

# MULRC

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## MEDIA LAW LETTER

Reporting Developments Through March 25, 2004

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## **Calling all Subpoena Fighters – We Need Your Proof!**

In case you did not receive an e-mail to this effect, MLRC needs your help in preparing a forthcoming “White Paper” on the Reporter’s Privilege.

Specifically, we are seeking:

- 1) any and all affidavits of reporters, editors, or publishers that you (or your colleagues) have tendered to demonstrate the value of recognizing and honoring the reporter’s privilege, and/or
- 2) any transcripts of live witness testimony directed to these issues; and
- 3) any academic studies or articles that you have referenced as support for these points.

We also invite you to send a list of news reports that were based upon anonymous sourcing and that were awarded a Pulitzer, Columbia-Dupont, Peabody, or similar recognition.

Thanks, in advance, for your assistance.

Steven D. Zansberg  
szansberg@faegre.com  
fax: (303) 607-3600

**Correction:** The *MediaLawLetter*’s previous reports on *Price v. Time* in December 2003 and February 2004 incorrectly reported that plaintiff, former Alabama University football coach Mike Price, was fired after publication of a *Sports Illustrated* article reporting his antics at a strip club. In fact, Price was fired before the article was published.

## New York Times Wins Libel by Implication Trial

By George Freeman

On March 22, a unanimous 11- person jury in federal district court in Philadelphia returned a verdict in favor of the New York Times and against plaintiff, Franklin Prescriptions, Inc., after a six day trial in a libel by implication case. *Franklin Prescriptions, Inc. v. The New York Times*, No. Civ. A. 01-145 (E.D. Pa. March 22, 2003).

Plaintiff claimed the juxtaposition of a picture of its website illustrating an article about the new and sometimes illicit market for fertility drugs on the Internet defamed it. The article entitled "A Web Bazaar Turns Into a Pharmaceutical Free-for-All" appeared in the E-Commerce special section of The Times on October 25, 2000.

Although the jury did find that the juxtaposition of the web-grab and the article did have a defamatory implication and that The Times was at fault in making the implication, it found – in answer to the sixth special interrogatory – that the Plaintiff suffered no "actual harm" because of the article. This entitled defendant to the verdict.

As described below, the trial result highlighted two notions, especially the importance of special interrogatories going to the jury. This was the second New York Times trial in ten months in which juries made the specific findings that Times articles were false and defamatory but where the Times won verdicts, here because of lack of damages and in an earlier case regarding reporter Fox Butterfield because of lack of actual malice.

In both cases the result might have been different were the jury not to have been given special interrogatories. Second, from talking to jurors after the verdict, it appeared that they believed that though The Times had made an honest mistake, it had not caused any real harm. They volunteered that if the mistake had been more egregious, reckless or intentional, they might have tried harder to find damages and would have stretched to compensate plaintiff.

### *Article Used Web-Grab of Plaintiff's Site*

The article at issue discussed many women's urgent need and high cost for fertility drugs and described how many have turned to the Internet to buy and sell fertility drugs, often without prescriptions. The article quoted regulators and doctors with respect to this new Internet marketplace. While some of the article dealt with unscrupulous on-line pharmacies and the "gray market" for fertility drugs, there also was discussion of brick-and-mortar drugstores which provide legitimate on-line services.

Along with a large photo of a woman with her twins who were conceived because of fertility drugs bought on

the Internet, another illustration was a picture of Franklin Drug Center's website, showing their price list for the very fertility drug which the woman featured in the lede and the photo used to produce her twins. Franklin was nowhere mentioned in the article, and as it turned out, is fully legitimate,

selling drugs only after a prescription is sent to them and not selling at all online.

The Times ran a correction within a week saying it was mistaken in implying that Franklin sold drugs online. In a telephone conversation with a Times editor, Franklin did not ask for a broader correction. When The Times editor called Franklin back, as he was preparing the correction to ensure it was appropriate, the owner of Franklin never returned his call, a fact The Times used effectively at trial.

### *Plaintiff Deemed to be a Private Figure*

In denying The Times's summary judgment motion, the Court held that Franklin was a private figure (notwithstanding its advertising on the Internet) and that Pennsylvania law applied (notwithstanding that Franklin promoted its business to doctors nationally, but was based in Philadelphia). Hence, Federal District Judge Cynthia Rufe found that the applicable standard was only negli-

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***Although the jury did find that the juxtaposition of the web-grab and the article did have a defamatory implication and that The Times was at fault in making the implication, it found ... that the Plaintiff suffered no "actual harm"***

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## **New York Times Wins Libel by Implication Trial**

*(Continued from page 4)*

gence – not actual malice nor even New York’s “gross irresponsibility” standard – which the Court felt was a question for the jury. Similarly, the Court felt that it was up to a jury to determine if there was a defamatory meaning in the juxtaposition of the illustration and the article.

### ***Plaintiff’s Case***

At trial, plaintiff emphasized the illustration’s connection to the unsavory character of some drug sales depicted in the article, emphasizing that the illustration was next to a boxed sidebar regarding “Safety Tips for Buying E-Medicine.” Plaintiff’s attorney argued that the very things the cautionary box advised consumers to look for were not found on the website made available to readers.

He combined that with arguing that The Times illustration should have also included the entire website, i.e. the small print at the bottom of the website page visible if a viewer scrolled down, rather than what came up on The Times’s researcher’s computer when he first came to Franklin’s webpage; in the alternative, he argued there should have been a caption explaining that Franklin was a legitimate pharmacy.

He also tried to argue that this lapse in judgment was caused by different Times journalists not communicating with each other and not being on the same page with respect to the meaning and significance of the illustration and article. (The Times had successfully won an in limine motion barring plaintiff from mentioning the Jayson Blair incident in the trial.)

Finally, plaintiff’s counsel constantly harangued about how the correction was inadequate, puny and arrogant, showing a lack of care about a small Philadelphia pharmacy.

After plaintiff’s case, much of which featured Times witnesses, The Times moved for a directed verdict. The Times’s main argument was that plaintiff had not put on any evidence showing that any one particular person thought less of plaintiff after the article. Its only fact witnesses were the proprietor and an employee, both of whom knew the defamatory implication was not true,

and an in-law of the proprietor who only testified that the juxtaposition was “strange” but did not say he thought less of the company because of it.

The Times also moved for a directed verdict on lack of damages caused by the article. The facts showed that the plaintiff made \$10,000 more in the month after the article, a figure consistent with, and even a little bit surpassing, its growth theretofore. Plaintiff put on a web hit study and drug shipping records to show that their business went down.

However, The Times argued that those reports were not a good proxy for sales and revenues, both of which continued to go up; that the studies themselves were flawed; and, most importantly, that plaintiff could make no causal link between the decreases shown in its studies and the article. In fact, no one – no doctor, no patient, no friend or colleague – complained to plaintiff about the article.

Nonetheless, Judge Rufe denied the directed verdict motion.

### ***Newspaper’s Case***

As part of its case, The Times showed how the entire package was put together, that each of The Times journalists acted responsibly in finding the web-grab and deciding that it was fit to print.

The Times emphasized the positive nature of the article, the connection between the lead character, the photo and the web-grab (which showed the very drug which the mother had taken), and argued that even by plaintiff’s account, the article was more than half positive. The Times also pointed out that the web-grab itself promoted Franklin as having been in business for over 30 years, indicating that it wasn’t a fly-by-night Internet outfit, and that its listing of drugs was accompanied by an “Rx” sign, suggesting that prescriptions were required.

The Times also read the deposition testimony of numerous doctors who plaintiff claimed stopped giving them orders after publication of the article; the depositions showed that none of those departures was in any way due to the article, and that the doctors had all been unaware of the article.

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## **New York Times Wins Libel by Implication Trial**

*(Continued from page 5)*

### ***Judge Issued Special Jury Interrogatories***

In a prolonged series of hearings near the close of trial, The Times prevailed upon the judge to issue special jury interrogatories. Most important, The Times argued that because plaintiff was a company, it had to show actual pecuniary damages; it argued that because of the corporate plaintiff, because this was a libel by implication case and using language from *Gertz*, presumed damages could not be allowed if only negligence was found. Critically, that position found its way into the jury interrogatory.

After three hours of deliberation, the jury found there was a defamatory implication which readers understood and which applied to plaintiff, that the story was not substantially true and that The Times was at fault in publishing the implication but that Franklin suffered no “actual harm” caused by the article.

Perhaps the most powerful exhibit The Times used was plaintiff’s own exhibit of a bar graph showing a de-

creasing amount of web hits. In addition to arguing that this was caused by diminution of Franklin’s position on various search engines causing less web surfers to go to its page, The Times superimposed over that bar graph another graph showing Franklin’s rising revenues.

That exhibit seemed to belie any argument that the article caused damage to Franklin’s business. Thus, the basic conclusion of the trial was – quoting a phrase coined by Chick Hearn, Los Angeles Laker basketball announcer – “No harm...no foul.”

Plaintiff was represented by George Bochetto of Bochetto & Lentz.

*George Freeman is inside counsel of The New York Times Company. He represented the newspaper in this case together with Carl Solano, Elizabeth Ainslie, Jennifer DuFault James, and Harris Feldman of Schnader Harrison in Philadelphia.*

***Look out for Registration Materials Arriving by Mail in April!***

## **2004 NAA/NAB/MLRC CONFERENCE**

Alexandria, Virginia  
September 29, 30 and October 1, 2004

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underwriting for the Conference  
should contact Sandy Baron at MLRC.

## **NY Anti-SLAPP Law Applied in Media Libel Case**

### ***Court Dismisses Complaint, Awards Compensatory and Punitive Damages To Defendant Newspaper***

**By Jay Ward Brown**

Ruling that a libel complaint against a newspaper violated New York's anti-SLAPP statute, a New York trial judge issued what appears to be a first-of-its-kind order, requiring plaintiff not only to reimburse the defendant newspaper for its attorney's fees, but also awarding the newspaper additional compensatory and punitive damages. *Duane Reade, Inc. v. Patrick Clark and The Wave Publishing Co.*, No. 107483/03 (N.Y. Sup. Ct. N.Y. County March 10, 2004)

In addition to holding that the anti-SLAPP statute applied, the court concluded that the challenged "advertorial" 1) constituted non-actionable opinion; 2) was in any event not susceptible of a defamatory meaning; and, further, 3) that plaintiff's tortious interference claim fails both under the First Amendment and for failure to identify specific lost business.

#### ***Defendant Complained about Store's New Memorial Site***

As is true of so many things in recent years, the roots of this case are to be found in the tragic events of 9/11. Residents of Rockaway Beach, Long Island, determined to build a Tribute Park on waterfront property to honor the memory of the victims of 9/11, and of a nearby airliner crash. Local stained-glass artist Patrick Clark was selected to design the memorial.

In the meantime, Duane Reade, a major drugstore chain, had leased the lot next to the site for Tribute Park and erected a new store and parking lot. In addition, the chain applied for a permit to erect a large, lighted billboard atop the store overlooking the planned memorial, an application that became the subject of local news reporting.

Clark objected to the billboard and placed a full-page advertisement in *The Wave of Long Island*, the weekly community newspaper serving Rockaway Beach and surrounding communities. Among other things, the advertisement accused Duane Reade CEO Anthony Cuti of having "laughed in [the] faces" of those in the community who opposed the sign, and referred to the company's board of directors as "cotton ball mercenaries without a soul, hunting for prey." Clark speculated that CEO Cuti "probably thinks [local] residents are moron drones who will be attracted to spend money at the store like flies drawn to dog droppings by the huge bright, spot light lit sign." The ad urged a boycott of the new store unless the billboard were removed.

At the top and bottom of the ad, disclaimers noted that it was a "Paid Advertisement" that reflected the "personal opinion" of "Patrick Clark, upset Tribute Park Artist." In addition, the layout of the ad distinguished it from the news pages of the paper.

#### ***Store Sued for Libel and Tortious Interference***

Duane Reade wasted no time in filing a complaint for libel and tortious interference with business relations -- indeed, the complaint was filed so promptly that Clark and *The Wave* were served prior to a hearing regarding Duane Reade's permit for the billboard. (A hearing after which, not so incidentally, the permit was revised to require a set-back of the sign and other adjustments.)

Duane Reade alleged that the factual statements in the ad were false and that the ad conveyed the implications that Duane Reade was a "bad neighbor" and "insensitive" to the events of 9/11, thereby damaging its business reputation.

*The Wave* first responded by calling New York's anti-SLAPP statute to Duane Reade's attention, and by offering to publish a responsive advertisement or a letter to the edi-

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***A New York trial judge issued what appears to be a first-of-its-kind order, requiring plaintiff not only to reimburse the defendant newspaper for its attorney's fees, but also awarding the newspaper additional compensatory and punitive damages.***

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## NY Anti-SLAPP Law Applied in Media Libel Case

(Continued from page 7)

tor in the newspaper. The drugstore chain, however, determined to pursue a money judgment.

Thus, in September 2003, *The Wave* and Clark each separately filed motions to dismiss the Complaint pursuant to New York's anti-SLAPP statute, CPLR 3211(g), requesting recovery of their attorney's fees and such other relief as the statute affords. In an opinion released March 10, 2004 (and which is expected to be published in *Media Law Reporter*), Justice Debra James granted their motion.

### *Trial Judge Applied Anti-SLAPP Statute*

Specifically, after reviewing the statute's legislative history and intended purposes, Justice James observed that the anti-SLAPP law places on the plaintiff the burden of establishing "by clear and convincing evidence a 'substantial basis' in fact and law for its claim." Slip op. at 10.

Justice James also noted that whether the anti-SLAPP law applies to a particular case involves a two-part inquiry:

First, "the court must determine whether the plaintiff is 'a public applicant or permittee,'" and then decide whether the lawsuit is "'an action, claim, cross-claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.'" Slip Op. at 9 (quoting N.Y. Civ. Rts. Law § 76-a(1)).

In this regard, Duane Reade did not dispute that it is a "public permittee" in connection with the store and sign. As a result, Justice James held, the anti-SLAPP law requires that Duane Reade be deemed "a public figure" under substantive libel law. Accordingly, Duane Reade would not be entitled to maintain its action "unless it is able to demonstrate by clear and convincing evidence that defendants acted with actual malice." Slip Op. at 12; *see also id.* at 8.

### *Advertisement Covered by Statute*

Justice James then addressed Duane Reade's principal contention: that the statute applies only to communications made directly to permitting authorities and, as a consequence, the advertisement in question did not fall within the law's ambit. The court readily dismissed this argument, finding it "beyond peradventure" that the lawsuit was materially related to Clark's efforts to oppose Duane Reade's permits.

The anti-SLAPP law should "not [be] read ... so narrowly as to exclude from its protection the use of the press to petition and participate in a public proceeding," the court held. While such participation may "'usually'" occur directly before a permitting authority itself, Justice James observed, the contention "that a critic's statements

are unprivileged because they appeared in the newspaper and were not spoken directly to the public agency would be completely antithetical to the fundamental free speech rights protected

under the anti-SLAPP statute." Slip Op. at 13-14 (citing *Harfenes v. Sea Gate Ass'n*, 167 Misc. 2d 647 (N.Y. Sup. Ct. N.Y. County 1995)).

### *Statute Not Limited to Statements Made in Agency Proceedings*

Justice James rejected Duane Reade's argument that the only First Department appellate decision concerning the anti-SLAPP statute had held that the law was limited to comments made in actual agency proceedings. She noted that the holding in *Bell v. Little*, 250 A.D.2d 485 (1st Dept. 1998), to the effect that graffiti on sidewalks does not fall within the scope of the law, is sharply distinguished "from Clark's use of the press to challenge an agency permit." Slip Op. at 14-15.

Having concluded that Duane Reade's complaint falls within the scope of the anti-SLAPP law, Justice James then turned to whether the drugstore chain had

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***The anti-SLAPP law should "not [be] read ... so narrowly as to exclude from its protection the use of the press to petition and participate in a public proceeding," the court held.***

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### NY Anti-SLAPP Law Applied in Media Libel Case

(Continued from page 8)

met its burden of clearly and convincingly demonstrating a substantial basis for its claims. She ruled that it fell far short of this measure.

Applying the four-part test for non-actionable opinion set forth in *Gross v. New York Times Co.*, 82 N.Y.2d 146, 153 (1993), Justice James underscored 1) the heated, on-going debate in the community regarding the sign, 2) Clark's disclosure of his bias through his self-identification as the "upset" artist designing the memorial, 3) the hyperbolic language in the ad, 4) his use of terms such as "monumental" that are not susceptible of precise definition, and 5) the absence of any allegedly undisclosed facts. In these circumstances, she concluded, the ad "constitutes pure opinion and is not actionable." Slip Op. at 17-19.

The court also held that, even assuming the ad could be construed as conveying statements of fact regarding Duane Reade's good neighborliness, it was "not, as a matter of law, 'reasonably susceptible of a defamatory connotation.'" Slip Op. at 19 (citation omitted).

"[A]ccusations of greed, selfishness or callousness, even if deemed to be false statements of fact, are not actionable," Justice James held. Slip Op. at 20 (citing *Hall v. Binghamton Press Co.*, 263 A.D.2d 403 (3d Dept. 1942), *aff'd* 296 N.Y. 714 (1946)).

### Tortious Interference Claim Dismissed

Duane Reade's claim for tortious interference is subject to the same First Amendment limitations that govern its defamation claim, the court held. Slip Op. at 21 (citing *Unelko Corp. v. Rooney*, 912 F.2d 1049 (9th Cir. 1990)). Moreover, plaintiff failed to identify any specific business it had lost as a result of the advertisement, as required by New York common law. Slip Op. at 21-22.

### Defendants Awarded Damages

Finally, Justice James "wholeheartedly embrace[d]" the proposition that "[t]he first remedy of any victim of defamation is self-help — using available opportunities to contradict the lie or correct and thereby minimize the adverse impact on reputation." Slip Op. at 23 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974)).

Declaring herself "mystified as to plaintiff Duane

Reade's rejection of [*The Wave's*] invitation to do just that," the court awarded to both defendants their costs and attorney's fees, and held "that defendants are entitled to both compensatory and punitive damages from Duane Reade." Slip Op. at 23-24. Assessment of the amount of such damages is to be the subject of a future hearing.

In the meantime, Duane Reade, which is represented by Kenneth M. Kramer and Adam S. Hakki of Shearman & Sterling, has publicly declared its intention to appeal.

*Jay Brown is a partner in Levine Sullivan Koch & Schulz, L.L.P. and, together with his partner Cameron Stracher and associate Thomas Curley, represented The Wave. Co-defendant Clark is represented by Charles S. Sims, Sari Gabay Rafiy and Kenneth E. Aldous of Proskauer Rose LLP and by Christopher Dunn and Arthur Eisenberg of the New York Civil Liberties Union.*

## Oregon Federal Court Applies Anti-SLAPP Statute in Media Case

In what is apparently the first use of Oregon's anti-SLAPP statute in a media case, a federal district court in Oregon granted an author's motion to strike a complaint for libel and intentional infliction of distress. *Douglas Card v. Daniel Pipes and Jonathan Schanzer*, Civil No. 03-6327-HO (D. Or. March 1, 2004)

Judge Michael Hogan dismissed a complaint brought by Douglas Card, a professor of Middle East Studies at the University of Oregon, against Middle East expert and author Daniel Pipes and Washington Institute Fellow Jonathan Schanzer for statements they made in a *New York Post* column (republished on their website) and in a separate letter to the editor that appeared in the *Jerusalem Review*. Pipes and Schanzer had criticized Card for anti-Israel bias in his teaching.

In what may prove a very useful precedent for media defendants in Oregon, the court adopted a very broad reading of the scope of the state anti-SLAPP statute, albeit without much analysis.

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**Oregon Court Applies Anti-SLAPP Statute in Media Case**

*(Continued from page 9)*

***Complaint Was Not Properly Served and Was Time Barred and Failed to State a Claim***

The court ruled that the complaint was never properly served (plaintiff had attempted to serve by mail) and, therefore the libel counts were time barred under Oregon’s one year statute of limitations for libel.

Plaintiff’s claim for intentional infliction of distress, governed by a two year statute of limitations, failed on substantive grounds. First, the plaintiff conceded that certain complained of statements were true. Other statements, e.g. that plaintiff described Israel as a “terrorist state” and Israelis as “baby killers,” were not sufficiently outrageous to support a claim.

The defamation claim was also dismissed because the statements at issue were protected opinion, not statements of fact. Furthermore, the court rejected the claim that there was a continuing tort based on the continued availability of the article online.

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***In the most notable aspect of the decision, the court concluded that the complaint should therefore be dismissed under Oregon’s anti-SLAPP statute.***

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***Anti-SLAPP Statute Applies to Newspapers and Websites***

In the most notable aspect of the decision, the court concluded that the complaint should therefore be dismissed under Oregon’s anti-SLAPP statute, Or. Rev. Stat. § 30.142 et seq.

The court then gave broad reading to the scope of the statute.

The statute applies to:

(a) Any oral statement made, or written statement or other document submitted, in a legislative, executive or judicial proceeding or other proceeding authorized by law;

(b) Any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive or judicial body or other proceeding authorized by law;

(c) Any oral statement made, or written statement or other document presented, in a place open to the public or a public forum in connection with an issue of public interest; or

(d) Any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

Judge Hogan simply ruled that subsection (c) applied because:

Plaintiff’s claims arise out of written statements presented in a place open to the public or public forum (website, newspaper) in connection with an interest of public concern (alleged political activism and bias in the college classroom).

This broad scope is similar to that of the California anti-SLAPP statute. Indeed, the court relied on California law

to conclude that the statute applies in a federal diversity action. Citing *Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963 (9th Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000) (anti-SLAPP statute does not conflict with substantive Federal Rules).

Defendants are entitled to reasonable attorney fees and costs.

Plaintiff was represented by David Force of Eugene, Oregon. Defendants were represented by Steven Wilker of Portland, Oregon.

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## New York Judge Rules that Records Sealed in a Libel Action Must Be Unsealed at the Summary Judgment Stage

### *Court Also Clarifies Requirements for Finding of “Gross Irresponsibility”*

By Henry R. Kaufman

On February 13, 2004, acting New York Supreme Court Justice Fred L. Shapiro granted a motion to unseal records filed in support of a weekly newspaper's motion for summary judgment in a private figure's libel action. The court rejected the plaintiff's contention that he should be permitted to effectively close all proceedings until plenary trial of his claims. *Visentin v. Haldane Central School District, et al.*, Putnam County Index No. 633/02.

In a related ruling the court granted the newspaper's motion for summary judgment. The court's opinion clarified application of New York's unique private-figure standard of “gross irresponsibility” under *Chapadeau v. Utica Observer-Dispatch* to a news story based on a single source.

#### ***The Putnam County Libel Action***

The upstate New York libel action was brought by a public high school English teacher against his former school district and the district Superintendent, along with a student and her step-mother who had lodged a complaint with the district that led to plaintiff's termination. Also named as defendants were a local newspaper, the *Putnam County News & Recorder*, its publisher and reporter. Plaintiff claimed that the newspaper defendants' front-page article, reporting on his termination as a teacher immediately after an incident with the complaining student, was false and defamatory.

Before discovery commenced plaintiff demanded that the parties agree to a pretrial protective order permitting the sealing of any document a party might designate as confidential. To avoid the expense of motion practice before it was known which, if any, documents would be designated for sealing, the newspaper (which at the time of the publication was uninsured) acceded to a limited protective order. At the newspaper's insistence, the order applied only to documents “reasonably and in good faith” subject to a claim of confidentiality, or otherwise protectable under state rules. The order also provided that contested designations could be challenged by a party at any stage of the proceedings.

Despite these limitations, as discovery proceeded plaintiff's counsel designated the *entire* record in the action for sealing – *every* pleading, *every* document disclosed during the course of discovery and *every* line of deposition testimony by parties and witnesses. Plaintiff's sweeping designations even extended to previously public documents – including related court proceedings not previously sealed as well as the newspaper article at issue in the action. By designating every aspect of the record plaintiff effectively sought a total gag on the proceeding, “effectively insulating,” as the court later found, “the entire record from public access.”

The newspaper ultimately moved to unseal all discovery materials filed in support of motions for summary judgment made by the newspaper and the school district at the close of discovery. Plaintiff even contested the newspaper's right to show its papers on the motion to unseal to potential *amici curiae*. The court ultimately ruled that nothing in those motion papers was confidential and unsealed them pending its consideration of the summary judgment filings.

#### ***Court Sets Precedent by Unsealing “Court Records”***

The Putnam County Court decision on the newspaper's motion to unseal establishes favorable precedent on two key issues not previously decided under applicable New York state court practice in a libel action – the timing of, and the cognizable grounds justifying, the sealing of court records.

First, the court ruled that documents designated for sealing by a party pursuant to a pretrial protective order cannot be kept sealed until trial in the absence of a finding of “good cause” as to specific protectable documents.

In determining that documents filed with the court are subject to unsealing – *at the summary judgment stage* – the court initially observed that the protective order entered on consent was applicable solely during discovery. Once discovery was completed, and the case had been placed on the “trial-ready” calendar, “all documents are deemed unsealed unless determined to be sealed by written order of this Court upon a finding of good cause.”

*(Continued on page 12)*

### **New York Judge Rules that Records Sealed in a Libel Action Must Be Unsealed at the Summary Judgment Stage**

*(Continued from page 11)*

Justice Shapiro relied on 22 NYCRR 216.1, a New York state court rule, enacted several years ago with input from media groups. The intent of 216.1 was to limit the ability of parties in civil actions to privately agree to keep documents confidential in the absence of a written finding by the court of good cause for the sealing of any “court records” – i.e., any records actually *filed* with the court.

Judge Shapiro broadly ruled, under 216.1, that “once materials are introduced or filed in open court, either at trial *or in connection with court rulings on substantive motions*, they become presumptively subject to unsealing, even if considered confidential.” (Emphasis added) The court observed that “records filed and considered in connection with dispositive motions, such as the pending motions for summary judgment in this matter, should, like evidence introduced at trial, be open to the public, given the potential for a final adjudication on the merits of the matter.”

The court’s refusal to continue the sealing of documents beyond discovery and until trial is of particular significance to media defendants because many if not most media libel actions are resolved at the summary judgment stage. A rule permitting broad sealing through trial would effectively permit libel plaintiffs to avoid any public scrutiny of their claims and reputations in most cases.

### ***Significant Victory for Media Interests***

Judge Shapiro also substantially limited the grounds for a finding of “good cause” to seal records in a libel action. First, he noted that “the proponent of sealing must establish that ‘compelling circumstances’ exist to justify secrecy.”

Applying this standard, the court found that plaintiff had failed to meet his heavy burden. According to the court, neither “the general desire for privacy,” nor the potential alleged for “embarrassment, stigma, humiliation,” nor even further “damage to reputation,” constitutes good cause sufficient to seal records in a libel action after the discovery stage.

This ruling should also be a very helpful one for media defendants in future libel cases. By definition, in every libel action the plaintiff is complaining of damage to repu-

tation along with attendant embarrassment, stigmatization or like dignitary harms. It would be the rare case where evidence or documents pertinent to a media defendant’s defenses to such claims would not have the arguable potential to exacerbate such claimed harms.

Similarly, every libel plaintiff undertakes to place at issue the falsity of allegedly defamatory claims in relation to his or her allegedly good reputation. Were mere embarrassment, or even further defamation, to be recognized as valid bases for the sealing of pertinent documents, most plaintiffs would have a colorable claim to seal much of the most relevant evidence in a libel action. Such a broad, presumptive right to the sealing of reputationally-related matter would be entirely inconsistent with the public adjudication of libel claims, as the Putnam County court has now held.

### ***Six News Organizations Move to Intervene***

The Associated Press, Gannett, Hearst, Newsday, and Ottaway Newspapers, led by the New York Times, sought to intervene in the action in support of the newspaper defendants’ motion to unseal.

In addition to other state rules, the news organizations invoked 216.1 in support of their intervention. Under that provision, “in determining whether good cause has been shown,” the court is required to “consider the interests of the public as well as the parties.” The rule specifically provides that “where it appears necessary or desirable, the court may prescribe appropriate notice and an opportunity” for representatives of the public “to be heard.”

The court denied the news organizations’ motion to intervene, on the ground that their intervention in the litigation – *for all purposes* – was not warranted under state intervention procedure. In any event, the court said formal intervention was unnecessary given the court’s favorable disposition of the newspaper defendants’ motion to unseal. Although he had denied their intervention motion, Justice Shapiro observed that the relief the news organizations were seeking – the unsealing of court records – had been achieved in response to the motion to unseal.

The court also noted that in granting the motion to unseal it had protected the right of the intervenors to have

*(Continued on page 13)*

### New York Judge Rules that Records Sealed in a Libel Action Must Be Unsealed at the Summary Judgment Stage

(Continued from page 12)

their arguments considered, under 216.1, as representatives of the “public interest.” In effect, the court treated the news organizations as *amici curiae*, holding its consideration of their arguments in support of unsealing to be an “adequate alternative ... to a grant of intervention.”

In the end, Judge Shapiro said he was satisfied that his ruling had “ensure[d] that the significant interest in providing access to the courts had been safeguarded.”

### Chapadeau Standard

In a separate Order, also handed down on February 13, the Putnam County court, having unsealed all documents filed on the motions for summary judgment, granted the newspaper defendants’ motion for summary judgment. (The court subsequently denied the school district’s summary judgment motion.)

The newspaper defendants had moved for summary judgment on the grounds of lack of substantial falsity and lack of fault.

The court declined to address the more complicated and fact-intensive issue of truth or falsity. It also declined to address the merits of the contention that plaintiff, as a public school teacher with substantial coercive authority over his students, should be deemed a public official required to prove “constitutional malice” under *Times v. Sullivan*.

The public official status of teachers has been recognized in several well-reasoned cases, although there is divided authority on this unresolved issue. Unfortunately, in New York the issue had previously been addressed by only one mid-level appellate court. Without analysis, and based solely on a decision of the Maine Supreme Court, that court held that public school teachers should be treated as private figures. Notwithstanding that the definitional issue is one of *federal* law, Justice Shapiro considered himself bound by the earlier New York decision unless and until reconsidered at the appellate level.

Assuming plaintiff to be a private figure, and assuming without deciding that plaintiff could meet his burden of establishing the substantial falsity of some or even all of the statements in the newspaper article, the court nonetheless held that plaintiff had failed to meet his burden of es-

tablishing “gross irresponsibility” under New York’s unique standard for private libel plaintiffs – a standard, according to the court, requiring proof of a “high degree of fault.”

Initially, the court noted that the newspaper article complained of was, by plaintiff’s own admission, “derived solely from statements made by” the defendant school Superintendent. And the court observed that the Superintendent swore under oath at his deposition “that the newspaper article accurately reported in substance the factual information and personal opinions that he provided to [the] reporter.”

Plaintiff had argued that it was grossly irresponsible for the newspaper not to have contacted other potential witnesses to the incident that led to plaintiff’s termination, or to have failed “to obtain and present [plaintiff’s] version of the events.”

Squarely rejecting those contentions, the court held that under *Chapadeau* “the media defendant is not charged with any requirement of fairness, balance or multiple source-checking.” Instead, “so long as the publisher relied on at least one authoritative source and had no reason to doubt the veracity of that source or the accuracy of the information he or she provided, even if that information ultimately proved to be incorrect or false, the publisher has appropriately discharged its duty.”

Justice Shapiro noted that there could be “no serious dispute” that the school Superintendent “was a reputable source for a story concerning events leading to the dismissal of a school teacher by his district.”

The court also found there was no basis for alleging that the newspaper defendants “had a reason to doubt the Superintendent or his account.” It noted that there was no proof of the newspaper’s knowledge of any previous unreliability, or ill will toward the plaintiff, on the part of the Superintendent, nor any evidence that “his account contained some glaring error, ambiguity or inherent contradiction that should have caused the newspaper defendants to continue gathering information.”

Finally, Justice Shapiro rejected as “futile” plaintiff’s effort to label the newspaper’s “basic news coverage of a newsworthy event” as “investigative reporting” or “high risk journalism” requiring further investigation.

(Continued on page 14)

### **New York Judge Rules that Records Sealed in a Libel Action Must Be Unsealed at the Summary Judgment Stage**

(Continued from page 13)

As the court held:

“The Newspaper Defendants were not *making* news; they were simply reporting it, based on an account of an authoritative source .... *Chapadeau* makes plain that the Newspaper Defendants had no affirmative duty to interview all possible witnesses to the events

chronicled, to write a more balanced article or even to provide plaintiff’s account of this newsworthy event.” (Emphasis in original)

*The newspaper defendants were represented by Henry R. Kaufman of New York City and Scarsdale, New York. The intervenor news organizations were represented by David McCraw of The New York Times. The plaintiff was represented by Jerold S. Slate of Poughkeepsie, New York.*

## **Quoting Opponent in Fundraising Letter Not Misappropriation**

The Michigan Court of Appeals granted summary judgment on misappropriation and false light claims brought by the president of a teacher’s union against a public policy group over its use of an unauthorized quote in a fundraising letter. *Battaglieri v. Mackinac Center for Public Policy*, No. 245862, 2004 WL 540257 (Mich. App. March 18, 2004).

### ***Newsworthiness Privilege Applied to Letter***

In a thoughtful opinion designated for publication, the court held that defendant’s letter “falls squarely within the protection of the First Amendment for discourse on matters of public interest” notwithstanding the letter’s request for financial contributions.

At issue in the case was a fund raising letter sent out by the defendant, a public policy group that had taken positions adverse to those of the teacher’s union on education issue. In relevant portion the letter stated:

By all measures ... the Mackinac Center has had an outstanding year ... and the people of Michigan are the beneficiaries. But you don’t need to take my work for it.

This fall ... Luigi Battaglieri, President of the Michigan Education Association, stated, “Frankly, I admire what the Mackinac Center has done.” Mr. Battaglieri, whose union is generally at odds with the Mackinac Center, said this with respect to how Mackinac Center research has shaped education reform in Michigan and around the nation.

The letter accurately quoted a statement made by plaintiff at a press conference announcing the formation of competing think tank.

Noting that “courts that have recognized the appropriation tort have also uniformly held that the First Amendment

bars appropriation liability for the use of a name or likeness in a publication that concerns matters that are newsworthy or of legitimate public interest,” the court easily concluded that the letter’s discussion of education issues addressed an important matter of public concern.

Moreover, First Amendment protection was not lost because the letter also had an obvious “commercial” purpose of raising financial support. Applying the newsworthiness privilege to the letter, the court noted that a “different approach would preclude the publication of much news and *other matters of legitimate public concern.*” (emphasis added).

### ***Plaintiff Must Prove Defamatory Meaning Was Intended***

As to the false light claim, the court held that defendant was entitled to summary judgment where there was no evidence that it intended to convey the false impression that plaintiff endorsed its policy goals.

In what may be the first Michigan state court case to explicitly adopt this standard, the court reasoned that:

In a case such as this, where the plaintiff is claiming injury from an allegedly harmful implication arising from the defendant’s article, he “must show with clear and convincing evidence that the defendant intended or knew of the implication that the plaintiff is attempting to draw....

*Citing Saenz v. Playboy Enterprises, Inc.* 841 F.2d 1309, 1318 (7<sup>th</sup> Circuit 1988).

Here there was no direct, or circumstantial evidence, that defendant intended to imply that plaintiff was endorsing its policy goals.

## Gennifer Flowers' Case Against Former Clinton Officials Dismissed

By Laura R. Handman and Matthew A. Leish

On March 8, 2004, Chief Judge Philip M. Pro of the U. S. District Court for the District of Nevada granted summary judgment in favor of James Carville, George Stephanopoulos and Little, Brown and Company and entered judgment dismissing all claims brought by Gennifer Flowers. *Flowers v. Carville, et al.*, CV-S-99-1629-PMP (D. Nev. March 8, 2004).

### *Flowers Sued Over Comments about "Doctored Tapes"*

Flowers sued these defendants along with Senator Hillary Rodham Clinton for libel, false light invasion of privacy and conspiracy arising out of statements made in 1998 by Stephanopoulos and Carville on *Larry King Live*; in 1999 by Stephanopoulos in his book, *All Too Human*, published by Little, Brown; and by Stephanopoulos in 2000 on *The Tim Russert Show*.

The statements referred to reports in 1992 on CNN and KCBS (the CBS station in Los Angeles) by tape experts hired by the broadcasters who examined the excerpts of tapes Flowers had made of her conversations with then-Gov. Clinton and which she had played at her press conference in January of 1992.

The case was on remand from the Ninth Circuit, (Kozinski, J.) which had reversed in part and affirmed in part Judge Pro's previous grant of defendants' motion to dismiss. 310 F.3d 1118 (9<sup>th</sup> Cir. 2002). Sen. Clinton, who was only still in the case on the conspiracy claim, was dismissed on statute of limitation grounds from the case in November of 2003.

### *No Evidence of Actual Malice*

The only issue before Judge Pro was actual malice. As a procedural matter, the Court had agreed to defendants' request that the initial phase of discovery and dispositive motion practice be limited to actual malice in view of the Ninth Circuit's directive that Flowers faced "an uphill battle" to show that defendants "knew the news reports were probably false or disregarded obvious warning signs from other sources." (310 F.3d at 1131).

This staggered discovery and motion practice allowed for very circumscribed, far less costly discovery although it also meant that defendants did not take Flowers' deposition at this stage.

Judge Pro held that the gist of the reports on CNN and KCBS was "an assertion that the tapes were questionable and not to be trusted." In so concluding, the Court rejected Flowers' claims that Stephanopoulos and Carville had ignored "obvious warning signs" such as CNN's expert's qualifier that there might be an innocent explanation for the breaks in the audio and KCBS' expert's statement that, although the tapes were not "doctored," they were "selectively edited" to create an "audio movie."

The Court said that, at best, the reports were ambiguous and Stephanopoulos and Carville's reference to these reports as finding that the tapes were "doctored" or "selectively edited" was a "rational interpretation." The omission of the qualifiers did not create a different effect in the mind of the viewer, nor constituted actual malice.

The Court also found that Flowers had failed to present admissible evidence that Stephanopoulos or Carville had in any way influenced the CNN and KCBS experts' conclusions.

The Ninth Circuit had reversed the dismissal to allow Flowers to take discovery as to whether KCBS' tape expert – Anthony Pellicano – was a "shill" for the Clintons. Pellicano, a notorious private investigator now doing time in a federal penitentiary, was subpoenaed by Flowers but refused to walk into the prison area where counsel waited to depose him.

Although Stephanopoulos had spoken with Pellicano about his findings at the time, everyone from the Clinton campaign – including Betsey Wright, the staffer in charge of "bimbo eruptions" – testified that Pellicano was not hired by the campaign.

Flowers is considering whether to appeal.

Gennifer Flowers was represented by Larry Klayman of Judicial Watch.

*Laura Handman and Matthew Leish of Davis Wright Tremaine represented the defendants in this case.*

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***That the tapes were  
"doctored" or "selectively  
edited" was a "rational  
interpretation."***

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## News Station's Internet Sex Sting Leads to Public Safety Complaints

Last month's MediaLawLetter reported on defamation lawsuits brought against KCTV-5, in Kansas City, Missouri, by two men caught in a news Internet sex sting report. Perverted Justice, an online advocacy group working with KCTV-5, arranged for the men to be invited to appear at a rented house in a Kansas City suburb for what they believed would be a sexual encounter with a teen while the teen's parent(s) were away. Instead, when the men arrived they were met by a reporter and a camera crew.

The series of reports received strong Nielsen numbers and the *Kansas City Star* noted that this would "virtually ensure that its formula will be copied by TV stations across the country."

On March 17, the defamation complaints against KCTV-5 were dismissed without prejudice.

A similar sting this month by Perverted Justice, working with WCAU-TV, an NBC-owned station in Philadelphia, elicited complaints – not from the targeted Internet pedophiles – but from local police and school officials on public safety grounds.

Perverted Justice arranged with targets over the phone – not on the Internet – to appear at a house in Newtown Square, Pennsylvania. After the March 3rd broadcast, neighbors, police, and community and school officials complained that the station had failed to take into account the danger posed to the neighborhood by the sting.

A school a half mile away from the rented house reportedly told parents not to let their children walk home alone. And police said they increased patrols in the area.

At a public meeting to discuss the broadcast, residents discussed filing a class action suit against the station and billing the station for increased police overtime. Local law enforcement officials said they would study whether the station broke any laws.

In a statement at the public meeting, WCAU-TV defended its report, stating that it helped raise awareness about the dangers of predators lurking on the Internet. The station also expressed its regrets that its report had caused any resident to be concerned and said it was working, as appropriate, with local officials in their pursuit of the men profiled in the sting.

## Patient's Online Complaints Not Actionable Under Lanham Act

A federal court in Pennsylvania dismissed for failure to state a claim a Lanham Act claim over a "sucks.com" website – the common url variant used by consumers to register their complaints about products and services. *Nevyas v. Morgan*, No. CIV.A. 04-CV-421, 2004 WL 547525 (E.D. Pa. March 11, 2004).

Plaintiffs, laser eye surgeons, sued a former patient who complained of his treatment online at <www.lasiksucks4u.com>, and the patient's lawyer. Among other things the site contains letters of complaint to the FDA about plaintiffs, and information about a prior malpractice suit between the parties.

Emphasizing that "[t]he Lanham Act is primarily intended to protect commercial interests ... harmed by a competitor's false advertising," Judge Joyner held that plaintiffs failed to state a claim where there was no allegation that the "defendants sought to divert the plaintiffs' business to themselves or to personally reap any financial benefit from their actions."

In addition, the website did not constitute false or deceptive advertising within the meaning of the Lanham Act. Thus, even if "plaintiffs may have suffered an injury to their commercial interests, they have not sustained competitive harm."

Having dismissed the federal claim, the court declined to exercise supplemental jurisdiction over plaintiffs' state law defamation claim.

Plaintiffs were represented by Stein & Silverman in Philadelphia. Defendants were represented by F. Michael Friedman and McKissock & Hoffman PC in Philadelphia.

### *Any developments you think other MLRC members should know about?*

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## Colorado Court of Appeals Reverses Summary Judgment in Seven-Year-Old Radio Libel Case

By Steven D. Zansberg

In a case that had previously established the scope of Colorado's press shield law in the context of libel actions against media defendants relying upon confidential sources, the Colorado Court of Appeals on February 26, 2004 reversed summary judgment in favor of radio talk show host Peter Boyles and Jacor Broadcasting, the owner and operator of KHOW-AM in Denver. *Gordon v. Boyles*, No. 02CA2196 (Colo. Ct. App. Feb. 26, 2004).

### *Radio Host Discussed Police Fight*

The case arose out of a series of morning drive-time broadcasts between April 10 and 16, 1997, in which Boyles alleged that Denver Police Officer Bryan Gordon had stabbed a fellow officer in a brawl outside a Denver nightclub.

Gordon (and his wife Betty) brought suit against Boyles and the radio station alleging seven counts of defamation, intentional infliction of emotional distress, false light, *respondeat superior*, negligent supervision, and loss of consortium.

After Boyles refused to disclose the identities of the confidential sources upon whom he relied, the District Court held Boyles in contempt, fined him \$5,000, and entered a partial directed verdict on the issue of actual malice against him. The District Court subsequently ordered Boyles' news supervisor and Jacor Broadcasting to divulge the identities of Boyles' confidential sources.

Those parties appealed and the Colorado Supreme Court reversed the District Court's orders mandating disclosure. *See Gordon v. Boyles*, 9 P.3d 1106 (Colo. 2000).

In the cross-appeal now presented to the Court of Appeals (after remand), Boyles challenged the propriety of the contempt sanctions that had been imposed upon him by the trial court. The Court of Appeals affirmed those sanctions, finding no abuse of discretion by the trial court, and finding that Boyles' refusal to provide certain information

in response to discovery requests was premised upon reasons other than the newspaper's privilege.

On remand, the defendants moved for summary judgment and the trial court (now presided over by a different judge) granted the defendants' motion on grounds that certain of the broadcast statements (that did not identify Officer Gordon by name) were libelous *per quod* and there was no claim of special damages, and other statements (in which Officer Gordon was identified by name) were not capable of defamatory meaning.

### *Court of Appeal Reinstates Libel and Related Claims*

The Court of Appeals reversed the grant of summary judgment to defendants on the four counts in which Officer Gordon was not named,

but in which Boyles had referred to him only as "the son of a high-ranking Denver policewoman," holding that the statement was libelous *per se*, and not libelous *per quod*.

Relying upon a footnote in the Colorado Supreme

Court's decision that had rejected the false light invasion of privacy tort (*Denver Publ'g Co. v. Bueno*, 54 P.3d 893, 896 n.3), the Court of Appeals, with scant little analysis, casts aside (by misreading) other binding Colorado Supreme Court precedent, *see Lininger v. Knight*, 123 Colo. 213, 226 P.2d 809 (1951), and adopts the majority view that a defamatory statement need not identify a plaintiff by name in order to be libelous *per se*.

Quite frankly, the Court of Appeals' holding on this issue cannot be harmonized with the Colorado Supreme Court's holding in *Lininger*.

The Court of Appeals affirmed the grant of summary judgment to defendants for claims premised on statements that made reference to Gordon's history of domestic violence, finding such statements were substantially true, in light of his 1991 arrest record for a domestic violence incident.

(Continued on page 18)

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***In a portion of the opinion that will likely impact future cases involving non-employee speakers, the Court of Appeals reversed the trial court's granting of summary judgment to defendant Jacor on the plaintiffs' claim for "negligent supervision."***

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**Colorado Court of Appeals Reverses Summary Judgment in Seven-Year-Old Radio Libel Case**

*(Continued from page 17)*

***Court of Appeals Reinstates “Negligent Supervision” Claim***

In a portion of the opinion that will likely impact future cases involving non-employee speakers, the Court of Appeals reversed the trial court’s granting of summary judgment to defendant Jacor on the plaintiffs’ claim for “negligent supervision.”

Based upon deposition testimony of the program director that she did not know whether Boyles had any training, background, or education in journalism, and deposition testimony of the vice president and general manager that the station had no internal practices or procedures to determine whether its employees were evaluating the credibility of confidential sources, the court found a triable issue of fact on whether the station was negligent in supervising the on-air conduct of Boyles.

Of course, as an employee of the station whose publications were almost irrefutably made within the scope of his employment, Boyles’ conduct, as well as his state of mind, is imputed to the station through the doctrine of *respondeat superior*. If Boyles were a non-employee/

independent contractor, the negligent supervision claim might impute his conduct to the station, but would not impute any actual malice.

***Outrageous Conduct Claim Dismissed***

The Court of Appeals affirmed summary judgment to the defendants on the plaintiffs’ claim for outrageous conduct, finding as a matter of law that the defendants’ conduct was not sufficiently extreme and outrageous to go beyond all bounds of decency in a civilized community.

Based upon previous conduct of the parties in this litigation, it is presumed that the defendants will be seeking reconsideration from the Court of Appeals and/or *certiorari* review from the Colorado Supreme Court.

Marc F. Colin and Joseph T. Van Horn represented the plaintiffs/appellants Brian and Betty Gordon. Daniel R. Satriana of Clisham, Satriana & Biscan and Alan Epstein of Hall & Evans represented Peter Boyles and Jacor Broadcasting.

*Steven Zansberg is a partner at Faegre & Benson in Colorado.*

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## False Light under Washington Law – *Harris v. City of Seattle*

By Bruce E.H. Johnson and Diana C. Tate

A federal district court in Washington granted summary judgment to KING Broadcasting Company on false light, intentional infliction of emotional distress and outrage claims brought by Ruby Dell Harris, a Seattle public official, against KING, the City, its former mayor and city attorney, a City council member, and others. *Harris v. City of Seattle, et al.*, Cause No. C02-2225P (W.D. Wash. Feb. 27, 2004).

Almost a year after dismissing defamation, invasion of privacy, intrusion and racketeering claims on a Rule 12(b)(6) motion, Judge Marsha Pechman's February 27, 2004 order found that Harris failed to show that KING Broadcasting or its former investigative reporter acted with the requisite actual malice necessary to prevail on her remaining claims.

KING Broadcasting's victory once again precludes recovery for false light in Washington, although the viability of the tort under Washington law remains uncertain.

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***KING Broadcasting's victory once again precludes recovery for false light in Washington, although the viability of the tort under Washington law remains uncertain.***

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### ***Investigative Report about Plaintiff's Trip to Las Vegas***

The claims against KING Broadcasting (which is owned by Belo Corp.) arose directly from an April 2001 investigative report aired on KING Broadcasting's TV station that uncovered the City of Seattle's Public Safety Civil Service Commission budgetary problems and the activities of the commission's Secretary and Chief Examiner, Ruby Dell Harris. The report focused on cost overruns by the commission and Harris's attendance at a conference – paid for by tax payers – in Las Vegas, Nevada. The report also brought to the public's attention complaints alleging a hostile work environment was created by plaintiff.

In October 2002, Harris filed a Second Amended Complaint (the "Complaint") in preexisting litigation against various other defendants which had initially been filed in state court and was removed to federal court.

When the plaintiff's jury demand was then struck as untimely, she dismissed her existing federal civil rights claims, forcing the case to be remanded to state court. In her brief time in state court, Harris added her claims against KING, filed a new jury demand, and claimed damages in excess of \$40,000,000 from all named defendants, including substantial punitive damages. Because the new claims involved RICO, the defendants removed the case once again to federal court.

In early March 2003, plaintiff's defamation, invasion of privacy, intrusion and racketeering claims were dismissed along with her request for punitive damages.

### ***False Light Claim***

Harris's false light claim was based on a statement in the investigative report that she spent only three and a half hours

in conference activities while on a tax payer funded trip to Las Vegas for a management conference for public administrators. Despite the fact that false light has not been expressly recognized under Washington law, Judge Pech-

man permitted Harris's claim to go forward and denied dismissal under Rule 12(b)(6). However, on summary judgment, Harris's claim failed because she did not establish sufficient evidence of actual malice.

Without deciding whether actual malice applied to a false light claim even if the plaintiff is not a public official, Judge Pechman concluded that actual malice applied to the claim because Harris is a public official. Specifically, the Court concluded that as Secretary and Chief Examiner of the City's Public Safety Civil Service Commission Harris was required to supervise other City employees and was entrusted with the responsibility of supervising the testing process for applicants to the Seattle Police and Fire Departments.

The Court found that these responsibilities established Harris as a public figure. The mere fact that "three commissioners functioned as her supervisors" and "that she did not exercise unsupervised discretion in the expenditure of public funds" did not negate her status.

(Continued on page 20)

### **False Light under Washington Law – *Harris V. the City of Seattle***

*(Continued from page 19)*

Moreover, the Court found that KING Broadcasting's investigative report focused on Harris's attendance at a Las Vegas convention in her capacity as a public administrator and, therefore, there was a "strong nexus" between the allegedly false light statements in KING Broadcasting's report and Harris's position as Secretary and Chief Examiner.

In applying the actual malice standard, Judge Pechman rejected Harris's claim that actual malice was established when the former KING Broadcasting investigative reporter testified at deposition that images used in the broadcast of Harris gambling may have been filmed during Harris's lunch hour, as opposed to only images filmed while the conference was in session.

The Court found persuasive the reporter's testimony that it was not his intent to have an inaccurate visual image displayed and that if such inaccuracies existed they did not affect the accuracy of the report.

Judge Pechman further relied on the reporter's testimony that he believed and continues to believe that the statements in his report were truthful and accurate.

The Court's decision also focused on Harris's failure to offer evidence that she did not gamble during conference hours and Harris's own deposition testimony which revealed that Harris was unable to recall how much time or when she gambled. Judge Pechman found that Harris's lack of evidence and the contradictions contained in her affidavit and deposition testimony failed to show by clear and convincing evidence that either KING Broadcasting or its former investigative reporter knew that the report contained false information or that they recklessly disregarded obvious warning signs that the report included such false information.

Accordingly, Harris's false light claim was dismissed as a matter of law.

### ***Outrage and Intentional Infliction of Emotional Distress***

With the dismissal of the false light claim, Judge Pechman also dismissed the inseparable claims of intentional infliction of emotional distress and outrage. The Court found that such claims require a public official to

establish actual malice and that Harris's failure to do so were detrimental to her claims. Furthermore, Judge Pechman found that these claims could not be sustained independent of the false light claim; thus, the intentional infliction of emotional distress and outrage claims were dismissed.

### ***Plaintiff's Discovery Request***

The decision concluded with a denial of Harris's discovery request to compel continuation of KING Broadcasting's former investigative reporter and the disclosure of untimely requested documents. Despite the lack of merit to the case, summary judgment was delayed by plaintiff's failure to appear and complete her deposition testimony.

Defense counsel spent months attempting to obtain Harris's deposition testimony, eventually filing a successful motion to compel her deposition and for an order for an independent medical examination. Conversely, Harris failed to initiate discovery with respect to KING Broadcasting until fourteen days prior to the discovery cutoff.

Accordingly, the Court denied Harris's attempt to request a Rule 56(f) continuance in her responsive pleadings to KING Broadcasting's summary judgment motion.

Plaintiff was represented by Phillip Aaron. The City of Seattle and related defendants were represented by Jennifer D. Bucher, Garvey Schubert Barer. Defendant, The Washington Firm Ltd., and related defendants, were represented by Medora A. Marisseau, of Bullivant Houser Bailey.

*Bruce E.H. Johnson is a partner in the Seattle office and Diana C. Tate is an associate in the San Francisco office of Davis Wright Tremaine LLP. They represented defendant KING Broadcasting Company.*

TO ORDER

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## Ohio Appellate Court Reinstates Libel Claims Against Akron Beacon Journal

By Kimberly S. Amrine

The Ohio Court of Appeals reversed a trial court's grant of summary judgment in favor of the Akron *Beacon Journal*, its publisher, its editor, and a reporter, holding that, as a matter of law, four statements in an article about a public figure were defamatory per se, and that sufficient evidence of actual malice existed to send the case to a jury. *Murray v. Knight-Ridder, Inc.*, Case No. 02 BE 45, 2004 WL 333250 (Ohio App. Feb. 18, 2004).

The *Beacon Journal* ran a series of articles entitled "Power to Pollute." As part of the series, the *Journal* ran a profile piece on Robert Murray, a well-known figure in the Ohio coal mining industry, entitled "Mine Owner Isn't the Shy, Quiet Type."

Murray and his company sued, alleging that the article contained numerous defamatory statements. In August 2002, the trial court dismissed all claims against the *Journal* and related defendants. The defendant appealed only as to four statements in the article.

### ***Suggestion that Plaintiff is Dying is Defamatory***

"The only thing I want is a long line at my funeral. I'm sick. I bought my cemetery plot." This statement was found by the trial court to be defamatory per quod. The trial court also found this statement to be true and subject to an innocent construction. The appellate court disagreed.

Noting that plaintiff is the sole shareholder of Murray Energy Corporation and that Murray's business is generally perceived as a "one man operation," the appellate court found that the death of Murray would likely disrupt his business greatly.

Accordingly, the court found that others would be deterred from dealing with Murray's companies if they believed that Murray's life might end in the near future. On this basis, the appellate court found the first statement to be defamatory per se.

### ***Innocent Construction Rule Does Not Apply***

The appellate court also held that if a statement is found to be defamatory per se, the innocent construction rule does not apply as a matter of law. It reasoned that the thrust of the innocent construction rule is that the statement has more than one interpretation. Because a statement that has more

than one interpretation cannot be defamatory per se, the rule has no application to such a statement.

The court did note, however, that even if the innocent construction rule applied to defamatory per se statements, there is no possible innocent interpretation of the statement suggesting Murray's imminent death.

### ***"Eye Roll" and Suggestions that Plaintiff "Exaggerates" Are Defamatory***

The last three statements at issue in the appeal were:

"If the Boich brothers were the quiet voice of coal in the 1990's, 'Honest Bob' Murray – as his competitors jokingly call him – was the loud one"; "Even his friends roll their eyes at his hyperbole"; and "Or former coal lobbyist Neal Tostenson: 'He tends to exaggerate a good bit.'"

The trial court had found all three of these statements defamatory per quod, and the last two statements substantially true.

Again, the appellate court disagreed. It found that the article painted a destructive picture of Murray. It also found that in the totality of the circumstances, the reader of the three statements at issue would likely believe that Murray is a liar and a despicable person who is willing to do whatever is necessary to get his way in business.

Reading the three statements together, the appellate court found that they reinforced the notion of Murray's dishonesty. Noting that no extrinsic evidence is needed to derive the defamatory meaning of the words, the appellate court found the three statements to be defamatory per se.

Having found all four statements at issue to be defamatory per se, the appellate court then considered whether the trial court committed error when it found that three of the statements were substantially true.

### ***Substantial Truth***

As to the first statement: "[t]he only thing I want is a long line at my funeral. I'm sick. I bought my cemetery plot," the court noted that there was disagreement regarding the origins of the statements.

The defendants argued that the statements were true regardless of their origins. There was no dispute that Murray had indicated his desire to have a long line at his funeral and

(Continued on page 22)

**Ohio Court Reinstates Libel Claims Against Akron Beacon Journal***(Continued from page 21)*

that he had purchased his cemetery plot. As to his health, Murray denied ever saying that he was sick, and defendants pointed to his lengthy history of neck and back problems, and numerous surgeries related to these injuries.

Finding that there is a substantial difference between a disability and dying – and noting the parties’ “disagreement as to whether the statements were made, how the statements were made and whether they are true” – the court held that there were factual questions for a jury. The court noted that a speaker’s statements can be defamatory if quoted out of context in such a way as to change the meaning.

As to the statement “[e]ven his friends roll their eyes at his hyperbole,” the defendants cited two sources for the comment. Because one of them did not recall discussing Murray with the reporter and the other’s comments were not clear, the court again held that there was a fact question for trial.

The court, noting that the sole source cited for the statement “[o]r former coal lobbyist Neal Tostenson: ‘He tends to exaggerate a good bit’” does not recall discussing Murray with the reporter, rejected the trial court’s determination that this statement was substantially true.

***Factual Issues of Actual Malice***

The court then held that there was a genuine issue of material fact from which a reasonable jury could find actual malice. The court noted that the source cited for the opening line of the article “‘Honest Bob’ Murray – as his competitors jokingly call him” stated that people call Murray “Honest Bob,” but did not say that the nickname was used jokingly. Nor did he laugh.

The court also noted that a factual question existed as to whether sources told the reporter anything concerning a predilection by Murray to exaggerate. The appellate court found

“[g]iven the confusion over the origins and validity of the statement, it is possible that a reasonable jury would find the statement was fabricated and thus made with actual malice.”

It further noted that “there are no fewer than eight statements contained in the subject article attributed to appellant Murray which he claims to have never spoken.”

As a side note, the court questioned the reporter’s note taking methods. The reporter took handwritten notes, entered them later into a computer, then – not surprisingly – she discarded some of the handwritten notes. She was uncertain as

to exactly what was thrown away. She also acknowledged revising and adding various notes as she found necessary.

On this basis, the appellate court concluded that “there are questions as to the truth and accuracy of the notes used to formulate the article which, if found to be lacking, could support a finding of actual malice. In regards to the possible fabrication of quotes, there is sufficient evidence from which a reasonable jury could find actual malice.”

***Company Also a Proper Plaintiff***

The court also reversed various holdings of the trial court regarding the proper parties to the action.

Most notably, the court reversed the trial court’s determination that the statements were not “of and concerning” The Ohio Valley Coal Company, Murray’s business. Although the business name was mentioned only once, the article repeatedly used plaintiff’s individual name informally to describe company functions. For example, “Murray employs the second\_largest number of miners in the state.”

The court concluded that a jury could reasonably find that the statements about Murray also referred to and harmed his company.

***Conclusion***

The court pointed out throughout its opinion that the reporter’s cited sources denied ever making the statements, or even speaking about Murray generally. As a result, the court’s discussion regarding “substantial truth” focuses more on the lack of truth to the cited sources than independent facts that may have supported or contradicted the truth of the statements in the abstract.

In addition to questions regarding the reporter’s substantiation, the appellate court was also guided by the fact that many of the reporter’s original notes were thrown away or significantly altered, so that the truth of her references and sources were not easily verified.

The plaintiffs-appellants Robert Murray and The Ohio Valley Coal Company were represented by Richard Lieberman of Chicago, Illinois and Michael Shaheen of St. Clairsville, Ohio. Defendants-appellees, Knight Ridder and the Akron Beacon Journal were represented by Ron Kopp and Alisa Wright of Roetzel and Andress in Akron, Ohio.

*Kimberly S. Amrine is a senior associate at Frost Brown Todd, LLC and a member of the firm’s First Amendment, Media and Advertising Law Practice Group.*

## Editorial Calling Former Mayor a “Convicted Felon” Is Protected Opinion in Ohio

The former Mayor of Warrensville Heights, Ohio lost what might be the final round in his libel suit against *The Call & Post* – a weekly news publication that touts itself as “Ohio’s African American Newspaper” – when an appellate court affirmed summary judgment in favor of the newspaper and several individual defendants. *Grabow v. King Media Enterprises, Inc.*, 2004 WL 443876 (Ohio.App. 8 Dist. March 11, 2004).

In September 2000, former Mayor Raymond Grabow filed suit against the newspaper, its publisher, president, vice president and editorial writer after it published an editorial that inaccurately described Grabow as “a convicted felon who stole city assets.” In fact, Grabow had only pled guilty to two counts of first degree misdemeanors for “receiving improper compensation while in office,” after other theft charges against him had been dropped.

The trial court granted summary judgment to the defendants finding insufficient evidence of actual malice. Grabow appealed this finding and also argued that he was no longer a public figure subject to the actual malice standard.

Pushing these arguments aside, Judge Frank Celebrezze, writing for the appellate court, affirmed summary judgment on the separate ground that the editorial was protected opinion under the Ohio Constitution.

Applying the totality of the circumstances test used in *Scott v. News Herald*, 496 N.E.2d 699 (1986), the court considered four factors: the specific language at issue, whether the statement is verifiable, the immediate context of the statement, and, finally, the broader context in which the statement appeared.

The first two factors weighed in favor of finding the statement actionable. A reasonable reader would most likely interpret the phrase “convicted felon who stole city assets” literally. And this literal interpretation is verifiable.

However under the totality of the circumstances test these elements can be outweighed by the context of the publication – which, the court concluded, made clear that the statement was opinion.

Specifically, the editorial opened with a bold font title in all capital letters stating “Our Opinion,” which the court determined would put the ordinary reader on

notice that the article that followed was the opinion of the writer. Moreover, its primary focus was not plaintiff, but the current mayor and the City Council.

Finally, the editorial was written with a sarcastic voice, “more typical of persuasive speech than of factual reporting.” 2004 WL 443876 at \*6. Descriptions of Grabow as the “boss” who “ruled the plantation” were subjective analogies “usually not found in factual reporting.” *Id.*

The plaintiff was represented by Howard S. Stern, Steiner & Stern Co. in Cleveland and Ross S. Cirincione, Reddy, Grau & Meek in Garfield Heights. The defendants were represented by George L. Forbes, Dennis N. Loconti and Scott H. Schooler of Forbes, Fields & Associates in Cleveland.

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## Alabama Supreme Court Affirms Dismissal of Libel Claim Against Newspaper Commentary on Actual Malice Grounds

The Alabama Supreme Court this month affirmed dismissal of a police officer's libel suit over a newspaper commentary for insufficient evidence of actual malice. *Smith v. The Huntsville Times Company, Inc.*, 2004 WL 473377 (Ala. March 12, 2004).

The comment in the Huntsville Times entitled "Can Glen Park residents believe in the badge?" recounted a local resident's complaint about a police officer. Among other things it reported that "She said he called her a prostitute, a low-life and a nigger. She said he cursed her, using the five-letter word for a female dog." The commentary concluded that "Citizens .... need to know that they can believe in the badge. And they need to know that those charged to serve and protect them don't see them as less than human."

### ***Actual Malice Standard Applies to Off-Duty Officer***

In affirming summary judgment the court first dismissed plaintiff's argument that the actual malice standard did not apply because he was off-duty during the complained of incident. Citing *Garrison v. Louisiana*, 379 U.S. 64 (1964), the court had "no difficulty in deciding that the criticisms in the Commentary touch on [a public] official's fitness for office." 2004 WL 473377 at \*5.

### ***Police Department's Denial Insufficient Evidence of Actual Malice***

Turning to the evidence of actual malice, the court dismissed as insufficient a police department spokesman's denial of the incident rendered to the author prior to publication. "To require that a reporter withhold such a story or face potential liability for defamation because a police officer denies a citizen's allegation of misconduct is exactly the type of self-censorship the *New York Times* rule was intended to avoid." *Id.* at \* 7 quoting *Roberts v. Dover*, 525 F.Supp. 987, 993 (M.D.Tenn.1981).

## Supreme Court Denies Cert. in Libel Suit Against ADL

On March 1, the Supreme Court refused without comment to hear an appeal of the Tenth Circuit's decision in *Quigley v. Rosenthal*, 327 F.3d 1044 (10th Cir. 2003), *cert. denied sub nom, Anti-Defamation League v. Quigley*, 2004 WL 368475 (U.S. 2004) (No. 03-778).

The decision leaves intact a 2-1 ruling by the 10th Circuit that upheld a \$9.1 million verdict, the largest libel judgment in Colorado history. See *MediaLawLetter*, May 2003 at 15. Following the denial of the appeal to the Supreme Court, the ADL reportedly paid \$12.1 million to the plaintiffs.

The Tenth Circuit held that statements by the ADL at a press conference and during a radio show summarizing a federal civil rights lawsuit that accused plaintiffs of anti-Semitism were not on a matter of public concern that would have required the private figure plaintiffs to prove actual malice. The court found that the ADL's allegations were not a matter of public concern because the dispute was "private" and the ADL should have known that the allegations against the plaintiffs were false. The dissent

"disagre[ed] with the suggestion that application of Colorado's public concern doctrine depends on the truthfulness of the allegedly defamatory statements." 327 F.3d at 1075.

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## Eyewitness Observations of Journalists Protected under First Amendment

By Michael W. Quinn

On January 31, 2004, a federal district court in New York held that the eyewitness observations of a journalist while covering a news event are protected by the qualified privilege extended to unpublished non-confidential information under the First Amendment and New York's Shield Law. *Michael Carter, et al. v. The City of New York*, 02 Civ. 8755 (RJH).

Judge Holwell of the Southern District of New York denied a motion made by the City of New York to compel NY 1 reporter, Jonathan Schiumo to testify as to what he heard and saw while covering a demonstration held by New York City firefighters shortly after 9/11.

### ***Reporter Covered Firefighters' Demo***

In the aftermath of 9/11, New York City firefighters were angered by Mayor Giuliani's decision to reduce the FDNY labor force at "Ground Zero." To protest, the firefighters held a demonstration on November 7, 2001 near the site of the World Trade Center attack.

The event was covered by all the major media outlets in New York, including NY 1, Time Warner Cable's local 24-hour news channel. The protest quickly deteriorated, however, as the firefighters crossed a police barricade and wound up scuffling with – and subsequently being arrested by – the NYC police.

Given the atmosphere of unity that existed immediately after 9/11, a fight between NYC's "bravest" and its "finest" was a big story. Jonathan Schiumo, who covered the event for NY 1, broadcast live from the scene in addition to shooting videotape that was later used by the news channel on its newscasts.

In attempting to prosecute the firefighters, the City subpoenaed the footage shot by NY 1 and other media outlets. Eventually, however, the criminal cases against the firefighters were dismissed. The firefighters union and some of its arrested members then sued the city for false arrest, malicious prosecution and other constitutional violations in the instant case before Judge Holwell.

This past December, facing a discovery deadline in the civil case, the City of New York subpoenaed Mr. Schiumo, seeking testimony on his eyewitness observa-

tions while covering the demonstration. While Mr. Schiumo was willing to testify in order to authenticate the videotapes that he had shot on behalf of NY 1, he refused to answer any questions regarding what he personally observed – or any conversations that he had – that were not included in the final broadcast story on the grounds that such information was unpublished information and thus was protected by the First Amendment's qualified privilege.

Deciding to seek an immediate order from the court, the City halted the deposition to call the judge's chambers. Judge Holwell conducted oral argument by telephone and then instructed the parties to submit letter briefs on the issue.

### ***The Qualified Privilege for Unpublished Non-Confidential Information***

While it has long been established that unpublished information such as unaired videotape or reporters' notes enjoy a qualified privilege under the First Amendment, a right recently affirmed by the Second Circuit in *Gonzalez v. National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999), the City argued that a different standard applied to the actual eyewitness observations of a reporter covering a story. The City took the position that journalists were no different from any other citizen – when subpoenaed, they had to testify about their personal observations like anyone else.

Indeed, no published federal or state court opinion in New York had explicitly held that the eyewitness observations of a journalist constituted "unpublished news" under the First Amendment or New York's Shield Law; and at least one — relied upon by the City in support of its argument — appeared to have reached the opposite conclusion.

In *Solargen v. Electric Motor Car Corp. v. American Motors Corp.*, 506 F.Supp. 546, 551 (N.D.N.Y. 1988) the Northern District court held that the shield law "is not applicable where the journalist is called upon, as other citizens, to testify with respect to personal observations."

The City also cited to *United States v. Markiewicz*, 732 F.Supp. 316 (N.D.N.Y. 1990), a case which – while

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## Eyewitness Observations of Journalists Protected Under First Amendment

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not ruling out the possibility that personal observations could be protected – noted that “the privilege does not carry as much weight when the reporter himself is subpoenaed, as opposed to when a party seeks to compel the reporter to produce unpublished documents.”

### ***Reporter’s Observations Protected by Privilege***

NY 1 argued that any observations made by a journalist in covering a story that were excluded from the final report in the editorial process had to enjoy the same qualified privilege that was extended to videotape outtakes that were not aired or reporter notes that were not printed.

The crucial inquiry, NY 1 argued, should be whether Mr. Schiumo’s observations were made while he was acting in his capacity as a professional journalist.

Had Mr. Schiumo been walking home after work and wandered into the middle of an armed robbery, then perhaps, he would be treated as every other citizen who witnesses a crime. However, if, as was the case here, he was covering an event in his professional role as a journalist, his observations had to be protected by the privilege.

Moreover, since journalists often cover controversial events that ultimately result in lawsuits, NY 1 argued that without the qualified privilege, journalists would automatically become de facto witnesses in each of those cases and the burden that such a status would impose on news organizations would have a chilling effect on the exercise of their First Amendment rights.

The District Court agreed, holding that:

The court reads *Gonzales* as establishing a qualified privilege as to all information gathered by a reporter whether through electronic recordation, such as a videotape, or through direct perception. Whether a reporter should be required

to turn over a videotape of an event or be deposed as to his direct perceptions of that event would appear to raise the identical policy issues that the court in *Gonzales* relied upon in finding that the qualified privilege for journalists extended to non-confidential information.

Of course, the qualified privilege can be overcome by a “clear and specific” showing that the information sought is (1) highly material and relevant; (2) critical or necessary to the maintenance of its defense; and (3) the party seeking the information has been unsuccessful in its attempt to obtain the information from alternative sources.

In the NY 1 case, however, Judge Holwell found that the City had made a particularly weak attempt to meet this burden. Accordingly, the Court denied the motion to compel.

In doing so, Judge Holwell extended the same protection to journalists’ personal observations under federal law that had previously been given to California

journalists under that state’s shield law.

In *Delaney v. The Superior Court of Los Angeles County*, 50 Cal. 3d 785 (1990), a case relied on by NY 1, the California Supreme Court held that eyewitness observations made in the course of newsgathering were protected by the qualified privilege of California’s Shield Law.

*Michael W. Quinn is Senior Counsel at Time Warner Cable, Inc. in Stamford, CT. He represented NY 1 in this case, together with Douglass Maynard, a partner at Akin Gump Strauss Hauer & Feld LLP and his associate Christopher Schulten.*

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***NY 1 argued that any observations made by a journalist in covering a story that were excluded from the final report in the editorial process had to enjoy the same qualified privilege that was extended to videotape outtakes that were not aired or reporter notes that were not printed.***

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## Ohio Appellate Court Affirms Order Requiring Radio News Director to Disclose Confidential Source

By Monica L. Dias

While recognizing the absolute privilege granted by Ohio's shield law to protect reporters' sources, a divided Ohio Court of Appeals found that the statute did not apply to a Toledo radio station news director. *Svoboda v. Clear Channel Communications, Inc.*, Court of Appeals No. L-02-1302, 2004 WL 368120 (Sixth Appellate District, Lucas County, Feb. 27, 2004).

In a decision by Judge Richard W. Knepper, with Judge Pietrykowski concurring, the court affirmed a trial court's order requiring a radio news director to name her confidential source for purposes of discovery in a lawsuit for defamation and related claims.

In its 2-1 ruling, the appellate panel found that the shield law (R.C. 2739.04) did not protect the news director for three reasons: 1) She was not acting as a newsperson when she spoke with her contact; 2) the information she received was a rumor and did not qualify as "information" under the statute; and, 3) she did not establish that her contact was a "source of any information" under the shield law.

### *The Phone Call*

The lawsuit pits a reporter for *The (Toledo) Blade* against employees for WVKS (92.5 FM) and station owner Clear Channel Communications, Inc. Sandra Svoboda, a reporter for *The Blade* who covered the University of Toledo, claimed station employees Dennis Schaffer, Fred LeFebvre, and news director Tricia Tischler defamed her during a show called "The Breakfast Club" in October 1999.

Svoboda alleged that comments on the show accused her of having a sexual relationship with John Block, co-publisher of *The Blade*, and that this relationship caused her to negatively slant her coverage of the university in accordance with Block's views. The broadcast included remarks that Svoboda was Block's "toy," that Block was "putting it to her," and that Block would "leave the money on the dresser."

In a deposition taken before she was added as a defendant, Tischler testified that during a brief phone conversation at work a confidential source told her that Svoboda and Block were dating. Invoking the state's shield law, Tischler

refused to testify about any details that would reveal her source's identity. The trial court ordered Tischler to name the source, and she appealed.

### *An Absolute Privilege*

R.C. 2739.04 protects broadcasters from compelled disclosure of "the source of any information procured or obtained by such person in the course of his employment." In construing the statute, the appellate panel acknowledged that no exceptions to the privilege should be granted in civil actions, including actions for libel, since no constitutional right is in conflict with the reporter's shield statute.

In that respect, the court acknowledged, "it is quite clear that the privilege enjoyed by a broadcaster or reporter, pursuant to R.C. 2739.04, is absolute."

However, Tischler did not show that she fell within the statute's protection, the court found. To qualify for the absolute privilege, Tischler would have to show that she was employed by a radio station "for the purpose of gathering, procuring, compiling, editing, disseminating, publishing or broadcasting news," that she "procured or obtained" "any information" from a "source," and that she "procured or obtained" such information in the course of her employment.

### *News Director Was Not Acting as a Newsperson*

Tischler was not acting in a news-related capacity at the time of her phone call with the source, the appellate court found. She did not ask investigatory questions, although the source had indicated a lack of firsthand knowledge that Svoboda and Block were dating. The court noted Tischler's "entire lack of any investigation" or verification of the reliability of the secondhand information and her failure to make a record of the conversation.

Tischler also did not consider the information to be newsworthy at the time she obtained it. While this alone would not disqualify Tischler from acting in a newsgathering capacity, the fact that she also did not ask follow-up questions and kept no record of the conversation "is quite revealing regarding the issue of whether she was acting as a 'news director' when she heard that Svoboda and Block were dating," the court found.

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## Ohio Appellate Court Affirms Order Requiring Radio News Director to Disclose Confidential Source

(Continued from page 27)

The court also found relevant that Tischler did not broadcast the information she obtained during a news segment of The Breakfast Club. The court acknowledged that a reporter does not have to first broadcast the information she obtains as news before qualifying for the privilege. However, this factor combined with the others established that Tischler was not acting in the course of her employment when she obtained the confidential information, the court decided.

### ***The Source Was Not a “Source” under the Meaning of the Shield Law***

Tischler failed to establish that her contact was a “source” as contemplated by R.C. 2739.04. Turning to common dictionary definitions, the court found that “a ‘source’ is ‘a point of origin’ or one who initiates or supplies ‘information.’” Moreover, “‘information’ is the communication or reception of ‘knowledge,’ obtained from investigation or study,” the court explained. Finally, “in order to have ‘knowledge’ of a fact or to know the truth or factuality of something, one must have had some experience, perception, acquaintance or familiarity with the subject-matter,” the court stated.

Tischler’s contact did not have firsthand knowledge of a dating relationship between Svoboda and Block and had only heard about it from an unknown third party, the court found. Thus Tischler’s contact could not be considered a “source” under the meaning of the statute.

### ***A Rumor Is Not “Information” Protected by the Shield Law***

The court found that, at best, the information Tischler received from her contact was a rumor. The court reasoned that a rumor cannot be considered “information” under the statute when the person perpetuating the rumor has no actual knowledge regarding the truth of the rumor. Without actual knowledge of a dating relationship between Svoboda and Block, Tis-

chler’s contact was not capable of supplying “information” as contemplated by the shield law.

The trial court’s order did not thwart the legislative purpose of the shield law to protect the free flow of information between confidential sources and reporters, the appellate panel found. A person who spreads rumors is not a source, so the ruling does not interfere with a relationship between reporter and source. “Additionally, if a person is not a ‘source,’ they are clearly not in a position of confidence with the person or persons who are the subject of the rumor. Without such a connection between the parties, any fear of publicity or possible retribution is unfounded,” the court stated.

### ***Dissent Warns of “Dangerous Narrowing” of Privilege***

“This is a dangerous narrowing of the statutory privilege provided to a broadcaster,” Judge Judith Ann Lanzinger warned in her dissent. Adding:

The majority pares down the statute to protect a source’s identity

only if a person is employed and acting in the capacity of a reporter, that is actually ‘gathering, procuring, compiling, editing, disseminating, publishing or broadcasting news’ at the exact moment she receives first hand knowledge – i.e., information.

2004 WL 368120 at \*12.

She warned, “Under the majority’s definition of ‘information,’ a source may be reluctant to tell what he or she knows because the source may not have a sufficient basis of knowledge.”

Sandra Svoboda was represented by C. Thomas McCarter of Toledo, Ohio, and Frederick Gittes and Kathaleen Schulte of Columbus, Ohio. Clear Channel Communications, Inc. was represented by Thomas G. Pletz and Neema M. Bell of Toledo, Ohio.

*Monica L. Dias is an associate at Frost Brown Todd, LLC and a member of the firm’s First Amendment, Media and Advertising Law Practice Group.*

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***“This is a dangerous narrowing of the statutory privilege provided to a broadcaster,” Judge Judith Ann Lanzinger warned in her dissent.***

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## Massachusetts Appeals Court Reverses Ruling that Newspaper Reveal Confidential Source

By Elizabeth A. Ritvo and Samantha L. Gerlovin

The Appeals Court of Massachusetts reversed a trial court ruling that ordered a newspaper in a libel suit to reveal its confidential sources for several alleged defamatory articles. *Wojcik v. Boston Herald, Inc.*, 803 N. E.2d 1261 (Mass. App. Feb. 26, 2004).

The court held that a plaintiff in a defamation action must demonstrate an “essential relationship” between the identities of the reporter’s sources and the elements of the plaintiff’s claim, for the court to compel a media defendant to disclose the identity of such sources.

### ***Newspaper Reported Allegations that State Employee Stole Lottery Tickets***

The plaintiff Edward Wojcik was an employee of the Massachusetts State Lottery Commission (“Lottery”). The Lottery had suspended him on suspicion that he had stolen tickets; it ultimately fired him for “violating Lottery policies and procedures.” During the Lottery’s investigation, the Boston Herald published several articles by two reporters that discussed the allegations.

Wojcik’s termination was eventually upheld in arbitration, without a determination as to whether Wojcik had stolen any lottery tickets.

After his suit against the Lottery and various Lottery officials was dismissed on procedural grounds, Wojcik filed an action against the *Boston Herald* and individual reporters. He requested by interrogatory that the reporters disclose the sources on whom they relied in publishing the allegations of ticket theft. The reporters objected on confidentiality grounds to such disclosure, and Wojcik moved to compel the responses. The motion judge ordered the reporters to disclose the sources, and the appellate court allowed an interlocutory appeal.

### ***Identities of Sources Not Central to Defamation Claim at this Stage***

The appellate court balanced “the public interest in every person’s evidence and the public interest in pro-

tecting the free flow of information.” (citing *Petition for the Promulgation of Rules Regarding the Protection of Confidential News Sources & Other Unpublished Info.*, 395 Mass. 164, 172 (1985)). Finding that the relevance of the sources’ identities was “not apparent ... on the present record,” the court disagreed with the motion judge’s decision that the newspaper’s sources were “central” to the plaintiff’s claim.

The court noted that the Lottery itself had publicly stated that Wojcik’s suspension was related to suspected ticket thefts; and it held that if the sources merely conveyed otherwise undisputed information, then their identities would not be necessary to the plaintiff’s claim.

Thus, before it could determine the relevance of the sources’ identities, the court found that further discovery would be “illuminating,” including discovery into exactly what the sources told the reporters, whether the unnamed sources were Lottery employees, whether the sources claimed to have personal knowledge of the information provided, and the extent to which the articles relied on the sources’ information.

### ***Dissent: Burden Shifted to Plaintiff***

In dissent, Judge Grasso argued that the majority decision essentially shifted the burden to the plaintiff to prove that the sources’ identities are relevant, material, and essential, where such burden had formerly been on the party seeking to protect the identity of the sources. (citing *Matter of a John Doe Grand Jury Investigation*, 410 Mass. 596, 600 n.1 (1991)).

He also noted that adding this new condition to compelled disclosure will impose significant financial and other burdens on defamation plaintiffs.

The Plaintiff is represented by Philip N. Beaugard of Beaugard Burke & Franco.

*Elizabeth A. Ritvo is a partner and Samantha L. Gerlovin is an associate at Brown Rudnick Berlack Israels LLP in Boston, Massachusetts. The firm represents the Boston Herald and partner M. Robert Dushman is counsel for the Boston Herald in this matter.*

## Rhode Island Investigative Reporter Held in Contempt for Failure to Disclose Confidential Source of Videotape

On March 16, Rhode Island Federal District Court Judge Ernest Torres found WJAR investigative reporter James Taricani in contempt of court for refusing to divulge the identity of a confidential source who leaked to the reporter a surveillance videotape from the criminal investigation of several Providence officials.

The court ordered Taricani to reveal the tape's source by noon the following day, or incur a \$1,000-a-day fine for failure to do so – Judge Ernest Torres reportedly decided against including a prison sentence because it might endanger the reporter's health.

Taricani immediately appealed the ruling and the First Circuit Court of Appeals granted a temporary stay of the order pending its decision. On Thursday, March 18, the special prosecutor filed his response requesting that Taricani be required to pay the \$1,000 per day fine.

The leak of the videotape was an apparent violation of an earlier-issued protective order in the on-going criminal investigation of official corruption in Providence. See *MediaLawLetter* October 2003 at 19.

In its October 2, 2003 order, the court found that reporters do not have a First Amendment privilege to refuse to “respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.” See *In re Special Proceedings*, 2003 WL 22284124 at \*5 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 690, 91 (1972)).

William Robinson of Edwards & Angell in Providence, Rhode Island represents the reporter.

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## Cleveland Television Station Sues for Access to City Sources, Mayor Settles

By Kurt Wimmer

On February 23, 2004, Raycom Media's station WOIO (TV) in Cleveland, a CBS affiliate, broadcast a report that Cleveland police officers had charged the City some \$84,000 in overtime for driving the teenage children of Mayor Jane Campbell and their friends. The report blurred the children's faces and provided no specifics of their daily routines or any of the trips in question.

The next day, the station's general manager, in one of his regular editorials, criticized the Mayor for this practice, among others, pointing to the fiscal crisis of the City; in footage accompanying this editorial, the faces of the Mayor's children were briefly visible. Mayor Campbell's children previously had been televised with her at political events.

### *Mayor Retaliates Against TV Station*

On February 25, Mayor Campbell issued the following statement: "19 Action News has crossed the line of journalistic integrity by putting the Mayor's children at risk. The City of Cleveland will no longer respond to any media inquiries on any subject except to fulfill public records requests — from 19 Action News."

The Mayor's communications director called WOIO and read the statement to a reporter, and later repeated it verbatim to the station's news director. The Mayor's edict had an immediate effect. When WOIO reporters sought comment on routine matters from city sources, they were told that they were under instructions from Mayor Campbell not to give any information to anyone from WOIO.

Other media continued to have their questions answered and interview requests granted. The same pattern of access denials continued over the ensuing weekend.

### *Station Sues over Denial of Access*

On March 2, Raycom filed suit in the U.S. District Court for the Northern District of Ohio challenging Mayor Campbell's ban on all city officials and reporters speaking with WOIO. The suit alleged that Mayor Campbell imposed a ban on city employees talking with WOIO in retaliation for its news coverage, thus denying WOIO the ability to report the news to its audience, and that Mayor

Campbell's edict illegally imposed on WOIO a bar to access that was not imposed on any other medium in Cleveland.

The suit also alleged that Mayor Campbell's edict was intended to have, and does have, a chilling effect on other journalists who could be subjected to the same denials of access in retaliation for their reporting.

Similar cases of explicit retaliation resulting in broad denials of access are relatively rare. The general principle is that a "public official may not constitutionally deny to one media access that is enjoyed by other media, because one [medium] is entitled to the same right of access as any other." *Southwestern Newspapers Corp. v. Curtis*, 584 S. W.2d 362, 364-65 (Tex. App. 1979); *Chicago Reader v. Sheahan*, 141 F. Supp. 1142, 1146 (N.D. Ill. 2001) (rejecting restrictions placed on one reporter who allegedly "deceived officials about her previous article"); *Borreca v. Fasi*, 369 F. Supp. 906 (D. Haw. 1974) (enjoining mayor from banning allegedly "irresponsible" reporter from press conferences).

See also *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986) (court could not give access to a non-public file to one "privileged media entity"); *Westinghouse Broad. Co. v. Dukakis*, 409 F. Supp. 895, 896 (D. Mass. 1976) (enjoining enforcement of city policy barring single station's photographers from meetings); *American Broad. Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977) (enjoining mayoral candidates from excluding ABC from campaign coverage).

This principle is particularly powerful when a public official explicitly admits that denial of access is based on the content of news reports. "Requiring a newspaper's reporter to pass a subjective compatibility-accuracy test as a condition precedent to the right of that reporter to gather news is no different in kind from requiring a newspaper to submit its proposed news stories for editing. . . . Each is a form of censorship." *Borreca*, 369 F. Supp. at 909-10.

### *TRO Hearing*

Raycom sought an immediate temporary restraining order, and Judge Solomon Oliver, Jr. held a hearing the afternoon the suit was filed. At the hearing, the city attorney

(Continued on page 32)

## Cleveland TV Station Sues for Access to City Sources

*(Continued from page 31)*

ney admitted that “there is no dispute between the parties” that the Mayor “will not make public statements to WOIO, and she has requested that members of her administration not do so either, with the exception of our legal obligations with regard to public records requests” because of “irresponsible coverage” on the part of WOIO.

The city objected, however, to any court order “suddenly micromanaging what is essentially a public relations decision, an executive branch discretionary decision.” The city focused on “the constitutional rights of the Mayor of the City of Cleveland and her staff to decide not to communicate with someone” and claimed WOIO was seeking an “equal time remedy” that would “chill the speech of the Mayor.”

Raycom responded that its complaint did not seek any access to the Mayor herself; rather, its claim is that the action of the Mayor imposing an absolute bar on access to *any* city employee acting as a source or even confirming information obtained otherwise by WOIO violates the constitution.

As put by Eric Hellerman for the station at the hearing, a “denial of access on the basis of conduct, to punish for conduct, is a violation of the First Amendment, and it doesn’t matter if it is a massive, complete wall of silence [or] whether this policy is being rigidly applied or flexibly applied.” The court provided the city an opportunity to file a brief, and committed to rule within 48 hours.

In an order issued on March 4, Judge Oliver denied the TRO but set a schedule for discovery, further briefing and a preliminary injunction hearing.

### ***Case Settles***

During the period set aside for discovery in the case, the parties settled. On March 17, 2004, WOIO and the Mayor issued the following public statement:

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***The principals involved in the matter met face-to-face and have mutually decided that their collective energies are best spent by Mayor Jane Campbell continuing to focus on running the City, and by 19 Action News continuing to focus on covering it.***

---

The City of Cleveland and 19 Action News (television stations WOIO and WUAB) announced today that they have resolved their issues regarding news coverage. 19 Action News agrees to dismiss the lawsuit it filed in federal court on March 2, 2004. The City acknowledges, as previously stated on March 1, that “Channel 19 gets the same public information that every other station receives.”

The principals involved in the matter met face-to-face and have mutually decided that their collective energies are best spent by Mayor Jane Campbell continuing to focus on running the City, and by 19 Action News continuing to focus on covering it.

In a joint statement, Mayor Campbell and Steve Doerr, 19 Action News’s news director, said “during a productive face-to-face meeting, we reached the inescapable conclusion that the City of Cleveland and its news viewers are best served if we put this matter behind us and move forward. We look forward to working together in an atmosphere of cooperation and mutual respect.”

The City of Cleveland was represented by Subodh Chandra, director of law for the City of Cleveland.

*Kurt Wimmer is a partner at Covington & Burling in Washington, D.C. He represented Raycom Media together with Eric Hellerman and Jason Criss of Covington & Burling and Jack Kluznick of Weston Hurd Fallon Paisley & Howley in Cleveland.*

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## New York to Make Case Information Available on the Internet

By Penny Windle

On February 25, 2004, New York Court of Appeals Chief Judge Judith Kaye announced that “for the first time in New York’s history, the court system will begin to make case file information available on the Internet.”

The vanguard program announced by Judge Kaye follows the recommendations released in a report by the New York Commission on Public Access to Court Records, which was chaired by Floyd Abrams of Cahill Gordon & Reindel LLP.

The report is available online at <[www.courts.state.ny.us/ip/publicaccess/index.shtml](http://www.courts.state.ny.us/ip/publicaccess/index.shtml)>.

Although a number of states, including New York, currently offer docket and calendar information on their websites, the Commission’s report addresses the more complex question of making court case files – including pleadings, briefs, affidavits, and other filed materials – accessible to the public over the Internet. The Commission’s core conclusion was that electronic court case records should be made available to the public on the Internet to the same extent that papers records are available at the courthouse.

### *The Interests at Stake: Open Records and Privacy*

In 2002, Judge Kaye formed the Commission to examine “the sometimes competing interests of privacy and open access relating to information in court case files.” The issue is one faced by jurisdictions all over the country as technological advances push the courts toward electronic docketing and filing systems.

Electronic records offer significant benefits – ease of access, minimized expense, increased efficiency – that serve the public interest in open records. “Public access” once meant that a file was available only to those who had the ability to visit the clerk’s office and either the information necessary to know what to ask for or the time to look for it.

In an Internet age, “public access” now potentially means that the same information is accessible to anyone with a computer and an interest. These same features, however, have prompted concerns when applied to the sometimes sensitive information contained in court case files. Private or sensitive information that was once technically “public” but safely obscure in a dense courthouse basement, may be subject to high-speed searching, gathering and dissemination when placed on the Internet in electronic form.

In this context, the question put to the Commission was whether court case records that are currently deemed public should be subject to any additional restrictions on public access before being placed on the Internet by the court system. The Commission’s core conclusion was that there should not be: “the rules and conditions of public access to court case records should be the same whether those records are made available in paper form at the courthouse or electronically over the Internet.”

### *The Presumption of Openness*

The Commission’s analysis began with the observation that, as a general matter of state and federal law, court case records are public. New York’s Judiciary Law establishes a presumption that court proceedings and case records are open to the public and its courts have clearly and repeatedly recognized the public interest in open court records.

In light of this strong presumption, the Commission concluded that public access to electronic and papers court records should be governed by the a single standard: “If a court case record ... is accessible to the public in paper form at the courthouse or County Clerk’s office, the same record should, as a general matter, be publicly accessible on the Internet if it is filed in or converted to electronic form.”

The Commission thus recommended against any procedure that would cause Internet access to result in less information being made available or in delaying the release of information. Similarly, the Commission considered and rejected a procedure that would make public access dependent on the identity of the person requesting the record: “once information is deemed public, there should be no different treatment of it as regards who may have access to it because it is in electronic as opposed to paper form.”

The Commission also concluded that criminal case records should be treated in the same manner as civil case records.

### *Privacy and Security Concerns Addressed in a Single Standard*

The Report took note of existing exceptions to the presumption of open access that currently apply to a variety of court case records in New York. For example, records of Family Court proceedings, certain records in matrimonial

(Continued on page 34)

**New York to Make Case Information Available on the Internet**

*(Continued from page 33)*

actions, records that identify the victim of a sex offense, and records of adoption proceedings are not open to the public.

These and other records that are confidential or sealed by law or court order, are not affected by the Commission's recommendations, which address only the treatment of records that are public under current law.

In addition, the Commission took note of testimony presented at three public hearings describing the potential harm to privacy and security that certain personal identifiers can pose when misused, and in particular the growing problem of identity theft.

The Commission recommended that in all public court case records – whether paper or electronic – Social Security numbers and financial account numbers be shortened to their last four digits, that the names of minor children be limited to their initials, and that birth dates include only the year of birth.

As to these specific types of information, the Commission concluded that “their public dissemination poses a particularly strong risk to personal privacy and security and ... their protection would not significantly impair the public right of access.” The responsibility for ensuring compliance with these guidelines lies with the filing attorney or self-represented litigant.

The Commission also heard from advocates for victims of domestic violence, stalking, and other threats to personal safety and recommended that courts “liberally grant requests by such individuals to protect their identity and location from public disclosure.”

***Pilot Programs***

The Commission's recommendations were directed only to court case records that are filed in or converted to electronic form in the future. As to these records, New York will begin to implement the Commission's recommendations through selective pilot programs in locations across the state.

Over the next five years, all case records available to public inspection in paper form at the clerk's office will be posted on the Internet. The Commission recommended a pilot program to allow the court system to develop mechanisms for notifying and educating judges, the bar, litigants,

and the public about the policy.

The Commission was comprised of representatives from the judiciary, the bar, media organizations, public interest groups, and the business community, including Court of Appeals Associate Judge Victoria Graffeo and Joseph Lelyveld, the former Executive Editor of the New York Times.

*Penny Windle is an associate with Cahill Gordon & Reindel LLP and served as Counsel to the Commission on Public Access to Court Records.*

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## Department of Homeland Security Issues Interim “Critical Infrastructure Protection” Rules

### *Temporarily Pulls Back From Provision That Would Have Covered More Agencies*

New interim regulations released by the Department of Homeland Security (DHS) in late February provide that, at least initially, only “critical infrastructure information” provided directly to DHS by private companies will be exempt from public disclosure under the Freedom of Information Act.

As originally proposed in April 2003, the regulations would have exempted from FOIA disclosure information obtained indirectly by DHS from other federal agencies.

While the new regulations temporarily back away from this, the Department of Justice Office of Information and Privacy states that “there remains the stated prospect of it being expanded” to indirectly acquired information at some point in the future.

See Critical Infrastructure Information Regulations Issued by DHS, U.S. Department of Justice FOIA Post (Feb. 27, 2004), available at <http://www.usdoj.gov/oip/foiapost/2004foiapost6.htm>.

### ***DHS Seeking Private Companies’ Infrastructure Information***

The interim rules were promulgated under a provision of the Homeland Security Act, known as the Critical Infrastructure Information Act of 2002 (the “Act”). One program under the Act seeks to encourage private companies to voluntarily provide DHS with information on electrical grids, computer networks, oil and gasoline distribution pipelines, and other systems.

The private infrastructure information will be reviewed by counter terrorism experts for vulnerabilities to attack and possible counter measures.

To encourage participation in the program, the rule exempts the information from disclosure under the Freedom of Information Act, 6 U.S.C.A. § 133 (2002). The rationale is that businesses will not submit the information if it can be exploited by competitors or potential terrorists.

Last year, DHS released a controversial proposed rule that would have exempted from FOIA disclosure of infrastructure information provided to other federal agencies that would act as conduits for submission to the DHS. See 68 Fed. Reg. 18523, 18525, § 29.1(b) (April 15, 2003).

Various comments submitted in response to the proposal objected that it was beyond the scope of authority that Congress had given DHS. Another concern raised was that these provisions could be used by companies to “hide” information from the public. The fear was that information normally provided to the government and available to the public would be off limits if it was also submitted to DHS.

The DHS took the position that this concern is addressed in two sections of the Act. The first provides that information routinely obtained by other federal agencies is outside its scope, subsection 214 (c); the second, 214 (d) provides that submissions to DHS shall not constitute compliance with any requirement that the information be submitted elsewhere.

Whether these provisions adequately address the concern over hiding information was avoided for now.

### ***Pulling Back, For Now***

The preface to the interim rule states:

Recognizing that, at this time, implementation of such a [broad] provision would present not only operational but, more importantly, also significant program oversight challenges, the Department has removed references throughout the rule to indirect submissions.

But the preface continues that, after the Protected CII program has become operational ... the Department anticipates the development of appropriate mechanisms to allow for indirect submissions in the final rule.”

In a memo explaining the interim rule, the Justice Department notes that “such a development could be expected to have an impact upon the daily processes of FOIA administration at many agencies.”

The interim rule became effective upon publication in the *Federal Register*. But written comments may still be submitted on the rule via postal mail to Janice Pesyna, Office of the General Counsel, Department of Homeland Security, Washington, DC 20528 or via e-mail to [cii.regcomments@DHS.gov](mailto:cii.regcomments@DHS.gov).

## Florida Court Embraces Constitutional Right of Access to Executed Search Warrants

By John Bussian

Citing the need for “the bright glare of sunlight” on court records, a state court in Florida reversed a lower court order sealing search warrants in five, major criminal cases against the producers of the notorious *Girls Gone Wild* videotape series. *Florida Freedom Newspapers, Inc., v. State*, No. 03-2065-CA-K (Cir. Ct. March 2, 2004).

The *News Herald*, a daily newspaper in Bay County, Florida, published by Freedom Newspapers, filed a petition to unseal the warrants and related information which had been sealed without notice by the criminal court.

In a sweeping March 2 decision, the Bay County Circuit Court, acting in its appellate court capacity, recognized a First Amendment and state constitutional right of access to executed search warrants, probable cause affidavits, returns, and inventories.

In the process the Circuit Court turned aside a 1998 decision by an intermediate Florida appeals court holding that all parts of search warrants and related material are exempt from public disclosure under the state’s public records law during a criminal investigation. *Florida Publishing Co. v. State*, 706

So.2d 54 (Fla. 1st DCA 1998)

In *Florida Publishing* the court ruled that the Florida Public Records Law and the Florida Rules of Judicial Administration, read together, permit blanket sealing of search warrants without notice during the pendency of a criminal investigation. However, the court expressly left open the constitutional questions posed by the sealing order. And that was all the encouragement the *News-Herald* needed in the instant case.

The instant court employed constitutional analysis exclusively in ruling that the strong presumption of openness could not be overcome by a blanket rule making “no distinction between executed and unexecuted warrants.”

Finding that the warrants in question had long ago been served, that all arrests in the cases had been made, and that the government offered no reasons for sealing beyond the holding in the *Florida Publishing* case, the Court ordered the immediate release of the records.

*John Bussian of The Bussian Law Firm PLLC in Raleigh, North Carolina was counsel to Florida Freedom Newspapers in this case.*

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***The Circuit Court turned aside a 1998 decision by an intermediate Florida appeals court holding that all parts of search warrants and related material are exempt from public disclosure under the state’s public records law.***

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## Update: DVD Copy Control Association Inc. v. Bunner

On remand from the California Supreme Court, a California appellate court again reversed a preliminary injunction prohibiting the dissemination of DeCSS, a computer code that can be used to copy movie DVDs, holding that the injunction was not warranted under trade secrets law. *DVD Copy Control Association Inc., v. Bunner*, 2004 WL 362414 (Cal.App. 6 Dist. Feb. 27, 2004).

Last year the California Supreme Court held that an injunction properly issued under trade secrets law would not be a prior restraint in violation of the defendant’s First Amendment rights. *DVD Copy Control, Inc. v. Bunner*, 31 Cal.4th 864, 75 P.3d 1, 4 Cal.Rptr.3d 69 (2003). See *MLRC MediaLawLetter* Sept. 2003 at 39. The defendant had posted the code on his website. The Court remanded the case to the Court of Appeal to review whether the trial court’s preliminary injunction was properly issued under this standard. *Id.* at 890, 92.

The Court of Appeal concluded that the preliminary injunction was not properly issued because the trade secrets had been widely disseminated by the time the injunction was issued. The court did not assume that the trade secrets became part of the public domain simply by having been published on the web but based its holding on the fact that there had been significant publicity surrounding the initial posting of the trade secret and that, therefore, “the initial publication was quickly and widely republished to an eager audience so that... the trade secrets it contained rapidly became available to anyone interested in obtaining them.” 2004 WL 362414 at \*7.

Having held that the injunction had not properly been issued, the Court concluded that “[t]he preliminary injunction, therefore, burdens more speech than necessary to protect DVD CCA’s property interest and was an unlawful prior restraint upon Bunner’s right to free speech.” *Id.* at \*9.

## English Trial Court Rejects Qualified Privilege Defense in *Jameel v. Wall Street Journal Europe*

By Meryl Evans

The hurdles which journalists in the UK are required to overcome in order to defend their journalism are getting so high, they'll soon be in need of vaulting poles! As if the standards set by the House of Lords in *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010 (28th October, 1999) were not high enough, the recent judgment delivered by Mr Justice Eady in *Jameel v The Wall Street Journal Europe*, (QB Jan. 19, 2004) confirms the fear that UK judges will reject the *Reynolds* defense if there is the slightest flaw in the journalism.

Then hard on the heels of the *Jameel* decision came the Hutton Report and its condemnation of the BBC for what it concluded was an error in its reporting on the lead up to the Iraq War. Lord Hutton glibly stated that the media's right to publish matters of public interest "is subject to the qualification...that false accusations of fact impugning the integrity of others, including politicians, should not be made by the media." (The Hutton Report is available online at [www.the-hutton-inquiry.org.uk](http://www.the-hutton-inquiry.org.uk)).

This does not accurately reflect our law, either pre- or post-*Reynolds* but perhaps gives us an insight into the prevailing attitudes amongst the UK judiciary.

### **UK Law as it Currently Stands**

The main defense to a libel action involving political speech remains "justification" *i.e.* to prove the truth of the allegation made. The burden is on the defendant to prove that what it published – and the defamatory meaning which emerges from it – is true.

Alternatively, where the libel arises from the expression of an opinion, the comparable defense is "fair comment" in which the defendant must satisfy the court that the view expressed was honestly held, was based on facts which were true, and which pertained to a matter of public interest.

We have no "public figure" defense. Politicians start their libel actions on precisely the same footing as ordinary citizens and the media must defend them in the same way. But the House of Lords in *Reynolds* confirmed that there might be occasions when material which cannot be proved to be true is still worthy of a defense if, putting it shortly, the

material is in the public interest and the journalism which produced it is "responsible."

However, anyone reading the judgment in *Jameel* might be hard pressed to believe the contents of the preceding paragraph.

### **Saudi Company Sued WSJ Europe**

The Wall Street Journal Europe published a front page article on February 6, 2002 headlined "Saudi Officials Monitor Certain Bank Accounts: Focus Is on Those With Potential Terrorist Ties." The *Jameel* Group was identified as being among those whose accounts were supposed to be monitored.

The newspaper raised a defense of *Reynolds* privilege. The defense failed. That was unsurprising as the jury had made a number of findings of fact which severely undermined the defense.

For example, the jury did not accept the journalist's evidence that 4 sources on whom the journalist relied to "firm up" his story had confirmed the crucial facts; nor did they accept his evidence on his contact with the claimant's representative in the days and hours leading up to publication.

### **Judge Applied Narrow Test for Privilege**

As noted by Eady, "Even though the defense is left appearing somewhat forlorn, however, the jury's decisions were not necessarily, as a matter of law, fatal" and there was still a possibility that, having weighed up all the factors which make up a *Reynolds* defense, the Judge would rule in the Defendants' favor. That he did not is not particularly surprising.

What is surprising is the judgment's virtual silence on the Court of Appeal's decision in *Loutchansky v Times Newspapers Ltd*, [2001] EWCA Civ 1805 (Court of Appeal 2001), which recognized *Reynolds* privilege as a free-standing defense. The Court of Appeal said:

Once *Reynolds* privilege is recognised as a different jurisprudential creature from the traditional form of privilege from which it sprang, the particular nature of the "interest" and "duty" which underlie it can more easily be understood.

(Continued on page 38)

### English Trial Court Rejects Qualified Privilege Defense in *Jameel v. Wall Street Journal Europe*

(Continued from page 37)

In contrast, Eady in *Jameel* says that

it is not possible to construe [their Lordships' speeches in *Reynolds*] as supplanting the common law touchstones of "social and moral duty" by a different test such as "responsible journalism" or the exercise of "due professional skill and care."

The Court of Appeal in *Loutchansky* viewed it differently. Following immediately from the extract quoted above, the Court of Appeal said:

The interest is that of the public in a modern democracy in free expression and, more particularly, in the promotion of a free and vigorous press that keep the public informed. The vital importance of this interest has been identified and emphasised time and again in recent cases and needs no restatement here. The corresponding duty on the journalist (and equally his editor) is to play his proper role in discharging that function. His task is to behave as a responsible journalist. He can have no duty to publish unless he is acting responsibly any more than the public has an interest in reading whatever may be published irresponsibly. That is why in this class of case the question whether the publisher has behaved responsibly is necessarily and intimately bound up with the question whether the defence of qualified privilege arises. Unless the publisher is acting responsibly privilege cannot arise.

There is no mention of this passage in Eady's judgment in *Jameel*. He sticks instead to the speeches in *Reynolds* and goes through the various elements of the case as they apply to the 10-point list in Lord Nicholls's speech in *Reynolds*. But there are a number of observations in this part of the judgment which might cause alarm bells to ring in the minds of journalists and the lawyers who represent them.

#### ***Duty to Publish***

The Court of Appeal in *Loutchansky* reversed as too narrow the following test applied by the trial court:

I take that form of duty, albeit one not owed in law, to be a duty such that a publisher would be open to legitimate criticism if he failed to publish the information in question.

Nevertheless, in *Jameel* Mr. Justice Eady relies upon this very passage. He says:

A useful cross-check may sometimes be to ask whether the journalists concerned might be the subject of legitimate criticism if they withheld the *ex hypothesi* false allegations

Although, he adds, "This should not, however, be elevated into a test, in its own right, of comparable status to those identified by Lord Nicholls."

There are other elements in Eady's judgment which are disquieting.

#### ***Public Interest***

When weighing up the "public interest" in publication, Eady considered not only the subject matter of the article but went further to take into account an inter-governmental agreement between the United States and Saudi Arabia not to reveal the names of those being investigated in the fight against terror. He considered that "cogent grounds [were] required to show why the public interest called for that agreement to be breached" but could find none in this case.

Considering the government's interest in withholding information from the public in determining how "public interest" is judged is, as far as we know, unprecedented in *Reynolds* privilege jurisprudence.

#### ***"Right to Know" or "Need to Know"***

Eady also narrowly interpreted the "public's right to know" as being the "need" to know, stating:

Whatever defamatory imputation one derives from the words complained of in this case, it is hard to see what public interest would be served by this exposure on 6 February 2002...I cannot see any basis for saying that the public in England and Wales *needed* to know, or were entitled to be told, that the Jameel group (or accounts "associated with" the group) were being monitored..." (emphasis added).

He then goes on to deal with the somewhat hypothetical (in that it seems to have been rejected by the jury) possibility that officials in Saudi Arabia and in Washington might have sanctioned publication and says: "Even if [they] did reveal

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### English Trial Court Rejects Qualified Privilege Defense in *Jameel v. Wall Street Journal Europe*

(Continued from page 38)

the information quasi-officially...it does not seem to me that this affects my assessment of urgency or the public's need to know" (emphasis added).

#### ***Gravity of the Allegation***

When weighing up the first of Lord Nicholls's ten factors – the gravity of the allegation – Eady notes, entirely correctly, that the graver the allegation, the greater the damage to reputation and, correspondingly, the greater the responsibility which needs to be exercised before deciding to publish. But it is surely also right that the graver the allegation, the greater the defendant's obligation to publish and the public's right to know.

The Court of Appeal has granted the Wall Street Journal permission to appeal.

#### ***Conclusion***

There is a nervousness in media circles in the wake of the Hutton Report that the standards for journalists are being set unrealistically high and that, as a result, the public will suffer. Matters which ought to see the light of day will remain

in the shadows, with editors too nervous to run the risk of publishing for fear of the criticism that will be heaped upon them if there proves to be the slightest flaw in the story.

The judgment in *Jameel* provides no comfort. Our judges seem unlikely at the moment to allow principles of freedom of expression and the public's right to know to outweigh *any* short-comings in the journalism. Lord Hutton's remark that the media's right to publish matters of public interest "is subject to the qualification...that false accusations of fact impugning the integrity of others, including politicians, should not be made by the media" adds weight to the impression that, in practice, the degree of public interest or the fact that the journalism is responsible will cut little ice.

The plaintiffs in *Jameel* were represented by James Price QC and Justin Rushbrooke, 5 Raymond Buildings, and the firm Peter Carter-Ruck & Partners. The Wall Street Journal Europe was represented by Geoffrey Robertson QC, Doughty Street Chambers, and the firm Finers Stephens Innocent.

*Meryl Evans is a partner in Reynolds Porter Chamberlain in London.*

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## Fleet Street Lawyers Program Explores Terror-Link Libel Claims in England

By Alastair Brett

On February 25, the Fleet Street Lawyers, a group of UK press and television in-house lawyers, and law firm DLA presented a program exploring the problems in reporting suspected links to terrorism under UK law.

The program revolved around a hypothetical situation in which the media were anxious to report links between a senior politician, a Saudi businessman, a charity and the funding of Palestinian terrorists.

#### ***Hypothetical Explored Reporting Terror Links***

Playing the role of a shadowy British politician and minister, sympathetic to the Palestinian cause, was real life MP, Peter Bottomley. According to the script for the evening, he also chaired a dodgy charity funded by an extremely rich Saudi businessman. The charity was already under investigation by the Charity Commission but there was increasing

interest from investigative journalists looking at the politician, the charity, the Saudi businessman and links with Palestinian terrorists. As the evening wore on the charity came under closer and closer scrutiny.

The highly respected author Tom Bower played the role of a fearless investigative journalist while his wife, [in real life] Veronica Wadley, the editor of the *Evening Standard* in London, played the role of the Editor of a fictional newspaper, The Globe. She and her paper were determined to publish as much as possible in the public interest using the developing defense of *Reynolds* or common law qualified privilege.

As editor of the fictional newspaper, Veronica was advised by Victoria Sharp QC a specialist in libel law from one of the leading chambers in London, 1 Brick Court. Peter Bottomley was advised by Mark Warby QC of 5 Raymond Buildings, the other main set of libel chambers in the City.

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## Fleet Street Lawyers Program Explores Terror-Link Libel Claims

(Continued from page 39)

Officiating over the parties was the former High Court judge, Sir Oliver Popplewell the only High Court Judge so far to have upheld a *Reynolds* defense in real life and allowed a story to be published because it was in the public interest and a matter of responsible journalism.

Heather Rogers, a barrister from Matrix Chambers and Martin Soames, a solicitor and partner at DLA moderated.

### ***Charity Supporting al-Qaeda?***

The script began with Tom Bower investigating suspicions that money from the charity might have found its way to an al-Qaeda group. There were also indications that the Charity Commission in London had questions to ask the businessman about his attendance at a meeting at which calls had been made for Muslims to send donations supporting jihad; there were also indications that the Commission might be about to investigate the UK branch of the charity.

As would happen in reality, the newspaper sought and was given advice on the ways in which it could build and formulate its story from what looked like rather a weak starting point. At the same time the Minister was advised on how he should respond.

The temperature rose quickly as the newspaper moved swiftly towards publication – a step accelerated by a terrorist attack at Heathrow, London’s main airport, and further investigations into the charity.

The Minister increased the pressure by retaining his legal advisors on a conditional fee basis backed with “after the event” insurance, steps which would more than double the costs which his advisors would recover if their client won.

### ***Newspaper Relies on Reynolds Defense***

Because a number of Tom’s sources were highly confidential and unable to give evidence, the newspaper had to rely entirely on qualified privilege, trying to meet the tests of public interest revelations coupled with responsible journalism set out in the case of *Reynolds v. Times Newspapers*.

As the media often suspect, this had the effect of turning the spotlight away from the claimant and onto the methodology and integrity of the media. Door-stepping

(ambushing) the Minister was frowned on as an unattractive journalistic tactic to try to get a quick answer out of a politician who the newspaper suspected of being linked to terrorism and Palestinian suicide bombers.

### ***Judge Rules Against Newspaper***

At the end of the evening both Sir Oliver Popplewell and the audience ruled against the story. This was a surprising result from an audience made up not only of the Fleet Street Lawyers but also of many other DLA clients representing publishing and other media interests.

The issue of reporting “links” between high profile people and possible terrorists is a serious topic which will not go away. While many such reports may well be in the public interest, the courts in the UK will focus heavily on the reasonableness or otherwise of the journalism and the tactics used by journalists to try to get to the truth.

If the criteria set out by Lord Nicholls in the leading case of *Reynolds v. Times Newspapers* are not rigorously followed, the defence of qualified privilege may well be lost. This is because allegations of funding terrorism are extremely serious and newspapers should not rush into print before they have been able to corroborate key facts, speak to the target of the article and fully check out what their source or sources have told them.

Recent cases demonstrate how close real life is to the fictional facts of a hypothetical evening and how difficult it can be to succeed in using a defence of qualified privilege alone.

The judgment in *Jameel v. Wall Street Journal Europe* arose out of allegations of terrorist funding. After a jury had cast serious doubt on the methods used by the journalist and what he had said in court, the judge held that while it was a proper subject for journalistic investigation, there was no proper public interest defence which could be deployed in the circumstances. Once again the clock was turned back to days before *Reynolds v Times Newspapers* and London started to restore its reputation as “the libel capital of the western world”!

*Alistair Brett is Legal Manager of The Times newspaper in London.*



## Prior Restraint Imposed on Japanese News Magazine in Privacy Claim

The daughter of Japan's former Foreign Minister Makiko Tanaka has obtained an injunction against the Japanese weekly magazine *Shukan Bunshun*, published by Bungeishunju Ltd., barring further distribution of a story that allegedly violates her privacy. A substantial percentage of the print run of the issue dated March 25 has already been distributed, and the court order did not, apparently, affect the sale of those copies.

The plaintiff in the action – whose name was not provided in the available news reports – was joined by her estranged husband in the litigation. The magazine reported

that the daughter married against her parents' objections, divorced after only one year and is now back in Japan. Her mother is a well known and outspoken politician in Japan, currently is a member of the House of Representatives in Japan, and is herself the daughter of the late prime Minister Kakuei Tanaka.

The magazine sought an appeal and a new three judge panel upheld the injunction on March 19. We understand that the magazine will be seeking further appeal to argue that publication was in the public interest.

## Virginia Supreme Court Rules on Constitutionality of Cross Burning Statute

By Seth D. Berlin and Audrey Critchley

On March 5, 2004, on remand from the United States Supreme Court, the Virginia Supreme Court upheld the constitutionality of a state statute criminalizing the burning of a cross with intent to intimidate, but unanimously struck down a provision in the statute making the act of burning a cross prima facie evidence of an intent to intimidate. *Elliott v. Commonwealth of Virginia*, Nos. 003014, 010038 (Va. March 5, 2004).

As a result of the ruling, the court affirmed the convictions of two men charged with cross burning under the statute.

### *The Prosecutions Under the Virginia Cross Burning Statute*

Virginia's cross burning statute provides that

"[i]t shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway, or other public place."

Va. Code Ann. § 18.2-423. It further provides that "[a]ny such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons." *Id.*

The constitutional challenge arose from three separate convictions under the statute. One defendant, Barry Black, led a Ku Klux Klan rally during which Klan members spoke about "what they were" and "what they believed in" and which culminated in the burning of a 25- to 30-foot cross. The rally took place on private property, and with the owner's consent. The other two defendants, Richard Elliott and Jonathan O'Mara, burned a cross on the yard of Elliott's neighbor, ap-

parently in response to the neighbor's complaints about Elliott's use of his backyard as a firing range.

The Court of Appeals of Virginia affirmed the convictions of all three defendants. The Supreme Court of Virginia consolidated the cases and reversed the convictions, finding the statute unconstitutional on its face.

### *The United States Supreme Court's Ruling*

On April 7, 2003, the United States Supreme Court affirmed in part, reversed in part, and remanded for further proceedings. Writing for the Court, Justice O'Connor concluded that "a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate." *Virginia v. Black*, 123 S. Ct. 1536, 1541 (2003). However, the Court found, "the provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional in its current form." *Id.*

The Court found that burning a cross, where "intended to create a pervasive fear in victims that they are a target of violence," constitutes a "true threat" falling outside the First Amendment's protection. *Id.* at 1548. The Court recognized, however, that cross burning may also constitute symbolic expression uniting the members of a group around its ideology. Under those circumstances, it cannot be punished consistent with the First Amendment.

As a result, the Court concluded that the prima facie evidence provision of the cross burning statute – interpreted by Virginia's Model Jury Instructions to mean that "[t]he burn-

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## VA Court Rules on Constitutionality of Cross Burning Statute

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ing of a cross, by itself, is sufficient evidence from which you may infer the required intent” – is unconstitutional on its face because it “strips away the very reason why a State may ban cross burning with the intent to intimidate.” *Id.* at 1550.

Applying this analysis, the Court found Black’s conviction problematic because he led a rally, rather than burning a cross directed at any particular person. The convictions of Elliott and O’Mara, which had not been based on the “prima facie evidence” provision, were remanded to the Virginia Supreme Court for further consideration in light of the Court’s ruling.

### *The Virginia Supreme Court Ruling*

On remand, the Virginia Supreme Court held that the prima facie evidence provision is unconstitutional, but the rest of the statute does not violate the free speech provisions of either the federal or Virginia constitutions and it affirmed the convictions of Elliott and O’Mara.

Following the U.S. Supreme Court’s lead, the court found that the prima facie evidence provision “sweeps within its ambit for arrest and prosecution, both protected and unprotected speech,” and is therefore unconstitutionally overbroad. Slip op. at 5. The Virginia Supreme Court then “severed” the unconstitutional prima facie evidence provision from the remainder of the cross-burning statute, leaving its principal prohibition intact. *Id.* at 9.

With respect to “the core provisions of the statute that remain,” the court held that they do not violate either the First Amendment or Article I, § 12 of the Virginia Constitution, *id.* at 16, which the Court found to be “coextensive with the free speech provisions of the federal First Amendment,” *id.* at 12-13. As a result, the Virginia Supreme Court affirmed the convictions of the two other defendants, Elliott and O’Mara. The model jury instruction was not given in Elliott’s trial. Because he was “convicted by the jury as if the provision was not in the statute,” Elliott “cannot be heard to complain about the unconstitutionality of a provision of the statute, found severable, that played no part in his trial.” Op. at 13-14.

With respect to O’Mara, the court noted that he had pled guilty and in so doing reserved only his right to challenge on appeal the constitutionality of the statute, rather than the prima facie evidence provision. Under these circumstances, O’Mara “waived any claim based upon the unconstitutionality

of the prima facie evidence provision,” which “clearly played no part in his plea agreement and no part in his appeal to this Court.”

### *Commentary on Brandenburg v. Ohio*

In reaching its conclusion, the Virginia Supreme Court expressly rejected challenges to the constitutionality of the statute based on *Brandenburg v. Ohio*, 395 U.S. 444 (1969), a case involving a Ku Klux Klan rally. There, the Court held that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Id.* at 447.

Although the U.S. Supreme Court’s plurality opinion in *Black v. Commonwealth* was silent with respect to *Brandenburg*, the Virginia Supreme Court noted that “the language of the opinion precludes any consideration of *Brandenburg* on remand,” Slip op. at 11, finding it “inconceivable that the Court could make such a clear statement about cross burning with the intent to intimidate being ‘proscribable under the First Amendment’ if it had any concerns about failure to meet the *Brandenburg* tests,” *id.* at 12.

### *Conclusion*

The Virginia Supreme Court appears to have misapprehended both the basis of the Supreme Court’s ruling in *Black v. Commonwealth* and the doctrinal underpinnings of *Brandenburg*.

*Brandenburg* established those circumstances in which speech that incites a third party to commit imminent lawless action can be proscribed or punished, while the issue in the Virginia cases, as properly analyzed by the U.S. Supreme Court, was whether the cross burnings constituted unprotected “true threats.”

Incitement concerns speech that is alleged to cause others to act and seeks to protect against the resulting violence or other lawless action. The threats doctrine, by contrast, is concerned primarily about the fear that a listener experiences upon receiving a threat. This doctrinal confusion does not, however, appear to have altered the result reached by the Virginia Supreme Court in its rulings on the statute.

*Seth D. Berlin and Audrey Critchley are with Levine Sullivan Koch & Schulz, LLP in Washington, D.C.*

## Tenth Circuit Upholds the Constitutionality of the National “Do-Not-Call” Registry

By Kavita Amar

On February 17, 2004, the Tenth Circuit Court of Appeals upheld the national do-not-call registry, concluding that the FTC and FCC rules that created the registry are a valid regulation of commercial speech under the First Amendment. *Mainstream Marketing Services, Inc. v. Federal Trade Commission*, 358 F.3d 1228 (10<sup>th</sup> Cir. Feb. 17, 2004).

The appeal involved four consolidated cases: *Mainstream Marketing Services, Inc. v. FTC*, 2003 WL 22213517 (D. Colo. Sept. 25, 2003); *Mainstream Marketing Services, Inc. v. FCC*, No. 03-9571 (10th Cir. filed July 25, 2003); *U.S. Security v. FTC*, No. 03-122-W (W.D. Okla. filed Mar. 26, 2003); and *Competitive Telecomms. Ass’n v. FCC*, No. 03-9594 (10th Cir. filed Sept. 23, 2003).

### **Registry Does Not Violate the First Amendment**

Holding that the registry was valid “in its entirety,” the Tenth Circuit reversed the highly publicized decision by U.S. District Court Judge Edward W. Nottingham of Denver that found that the do-not-call registry violated the First Amendment because it was a content-based restriction that allowed consumers to refuse call from commercial organizations, but not calls from political or charitable organizations.

In addition to reviewing Nottingham’s decision, the Tenth Circuit also ruled that the registry, which requires telemarketers to pay a fee to access and thus comply with the registry, does not impose an unconstitutional tax upon protected speech, and that the FTC has the statutory authority to enact the registry.

### **Registry is a Valid Regulation of Commercial Speech**

The main issue before the Tenth Circuit was whether the do-not-call registry is a valid commercial speech regulation because it provided “a mechanism for consumers to restrict commercial sales but does not provide a similar mechanism to limit charitable or political calls.”

The court applied the *Central Hudson* test for commercial speech, which requires the government to assert a substantial interest for its regulations, establish that the regulations directly advance the government interest, and substantiate that the regulations are narrowly tailored and do not restrict more speech than necessary.

With regard to the government’s interest, the court accepted the FTC and FCC assertions that the do-not-call regulations were promulgated to protect individual privacy in the home and to protect consumers from the abusive or fraudulent telemarketing.

Next, the court held that the government’s privacy and consumer protection interests were directly advanced by the registry, which blocks a significant number of calls. The telemarketers argued that the registry was unconstitutional because it was underinclusive – it prevented commercial calls but it did not prevent charitable or political calls to one’s home.

The court rejected this argument, stating that “underinclusiveness is not fatal” under *Central Hudson*. Noting that more than 50 million telephone numbers had been registered on the do-not-call list, the court dismissed the assertion that the registry’s underinclusive nature made it “ineffective”, stating that

“[a]s a general rule, the First Amendment does not require that the government regulate all aspects of a problem before it can make progress on any front.”  
358 F.3d at 1238.

The court cited to the record to support the proposition that consumers find commercial calls more intrusive, while non-commercial calls are not as intrusive because they are more expected and because there is a lower volume of such calls. Without any critical inquiry or acknowledgment of contradictory evidence in the record, the court relied upon the FTC’s report that charitable and political callers were not as likely to engage in the abusive tactics that the registry was aimed at preventing:

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***The court accepted the FTC and FCC assertions that the do-not-call regulations were promulgated to protect individual privacy in the home and to protect consumers from the abusive or fraudulent telemarketing.***

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## Tenth Circuit Upholds the Constitutionality of the National “Do-Not-Call” Registry

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Specifically, the FTC concluded that in charitable and political calls, a significant purpose of the call is to sell a cause, not merely to receive a donation, and that non-commercial callers thus have stronger incentives not to alienate the people they call or to engage in abusive and deceptive practices.

Id. at 1241.

### *Registry Was Narrowly Tailored*

Finally, the court found that the registry was narrowly tailored because it blocked calls only when consumers opted in to the registry. Because the registry allows for private choice by the consumer by “opting in,” the court ruled that the registry “does not itself prohibit any speech.” Instead it relies upon the consumer to make a personal choice as to whether or not to accept commercial telemarketing calls.

The court dismissed all of the telemarketers’ arguments that the registry was not narrowly tailored. First, the telemarketers argued that the company specific do-not-call approach, which had been in effect prior to the creation of the do-not-call registry, should have been marketed more to consumers before the extremely prohibitive do-not-call registry was implemented.

- The court found this argument unpersuasive, concluding that the company specific approach was flawed and inadequate to protect consumers from abusive practices and difficult to enforce, and that its marketing was not the root of the problem.

Next, the telemarketers asserted that technological means of avoiding unwanted calls – such as caller ID or electronic devices designed to block unwanted calls – would have been less restrictive than the registry. The court rejected this alternative because it placed the costs upon the consumers.

Concluding that the do-not-call registry addressed and advanced privacy and consumer protection interests and was narrowly tailored, the court pointed out that the registry only restricted one avenue by which organizations could communicate with consumers and that other methods of solicitation, such as direct mail, still remained open. However, given the federal government’s recent trend in restrict-

ing communications from the advertiser to the consumer, as seen by the recent federal anti-spam law (CAN-SPAM Act of 2003), it is unclear that alternative avenues of communication with the consumer will remain open.

### *Fees to Access List Not an Unconstitutional Tax*

Moving on to other issues raised by the four consolidated cases, the court rejected the telemarketers’ argument that the fees paid by the telemarketers to access the numbers on the do-not-call list in order to comply with the list constituted an unconstitutional tax on protected speech. The court held that the fees charged to access the registry were imposed to cover the costs of implementing and enforcing the registry, and were constitutional, even if “such a fee incidentally burdens speech.”

Finally, the court addressed an issue raised in the Oklahoma case, in which the district court held that the FTC lacked statutory authority to enact the do-not-call registry. The Tenth Circuit rejected this argument, noting that the FTC permissibly interpreted its authority under the Telemarketing Act, and that in any case, Congress expressly ratified the FTC’s do-not-call regulations in response to the district court’s decision, so there was no question as to the FTC’s authority to enact the registry.

While the Tenth Circuit decision rejected all arguments made by the telemarketers, it may not be the end of the battle between consumer privacy interests and the First Amendment. American Teleservices Association has announced that it will seek Supreme Court certiorari of this decision.

The lead counsel for plaintiffs in the consolidated cases were Robert Corn-Revere, Davis Wright Tremaine, LLP, Washington, D.C.; Thomas F. O’Neill, III, Piper Rudnick, Washington, D.C.; and Ian Heath Gershengorn, Jenner & Block, LLC, Washington, D.C. Lead counsel for the government were Peter D. Keisler, Assistant Attorney General; Lawrence DeMille-Wagman of the FTC; and Jacob M. Lewis of the FCC.

*Kavita Amar is an associate at Davis Wright Tremaine LLP in Seattle.*

## California Court Holds that Advertisements for Movies Are Unprotected Commercial Speech

By Devereux Chatillon

The recent decision *Rezec v. Sony Pictures Entertainment, Inc.*, No. B160586, 2004 Cal. App. LEXIS 226 (Jan. 27, 2004), *as modified*, 2004 Cal. App. LEXIS 227 (Feb. 26, 2004), is only the latest in a string of cases in California holding that advertisements have diminished constitutional protection as commercial speech.

But *Rezec* goes one step further – it holds that an ad for a movie is not an exercise of constitutional rights at all and thus doesn't fall within the California anti-SLAPP statute.

### Background

There was a minor scandal a few years ago when it was revealed that Sony Pictures had included blurbs in some of its movie ads from a fictitious reviewer, "David Manning of the Ridgefield Press."

After *Newsweek* reported the misrepresentation, Sony apologized, withdrew the ads, suspended the responsible employee and that employee's immediate supervisor, and changed its policies to avoid any reoccurrence.

End of story? Not in California.

Invoking the California Unfair Competition and False Advertising Laws, "certain film viewers" filed suit against Sony asking for injunctive relief, restitution, and disgorgement over the movie blurbs.

### Motion to Strike

Sony moved to strike the complaint under the California anti-SLAPP statute, Cal. Code Civ. Proc. § 425.16 (2004). This statute allows early examination of the merits of lawsuits that arise from exercise of constitutional rights of freedom of speech.

If a court finds that a cause of action arises from

"any act . . . in furtherance of the person's right of . . . free speech under the United States or California Constitution in connection with a public issue," the cause of action is subject to a special motion to strike unless "the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Initially under the anti-SLAPP statute, the burden is on the defendant to make a prima facie showing that the plaintiff's cause of action arises from the defendant's free speech activities. This, the court held, Sony had failed to do.

The *Rezec* court followed a recent and constitutionally

questionable line of California cases holding that a wide variety of advertisements are commercial speech and thus subject to regulation or outright bans if "false."

The California Supreme Court in *Kasky v. Nike, Inc.*, 27 Cal.4th

939, 45 P.2d 243, 119 Cal.Rptr. 296 (2002), *cert. dismissed*, 123 S.Ct. 2554 (2003), held that statements by Nike (not advertisements) defending the working conditions under which its products are manufactured overseas were commercial speech and thus subject to California's unfair competition and false advertising statutes. Despite the fact that Nike was responding to press reports such as CBS News' report, *48 Hours*, the court held that because the statements at issue concerned matters in which Nike had financial interests, they were commercial speech.

The United States Supreme Court, which had originally granted certiorari and heard oral argument, dismissed the writ as improvidently granted because, among other things, the judgment at issue wasn't final.

Equally disturbing was a case that preceded the *Nike* case – *Keimer v. Buena Vista Books, Inc.*, 75 Cal. App. 4<sup>th</sup> 1220, 89 Cal. Rptr.2d 781, 28 Media L. Rep. 1050 (Cal.

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***The ludicrousness of this result — that a libel or privacy claim against the movie itself would fall within the anti-SLAPP statute, but the identical claim relating to the ads for the movie would not — points out the severe problems in this statutory scheme in California and in the California courts constitutional analysis.***

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### California Court Holds that Advertisements for Movies Are Unprotected Commercial Speech

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App. 1999). In *Keimer*, the Court of Appeals held that the cover of a printed book and the cover of the audio edition of the printed book were commercial speech which was not protected by the First Amendment. (The exactly opposite result was reached by a New York court considering a similar suit against the same defendant. *Lacoff v. Buena Vista Pub., Inc.*, 705 N.Y.S.2d 183, 28 Media L. Rep. 1307 (N.Y. Sup. Jan 28, 2000).)

In the face of this precedent, it is hardly surprising the Court of Appeals in *Rezec* held that a First Amendment defense against these California statutes did not fall within the anti-SLAPP statute.

Since the complaint alleged falsity in the movie ad, falsity which is not likely to be challenged by Sony, and since the ads fall within the definition of commercial speech adopted by the California Supreme Court in *Nike*, however erroneously, and since the *Nike* Court

announced that false commercial speech has no First Amendment protection, it is hard to see how the court could have come out otherwise.

The ludicrousness of this result – that a libel or privacy claim against the movie itself would fall within the anti-SLAPP statute, but the identical claim relating to the ads for the movie would not – points out the severe problems in this statutory scheme in California and in the California courts constitutional analysis.

Plaintiffs was represented by Blumental & Markham, San Diego; Kyle R. Nordrehaug; Prongay & Borderud, Los Angeles; Philip C. Cifarelli; Alan Himmelfarb, Vernon; and Henry A. Koransky. Sony was represented by Robert M. Schwartz, Marvin S. Putnam and Ruth M. Moore of O'Melveny & Myers, Los Angeles.

*Devereux Chatillon is a partner in Sonnenschein Nath & Rosenthal LLP in New York City.*

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## ANALYSIS: California Wrestles with Commercial Speech After *Kasky v. Nike*

By Joshua Koltun

Last June, when the United States Supreme Court dismissed the writ of certiorari in *Nike v. Kasky*, 123 S.Ct. 2554 (2003), courts in California were left in a curious position as they attempted to deal with the old and difficult problem of determining the level of protection to be accorded to speech that arguably has a “commercial” component, but also arguably relates to matters of public interest.

On the one hand, the California Supreme Court’s decision in *Kasky v. Nike*, 27 Cal. 4<sup>th</sup> 939 (2002) deems speech to be worthy of lesser protection if it is “commercial,” even if it concerns a matter of public interest.

On the other hand, cases interpreting California’s anti-SLAPP statute (Code of Civil Procedure § 425.16), had appeared to indicate that speech would be subject to the protection of the anti-SLAPP statute if it concerned a matter of public interest, even if it was deemed “commercial.” And just as courts began attempting to reconcile these competing strands, the California legislature revised the anti-SLAPP statute, complicating matters further.

### ***Case Against Planned Parenthood Dismissed under Anti-SLAPP Statute***

In *Bernardo v. Planned Parenthood Federation of America*, plaintiff invoked California’s unfair competition and false advertising laws (Business & Professions Code §§ 17200 & 17500), seeking to enjoin Planned Parenthood from publishing its position that the weight of credible medical research has failed to establish a link between induced abortion and breast cancer. *Id.*, 115 Cal. App.4<sup>th</sup> 322, 328 (2004).

Planned Parenthood’s website published various “fact sheets” discussing the controversy over an alleged link between abortion and breast cancer, stating Planned Parenthood’s position that the theory “has not been borne out by research” but also acknowledging that “having a full term pregnancy early in a woman’s childbearing years is protective against breast cancer.” *Id.*

Plaintiff complained that Planned Parenthood’s statements were “unlawful, unfair, confusing, and misleading statements/advertisements” that caused women to make critical health care decisions without full, complete and

accurate information about the safety of abortion.” *Id.* Planned Parenthood moved to strike the complaint under the anti-SLAPP statute.

The court began its analysis by considering whether the websites at issue constituted “fully protected noncommercial speech.” *Id.* at 343. The court applied the Nike three-part test – 1) whether the *speaker* is “engaged in commerce ... the production, distribution, or sale of goods or services or someone acting on behalf of a person so engaged”; 2) whether the *intended audience* “is likely to be actual or potential buyers or customers of the speaker’s goods or services, or persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to or otherwise influence actual or potential buyers or customers,” and 3) whether the *content of the message* constituted “representations of fact about the business operations, products, or services of the speaker (or the individual or company that the speaker represents), made for the purpose of promoting sales of, or other commercial transactions in, the speaker’s products or services.” *Id.* at 347(citing *Nike* 27 Cal.4<sup>th</sup> at 960-61, 964).

The Bernardo court held that the websites did not meet the Nike test of commercial speech.

Whereas the Supreme Court in *Nike* had characterized the statements in question as being “factual representations about [Nike’s] own business operations,” and which addressed matters within Nike’s own knowledge, Planned Parenthood’s statements about the ongoing medical debate were “not readily verifiable factual assertions about matters within Planned Parenthood’s own knowledge,” but rather Planned Parenthood’s expression of opinion about an ongoing genuine scientific debate. *Id.*, 115 at 348.

Moreover, plaintiff “has also failed to show that the intended audience of Planned Parenthood’s Web site speech was ‘likely to be actual or potential buyers or customers’” of the health services of its affiliates. *Id.* The court reasoned that the challenged statements were published on the internet, and were thus available to the general public and not “directed to any particular audience.” *Id.* at 349. The court held, further, that plaintiff had not met its burden of showing that Planned Parenthood’s speech was actionable under California’s unfair competition and false advertising laws – even assuming that they were statements of fact, not opinion, and were commercial speech. *Id.*

(Continued on page 48)

**California Wrestles with Commercial Speech After Kasky v. Nike***(Continued from page 47)*

The decision is not entirely clear as to the applicable standard of proof. The court stated, that a defendant has to make a “threshold showing that the challenged cause of action is one arising from protected activity. ... ‘A defendant meets this burden by demonstrating that the act underlying the plaintiff’s cause fits one of the categories spelled out in section 425.16.’” *Id.* at 341 (citing *Navellier v. Sletten*, 29 Cal.4<sup>th</sup> 82 (2002) and *Equilon Enterprises v. Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (2002)). Once the moving defendant has met that burden, plaintiff must make a *prima facie* showing, substantiated by admissible evidence, of its claim -- much like a summary judgment motion. *Id.*

Plaintiff, for its part, had assumed that the question of whether the statements were “protected” was part of defendant’s initial burden, arguing that that “Planned Parenthood’s speech was false and misleading [and therefore] was not entitled to legal protection, and thus Planned Parenthood had failed to make the requisite *prima facie* showing that they were engaged in protected activity.” *Id.* at 337.

But, as noted, the term “protected activity” is a statutory term of art, so it is not necessarily coterminous with the protections of the First Amendment (despite the statutory reference thereto). The court never expressly stated that plaintiff was incorrect in placing the burden on defendant to show that its speech was not “false and misleading” (let alone “commercial speech”).

Indeed, the court did not explicitly discuss how Planned Parenthood had met its initial burden. Under section 425.16, one of the categories of “protected activity” includes “any written...statement ... made in a place open to the public ... in connection with an issue of public interest.” Section 425.16(g)(3).

Although the court stated that Planned Parenthood’s statements were on “issues of public interest,” this came in the midst of an analysis of whether *plaintiff* had carried *its* burden, concluding that plaintiff’s own evidence demonstrated that Planned Parenthood’s statements were “noncommercial speech entitled to full First Amendment protection.” *Id.* at 343.

According to the Court, “none of Planned Parenthood’s challenged Web pages proposed a commercial transaction in its contents. Rather, they were all educational in nature and asserted Planned Parenthood’s positions on disputed scientific and medical issues of public interest.” *Id.* at 344.

That characterization avoided the conundrum of defining commercial speech — if a statement is both “political” and also “commercial” what level of protection applies? Under the Nike formulation, if a statement is “commercial” the First Amendment protection is reduced, even if it also concerns an issue of public interest. Statements that some would characterize as “educational” or “political” in nature might also be deemed to be aimed at an “intended audience” of “likely ... actual or potential buyers.”

But how is the court to evaluate claims about the “intended” audience of such “political” or “educational” statements?<sup>1</sup> Although the *Bernardo* Court stated that plaintiff’s evidence showed that Planned Parenthood’s speech was “fully” protected, this appears to be on the grounds that the statements were of opinion as opposed to fact. As to separate issue of the intended audience, the court stated simply that plaintiff had “failed to show” that intended buyers of Planned Parenthood’s services were the likely customers. *Id.* at 349.

Significantly, the California Supreme Court had recently clarified that on an anti-SLAPP motion, although the movant/defendant has the initial burden of showing that the speech concerned a “public issue,” it is *not* part of the defendant’s initial burden to demonstrate that the speech is protected by the First Amendment. *Navellier*, 29 Cal.4th at 94.

“[A]ny ‘claimed illegitimacy of defendant’s acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff’s [secondary] burden to prove a *prima facie* showing of the merits of the plaintiff’s case.”

*Id.* at 94 (original emphasis, citation omitted).

Other cases have held, moreover, that a cause of action is subject to an anti-SLAPP motion if it arises only *in part* from statements about a “public issue.” See, e.g., *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal.App.4th 294, 308 (2001).

Thus, even though, under Nike, speech may be “commercial” even though it also concerns a “public issue,” under section 425.16, under *Navellier*, it may be “protected activity” subject to the anti-SLAPP statute if it concerns a “public issue,” even if it is also “commercial.”

There is no inconsistency between those two cases. Being subject to the protection of the anti-SLAPP statute does not immunize the speech, it only subjects plaintiff to the burden of presenting its *prima facie* case on all elements of its causes of action at the very outset of the case.

*(Continued on page 49)*



**California Wrestles with Commercial Speech After Kasky v. Nike**

*(Continued from page 48)*

This complication had not been present in Nike because that case had arisen on appeal from a demurrer rather than an anti-SLAPP motion to strike.

But a number of recent cases have raised the issue whether arguably “commercial” speech is subject to an anti-SLAPP motion. *DuPont Merck Pharmaceutical Co. v. Superior Court*, a pre-Nike, pre-Navellier case, had involved a class action against the manufacturer of the drug Coumadin for allegedly disseminating false information about a generic alternative in public advertising, among other things. *Id.*, 78 Cal.App.4th 562-4. (2000). Based on the allegations of the complaint that more than 1.8 million Americans had purchased the drug, which treats life threatening conditions, the court concluded that the statements concerned an issue of “public interest” and was thus subject to the anti-SLAPP statute. *Id.* at 567.

In *Nagel v. Twin Laboratories, Inc.* by contrast, the court held that while “matters of health and weight management are undeniably of interest to the public, it does not necessarily follow” that the listing of ingredients on the label of a dietary supplement regarded “public issues.” *Id.* 109 Cal. App.4th 39, 47 (2003). The court reasoned that the label was not “participation in a dialogue on weight management issues.” *Id.*

The court distinguished *DuPont* on the ground that there the speech was “inextricably intertwined with speech providing medical information to the consuming public and medical doctors, and with speech furthering its political lobbying activities.” *Id.* at 50.

But the court went beyond that narrow holding and opined that the “in connection with a public issue” requirement “modifies earlier language in the statute referring to the acts in furtherance of the constitutional right of free speech” and that therefore the question whether speech was “commercial” was part of the first prong of analysis. *Id.* at 47-50. The court cited Nike for the proposition that statements that were part of a public debate could nevertheless be “commercial speech. *Id.* at 48.

It is not clear why the court thought it was necessary to cite Nike on this point since the court had already determined that the product labels at issue were not part of a debate about health or weight management issues. Moreover, as the court in Nike had explained, commercial speech is not un-

protected by the First Amendment, it simply merits a lower level of protection. Nike, 27 Cal.4th at 952.

And in any event the discussion is misplaced because, as the California Supreme Court held in *Navellier*, although the statute references the “constitutional right of free speech,” it is not defendant’s initial burden (the first prong) to show that his speech is protected, but rather part of the plaintiff’s burden (the second prong) to show that it is not.

Other courts appear to have followed Nagel in holding (at least in the alternative) that the question whether speech is “commercial” is determinative as to whether the anti-SLAPP statute applies. *Rezec v. Sony Pictures*, 04 C.D.O.S. 1679 (February 25, 2004); *Martinez v. Metabolife*, 113 Cal. App.4th 181, 192 (2003), *Consumer Justice Center v. Trimedica International, Inc.*, 107 Cal. App.4th 595, 600 (2003).

These cases, like Nagel, also involved a narrower determination that the speech at issue did not concern any “public issue” or that the causes of action at issue did not even arise from “speech,” and thus could have been decided on that basis alone.

***Commercial Speech Not Necessarily Outside of Anti-SLAPP Statute’s Protection***

Other courts either expressly or implicitly rejected the proposition that “commercial” speech is necessarily outside the anti-SLAPP statute.

In *Scott v. Metabolife*, the court specifically rejected the contention that “section 425.16 does not apply to Metabolife’s ‘false’ advertising because false advertising ‘is not constitutionally protected.’” *Id.*, 115 Cal.App.4th 404, 419 (2004) (original emphasis).<sup>2</sup> The court recognized that even “commercial speech” is protected by the First Amendment, and that in any event under *Navellier*, the issue whether speech is “protected” is not a part of the initial determination whether the anti-SLAPP statute applies. *Id.* at 420.

Instead, the Court ruled that the SLAPP statute did not apply on the narrower ground that the advertising in question – which was on the labels of the products themselves – did not concern a “public issue.” *Id.*

Similarly, in *Kids Against Pollution v. California Dental Association*, the court held that the statements of a dental trade association regarding the safety of mercury amalgam fillings “address[ed] the controversy over the assertedly wide-

*(Continued on page 50)*

## California Wrestles with Commercial Speech After *Kasky v. Nike*

(Continued from page 49)

spread health effects of the mercury contained in dental amalgam undoubtedly concern an issue of public importance” and were therefore subject to the anti-SLAPP statute. *Id.*, 108 Cal.App. 4th 1003, 1015 (2003), depublished upon grant of review, 4 Cal.Rptr. 3d 808 (2003).

The court determined that it need not decide whether the speech at issue was “commercial speech” since, after the filing of the motion, the plaintiffs had amended their complaint to withdraw any cause of action arising from any allegedly false factual statements by defendants, and thus had effectively conceded the merits. *Id.* at 1020.

Other cases have decided anti-SLAPP motions purely by determining that the speech at issue was narrowly targeted to a small audience and had not involved a discussion about issues of widespread interest. *Commonwealth Energy Corporation v. Investor Data Exchange*, 110 Cal. App.4th 26, 34 (2003) (telemarketing statements were about defendant’s services, not about “investment scams in general”); *Jewett v. Capital One Bank*, 113 Cal.App.4th 805, 812-13 (2003) (characterizing credit card solicitations as being designed “solely for the purpose of commercial activity,” not to inform the public of an issue of public interest.”).

### *Anti-SLAPP Statute Amended*

But in any event, the statute has subsequently shifted underfoot. In September 2003 the Legislature added a new section 425.17 to the Code of Civil Procedure that incorporates a modified Nike standard directly into the statute.<sup>3</sup> It provides, in part, that section 425.16 does not apply to any cause of action brought

against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:

(1) the statement or conduct consists of representations of fact about that person’s or a business competitor’s business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person’s goods or services, or the statement or conduct was made in the course of delivering the person’s goods or services.

(2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation ... notwithstanding that the conduct or statement concerns an important public issue.

It is not by no means clear how this statute will be applied. For example, where a statement by a defendant **does** concern “an important public issue,” does the defendant have the initial burden of demonstrating that it was **not** made “for purpose of ... promoting commercial transactions,” ... or that the “intended audience is an actual or potential buyer ... or a person likely to repeat the statement to” such a person?

And, if so, how would that burden be discharged? Once discharged, what is the burden on plaintiff to show that section 425.17 does in fact apply, trumping section 425.16? Is the statute constitutional?

Does the answer to that depend on whether *Kasky v. Nike* constitutes a correct statement of the standard for “commercial speech?”

Stay tuned.

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<sup>1</sup> *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, on which the *Nike* court had relied, had deemed certain informational pamphlets to be “commercial speech” even though they did not contain any direct references to the products of the speaker. Thus the Court suggested that under some circumstances the juxtaposition of “informational” materials with other materials of a more directly promotional nature will render the “informational” materials “commercial speech.” *Id.* at 66-67 & n.13. But the case provides little guidance in determining when and under what circumstances the balance will be tipped. Indeed, as the Court itself indicated, there was really no need to resolve the “commercial” nature of the materials at issue since the statute challenged in that case was deemed unconstitutional even under more lenient “commercial speech” test. *Id.* at 66 n.11 (“To the extent any of appellee’s mailings could be considered noncommercial speech, our conclusion that [the statute] is unconstitutional as applied would be reinforced.”).

<sup>2</sup> The court held that a number of personal injury causes of action against the dietary supplement manufacturer did not “arise” at all from the manufacturer’s “speech” about its product at all. *Id.*, 115 Cal.App.4th at 413.

<sup>3</sup> For example, the test references “competitors.” The statute contains exceptions, including for journalists and academics.

## Treasury Department Regulations Threaten Publishing Activities

By Jonathan Bloom and Mark J. Fiore

The Treasury Department's implementation of trade embargoes imposed by the President pursuant to authority delegated by Congress has led to a confrontation with an unlikely enemy: publishers of scientific and other scholarly journals.

For decades, the United States has imposed trade embargoes on countries such as Iran, Cuba, Libya, and the Sudan, sanctioning these nations for their hostility to the U.S. and for their support of international terrorism. But in recent administrative rulings interpreting and applying regulations dating from 1989, the Treasury Department's Office of Foreign Assets Control (OFAC) has taken the position that the performance of such basic editorial functions as correcting grammar and syntax and fixing typos in scientific articles authored by nationals of embargoed nations is prohibited unless OFAC has issued a license authorizing such activities.

Many in the publishing community believe this regulatory scheme exceeds OFAC's statutory authority and constitutes an unconstitutional prior restraint. As of this writing, a legal challenge was being considered.

### ***First Amendment Related Materials Should Be Exempt from Embargo Rules***

The issue crystallized in September 2003, when OFAC issued three advisory opinions regarding application of the Iran regulations to scientific publishing activities. The opinions, issued in response to requests from the Institute of Electrical and Electronics Engineers (IEEE), were based on Treasury Department regulations purporting to implement Presidential Executive Orders concerning Iran issued pursuant to, *inter alia*, the 1977 International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701 *et seq.*

The problem is that the regulations impose restrictions on transactions relating to First Amendment-protected materials that have no basis in the plain language of IEEPA.

In 1988, by means of the so-called Berman Amendment (named after its sponsor, Representative Howard Berman (D-Cal.)), Congress amended IEEPA in order to expressly protect transactions involving First Amendment-protected materials.

Specifically, the Berman Amendment limited the President's powers under section 1702(a) of IEEPA by prohibiting him from restricting "directly or indirectly, the importation from any country, or the exportation to

any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications...."

A 1994 amendment to IEEPA clarified Congress's intent that "no embargo may prohibit or restrict directly or indirectly the import or export of information that is protected under the First Amendment to the U.S. Constitution."

The language of the Berman Amendment was incorporated into an Executive Order, issued by President Clinton in 1997, that prohibited "the importation into the United States of any goods or services of Iranian origin or owned or controlled by the Government of Iran, *other than information or informational materials....*"

Nevertheless, in 1989 OFAC issued regulations that embodied a puzzling qualification to the "information and informational materials" exemption: they prohibited all "transactions related to information and informational materials *not fully created and in existence at the date of the transactions, or to the substantive or artistic alteration or enhancement of informational materials, or to the provision of marketing and business consulting services.*"

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***The Treasury Department's Office of Foreign Assets Control (OFAC) has taken the position that the performance of such basic editorial functions as correcting grammar and syntax and fixing typos in scientific articles authored by nationals of embargoed nations is prohibited unless OFAC has issued a license authorizing such activities.***

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**Treasury Department Regulations Threaten Publishing Activities***(Continued from page 51)****OFAC: Embargo Rules Apply to Editing Scientific Publications***

OFAC appeared to go even further in its September 30, 2003 letter to IEEE relating to manuscripts from Iranian authors. OFAC stated therein that even such activities as “the reordering of paragraphs or sentences, correction of syntax, grammar, and replacement of inappropriate words” in an Iranian article were prohibited. Further, apropos of peer review, OFAC stated that selection by a U.S. entity of reviewers and facilitation of review by its members of an Iranian manuscript “for the purpose of collaborating with Iranian authors on manuscripts resulting in substantive enhancements or alterations to the manuscript, would be prohibited.”

Strangely, though, OFAC opined that unaltered, or “camera-ready,” materials, were exempt. Needless to say, it is difficult to imagine how exempting the publication of “camera-ready” materials, while prohibiting any substantive alteration, could possibly serve the national security interests IEEPA is intended to advance.

Since becoming aware of the long-unnoticed OFAC regulations, a number of publishing entities have begun engaging in self-censorship – refusing to interact in a variety of contexts with authors and other entities in embargoed countries – rather than risk severe criminal and/or civil penalties. According to the IEEE, one organization has refused to send any publications to embargoed countries.

Others now agree to accept for publication only manuscripts submitted from embargoed countries that arrive in publishable form. And, it should be noted, the effects of the regulatory scheme extend beyond scientific and scholarly publishing; projects to translate literary works by, for example, Iranian authors also appear to be implicated.

***Regulations Are a Prior Restraint***

In addition to having no basis in the statutory authority delegated to the President, the OFAC regulatory scheme constitutes an unconstitutional prior restraint: it prohibits

constitutionally protected publishing activities absent a license; it provides no criteria pursuant to which licensing decisions shall be made; it imposes no time restrictions on such determinations; and it contains no provision for prompt judicial review.

Illustrative of the problems, ten months passed before OFAC issued its September 30, 2003 opinion, and OFAC’s request for a license remains pending.

Notably, Representative Berman recently weighed in on the controversy and rebuked OFAC. In a strongly worded March 3, 2004 letter to Richard Newcomb, OFAC’s director, Berman stated that “the guidance issued by OFAC on this matter – and the underlying regulations on which it is based – are clearly inconsistent with both the letter and spirit of the law.”

Against the backdrop of the First Amendment and, in particular, the need for “a robust peer review process” in scientific scholarship, Berman wrote, OFAC’s interpretation of the statutory language was

“patently absurd.” He continued: “It is my understanding that OFAC’s narrow and misguided interpretation of the law has threatened the publication of a number of worthy manuscripts, including a book of poems written by Iranian dissidents.”

He added: “I fail to see how this serves the interests of the United States in any way, shape or form.” It remains to be seen whether OFAC can be persuaded to reverse course by anything short of a court order.

*Jonathan Bloom is Counsel, and Mark J Fiore, an associate, at Weil, Gotschal & Manges in New York.*

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***In addition to having no basis in the statutory authority delegated to the President, the OFAC regulatory scheme constitutes an unconstitutional prior restraint***

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## LEGISLATIVE UPDATE: Broadcast Decency Continued

By Kevin Goldberg

Just one month has passed since it was first introduced but there have been serious goings-on with regard to the Broadcast Decency Enforcement Act, which would increase penalties for violations of the FCC's indecency rules.

Not content with a tenfold increase of current penalties, federal legislators have further amplified the per-violation penalty and added the possibility of hearings regarding license revocation for multiple offenses.

In addition, a Bill introduced by Senator Richard Lugar recognizes have rejected, the potential for foreign media in furthering democracy.

### ***HR 3717 (Broadcast Decency Enforcement Act of 2004)***

- Rep. Fred Upton (R-MI) introduced the Broadcast Decency Enforcement Act (HR 3717) on January 21, 2004. As introduced, the bill would have allowed the FCC to impose a penalty of up to \$275,000 for each violation or each day of a continuing violation, and \$ 3 million total, for any broadcast of obscene, indecent or profane language. There is currently no overall cap and a penalty of \$ 27,500 for each violation.
- On January 28, 2004, the House Telecommunications and Internet Subcommittee held a hearing entitled "Can You Say that on TV? An Examination of the FCC's Enforcement with Respect to Broadcast Indecency". This hearing involved testimony from 4 witnesses: David H. Solomon, Chief of the FCC's Enforcement Bureau; L. Brent Bozell, President of the Parents Television Council; William J. Wertz, Executive Vice President of the Fairfield Broadcasting Company; and Bob Corn-Revere, a Washington attorney. Within a week of the infamous "wardrobe malfunction" at the Super Bowl, two hearings had been scheduled for February 11, 2004. The same Telecommunications and Internet subcommittee held a hearing on HR 3717, with a vote held the following day. Also on February 11, 2004, the Senate Committee on Commerce, Science and Transportation held a hearing entitled "Protecting Children from Violent and Indecent Programming" at which all five FCC Commissioners testified. HR 3717

passed the Telecommunications and Internet Subcommittee on February 11, 2004.

- Another hearing was held in the Telecommunications and Internet Subcommittee on February 26, 2003. Six witnesses testified at this hearing: Alex Wallau, President of the ABC Television Network; Gail Berman, President of Entertainment for the Fox Broadcasting Company; Alan Wurtzel, President of Research and Development for NBC; Lowell "Bud" Paxson, Chairman and CEO of Paxson Communications; John Hogan, President and CEO of Clear Channel Communications; and Harry J. Pappas, Chairman and CEO of Pappas Telecasting Companies.
- The full Energy and Commerce Committee then held a markup session on March 3, 2004 at which the bill was passed by a vote of 49-1 with some significant amendments. As passed by the Energy and Commerce Committee, HR 3717 now allows for a fine of up to \$500,000 per violation. There is no longer a \$ 3 million ceiling for cumulative violations. Instead, the only "maximum" pertains to the fact that three violations will subject the licensee to a hearing before the FCC as to whether it is operating its license in the public interest.
- Meanwhile, Sen. Sam Brownback (R-KS) has introduced a companion bill in the Senate. S 2056 was introduced on February 9, 2004 and referred to the Committee on Commerce, Science and Transportation, but has not received a hearing in that committee.
- Because of the shortened Congressional session due to the fall elections, it remains to be seen whether these bills can be passed in 2004. However, interested MLRC members should make their voices known to their congressional representatives prior the House vote on HR 3717 or to any members of the Senate Committee on Commerce, Science and Transportation if that body schedules a hearing.

### ***International Free Press and Open Media Act of 2004 (S 2096)***

Many MLRC members have taken an active interest in international free press matters following the Australian High Court's decision in *Dow Jones v. Gutnick* which

*(Continued on page 54)*

**LEGISLATIVE UPDATE: Broadcast Decency Continued***(Continued from page 53)*

highlighted the risk of being hailed into any court in the world for material available on the Internet. Perhaps cognizant of the fact that it cannot overturn actions by foreign tribunals, the United States Congress may take action designed to assist foreign media in their own fight to bring foreign laws related to free expression into line with those protections offered by the First Amendment to the United States Constitution.

- On February 23, 2004, Sen. Richard Lugar (R-IN) introduced S 2096. This bill adds the media to the list of businesses that will benefit from grants made by the National Endowment for Democracy (described in the "Findings" section of the bill as "a nonprofit, federally funded, grant making, nongovernmental organization recognized by Congress in the National Endowment for Democracy Act"). The bill would also withdraw the \$ 13,800,000 earmarked for the Free Trade Union Institute and the \$2,500,000 slated for the National Chamber Foundation for Fiscal Year 2005. Instead, 10 percent of the amounts made available to the Endowment during that year would go to programs to promote freedom of the press and other media. The specific programs supported by these funds are not defined.
- Sen. Lugar's statement supporting the bill upon introduction offered a strong endorsement for the role of a free press in a burgeoning democracy. His remarks included the following: "There is a strong desire by our finest journalism schools, newspapers, broadcasters, and marketing and advertising enterprises to help build free press and open media in the world. We also need to engage all the new media, like Internet companies and wireless forms of communications. To better organize and focus these efforts, this legislation directs the Secretary of State to provide funding to the National Endowment for Democracy for the work a free press institute."
- The bill has not received any action from the Senate Committee on Foreign Relations. Interested members should contact Senator Lugar's office at 202-224-4814 in order to find out how best to move S 2096 toward passage.

***Office of Foreign Asset Control to Enforce Editing of Certain Foreign Writers as "Illegal Services"***

The Department of Treasury's Office of Foreign Assets Control ("OFAC") has sent letters to certain publishers indicating that it will begin prosecuting as violations of federal law any attempts to edit and publish works produced by writers living in countries with whom the United States has a trade embargo, such as Iran, North Korea and Cuba. OFAC will allow publication of unedited works by these foreign nationals; it considers editing the work to be a "service" offered to these authors in violation of these embargoes. This is despite a legislative amendment introduced by Rep. Howard Berman (D-CA) and passed in 1988, which explicitly states that any informational materials are to be exempted from the items which constitute a violation of these trade embargoes.

See Jonathon Bloom's article in this issue for an in depth review of OFAC's enforcement policy.

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

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## FCC Fines Radio Broadcasters; Decides “F Word” is Indecent

Responding quickly to the politically charged issue of indecency on the airwaves, the Federal Communications Commission issued three indecency rulings on March 18 – fining two radio broadcasters, and reversing an earlier decision on the use of the “F word.”

The FCC proposed fining Infinity Broadcasting Company \$27,500 for material aired on Detroit station WKRK on the July 26, 2001 Howard Stern Show that involved a discussion of sexual and excretory matters. *Infinity Broadcasting Operations, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 04-49 (March 18, 2004).

In a separate order, the FCC proposed fining Capstar \$55,000 for material broadcast on stations WAVW-FM and WCZR-FM in Florida that appeared to involve a live sex act. Capstar is indirectly owned by Clear Channel. Writing separately, Commissioner Michael Copps argued that “for repeat offenders as in this case, I believe the Commission should have designated these cases for license revocation hearings.” *Capstar TX Limited Partnership*, Notice of Apparent Liability for Forfeiture, FCC 04-36 (March 18, 2004).

The FCC’s rulings are available at [www.fcc.gov](http://www.fcc.gov).

### ***FCC Reverses its Decision on Indecency of “F Word”***

In a separate decision, NBC and other licensees escaped being fined for U2 frontman Bono’s use of the “F word” during his acceptance speech at the 2003 Golden Globe Awards ceremony. But the FCC reversed its previous rulings that an isolated use of the four-letter word as an intensifier is not indecent. *Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards,”* File No. EB-03-IH-0110 (FCC rel. March 18, 2003).

During NBC’s live broadcast of the Golden Globes in January 2003, Bono remarked “this is really, really fucking brilliant.” The FCC received 234 complaints, most from the Parents Television Council, that the statement was obscene and/or indecent.

On October 3, 2003, however, the FCC’s Enforcement Bureau issued an order finding that the statement, in context, did not violate the Commission’s indecency standards.

The word “fucking” may be crude and offensive, but, in the context presented here, did not describe sexual or excretory organs or activities. Rather, the performer used the word “fucking” as an adjective or expletive to emphasize an exclamation. Indeed, in similar circumstances, we have found that offensive language used as an insult rather than as a description of sexual or excretory activity or organs is not within the scope of the Commission’s prohibition of indecent program content.

*Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards,”* 18 FCC Rcd 19859 (EB rel. Oct. 3, 2003).

The FCC granted the Parents Television Council’s application for review and reversed.

The Commission concluded that prior decisions holding that isolated or fleeting use of the “F-word” is not indecent are no longer good law.

We recognize NBC’s argument that the “F-Word” here was used “as an intensifier.” Nevertheless, we believe that, given the core meaning of the “F-Word,” any use of that word or a variation, in any context, inherently has a sexual connotation, and therefore falls within ... our indecency definition.

The “F-Word” is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language. Its use invariably invokes a coarse sexual image. The use of the “F-Word” here, on a nationally telecast awards ceremony, was shocking and gratuitous. In this regard, NBC does not claim that there was any political, scientific or other independent value of use of the word here, or any other factors to mitigate its offensiveness.

The Commission emphasized that all broadcast licensees are on notice that use of the “F word” in similar contexts in the future will lead to fines and potential license revocation, if appropriate.

## **SAVE THE DATES**

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***Look out for Registration Materials Arriving by Mail in April!***

### **2004 NAA/NAB/MLRC CONFERENCE**

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