

**MILRC**  
Media  
Law  
Resource  
Center

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# MEDIA LAW LETTER

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Reporting Developments Through March 31, 2006

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# MLRC Calendar

September 27-29, 2006

NAA/NAB/MLRC Media Law Conference  
Alexandria, Virginia

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November 8, 2006

MLRC Annual Dinner  
New York, New York

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November 10, 2006

MLRC Defense Counsel Section Annual Breakfast  
New York, New York

## D.C. Circuit Affirms Wiretap Judgment Against Congressman For Leak to Media

### *Leaked Tape Was “Unlawfully” Acquired*

A divided D.C. Circuit Court of Appeals panel this month ruled that Washington Democratic Congressman James McDermott violated the federal wiretap act by passing on to the media a tape of an illegally intercepted phone conversation. *Boehner v. McDermott*, No. 04-7203, 2006 WL 769026 (D.C. Cir. March 28, 2006).

McDermott did not participate in the illegal interception in any way, but the people who did intercept the conversation personally delivered the recording to McDermott and discussed with him how they acquired it, according to the facts found by the court. McDermott then leaked the recording to the press.

In a decision written by Judge Raymond Randolph and joined by Circuit Chief Judge Douglas Ginsburg, the court held that under these facts, the case was distinguishable from *Bartnicki v. Vopper*, 532 U.S. 514 (2001), where the Court held that a



*Washington Democratic Congressman James McDermott*

third party's illegal conduct does not remove the First Amendment shield from speech about matters of public concern.

Here, because McDermott had actual knowledge that the phone conversation was illegally intercepted and knew who intercepted the call, McDermott had “unlawfully” obtained the recording and had no First Amendment right to disclose it.

Judge David Sentelle, in a lengthy dissent, argued that the relevant facts were indistinguishable from *Bartnicki*, where it was assumed that defendants were also aware that the recording they disclosed was illegally intercepted. The majority's decision, Sentelle wrote, is “fraught with danger” because its “defect in the chain” rationale could create broad liability for the press and public.

### *Background*

The case began nearly ten years ago in December 1996. A Florida couple, Alice and John Martin, monitoring their police scanner radio, overheard and recorded a conference call involving Ohio Republican Congressman John Boehner (the plaintiff in the case),



*Ohio Republican Congressman John Boehner*

Newt Gingrich (then the Speaker of the House) and other House Republicans discussing how to deal with an ethics committee investigation of Gingrich – a matter of much public interest at the time.

The couple – supposedly Democratic Party activists – initially sought out their local Congresswomen, but were directed to give the recording to McDermott, who was then the ranking Democrat on the House Ethics Committee. The Martins went to Washington, D.C. and personally gave the tape to McDermott together with a letter stating that it contained a “conference call heard over a scanner.”

McDermott listened to the tape and then leaked it to the *New York Times* and *Atlanta Journal-Constitution* and *Roll Call* which published articles about the content of the recording in early 1997. The *Times*, for example, reported that it received the tape from a “Democratic Congressman hostile to Mr. Gingrich” who said “the tape had been given to him ...by a couple .... saying it had been recorded off a radio scanner.”

Boehner sued McDermott for violating the federal wiretap statute, 18 U.S.C. § 2511 which provides in relevant part:

Except as otherwise specifically provided in this chapter any person who –

....

intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the

*(Continued on page 6)*

## D.C. Circuit Affirms Wiretap Judgment Against Congressman For Leak to Media

(Continued from page 5)

interception of a wire, oral, or electronic communication in violation of this subsection; . . . shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

The D.C. District Court initially granted McDermott's motion to dismiss the complaint, holding that the disclosure of truthful, newsworthy information was protected by the First Amendment. *See* 1998 WL 436897 (D.D.C. Jul 28, 1998) (Hogan, J.).

That decision was reversed by the Court of Appeals the following year – with the identical panel of judges split along the same lines as now. *See* 191 F.3d 463 (D.C.Cir. 1999) (Randolph and Ginsburg voting to reinstate the claim, Sentelle dissenting).

In that 1999 decision, Judge Randolph took the view that McDermott engaged in “conduct” not speech and could therefore be held liable under the wiretap statute. Ginsburg concurred in the result, but wrote separately. Assuming for purposes of the decision that McDermott engaged in speech, McDermott was still liable under the statute, according to Judge Ginsburg, because “one who obtains information in an illegal transaction, with full knowledge the transaction is illegal, has not ‘lawfully obtained’ that information in any meaningful sense” – the reasoning largely adopted by Judge Randolph on remand.

In 2001 the Supreme Court granted certiorari in *McDermott and Bartnicki v. Vopper*. In *Bartnicki*, which was decided after *McDermott*, a divided Third Circuit held that defendants who disclosed the contents of an illegally intercepted phone call could *not* be held liable under the wiretap statute where they did not participate or encourage the illegal interception. In *Bartnicki* an unknown person illegally intercepted a phone conversation about ongoing teacher union negotiations and anonymously left the recording in one defendant's mailbox.

Interestingly, the Third Circuit noted that while the two cases bore some factual resemblance they were distinguishable because “McDermott was more than merely an innocent conduit” because he knew who intercepted the conversation and allegedly sought to embarrass his political opponents with the tape.

## *Bartnicki Decision*

In 2001, the Supreme Court in a 6-3 ruling affirmed the Third Circuit's ruling in *Bartnicki*. Justice Stevens' opinion for the Court began by noting that “as a general matter, state action to punish the publication of truthful information seldom can satisfy constitutional standards.” He recognized the state interest in protecting the privacy of phone conversations, but found that “the normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.”

He concluded that the wiretap statute could not be applied to the defendants for three reasons. First, they played no part in the illegal interception of the phone conversation, finding out about the interception only after it occurred, and never learning the identity of the person who made the interception. Second, even though a third party illegally intercepted the conversation, the defendants obtained the tape lawfully. And third, the content of the conversation was a matter of public concern.

Justice Stevens only mentioned *McDermott* in a footnote, noting that in that case “the defendant knew both who was responsible for intercepting the conversation and how they had done it.” Nothing seemed to suggest that this factual difference required a different result.

The Supreme Court in a separate opinion summarily reversed and remanded *McDermott* for further proceedings in light of its *Bartnicki* ruling. The Court of Appeals in turn sent the case back to Judge Hogan. Following discovery, both sides moved for summary judgment.

## *On Remand*

In 2004, D.C. District Court Judge Hogan granted summary judgment to Boehner, holding that McDermott entered into an “illegal transaction” when he voluntarily accepted the tape with knowledge that it was produced unlawfully and thus fell outside the protection of *Bartnicki*.

The District Court essentially concluded that because McDermott had a face to face encounter with the Martins, rather than receiving the tape anonymously, and because, in the court's view, he knew it was an illegally recorded tape as he received it and before he listened to it, McDermott had “participated in an illegal transaction” and was stripped of his First Amendment rights.

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## D.C. Circuit Affirms Wiretap Judgment Against Congressman For Leak to Media

(Continued from page 6)

Boehner was awarded \$10,000 in statutory damages, \$50,000 in punitive damages for “defendant’s outrageous conduct in this case” and attorneys fees, estimated at \$600,000.

### D.C. Circuit Affirms

This month the D.C. Circuit affirmed. Judge Randolph disposed of McDermott’s objection that disputed issues of fact existed regarding whether he knew the tape was illegally intercepted when he received it from the Martins. The court found that McDermott’s knowledge of the illegal interception was proven as a matter of law by the 1997 *New York Times* article. Its description of how the tape was made and acquired could only have been based on a conversation between McDermott and the Martins.

As to the constitutional issues, the Court held that *Bartnicki* does not stand for the proposition that “any individual who did not participate in the illegal interception of a conversation has a First Amendment right to disclose it.”

In a rather thin analysis of *Bartnicki*, Judge Randolph glossed over most of Justice Stevens opinion and returned again to McDermott’s encounter with the Martins.

“The eavesdropping statute may not itself make receiving a tape of an illegally-intercepted conversation illegal. ... But it does not follow that anyone who receives a copy of such a conversation has obtained it legally and has a First Amendment right to disclose it. If that were the case, then the holding in *Bartnicki* is not ‘narrow’ as the Court stressed, but very broad indeed. On the other hand, to hold that a person who knowingly receives a tape from an illegal interceptor either aids and abets the interceptor’s second violation (the disclosure), or participates in an illegal transaction would be to take the Court at its word. It also helps explain why the Court thought it so significant that the illegal interceptor in *Bartnicki* was unknown, and why the Court distinguished this case on that ground ....” (citations omitted).

In conclusion, Randolph returned to the speech vs. conduct distinction he relied on his first decision in the case. “The difference between this case and *Bartnicki* is plain to see,” he wrote. “It is the difference between someone who discovers a bag containing a diamond ring on the sidewalk and someone who accepts the same bag from a thief, knowing the ring inside to have been stolen. The former has committed no offense; the latter is guilty of receiving stolen property, even if the ring was intended only as a gift.”

But as Judge Sentelle pointed out in dissent, the Supreme Court in *Bartnicki* found no constitutional significance to the fact that defendants knew or had reason to know of the illegal interception. Had their actual knowledge been a relevant concern in *Bartnicki*, Sentelle added, the Supreme Court would have remanded the case for further fact finding because the record did not establish whether the defendants actually knew the provenance of the tape. “As the Court made no such disposition, there is plainly no such distinction of constitutional magnitude.” (Randolph’s counter-argument to this was that actual knowledge must have been relevant because the Court remanded *McDermott* for further proceedings rather than dismissing it outright.)

The potential impact of the majority’s decision on newsgathering and publication is evident. As Judge Sentelle concluded:

Just as Representative McDermott knew that the information had been unlawfully intercepted, so did the newspapers to whom he passed the information. I see no distinction, nor has Representative Boehner suggested one, between the constitutionality of regulating communication of the contents of the tape by McDermott or by The Washington Post or The New York Times or any other media resource. For that matter, every reader of the information in the newspapers also learned that it had been obtained by unlawful intercept. Under the rule proposed by Representative Boehner, no one in the United States could communicate on this topic of public interest be-

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## D.C. Circuit Affirms Wiretap Judgment Against Congressman For Leak to Media

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cause of the defect in the chain of title. I do not believe the First Amendment permits this interdiction of public information either at the stage of the newspaper-reading public, of the newspaper-publishing communicators, or at the stage of Representative McDermott's disclosure to the news media. Lest someone draw a distinction between the First Amendment rights of the press and the First Amendment speech rights of non-professional communicators, I would note that

one of the communicators in Bartnicki was himself a news commentator, and the Supreme Court placed no reliance on that fact.”

Congressman McDermott is represented by Frank Cicero, Jr., Kirkland & Ellis, Chicago, IL. Congressman Boehner is represented by Michael A. Carvin, Jones Day, Washington, D.C. Theodore J. Boutros, Jr. and Thomas H. Dupree, Jr., Gibson Dunn & Crutcher, filed a media amicus brief to the D.C. Circuit Court of Appeals.

## Check Out the Legislative Affairs Committee's Web Page for Federal Bill Tracking

Committee co-chairs Kevin M. Goldberg, American Society of Newspaper Editors, and Robert D. Lystad, Baker & Hostetler LLP, have put together a comprehensive resource on media-related bills in the House and Senate.

The screenshot shows a Mozilla Firefox browser window displaying the Media Law Resource Center website. The page title is "MLRC | Legislative Affairs Committee - Mozilla Firefox". The address bar shows "www.medialaw.org". The website header includes "MEDIA LAW RESOURCE CENTER" and a search bar. The main content area is titled "MEDIA-RELATED BILLS INTRODUCED IN THE 109<sup>TH</sup> CONGRESS" and is last updated on March 21, 2006. It lists bills introduced in the House of Representatives:

- a. [HR 310 \(Broadcast Decency Enforcement Act of 2005\)](#)
  - ◆ Introduced January 25, 2005 by Rep. Upton (R-MI)
  - ◆ Will increase the penalties for violations by television and radio broadcasters of the prohibitions against transmission of obscene, indecent and profane material, and for other purposes
  - ◆ Referred to Energy and Commerce Committee
  - ◆ Passed Energy and Commerce Committee on February 9, 2005
  - ◆ Passed House of Representatives by a vote of 398-39 on February 16, 2005
- b. [HR 581 \(Free Flow of Information Act of 2005\)](#)
  - ◆ Introduced February 2, 2005 by Rep. Pence (R-IN)
  - ◆ Will maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media
  - ◆ Referred to Judiciary Committee

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## Espionage Prosecution of Lobbyists Raises First Amendment Issues

A rare government prosecution under the Espionage Act, 18 U.S.C. § 793, has raised interesting First Amendment questions about criminalizing the receipt of leaked government information.

In *U.S. v. Rosen and Weissman*, Crim. No. 1:05CR225 (E.D. Va.), two former lobbyists for AIPAC, the American Israel Public Affairs Committee, are being prosecuted for violating the statute by receiving national defense information from a former Defense Department official, Lawrence Franklin.

Franklin pled guilty to violating the Espionage Act and was sentenced to 12 years in jail for providing Rosen and Weissman with classified defense information. Rosen and Weissman are charged with violating the statute by sharing that information with reporters and foreign government officials.

The Espionage Act criminalizes, among other things:

unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it . . . Shall be fined under this title or imprisoned not more than ten years, or both.

Defendants moved to dismiss the indictments, arguing that the Act is unconstitutionally vague as applied to their routine meetings with American and foreign government officials. In particular, they argue the statute is vague as applied to oral communications of information since such communications do not give the recipient fair notice of the status of the information.

As stated in the defendants' brief:

The implications of this prosecution cannot be overstated. Every day members of the press and members of policy organization meet with government officials. These meetings are a vital and necessary part of how our government and society function. ... With regularity, members of the press publish the information they obtain from these meetings. ... [and] reporters actually solicit the leaking of classified information.

In its brief, the government stressed that defendants are not members of the press and any vagueness in the statute is cured by the scienter requirement which they stressed they could prove at trial. As to the press, the government stated:

we recognize that a prosecution under the espionage laws of an *actual* member of the press for publishing classified information leaked to it by a government source, would raise legitimate and serious issues and would not be undertaken lightly, indeed, the fact that there has never been such a prosecution speaks for itself.

On March 24, Judge T.S. Ellis in the Eastern District of Virginia heard oral argument on the defendants' motion to dismiss the indictments – a portion of the transcript is reproduced herein. Judge Ellis noted that there was no case law applying the statute on these facts, observing “we are a bit in new, uncharted waters, and that's why I'm going to consider this matter extremely carefully.” Judge Ellis ultimately asked for additional briefing on the constitutional issues which he regarded as “central to the case.” Those briefs were due to be submitted on March 31, 2006.

*The history of the Espionage Act is discussed in detail in “Reporting on the War on Terror: The Espionage Act and Other Scary Statutes,” by Susan Buckley, Cahill Gordon Reindel, published in LDRC Bulletin 2002:02 Criminal Prosecutions of the Press.*

*The article is available at [www.medialaw.org](http://www.medialaw.org)*

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

UNITED STATES OF AMERICA,

Plaintiff,

v. CRIMINAL ACTION

STEVEN J. ROSEN, 1:05 CR 225  
KEITH WEISSMAN,

Defendants.

REPORTER'S TRANSCRIPT MOTIONS HEARING

Friday, March 24, 2006

BEFORE: THE HONORABLE T.S. ELLIS, III  
Presiding

APPEARANCES: OFFICE OF THE UNITED STATES ATTORNEY  
BY: KEVIN DIGREGORY, AUSA  
NEIL HAMMERSTROM, AUSA  
THOMAS REILLY, SAUSA (DOJ)  
MICHAEL MARTIN, SAUSA (DOJ)

For the Government

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ABBE LOWELL, ESQ.  
KEITH ROSEN, ESQ.  
ERICA PAULSON, ESQ.  
For Defendant Rosen

JOHN NASSIKAS, ESQ.  
KARITHA BABU, ESQ.  
KATE BRISCOE, ESQ.  
BARUCH WEISS, ESQ.  
For Defendant Weissman

\* \* \*

23 THE COURT: Does it make any difference to you  
24 if, instead of these defendants, it had been reporters for  
25 the Washington Post and the Washington Times?

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1 ATTORNEY DIGREGORY: Interesting question, your  
2 Honor. And I think that, as we said in our pleading --  
3 THE COURT: Isn't that the Pentagon Papers?  
4 ATTORNEY DIGREGORY: Well, no, that's not  
5 Pentagon Papers, your Honor. And it's not, because Pentagon  
6 Papers was a case about prior restraint. It's not a case

7 about criminal prosecution.  
8 THE COURT: All right. Go on. Forget the  
9 Pentagon Papers' reference. You're correct. It was about  
10 prior restraint.  
11 But nonetheless, what's the answer to my  
12 hypothetical? Suppose these two defendants had been  
13 reporters for a newspaper.  
14 ATTORNEY DIGREGORY: It all depends, your  
15 Honor, on what the facts are in any given situation.  
16 But as we said in our pleading, we would have  
17 to carefully scrutinize whether or not, whether or not there  
18 was -- because of the media being involved, we would have to  
19 carefully scrutinize whether or not the statute was actually  
20 violated, whether or not there was any willfulness shown on  
21 the part of the actors in engaging in the conduct that they  
22 engaged in. And we would do that with respect to any case,  
23 just as we have done in this case, your Honor.  
24 THE COURT: Let me ask you two further  
25 questions along this line.

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1 Tell me again why you argue that Bartnicki is  
2 distinguishable.  
3 ATTORNEY DIGREGORY: Bartnicki is  
4 distinguishable in the first instance because it doesn't  
5 deal with the national security interests of the United  
6 States.  
7 In the second -- and it deals with an  
8 individual's right to privacy, an individual who, oh, by the  
9 way, was engaged in the telephone conversation about hurting  
10 other individuals who didn't agree with him. Okay?  
11 And secondly, Bartnicki is a case in which  
12 there is no implication whatsoever of the person who, who

(Continued on page 11)

(Continued from page 10)

13 eventually broadcasted the tape-recorded conversation, nor  
14 the person who obtained the tape-recorded conversation in  
15 any illegality.  
16 That's different from this case, your Honor,  
17 because of what we've alleged in this case. And we'll have  
18 to be put to our proof, but what we've alleged in this case  
19 is that these defendants, together with other individuals  
20 known and unknown, including Lawrence Anthony Franklin,  
21 actively decided, agreed, that they were going to gather  
22 national defense information and disseminate it.  
23 They engaged in illegal conduct. And that's  
24 another reason why Bartnicki does not apply to them.  
25 THE COURT: Well, you -- let me go back to the

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1 question I asked you, which is whether a prosecution of  
2 members of the press would be different from prosecution of  
3 members of a foreign policy lobbying organization.  
4 Why would it be any different?  
5 ATTORNEY DIGREGORY: I'm not -- I think that  
6 because of the function that the media serves in this  
7 country --  
8 THE COURT: So you're --  
9 (Simultaneous speaking)  
10 ATTORNEY DIGREGORY: -- we would have to be --  
11 THE COURT: -- taking a position --  
12 ATTORNEY DIGREGORY: -- we would have to  
13 carefully scrutinize whether or not we would take action.  
14 And of course --  
15 THE COURT: So you're taking --  
16 (Simultaneous speaking)  
17 ATTORNEY DIGREGORY: -- as with any --

18 THE COURT: -- a position now diametrically  
19 opposed to Mr. Lowell's argument that there isn't a  
20 hierarchy of values in the First Amendment. All First  
21 Amendment -- all First Amendment rights are of the same  
22 stature.  
23 ATTORNEY DIGREGORY: Not at all, sir. The  
24 position that I'm taking is one that has to do with the  
25 exercise of prosecutorial discretion, and what kinds of

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1 things we would consider in exercising that discretion.  
2 THE COURT: There are comments in the Pentagon  
3 Papers, New York Times case about 793(e).  
4 ATTORNEY DIGREGORY: Yes, sir.  
5 THE COURT: You're familiar with that?  
6 ATTORNEY DIGREGORY: Yes, sir. I'm sorry.  
7 THE COURT: Are those to be ignored?  
8 Are they mere dicta or --  
9 ATTORNEY DIGREGORY: I'm not -- and if the  
10 comments of which the Court speaks are those comments made  
11 by Justices White and Justice -- Justices White and Stewart,  
12 no, they're not comments to be ignored.  
13 All the justices were simply saying that if you  
14 look at the statute on its face, it plainly applies to  
15 journalists.  
16 And that's all we said in our pleading, was  
17 that 35 years ago, two very brilliant Supreme Court justices  
18 decided to take a look at that statute, and said that that  
19 statute on its face plainly applies to anyone, to anyone,  
20 whoever, whoever engages in the criminal conduct that is  
21 laid out in the statute.

## Supreme Court Denies Petition for Cert. in *Hatfill v. New York Times*

The U.S. Supreme Court this month denied the *New York Times*' petition seeking review of the Fourth Circuit's decision in *Hatfill v. New York Times Co.*, 416 F.3d 320 (4th Cir. 2005), *cert. denied*, 2006 WL 151585 (U.S. Mar 27, 2006) (No. 05-897). See also *MLRC MediaLawLetter* August 2005 at 5; Oct. 2005 at 23; Jan. 2006 at 5.

The denial leaves in place the Fourth Circuit's decision reinstating claims for libel and intentional infliction of emotional distress arising out of the publication of op-ed columns criticizing the FBI's investigation in to the anthrax mailings of 2001, which plaintiff claims implicitly accuse him of being the anthrax killer.

The petition presented the following questions.

- 1) Does the First Amendment limit the actionable defamatory implications arising from a publication about a matter of public concern to those that a recipient would reasonably conclude the publication, taken as a whole, was intended to convey?
- 2) Does the First Amendment preclude liability for the tort of intentional infliction of emotional distress based upon the alleged publication of a false and defamatory implication, when the challenged publication involves a matter of public concern and was not written for the specific purpose of inflicting harm on the plaintiff?

## Supreme Court Denies "Pit Bull" Lawyers' Petition for Cert.

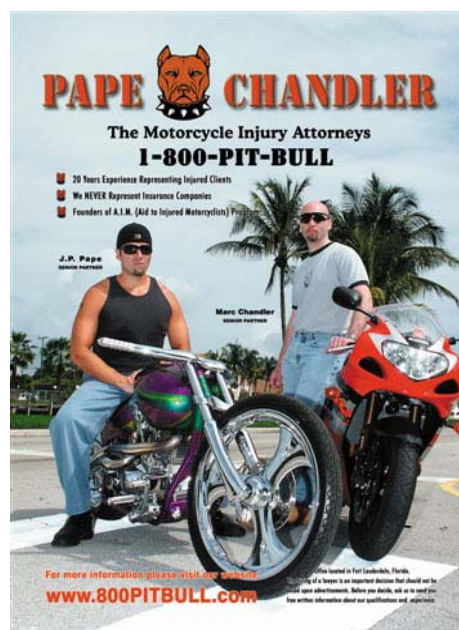
The Supreme Court this month denied a petition filed by two Florida lawyers seeking review of a Florida Supreme Court decision that held their firm's advertisement, featuring a fierce dog logo and the telephone number 1-800-PIT-BULL, was in violation of state ethics rules. *The Florida Bar v. Pape*, 918 So.2d 240 (Fla. 2005), *cert. denied*, 2006 WL 393190 (March 27, 2006) (No. 05-1046). See also *MLRC MediaLawLetter* Nov. 2005 at 13.

The Florida Supreme Court found that the advertisements suggested that the lawyers would behave like actual pit bulls by engaging in "combative and vicious tactics that will maim, scar, or harm the opposing party." "For the good of the legal profession and the justice system," the Florida court stated, "this type of non-factual advertising cannot be permitted."

The question presented in the petition was:

Does it violate First Amendment for state to discipline attorneys who included image of "pit-bull" dog and phone number 1-800-PITBULL in their advertising, when disciplinary action was imposed without applying commercial speech standard of *Central Hudson*, and without any empirical data or other supporting evidence to justify advertising prohibition, but was rather based solely on grounds that such advertising is "demeaning to the profession" and "demeaning to our system of justice" and "inherently misleading"?

The lawyers were represented on appeal by Professor Rodney Smolla.



## Ohio Station Wins Jury Verdict in Private Figure Libel Action

By Steven A. Friedman

Last month, after a two week trial, an Ohio jury returned a defense verdict in a private figure libel action against Gannett's WKYC TV, Inc. The jury unanimously found the broadcasts that were the subject of the libel action were substantially true. *Young v. Russ*, No. 02 CV 974 (Lake County Common Pleas Ct. Feb. 17, 2006) (Lucci, J.).

### **Background Facts**

Plaintiff was employed by the Painesville City Board of Education as head custodian/lunchroom monitor at an elementary school. In February 2002, plaintiff was involved in two separate incidents that led to allegations of the use of excessive force in disciplining students in the lunchroom. A concerned parent contacted WKYC, alleging that plaintiff "was manhandling students in the lunchroom."

A WKYC reporter investigated the accusations and interviewed parents and several children who confirmed the allegations. One child interviewed on camera claimed plaintiff "lifted him up by the neck." The other child alleged that he was "choked up" when the plaintiff picked him up by his shirt.

The reporter then met with school officials and was told that they were investigating the matter. The school officials indicated that there were some "inconsistencies" between the children's stories and what they believed occurred, but did not elaborate on any details.

The same day, the reporter attempted to interview the plaintiff outside his home. The plaintiff refused to be interviewed on camera, but gave the reporter a short interview, including a general denial that he used any excessive force with the students.

The next day, one of the children's parents called the police, and a police officer interviewed her son in the principal's office. According to the police officer, the child "recanted" his allegation that he had been picked

up by the neck during his altercation with the plaintiff and admitted that he made this up to avoid getting into trouble for his bad behavior.

Later that day, the school district sent a letter home to the parents informing them that "the local media is investigating an allegation against one of the staff members at the [school]." The letter also indicated that the school district was opening a formal investigation and that during the investigation the staff member would be temporarily reassigned to an assignment that did not involve direct contact with students. The same parent who initially called the TV station sent the reporter a copy of the school district's letter that evening.

That night WKYC broadcast the first of two reports on the matter. The report described the alleged incidents involving the children, noted that the school was investigating and included plaintiff's denial of the allegations.

The next day, the reporter accompanied the parents of the child

who had not previously been interviewed by the police to the police station where they made a formal complaint. While at the police station, the reporter was denied access to the police officer and therefore was not told of the other child's alleged "recantation."

That night WKYC aired another story with the byline "abuse allegations." The second story reported on the parent's filing of the criminal complaint against the plaintiff. The second report again included plaintiff's denial of the allegations.

During the next several days, the police concluded their investigation and determined that no charges would be filed against plaintiff. About three weeks later, the school completed its investigation and concluded that plaintiff had not engaged in unlawful or excessive behavior. On March 13, 2002, the school district sent another letter home to parents informing them of the police department's and school district's findings. The reporter obtained a copy of this letter and prepared a follow up; however, the follow up was not broadcast.

(Continued on page 14)

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***The report described the alleged incidents involving the children, noted that the school was investigating and included plaintiff's denial of the allegations.***

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## Ohio Station Wins Jury Verdict in Private Figure Libel Action

(Continued from page 13)

### **Procedural History**

In August 2003, the trial court granted summary judgment. Although the trial court found the plaintiff was a private figure, it also determined there the reporter was not negligent in his investigation.

In June 2005, a divided court of appeals reversed, and reinstated the case. *Young v. Russ*, 2005 WL 1538103, (Ohio App. June 30, 2005). See also *MLRC Media-LawLetter* July 2005 at 45. The appellate court found a genuine issue of fact existed over whether the reporter knew prior to broadcast that one child recanted his allegations against plaintiff. The school principal, who was present for the police officer's interview of the child, testified in deposition (and at trial) that she told the reporter about the child's recantation prior to the broadcast.

She also stated that the reporter disregarded her statements because he "wanted to believe the children" and "was not looking for the truth."

The reporter and the school district's superintendent (who was present at the reporter's meeting with the principal where she alleged she told him of the police officer's interview) both denied that the principal told the reporter about the police officer's interview of the student.

The appellate court affirmed summary judgment for Gannett and WKYC's anchor, who were also named as defendants.

### **Evidentiary Issues**

On remand, the Judge Eugene A. Lucci made a number of important evidentiary rulings. First, he granted defendants' motion in limine to exclude all evidence related to defendants' non-publication of a follow up or retraction.

Plaintiff's counsel repeatedly challenged this ruling, and during trial Judge Lucci issued a short opinion reaffirming his ruling. In the ruling, the judge explained that plaintiff could offer post-broadcast evidence to prove falsity, but not negligence, because post-broadcast conduct is not relevant to negligence at the time of broadcast.

Defendants also moved to exclude expert testimony on the standard of care because the Ohio Supreme Court has

explicitly rejected a professional standard of care for reporters, and adopted ordinary negligence. The judge denied defendants' motion relating to expert testimony.

Professor Kent Collins of the University of Missouri School of Journalism testified on behalf of the plaintiff. Virgil Dominic, the former anchor, news director and general manager of WJW in Cleveland, testified on behalf of defendants.

As part of Mr. Collins' testimony, plaintiff introduced ethical guidelines promulgated by the Radio-Television News Directors Association (RTNDA) over defendants' objection. The judge admitted the guidelines, but included a limiting instruction in the jury instructions that:

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**Defendants focused on the reporter's professional and extensive investigation of the story, including numerous interviews and follow up.**

---

"[RTNDA] guidelines were not promulgated or mandated by any governmental agency, and there is no binding legal effect to the guidelines with respect to establishing what ordinary care means under the circumstances

of this case. Certain aspects of ordinary care may be contained within the guidelines, and the guidelines may contain standards that exceed ordinary care or that are below ordinary care. It is solely your province to determine what the standard of ordinary care means under the circumstances of this case. Ordinary care, as you determine it to be, may require more care or less care than that degree of care contained in the guidelines."

### **Trial and Verdict**

Voir dire consisted of an entire day. Plaintiff used a jury consultant; defendants did not. The jury consisted of six women and two men.

The trial lasted almost two weeks. Plaintiff's theme was that the broadcast accused him of the criminal offense of child abuse; and that defendants did not conduct a proper investigation in the face of the school principal's testimony that she told the reporter about one of the children's "recantation."

Plaintiff focused on the unreliability of the children who were interviewed, the reporter's alleged failure to

(Continued on page 15)



**Ohio Station Wins Jury Verdict in Private Figure Libel Action**

*(Continued from page 14)*

find adult sources (other than the plaintiff) and the testimony of the school principal relating to her conversation with the reporter. Plaintiff also called the reporter, the producer of the broadcast and executive producer on cross-examination to attempt to establish the station's lack of supervision. Plaintiff's damages were supported by his own testimony and that of his wife, sister and brother-in-law. Plaintiff generally was a credible and sympathetic witness.

Defendants focused on the reporter's professional and extensive investigation of the story, including numerous interviews and follow up. Defendants also focused on the information supplied by the school district and the status of the school district's investigation prior to the broadcast. The testimony of the school district's superintendent, who was an extremely credible witness, was pivotal in this regard. The superintendent also supported the reporter's testimony about his conversation with the school principal.

Judge Lucci denied motions for directed verdict on all claims, including punitive damages, at the close of plain-

tiff's case and at the close of the evidence. In closing argument, plaintiff's counsel requested \$5 million in compensatory damages and \$5 million in punitive damages, despite the lack of evidence of any economic damages.

The court gave an instruction that it is not a defense to a libel action that the defendants republished false and defamatory statements made by others and that republishing a false statement as an "allegation" is not a defense to a defamation claim. The jury instructions also included an instruction that a broadcast is substantially true when the gist or substance of the statement is true, or is justified by the facts, taking the statement as a whole.

After about four hours of deliberations, the jury returned a unanimous verdict for the defendants, finding the broadcasts were substantially true. Accordingly, the jury did not reach the questions of negligence or actual malice.

*Steven A. Friedman, Robin G. Weaver and Maureen Sheridan Kenny, Squire, Sanders & Dempsey, L.L.P., Cleveland represented defendants in this trial. Plaintiff was represented by Don C. Iler and Nancy Iler, Cleveland.*



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## Rhode Island Weekly Wins Directed Verdict

On February 13, *The Standard Times*, a weekly community newspaper in North Kingstown Rhode Island, won a directed verdict in a private figure libel case over an arrest report. *Trainor v. State of Rhode Island et al.*, C.A. No. WC/2003-295 (R.I. Super. 2006).

The issue was a police blotter item that reported that the plaintiff, Kent Trainor, was:

“arrested on a warrant from the Rhode Island State Police for failing to appear for a payment schedule, stemming from a prior charge of leaving the scene of an accident, death resulting.”

Plaintiff sued *The Standard Times*, the state of Rhode Island and the state police for libel and negligent infliction of emotional distress, alleging the newspaper article falsely implied he had caused someone’s death. He admitted that he had been charged in May 2000 with “leaving the scene of an accident, personal injury resulting.” The news report was based on a police document that read: “Charge: Leaving the scene of an accident injury/death resulting.”

The newspaper moved for summary judgment on the neutral report and fair report privileges. Despite Rhode Island cases on point, a motions judge denied the newspaper’s motion. (The state defendants’ motions for summary judgment were granted.)

Plaintiff retained Jonathan Klarfeld as an expert witness on journalistic standards. Klarfeld is a professor at Boston University, and before that was a media critic for the *Boston Herald*. He was the plaintiff’s expert witness in *Howard v. Antilla* (D.N.H. 2000), a trial that resulted in a \$480,000 false light verdict. (That trial verdict was later reversed on appeal. See 294 F.3d 244, 30 Media L. Rep. 1936 (1st Cir. 2002)).

In his deposition and later at trial, Klarfeld testified that the newspaper violated established journalism principles by characterizing without further investigation the police document as “accident, death resulting” rather than “accident injury/death resulting” as stated in the police document.

Plaintiff also called the reporter who wrote the item and a registered psychiatric nurse who attempted to show the psychological harm plaintiff suffered.

At the close of plaintiff’s evidence, trial judge Alan P. Rubine granted a directed verdict for the newspaper. The court held that article was covered by a qualified fair report privilege and that there was no evidence of ill will or malice. The trial court also found that the report was substantially true. Plaintiff has appealed to the Rhode Island Supreme Court.

The newspaper was represented by Michael F. Horan of Pawtucket, R.I. Plaintiff was represented by Arthur E. Chatfield III of Providence, R.I.

## “Rival” Vanquished: New York Appellate Court Affirms Dismissal of Defamation Claim

By Karim Abdulla

In a decision reaffirming the breadth of privileges and protections afforded the press, New York’s Appellate Division recently affirmed summary judgment in favor of the *The Buffalo News*, finding the paper was not grossly irresponsible, and also that the complained-of publication was absolutely privileged under the state’s fair report statute. *Cottrell v. Berkshire Hathaway, Inc. d/b/a The Buffalo News, et al.*, 127 CA 05-01632, (N.Y. App. Feb. 3, 2006) (Kehoe, Martoche, Smith, Pine, and Hayes, JJ.).

### *The Defamation Claim*

On Sunday, Nov. 13, 1994, *The Buffalo News* published a lengthy article concerning the prosecution of Darryl “Reese” Johnson. In what was described as a “reign of terror,” the article, headlined “Suspect described as city’s deadliest,” reported that Johnson had been accused of a litany of crimes including eight murders, twenty-five attempted murders, drug dealing and extortion.

Accompanying the article was an inset or graphic entitled “A TRAIL OF DEATH.” The graphic included 18 bullet points listing the federal government’s charges and accusations against Johnson. One of the bullet points – and indeed the sole reference to the plaintiff – reported the following accusation against Johnson: “Offering \$10,000 for the killing of Buffalo rival, Sid Cottrell and two other people, in May 1992. The slayings never occurred.”

Cottrell, 54 years old at the time of the article, brought suit against the newspaper, its editor and reporter, claiming the word “rival” suggested he was engaged in criminal activity equal to that of Johnson. Asserting he had led a law-abiding life, Cottrell claimed that the statement was false and defamatory and sought damages of \$15 million.

### *The Seeds of a “Rivalry”*

In preparing the article, the reporter, Dan Herbeck, reviewed and relied on pleadings filed in federal court by prosecutors. These pleadings alleged that Johnson had hired someone to kill plaintiff and his purported bodyguard in order to take over an illegal “numbers” operation. Prior

to publication, the reporter discussed these allegations with the Assistant United States Attorney responsible for the prosecution, as well as an agent of the Federal Bureau of Investigation.

In addition, the reporter relied on his past experience as a police-beat reporter, recalling numerous instances where police officials had identified the plaintiff as a numbers operator. The reporter also reviewed prior *News* reports regarding Johnson and his cohorts, including those concerning the 1988 murder of plaintiff’s son, Larnell Cottrell, by fellow gang leader Donald “Sly” Green. Armed with this information, the reporter determined that “rival” was an appropriate term to describe the relationship between Johnson and Cottrell.

Denying knowledge of Johnson as well as any involvement in a numbers operation, Cottrell argued that none of the official records allegedly relied on had used the term rival to describe him, nor did any of the records accuse him of committing any crime whatsoever. Cottrell also asserted that while the police reports (collected by defense counsel for the purpose of defending the claims) may have referred to his family’s involvement in the “numbers racket,” the references were to his children, not him and, indeed, he had never been questioned, let alone charged with any gambling related offenses.

### *Trial Court Dismisses Claims*

On December 31, 2004, after reviewing the voluminous evidence presented by the defendants, which included the public records relied by the reporter, prior news reports of the feud between the Johnson interests and the Cottrell family, and police reports tying the Cottrell family to the numbers operation, the trial court granted defendants’ motion for summary judgment and dismissed the plaintiff’s claims.

Citing the Fourth Department’s decision in *Balderman v. American Broadcasting Co.*, 292 AD2d 67, the trial court agreed with the defendants that “[T]here is substantial case law setting forth the proposition that summary judgment is the rule, not the exception, in

(Continued on page 18)

### **“Rival” Vanquished: New York Appellate Court Affirms Dismissal of Defamation Claim**

*(Continued from page 17)*

defamation cases.” The trial court went on to find that the defendants did not act “in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties,” *Chapadeau v. Utica-Observer Dispatch*, 38 NY2d 196, 199.

#### ***Appellate Decision***

In a media-friendly decision, the New York appellate court panel agreed, holding that defendants’ conduct was sufficient to establish a lack of actionable fault:

The “standard of ‘gross irresponsibility’ demands no more than that a publisher utilize methods of verification that are reasonably calculated to produce accurate copy.” Here, defendants met their initial burden on the motion by establishing that they were not grossly irresponsible, and plaintiff failed to raise a triable issue of fact. Defendants established that, in writing the article, Herbeck relied on pleadings filed in federal court concerning Johnson, particularly the allegations therein that Johnson hired someone to kill plaintiff and attempted to murder plaintiff’s bodyguard so that

Johnson could take over the numbers operation at issue. Herbeck also relied on conversations with an agent of the Federal Bureau of Investigation and an assistant United States attorney regarding those allegations, as well as conversations with several law enforcement officers wherein plaintiff was named as a person involved in the numbers operation.

The Court went further, however, agreeing with the defendants that, although the complained-of statement did not quote the official source materials, it was nonetheless within the ambit of Civil Rights Law § 74, New York’s statutory fair report privilege:

Also contrary to plaintiff’s contention, the statements by Herbeck were privileged pursuant to Civil Rights Law § 74. The record establishes that the article was a fair and true report of the charges against Johnson in the federal action, *i.e.*, that the article was “substantially accurate.”

*Joseph M. Finnerty and Karim A. Abdulla of Stenger & Finnerty in Buffalo, NY represented the The Buffalo News. Plaintiff was represented by David J. Seeger and Leigh E. Anderson.*

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### **TRIAL TALES**

Since 1991, "Tom Kelley's Trial Tales," compiling information on media trials from the attorneys involved, has been a highlight of the Biennial National Conference. "Trial Tales" from 1991 to the present are now available on the MLRC website at

<http://www.medialaw.org/TrialTales>

## Summary Judgment on Maryland False Light Claim Affirmed

By Charles D. Tobin

A television news writer's instruction for others to pull archive footage for a story, without screening the footage herself or watching the new story into which it was inserted, does not constitute actual malice, the Maryland appeals court held this month. *Ross v. Fox Television Stations, Inc.*, slip op., No. 623 (Md. Ct. Spec. App. March 8, 2006) (unpublished).

In a 2-1 decision, the court affirmed summary judgment dismissing a false light invasion of privacy claim against WTTG, Fox's Washington, D.C. area station

### Background

The lawsuit arose out of a February 2002 broadcast about new D.C. towing regulations designed to eliminate corruption in the industry, as well as an FBI sting that resulted in the arrests of 60 towing company employees. Plaintiff Terrence Ross, owner of a suburban Maryland towing company, was not implicated in the arrests. Ross was, however, the defendant in a civil class action lawsuit against a number of towing companies alleging fraud.

Fox's station, WTTG, a month earlier had broadcast a story on the class action that included footage of one of Ross's trucks. In preparing the script for the February 2002 story, the morning-news writer remembered that the class-action story had run and directed others at the station to pull archive footage from it.

She did not screen either the archive footage or the video cut for the new story. The February 2002 story about the arrests and the new towing regulations included images of one of Ross's company trucks, recognizable by its logo.

For reasons never made clear, Ross filed the lawsuit after expiration of the defamation statute of limitations. His counsel styled it as a false light claim. Under Maryland case law, defamation has a one-year limitations period, while false light has a three-year limitations period.

In May 2005, the Maryland Circuit Court granted WTTG's summary judgment motion on grounds that Ross had failed to demonstrate actual malice with convincing clarity. See *MediaLawLetter* May 2005 at 19.

### Divided Court Affirms

A divided three judge panel of the Maryland Court of Special Appeals affirmed that ruling this month. The majority opinion by Judge James R. Eyler rejected plaintiff's argument that, because the same writer had prepared the January 2002 class-action story and the February 2002 script for the broadcast at issue, she must have had actual knowledge of the broadcast.

The appeals court cited to her deposition, in which the writer testified about her state of mind at the time she directed others to pull the archive tape: "I just remembered that it was about towing companies. That's all I remembered about it at the time."

The court also noted that the writer testified that she had not remembered that the earlier footage contained images of plaintiff's company logo. The court concluded:

***[The writer] had no actual knowledge at the time of the broadcast that [the company] was depicted on the video.***

This testimony indicates [the writer] had no actual knowledge at the time of the broadcast that [the company]

was depicted on the video, only that the footage depicted "towing companies."

The court also rejected plaintiff's interesting argument that, because "at least one employee of [WTTG] must have had actual knowledge that [his company] was depicted on the tape," the "collective knowledge of all of [WTTG's] employees should be imputed" to the station. Citing to *New York Times v. Sullivan*, the court noted that Ross "produced no evidence that any employee" had acted "with at least reckless disregard of the falsity of the statement." The court held that the evidence Ross urges did not establish "that the requisite knowledge existed."

Finally, the court rejected Ross's argument that WTTG had a duty to investigate before using the archive footage or that the station's actions reflected a purposeful avoidance of the truth or falsity of the February 2002 broadcast.

Judge Timothy E. Meredith dissented. He wrote that the evidence "was sufficient for a trier of fact to find that the station acted with total disregard for whether it was true that [Ross's] towing company had any connection

(Continued on page 20)

**Summary Judgment on Maryland False Light Claim Affirmed**

*(Continued from page 19)*

to the criminal activity described in this news report.” To him, this “strongly supported” a finding of actual malice.

The majority and dissent both declined to address WTTG’s additional arguments that Ross evasively pleaded around the one-year defamation statute of limitations, and that because the litigation sought recover for the depiction of a sole proprietorship business and not Ross himself, invasion of privacy law will not permit recovery as a business has no cognizable privacy interest.

*Charles D. Tobin, Leo G. Rydzewski, and Judith F. Bonilla, Holland & Knight, LLP, Washington, D.C. represented Fox Television Stations, Inc. Plaintiff was represented by Timothy F. Maloney, Veronica Byam Nannis, and Paul R. Scuibba, Joseph, Greenwald & Lakke, P.A., Greenbelt, MD.*

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**Florida Bill Would Limit False Light Claims**

Companion bills pending in the Florida legislature would limit false light claims in that state to false statements of fact. *See* S. B. 1346 / H. 1323 (Fla. Leg. 2006).

The bills, sponsored by State Senator Rod Smith and State Rep. David Simmons, were drafted in reaction to a \$18.28 million false light damage award against the *Pensacola News Journal*. The award – apparently the first award in Florida against the media for false light – stemmed from an article that reported that plaintiff “shot and killed his wife ... with a 12 gauge shotgun.” Two sentences later, the article explained that “law enforcement officials determined the shooting was a hunting accident.”

While the article was literally true, plaintiff claimed that the article implied he intentionally murdered his wife and a jury returned a verdict in his favor. *Anderson Columbia Co. v. Pensacola News Journal*, No. 2001 CA 001728 (Fla. Cir. Ct. Dec. 12, 2003) (appeal pending). *See also MLRC MediaLawLetter* Dec. 2003 at 11; April 2005 at 15.

The bills provide that “a person may not be held liable for publishing a matter concerning an individual which places that individual before the public in a false light, unless the matter published *relates to a fact that is false*.” At least one Florida appellate court decision recognized a claim for false light over true statements of fact that create a false impression, *see Heekin v. CBS Broad., Inc.*, 789 So. 2d 355, 358 (Fla. 2d DCA 2001), but the Florida Supreme Court has not addressed the issue.

The bill would also codify the actual malice standard for false light claims.

“This is not going to be a license to destroy the character of honest people,” Rep. Simmons told the *Tallahassee Democrat* newspaper. “This is for the purpose of assuring that we have weighed freedom of the press with the rights of individuals.”



## Summary Judgment for Texas Broadcaster Affirmed

By Gabriela A. Gallegos

The Fort Worth Court of Appeals this month affirmed summary judgment in favor of WFAA-TV, Belo Corp., and reporter Valeri Williams, on libel and related claims brought against them by a doctor. *Grotti v. Belo Corp.*, No. 2-05-105-CV, 2006 WL 563254 (Texas App. March 9, 2006) (Cayce, Dauphinot and McCoy, JJ.). The court held that the broadcasts at issue were all substantially true where they accurately reported third-party allegations and the status of pending investigations.

### Background

The plaintiff, Dr. Lydia Grotti, was the former ICU Chief at John Peter Smith Hospital in Fort Worth, Texas. At issue were seven news broadcasts reporting on allegations made by multiple third parties, including doctors, nurses, and staff at JPS Hospital, the Texas Board of Medical Examiners, the Fort Worth Police Department, a Special Prosecutor, and a Tarrant County grand jury concerning the deaths of two patients under Dr. Grotti's care.

Dr. Grotti's suit alleged claims for libel, conspiracy to defame, and intentional infliction of emotional distress. She later amended her petition to complain of comments that reporter Valeri Williams made in a break-out session at the annual meeting of Investigative Reporters and Editors.

The defendants moved for summary judgment on numerous grounds, including truth, public official/limited-purpose public figure, lack of actual malice, and privilege. The trial court granted the defendants' motion

for summary judgment on all grounds and sustained some of the defendants' objections to Dr. Grotti's summary judgment evidence. On appeal, Dr. Grotti challenged the trial court's orders on summary judgment and summary judgment evidence only as to her defamation claims.

Dr. Grotti lost her Texas medical license, was indicted for the murder of one patient, and was convicted of criminally negligent homicide by a Tarrant County jury. Nonetheless, Dr. Grotti argued that defendants had falsely charged her with murder and euthanasia by omitting, juxtaposing, and manipulating facts to sensationalize the news reports.

### Appeals Court Decision

The appellate court examined each broadcast individually and concluded that the media defendants conclusively established that the gist of the broadcasts was substantially truthful as a matter of law.

Upholding the trial court's grant of summary judgment on the issue of substantial truth, the court declined to reach any other issues raised in the appeal, including whether Dr. Grotti was a public official or limited-purpose public figure and whether the defendants acted with actual malice.

Dr. Grotti's criminal conviction is still on appeal.

*Mike Raiff, Tom Leatherbury, and Gabriela Gallegos of Vinson & Elkins L.L.P. in Dallas represented WFAA-TV, Belo Corp., and reporter Valeri Williams in this case. Gary L. Richardson and Keith A. Ward, Tulsa, OK, Brian D. Esenwein, Cotten Schmidt, L.L.P., Fort Worth, represented plaintiff.*

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## Libel Suit Against Newspaper's April's Fool Day Issue Dismissed

A Connecticut trial court granted summary judgment to a local newspaper that was sued for libel and related claims over an April Fool's Day parody issue. *Victoria Square, LLC v. Glastonbury Citizen*, 49 Conn.Supp. 452, 2006 WL 464112 (Conn.Super. Feb. 17, 2006) (Miller, J.). The court held that any reasonable person would have understood the issue as a parody, concluding that "a false statement that is published as a parody cannot be defamatory."

### Background

In 2004, *The Glastonbury Citizen*, a weekly newspaper in central Connecticut, published an April Fools parody issue. The phrase "April Fools" was prominently displayed across the running head of the issue. And the word "NOT" appeared in large bold letters partially obscuring the name of the paper on the front page.

The issue consisted of several improbable articles. One stated that a local student won a Noble Prize. Another article reported that a "black hole" was discovered at a local school.

At issue in the case was a parody article poking fun at a local commercial property developer whose plans to construct a shopping center had received local attention.

Headlined, "Sakon to Build Hooters, Wal-Mart," the article reported that plaintiff was planning to build a shopping center containing a Wal-Mart store and the state's largest Hooters restaurant. It stated the restaurant would face a local church and an elementary school.

And the shopping center would also have a helicopter launching pad.

Plaintiff sued for libel, false light and violation of the Connecticut Unfair Trade Practices Act.

### Parody Defense

Granting summary judgment and dismissing all claims, the court stated:

"Defamation is, by its nature, mutually exclusive of parody. By definition, defamation requires a false statement of fact; parody, to the degree that it is perceived as parody by its intended audience, conveys the message that it is not the original and, therefore, cannot constitute a false statement of fact."

Parodies must be protected where they appear as such to the reasonable reader. Here no reasonable reader could construe the article in question as anything other than a parody. Moreover the "reasonable reader is no dullard. He or she does not represent the lowest common denominator, but reasonable intelligence and learning. He or she can tell the difference between satire and sincerity." Quoting from *New Times, Inc. v. Isaacks*, 146 S. W.3d 144, 157 (Tex.2004).

The newspaper was represented by Alter & Sherwood. Plaintiff was represented by Trendowski Law Offices, for the plaintiffs.

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## Pennsylvania Court Dismisses Ex-Coach's Libel Lawsuit

### *No Actual Malice in Report About Drug Use and Theft*

By Amy B. Ginensky and Laura M. Leitner

A Philadelphia trial court this month granted summary judgment in favor of a sports commentator and NBC, in a lawsuit for libel and related claims brought by Nathaniel Blackwell, a former assistant basketball coach at Temple University. *Blackwell v. Eskin*, No. 02098, 2006 Phila. Ct. Com. Pl. LEXIS 125 (C.P. Philadelphia Mar. 14, 2006) (Rau, J.).

The court found that plaintiff had produced insufficient evidence of actual malice. Relying on *Tucker v. Philadelphia Newspapers, Inc.*, 848 A.2d 113 (Pa. 2004), the court issued a strongly worded opinion about the importance of free speech, emphasizing that the standard for proving actual malice remains high in Pennsylvania.

#### **Background**

Plaintiff Nathaniel Blackwell, a former college basketball star and NBA basketball player, used to be the assistant basketball coach at Temple University under Coach John Chaney. On March 9, 2003, Howard Eskin, then an NBC 10 sports commentator, broadcast a report on WCAU-TV on his sports show, "Eskin Inside."

In his report, Eskin stated that Blackwell had been suspended the day before for "violating team rules." He also reported that Blackwell had a substance abuse problem, that Blackwell had missed games and practices over the past week, that officials at Temple did not know where Blackwell was, and that Temple had been covering up Blackwell's substance abuse problem. Eskin went on to say that the problem had gotten so bad that Blackwell had been "involved in a theft problem last year in the team's locker room." Some time after Eskin's report was broadcast, Blackwell resigned from Temple University.

Eskin based his report, in part, on information he had received from a Temple Police Officer, Charles Campbell, who had been assigned to the Temple University Men's Basketball Team. In an affidavit submitted with the summary

judgment motion, Campbell stated that during his assignment with the team, he learned of Blackwell's drug problem.

Campbell also said he "had learned that the problem was so bad that Mr. Blackwell had been involved in a theft of in the ... locker room of the basketball players." Campbell further stated that he was concerned that Temple was not adequately addressing Blackwell's drug use, and, believing that a drug addict should not be a college coach, he told Eskin about Blackwell's problems, including his knowledge of the alleged theft, in the hope that Eskin would report on it.

Blackwell did not deny that he had a drug addiction. The only part of Eskin's report that Blackwell claimed was false was the allegation that he had been involved in a theft in the locker room.

During discovery, Temple University's witnesses denied knowing of a drug issue and also denied that there had been a theft. Plaintiff also attacked Officer Campbell because he had been suspended for a period of

time prior to the broadcast, and because after the broadcast, Officer Campbell had further difficulties.

#### **No Actual Malice**

In granting defendants' motion for summary judgment, Judge Rau began her analysis by observing, "Free speech and press are axiomatic to true democracy." Quoting from *New York Times v. Sullivan*, 376 U.S. 254, 271-72 (1964) and *St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968), Judge Rau's opinion outlined the importance of allowing free speech and debate, even at the cost of some erroneous statements.

She observed that the U.S. Supreme Court, in *New York Times v. Sullivan*, "outlined the significance of free speech and press to the very fabric of our nation and culture." She then went on to observe that in order to protect free speech and press, summary judgment is not only appropriate, but encouraged, if a plaintiff has failed to provide sufficient proof of "actual malice."

*(Continued on page 24)*

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**Regardless of whether Eskin could have conducted a more careful investigation, he had certainly conducted enough of an investigation to demonstrate he was not acting with actual malice.**

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### **Pennsylvania Court Dismisses Ex-Coach's Libel Lawsuit**

*(Continued from page 23)*

Finding plaintiff to be a public figure, based upon the evidence and the fact that plaintiff did not dispute that status, the court applied an actual malice analysis. Whether or not the statement about the theft was actually true, Judge Rau found that there was no evidence that the defendants had acted with actual malice.

To the contrary, she noted, Eskin had received the information from a credible source, had attempted to confirm some of the story with Temple's athletic director, and had even observed some of Blackwell's absences for himself. In this context, and lacking any evidence that Eskin knew that Campbell was unreliable or that Eskin had a personal vendetta against Blackwell, she found there was no evidence of actual malice.

Moreover, Judge Rau found that the statement could not be considered in isolation. "A proper analysis of whether Mr. Eskin acted with actual malice requires the entire context of the situation to be analyzed." The larger story, according to the court, was that the assistant basketball coach had a drug problem that was causing him to miss games and be suspended from his position.

In such a context, it was not unreasonable to believe that Blackwell might have resorted to theft to support his drug habit. Since the constitutional standard is not an objective one, but a subjective one, the relevant issue is whether Eskin "actually knew the broadcast was false or probably false." Lacking such evidence, plaintiff failed to meet the actual malice standard.

Plaintiff had further argued that Eskin failed to properly investigate the allegation before repeating it on the air.

Judge Rau rejected this argument completely, observing that, "Negligent reporting, while regrettable, does not amount to defamation."

She further noted that requiring Eskin "to delve into the ultimate origin of his source's information would require the kind of background investigation and fact checking that courts have consistently rejected." Accordingly, she found that, regardless of whether Eskin *could* have conducted a more careful investigation, he had certainly conducted enough of an investigation to demonstrate he was not acting with actual malice; he was not willfully and recklessly avoiding the truth.

Judge Rau also dismissed plaintiff's false light invasion of privacy claim for failing to prove actual malice under the same analysis. Finally, she dismissed plaintiff's attempt to plead tortious interference with prospective contractual relations because Blackwell had produced no evidence that any employer would be willing to hire him.

### ***Conclusion***

This decision affirmed that free speech and press are to be protected, even at the cost of protecting potentially erroneous reporting. Furthermore, the court's order granting summary judgment affirms that summary judgment is proper if a public-figure plaintiff has failed to provide sufficient evidence of actual malice, in order to protect free speech. The plaintiff has appealed.

*Amy B. Ginensky, Robert C. Heim, and Kristin Hynd Jones of Dechert LLP represented the defendants. Plaintiff was represented by James E. Beasley, Jr.*

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## Federal Court Dismisses High Profile Libel Claim Against Polish Political Magazine

By Daren Orzechowski

A federal court in South Carolina granted a motion to dismiss in favor of a Polish political magazine, its editor, a reporter and the magazine's American distributor where the circulation of the periodical in the district was minimal and despite the fact that the plaintiffs resided in the district and the magazine was published on the Internet. *Harlan and Cimoszewicz v. Wprost, et al.*, Civil Action No. 7:05-2605-HFF, 2006 WL 360023 (D.S.C. Feb. 15, 2006).

### *Wprost Magazine*

*Wprost*, the leading news periodical in Poland, focuses its reporting on Polish politics and current events. The weekly magazine is published in the Polish language and is directed towards a Polish-speaking readership.

As a result, the overwhelming majority of *Wprost's* total circulation is in Poland. In fact, less than one percent of *Wprost's* circulation reaches the United States.

Some of *Wprost's* content is published on *Wprost's* Internet website, [www.wprost.pl](http://www.wprost.pl). Like the printed publication, the *Wprost* website contains articles and advertising written in Polish targeting an audience interested in Polish politics and current affairs.

### *Cimoszewicz Controversy*

The pleadings and other papers filed in the litigation detail the story of Mr. Włodzimierz Cimoszewicz, a well-known Polish politician, who during the summer of 2005 declared his intention to run for president of Poland. Shortly after announcing his candidacy, Mr. Cimoszewicz caused a major political uproar by refusing to testify before a parliamentary commission investigating potential corruption in Poland's oil industry. Specifically, Cimoszewicz refused to testify regarding his ownership of shares in stock of a Polish oil refinery.

Eventually, Cimoszewicz testified before the commission and was questioned as to why his disclosure statement, which he was obligated to release as a member of

Parliament, did not report income from the sale of the stock at issue. Cimoszewicz responded that he was not obligated to report income from the stock sale because he had not purchased the shares for himself, but for his daughter, Malgorzata-Natasza Cimoszewicz, and her husband, Russell Harlan, with funds they had given him. Therefore, he claimed that he did not personally profit from the transaction. Mr. Cimoszewicz ultimately withdrew from the race for the presidency.

Mr. Cimoszewicz's initial refusal to testify and subsequent revelations attracted the attention of the Polish

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**Plaintiffs focused on the fact that *Wprost* is published on the Internet and viewable by Polish-speaking readers in South Carolina.**

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press, which began reporting extensively on what became known in Poland as the "Cimoszewicz Controversy." *Wprost*, like many other Polish periodicals and news sources, reported on these events.

### *Procedural History*

In September of 2005, the candidate's daughter and son-in-law, both residents of South Carolina, filed suit in the United States District Court for the District of South Carolina claiming that statements made in various *Wprost* articles concerning their alleged involvement in the Cimoszewicz Controversy constituted libel *per se* and libel *per quod* under South Carolina law. The named defendants included the publisher of *Wprost*, *Wprost's* editor, *Wprost* reporters, and *Wprost's* American distributor.

The defendants promptly moved to have the complaint dismissed for lack of jurisdiction and *forum non conveniens*.

### *Libel Claims Dismissed*

The defendants asserted that there was no basis to litigate in South Carolina. The case focused on a Polish dispute involving a Polish language periodical that covers controversial Polish politics, which is written, edited and published in Poland by and for Polish citizens. Defendants argued that there were very few Polish-

(Continued on page 26)



### Federal Court Dismisses High Profile Libel Claim Against Polish Political Magazine

(Continued from page 25)

speaking citizens within South Carolina and that the magazine's actual print circulation in South Carolina was limited to a single subscriber. Furthermore, the conduct of defendants in no way targeted South Carolina's citizens. To the contrary, the published articles were directed to *Wprost's* readership in Poland.

In opposition, plaintiffs narrowed their arguments and focused on the fact that *Wprost* is published on the Internet and viewable by Polish-speaking readers in South Carolina. Relying on the Supreme Court's effects test as set forth in *Calder v. Jones*, 465 U.S. 783 (1984), plaintiffs argued that:

- (1) defendants had committed an intentional tort;
- (2) plaintiffs felt the brunt of the harm in South Carolina; and
- (3) defendants expressly aimed their tortious conduct at South Carolina.

Defendants countered with, and ultimately prevailed on, the argument that a defendant's Internet activity will only serve as a basis for jurisdiction if the defendant directs electronic activity into the forum state with the manifest intent of engaging in business or other interactions within that state in particular. *See, e.g., Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002),

*cert. denied*, 538 U.S. 1035 (2003) (dismissal of action where individual in Virginia sued Connecticut newspapers based on Internet publication).

Judge Henry Floyd, in dismissing this action, found that:

"Defendants made little or no effort to circulate hard copies of their publication in South Carolina" and explained that "[s]imply placing *Wprost* into the stream of commerce, whether on paper or via the Internet, does not qualify as a minimum contact with South Carolina--even if copies of *Wprost* make their way to this State."

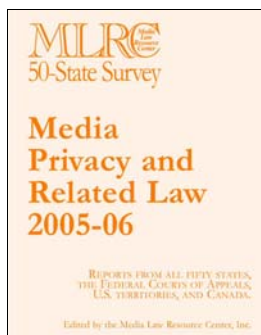
*Harlan*, 2006 WL 360023, at \*4.

In addition, the Court held that the *Wprost* defendants had not purposefully availed themselves of the markets in South Carolina, further justifying dismissal of the claim.

*Defendants Agencja Wydawniczo-Reklamowa "Wprost" sp. z o.o., Marek Krol and Maciej Rybinski are represented by Marc Ackerman and Daren Orzechowski of White & Case LLP and Rivers Stilwell of Nelson Mullins Riley & Scarborough LLP; Defendant Lowell International Co. is represented by N. Heyward Clarkson, III of Clarkson Walsh Rheney & Turner P.A.; Plaintiffs Russell J. Harlan And Malgorzata-Natasza Cimoszewicz are represented by Thomas H. Coker, Jr. of Haynsworth Sinkler Boyd, P.A.*



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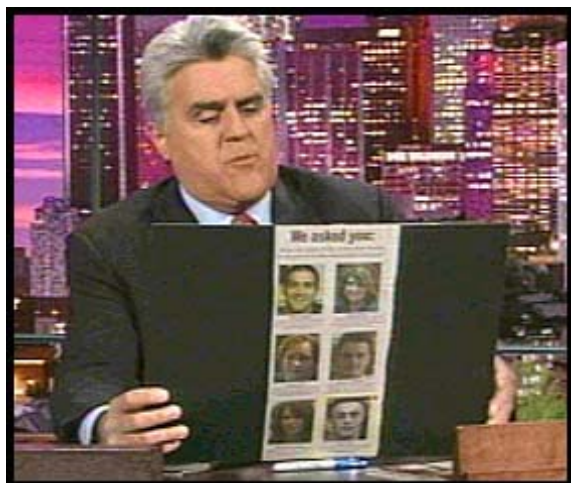
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## Privacy Claim Against “Funny Headlines” Segment Dismissed

In a short opinion, a New York appellate court this month dismissed a privacy claim against NBC and late night host Jay Leno based on Leno’s display of plaintiff’s photograph in a “Funny Headlines” segment on “The Tonight Show.” *Walter v. NBC Universal, et al.*, No. 05-01646, (NY App. 4th Dept. March 17, 2006) (Pigott, Hurlbutt, Gorski, Green, Hayes, JJ.)

Plaintiff’s photograph appeared in an advertisement of her former employer – a New York car dealer. The car dealer allegedly sent the advertisement to “The Tonight Show.” Plaintiff sued the NBC defendants and her former employer for intentional infliction of emotional distress and for violating New York’s statutory privacy law, Civil Rights Law §§ 50,51 which prevents the unauthorized commercial use of a person’s name or likeness.



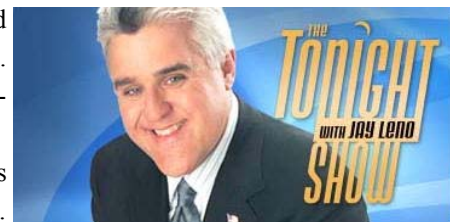
The trial court granted the NBC defendants’ motion to dismiss the emotional distress claim, but denied the motion as to the privacy claim. This was an error, the appellate court ruled, noting that New York’s privacy statute is “to be narrowly construed and strictly limited to ... commercial appropriations.”

Here the use was not commercial.

Moreover, the court ruled that the comedic use of the photograph fell within the newsworthiness exception to the statute. “A performance involving comedy and satire may fall within the ambit of the newsworthiness exception even if the performance is not related ‘to a legitimate’ news broadcast.”

As to the car dealer defendant, the appellate court dismissed the emotional distress claim, finding that sending the advertisement to “The Tonight Show” was not sufficiently extreme and outrageous to support the claim. But the court refused to extend the same newsworthiness exception to the car dealer where plaintiff alleged the dealership submitted the material to Leno – which contained the company’s name and a partial telephone number – for “advertising purposes.”

The NBC defendants were represented by Christopher D. Thomas, Nixon Peabody LLP, Rochester, NY. Dorschel Automotive Group was represented by Michael F. Chelus, Buffalo, NY. Plaintiff was represented by Nira T. Kermisch, Rochester, NY.



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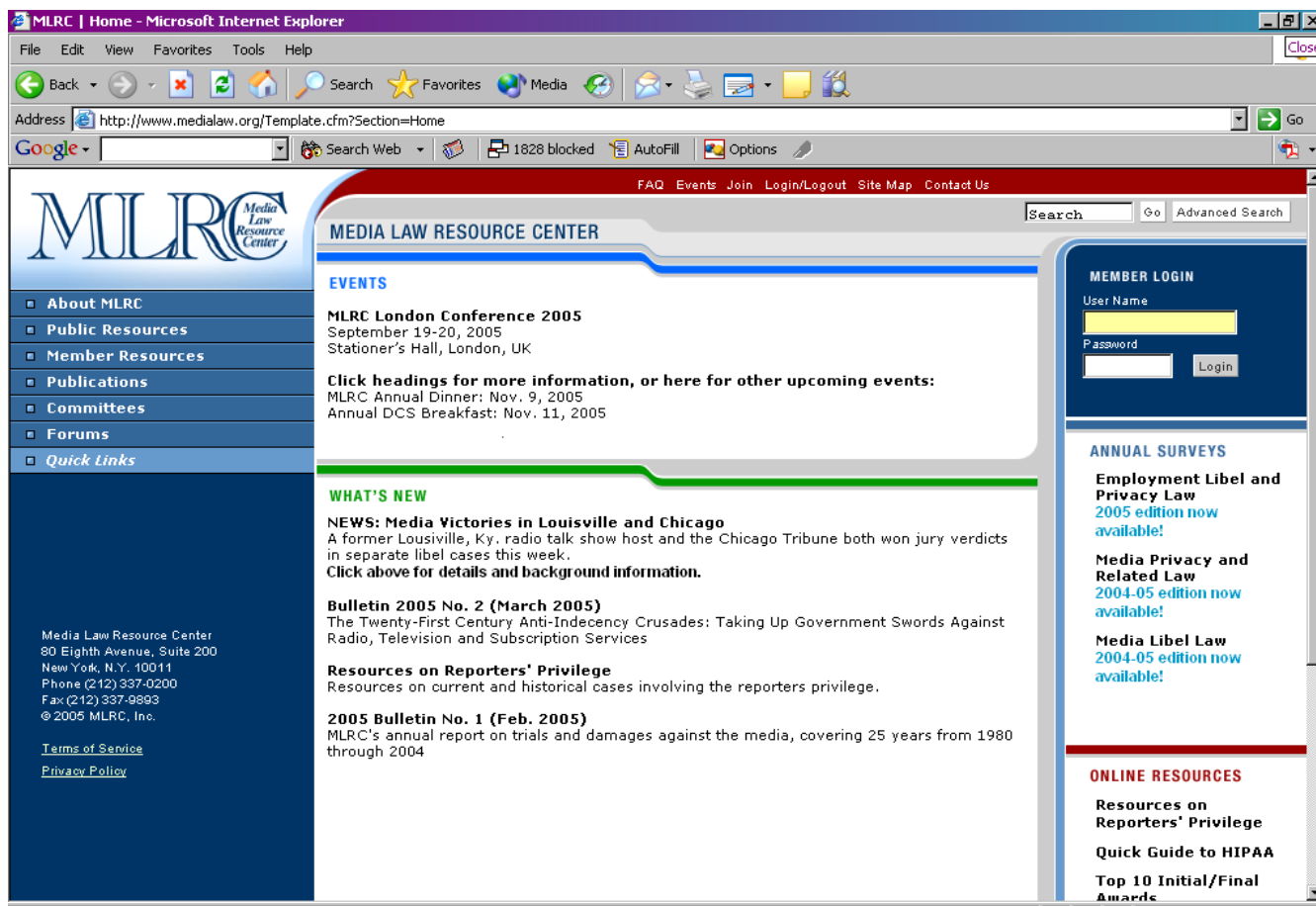
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## Texas Statute Prohibiting Disclosure of HIV Status Does Not Apply to Media Without Knowledge of Test Results

By Jim Hemphill

A Texas appellate court recently held, in a case of first impression, that a broadly worded Texas statute prohibiting the disclosure of a person's HIV status does not apply to the media, or to any other person or entity without access to actual medical or similar records. *New Times v. Doe*, No. 05-05-00705-CV (Texas App. Jan. 24, 2006) (Whittington, J.).

### Background

The Texas statutory scheme at issue is part of Chapter 81 of the Texas Health & Safety Code, which provides mechanisms for mandatory HIV testing under certain narrow circumstances and establishes that test results are confidential.

The statute defines "test results" to include "any statement that indicates that an identifiable individual has or has not been tested for AIDS or HIV infection, antibodies to HIV, or infection with any other probable causative agent of AIDS, including a statement or assertion that the individual is positive, negative, at risk, or has or does not have a certain level of antigen or antibody." Tex. Health & Safety Code § 81.101(5).

The statute further provides that "A test result is confidential. A person that possesses or has knowledge of a test result may not release or disclose the test result or allow the test result to become known except as provided by this section." *Id.* § 81.103(a).

The lawsuit arose after the *Dallas Observer*, an alternative newsweekly, published an in-depth story about a Dallas church known as the Cathedral of Hope, which was identified as the "world's largest gay and lesbian church." The article focused on rifts among current and former church leaders and officials over a variety of matters, including alleged fiscal mismanagement. (It is available online at <http://www.dallasobserver.com/Issues/2003-12-04/news/feature.html>.)

In the story, reporter J.D. Sparks recounted an allegation made by a former church official that she was ordered to add a volunteer, Roger Stanley, to the church's health insurance plan. The official refused be-

cause Stanley, as a volunteer, was not eligible for the plan. The article added that Stanley was HIV positive. The church official eventually resigned over the matter.

### Privacy Claims

Stanley sued the *Observer*, reporter Sparks, and parent company New Times (now Village Voice Media), originally asserting a claim for common-law invasion of privacy as well as a statutory claim for alleged violation of Chapter 81. The plaintiff later amended his pleading, dropping the privacy claim and leaving the statute as his sole claim of liability. Although the suit was filed as a "John Doe" proceeding, Stanley later revealed his name in open court filings.

Stanley's position was simple: the statutory definition of "test result" includes any "statement or assertion that the individual is positive" for HIV; the statute provides that anyone who "possesses or has knowledge of a test result" cannot "release or disclose the test result or allow the test result to become known"; the *Observer* clearly published Stanley's HIV status without his consent; therefore, the statute was violated, according to Stanley.

Even more startling than the liability claim was Stanley's damages theory. The statute provides for up to \$10,000 in statutory damages for a willful release or disclosure of a test result, and further specifies that "Each release or disclosure made, or allowance of a test result to become known, in violation of this subchapter constitutes a separate offense." Tex. Health & Safety Code § 81.104. Plaintiff thus reasoned that since the circulation of the *Dallas Observer* is at least 110,000, each copy of the newspaper constituted a "separate offense" with damages of up to \$10,000, and thus the damages sought were approximately \$1.1 billion. Yes, *billion*.

This case was not the first time a person sued or threatened to sue a media outlet for alleged disclosure of HIV status under Chapter 81. The author and his law partners were involved in at least two prior cases involving similar claims; however, both were resolved without any appellate decisions.

(Continued on page 30)

## Texas Statute Prohibiting Disclosure of HIV Status Does Not Apply to Media

(Continued from page 29)

The *Observer* defended its story on multiple grounds. First, it established that Stanley's HIV status was not private, secret, or confidential. Not only had Stanley been open about his status in the Cathedral of Hope church – which has thousands of members – but he also was the accompanist for an all-HIV-positive church choir that released two CDs that included the names and pictures of the members, including Stanley, and that toured throughout Texas and other states.

The *Observer's* legal arguments encompassed both constitutional and statutory interpretation grounds. It argued that the statutory term “test results” should be limited to actual results of HIV tests held by doctors, laboratories, employers, insurers, and others with special access to test results due to their relationship with the tested person. The *Observer* further argued that it did not “disclose” a test result because Stanley had already engaged in broad, unrestricted, voluntary self-disclosure of his HIV status.

The *Observer* also maintained that if the Texas statute was interpreted in the manner argued by the Plaintiff, such interpretation would be unconstitutional. Punishment of publication of true, non-private, lawfully obtained information is prohibited under both the U.S. and Texas Constitutions, the defendants argued.

Defendants' summary judgment motion was denied. An interlocutory appeal was taken under a Texas statute allowing for such appeals when a member of the media asserts a constitutional defense (Tex. Civ. Prac. & Rem. Code § 51.014(a)(6)).

### ***Appeals Court Decision***

The Dallas Court of Appeals ruled in favor of the Defendants/Appellants on statutory interpretation grounds. The court held that the statutory term “test result” cannot be extended to apply to persons who have no involvement with the tested person's medical care and had no knowledge of the person's actual blood test result.

Stanley's interpretation of the statute, the court held, “would extend ... to situations completely unrelated to any testing under subchapter F of Chapter 81.” The court added, “Our holding is limited to the circumstances of this case, in which appellants did not possess or have knowl-

edge that appellee had or had not been tested for AIDS or HIV infection, and had no knowledge of or connection to appellee's medical care, history, records, or other health or medical information.”

Because it rested its decision on the statutory definition of “test result,” the court did not address the *Observer's* other statutory or constitutional arguments.

The Plaintiff/Appellee has not moved for rehearing or requested that the Texas Supreme Court review the decision.

*Jim Hemphill is a shareholder at Graves Dougherty Hearon & Moody, P.C. in Austin, Texas. He represented the Dallas Observer and the other defendants/appellants in New Times v. Doe.*

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## Ninth Circuit Asks California Supreme Court to Address Private Facts Issue

### *Does Gates v. Discovery Apply in Non-Media Cases?*

The Ninth Circuit this month asked the California Supreme Court for guidance on whether that court's decision in *Gates v. Discovery Communications, Inc.*, 101 P.3d 552 (Cal. 2004), applies with equal force in non-media private facts cases. *Readylink Healthcare v. Lynch*, No. 04-55890, 2006 WL 679828 (9th Cir. Mar 14, 2006) (Fletcher, Tashima, Callahan, JJ.), *certifying question*, 2006 WL 618875.

In *Gates* the California Supreme Court expressly overruled its 1971 decision in *Briscoe v. Reader's Digest Association, Inc.*, 483 P.2d 34, 1 Media L. Rep. 1845 (Cal. 1971), that had recognized a private facts cause of action over a true report of a criminal conviction. In *Briscoe* the court held there was a strong public interest in keeping private the identity of past offenders to preserve the integrity of the rehabilitative process. Overruling *Briscoe*, the California Supreme Court recognized that a line of subsequent U.S. Supreme Court cases, including *Cox Broadcasting Corp. v. Cohn* 420 U.S. 469 (1975) and *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) made clear that *Briscoe* is no longer good law.

The plaintiffs in *Readylink* are a company that provides nursing services and the company's owner. The defendant is a lawyer who had represented a client in a lawsuit against Readylink. Plaintiffs alleged that after Readylink prevailed in this litigation, defendant "commenced an irrational campaign of hatred against Readylink and its management, taking every opportunity to cause it injury."

Specifically at issue was a website page disclosing the owners criminal conviction. That page stated:

Barry Treash is a CONVICTED FELON!

The Public Records of the United States District Court for the Central District of California, more particularly, Case No. CR 84-298, reflect that on July 24, 1984, Barry Lynn Treash, date of birth December 25, 1944, was convicted of multiple felonies. He served time in Federal Prison and was released in 1988. He was then on probation until 1993. The documents speak for themselves. I urge everyone to

read these documents to make an informed decision about Barry's reputation and whether or not to do business with him.

The website provided links to downloadable versions of the "Court Docket," "Indictment," "Transcript of Conviction and Sentencing," and "Prison Record" of Barry Treash.

The district court granted defendant's motion to dismiss. On appeal to the Ninth Circuit, plaintiffs admitted this information about his past conviction was true, but argued that *Gates* does not apply in the non-media context. Finding the law unclear, the Ninth Circuit asked for answers to the following questions:

- 1) Does the California Supreme Court's decision in *Gates v. Discovery Communications, Inc.*, ... finding no invasion of privacy, under the First Amendment, in the publication of facts about past crimes obtained from public records, apply only to publication by media defendants?
- 2) Can there be liability under an invasion of privacy theory where a nonmedia defendant, with a commercial interest in or a malicious motive for publishing facts about a plaintiff's past crimes, does so?
- 3) Under the commercial speech doctrine, is the speech of a non-media defendant with a commercial interest in or malicious motive for publishing facts entitled to less protection under the First Amendment than that of a media defendant?

Plaintiffs are represented by David N. Makous, Eric J. Erickson, Leo A. Bautista, of Lewis Brisbois Bisgaard & Smith, LLP, Los Angeles, CA. Defendant is represented by Frederick S. Reisz, Meyers & McConnell, Los Angeles, CA.

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## Ninth Circuit Applies Single Publication Rule to Internet Posting

### *Rule Applies to Privacy Act Claims*

In an interesting non-media case, the Ninth Circuit held that the single publication rule applies to a Privacy Act claim over content on a government website. *Oja v. U.S. Army Corps of Engineers*, No. 03-35877, 2006 WL 618915 (9th Cir. March 14, 2006) (Hug, Jr., Berzon, Bybee, JJ.).

#### **Background**

Plaintiff was a former official with the U.S. Army Corps of Engineers (“USACE”). The *Washington Post* published an article criticizing the USACE, including discussing plaintiff’s role as a regulatory manager.

The USACE posted on its website a rebuttal to the *Post* article which included the statement that:

“Removal from Job. Mr. Oja stopped coming to work on October 23, 1997, and failed to provide information about the likelihood of returning to work. Effective September 5, 1998, Mr. Oja was removed from his position for excessive absence due to illness.

Plaintiff sued, arguing the statement disclosed personal information in violation of the Privacy Act, 5 U.S.C. § 552(a)). The Act bars the government from disclosing without authorization certain employee information.

#### **Single Publication Rule**

The district court dismissed the complaint for being untimely under the single publication rule. The court analogized the website posting to the publication of a

magazine or office manual. The Ninth Circuit, in an opinion by Judge Bybee, agreed that the mass media publication analogy provided the correct framework when considering claims under the Privacy Act.

The Privacy Act, according to the court, implies the concept of publication to a third party and therefore:

“it is appropriate to import publication considerations into our analysis of the Privacy Act. In so doing, we also consider legal doctrines generally associated with the realm of defamation law, namely the single publication rule. We also note that the fact that both the Privacy Act and defamation law are driven by similar policy concerns – personal integrity and reputational interests – makes the application all the more apt.”

After adopting this framework, the Court cited and relied on the large body of case law applying the single publication rule to the Internet. These cases, the court noted, are based on the premise that “web content is functionally identical to published traditional print media and, accordingly, Internet publication should be considered ‘published’ in the same manner as is a print edition.” While noting differences in Internet and print media, such as the ability to make corrections, it concluded that the analogy between Internet and print publication is sufficiently apt to apply the single publication rule.

Plaintiff was represented by Marianne Dugan, Facaros & Dugan, Eugene, OR. U.S. Attorneys Karin J. Immergut and James L. Sutherland represented the USACE.

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## Will the Circle Be Unbroken? Not in Ohio – State Records Law Triumphs over HIPAA

By John C. Greiner

In what appears to be the first state supreme court decision on the subject, a unanimous Ohio Supreme Court ruled on March 17 that the Ohio Public Records Act supersedes the HIPAA Privacy Rule when those two provisions conflict. (*State ex rel. Cincinnati Enquirer v. Daniels*, No. 2006-0068, 2006 WL 685017 (Ohio Mar. 17, 2006).

In the short run, the Supreme Court's ruling permits *The Cincinnati Enquirer* to obtain citations the City of Cincinnati had issued to property owners requiring that those property owners clean up lead contaminated properties. In the long run, the decision confirms the preeminence of Ohio's Open Records Act and may help other states clarify the interplay between the HIPAA privacy rule and state open record laws.

### Background

The case arose when, in January 2004, Cincinnati Enquirer reporter Sharon Coolidge requested that the Cincinnati Health Department provide "copies of the 343 lead citations and any others that were issued between 1994 and the present."

The requested lead abatement citations were issued by the Health Department to property owners whose property disclosed unhealthy levels of lead during inspections conducted by the Health Department. The Health Department inspects the properties whenever a child who lives there, (or who attends school or daycare there) tests positive for a certain level of lead in their bloodstream.

State law requires that any medical personnel who discovers such a condition to report it to the local public health authority. *The Enquirer* was attempting to investigate the extent to which the Health Department and the city actually enforced the lead abatement citations.

In response to the request, the Health Department refused to produce the citations, contending that the HIPAA Standards for Privacy of Individually Identifiable Health Information (Privacy Rule, Part 160, subparts A and S and Part 164, Title 45, C.F.R.) precluded production.

Although the citations did not mention the name of any child, the Health Department contended that disclosure of the property address could lead to identification of the child who'd tested positive for an elevated lead content.

In the Health Department's view, this constituted disclosure of individually protected health information, which was barred by the HIPAA Privacy Rule. Based on this theory, the Health Department invoked a provision of Ohio's Public Records Act, which exempts from public access, "records the release of which is prohibited by state or federal law."

The HIPAA Privacy Rule, however, provides that "A covered entity may \* \* \* disclose protected health information to the extent that such disclosure is required by law \* \* \*."

### HIPAA & Public Records Act

In this case, the lead citations were not exempt under any provision of the Ohio Public Records Act. As the Supreme Court noted, "Hence we are confronted here with a problem of circular reference because the Ohio Public Records Act requires disclosure of information unless prohibited by federal law, while federal law allows disclosure of protected health information if required by state law."

In seeking to break the circle, the Supreme Court looked at the "Standards for Privacy of Individually Identifiable Health Information" promulgated by the Department of Health and Human Services ("HHS"). Those standards provide "[W]e intend [160.512(a)] to preserve access to information considered important enough by state or federal authorities to require its disclosure by law"; "we do not believe that Congress intended to preempt each such law"; and "[t]he rule's approach is simply intended to avoid any obstruction to the health plan or covered health care provider's ability to comply with its existing legal obligations."

The Court also noted that the HHS Standards specifically provide that information subject to disclosure under the federal Freedom of Information Act is subject to the "required by law" provision.

(Continued on page 34)

### Will the Circle Be Unbroken?

*(Continued from page 33)*

Based on the HHS Standards, the Court noted: “[B]y analogy, an entity like the Cincinnati Health Department, faced with an Ohio Public Records Act request need only determine whether the requested disclosure is required by Ohio law to avoid violating HIPAA’s privacy rule.”

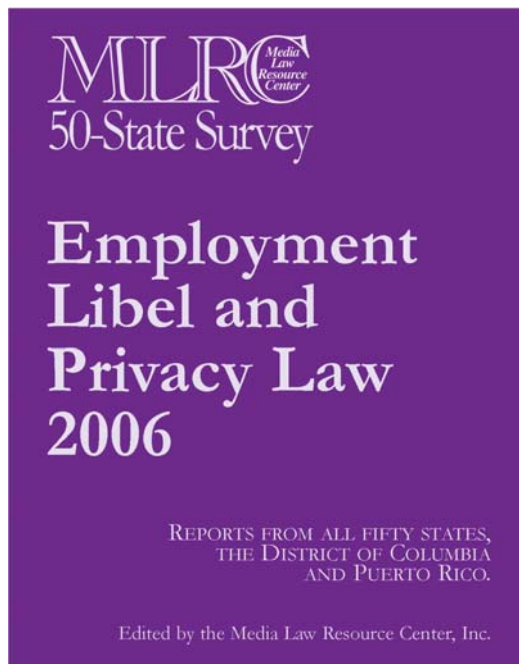
Because the lead citations were subject to production under the provisions of the Ohio Public Records Act, they were not subject to the HIPAA Privacy Rule, and, therefore, their production was not precluded “by federal law.”

The decision is welcome news to media organizations conducting investigative reporting on the activities of public health agencies. If records such as those involved in this case could be shielded from production by HIPAA, the resulting loophole would be roughly the size of a “HIPAA” potamus.

*John C. Greiner is a partner with Graydon Head & Ritchey in Cincinnati, OH.*



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## Fourth Circuit Orders District Court to Provide Access to Moussaoui Trial Exhibits

### *Press and Public Have Right of Access to Exhibits*

By Jay Ward Brown

Granting in part a petition for a writ of mandamus, the Fourth Circuit has ordered District Court Judge Leonie M. Brinkema to provide to the press and public contemporaneous access to copies of exhibits admitted in evidence and published to the jury in the death penalty sentencing trial of Zacarias Moussaoui. *In re Associated Press*, No. 06-1301 (4th Cir. March 22, 2006) (Wilkins, CJ, and Gregory and Duncan, JJ.).

In reversing an order that had effectively sealed the exhibits at least until after conclusion of the anticipated three-month trial, the Fourth Circuit reaffirmed that the right of access to trial exhibits is grounded in both the First Amendment and the common law, and it rejected administrative burden and fear of possible juror taint as sufficient to overcome these access rights.

#### **Background**

Three weeks before commencement of Moussaoui's sentencing trial, Judge Brinkema *sua sponte* entered two orders governing access to portions of the trial record. First, in a written order, she directed that "none of the exhibits entered into evidence will be made available for public review until the trial proceedings are completed, at which time requests for these materials will be considered."

Citing the administrative burden that would be imposed either on court staff or the parties if they were required to make available copies of the thousands of anticipated exhibits while focusing on trying a complex case, Judge Brinkema preemptively ruled that it simply was impossible as a practical matter to accommodate the public's access rights during trial.

Moreover, Judge Brinkema asserted, the prospect that news media outlets would discuss exhibits that had not yet been published to the jury, coupled with the possibility that jurors would be exposed to those news reports, created the

potential for juror taint. The need to protect the defendant's fair trial rights therefore overrode any interest the public had in contemporaneous access to the exhibits during trial.

Judge Brinkema stated in her order that she would not entertain any requests for "reconsideration" of her ruling, notwithstanding that the press and public had neither notice nor any opportunity to be heard in connection with it.

For similar reasons, Judge Brinkema the same day orally ordered that all transcripts of bench conferences

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**Judge Brinkema preemptively ruled that it simply was impossible as a practical matter to accommodate the public's access rights during trial.**

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would be sealed until after trial, at which time they would be unsealed unless their contents required continued sealing.

A coalition of news organizations promptly intervened in the district court and moved to modify both orders on the grounds that they were (1)

facially invalid because entered without notice to or opportunity for the public to be heard in connection with them and (2) substantively invalid because the court had not made specific findings sufficient to support the conclusion that such sealing was required to protect a compelling interest that no narrower relief could achieve. Participants included the Associated Press, CNN, The Hearst Corporation, NBC Universal, The New York Times, the Washington Post, USA Today, The Star Tribune Company and the Reporters Committee for Freedom of the Press.

Without conceding that "contemporaneous" means less than it implies, the media intervenors suggested several ways in which the district court could reconcile the interests it had cited with the public's access rights. For example, the intervenors suggested that the parties could be required to provide a single copy of exhibits to a pool representative at the end of each half day, or even each full day of trial.

And, with respect to bench conference transcripts, the intervenors suggested that they could be sealed for a brief period, but then automatically placed in the public record

*(Continued on page 36)*

### Fourth Circuit Orders District Court to Provide Access to Moussaoui Trial Exhibits

(Continued from page 35)

if no party sought within that period to maintain them under seal.

Both the government and the defense filed perfunctory oppositions to the motion, with the government endorsing the district court's stated reasons for entering the orders. While the motion for access, pursuant to normal court procedure, was set for hearing a full week in advance of the commencement of trial, Judge Brinkema struck the hearing from the calendar, saying she would decide the motion on the papers.

When Moussaoui's sentencing trial began and access to exhibits and transcripts was denied without any action by Judge Brinkema on the pending access motion, the media intervenors filed a petition for a writ of mandamus in the Fourth Circuit, repeating the arguments made in the district court. A few hours after the petition was filed and served, Judge Brinkema entered a written order denying the motion for the reasons previously stated. The appellate court ordered the government and defense to answer the petition within five days, and the Fourth Circuit issued its ruling just eight business days after the petition was filed.

#### Fourth Circuit Decision

The Fourth Circuit first reiterated the principle that an order sealing any portion of the record or closing a courtroom is facially invalid if entered without *prior* notice to and an opportunity for interested members of the public to be heard. See Slip Op. at 5 (citing *In re Knight Publ'g Co.*, 743 F.2d 231, 234 (4th Cir. 1984); *In re S.C. Press Ass'n*, 946 F.2d 1037, 1039-40 (4th Cir. 1991)). The Fourth Circuit concluded that this defect in Judge Brinkema's original orders had been "belatedly" cured by her subsequent ruling on the merits of the intervenors' motion to modify those orders. Slip Op. at 5-6.

Turning to the order denying access to copies of documentary trial exhibits (a category that, according to the Fourth Circuit, includes documents, videotapes and photographs, Slip Op. at 6), the appellate court con-

firmed its prior conclusion that this right "aris[es] from the First Amendment" in addition to the common law. Slip Op. at 6-7 (citing *In re Time Inc.*, 182 F.3d 270, 271 (4th Cir. 1999)).

The Fourth Circuit "ha[d] little difficulty concluding that the district court did not abuse its discretion in refusing to provide access to items that have been admitted into evidence but that have not yet been published to the jury," or that were to be published to the jury part by part, since the burden of providing "piecemeal access to partially admitted exhibits" justified a denial of contemporaneous access. Slip Op. at 7.

Similarly, the Fourth Circuit held that, if an exhibit is published to the jury but *not* to the public in attendance at trial, *e.g.*, where an exhibit is a classified national security document shown only to jurors and not disclosed in open court, then the district court could properly deny access to copies of the exhibit. Slip Op. at 8.

But where an exhibit has been both "admitted into evidence and fully published to the jury" the "district court abused its discretion in denying access." *Id.* Adopting a standard articulated by the Second Circuit, the Fourth Circuit held that "it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction." *Id.* (quoting *United States v. Myers (In re Nat'l Broad. Co.)*, 635 F.2d 945, 952 (2d Cir. 1980)). Not even the highly-charged circumstances surrounding the Moussaoui death penalty trial meet this high bar, the Fourth Circuit concluded.

In particular, Judge Brinkema's "concern for jury taint is not well taken regarding the exhibits that have been fully published to the jury," especially where, as here, the district court had "instructed the jurors not to expose themselves to media coverage of the trial," since it is "unlikely that simply seeing the evidence again through a media publication will endanger Moussaoui's right to a fair trial." Slip Op. at 8-9.

(Continued on page 37)

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**Where an exhibit has been both "admitted into evidence and fully published to the jury" the "district court abused its discretion in denying access."**

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### Fourth Circuit Orders District Court to Provide Access to Moussaoui Trial Exhibits

(Continued from page 36)

Although the Fourth Circuit emphasized that it did “not doubt that the administrative burdens facing the district court are enormous,” it agreed with the media intervenors “that there are ways to ease the incremental administrative burdens that would arise from accommodating their First Amendment right of access, such as providing access to one copy of an exhibit – either through the parties or through the court – and requiring the media to make additional copies at their own expense.” Slip Op. at 9-10.

At bottom, the Fourth Circuit held, it could not agree with Judge Brinkema “that the incremental rise in [administrative] burdens that would be caused by providing access justifies” the order denying access to copies of exhibits until after trial.

The appellate court therefore directed the district court to make one copy of each exhibit available to the media “as soon as is practically possible, but in no event later than 10:00 a.m. on the day after the exhibit is published to the jury, or, in the case of an exhibit that is published to the jury in parts, after all parts of the exhibit have been published to the jury.” Slip Op. at 10.

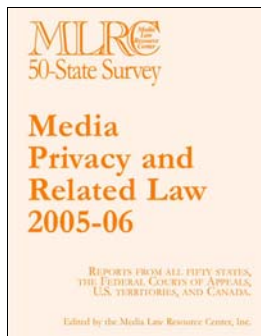
### Post-Trial Release of Transcripts

As for the bench conference transcripts, however, the Fourth Circuit concluded that, because the conferences themselves properly are closed to the public, the public does not have a right of contemporaneous access to transcripts of them, precisely because this would risk exposing jurors to matters properly concealed from them prior to deliberation. Slip Op. at 11-12. Any right of access to bench conference transcripts “is amply satisfied by prompt post-trial release of transcripts.” Slip Op. at 12.

*Jay Ward Brown, David A. Schulz and Adam J. Rapaport at Levine Sullivan Koch & Schulz, L.L.P. in Washington, D.C. represented the media intervenors. Principal appellate counsel for the Department of Justice were Assistant Attorney General Alice S. Fisher, Criminal Division Appellate Section Chief Patty Merkamp Stemler, and AUSA Robert A. Spencer. The defendant was represented by Edward B. MacMahon of Middleburg, Va., and by public defenders Gerald T. Zerkin and Kenneth P. Troccoli.*



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## Speakers Bureau on the Reporter's Privilege

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

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

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

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

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

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

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

### The Reporter's Privilege

#### Protecting the Sources of Our News

This Presentation has been made possible by a grant from  
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**Suggestion for background reading:**  
**Custodians of Conscience by James S. Ettema and Theodore Glasser. Great source re: nature of investigative journalism and its role in society as force for moral and social inquiry.**

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

### A Federal Shield Law?

- Bipartisan proposals for federal shield law in face of increased threats
- -- Need for nationwide uniformity
  - √ Reporters need to know the rules so they can do their jobs
  - √ Would-be whistleblowers and other potential sources need to be able to predict the risks
  - √ Will cut down on costly litigation over subpoenas

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### What Is the "Reporter's Privilege"?

Various rules protecting journalists from being forced, in legal and governmental proceedings, to reveal confidential and other sources.

- Sometimes also protects unpublished notes and other journalistic materials

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## Tenth Circuit Denies Habeas Petition Based on Pretrial Publicity

By Dessa J. Baker

Last month the Tenth Circuit affirmed the denial of habeas relief to a man convicted of murder who claimed that pretrial publicity denied him his right to an impartial jury and to a fair trial. *Goss v. Nelson*, 439 F.3d 621 (10th Cir. Feb. 21, 2006) (Tymkovich J., and McConnel and Holloway JJ.).

### Background

In 1987, a Kansas jury convicted John Goss of first-degree murder and unlawful firearm possession. The murder occurred in a small town near the Kansas-Oklahoma border. Goss fled after committing the crimes and a two-week manhunt ensued. Local and regional media covered the murder and the manhunt.

Prior to trial of the murder and firearm possession charges, Goss moved for a change of trial venue on two occasions due to press coverage of his crimes. The Kansas trial court denied both of these motions holding that Goss had failed to meet his burden of proving that the coverage denied him an impartial jury and a fair trial.

The Kansas Supreme Court affirmed the trial court's ruling. The Kansas Supreme Court stated that the trial court found an adequate number of potential jurors in the jury pool who were sufficiently impartial and the trial court was generous with excusing jurors for cause and Goss passed the remaining prospective jurors for cause.

Goss sought habeas relief from the federal district court arguing that the Kansas Supreme Court's decision constituted an unreasonable application of federal law. A federal magistrate judge recommended that Goss' habeas petition be granted because the pretrial coverage was so extensive that prejudice could be presumed. The federal district court rejected this recommendation and held that the pretrial publicity fell far short of establishing presumed prejudice. Goss appealed the decision to the Tenth Circuit.

### The Tenth Circuit Decision

The Tenth Circuit clarified that Goss had not argued that the jury selected was actually prejudiced but had only

asserted that pervasive press coverage and community sentiment showed that any jury selected from the county would be presumptively prejudiced.

The Court noted that Supreme Court jurisprudence has only addressed pretrial publicity and due process concerns in two contexts. First, the Supreme Court has found presumed prejudice where pretrial coverage is so pervasive and prejudicial that an unbiased jury pool cannot be expected. Second, the Supreme Court has found presumed prejudice where the effect of pretrial publicity manifested at jury selection is so substantial as to taint the entire jury pool. The Court stated:

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***The pretrial publicity was not so pervasive and prejudicial that an unbiased jury pool could not be expected.***

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These two lines of cases establish that while substantial adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed, they do not stand for the position that juror exposure to...news accounts of the crime with which [the defendant] is charged alone presumptively deprives the defendant of due process.

*Goss*, at 629-30 (internal quotations and citations omitted).

The Court held that the pretrial publicity was not so pervasive and prejudicial that an unbiased jury pool could not be expected based on its examination of two factors. First, the Court found that the nature of the publicity and its temporal nexus to the trial were not such that an unbiased jury pool could not be expected.

All of the articles about Goss' crimes were published over seven months before the trial occurred, the news coverage was dispersed over a larger geographic area and was not solely concentrated in the county from which jurors were selected, the local newspaper was published infrequently, and the news coverage of the crimes was predominantly factual and non-inflammatory.

Second, the Court found that the effect of the pretrial publicity on the jury pool was not such that an unbiased pool could not be expected. While the county did have a relatively small population, the county was able to supply a sufficient number of unbiased prospective jurors. Also,

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**Tenth Circuit Denies Habeas Petition  
Based on Pretrial Publicity**

*(Continued from page 39)*

the passage of time between the crime and the trial diminished the presumptive impact of publicity that occurred at the time of the crime.

The Court also held that the effect of pretrial publicity was not so substantial as to taint the entire jury pool. Only thirty-nine percent of the potential jurors called for voir dire expressed a preconceived opinion of Goss' guilt, as compared with sixty-two percent and seventy-seven percent in Supreme Court cases. The Court also found that the comments made by potential jurors were not so prejudicial as to taint the jury pool. Though some

of the prospective jurors expressed doubts about their ability to be impartial, these comments did not disclose information about the facts of the murder.

*Dessa J. Baker is an associate at Hall Estill in Oklahoma City, OK. John Goss was represented by Elizabeth Seale Cateforis of the Paul E. Wilson Defender Project, University of Kansas Law School, and Michael Nelson, the warden, and the Attorney General of the State of Kansas were represented by Kristofer R. Ailsieger, Assistant Attorney General.*

## MLRC Calendar

September 27-29, 2006

NAA/NAB/MLRC Media Law Conference  
Alexandria, Virginia

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November 8, 2006

MLRC Annual Dinner  
New York, New York

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November 10, 2006

MLRC Defense Counsel Section Annual Breakfast  
New York, New York

## Billionaire Seeks Review of California Court of Appeal Decision Striking Down Divorce Court Secrecy Statute

By Susan Seager

Two months after a California appellate court struck down a new divorce court secrecy statute as unconstitutional in *Burkle v. Burkle*, 37 Cal. Rptr. 3d 805 (2006), the battle continues over the statute and public access to divorce court records in that state.

The battle is as much political as it is legal. Hundreds of pages of routine divorce court records remain under seal as the fight continues.

### Background

In the middle of the battle is Ronald W. Burkle, the California billionaire supermarket magnate and multimillion-dollar political fundraiser. Mr. Burkle has waged a four-year battle to keep his divorce court records under seal and to defend a secrecy statute that appeared to be written specifically for him after he made over \$150,000 in political donations to Governor Arnold Schwarzenegger and the state Democratic Party. Mr. Burkle has denied that he had a hand in writing the statute, Family Code § 2024.6.

Mr. Burkle has asked the California Supreme Court to review the Court of Appeal's January 20 decision striking down the statute for creating an undue burden on the First Amendment right of public access to court records. See *MLRC MediaLawLetter* Jan. 2006 at 32.

### Petition to California Supreme Court

Mr. Burkle has asked the California Supreme Court to review the Court of Appeal's January 20 decision striking down the statute. Mr. Burkle asserts that the Court of Appeal erred in its conclusion that divorce court proceedings and records are presumptively open under the First Amendment.

Mr. Burkle also argues that the appellate court should have rewritten the statute to get rid of its unconstitutional features, including the requirement that a trial court seal an entire court record upon request without conducting a balancing test.

But the Los Angeles Times, The Associated Press, and California Newspaper Publishers Association have filed a

brief with the Supreme Court asserting that review is not necessary. The media organizations assert that the *Burkle* decision relied on well-established authority in deciding that divorce court proceedings and records are presumptively open under the First Amendment, and that the statute is not narrowly tailored. The media entities also argue that the Court of Appeal was not permitted to rewrite the statute because Mr. Burkle's suggested revisions would violate Legislative intent.

The Legislature made plain that it intended to do away with the constitutionally proscribed case-by-case balancing tests by *requiring* a court, upon request, to automatically seal a divorce court record – in its entirety and without a balancing test – even if the court record merely contained a footnote reference to a party's home address (which would be a reference to the location of an "asset").

Meanwhile, the Legislature is frantically trying to resurrect a new version of the unconstitutional divorce court secrecy law that once again appears to be written with Mr. Burkle's interests in mind. The new version of Family Code § 2024.6 would still require a court, upon request, to seal all financial information contained in divorce court records, but would allow a court to use redactions. The statute continues to be revised, but at least one version would still require redactions without a balancing test.

Meanwhile, Mr. Burkle has emerged as a suitor for the dozen newspapers McClatchy Co. is unloading in the wake of its \$4.5 billion purchase of Knight Ridder Inc. Mr. Burkle's desire to play a role in owning a chain of newspapers is ironic given that he reportedly ordered an employee to swoop down on a Beverly Hills newsstand to buy all up copies of the Los Angeles Business Journal's detailed report about his divorce court records before they were sealed – including his estranged wife's allegations that he hid \$30 million in assets from her.

*Kelli Sager, Susan Seager, and Alonzo Wickers of Davis Wright Tremaine LLP in Los Angeles represent the media intervenors in this case.*

## Virginia Court Enjoins Execution of Newsroom Search Warrant

In an interesting decision last year, a Virginia state court applied the First Amendment Privacy Protection Act to enjoin the execution of a search warrant against a broadcaster. *In re Search Warrant to WAVY-TV*, CH05-898 (Va. Portsmouth Cir. Ct. Nov. 7, 2005) (Morrison, J.). Prosecutors had sought to obtain unaired portions of an interview potentially relevant to a criminal investigation.

### Background

A reporter for WAVY-TV, the local NBC station, interviewed the mother of a two-year old boy who was killed by family pitbulls. Portions of that interview were aired during the station's regular news broadcast.

The City of Suffolk obtained a warrant to search the station's newsroom for the unedited tape of the interview. The City later stated that the search warrant was necessary because, without a pending criminal case, they could not use a subpoena.

When the officers appeared at the station to execute the warrant, the station called its attorneys who then contacted the Commonwealth's Attorney's Office. By agreement of counsel, the parties contacted the circuit court for the jurisdiction that issued the warrant to seek a hearing on the issue. The court directed the attorneys for the station to take possession of the videotape and ordered that the parties appear for a hearing the following morning.

### Court Hearing

Prior to the hearing, the station filed a petition for injunctive relief asking the court to enjoin execution of the search warrant based upon the First Amendment Privacy Protection Act, 42 U.S.C. §§ 2000aa et seq. This statute generally prohibits law government officials from searching newsrooms and seizing work product or documentary materials, except in cases where the publisher is suspected of a crime. (The statute notably states that for purposes of the statute such crimes do not include claims over the receipt, possession, communication, or withholding of the materials).

The station argued in its petition and during the hearing that the unedited videotape footage constituted both

documentary materials and work product materials protected by the Act. The station agreed to provide the Commonwealth's Attorney with a copy of the aired interview, but objected to producing the unedited portion of the tape. The Commonwealth's Attorney opposed the motion arguing that the statute did not apply to local governments.

After taking the matter under consideration, the circuit court enjoined the execution of the search warrant. The court found that the unedited videotape constituted both work product and documentary materials under the Act and work product materials protected by the Act. In reaching this conclusion, the court stated:

Clearly, the full-length unedited videotape that the Commonwealth seeks qualifies as documentary material and as work product material both under the statute's definitions and under case law. Therefore, the unedited videotape is protected by the First Amendment Privacy Protection Act and not subject to the Commonwealth's search warrant.

This was the second time in the last five years that WAVY-TV successfully opposed a search warrant. It appeared in each case that the magistrate issuing the warrant was unfamiliar with the First Amendment Privacy Protection Act.

WAVY-TV was represented by Conrad M. Shumadine, Gary A. Bryant, and Brett A. Spain of Willcox & Savage, P.C., out of Norfolk, Virginia. The Commonwealth of Virginia was represented by Deputy Commonwealth's Attorney T. Marie Walls in the most recent case.

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## Ohio Court Rejects City's Request to Enjoin Publication of Police Officer Information

### *City Filed Third-Party Complaint Against Newspaper*

By John C. Greiner and Stacey A. Cole

An Ohio court rebuffed an effort by the City of Cincinnati to obtain a prior restraint against *The Cincinnati Enquirer*. *Fraternal Order of Police v. Cincinnati*, No. A 0503473 (Hamilton Comm. Pleas March 2006) (Ruelhman, J.).

The case illustrates the ongoing confusion over the status of home addresses of police officers under Ohio's Public Records Act, as well the utility of the civil rules of procedure in fending off a troublesome claim early in the litigation.

#### **Background**

In February 2005, *Cincinnati Enquirer* reporter Greg Korte made a request under Ohio's Public Records Act for the home addresses of all police officers then employed by the city of Cincinnati. At the time of the request, home addresses of "peace officers" (this included police, fire and EMT personnel) were subject to a limited exemption from the Ohio Public Records Act.

The Ohio legislature had created this specific exemption in response to the case of *Kallstrom v. Columbus*, 136 F.3d 1055 (6th Cir. 1998), in which the Sixth Circuit found a constitutional privacy right in such information under certain limited circumstances.

The Ohio legislature, however, also created an exception to this exemption, which required the release of such addresses to a journalist who made a records request in writing. The request must be signed by the journalist, and must include the journalist's name and title, the name and address of the journalist's employer, and a statement that the disclosure sought is in the public interest.

Believing the "journalist exception" was applicable to Korte's request, the city released the information without providing sufficient notice to the police officers.

The Fraternal Order of Police subsequently filed a complaint against the city, seeking recovery for invasion of their privacy interest in the home addresses as well as

an injunction prohibiting any future release.

At the time the Fraternal Order of Police filed its lawsuit, the parties considered a key issue to be whether the "journalist exception" permitted a "bulk" release of information – in this case, the addresses of the entire force – or whether the exception applied only to requests for information concerning a particular officer. Because at the time, the Ohio Supreme Court was deliberating a case which seemingly presented that issue, the parties stayed the matter pending the Ohio Supreme Court's decision.

On September 7, 2005, the Supreme Court handed down its decision in *State ex rel. Dispatch Printing Co. v. Johnson*, 833 N.E.2d 274, in which it found that home addresses of public employees are, by definition, not public records because the home addresses do not "document the activities" of the public office. Thus, the "journalist exception" would not apply *in most cases*, because the home addresses were not public records in the first place.

#### **City Seeks Injunction**

Following the release of the *Dispatch Printing Co.* decision, the Fraternal Order of Police lawsuit resumed. The city filed a motion to dismiss, which the court denied. Thereafter, the city filed a third-party complaint against *The Enquirer*, arguing that the court should enjoin *The Enquirer* from publishing the information. Although the third-party complaint was not terribly clear, it sought a blatantly unconstitutional prior restraint. *The Enquirer* immediately filed a motion to dismiss.

In pursuing its motion to dismiss, *The Enquirer* brought to the court's attention the problems associated with any request for a prior restraint. But to avoid bogging down the case on those weighty constitutional issues, *The Enquirer* stressed the relatively obvious procedural point – the city's third-party complaint did not (and could not) assert a "claim against" the paper for any liability to the city for the Fraternal Order of Police's claim.

Ohio Civil Rule 14 permits a defendant to assert a third-party complaint only when that defendant claims that

(Continued on page 44)

### Ohio Court Rejects City's Request to Enjoin Publication of Police Officer Information

(Continued from page 43)

the third party is or may be liable to the defendant for all or part of the underlying claim. A classic example is a retailer asserting a third-party claim against a manufacturer when the retailer is sued for selling a defective product.

In this case, however, the city's potential liability arose from its release of the information, a decision that it made on its own. Essentially, the city argued that *The Enquirer* should be subject to third-party liability because it requested the records. *The Enquirer* maintained

that this was not a legitimate basis for a third-party claim.

The court agreed with *The Enquirer's* procedural point, noting at oral argument that "The Enquirer was just doing its job." As a result, the court granted *The Enquirer's* motion to dismiss and halted the city's efforts to obtain a prior restraint.

*John C. Greiner and Stacy A. Cole of Graydon Head & Ritchey represented The Cincinnati Enquirer in this case.*

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## FCC Unloads its Docket

### *Rules on Thousands of Television Indecency Complaints; Imposes Record Fine*

Clearing a four-year backlog, the FCC this month ruled on thousands of television indecency complaints. The Commission upheld its decision to fine CBS for Janet Jackson's Super Bowl "wardrobe malfunction," and it handed down its largest fine ever – \$3.6 million – over a teen sex scene.

These were the first fines imposed under the leadership of Chairman Kevin J. Martin, who took over for Michael Powell last March.

#### *“Without a Trace”*

More than doubling its largest previous single program indecency fine, the FCC ordered 111 CBS owned and affiliate stations to pay the maximum allowable penalty of \$32,500 per station (\$3.6 million total) for airing an episode of “Without a Trace.” (Opinion at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-06-18A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-18A1.pdf)).

The stations fined were only those in the Central and Mountain time zones for which the FCC had received a citizen complaint. Eastern and Pacific time zone stations

aired the episode at 10 PM rather than 9PM, placing them inside the FCC's “safe harbor;” the 10 PM to 6 AM time period during which indecency regulations are not enforced.

The episode, titled “Our Sons and Daughters,” depicted several teenagers engaged in group sex. It also included two shots of teen couples engaged in simulated intercourse. The scene contains no nudity, but “it does depict male and female teenagers in various stages of undress.”

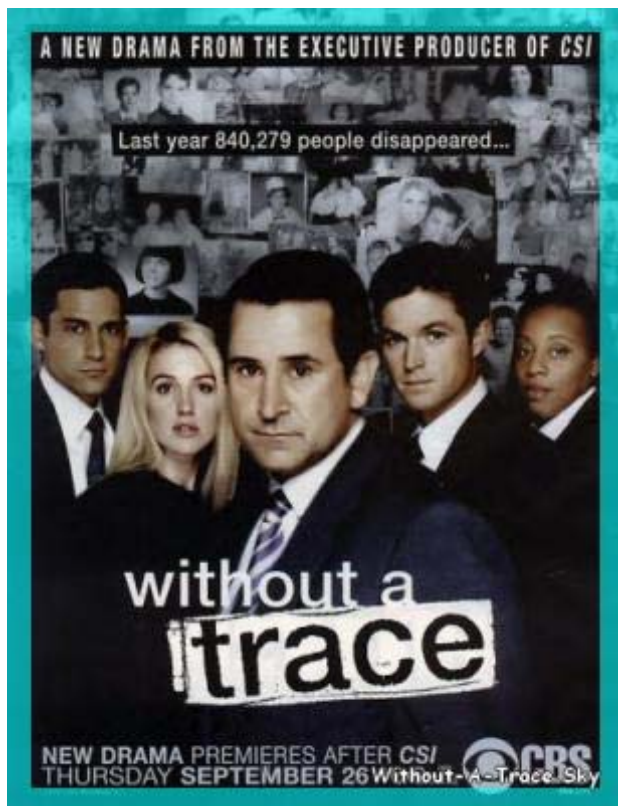
The FCC “defines indecent speech as material that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium.” Contemporary community standards are defined according to the tastes of the average broadcast viewer in the nation. The degree to which this preternaturally typical viewer would be offended is measured by a three factor balancing test.

These factors include: “(1) the explicitness or graphic nature of the description; (2) whether the material dwells on or repeats at length descriptions of sexual or excretory organs or activities; and (3) whether the material panders to, titillates, or shocks the audience.” The degree to which the material panders to or titillates the audience can be mitigated by educational, political, and current affairs content.

In the space of four paragraphs, the Commission ruled that “Our Sons and Daughters” violated decency standards. The program was intended to excite sexual thoughts, included explicit sexual sounds, and would easily be discerned as sexual activity by any child in the audience. The FCC found it particularly offensive that the actors were depicting teenage sex, as if that alone was dispositive of the inquiry.

#### *Ms. Jackson's Wardrobe Malfunction*

The FCC upheld its September 22, 2004 decision, fining CBS \$550,000 (20 CBS-owned stations each fined \$27,500) for its airing of a Super Bowl Halftime



(Continued on page 46)

### FCC Unloads its Docket

*(Continued from page 45)*

show which culminated in Justin Timberlake pulling off a portion of Janet Jackson's bustier, revealing her breast. (Opinion at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-06-19A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-19A1.pdf).)

CBS affiliates were not fined because there was "no evidence that the licensees of any of those stations played any role in the selection, planning or approval of the halftime show or that they could have reasonably anticipated that CBS's production of the halftime show would include partial nudity."

On appeal, CBS argued: 1) that the Super-Bowl Halftime show was not indecent; 2) that any violation of the rules was not "willful" as required for liability under §503(b)(1)(B) of the Communications Act; and 3) that the FCC's indecency regulations were unconstitutionally vague and overbroad both facially and as applied.

Using the same three part balancing test outlined above, the FCC quickly rebuffed CBS' contentions. As for the first factor, explicitness, the FCC stated "[n]otwithstanding CBS's claimed befuddlement at how the televised image of a man tearing off a woman's clothing to reveal her bare breast could be deemed explicit, we believe that conclusion is clearly warranted by the facts here and fully consistent with the case law."

Although the display was brief, the FCC ruled that this mitigating factor was overwhelmed by the aggravating factors present in the first and third prongs of the test. Discussing the context of the performance, the FCC found it highly sexualized, containing suggestive lyrics and sexual gestures such as crotch grabbing, and thus it was clearly intended to titillate.

The FCC interpreted "willful" as the term is used in trespass rather than how it is used in criminal or copyright law. That is, it is sufficient that CBS intended to broadcast the show. "Willful" is defined as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law.

It is enough, the opinion states, that CBS was aware of some risk that indecency rules could be violated and yet failed to take available precautions that would have prevented the broadcast of indecent material. Even if CBS had no knowledge that Ms. Jackson's breast would be revealed, CBS is responsible for her actions, as well as those of the other performers, under a respondeat superior theory. The performers

were employed by a Viacom subsidiary and CBS had a high degree of control over their actions.

The Commission did not fully entertain CBS' Constitutional arguments, dismissing them with a reference to the many judicial decisions upholding the indecency framework. CBS' contention that new technologies had rendered FCC regulation of broadcast obsolete was shunted aside just as quickly.



Lastly, the FCC rejected CBS' concern that this ruling would chill coverage of live public affairs and political programming, noting that this was a staged event for which CBS had ample notice and opportunity to prepare. Given CBS' knowledge that the program was live and would contain sexually charged material, the decision notes, they should have taken more precautions, such as instituting a video delay.

### *Other Sanctions and Complaints*

In its memorandum "Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005," the FCC addressed hundreds of thousands of other complaints regarding programming aired between February

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## FCC Unloads its Docket

(Continued from page 46)

2002 and March 2005. (Opinion at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/FCC-06-17A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-06-17A1.pdf)).

The FCC imposed fines involving six programs. Several of these programs aired on multiple stations, but only those stations that had viewer complaints lodged against them were fined.

- “The Surreal Life 2”: The Commission imposed a \$27,500 against WBDC Broadcasting for airing an episode showing Ron Jeremy, an adult film star, having a pool party with several female adult film stars. “The scene lasts for over ten minutes, contains approximately twenty pixilated images of nude adults, including a fully nude body, and focuses almost entirely on men and women disrobing, ogling, fondling, kissing, and sexually propositioning one another during a pool party.” Pixilation, the Commission notes, does not preclude forfeiture, but must be analyzed in context.
- “Con El Corazón En La Mano”: NBC Telemundo was fined \$32,500 for airing a graphic rape scene. The FCC rejected claims that the scene was necessary for a realistic portrayal of events. Even if it were, the opinion states, the factors other than pandering (explicitness and dwelling at length) are sufficient to justify the fine.
- “Fernando Hidalgo Show”: The FCC fined the Sherjan Broadcasting Company \$32,500 for a segment of a talk show where a woman wore an open front dress with only her nipples covered. The comedic nature of the program did not mitigate its intent to titillate.
- “Video Musicales”: Aerco Broadcasting Corp. was fined \$220,000 for airing explicit Spanish language music videos. The amount was reduced from \$385,000 (\$27,500 multiplied by 14 broadcasts) because the Commission deemed the smaller amount sufficient for deterrence and the broadcaster had no prior indecency violations.
- “The Blues: Godfathers and Sons”: This most controversial decision imposed a \$15,000 fine on San Mateo County Community College District for airing a program that included multiple uses of the words “fuck” and

***The Commission did not fully entertain CBS’ Constitutional arguments, dismissing them with a reference to the many judicial decisions upholding the indecency framework.***

“shit.” The program in question, executive produced by Martin Scorsese is a documentary about the history of the blues and its influence on modern hip-hop music. The film also aired on various PBS stations. Unlike its prior decision on the broadcast of “Saving Private Ryan” which dismissed a complaint over such language where deleting would have diminished the power and realism of the film, here the FCC determined that San Mateo had not shown the expletives to be necessary. Given that the station is a small non-profit educational broadcaster, it was not fined the maximum amount allowed. Commissioner Jonathan Adelstein vigorously dissented from this decision, saying that it would chill protected speech.

- “The Pursuit of D.B. Cooper”: KTVI TV was fined \$27,500 for airing a movie containing multiple gratuitous utterances of the words “shit,” “horseshit,” “bullshit,” and “owl shit.”

Several broadcasts were determined to be indecent or profane but were not fined because the Commission’s “precedent at the time of the broadcast indicated that [it] would not take enforcement action against isolated use of expletives.” (These broadcasts aired before the Commission’s 2004 ruling in *Golden Globe Awards*, which fined several stations for airing a speech where Bono said something approximating “fuck.”)

### ***Oprah and Today Show Spared***

Two of the more interesting of the many decisions where fines were not imposed concerned the Today Show and the Oprah Winfrey Show. During live coverage of a police rescue, broadcast during the Today Show, a man wearing only a shirt was pulled from flood waters, briefly exposing his genitals. The Commission found that the news context of this rescue, and that it was not intended to titillate, militated against liability.

And Oprah Winfrey’s discussion of sexual vocabulary used by teenagers was also found not to be indecent. Despite discussion and definition of such terms as “rainbow party,” “booty call,” and “tossed salad,” the Commission found the show was presented with an educational intent, rather than intent to titillate.

## Department of Justice Continues Crackdown On Publication of Advertisements for Online Gambling

By Robert J. Driscoll

Recent developments make clear that for United States media outlets, publishing or broadcasting advertisements for offshore gambling websites continues to be a risky business.

### *Sporting News Settles with Prosecutors*

Since the late 1990's, federal and state prosecutors have sought to restrict the availability in the United States of offshore gambling websites, contending that offering gambling activities to United States residents via the sites violates various federal and state anti-gambling laws.

Initially, prosecutors focused on those who run the websites. However, the government (apparently recognizing the difficulties involved in locating and prosecuting offshore businesses and their principals) subsequently turned its attention to U.S.-based companies that do business with operators of online gambling sites, including financial services companies that process gambling-related payments and media companies that run advertisements for the sites.

In a signal that the government's campaign against these peripheral players remains in force, the United States Attorney for the Eastern District of Missouri in January 2006 announced a settlement with The Sporting News concerning its publication of advertising for offshore sports betting and casino-style gaming operations.

In the settlement, the publisher, without admitting any liability, agreed to pay \$4.2 million to the United States and to undertake a \$3 million public service anti-gambling campaign. This appears to be the largest civil forfeiture to date by any media company in connection with publication of advertisements for offshore gambling sites.

### *Pressure on Publishers*

The settlement involving The Sporting News is the latest development in a pressure campaign against media outlets that has been underway for several years.

In 2003, an Assistant Attorney General in the Department of Justice's Criminal Division sent a letter to the National Association of Broadcasters informing it, as a "public service," that provision by offshore gambling sites of their services to United States residents violates various federal laws, including the Wire Act (18 U.S.C. § 1084), the Travel Act (18 U.S.C. § 1952), and the Illegal Gambling Business Act (18 U.S.C. § 1955), and that broadcasters that run advertisements for such sites may be guilty of aiding and abetting these illegal activities.

The prosecutor noted that broadcasters might wish to "consult with their counsel or take whatever actions they deem appropriate" with respect to such advertisements. At around the same time, the office of the United States Attorney for the Eastern District of Missouri, which has for several years been the primary source of the federal government's prosecutorial activities in this area, issued a number of subpoenas to

media outlets seeking information relating to online gambling advertisements.

Other highly-publicized examples of the federal government's activities in this area include the seizure from Discovery Communications in 2004 of \$3.2 million that the company had received for commercial airtime purchased by an offshore online casino, and a 2004 settlement between the federal government and a group of St. Louis radio stations that involved a forfeiture of \$158,000.

### *Casino City Lawsuit Dismissed*

In response to the government's enforcement activities, a number of publishers – although disputing the government's position that publishing gambling advertisements may be a violation of the federal aiding and abetting statute – determined that the risk of investigation or prosecution outweighed the benefits of running the advertisements, and the advertisements disappeared from many major media outlets.

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## Department of Justice Continues Crackdown On Publication of Advertisements for Online Gambling

(Continued from page 48)

One media company, however, decided to fight. Casino City, an operator of websites featuring information about and advertising for online gambling sites, filed a complaint in 2004 against the United States in federal court in Baton Rouge, seeking a declaratory judgment that the threatened application of the federal aiding and abetting statute to Casino City's publication of advertisements for online gambling sites violates the First Amendment.

The District Court dismissed the complaint in February 2005, holding that Casino City had failed to establish an actual case or controversy and that it lacked standing because it had failed to show a credible threat of prosecution.

*See Casino City, Inc. vs. United States Department of Justice*, Civil Action No. 04-557-B-M3 (M.D. La. February 15, 2005).

Among other things, the court found it important that the Department of Justice had not sent its 2003 letter to Casino City, served Casino City with a subpoena, or issued to it a target letter advising it that it was the subject of a criminal investigation.

The court did not stop there, however – it went on to reject Casino City's First Amendment claims on the merits. It analyzed, in a rather cursory fashion, the government's activities with respect to online gambling activities under the framework set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980):

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

*Id.* at 567.

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**United States media outlets that continue to deal with online gambling companies must remain prepared for further governmental scrutiny.**

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The Casino City court held that because advertisements for online gambling “only address[] illegal activity” and “falsely portray[] the image that Internet gambling is legal,” such advertisements do “not [constitute] speech that is protected by the First Amendment.”

The court went on to assert that the government has a substantial interest in regulating Internet gambling “because of its accessibility by the general public, which includes children and compulsive gamblers.”

Finally, the court noted that “[b]y targeting and punishing advertisers who utilize this information, the government reaches its goal of deterring this illegal activity” (apparently concluding that the government's activities therefore “directly advance” the governmental interest asserted, as required by *Central Hudson*).

It did not, however, explicitly consider the final element of the *Central Hudson* analysis, i.e., whether the government regulation “is more extensive than is necessary to serve [the asserted governmental] interest.”

Casino City initiated an appeal to the Fifth Circuit, which the parties fully briefed, but Casino City withdrew the appeal after oral argument. The District Court's decision therefore remains the last word on the First Amendment issues relating to online gambling advertisements.

### ***The Future of Online Gambling Ads?***

One of the arguments made by offshore gambling companies, and media companies that publish their advertisements, is that not all forms of gambling are prohibited under federal law.

They note that although the federal government has relied heavily on the Wire Act to support its blanket assertion that all forms of online gambling violate federal law, that statute refers only to “bets or wagers on any sporting event or contest,” such that it is applicable only to sports betting operations and not casino-style gambling. *See In re MasterCard Int'l*, 313 F.3d 257, 273 (5th Cir. 2002) (noting that “the Wire Act does not prohibit non-sports [I]nternet gambling”).

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## Department of Justice Continues Crackdown On Publication of Advertisements for Online Gambling

*(Continued from page 49)*

To the extent this limitation of the Wire Act presents a loophole for operators of offshore casino-style gambling websites, however, it may soon be closing: The Internet Gambling Prohibition Act (H.R. 4777), introduced in the House of Representatives in February 2006 by Rep. Robert Goodlatte, would amend the Wire Act such that it would apply to all forms of online gambling, including casino-style gambling.

In addition, the limitations of the current Wire Act notwithstanding, many forms of Internet gambling violate various state laws, and would therefore also run afoul of the federal Illegal Gambling Business Act, 18 U.S.C. § 1955, which criminalizes gambling businesses that violate state law and exceed certain revenue or operational thresholds.

Another aspect of the online gambling controversy that is likely to draw further attention is the advertising of “.net” sites. These are sites affiliated with gambling websites and accessible at a URL that is virtually the same as the gambling site, except that the website address ends with “.net” rather than “.com” (for example, a gambling website located at allgambling.com might have a companion site at allgambling.net).

The content of these companion sites vary, but they all tend to avoid directly offering paid gambling services. Many of them are limited to offering gambling-related information, and others offer Internet users the opportunity to play games such as poker and blackjack but without paying a fee or receiving a prize.

A number of media outlets now run advertisements for these companion sites, believing that they are sufficiently removed from actual gambling activity to minimize the threat of governmental scrutiny.

Some also have attempted to protect themselves by carefully reviewing the content of the “.net” sites to make sure that they do not offer gambling services or link directly to gambling sites, and requiring advertisers to verify that the funds used to pay for the advertising space are not derived from gambling activity.

It remains to be seen how prosecutors will view “.net” advertising. There are some reports that the Department of Justice is looking into media outlets that accept advertisements for these “.net” sites, but it appears that the investigative focus may be on those sites that actually offer consumers the ability to play poker and similar games (albeit without charge), rather than those sites that only offer gaming-related information.

In any case, it is unlikely that offshore gambling companies will cease trying to reach consumers in the United States. Given the highly visible and political nature of the federal government’s anti-gambling campaign, those United States media outlets that continue to deal with online gambling companies – regardless of the specific manner in which those companies advertise – must remain prepared for further governmental scrutiny.

*Robert J. Driscoll is a partner in the New York office of Davis Wright Tremaine LLP.*

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## Google Image Search Thumbnails Held Likely to Infringe Photo Copyrights

By Mark Sableman

In a decision with potentially broad implications for search engines, a federal district court has ruled, on a preliminary injunction motion, that the creation and display of thumbnail images, in the ordinary operation of Google's Image search service, likely infringes copyrights of parties that object to the indexing and display of their images in that service. *Perfect 10 Inc. v. Google, Inc.*, 2006 WL 454354 (C.D. Cal. Feb. 17, 2006) (Matz, J.).

Though limited to the image search function, the decision could have ramifications for other search engine services, including even textual search results. The court considered and addressed several important issues raised by the Google Image search service (some of which also arise in the context of other search engine services):

- Whether the thumbnails that are essential to displaying image search results themselves infringe copyrights in the original photographs
- Whether the use of "inline linking" to bring an image resident on the original publisher's server onto the page created by the search engine constitutes a display-right infringement
- Whether the act of framing the searched-for photo on a search-engine-created composite page constitutes some kind of infringement
- Whether search engine operators can be secondarily liable for infringement committed by internet users, or by third-party sites that obtain customer traffic through search engine listings

The court found infringement liability only as to as to the first issue (direct infringement through creation and use of thumbnails), and rejected infringement with respect to use of the in-line linking and framing techniques, and the secondary liability theories. But although the decision did not go as far as the plaintiff wanted, it still represents a significant impingement on customary search engine practices.

### *Background*

Perfect 10 is the publisher of an adult magazine and the operator of a subscription website, both of which feature "high-quality, nude photographs of 'natural' models," according to the court. Moreover, in addition to its magazine and website outlets, since early 2005 (after it filed this case), Perfect 10 through a licensing arrangement with a UK mobile phone service provider has sold reduced-size copyrighted images for download and use on cell phones – approximately 6,000 downloads per month in the United Kingdom.

Perfect 10 is also a frequent litigator, largely unsuccessful until now, of innovative copyright claims against internet intermediaries including search engines, service providers, and credit card companies.

Google, of course, is one of the most admired companies of the day, known to almost everyone. But several relatively unknown aspects of its services played important roles in the decision. First,

Google lets websites opt out of having their content indexed.

If a website signals that it does not wish to be indexed, or wishes only partial indexing, Google will honor that request. In this case, Google has apparently honored Perfect 10's wishes not to be indexed, but it has continued to index Perfect 10 photographs that appear on infringing websites.

Second, Google has two advertising programs, the well-known AdWords program, for advertising on Google's own pages, and the less visible AdSense program, whereby pages on third party websites carry Google-sponsored advertising and share the resulting revenue with Google. The focus of the case appears to have been on Google thumbnail indexing of Perfect 10 photos found on infringing third-party websites – particularly websites that belonged to the AdSense program.

One prior case has addressed an image search engine, *Kelly v Arriba Soft Corp.*, 280 F.3d 935 ("Kelly I") and 336 F.3d 811 (9th Cir. 2003) ("Kelly II"). *Kelly I* had addressed in-line linking – the process by which one website (here, the image search engine) signals through HTML code that an image from another website (here, the original publisher of

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***Perfect 10 is also a frequent litigator, largely unsuccessful until now, of innovative copyright claims against internet intermediaries including search engines, service providers, and credit card companies.***

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## Google Image Search Thumbnails Held Likely to Infringe Photo Copyrights

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the photograph) should be displayed on the user's browser.

*Kelly I* held this process constituted infringement of the copyright display right, but the Ninth Circuit later withdrew that controversial and much-criticized ruling on procedural grounds in *Kelly II*. *Kelly II* addressed only image search thumbnails, and held that the image search engine's creation and use of them constituted fair use.

### ***In-Line Linking & Infringement***

In *Perfect 10*, the court first addressed Google Image Search's use of two special internet techniques: in-line linking, and framing.

Google, like the Arriba Soft image search engine involved in the earlier decision (now Ditto.com), creates a special page when the image-search user shows interest in a photo thumbnail shown on its image search results page. The resulting page is shown in frames. The upper frame, from Google's server, shows the thumbnail and a textual explanation about it.

The bottom frame displays the full photograph, from its home website; it does so because Google, which created the two-frame page, so directed, through an in-line link. The overall framed page will display a Google URL, since Google's webpage had created the framed composite page.

The court considered Google's framing and in-line link in the copyright context. It noted that framing could mislead consumers as to a website's origin by creating a "seamless presentation" from content taken from the creator's own and third party websites – but this was a trademark issue, not a copyright issue. Thus, the court essentially found framing irrelevant in a copyright analysis.

As to in-line linking, the court recognized two different approaches, one which favored Google and one which favored *Perfect 10*. The court adopted the "server" approach to in-line linking, which favored Google. Under this approach, the "display" of the image – i.e., the utilization of this exclusive right of the copyright owner – is attributed to the party that physically sends the content to the user's browser. In this case, it was the underlying site

that contained the full photograph. While acknowledging that this test could be abused (a website entitled "Infringing Content for All," with thousands of in-line links), the court found it to be the most straightforward and intuitive.

The opposing approach to in-line linking, which the court termed the "incorporation" test, would have attributed the "display" to the website that inserted the in-line link, and thus sought to incorporate an image from another website into the composite page of its design. While this approach had its pluses (it focused on the "visual" resulting page) and potential abuses (placing even well-explained well-intended in-line links at risk of infringement), ultimately the court seem to find it incompatible with the link-happy and search-needy nature of the internet.

"To adopt the incorporation test would cause a tremendous chilling effect on the core functionality of the web – its capacity to link, a vital feature of the internet that makes it accessible, creative, and valuable," the court held. Similarly, referring to the "delicate balance" in copyright law between encouraging initial creativity and encouraging dissemination of information, the court held that the incorporation test would defeat that policy if it made it infringement "merely to index the web so that users can more readily find the information they seek."

Thus, the court in *Perfect 10* exculpated Google from any direct copyright infringement liability by virtue of its use of in-line linking in connection with the Google Image service. Considering the contrary *Kelly I* conclusion, which took a far more expansive view of the copyright display right, this holding was a useful win for Google, and other users of the in-line linking technique.

### ***Fair Use Analysis***

In the next part of its analysis, however, the court departed from *Kelly II*'s conclusion that image search thumbnails were protected by fair use. Changes in facts both about the search engines (Google's broad advertising services) and the original photograph copyright owner (especially, the salability of thumbnail-sized photos for cell phone displays) contributed to this different holding.

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## Google Image Search Thumbnails Held Likely to Infringe Photo Copyrights

(Continued from page 52)

The *Kelly II* holding that image search thumbnails were fair use had hinged largely on the non-commercial nature of the Arriba Soft image search engine, and the transformative nature of the thumbnails, due to the fact that the thumbnail images did not replace the market for the full-sized images, but rather served a different (and public interest) purpose of enabling users to find images on the internet. In *Perfect 10*, however, the court found that Google obtained commercial benefit from its Image Search, and its thumbnails supplanted a commercial use, the use of images for cellphone displays.

On the commercial benefit point, the court noted that Google's AdSense program allows Google to benefit when internet users are directed to participating websites, because Google shares in the revenue obtained from AdSense ads. Indeed, the court noted that 46% of Google's total revenues derived from the AdSense program. Although Google asserted that its policy prohibits posting of images from AdSense partners on Google Image Search, the court credited evidence that the policy was not consistently enforced. Accordingly, the court treated Google as a party deriving commercial benefit from the thumbnail displays, and thus found that the fair use factor relating to the purpose and character of the use, including the commercial versus non-commercial aspect, to slightly favor Perfect 10.

(Media lawyers may have some concerns with this conclusion. Considering that fair use doctrine embodies the public interest and First Amendment interests in use of copyrighted materials, the conclusion that profit makes the difference between a protected use (the non-commercial Arriba Soft image search engine) and an unprotected use (the for-profit Google Image search engine) seems to contradict the principle that the First Amendment applies to all, including profit-making businesses.)

The fair use factor relating to the effect of the use on the market for the copyrighted work had been the decisive one in *Kelly II*, because the Ninth Circuit found the search engine use "transformative," and not "consumptive" – that is, the thumbnails used by the image search engine served a

different function than the original photographs, and thus did not substitute for them in the marketplace.

In *Perfect 10*, the court acknowledged that the thumbnails still accomplished that transformative search-related use, but in view of Perfect 10's exploitation of the cell phone display market, the Google thumbnails also performed a consumptive use. People could, and probably did, use Google thumbnails as a substitute for paid Perfect 10 cell phone downloads. The court employed some speculation on this point, including its observation "that viewers of P10's photos of nude women pay little attention to fine details." The court did not discuss the fact that Perfect 10's thumbnail sales began after the suit was under way. Accordingly, the court found this factor to weigh slightly in favor of Perfect 10.

The court decided the two other stated fair use factors similarly to *Kelly II*; the amount and substantiality of the portion used was neutral and the nature of the

copyrighted work weighed slightly in favor of Perfect 10. The court did not – unlike the court in *Field v. Google Inc.*, (D. Nev. Jan. 12, 2006), which considered fair use in the context of Google caching a month earlier – consider factors other than the four stated factors in section 107, despite that section's non-exclusive language.

After considering the four stated factors, the court essentially applied an arithmetical weighing of those factors, concluding that three factors slightly favoring Perfect 10 and one neutral led to a clear conclusion of no fair use. This section of the decision – particularly contrasted against the *Field* analysis that gave strong weight to the public policy interest in search engine functioning in connection with an unstated "public interest" fair use factor – may well become the focus of discussion concerning the correctness of the thumbnail ruling.

Based on its rejection of the fair use defense, and Google's acknowledgement that it created and stored the thumbnails, the court found it likely that Perfect 10 would prevail on its direct infringement claim against Google based on the thumbnail images.

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***The court found that Google obtained commercial benefit from its Image Search, and its thumbnails supplanted a commercial use, the use of images for cellphone displays.***

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## Google Image Search Thumbnails Held Likely to Infringe Photo Copyrights

(Continued from page 53)

### **Impact of the Decision**

Copyright-owner plaintiffs in other suits will undoubtedly find encouragement in this ruling. Agence France Press is challenging the use of its headlines and other materials by the Google News service. Book authors and publishers are challenging the planned Google Library project which would permit searching and review of short excerpts of copyrighted books.

And like the recent pro se case of *Parker v. Google Inc.*, No. 04-CV-3918, 2006 WL 680916 (E.D. Pa. March 10, 2006), other suits could assert claims that the website excerpts found in Google's ordinary textual search listings infringe copyrights. Many of these claims could hinge on whether courts are willing to step beyond the four stated fair use factors to recognize a public interest in the information-indexing benefits of search engines.

The court then turned to Perfect 10's secondary liability claims against Google. For secondary liability to exist, of course, there must be some direct infringement by someone. The court found no evidence that individual users of Google infringed Perfect 10's copyrights, and thus did not consider that as direct infringement. It examined, instead, Google's secondary liability or the direct infringement by third party websites that reproduce and display Perfect 10's photographs.

For contributory infringement, Perfect 10 had to show that Google knew of the infringing activity and induced, caused or materially contributed to it. Perfect 10's theory was that by helping people find sites that carried infringing material, Google was materially contributing to the infringement. The court decided that even if Google had knowledge of the third party infringement from the many notices that Perfect 10 sent it, Google's mere facilitation of searching was not equivalent to the far more active participation that has been found sufficient in the Napster case.

As to vicarious liability, which required proof that Google enjoyed direct financial benefit from the third party websites' infringement, and that Google had declined to exercise its right and ability to control the infringement, the court found that Perfect 10 could not

"control" third party infringement for a some basic reasons: "Google does not exercise control over the environment in which it operates – *i.e.*, the web", and even the AdSense program falls short of creating such strong control over third party sites.

Based on the court's refusal of the secondary liability theories, the court concluded that Perfect 10 was not entitled to all of the preliminary injunction relief it sought, and it requested the parties to jointly propose the terms of an injunction implementing the court's decision – an injunction to be "carefully tailored to balance the competing interests ... of intellectual property rights on the one hand and those promoting access to information on the other."

Amazon.com was also a defendant in the case, because of its licensed use of Google technology, but the decision addressed only plaintiff's claims against Google, and promised that a separate order would address the issues as to Amazon.

*Mark Sableman is a partner with Thompson Coburn in St. Louis MO. Jennifer A. Golinveaux, Michael S. Brophy, and Andrew P. Bridges of Winston and Strawn, San Francisco, CA, represented Google. Daniel J. Cooper, Beverly Hills, CA; Jeffrey N. Mausner, of Berman Mausner and Resser; and Jeffrey D. Goldman, Russell J. Frackman, of Mitchell Silberberg and Knupp, Los Angeles, CA, represented Perfect 10.*

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## Protecting Those That Inform Us

### *Journalists' Shield Laws in Australia*

By Peter Bartlett and Chris Sibree

At the same time that America was consumed by the imbroglio of Judith Miller refusing to reveal her sources and going to jail, CIA agents being ratted out, Scooter Libby's indictment and a revived push for a federal shield law to protect journalists' sources from disclosure, Australia was focusing on its own governmental scandal.

#### **Background**

In February 2004, one of Australia's most widely read tabloid newspapers, the *Herald Sun*, published a contentious article outlining the Federal Government's plan to reject increases in war veterans' benefits. Written by two senior journalists with the paper, Michael Harvey and Gerard McManus, the feature was allegedly based on secret Government documents that the journalists had seen.

Federal police later charged a senior Federal bureaucrat with unauthorized disclosure of information. On two occasions at court hearings concerning the charges, Harvey and McManus were asked to identify their source. Both times they refused. The presiding Judge later directed that they be charged with Contempt of Court. The pair currently await trial.

The plight of Harvey and McManus re-focused calls for the enactment of a shield law in Australia. While over 30 US States and many countries worldwide have enacted legislation or developed case law which, to a certain extent, shield journalists and their confidential sources in court proceedings, there are scant protections for journalists' sources in Australia.

#### **Australian Law**

Australia has long had a disparate patchwork of evidence laws across the various states and territories, causing anomalies between the jurisdictions. The clos-

est Australia has to a shield law operates only in New South Wales (Sydney). The *Evidence Act* 1995 (NSW) privileges from disclosure "protected confidences" and "protected identity information," shielding the identity and information disclosed by a third party to a confidant in their professional capacity (including journalists) where the circumstances manifest an obligation to not disclose the information or identity.

The obligation can arise under law or from the nature of the relationship between the two, and the privilege does not apply where waived by the person making the communication or the communication was made in furtherance of a commission or fraud. The discretion is not absolute, the court being required to balance certain specified conditions before directing that the privilege exists.

However, after being asked by the Federal Attorney General, the Australian, New South Wales and Victorian Law Reform Commissions recently released their report into a renewed push for national uniform evidence laws.

In a clear recognition of the fact that it may be in the interests of justice to protect the confidentiality of professional confidential relationships, the Commissions recommended that the New South Wales provisions in relation to protection of journalists' sources be incorporated into the uniform evidence statutes Australia-wide.

While the recommendation supports limiting the protections to "circumnavigate illegitimate attempts to claim the privilege," it represents a substantial improvement in the current status quo, which is at best perforated and at worst non-existent. The recommendation will have significant force in the final framing and adoption of any uniform evidence legislation.

Importantly, Victoria (Melbourne) leads the charge and has already said that it will implement the Commissions recommendation, meaning the contempt charges against Harvey and McManus may be dropped.

(Continued on page 56)

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***The recommendation represents a substantial improvement in the current status quo, which is at best perforated and at worst non-existent.***

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### Protecting Those That Inform Us

*(Continued from page 55)*

One area of the proposal remains of concern however. Under the proposed laws, there is no protection of journalists where they are involved in the “furtherance” of the commission of a fraud or an offence or the commission of an act that renders a person liable to a civil penalty.

Arguably, the term “furtherance” would not protect the Harvey and McManus situation, as all leaks by federal public servants are punishable under the Crimes Act with two years in prison.

While the Federal Attorney General has said that these two journalists would be protected under any amendments and “does not accept any inconsistency” between that sentiment and the proposal, there does appear to be some ambiguity.

### Conclusion

Shield laws contribute dramatically to the quality of reporting, the ability of the media to investigate and expose public and private scandals and hidden issues and to the upholding of the basic tenets of the implied constitutional freedom of political discussion and communication that the Australian High Court has established.

Although there is some way to go, the recent struggles to provide protections for journalists and their sources looks closer than ever to becoming a national reality. This is undoubtedly a positive move, particularly in light of the recent events surrounding journalists in Australia and elsewhere.

*Peter Barlett and Chris Sibree are with Minter Ellison in Melbourne, Australia.*



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## Atlanta Airport Newsrack Litigation: Finding City “Stubborn And Contentious”

### **11th Circuit Rejects Appeal & Affirms \$1.2 Million Plus Fee Award To Publishers**

Rejecting yet another appeal by a “stubborn and contentious” City of Atlanta, the Eleventh Circuit brought to a close almost a decade of litigation by affirming a district court order awarding newspaper publishers over \$1.2 million in attorney’s fees and costs for successfully challenging the constitutionality of non-fee aspects of the Atlanta airport’s newsrack regulations. *Atlanta Journal-Constitution, USA Today and The New York Times v. City of Atlanta Department of Aviation*, 2006 U.S. App. LEXIS 6359 (11th Cir. 2006) (Cox, J., with Dubina and Marcus, JJ.). See *MLRC MediaLawLetter* Feb. 2002 at 31; Mar. 2003 at 49; Dec. 2004 at 57.

#### **Background**

In 1996, the *Atlanta Journal-Constitution*, later joined by *USA Today* and *The New York Times*, challenged as unconstitutional a proposed newsrack regulation scheme at the City’s Hartsfield-Jackson Airport that (1) vested officials with unfettered discretion in the granting or revoking of permits; (2) forced publishers to use newsracks bearing advertisements for other products; and (3) required publishers to pay a fee not tied to the City’s costs in administering the scheme.

The scheme was immediately and preliminarily enjoined in 1996, see 1996 U.S. Dist. LEXIS 22591 (N.D. Ga. 1996) (Hunt, J.), and again in 1998, see 6 F.Supp.2d 1359 (N.D. Ga. 1998) (Story, J.) (denying City’s motion to dissolve injunction), and permanently enjoined in 2000, see 107 F.Supp.2d 1375 (N.D. Ga. 2000) (Story, J.).

In early 2002, an Eleventh Circuit panel affirmed the injunction in its entirety. See 277 F.3d 1322 (11th Cir. 2002) (Hill, J., with Black and Stapleton, JJ.). In February 2003, the Eleventh Circuit *en banc* affirmed the trial court’s injunction generally – including specifically its prohibitions of unrestrained official discretion and of forced advertising – but reversed its revenue-raising fee prohibition. See 322 F.3d 1298 (11th Circuit 2003) (*en banc*). The Court remanded the case to the district court for further proceedings consistent with its opinion, specifically leaving open the issue of whether the City would be

entitled to back rent for newsracks placed at the airport while the injunction was in place. 322 F.3d at 1312.

On remand, on December 2, 2004, the district court awarded the City restitution in the amount that it was enjoined from collecting during the period of the injunction against the 1996 newsrack plan, i.e., \$15 per newsrack per month (arrived at by taking the \$20 fee from the 1996 plan minus a \$5 “cost recovery” fee because the publishers never used city-provided newsracks). See 347 F. Supp.2d 1310, 1316-18 (N.D. Ga. 2004) (Story, J.). The restitution award amounted to \$240,072.60 from The Atlanta Journal-Constitution, \$18,771.60 from The New York Times, and \$90,801.39 from USA Today. 347 F. Supp.2d at 1326.

The district court also awarded attorneys’ fees and expenses to the publisher plaintiffs. The district court concluded that plaintiffs were prevailing parties who had conferred a substantial public benefit, but reduced plaintiffs’ recovery by twenty percent to account for the City having prevailed on its ability to charge a profit-conscious fee. See *id.* at 1318-25. The district court declined any further reduction in fees in light of “the City’s stubborn litigiousness, and steadfast adherence to the 1996 Plan which prolonged the litigation.” *Id.* at 1325. The attorneys’ fee award amounted to \$678,487.80 to The Atlanta Journal-Constitution, \$16,200.28 to The New York Times, and \$659,016.38 to USA Today. *Id.* at 1326.

#### **11th Circuit Affirms**

On March 15, 2006, the Eleventh Circuit brushed aside a City appeal and affirmed both awards. With respect to the restitution award, the Eleventh Circuit rejected the City’s contention that it should have been awarded not only the \$20 enjoined rate, but also higher rates it would have charged in 1997 and 2003 had the injunction not been in place. *Slip Op.* at 10-12. The Eleventh Circuit found that the district court did not abuse its discretion in finding “that the only object of the injunc-

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**Atlanta Airport Newsrack Litigation:  
Finding City “Stubborn And Contentious”**

*(Continued from page 57)*

tion was the 1996 plan (which contained a \$20 per newsrack per month rent), not any contemplated plan that was never before the court.” *Id.* at 11. The Eleventh Circuit also noted that the district court considered several other factors in setting the restitution award, including finding that to allow restitution at greater rates would constitute a retroactive increase on publishers, and rejecting the publishers’ argument that the restitution award should be further limited, if allowed at all. *Id.* at 12-13.

The Eleventh Circuit also affirmed the attorneys’ fee award, rejecting the City’s argument that the award should have been limited to the fees and costs incurred in securing the preliminary injunction in 1996, or alternatively, reduced more than twenty percent due to the City prevailing on the issue of its ability to charge a revenue-conscious fee. *Id.* at 14-15. The Eleventh Circuit agreed with the district court that the publishers conferred a “substantial public benefit” worthy of an eighty percent award. *Id.* at 15. The Court found that:

[t]he publishers were successful in resisting the Department’s plan to unconstitutionally force them (and other newspaper publishers) to display Department-determined advertising on the news-

racks in the airport. Plaintiff publishers were also successful in protecting themselves and other newspaper publishers from the unconstitutionally boundless discretion of a Department official who, under the 1996 plan, would have determined which publishers could use which (if any) newsracks in the airport.

*Id.* at 15-16.

The Court also found that the district court did not abuse its discretion in finding that the City was not entitled to a further fee reduction because its own litigation strategy had been “stubborn and contentious,” and in finding that “by continuing to litigate all aspects of the 1996 plan in the district court and on appeal, the Department was ‘largely responsible for the long duration of the litigation and mounting attorneys’ fees.’” *Id.* at 16-17 (citation omitted).

The Atlanta Journal-Constitution and The New York Times have been represented by Peter Canfield, Marcia Bull Stadeker and Lesli Green of Dow, Lohnes & Albertson. USA Today has been represented by James Rawls and Eric Schroeder of Powell Goldstein. The City of Atlanta has been represented by William Boice, Michael Tyler and Jill Warner of Kilpatrick Stockton.



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## LEGISLATIVE UPDATE

### Open Government Act, Executive Order 13392

By Kevin M. Goldberg

The Open Government Act was introduced one year ago with high hopes that the proposed procedural changes to FOIA would be welcomed by members of both parties, allowing for some much-needed reform to FOIA processing. Unfortunately, the bill, like implementation of law it seeks to amend, is mired in bureaucratic wrangling that will delay its ultimate resolution.

After two hearings and constant negotiation among Hill staff on the more controversial provisions of the bill, a potential hearing could still occur in the House Government Reform Committee this spring. However, an Executive Order released in December 2005 threatens to put the Open Government Act in a permanent holding pattern for most of 2006.

#### ***Open Government Act of 2004*** **(S 394 and HR 867)**

- The Open Government Act was introduced by Senators John Cornyn (R-TX) and Patrick Leahy (D-VT) as S 394 on February 16, 2005; Rep. Lamar Smith (R-TX) introduced the bill as HR 867 in the House on the same day.
- Among the bill's proposed changes are:
  - A broader definition of the "news media" which will apply to any requestor who demonstrates an intent to distribute information to a wider audience, regardless of affiliation.
  - A change to the rule regarding recovery of attorneys fees, allowing litigants to obtain attorneys fees if a substantial part of the records were obtained through court order or settlement.
  - Creation of an annual report to track the use of the FOIA exemption for critical infrastructure information that was created in the Homeland Security Act of 2002.
  - Providing a real enforcement mechanism to ensure that agencies do not ignore the statutorily-required 20 day deadline for responding to a FOIA request.
- Clarification that records which been given to private contractors for storage and maintenance are still subject to FOIA.
- Creation of a "FOIA Ombudsman" to oversee FOIA and ensure it is administered fairly.
- Establishment of a tracking system to allow requestors to know the status of a request.
- Explicitly requiring Congress to cite to FOIA when creating any new exemption to FOIA in order to prevent new "(b)(3)" exemptions from being passed in secret.
- Two hearings have been held in Congress on this bill. The subcommittee on Terrorism, Technology and Homeland Security of the Senate Judiciary Committee held a hearing on March 15, 2005. This was followed by a May 11, 2005 hearing in the subcommittee on Government Management, Finance and Accountability of the House Government Reform Committee. After these hearings, the bill's progress slowed as the Senate Judiciary Committee began work on other issues and the House considered other possible language for the provisions relating to the ombudsman and enforcement penalties for undue delay.

#### ***Executive Order 13392***

- Perhaps the biggest impediment to passage of the Open Government Act, however, will be the issuance of Executive Order 13392 by President Bush on December 14, 2005.
- Entitled "Improving Agency Disclosure of FOIA, it:
  - Requires each agency of the federal government to designate a senior official as the "Chief FOIA Officer" of the agency
    - Each agency was required to do this by January 14, 2006
    - The Chief FOIA Officer must be someone at the Assistant Secretary level or its equivalent
    - He or she will be responsible for the agency's "efficient and appropriate compliance" with FOIA.

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**LEGISLATIVE UPDATE**

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- Creates “FOIA Requester Service Centers” within each agency.
  - These are the gateways to the agency where requestors can obtain information about the status of requests and any information about an agency’s response.
  - Each FOIA Requester Service Center shall have one or more “FOIA Liaisons” who are to “ensure a service-oriented response to FOIA requests and FOIA-related inquiries”, though no specific methods for accomplishing this are required no new staff or resources are allocated for this purpose.
- Mandates review of agency administration of FOIA by the Chief FOIA Officer.
  - This is to result in the development of an agency-specific plan to improve FOIA implementation over the next two years.
  - This plan, due to the Attorney General and Office of Management and Budget by June 14, 2006 will contain concrete milestones to be achieved. Similar plans are to be contained in the agency’s annual FOIA reports for Fiscal Years 2006 and 2007.
- The Attorney General will review these plans and submit a government-wide FOIA plans to the President on October 14, 2006, June 1, 2007 and June 1, 2008.

While the Executive Order, at first blush, looks like a step forward, there is suspicion that it will delay necessary FOIA changes for some time. In effect, it allows legislators to adopt a “wait and see” approach to FOIA reform pending the agency-specific plans of June 14, 2006 and the Attorney General’s report of October 14, 2006. With actual legislative business days dwindling rapidly (Congress is expected to adjourn in late September or early October and will be taking off one full week per month until then), it is unlikely that the Open Government Act will pass. In addition, many of the changes proposed by the Executive Order are suggested in nature,

rather than mandatory, as provided in the Open Government Act. For instance:

- The Open Government Act is attempting to mandate the creation of a FOIA Ombudsman to assist the public in navigating the FOIA request process and avoid litigation, while this is suggested (and unfunded) by the Executive Order
- The Open Government Act would create an electronic tracking system to allow users to learn the status of a request; this is simply suggested by the Executive Order
- The Open Government Act would tip the balance back in the favor of the requestor who must go to court to obtain records, increasing the instances in which attorneys fees could be awarded, while the Executive Order does not address the topic of attorneys fees (or litigation generally).
- While the Open Government Act creates an enforcement mechanism for agencies that fail to respect the 20 day deadline for responding to a FOIA request, the Executive Order does not address the topic of lessening delays
- The Executive Order does not address the topics of fee waivers, exemptions that are newly-created in silence, outsourcing of records to private institutions for storage and processing, critical infrastructure information and disciplining FOIA officers for refusing to disclose records in bad faith.

*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 Kevin.Goldberg@cohnmarks.com.*

November 10, 2006

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## ETHICS CORNER

### Issue and Positional Conflicts: Can Media Lawyers Be Open-minded about Closure?

By Kip Purcell

Lawyers accustomed to contending on behalf of their media clients that the appropriate antidote to noxious speech is more speech were startled last fall by the news that Time Inc. and Sports Illustrated had asked a federal judge to scuttle the settlement of a libel action brought against them by former Alabama football coach Mike Price, to dismiss the action itself, and to award them damages on the ground that Price and his lawyer had breached a confidentiality agreement by publicly characterizing the settlement as a “great victory” that had “vindicated [Price’s] name.”<sup>1</sup> (More power to Time and its attorneys, of course, if they could turn a settlement into a summary judgment, and the defense of a defamation suit into a paying proposition.)

Even more surprising, at least for lawyers committed to the notion that secret court proceedings “are anathema to a free society,”<sup>2</sup> was the revelation that Time had persuaded the judge to seal all documents filed in connection with the dismissal motion (including, presumably, the settlement agreement that Time had asked the court to enforce).

That twist – in addition to suggesting the disadvantages of First Amendment absolutism – brings to mind prickly questions: to what extent can a single lawyer or law firm make opposite arguments in separate cases? Joni Mitchell sang that she had looked at clouds from both sides now, but could she have litigated them simultaneously?

Although many law firms that regularly represent media clients avoid the most obvious conflicts by shying away from the prosecution of defamation actions, the problem often arises in other contexts.

Suppose that your local daily retains you to challenge the imposition of a gag order, or the sealing of a court file, or the closure of a courtroom. Suppose that at the same time, in a different case that has attracted media attention, you or your partners are asked by another client (the manufacturer of a supposedly dangerous product, a nursing

home alleged to have neglected its residents, the defendant in a notorious criminal case) to advocate the same sorts of impediments to newsgathering. Can you or your firm serve both masters?

#### *Model Rule 1.7*

Authorities on legal ethics refer to this problem as one involving an “issue” or “positional” conflict, and they identify several important factors for the lawyer to consider. Their starting point is Model Rule 1.7, which – in the absence of proper consent – forbids a lawyer from

representing a client “if the representation involves a concurrent conflict of interest.”<sup>3</sup>

Because they appear to agree that representations of the sort described above are not “directly adverse,”<sup>4</sup> commentators focus on the portion of

the rule that declares a concurrent conflict of interest to exist when “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client.”<sup>5</sup> They commonly point to the risk that the lawyer’s successful representation of one client will adversely affect her representation of the other – or the risk that, to avoid such an outcome, the lawyer will “pull her punches,” to one client’s advantage and the other’s detriment.

For example, if both cases are being argued in the same court, will the impact of the lawyer’s advocacy be diluted in the eyes of the judge(s)? Will the first decision rendered be persuasive (or even binding) precedent with respect to the other case, thus impairing the lawyer’s effectiveness – and, if so, can the lawyer (or firm) avoid favoring one client over the other in the “race” to be first? And will one or the other of the clients become concerned that the law firm it has employed may have divided loyalties?<sup>6</sup>

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***To what extent can a single lawyer or law firm make opposite arguments in separate cases?***

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## ETHICS CORNER

*(Continued from page 61)*

Accordingly, only if the lawyer and the law firm “reasonably believe[] that the[y] will be able to provide competent and diligent representation to each affected client” – and only if the clients give their informed consent – can the representations proceed simultaneously.<sup>7</sup>

As a comment to Model Rule 1.7 explains:

Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer’s action on behalf of one client will materially limit the lawyer’s effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients’ reasonable expectations in retaining the lawyer.<sup>8</sup>

“If there is significant risk of material limitation,” the comment concludes, “then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.”<sup>9</sup>

So where does the balancing of these indeterminate “factors” leave us? First, the authorities unanimously express reservations about efforts by a lawyer or law firm to take inconsistent positions in cases pending before the same tribunal – or, to put the matter more broadly, “in the same jurisdiction.”<sup>10</sup> Thus, at a minimum, a law firm should avoid advancing directly contradictory arguments

in cases awaiting decision by the same appellate court.

That kind of conflict is probably unconsentable; the law firm cannot “reasonably believe[] that [it] will be able to provide competent and diligent representation to each affected client.”<sup>11</sup> But putting arguments on a collision course before the same appellate court isn’t the only sort of conflict against which the rules caution us.

After all, the impact of an appellate court decision on the second case would be the same even if the second case were still before the trial court in that particular jurisdiction. Moreover, even if *both* cases were in the trial court, but assigned to different judges, the decision in the first-decided case would, in all likelihood, carry at least some precedential or persuasive weight in the second case. And if both cases should happen to end up before the same judge, the situation would be even worse.<sup>12</sup>

On the other hand, even within the same state and at the same level of the judicial hierarchy, cases pending in counties that are geographically remote – or before judges who wouldn’t be caught dead following each other’s decisions – may present less cause for concern.

The question “whether the issue is substantive or procedural”<sup>13</sup> echoes the opinion of the ABA Committee on Ethics and Responsibility that “procedural, discovery and evidentiary issues ... almost invariably turn on their particular facts, and it is therefore rare that such issues will give rise to [a positional] conflict problem.”<sup>14</sup> Armed with this rationale, a law firm might be tempted to dismiss the entire problem described above on the ground that a request for file-sealing or court closure “almost invariably turn[s] on [its] particular facts.”

But our media clients are unlikely to view such matters so benignly. They may well believe that every court-ordered denial of access, regardless of whether it results in a published opinion, accomplishes an incremental incursion on our freedom of information; that every successful closure bid makes the next request eas-

*(Continued on page 63)*

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***At a minimum, a law firm should avoid advancing directly contradictory arguments in cases awaiting decision by the same appellate court.***

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## ETHICS CORNER

(Continued from page 62)

ier for the next judge in the next case to contemplate. Deploying for one client an argument to which another client is categorically hostile presents a classic positional-conflict problem.

Far more illuminating than whether the issue can be pigeonholed as “substantive” or “procedural” is “the significance of the issue to the immediate and long-term interests of the clients involved and the clients’ reasonable expectations in retaining the lawyer.”<sup>15</sup> As Hazard and Hodes declare: “Whenever a positional conflict concerns an issue about which one or more of the clients feels strongly, it is unlikely that the lawyer will be able to successfully represent those parties, or that she will be able to obtain the necessary waivers or consents.”<sup>16</sup>

The relevant comment to Model Rule 1.7 finally directs our attention to “the temporal relationship between the matters.”<sup>17</sup> We have been considering the situation of simultaneous and inconsistent representa-

tions. By contrast, and unsurprisingly, a law firm that has already kissed its media work good-bye is not similarly constrained: “a lawyer who recurrently handled a type of problem for a former client is not precluded from representing another client in a factually distinct problem of that type even though the subsequent representation involves a position adverse to the former client.”<sup>18</sup>

But at least one additional situation remains to be considered. Suppose that the law firm is hired to advocate restrictions on access to court documents or proceedings for one client, while at the same time representing regular media clients in separate matters that involve no access issues whatsoever. Does the law firm face a conflict? And if it does, can the conflict be circumnavigated?

Because the law firm’s representation of the secrecy-seeking client has the potential to be “materially limited by the [firm’s] responsibilities to [other] client[s]”<sup>19</sup> – namely, by the firm’s loyalty to its regular media clients, and by its desire to avoid harming their interests or even giving them offense – ethics authorities commenting on

analogous cases tend to agree that a conflict indeed exists, that the law firm must reasonably believe that it will not soft-pedal the arguments that it makes on behalf of the one-time client, and that the law firm must obtain that client’s informed consent.<sup>20</sup>

The harder question is whether the media clients’ consent is necessary as well. Hazard and Hodes assert that because the law firm “cannot guarantee that vigorous representation of [its] new client will not severely damage [its] representation of the [existing media clients] in future cases,” the consent of the existing clients “would certainly have to be obtained.”<sup>21</sup> Other commentators doubt that the language of Model Rule 1.7 compels lawyers to worry about the impact of a given representation on “future cases.”

But what can’t be doubted is the effect of such an undertaking on client relations. In the interests of keeping regular clients happy, and irrespective of whether the rules of professional conduct require it, the

law firm in the example given above may be well advised to give its longtime clients “veto power” over the new representation.

Avoidance of positional conflicts is complicated by the fact that most conflicts data bases are ill-designed to detect them. For that matter, many such conflicts do not arise until mid-litigation.<sup>22</sup> But once they emerge, they can’t be ignored. When a lawyer’s responsibilities to one client pose a significant risk of materially limiting his representation of another, consent or resignation is the only way out.

The best defense against that awkward situation – perhaps the only defense – is thoroughgoing communication with your colleagues about what they’re up to, coupled with careful attention to the needs and objectives of your own clients. If you look at clouds from both sides now, be sure to keep your head above them.

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

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***“Whenever a positional conflict concerns an issue about which one or more of the clients feels strongly, it is unlikely that the lawyer will be able to successfully represent those parties...”***

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**ETHICS CORNER**

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<sup>1</sup> See, e.g., R. Robin McDonald, 'Sports Illustrated' Wants Out of Settlement with Football Coach, Fulton County Daily Report, Oct. 14, 2005, available at <http://www.law.com/jsp/article.jsp?id=1129194314378>.

<sup>2</sup> *M.M. v. Zavaras*, 939 F. Supp. 799, 801 (D. Colo.), appeal dismissed, 98 F.3d 1349 (10th Cir. 1996).

<sup>3</sup> Model Rules of Prof'l Conduct R. 1.7(a) (2002). And no lawyer is an island in this regard; Model Rule 1.10 imputes such a conflict to everyone associated in a firm. See Model Rules of Prof'l Conduct R. 1.10(a) (2002) ("While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule[] 1.7 ....").

<sup>4</sup> Model Rules of Prof'l Conduct R. 1.7(a)(1) (2002).

<sup>5</sup> Model Rules of Prof'l Conduct R. 1.7(a)(2) (2002). Similarly, the Model Code of Professional Responsibility provides that a lawyer "shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment." Model Code of Prof'l Responsibility DR 5-105(A) (1980). The ABA Committee on Ethics and Professional Responsibility has observed that the analysis of issue or positional conflicts "should be the same under the Model Code as under the Model Rules." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-377 (1993).

<sup>6</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-377 (1993).

<sup>7</sup> Model Rules of Prof'l Conduct R. 1.7(b)(1), (4) (2002). Under the 2002 edition of the model rules, the consent must be "confirmed in writing." Model Rules of Prof'l Conduct R. 1.7(b)(4) (2002).

<sup>8</sup> Model Rules of Prof'l Conduct R. 1.7 cmt. 24 (2002); accord Restatement (Third) of the Law Governing Lawyers § 128 cmt. f (2000).

<sup>9</sup> Model Rules of Prof'l Conduct R. 1.7 cmt. 24 (2002).

<sup>10</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-377 (1993).

<sup>11</sup> Model Rules of Prof'l Conduct R. 1.7(b)(1) (2002); see, e.g., Restatement (Third) of the Law Governing Lawyers § 128 cmt. f, illus. 6 (2000).

<sup>12</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-377 (1993).

<sup>13</sup> Model Rules of Prof'l Conduct R. 1.7 cmt. 24 (2002).

<sup>14</sup> ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-377 (1993) (footnote 1).

<sup>15</sup> Model Rules of Prof'l Conduct R. 1.7 cmt. 24 (2002).

<sup>16</sup> 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 10.10, at 10-30 (3d ed. Supp. 2004).

<sup>17</sup> Model Rules of Prof'l Conduct R. 1.7 cmt. 24 (2002).

<sup>18</sup> Model Rules of Prof'l Conduct R. 1.9 cmt. 2 (2002).

<sup>19</sup> Model Rules of Prof'l Conduct R. 1.7(a)(2) (2002).

<sup>20</sup> See, e.g., 1 Geoffrey C. Hazard, Jr. & W. William Hodes, supra note 17, § 10.10, at 10-31.

<sup>21</sup> *Id.* at 10-32.

<sup>22</sup> See, e.g., *Fiandaca v. Cunningham*, 827 F.2d 825 (1<sup>st</sup> Cir. 1987) (conflict created by unexpected terms of adversary's settlement offer).

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