so ads appearing before the "well" in the magazine and the half dozen or so ads appearing after the "well," all contained the designers' logos or the retailers' logos, which is expected of an advertisement. However, neither the "Grand Illusions" article nor the "Shopping Guide" displayed any of the designers' or retailers' logos for the fashions discussed.

Finally, when you peruse the March 1, 1997 issue of *Los Angeles Magazine*, you notice that the "high-end advertisers" that advertised in *Los Angeles Magazine* ( e.g., Giorgio Armani, Celine, Gucci, Bebe, Adrienne Vittadini) do not list prices in their ads. Indeed, only one of the two-and-one-half dozen or so fashion ads in the March 1997 issue of *Los Angeles Magazine* listed a price (and that was for a pair of loafers available at Macy's). Unlike typical ads, the "Shopping Guide" annexed to the "Grand Illusion" annexed to the "Grand Illusions" article did list prices.

Thus, the context in which the photo of the Dorothy Michaels character from *Tootsie* appeared does not seem to support the Court's findings that it was an "unbridled exploited speech at the expense of Mr. Hoffman and his distinguished career." Findings, p. 12, lines 20-21. On the contrary, based on the context in which it appeared, the photo of the Tootsie character seems to be editorial in nature.

### *Magazine Staff Controlled*

There are also additional factors that seems to further suggest that the article was editorial in nature, not an advertisement.

The Magazine apparently introduced expert testimony that editorial pages are conceived, controlled and created by the editorial department in a style consistent with the magazine's over arching editorial design. Advertising pages, by contrast, are purchased by outside organizations, commonly merchants, who then design the pages without involving the magazine's editorial staff.

Testimony from a *Los Angeles Magazine* style editor apparently established that the "Grand Illusions" article was conceived, controlled and created by the editors without involving the magazine's advertising staff or advertisers. The article is also billed on the cover, the editorial, table of contents and editor's pages, unlike ads. In addition, the article's design and content is consistent with the magazine's over arching design and the edition's "Hollywood" theme.

Further, time and time again the editors explained how they created the feature. They selected familiar movie stills (all shown intact at the end of the article) and then dressed the actors in those stills in digital representations of current fashions. There was apparently also testimony that the editors made all decisions about what product or services to include without consulting any outsiders, including the designers featured, the actors depicted, or advertisers. In addition, apparently neither Richard Tyler nor Ralph Lauren

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## Toot, Toot, Tootsie, Don't Cry

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advertised in *Los Angeles Magazine* at the time of the publication in question.

### *What Was Not Said Hurt*

Most troublesome about the decision is that the Court appears to have imposed liability on *Los Angeles Magazine* as much for what was *not* said as for what *was* said. In that regard, the Court found that the Magazine's First Amendment defense was "unavailing" because the First amendment did not protect the "exploited commercial use of Hoffman's name and likeness." Findings, p. 17, lines 3-5. The Court then observed that the article:

- provided no commentary on fashion trends
- provided no coordinated or unified view of current fashions
- contained no statement that any particular style of clothes is in vogue
- contained no statement that any particular color is becoming popular
- contained no statement that any type of fabric is attracting attention of designers.

Findings and Conclusions, p. 17, lines 5-11.

The Court, however, provided no authority for the proposition that liability maybe imposed for what was *not* said. Nonetheless, if some or all of what the Court wanted said had been said in the Article, presumably the outcome of the case would have been different

In addition, according to the defendants' trial brief, the editors of *Los Angeles Magazine* arguably did, in fact, set out to comment on fashion trends and on how classic movie scenes might look in film today. Indeed, the style editor for *Los Angeles Magazine* was quoted in her deposition as saying:

> I thought about the clothes that I had seen at the fashion shows, I thought about what would work best as far as if we were going to redo these movies, if these movies were going to be remade today, what would work best in updating the characters' wardrobe, and at that point I started thinking about the different designers and the different clothes as to what would flatter the characters the most. Defendants' Trial Brief, p. 2, lines 16-25.

Thus, the Court's determination that the Magazine used Hoffman's name and likeness "to endorse and promote articles of clothing designed by Richard Tyler and Ralph Lauren" -- *i.e.*, the photo was an "advertisement in disguise" -- appears subject to challenge.

### *Where's The "Falsity"?*

Both Hoffman and the Magazine agreed that to succeed in a right of publicity claim, some species of "falsity" must be proven. Indeed, California Civil Code § 3344 (the California right of publicity statute) expressly requires a showing of "falsity": is the use of the name or likeness "so directly connected with the commercial sponsorship or with the paid advertising" to suggest that the use of the name or likeness were "for the purposes of advertising, or selling, or soliciting purchases of, products, merchandise, goods or services . . ."

However, the only "falsity" cited by the Court in support of its finding that Hoffman's "publicity rights" had been violated was that:

- *Los Angeles Magazine*, Inc. knew that Mr. Hoffman had never worn the designer clothes he was depicted as wearing, and that what they were showing was not even his body. (Findings, p. 17, lines 3-6; Findings, p. 18, lines 18-21.)
- *Los Angeles Magazine*, Inc. admitted that it intended to create the false impression in the minds of the public "that they were seeing Mr. Hoffman's body" (Findings, p. 17, lines 6 to p. 18, line 2)

Thus, the "falsity" on which the Court relied in the *Hoffman* case to defeat the First Amendment protections was that the Magazine knew that Mr. Hoffman had never worn the designer clothes he was depicted as wearing and that they were not even showing Mr. Hoffman's body. Of course, the Magazine knew *that*. In fact, they alerted the reader *to that fact* on the Table of Contents, the Editor's Page, the Contributors page and in the Article itself.

On the contrary, the falsehood that must exist in a publicity action must be a falsehood that is suggested to the

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## Toot, Toot, Tootsie, Don't Cry

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ordinary reader of the publication as true. *Eastwood v. National Enquirer*, 123 F.3d 1249, 1256 (1997). Certainly the fact that "Mr. Hoffman had never worn the designer clothes he was depicted as wearing" and "that what [*Los Angeles Magazine* was] showing was not even his body" were not falsehoods suggested to the ordinary reader. Those "falsehoods" were pointed out by the magazine on several occasions to be just that. The issue that should have been addressed was whether the editors falsely suggested to the ordinary reader of their publication that Hoffman *sponsored or endorsed* the designer clothes that the Tootsie character appeared to be wearing in the photo. The question that should have been addressed was whether the editors of *Los Angeles Magazine* intended to convey the impression -- known by them to be false -- that Mr. Hoffman sponsored or endorsed the designer clothes that he appeared to be wearing in the photograph. *See, e.g., Eastwood v. Enquirer*, 123 F.3d at 1256. While the Court finds that the Magazine intended to convey that impression (Findings, p. 19, lines 19-25), the Court cites nothing in the record to support *that* finding.

### *Where's The "Actual Malice"?*

As pointed out in *Eastwood, supra* -- a case not cited by the Court -- a public figure -- which, certainly, "one [of] our country's living treasures" must be -- may sue a news organization -- which *Los Angeles Magazine* certainly is -- for harms perpetrated by its reporting only by proving "actual malice," i.e., that the statements were made with a reckless disregard for the truth. Defendant must have made the decision to publish with a "high degree of awareness of the probable falsity," or must have entertained serious doubts as to the truth of his publication. Id. at 1251. On that both Hoffman and the Magazine agreed.

However, to the extent that the First Amendment requires a showing of "actual malice" before liability may be imposed on a news organization by a public figure for harms perpetrated by its reporting, actual malice becomes an element of the offense in such a case. That it is not the manner in which the Court analyzed actual malice in the *Hoffman* case, though.

Hoffman argued that all he needed to show to demonstrate "actual malice" was that he did not wear the dress in question and that magazine editors knew that. Neither of those facts were disputed. Yet, *Los Angeles Magazine* argued that neither of them created any liability.

According to *Los Angeles Magazine*, under *Eastwood* and its precursors, Hoffman was required to also show by clear and convincing evidence that the defendants subjectively intended to cause readers to believe that Hoffman was appearing in an advertisement for the dress and the shoes. That is, Hoffman had to prove by clear and convincing evidence that the editors of the Magazine *subjectively intended* that readers believe that the "Grand Illusions" article was, in fact, an advertisement. *Eastwood*, 123 F.3d at 1252.

Interestingly enough, before trial the Magazine moved for summary judgment on the issue of the subjective intent of the editors of *Los Angeles Magazine*, and argued that, among other things, "the editor-in-chief of *Los Angeles Magazine* . . . [had] testified that he did not intend to convey the impression that Hoffman or the other actors or actresses [portrayed in the Grand Illusions article] had either modeled the clothes themselves or had endorsed the clothing in question." Deft's Memo of Pts. and Auths. at 23. Surprisingly, in its Order denying defendants' motion for summary judgment, the Court held that "the subjective intent of [the Magazine's] editor-in-chief is wholly irrelevant to the actual malice inquiry." Order p. 8, lines 25-27. All that mattered to the Court was that the Magazine "knew that the composite photograph was a computer fabrication, not a genuine image of [Hoffman] and [the Magazine] apparently knew that the photograph would suggest to viewers that the body in the Richard Tyler dress was [Hoffman's]." Order, p. 9, lines 21-25.

Little new was said in the Court's findings and conclusions *after trial* about either the necessity for a finding of "actual malice" or the evidence supporting such a finding.

### *What About The Magazine's Affirmative Defenses?*

The Magazine asserted several affirmative defenses:

- The First Amendment to all claims
- Copyright preemption to all claims
- The "news" or "public affairs" defense of Civil

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## Toot, Toot, Tootsie, Don't Cry

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Code § 3344(d)

- The "fair use" defense to the Lanham Act

None of them met with any success.

The Court dismissed the defendants' First Amendment claim finding that the Magazine exploited Hoffman's name and likeness and that the First Amendment does not protect the exploited commercial use of someone's name and likeness. In addition, according to the Court, the First Amendment does not protect knowingly false speech and the Magazine knew that Hoffman never wore the designer clothes he was depicted as wearing, and that what the Magazine was showing was not even his body and that the Magazine admitted that it intended to create the false impression in the minds of the public "they were seeing Mr. Hoffman's body."

The Court dismissed the copyright preemption argument -- *i.e.*, that the still photo of the Tootsie character from the film used by Magazine was copyrighted, Columbia owned the copyright, hence, Hoffman's claim was preempted -- on the ground that, what Hoffman sought to protect -- his name, face and persona -- were not "writings" or "works of authorship" that come within the subject matter of copyright, that the rights that Hoffman sought to protect were not "equivalent" to the rights protected by the Copyright Act and that the claims asserted by Hoffman involved extra elements that were different in kind from those in a copyright infringement case.

The Court dismissed defendants "news" or "public affairs" defense to Civil Code § 3344(d) because the defense does not apply "when a party uses the name or likeness of another in an knowingly false manner" and, in the *Hoffman* case, the Magazine "knew that Mr. Hoffman never wore the clothes he was depicted as wearing, and that what they were showing was not even his body."

The Court dismissed the Magazine's fair use defense to the Lanham Act on the ground that it was unavailable because the use of Hoffman's name and likeness in the article was not merely descriptive, rather, the use suggested Hoffman's sponsorship and endorsement of *Los Angeles Magazine* and the designer clothes that he appeared to be wearing in the photograph.

Finally, on several occasions the Court imposed liability on the Magazine for using Hoffman's name and likeness "to sell magazines." *See e.g.*, Findings, p. 13, lines 17-18; p. 14, lines 19-22. Certainly, to the extent the Court's decision is based upon the supposed use of Hoffman's name and likeness "to sell magazines" that, of course, would not support the judgment. The mere fact that the magazine in which the allegedly offending article appeared was "offered for sale" does not transform its contents into some form of expression whose liberty is no longer to be safeguarded by the First Amendment. *See, Joseph Burstyne, Inc. v. Wilson* 343 U.S. 495, 501 (1952); *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890, 895 (9th Cir. 1988). However, since the Court always coupled those findings with a finding that the Magazine used Hoffman's name and likeness, as well, "to promote designer clothing" or "for purposes of advertising or selling or soliciting purchases of goods," a reversal of the Court's holding regarding the "sales" of the Magazine, alone, would not justify a reversal of the decision.

### *Conclusion*

Once the Court concluded that (i) the picture was "false" -- *i.e.*, Hoffman never wore the dress or the heels -- and (ii) that the Magazine knew it was "false" -- which it admitted on the Table of Contents, the Editor's Page, the Contributors Page and in the Article itself -- and (iii) that the Magazine published the picture with "actual malice" -- *i.e.*, the Magazine knew Hoffman had never worn the dress or the shoes -- liability was established and the affirmative defenses were discarded.

Yet, the Court seems to have determined (i) that the Tootsie photo was an ad, not an editorial, because of what was *not* said, (ii) that it was false, though the respect in which it was "false" was fully and repeatedly disclosed to the readers of the Magazine, and (iii) that the Magazine acted with actual malice because of what was *not* intended by the editors of the Magazine to be said.

Was it an advertisement or was it an editorial? What was the appropriate inquiry regarding falsity? Was there of actual malice? The Ninth Circuit may well get an opportunity to address these questions.

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# Reflections on Justice Blackmun's Evening with the LDRC

*LDRC honored Justice Harry A. Blackmun in 1995, bestowing on him the LDRC William J. Brennan, Jr. Defense of Freedom Award. It was one of the warmest, most wonderful evenings in the history of the organization. It was thus with great sadness that we learned of his death. We asked a former Justice Blackmun law clerk, Luther Munford, for some thoughts about this great man.*

**By Luther T. Munford**

When retired Justice Harry A. Blackmun accepted the 1995 *William J. Brennan Defense of Freedom Award*, he shared some of his thoughts about the Court with those gathered at the dinner to honor him. On the subject of memoirs, he told us this:

> I've always said and said it more or less privately, but around the conference table that, by gum, I'm gonna write a book. That always sort of drains the blood out of them. They wonder what I'm gonna write about.

He died March 4, 1999. He never wrote the memoirs.

He correctly predicted, however, his colleagues' attitude toward his ambitions to be an historian. At a memorial session with Justice Blackmun's law clerks and family, Justice David Souter recalled that, when he found out the retired Justice did not intend to write the threatened memoirs, he shared this bit of intelligence with the Court during a conference. "I've never heard such a sigh of relief," Justice Souter said.

What would Justice Blackmun have said in his memoirs? Probably nothing that he didn't capture in his voluminous notes and correspondence that will be given to the Library of Congress under a five-year embargo.

On the other hand, the notes probably will not solve a fundamental Blackmun mystery that only he could have answered: why a 61-year-old conservative in 1970 changed so much during his 24-year tenure with the Court. Nothing is more striking in this regard than the changes which led to the First Amendment decisions we lauded him for in 1995.

In his first term, he demonstrated a bristling hostility to expansive First Amendment interpretations. He dissented from the decision to release the Pentagon Papers, *New York Times Co. v. United States*, 403 U.S. 713 (1971). He also dissented in *Cohen v. California*, 403 U.S. 15 (1971). "Fuck the Draft" was too juvenile to merit constitutional protection, he said.

Over the course of his subsequent career, however, he came to view the First Amendment as a friend rather than as a foe. In *Bigelow v. Virginia*, 421 U.S. 809 (1975) and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), he created the commercial speech doctrine. He advocated press access to closed court proceedings. *Gannett v. DePasquale*, 443 U.S. 368, 380 (1979) (Blackmun, J., dissenting). He even found constitutional value in words such as "if they go for him [the President] again, I hope they get him." *Rankin v. McPherson*, 483 U.S. 378 (1987) (joinder in majority opinion).

To my mind, some of his evolution in thinking about the First Amendment was simply an accident of history: the commercial speech cases that reached him first were cases in which speech rights coincided with physicians rights or interests. His background inclined him to be a "physician's justice." He probated the Mayo brothers' wills. He served the Mayo Clinic as general counsel for 10 years. Throughout his tenure on the Court, he spoke weekly, if not daily, with physicians in Minnesota who remained his friends. From this perspective, it is easier to understand both *Bigelow* and *Virginia State Board of Pharmacy*. *Bigelow* protects a patient's right to seek a physician of her choice. *Virginia State Board of Pharmacy* promotes competition within the drug industry that makes treatment cheaper. Also noteworthy is his later opinion, *Daubert v. MerrellDow Pharmaceuticals*,

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## Justice Blackmun

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509 U.S. 579 (1993) which displays a respect for medical science, and a corresponding disrespect for quack science.

So, to some extent, the beginnings of his travels down a different First Amendment path can be seen in his essential trust of physicians with whom he was so close.

But there was certainly more.

As he worked on *Roe v. Wade*, 410 U.S. 113 (1973), Justice Blackmun may have been like Charles Lindbergh on his 1927 flight across the Atlantic. As Scott Berg describes Lindbergh in his recent biography, Lindbergh intended to land in Paris, collect his prize, and then take a leisurely tour around Europe. When Lindbergh arrived in Europe, however, he had become a media sensation. He was imprisoned in the U. S. Ambassador's residence to protect him from mobs. Much of the rest of his life was spent in an attempt to escape the continuing consequences of that early fame, which ultimately both brought him popular fame and fueled popular disdain.

Justice Blackmun no doubt knew in 1973 that *Roe* was an important decision, but he could not have possibly predicted what a profound impact it would have on the course of his remaining life. That impact, of course, became particularly severe after 1980, when President Ronald Reagan and other Republican politicians made the decision a target for attack. Shortly afterwards, a bullet went through the Blackmuns' apartment window. He too became a prisoner of a famous event.

It is possible, if not probable, that *Roe* changed his views on First Amendment speech. He felt he had a duty to read the hate mail that arrived in his office daily. After daily doses of being called a butcher of babies, he perhaps lost his early sensitivity to less offensive speech. Even flag burning, from this point of view, could be seen as a relatively mild form of protest. *See Texas v. Johnson,* 491 U.S. 397 (1989) (joinder in majority opinion).

For better or worse, *Roe* also effected his selection of law clerks. One of the questions he regularly asked prospective law clerks went something like this:

> Now, you may have heard of a case that I wrote several years ago called *Roe v. Wade.* It has caused some controversy I need to know whether you would feel uncomfortable working in my chambers in light of that decision.

To my knowledge, no one ever gave a negative answer to that question, but the implication was clear. He wanted law clerks with a fundamental respect for individual rights.

Whatever the reason, there is no doubt that he changed his views about the First Amendment.

Justice Blackmun also changed in other ways, particularly in his attitude toward female law clerks. In the 10 years before he came to the Supreme Court, all of his clerks were male. By the time of his death, he had hired more female law clerks than any other Justice. In fact, he had more female law clerks than all the other Justices combined have, of course that may have been influenced less by a change in ideology than by the fact that he had three daughters. Two of them sopke at the LDRC Dinner — warmly, genuinely about free speech and Justice Blackmun — and one, Sally, graduated from law school in the mid-1970's.

At Justice Blackmun's funeral service, Justice Stephen Breyer remarked that it was remarkable that a man could come to the Court at age 61 and yet be so willing to change his fundamental thinking about legal issues. Whatever the reason, we should be glad that he did.

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# SAVE THE DATES!

## 1999 NAA/NAB/LDRC Libel Conference

September 22-24, 1999

Hyatt Regency Crystal City Hotel

Arlington, Virginia

## LDRC Annual Dinner

Tribute to Floyd Abrams

Wednesday, November 10, 1999

Sheraton New York Hotel & Towers

## LDRC Defense Counsel Section Annual Breakfast Meeting

Millennium Broadway

Thursday, November 11, 1999

***Note New Locations***

# As We All Wait...Remarkable Number of Issues Pending in 1999

LDRC has been reviewing the 1990's with an eye toward publishing at the end of the year, as part of **LDRC BULLETIN**, Issue 99:4, articles on the issues that have seen seismic change in the decade of the 1990's. In some instances, our nominees for this distinction are areas of law in which there was little or no law at all prior to the 1990's. These issues suddenly burst upon the scene in the 1990's and collectively, resulted in new focus on newsgathering. Our nominees to date, are:

Ride-alongs
Fraud
Damages in newsgathering claims
Incitement
Reporters privilege
Anti-SLAPP law
Commercial speech

As to libel, "seismic changes" may over-dramatize the developments, but in the not-to-be-ignored category:

Post-Milkovich opinion
Incremental harm
Libel by implication

Of course, cyberspace is not so much a category of law, as a new medium in which to apply law. We will include it somehow as well. And, if you believe we have overlooked an issue, send us your nominees.

What we discovered in looking at this list -- and the reason that we have scheduled publication for the end of the year -- is that in so many of these areas, the media bar and their clients are standing by for significant decisions from highly influential courts. We believe that the number of very important matters awaiting review at the appellate level this year, just looking at the federal courts, is quite astonishing.

The Supreme Court of the United States currently has before it issues of liability from ride-alongs of law enforcement personnel in *Hanlon v. Berger* from the Ninth Circuit, and the commercial speech doctrine in *Greater New Orleans Broadcasting Assoc., Inc. v . United States and Federal Communications Commission*. The issue of fraud, and the arguments on the limitations of damages in newsgathering (nonpublication-based) cases, is pending before the Fourth Circuit in *Food Lion v. ABC*, one of the highest visibility, if not one of the most important litigations of the decade. Similar issues may soon be before the Sixth and Ninth Circuits in *W.D.I.A. v. McGraw-Hill, Inc.* and *Medical Laboratory Management Consultants v. American Broadcasting Companies, Inc.*, respectively.

The liability, if any, of third parties under eavesdropping statutes for use of what turns out to be unlawfully taped material is at issue right now before the D.C., the Third, and the Fifth Circuits. Reporters privilege has been struck virtually dumb, at least temporarily, by a panel of the Second Circuit in *Gonzales v. NBC*. The media awaits a decision by the Second Circuit as to whether it will grant rehearing or rehearing *en banc*.

Incitement is on trial in May in *Rice v. Paladin Enterprises, Inc.* A Louisiana case urging incitement will be returning for further litigation in the Louisiana state courts after the United States Supreme Court denied *cert.* this past month on denial of defendants' motion to dismiss.

It all suggests one blaze of a First Amendment send-off for this century -- or at the least, this decade.