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California Supreme Court Dismisses Most Claims Against Academics Who Criticized "Repressed Memories" Theory

But Intrusion Claim Based on Alleged Misrepresentation Survives

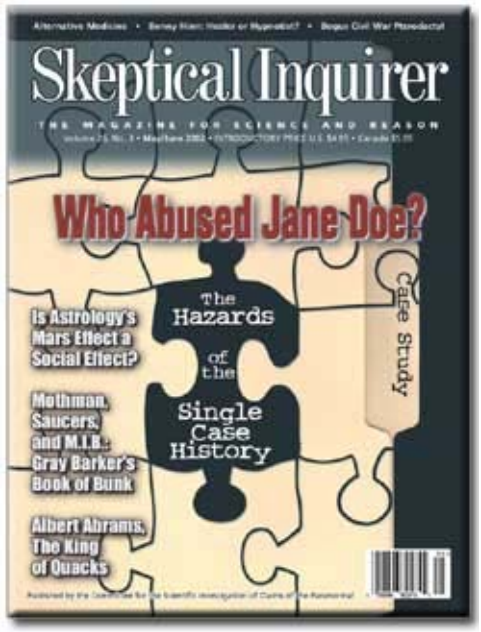
By Thomas R. Burke and Rochelle L. Wilcox

On February 26, 2007, the California Supreme Court issued a decision in a factually complex invasion of privacy and defamation action involving an article that questioned the veracity of a case study offered as proof that childhood memories of sexual abuse can be repressed and later recalled. *Taus v. Loftus*, 54 Cal.Rptr.3d 775, 151 P.3d 1185 (2007). (George, CJ, Kennard, Werdegar, Chin, Corrigan, JJ).

The article, written by prominent psychologists Elizabeth Loftus and Melvin Guyer, appeared in *Skeptical Inquirer* magazine. In the article and during later speeches given by Dr. Loftus, defendants consistently maintained plaintiff's anonymity, referring to plaintiff only as "Jane Doe."

Dismissing three out of four claims that the Court of Appeal had kept alive, the Supreme Court held that the "overwhelming majority of plaintiff's claims properly should have been struck in the trial court under the anti-SLAPP statute." The Court asserted that, "consistent with the fundamental purpose of the anti-SLAPP statute to minimize the chilling of conduct undertaken in furtherance of the constitutional right of free speech," defendants are entitled to their costs on appeal.

Because California's anti-SLAPP statute mandates fee-shifting for successful defendants on an anti-SLAPP motion, practically speaking, this should result in a substantial attorneys' fees award for defendants. However, emphasizing the highly unusual facts of the case, a majority of the Court permitted a single claim for invasion of privacy by intrusion to proceed to trial – the claim that Dr. Loftus misrepresented herself to plaintiff's foster mother to obtain information about plaintiff.



In doing so, the Court distinguished situations in which news reporters shade or withhold information from their sources and expressly avoided the adoption of "a broad rule under which any type of misrepresentation by a reporter, investigator, or scholar to obtain information would be considered sufficient to support a cause of action for intrusion into public matters."

Background

In May 1997, Drs. David Corwin and Erna Olafson published their article, "Videotaped Discovery of a Reportedly Unrecallable Memory of Child Sexual Abuse: Comparison With a Child Interview Videotaped 11 Years Before," in *Child Maltreatment*, a scientific journal (the "*Child Maltreatment* Article"). The article offered the case history of "Jane Doe" as support for the theory that people can and regularly do repress painful memories, sometimes to be recalled years later.

With the explicit written consent of "Jane Doe," the article contained excerpts of videotaped interviews with Jane Doe at age six – recounting allegations of physical and sexual abuse by her mother – and at age seventeen – purportedly recalling lost memories of that abuse. The article also included commentary by Jane Doe's foster mother, who revealed other intimate details about "Jane Doe."

Its co-author, Dr. Corwin, and Jane Doe's lawyer would later explain that the article – and commentaries that emphasized the significance of Dr. Corwin's "Jane Doe" case history – received significant attention and contributed to the very contentious "repressed memories" debate.

At lectures throughout the country, Dr. Corwin discussed his article and showed the videotape of Plaintiff at ages six and seventeen, which revealed Plaintiff's first name and her hometown of Modesto.

Drs. Elizabeth Loftus and Melvin Guyer – prominent psychologists well known for their contributions to the re-

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pressed memory debate – were skeptical of Dr. Corwin's claims. Using information publicly revealed by Dr. Corwin in the *Child Maltreatment* Article and elsewhere, they identified Jane Doe as Nicole Taus.

Using court records and other public records, they also investigated the Article's claims regarding Jane Doe by reviewing public records and interviewing plaintiff's family members. They obtained information, not revealed in the *Child Maltreatment* Article, that cast doubt on Dr. Corwin's depiction of plaintiff's alleged abuse by her mother. Among other things not mentioned in Dr. Corwin's article, shortly after plaintiff first made claims of abuse, plaintiff was interviewed by an expert who concluded that plaintiff had not been abused. Their investigation of public records and interviews with family members also raised questions regarding the credibility of plaintiff's father and stepmother.

When plaintiff learned of Drs. Loftus and Guyer's investigation, she filed an ethics complaint against Dr. Loftus with her then-employer, the University of Washington. Plaintiff claimed that Dr. Loftus's investigation constituted "human subjects research" that should have been approved by the University's Institutional Review Board ("IRB"). Nearly two years later, the University concluded that Dr. Loftus had committed no wrong, and it authorized her to publish her findings. She and Dr. Guyer published their article, "Who Abused Jane Doe? The Hazards of the Single Case History" in the *Skeptical Inquirer* magazine (the "*Skeptical Inquirer* Article").

In this article, plaintiff was only referred to as "Jane Doe." The article disclosed facts about Jane Doe's childhood and her abuse allegations not revealed in the *Child Maltreatment* Article, which they believed rendered reliance on the Article to support the "repressed memories" theory questionable. The *Skeptical Inquirer* Article was accompanied by an article by Carol Tavris, "The High Cost of Skepticism" (the "Tavris Article"), in which she discussed the University of Washington's two-year investigation and the dangers, in general, of requiring IRB approval, which Tavris claimed stifle scientific inquiry.

Jane Doe sued a few months later, disclosing for the first time her real name – Nicole Taus – and significant details about her life as a child and an adult. She asserted four causes of action:

(1) Negligent infliction of emotional distress, based on her claim that Drs. Loftus and Guyer had misused their abilities as psychologists to exploit her, despite their knowledge that plaintiff was "extremely susceptible to emotional abuse, slander, libel and exploitation";
(2) Invasion of privacy, based on plaintiff's claim that (a) defendants publicly disclosed private facts about her (both in the *Skeptical Inquirer* Article and in later speeches by Dr. Loftus); (b) defendants obtained access to confidential court records; and (c) Dr. Loftus obtained information about plaintiff by misrepresenting to plaintiff's foster mother that Dr. Loftus was Dr. Corwin's supervisor, working to assist plaintiff;
(3) Fraud, based on plaintiff's claim that Dr. Loftus made misrepresentations to plaintiff's relatives and friends to obtain private information about her; and,
(4) Defamation, based on the *Skeptical Inquirer* Article, the Tavris Article, and Dr. Loftus's public statements made after publication of the Articles.

Lower Court Decisions

In the trial court, defendants moved to strike all of the claims using California's anti-SLAPP statute. The trial court struck the fraud claim against Dr. Loftus and the libel claim based on the Tavris Article, but otherwise left the complaint intact. Defendants appealed to the Court of Appeal, which struck more than a dozen of plaintiff's privacy and defamation theories, but still permitted plaintiff to proceed on four theories:

(1) public disclosure of private facts, based on the claim that Dr. Loftus revealed private facts about plaintiff at a professional conference, and revealed plaintiff's initials during a deposition in an unrelated court action;
(2) intrusion, based on the claim that defendants obtained and revealed private information from "confidential" juvenile court files;
(3) intrusion, based on the claim that Dr. Loftus misrepresented herself to obtain information from plaintiff's foster mother; and

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(4) defamation, based on the allegation that at a professional conference following publication of the Articles, Dr. Loftus stated "Jane Doe engaged in destructive behavior that I cannot reveal on advice of my attorney. Jane is in the Navy representing our country," which purportedly gave rise to an implication that Plaintiff was unfit to serve in the military. The Court of Appeal's unpublished decision is available at 33 Med.L.Rptr. 1547 (2005)

California Supreme Court Decision

Defendants petitioned the Supreme Court for review. Although the appellate decision below was unpublished – and in California, not citable as precedent – the state's high court accepted review.

Plaintiff did not seek review of the claims dismissed by the Court of Appeal. Ultimately, the Supreme Court dismissed all of plaintiff's remaining claims except one – the intrusion claim alleging that Dr. Loftus misrepresented herself to obtain information from plaintiff's foster mother.

"The mere disclosure of plaintiff's initials could not properly be considered to constitute a public disclosure of her identity..."

Private Facts – Scientific Conference

The Court first rejected the public disclosure of private facts claim based on Dr. Loftus's revelation of two relatively innocuous facts at a professional conference – that plaintiff previously engaged in "destructive behavior" and that she was in the Navy.

The Court initially expressed "serious doubts whether either of the statements in question … constitutes disclosure of the kind of sufficiently sensitive or intimate private fact which would be offensive and objectionable to the reasonable person," giving rise to a claim.

The Court did not decide that issue, however, holding instead that information about Plaintiff's adult life was newsworthy due to its relevance to the underlying repressed memory debate. In doing so, the court reinforced the significant protection afforded "newsworthy" information and the deference given to editorial discretion.

It concluded that in light of (1) the commentaries in the *Child Maltreatment* Article, many of which enunciated the importance of watching how Plaintiff developed; and (2) the fact that the revelations "were not of an '[i]ntensely personal or intimate' nature," public disclosure of these facts about Plaintiff was protected.

Defamation

The Court next addressed the defamation claim. It did not decide the issue presented – whether plaintiff was a limited purpose public figure – although it included a lengthy footnote asserting that there is a "strong argument" that plaintiff should be treated as a limited purpose public figure.

Instead, after soliciting additional briefing from the parties, the Court determined that this claim was protected by California's common interest privilege, California Civil Code Section 47(c)(1). The Court found the statement privileged because the statement was made "at a professional conference attended by other mental health professionals and [] was related to the subject of the conference." It held that plaintiff's evidence of malice – which she had proffered to show constitutional malice – did not suffice.

Key to the Court's decision was the fact that during her conference remarks, Dr. Loftus did not reveal plaintiff's identity or the details of plaintiff's prior "destructive behavior," reflecting that she did not act out of hatred or ill will. The Court also rejected circumstantial evidence of malice – Dr. Loftus's persistence in investigating the claims in the *Child Maltreatment* Article and her displeasure with the ethics inquiry plaintiff instituted at the University of Washington – asserting that "[t]he qualified privilege embodied in Civil Code section 47, subdivision (c)(1) is intended to provide substantial protection to statements made on just such an occasion, and the circumstances relied upon by Plaintiff fall far short of providing an adequate basis for finding that Loftus made these statements with actual malice."

Private Facts – Deposition Disclosure

The Court next rejected a public disclosure of private facts claim based on Dr. Loftus's revelation of plaintiff's initials at a deposition two weeks *after* plaintiff filed her

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original complaint in this matter (which the Court of Appeal had concluded might lead to plaintiff's true identity).

On this claim, the Court disagreed with the Court of Appeal for several reasons. It expressed doubt over the lower court's conclusion that Jane Doe's identity was not a matter of public interest, but did not decide that issue. It concluded that "the mere disclosure of plaintiff's initials could not properly be considered to constitute a public disclosure of her identity so as to support an action for public disclosure of private facts."

More importantly, the disclosure of the initials occurred only *after* plaintiff filed her original complaint, in which she voluntarily disclosed her full name and identified herself as Dr. Corwin's "Jane Doe." The Court held that by merely revealing plaintiff's initials, Dr. Loftus did not disclose any private fact about plaintiff, but instead simply gave further publicity to information which plaintiff already had made public.

In the Court's view, the alleged misrepresentation by Dr. Loftus may "properly may be considered 'beyond the pale' for purposes of the intrusion tort..."

Intrusion – Access to Court Records

The Court next rejected an intrusion claim based on plaintiff's allegation that defendants purportedly obtained confidential and/or juvenile records regarding plaintiff. The Court pointed out that the intrusion must be "intentional" and that it includes "highly offensive intentional intrusions upon another person's private affairs or concerns." The Court held that no claim is viable based on information available in records that are open to the public, even if those records might otherwise be considered private.

It took judicial notice of information which revealed that Taus's name, her foster mother's identity, and other intimate personal information was available in voluminous court records. In light of these public records, the Court held that plaintiff failed to produce any evidence to support her claim that defendants had somehow accessed confidential and/or juvenile records.

Alleged Misrepresentation to Foster Mother

Finally, the Court addressed the intrusion claim alleging that Dr. Loftus misrepresented herself, claiming to be Dr. Corwin's supervisor, to obtain private information from plaintiff's foster mother.

The Court initially noted the "sharp conflict in the evidence in the record regarding whether Loftus represented herself to Cantrell as working with or associated with Dr. Corwin." However, due to the procedural posture of the case – in which plaintiff's evidence must be accepted as true – the Court said it could not resolve this evidentiary dispute.

Defendants argued that plaintiff, having consented to have intimate details of her life publicly disclosed, and having specifically consented to the foster mother's revelation of intimate private information about plaintiff in the *Child Maltreatment* Article, had no reasonable expectation of privacy in information held by her foster mother.

The Court agreed that no claim generally is available against a relative or close friend for voluntarily disclosing personal information to a third party. However, relying on a comment to Section 652B of the Restatement Second of Torts, which would permit liability for presenting a forged court order to a bank to obtain another's bank records, and cases to this effect, the Court concluded that a claim could be stated here.

It recognized that none of the cases involved misrepresentations to obtain information from a friend or family member, yet nevertheless found that nothing in those cases suggested those courts would exclude such circumstances. The Court also found that Dr. Loftus could not be held liable had she simply interviewed the foster mother. However, the allegation was that Dr. Loftus *misrepresented* her relationship with Dr. Corwin, "a psychiatrist with whom plaintiff had a friendly and trusting professional relationship," claiming that she was Dr. Corwin's supervisor, there to assist plaintiff.

It was this alleged behavior – "falsely posing as an associate or supervisor of a mental health professional in whom plaintiff had confided" – that the Court found "highly offensive" and could give rise to a claim.

In reaching its conclusion, the Court was careful to emphasize the narrow scope of its holding. In particular, it recognized the concerns of an amicus curiae brief submitted by a number of media entities, asserting that those concerns "appear quite reasonable and clearly demonstrate

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the danger and inadvisability of adopting a broad rule under which any type of misrepresentation by a reporter, investigator, or scholar to obtain information would be considered sufficient to support a cause of action for intrusion into private matters."

The Court specifically acknowledged amici's concern that "a source may claim, after the fact, that the reporter failed to be forthright in disclosing his or her motives, position, or point of view to the source."

Distinguishing these situations, it explained that "it is important to recognize that there are at least some types of misrepresentations that are of such an especially egregious and offensive nature and significantly different from the more familiar practice of a news reporter or investigator in shading or withholding information regarding his or her motives when interviewing a potential news source."

In the Court's view, the alleged misrepresentation by Dr. Loftus may "properly may be considered 'beyond the pale' for purposes of the intrusion tort, even when the misrepresentation is made to friends or relatives of the subject of an inquiry who are under no legal obligation not to reveal private information about the subject of the inquiry."

Thus, on the "special and unusual" facts of this case – primarily the Court's analogy to a doctor-patient relationship between plaintiff and Dr. Corwin (although that relationship, in fact, never existed between them) – the Court held that plaintiff had sufficiently alleged enough for this claim to go to a jury.

Partial Dissent on Intrusion Claim

In a partial, 20-page dissent, Justice Moreno, joined by Justice Baxter, rejected plaintiff's intrusion claim. Reviewing the Court's prior cases, they discerned three principles: (1) as to the first element (whether plaintiff had a reasonable expectation of privacy), it is insufficient to assert that defendant employed offensive means without also establishing "that the defendant breached a zone that the plaintiff *reasonably* expects to remain private or secluded"; (2) "a reasonable expectation of privacy or seclusion is one derived not only from law, but also from well-defined 'custom [or] … habit of … society"; and, (3) where a data source is involved, "a plaintiff must reasonably expect, based on law, custom, or habit, that the information source will keep the information in relative secrecy *but for* the improper intrusion, and that the information itself will remain relatively private."

Having established these principles, the dissenting Justices applied them to the unique facts of this case. They rejected any formulation that would focus on the foster mother's expectations, reiterating that the question is whether *plaintiff* had a reasonable expectation that her foster mother's observations of her would remain private.

The dissent restated the Court's prior decisions asserting that the intrusion tort was not designed to protect against the garnering of information from third parties. It also rejected the hypotheticals on which the majority relied, posing many questions that remained unanswered by the majority's conclusion.

The dissent concluded that the majority's holding – that plaintiff's claim can proceed on the theory "that plaintiff reasonably expected that an investigator would not seek and obtain access to such personal information about her from a relative or friend by falsely posing as an associate or supervisor of a mental health professional in whom plaintiff had confided" – "confuses the first and second prongs of the intrusion tort."

The dissent explained that:

> The majority solves its reasonable expectation of seclusion problem by concluding that Taus would not reasonably expect that someone would use highly offensive means, such as posing as an associate of a trusted mental health professional, to acquire the information. But that is not enough – highly offensive means are unreasonable by definition, and a plaintiff presumably will never reasonably expect that such means would be employed.

The dissent found that plaintiff simply could not have had a reasonable expectation of privacy for many reasons. First, the information that plaintiff's foster mother revealed to Dr. Loftus was "directly pertinent to the Jane Doe case study that had become central to the recovered memory controversy."

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Second, plaintiff could not demonstrate a reasonable expectation that her foster mother would not discuss her observations about Plaintiff's childhood with others.

Third, Plaintiff submitted no evidence regarding whether her foster mother had, or had not, discussed this same information with others. Indeed, the *Child Maltreatment* Article included commentary by the foster mother discussing plaintiff's conversations with her about intimate personal matters. The dissent also emphasized that Dr. Loftus was discrete with the information she obtained.

In conclusion, the dissent would have stricken the intrusion claim also, and protected academics and other investigators from claims when the information itself is not subject to a reasonable expectation of privacy. It expressed concern with "chill[ing] vigorous journalistic investigation because of the inherently problematic nature of the relationship between journalists and their news sources."

While it would not necessarily have conferred "a blanket immunity from all such suits based on alleged misrepresentations to third party news sources," it would have required, at a minimum, that Plaintiff demonstrate a reasonable expectation of privacy in the information obtained.

Thomas R. Burke and Rochelle L. Wilcox are partners in the San Francisco office of Davis Wright Tremaine LLP and represented Drs. Loftus and Guyer and the other defendants in this case. Plaintiff was represented by Julian J. Hubbard, McCloskey, Hubbard, Ebert & Moore.

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California Court Dismisses Frat Boys' Lawsuit Over Borat Movie

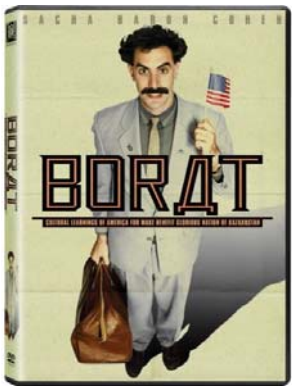
Movie Involved a Matter of Public Interest

By Walter Sadler

On February 15, 2007, the Los Angeles Superior Court granted a Special Motion to Strike the lawsuit of two fraternity brothers who filed a complaint against the production company and distributor of the recently released comedy "Borat: Cultural Learnings of America For Make Benefit of Glorious Nation of Kazakhstan" ("Borat"). *John Does 1 & 2 v. One America Productions, et al.*, No.5C 091723. (Cal. Super. Ct. Feb. 15, 2007) (Biderman, J.).

In Borat, the plaintiffs were shown candidly discussing their controversial views on a variety of topics including American women, minorities, slavery and Jews. The two John Doe plaintiffs (dubbed the "Frat Boys" by the press) alleged that they had been fraudulently induced to sign a "standard consent agreement" and "engage in behavior they otherwise would not have engaged in" because they supposedly had been told that the film would be shown only in Europe and would not disclose their names, their fraternity or their university.

Their complaint contained six causes of action for fraud, rescission of contract, common law false light, statutory false light (California Civil Code § 3344) misappropriation of likeness and negligent infliction of emotional distress.



Background

The motion picture "Borat" was described in a November 17, 2006 *Rolling Stone* article as a "new kind of comedy" in which a fictional character named Borat Sagdiyev poses as a television correspondent from Kazakhstan to film a documentary about "real life" Americans.

The movie, which mixed mostly unstaged footage with scripted comedy, chronicles the adventures of Borat as he crosses America in the manner of Jack Kerouac or Alexis de Tocqueville, trampling and offending Americans along the way. As conceived by British comedian Sacha Baron Cohen, Borat's trip to America begins in New York City and ends, after he falls in love with Pamela Anderson via old "Baywatch" episodes, with a cross-country drive to California in a dilapidated ice cream van.

Along the way, the film makers used a unique comedic approach of engaging real people with the wholly fictional Borat character who acted as if he really was a clueless Kazakh journalist. None of the "real life Americans" who appeared in the film were aware that he or she was talking to a guerilla comedian. Borat has various encounters and misadventures with his American subjects. Among the more memorable incidents are:

(1) A speech at a Virginia rodeo in which Borat, dressed in a star spangled shirt, speaks to the southern crowd, saying he supports George Bush's "war of terror" and saying Gulf War II should continue until Bush has tasted "the blood of every man, woman and child in Iraq."
(2) An encounter with a Southern Bed & Breakfast run by a Jewish couple where Borat insists that two roaches who invade his room are the "shape shifted" owners and throws dollar bills at the bugs to mollify them.
(3) A jaw dropping nude bout of no holds-barred wrestling between Borat and his rotund Kazakh producer that goes considerably beyond what can be seen on YouTube or anywhere else.

One of Borat's encounters with real life Americans involved his interaction with the Frat Boys, who were happy to share their controversial views with Borat on a number of subjects. The Frat Boys clearly knew while they were speaking with Borat that they were being filmed for a movie not only because the release they signed specifically stated that it could be exhibited "throughout the universe," but also because the camera crew was very visible in the close quarters of the recreational vehicle in which they were being filmed.

In an unrehearsed and unscripted encounter, the Frat Boys opined, among other things, that (1) they "wish" slavery could be reintroduced into the United States (presumably with them as slaveholders) because it would make the United States a "better country" (2) that in the United States "the minorities actually have more power" and (3) Jews have the upper hand "in American Society."

SLAPP Motion

The California anti-SLAPP statute codified in Code of Civil Procedue § 425.16 is a two-prong procedural device that was

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enacted to weed out meritless lawsuits "arising from any act .... of speech" where (1) the defendants carry their initial burden of proving that the plaintiffs complaint is based upon speech that is "of public interest," and (2) the plaintiffs cannot carry their reciprocal burden of proving a "probability of prevailing" on any cause of action with competent, admissible evidence.

At first blush, Borat may not seem like the kind of "significant" speech that the California legislature indicated in the preamble of § 425.16 it was trying to protect from being "chilled through the abuse of the judicial process," when it enacted the SLAPP statute in 1992.

After all, Borat includes all sorts of bathroom humor (literally). Indeed, it is probably the only film that contains a "Feces Provided by" credit.

However, the defendants were able to overcome this hurdle by demonstrating with several examples (*i.e.* Kubrick's "Dr. Strangelove" and Chaplin's "The Dictator") that the movie was part of a rich cinematic tradition of using mockery, shtick and slapstick humor to comment on political, social and cultural stereotypes. The defendants argued that while most people might not immediately realize what the filmmaker were doing, the movie wasn't about promoting ignorance and intolerance but exposing and deflating it through humor.

The Judge "got it" and held that the topics addressed and skewered in the movie – racism, sexism, homophobia, xenophobia, anti-Semitism, ethnocentrism, and other societal ills – are issues of public interest.

In this regard, the defendants also submitted extensive evidence that there was a "public interest" in many of the broad themes that were addressed in Borat (i.e. sexism, racism and anti-Semitism). Fortunately, the Judge "got it" and held that the topics addressed and skewered in the movie – racism, sexism, homophobia, xenophobia, anti-Semitism, ethnocentrism, and other societal ills – are issues of public interest, and that the movie itself has sparked significant public awareness and debate about these topics.

The Frat Boys also argued that while there may be a public interest in the broad themes of racism, sexism and anti-Semitism, there was no "public interest" in their views on these topics. However, the defendants countered that the proper focus under the first prong of the SLAPP statute is whether the movie contains speech of "public interest," not whether there is public interest in the plaintiffs themselves. Again, the court "got it" and held that:

> The movie is not about whether these specific plaintiffs held racist, sexist or anti-Semitic views, but rather concerns the general topics of racism, sexism, homophobia, anti-Semitism, and ethnocentrism, which are issues of public interest. *See MG v. Time Warner, Inc.* (2001) 89 Cal.App.4th 623, 629 (courts are to look at the broad topic of an article or program in determining whether the act and furtherance of a speech was related to a public issue).

Finally, the plaintiffs argued that their cause of action for fraud and rescission of contract did not "arise from" speech on matters of "public interest," but rather "arose from" the defendants' misrepresentations to the plaintiffs about the territories where the film allegedly would be exhibited.

In response, the defendants argued that the plaintiffs' fraud cause of action did "arise from" speech because there could be no cause of action for fraud under the plaintiffs' theory unless the film was exhibited in the United States.

Furthermore, without admitting that a fraud had occurred, the defendants argued that even if the alleged misrepresentation had been perpetrated and it was considered not to be protected speech on a matter of public interest, it nevertheless was an act in "furtherance of speech" because it led to the defendants being able to obtain the Frat Boys' participation in the movie. *See Lieberman v.* KCOP *Television, Inc.*, 110 Cal.4th 156 (2003) (under the first prong of the anti-SLAPP statute, "conduct is not limited to the exercise of [defendants] right of free speech, but to all conduct in furtherance of the exercise of the right of free speech in connection with a public issue" *including an illegal wire tap*).

Again, the Court "got it" and held that:

> Plaintiffs argue that this case is about misrepresentations, not conduct in furtherance of free speech rights. However, the last four causes of action stated in plaintiffs' complaint indisputably arise from defendants' communications (i.e. the movie). As to the first causes of action (fraud and rescission), though couched in fraud, the gravaman, or principal thrush, goes to the exhibition of the move. *See e.g. Martinez v. Metabolife. Int'l.*

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(2003) 113 Cal.App.4th 118, 188 ("it is the principal thrust or gravaman of the plaintiffs' cause of action that determines whether the anti-SLAPP statute applies."). Indeed, at oral argument, counsel effectively conceded, as he must, that this action would not exist at all if the movie were not playing in the United States.

Probability of Plaintiffs Prevailing

As to the second prong, the Court held that the Frat Boys had not carried their reciprocal burden of proving a "probability of prevailing." Significantly, the Court's Minute Order did not directly mention the release as a grounds for its ruling, even though the release would have acted as a bar to all of the Frat Boys' claims.

Instead, the Court held that the Frat Boys had failed to establish their fraud cause of action with competent evidence because, among other things, they had introduced no evidence that they sustained any damages. As a result, the Court held that the "plaintiffs have failed to show a basis for the equitable remedy of rescission of their release agreement."

Similarly, the Court found that the Frat Boys had not adequately "responded to defendants' argument that they did not portray plaintiffs in a false light" because they submitted no evidence that they did not hold the views which they expressed in the movie.

The Court found that the plaintiffs' right of publicity claims (both common law and statutory) were barred by the First Amendment because the "movie, which is part fiction and part documentary, utilizes the reactions and statements of people such as plaintiffs to subversively satirize the true targets of the movie: Ethnocentrism, sexism, racism and the like."

Finally, the Court found that the plaintiffs' cause of action for negligent infliction of emotional distress was "really a claim for negligence" and that the plaintiffs "failed to identify the duty which they contend defendants owed to them, and the manner in which the defendants breached said duty."

Walter Sadler of Leopold Petrich & Smith in Los Angeles represented the defendants in this case. Plaintiffs were represented by Olivier A. Tailleau, Beverly Hills, Ca.

Other Lawsuits Filed Over the Borat Movie

Case	Plaintiff(s) / Claims
Alabama: *Martin v. Baron Cohen* (Jefferson County Circuit Ct., Ala.)	Plaintiff, the owner of an etiquette school, claims she was fraudulently induced to be filmed under the "guise of conducting an etiquette training class for a foreign reporter 'filming a documentary for Belarus television.'" Claims for fraud, unjust enrichment, misappropriation, intentional infliction of emotional distress
California: *John Doe 3 v. One America Productions* (Los Angeles Superior Ct.)	The "John Doe" plaintiff was at a Virginia rodeo show where Borat sang a butchered version of the Star Spangled Banner and stated "I hope you [Americans] kill every man, woman and child in Iraq, down to the lizards," and "may George W. Bush drink the blood of every man, woman and child in Iraq." The complaint is not available online, but it reportedly alleges that the movie falsely portrays spectators as "uneducated, racists, sexists and bigots."
New York: *Todorache v. 20th Century Fox Film Corp., 06-CV-13369* (S.D.N.Y.)	Plaintiffs, two residents of the Romanian village of Glod where portions of the movie were filmed, allege they agreed to be filmed as part of a documentary on extreme poverty in their country. Instead, they were portrayed as "rapists, abortionists, prostitutes, thieves, racists, bigots, simpletons and/or boors." Claims for fraud, misrepresentation, breach of contract, § 1983, § 1985 discrimination claims.
South Carolina: *John Doe v. 20th Century Fox Film Corp.* (Richland County Ct. of Common Pleas, S.C.)	The "John Doe" plaintiff alleges he was a customer at a restaurant where a film crew was supposedly filming a documentary about tourism. Plaintiff encountered Borat in the men's room and alleges he "entered an adjacent stall and lifted himself up, looking over the stall divider at Plaintiff's genitals, and commenting thereabout." Plaintiff alleges the scene was filmed, but it did not appear in the movie. Claims for intrusion, private facts, misappropriation, fraud, negligent misrepresentation, premises liability (against the restaurant), intentional infliction of emotional distress.

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Book Not "News" For Purposes of Shield Law

In a decision delivered from the bench during oral argument, a New Jersey Superior Court judge last December held that a book author could not claim protection under New York's shield law since his book, *TrumpNation: The Art of Being The Donald*, did not qualify as news under the statute. *Trump v. O'Brien*, Superior Court of New Jersey, Law Division – a Civil Part, Camden County, Docket No. L-545-06 (December 20, 2006) (Snyder, J.).

The ruling on a motion to compel discovery was part of an underlying defamation claim brought by Donald Trump against author and *New York Times* reporter Timothy L. O'Brien and Warner Books. The court also gave an alternative holding, stating that the sources of the alleged defamatory statements were not "confidential," since O'Brien had not specifically described them as such when he cited to them in the book.

The court also ruled that New York law applied on the ground that the tort and injury occurred in New York. Thus the court applied New York's shield law which is slightly less protective than New Jersey's statue.

Background

TrumpNation was published in 2005 by Warner Books. A *Publisher's Weekly* review described it as an:

> "instructive tongue-in-cheek primer for would-be Trumps. Sometimes hilarious quizzes summarizing the main points of each chapter demonstrate Trump's audacity, itinerant poor judgment and the kind of hubris one can only stand back and watch with astonishment and a sort of clandestine admiration."

The book notably estimates Trump's actual worth at $150 to $250 million rather than $5.4 billion as Trump has claimed. (*Forbes* magazine has reported Trump's worth at $2.7 billion and in an interview Trump said the figure should be doubled.)

Donald Trump sued Timothy O'Brien primarily on the basis of Chapter 6 entitled "Trump Broke" which discusses Trump's wealth. Trump argues that book is defamatory because it "rejects the fact that Trump is a billionaire" and instead asserts "that Trump is an unskilled and dissembling businessman whose actual wealth is a tiny fraction of what Trump says it is." (Trump's Memorandum of Law in Support of Motion to Compel Discovery, page 7).

Moreover, by suggesting that Trump exaggerated his financial holdings, O'Brien "sought to deter the business community from transacting business with Trump and to influence the consuming public to avoid Trump's goods and services." *Id.*

O'Brien was a staff reporter – and is now an editor – for the *New York Times*, who wrote a series of articles for the newspaper on the restructuring of Donald Trump's casinos. Both the book and the *Times* articles relied upon confidential sources. In his brief before the Superior Court, O'Brien asserted that although he wrote *TrumpNation* as a freelance author, he "saw the Book as a logical extension of his newspaper reporting."

O'Brien used "the same journalistic methods as he used in his newspaper reporting, albeit with a lighter tone, and obtained approval from *The Times'* editorial management to write the Book." (O'Brien Memorandum of Law in Opposition to Plaintiff's Motion to Compel Discovery, page 7). Indeed, O'Brien used the same confidential sources and research files in writing *TrumpNation* as he had for the *Times* pieces.

TrumpNation, however, differed in tone from the prior *New York Times* articles. For example, the book contains a humorous "Trump Quiz" at the end of each chapter. For example, Quiz 2 asks:

> To emerge victorious on The Apprentice, you should:
>
> 1. Let a leech slither up your urethra.
> 2. Find out before the end of the season whether Donald actually owns any of the projects to which he'll assign you if you win.

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3. Grovel.
4. Be extremely innovative and industrious.
5. Pander.
6. When in doubt, don't stick out.
7. Call Donald "Mr. Trump," and mean it.
8. Be smart and be on time.
9. Handle your boardroom grillings like Donald Rumsfeld handles press conferences.
10. Crawl around on all fours whenever necessary.
11. Have a big-time genetic pool.

On the motion to compel, Trump pointed to these quizzes and the general tone of the book, to argue that the book is a "sensationalist, gossipy biography" – not newsworthy information. And that O'Brien "sought only to titillate, providing lurid details of whether Trump uses Viagra (he does not), about Trump's affair with Marla Maples, about Trump 'prowling' at Studio 54 in the 1970s." (Trump's Memorandum of Law, page 3).

Trump also argued that the marketing of the book was evidence of its "sensationalist" basis: O'Brien appeared on a television show to discuss Trump's alleged exaggeration of his wealth. The author appeared at bookstores as well, speaking about the book, Trump's relationship with his family, and his finances and making, what Trump described in pleadings as "a lengthy, malicious and defamatory oral attack." (Trump Memorandum of Law, page 8).

The Lawsuit

Donald Trump filed a libel complaint against O'Brien and Warner Books in January 2006 in Camden County, New Jersey. In the first count of the complaint, Trump alleged that O'Brien and Warner Books defamed him by falsely and deliberately misstating his worth. And in a second count, Trump alleged that O'Brien slandered him in making statements about his worth on CNBC and in a book store appearance.

In August 2006, the trial court denied defendants' motion to dismiss, holding that the complained of statements in *TrumpNation* were susceptible to a defamatory meaning.

Following the denial of the motion to dismiss, Trump made a discovery request, seeking among other things the identity of three people described in the book as having "worked closely with" Trump, who told O'Brien that Trump is not "remotely close to being a billionaire."

Defendants invoked the "newsperson's privilege" and the motion to compel discovery ensued.

Motion to Compel Discovery

Trump argued for the application of New York law on the motion, despite the fact that he had brought the case in New Jersey. The court first found that a conflict existed between the New Jersey and New York shield statutes. New Jersey's shield law, Judge Snyder pointed out, creates "an absolute privilege and it's rather extensive." Though New York's statute has a similar public policy to protect journalists, it is "more liberal" in allowing disclosure of reporters' source material, especially where non-confidential sources are concerned.

Importantly, the two statutes also define "news" differently. Under New Jersey law, "'News' means any written, oral or pictorial information gathered, procured, transmitted, compiled, edited or disseminated by, or on behalf of any person engaged in, engaged on, connected with or employed by a news media and so procured or obtained while such required relationship is in effect." N.J. Stat. Ann. § 2A:84A-21a(b).

Under New York law, "'News' shall mean written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare." N.Y. Civ. Rights Law § 79-h(a)(8).

While noting that O'Brien is a resident of New Jersey, that Trump has holdings in New Jersey, and that the book was sold nationwide, the court nonetheless concluded that the majority of contacts in the litigation were with the State of New York: Trump is a resident of New York, the publication of the work occurred in New York, and O'Brien "is a New York journalist [who] relies upon that reputation ... to not only market himself, but to continue to do what he does." In addition, the court found that the "book is marketed as a metropolitan New York type of publication."

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Analyzing the choice of law test, Judge Snyder acknowledged that "there's no doubt that New Jersey public policy is a strict policy to protect journalists." But that policy would not be frustrated by applying the New York shield law because "the states have a very similar interest in protecting journalistic integrity and sources."

Defining News

The argument then turned to the issue of whether *TrumpNation* could qualify as "news" under the New York shield law. Trump argued that the book did not qualify, and the judge strongly agreed, seizing on the "tone" of the book, and the "Trump Quizzes."

Although the defendants argued that an author's "tone" could not remove a book from First Amendment and shield law protection, the judge concluded "the tone sets what the book is."

He acknowledged that book was clearly of public interest, since it sold copies, and that some of the material could be defined as news. Still, the court looked to *TrumpNation* as a whole and decided that "the main function of this book is not to disseminate news to the public." The shield law did not apply, and the court ruled that O'Brien would be required to answer discovery queries about his confidential sources.

Confidential Sources

Judge Snyder offered an alternative basis for his holding as well. Even if *TrumpNation* qualifies as "news" under New York's shield law, plaintiff could still compel information about O'Brien's sources for the statements about Trump's wealth because the sources were not confidential.

The sources at issue were mentioned on page 154 of the book in a passage relating to a discussion of Trump's wealth: "Three people with direct knowledge of Donald's finances, people who had worked closely with him for years, told me that they thought his net worth was somewhere between $150 million to $250 million. [N]one of these people thought he was remotely close to being a billionaire."

O'Brien did not specifically characterize these people as "confidential" sources in a footnote. But elsewhere throughout book, the court pointed out at length, other information was specifically attributed to confidential sources.

This was a "glaring omission," according to Judge Snyder, "when this author has gone to great lengths to articulate in his footnotes or in the body of the text, who is and who is not one that would be a confidential source."

Residual Findings

The court made a number of clarifications for the record on appeal. Should New Jersey law have applied to the case, Judge Snyder noted, O'Brien would have been granted the protection of the New Jersey shield law: "New Jersey's law is written so strictly, ... I can't make a finding that's consistent with the finding under New York law. There's no doubt about it."

In a brief statement, the judge also held that O'Brien could not seek to prevent disclosure of his materials under a constitutional, qualified privilege either.

Finally, the judge ruled even if the New York shield law did apply, "editorial processes" would not be protected, and O'Brien would be required to turn over any interview notes from sessions with non-confidential sources. These, the court held, would go directly to the issue of actual malice, and were essential to Trump's case.

Interlocutory Appeal Sought

The defendants have filed a motion for interlocutory appeal with the New Jersey Appellate Division. A media coalition has moved for leave to intervene in support of defendants' motion for interlocutory appeal.

Among other things the media brief would argue that:

> The trial court's holding ignores additional case law applying the New York Shield Law to other works that are even more "entertainment-oriented" than the Book – e.g., an unauthorized biography of Martha Stewart that was excerpted in The National Enquirer or an MTV reality television show entitled True Life: I'm a Staten Island Girl.
>
> Even if the trial court's interpretation of what constitutes "news" under the New York Shield Law

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were correct as a matter of statutory interpretation, such a reading would be so contrary to the First Amendment principles underlying New Jersey's strong public policy of providing absolute protection for journalists from compelled disclosure in libel cases, that the trial court should have applied New Jersey law to the privilege question, which the trial court conceded would have shielded the material at issue from disclosure.

Defendants Timothy O'Brien, Time Warner Book Group and Warner Books are represented by Mary Jo White, Andrew J. Ceresney, and Andrew M. Levine of Debevoise & Plimpton in New York and Mark S. Melodia, Steven J. Picco, and James F. Dial of Reed Smith in Princeton, NJ.

Donald Trump is represented by Marc E. Kasowitz, Daniel R. Benson, Mark P. Ressler, and Maria Gorecki of Kasowitz, Benson, Torres & Friedman, in New York, and William M. Tambussi and William F. Cook of Brown & Connery, Westmont, NJ. The media motion in support of the interlocutory appeal was filed by Floyd Abrams, Joel Kurtzberg and Brian Barrett of Cahill Gordon Reindel.

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Georgia Court of Appeals Affirms Libel Verdict Against Extreme Blogger

By Tom Clyde

In what may be the first fully-litigated, contested judgment against a blogger, the Georgia Court of Appeals has affirmed a $50,000 award. *Milum v. Banks*, 2007 Ga. App. Lexis 217 (Ga. Ct. App. March 5, 2007) (Barnes, C.J., Andrews, P.J., Bernes, J.).

In a decision issued in early March, the Court of Appeals upheld a jury verdict against a blogger who had put up a full defense at trial against charges he libeled his former attorney by labeling him a "drug dealer bribery mule." Although other verdicts have been entered against bloggers, they have typically followed the entry of default judgments.

The verdict in this case was rendered after a three day trial in which the blogger's attorney defended his speech on the grounds that it was non-actionable opinion and published without actual malice. The Court of Appeals affirmed the verdict against the blogger, noting that several errors in the trial were waived by the blogger's counsel.

Background

The case arose from a personal dispute between the blogger, David Milum, and his former, high-profile attorney, Rafe Banks, III. Milum hired Banks to defend him against DUI charges. When Banks recommended that Milum accept a plea that he had negotiated with the prosecuting attorney, Milum decided to hire another attorney and asked for the return of his $3,000 fee. Banks refused.

Milum, a well-known political gadfly in Forsyth County (a rapidly growing County just north of Atlanta) resorted to a forum he knew well: his blog "aboutforsyth.com."

Milum proceeded to skewer Banks in a series of attacks recounting Banks' alleged involvement in the bribery of judges:

> Are you a drug dealer when you have an ounce of cocaine in your possession worth hundreds of dollars or when you carry $25,000.00 to a Superior Court judge ... to keep a drug dealer out of jail? Are you a drug dealer when you have a gram of methamphetamine in your possession or is it when you arrange for a lifelong drug dealer to escape doing eighteen years in federal prison for attempted murder? Polo Fields resident Rafe Banks is both. For the proof of this, visit our ... video. ... A cocaine dealer names Rafe Banks as being involved in bribing judges here in Forsyth County and in Federal Court in Miami.

Milum later made clear in his blog that he was not just speaking rhetorically about the role of defense attorneys: "No. This does not include those attorneys who simply defend drug dealers. I am speaking of transporting substantial bribes, as did attorney Rafe Banks."

Milum even challenged Banks: "Rafe Banks will never make one single move against me or this website because he knows that we have the witnesses to prove that he carried these drug dealer payoffs to a judge."

Not surprisingly, Banks accepted the challenge. Banks is the former district attorney of Forsyth County and now a high-profile attorney in private practice. While in private practice, he has occasionally threatened the media with defamation claims on behalf of his clients.

The case proceeded to a three day trial presided over by Forsyth County Superior Court Judge Arthur Fudger.

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Several of the witnesses whom Milum had identified in discovery did not support his accusations. Milum testified that he was relying on a videotape that mysteriously appeared in his carport in which an unknown woman facing drug charges told police that said she "had heard" Banks and another attorney bribed judges. Milum admitted he never spoke to the woman or police to determine whether these allegations were investigated.

After two days of deliberation, the jury returned the $50,000 verdict. The verdict fell far short of the Banks' request for a verdict between $400,000 and $2 million.

Court of Appeals Affirms

The Court of Appeals noted that there were a number of irregularities in the verdict.

The trial court, for example, correctly concluded that Banks was a limited purpose public figure as a matter of law, yet then permitted the issue to go to the jury. Unfortunately, the Court concluded Milum's counsel made no objection, so the issue was waived.

Similarly, the jury returned a verdict form that that awarded Banks $50,000 in general damages, but then answered "no" to a punitive damages question asking whether Milum acted with "wanton and reckless disregard for the truth of the statements at issue." The Court of Appeals recognized there was a potential inconsistency between a general damages verdict under the actual malice standard and the jury's negative answer to the punitive damages question, but said this should have been remedied by an objection to the verdict form or a special interrogatory to the jury, which Milum's counsel did not request.

The Aftermath

Remarkably, Milum seems unbowed by his legal woes. He is facing at least one other defamation case and claims to be bankrupt, yet he is still posting flaming comments on Forsyth County websites. In the immediate aftermath of the Court of Appeals decision, he was back on "aboutforsyth.com" attacking Banks yet again with a new set of charges.

Tom Clyde is a partner with Dow Lohnes PLLC in Atlanta and was not involved in the case. Plaintiff Rafe Banks, III, was represented by Myles Eastwood of Atlanta, Georgia. Defendant David Milum was represented by Jeffrey M. Butler of Woodard & Butler in Augusta.

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Antitrust and Defamation Claims Against Google for Search Results & Rankings Dismissed

In an interesting decision this month, a California federal district court dismissed for failure to state a claim a complaint against Google over its search results and website rankings. *Kinderstart v. Google*, No. C 06-2057 (N.D. Cal. March 3, 2007) (Fogel, J.).

Plaintiff, owner of the KinderStart.com website, brought a variety of business claims, including violations of the Sherman Act and Lanham Act, as well as a defamation claim, all based on a "cataclysmic" fall in page views, allegedly caused by Google's search and ranking results. The court held that plaintiff failed to state any claims against Google and dismissed with prejudice.

On the defamation claim, the court notably found that Google's web rankings are not statements of fact. Moreover, the court held that Google's web rankings were communications protected by a common interest privilege.

Background

KinderStart.com describes itself as "the largest (and most popular) indexed directory and search engine focused on children zero to seven on the net." KinderStart alleged that in March 2005 it suffered a drop of 70% or more in monthly page views and traffic because common key word searches in Google would no longer return KinderStart in the results. Moreover Google's PageRank function had assigned a rating of zero to plaintiff's website.

PageRank is a feature that can be downloaded as part of a Google toolbar that ranks websites from zero to 10. PageRank is based on Google's mathematical analysis of the relevance of a website to a person's web search. KinderStart alleged that Google was "artificially manipulating" the ranking and that is was losing ad revenue because of the decrease in traffic, including revenue from Google which placed ads on the site as part of its AdSense program.

Antitrust & Business Torts

KinderStart claimed that Google was attempting or actually exerting illegal monopolization of the search engine market and its web search advertising market in violation of Section 2 of the Sherman Act, 15 U.S.C. §2. In a lengthy analysis of the antitrust claims, the court held that plaintiff failed to allege "a relevant market" and therefore failed to state any claims. As to the search engine market, the court found that:

> KinderStart cites no authority indicating that antitrust law concerns itself with competition in the provision of free services. Providing search functionality may lead to revenue from other sources, but KinderStart has not alleged that anyone pays Google to search.

Moreover, Google's web search advertising program was too narrow to constitute a relevant market under antitrust law. "A website," the court found, "may choose to advertise via [other] search-based advertising or by posting advertisements independently of any search."

Kinderstart also alleged that Google violated the false advertising prong of the Lanham Act, 15 U.S.C. § 1125 (a) by allegedly stating falsely that its web rankings were "objective." The court dismissed the claim, holding that PageRanks were not "commercial advertising and promotion." Plaintiffs' other unfair competition claims were similarly dismissed.

Defamation Claim

KinderStart also brought a defamation claim over the PageRank of zero, i.e., that the ranking meant that the website was not worth visiting as matter of objective fact. Dismissing, the court found that "PageRank is a creature of Google's invention and does not constitute an independently discoverable fact."

Moreover since the PageRank is only provided to web users who download a Google toolbar, the communication of the PageRank is protected by the common interest privilege under Cal. Civ.Code § 47 (c) which privileges communications made without malice between interested persons.

Anti-SLAPP Motion

Finally, the court denied Google's additional motion to strike the complaint under California's anti-SLAPP statute, Cal. Civ. Code § 425.16. The court held that the PageRank and search results about KinderStart were not of "public interest" within the meaning of the statute. Although the lawsuit received public attention, the court noted that there was no prior public discussion of the issue of KinderStart's ranking, except between the parties.

But the court granted a separate motion for Rule 11 sanctions against KinderStart for unfounded allegations in the complaint that Google sold web rankings and blocked websites on the basis of political or religious affiliation.

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Pennsylvania Newspaper Wins Libel Trial Over Letter to the Editor

Letter Didn't Defame Former District Attorney

After three and a half days of trial in February, a Pennsylvania jury took approximately 30 minutes to return a verdict for a weekly newspaper in a libel suit brought by a former district attorney. *Germak v. Sieber*, No. 329 of 2000 and *Germak v. Sweitzer*, No. 5 of 2002 (Pa. C.P., Juniata County verdict Feb. 16, 2007).

Background

The suit stemmed in part from a letter to the editor published in the weekly *Times* in Port Royal, located in central Pennsylvania. The letter alleged that Ralph A. Germak, a former Juniata County district attorney who by then was in private practice, had been involved in efforts to undermine the county school administration. The school board, administration, and school issues in general had been the subject of much local controversy in the mid to late 1990s.

In the November 1999 election, Germak lost his bid for re-election to a fourth term as district attorney. At the same time a new school board majority was elected and in January 2000, they appointed Germak as School Board Solicitor.

On February 16, 2000, the *Times* published a 10-paragraph letter which stated in the first paragraph that meetings had been held in the school board solicitor's home – without mentioning Germak by name – and that the goal of these meetings was "to try and undermine the present [school] administration."

In late 2000, Germak sued the *Times*, its owner Donna K. Swartz and the man who signed and submitted the letter to the newspaper. After learning in discovery that the letter to the editor was initiated and drafted by another man – a frequent commentator on school board issues – Germak filed a separate libel action against him.

After an initial flurry of activity, the cases remained dormant until 2006, when they were revived. The cases were consolidated and went to trial before visiting senior Judge Barry F. Feudale, who has presided over a number of high profile defamation cases in Pennsylvania.

Libel Trial

The trial began on February 12, 2007. Germak attempted to show that the statements made about him implied that he had behaved criminally, violated his oath of office as district attorney and violated the code of professional responsibility as school district solicitor. The defense argued that the statements were true, they were not defamatory, and that there was no evidence that the letter had actually harmed Germak.

The newspaper's owner and editor Donna K. Swartz testified that she checked with a reporter for the newspaper who covered school district matters, who told her that at least one meeting had been held in Germak's home, and that the participants were undermining the school administration. Swartz did not contact Germak, but testified that she thought that the contents of the letter were true.

Judge Feudale denied both a defense motion for non-suit at the conclusion of plaintiff's case, and a defense motion for a directed verdict at the conclusion of the trial for claims against Swartz and the *Times*.

The 12-member jury reached a unanimous verdict in favor of all the defendants. Plaintiff has since filed a motion for a new trial on the grounds that one of the jurors should have been disqualified because she was convicted of misdemeanor theft in a case that he prosecuted as district attorney. The defense has responded by arguing that Germak could have discovered this before trial and removed the juror during *voir dire*, and that the verdict should stand even if that juror is disqualified because Pennsylvania law allows a verdict by five-sixths of a jury to stand.

All of the defendants were represented by Scott C. Etter of Miller, Kistler & Campbell in State College, Pa. Plaintiff represented himself at trial, and had previously been represented by Ronald Katzman of Goldberg, Katzman & Shipman in Harrisburg, Pa.

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A Showdown in Texas: D.A.'s Lawsuit Against Local Newspaper Thrown Out

Summary Judgment Granted on Interlocutory Appeal

By Tom Clyde and Bill Christian

On February 13, 2007, the Third District Court of Appeals in Austin, Texas, rejected the defamation claims of former District Attorney Charles Penick, who claimed *The Smithville Times* had recklessly published the accusations of a conspiracy theorist. *Cox Texas Newspapers, L.P. d/b/a The Smithville Times v. Penick*, No. 03-05-504-CV (Tex. App. – Austin 2007) (Law, C.J., Pemberton, Waldrop, JJ.).

In a detailed decision examining the "of and concerning" standard as well as an array of alleged evidence of actual malice, the Court reaffirmed the right of the news media to report and comment on controversial criminal prosecutions without risk that such reporting will be transformed into fodder for libel lawsuits.

Background

When Charles Penick retired after almost twenty years of service as the District Attorney of Bastrop County, he left office carrying a grudge. He was upset at his hometown newspaper for an editorial series and related news reporting on a controversial death penalty prosecution that occurred under his watch.

Although larger newspapers, including *The Austin American-Statesman* and *The Austin Chronicle*, had closely reported on the criminal case, Penick was particularly angry that *The Smithville Times*, his local newspaper, had shown the temerity to report on and publish negative editorials about the prosecution.

In particular, Penick believed that *The Smithville Times* was being influenced by a local gadfly named David Fisher, who had repeatedly made allegations about the evidence used by the prosecution, including in filings Fisher made with a statewide Public Integrity Unit that accused Penick of fraud.

Just before the one-year statute of limitations ran, Penick filed a defamation lawsuit against *The Smithville Times*, its editor and reporter. The case was before the same court where Penick had served as District Attorney for almost two decades. After discovery and the recusal of local district judges, *The Smithville Times*' summary judgment motion was heard by a specially-appointed trial court judge, Hon. Vann Culp.

Although Judge Culp dismissed several of Penick's claims, he found a triable issue of actual malice with respect to Penick's libel claims premised on an editorial critical of the Reed prosecution and on a news report about Fisher's filing with the Public Integrity Unit.

The defendants' took an interlocutory appeal of the order under a Texas statute allowing media defendants to appeal the denial of summary judgment motions premised on a First Amendment defense. On February 13, 2007, the Third District Court of Appeals brought Penick's case to an end. The Court of Appeals reversed the district court for failing to grant summary judgment on all claims and entered a take-nothing judgment in favor of the newspaper.

Not "Of and Concerning" Plaintiff

In bringing his lawsuit, Penick directed much of his outrage at a ten-part editorial series titled "Is this Justice?" that analyzed the evidence in the criminal case in considerable detail and pointed to alleged discrepancies that had come to light since Reed's conviction.

Penick contended that the editorial series was little more than a repetition of various allegations by Fisher and that *The Smithville Times* reporter Tyanna Tyler had conspired with Fisher to smear Penick and his office.

Despite Penick's evident frustration with the editorials, his claims based on the series were dramatically undercut by the fact that the editorial series did not once mention him.

Although the series identified the appointed assistant district attorney who "first chaired" the case as well as to various investigators who gathered evidence for the prosecution, it did not once identify Penick by name or office. Penick's primary contention was that readers would have connected the editorial series to him because the first editorial ran on the same day as a letter to the editor from Fisher in which Fisher criticized Penick by name.

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The Third District Court of Appeals found the evidence fell considerably short of the "of and concerning" standard and reversed the trial court for failing to grant summary on the last editorial in the series. After reviewing the constitutional underpinnings of the "of and concerning" standard articulated in *New York Times v. Sullivan*, 376 U.S. 254, 288 (1964), the Court squarely rejected the contention that a public official could transform impersonal criticism of a governmental group into an attack on him individually by alleging that the public official's name had been used in the past in the same periodical.

The Court explained, "[a]lthough we recognize that defamation claims should be reviewed in context, our concern is where the inquiry would stop under Penick's analysis." Noting that public officials are mentioned frequently in the media, the Court rejected this as an end-run around the "of and concerning" standard.

The evidence fell considerably short of the "of and concerning" standard.

Actual Malice

Penick also complained that he was defamed by *The Smithville Times'* news article on Fisher's filings with the Public Integrity Unit, also authored by reporter Tyler. In particular, Penick asserted that the report was false and malicious because the article's headline – "Fraud Charges Filed on DA in Reed Case" – allegedly portrayed the filings as tantamount to a criminal action, yet ignored information from the Public Integrity Unit that it had not launched a formal investigation. In fact, the Public Integrity Unit would formally close its file on Fisher's submission shortly after *The Smithville Times'* news report.

The Court of Appeals found these allegations, and other alleged evidence of actual malice, unpersuasive. In doing so, the Court applied long-standing Texas law that a media defendant can meet its summary judgment burden to negate actual malice through affidavits of the relevant reporters and editors denying any actual malice and explaining the circumstances surrounding the challenged publications.

Specifically, the Court rejected Penick's argument that *The Smithville Times'* report created a substantially false impression because it did not recount an alleged statement from a Public Integrity Unit attorney indicating that no formal investigation was underway. The Court explained that the Public Integrity Unit had confirmed that the complaint was in a "preliminary review stage." As a result, the Court concluded, "the presumption that the investigation was still open at some level was substantially true."

The Court of Appeals also dismissed a wide array of other evidence that Penick claimed was probative of publication with actual malice. The Court rejected the contention that *The Smithville Times* "blindly" relied on Fisher, noting that it was undisputed that its reporter and editor had themselves closely scrutinized the evidence in the case.

Moreover, the Court noted that under the actual malice standard, "even assuming the publications were authored from a hard-hitting conspiracy theorist's perspective, this too provided no evidence of actual malice."

The Court also rejected claims that actual malice was shown because *The Smithville Times* allegedly failed to disclose its relationship with Fisher, omitted complimentary information about Penick, and failed to obtain comment from Penick or other members of the prosecution team.

Penick has moved the Court of Appeals to reconsider its decision. That motion remains pending and no response from *The Smithville Times* has been requested as of the time the *MediaLawLetter* went to press.

Tom Clyde and Peter Canfield of Dow Lohnes PLLC and Mike McKetta and Bill Christian of Graves, Dougherty, Hearon & Moody, P.C. represented defendants Cox Texas Newspapers, L.P. d/b/a The Smithville Times and reporter Tyanna Tyler. Plaintiff was represented by Greg Anderson of Anderson, Anderson, Bright & Crout, P.C.

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Iowa Supreme Court Recognizes Libel by Implication

Finds Sufficient Evidence That Newspaper Intended to Imply Unprofessional Conduct

The Iowa Supreme Court this month affirmed an appellate court ruling that reinstated a freelance sports columnist's libel by implication claim against a newspaper and sports editor over a column criticizing plaintiff's work. *Stevens v. Iowa Newspapers*, No. 04-0987, 2007 WL 704592 (Iowa March 9, 2007) (Larson, Cady, Streit, Wiggins, JJ., Ternus, C.J.).

The court found that while the complained of statements in the column were literally true, that was not a bar to the libel claim because Iowa recognizes claims for libel by implication by public figures.

The court also affirmed that reasonable jurors could find that the newspaper intended to imply that plaintiff fabricated his columns when the newspaper wrote that plaintiff "rarely attended events about which he wrote."

Background

The plaintiff, Todd Stevens, was a freelance sports columnist for the *Ames Tribune*, published by Iowa Newspapers, Inc. The libel case arose from a dispute between Stevens and the newspaper's sports editor Susan Harman over coverage of Iowa University's athletics department. Stevens resigned from the paper after it refused to publish a column he wrote about the subject. The newspaper agreed to publish a final "farewell" column, but decided that Harman would also write a column in "point-counterpoint" fashion.

In his farewell column, Stevens wrote that he had been censored and that his First Amendment rights had been violated by the newspaper. Harman responded by criticizing Stevens, stating, among other things, that he (1) "rarely attended events upon which he wrote columns"; (2) that his rejected column "contained numerous factual errors and unsubstantiated claims"; and (3) that even a redraft "continued to include fatal factual errors and near libelous characterizations."

Stevens sued the paper and Harman for libel. The trial court granted summary judgment to the defendants, finding that the first statement was substantially true where plaintiff admitted that he attended only eighteen percent of the over 300 events about which he wrote. The remaining statements were published without actual malice or were protected opinion.

The intermediate appellate court affirmed dismissal of claims over the second and third statements. *See* 711 N.W.2d 732, 34 Media L. Rep. 1430 (Iowa App. Jan 19, 2006). The statement that plaintiff's column contained "numerous factual errors" had some factual support and therefore could not have been published with actual malice. And the statement that the column contained "near libelous characterizations" was protected opinion since "there is simply no way to prove or disprove that something is near libelous."

But the court reinstated the libel by implication claim over the first statement, holding that under Iowa law literally true statements can be actionable. The court also found sufficient evidence that the defamatory implication was intended based on the sports editor's deposition testimony.

Among other things, she testified that she intended to convey the notion that Stevens "very often would not do the legwork to support the columns, whether it be attending events or making the necessary phone calls, talking to players, talking to coaches" – but conceded that personal attendance at events was not essential for a columnist like Stevens.

Viewing this evidence at the summary judgment stage in a light most favorable to plaintiff, the court of appeals concluded that:

> A reasonable person could find that while Harman knew journalistic standards do not require issue columnists to attend the events they write about, her opinion implied the opposite. We also believe a reasonable juror could find Harman intended to convey to readers the message that Stevens was professionally incompetent or otherwise incredible.

Iowa Supreme Court Decision

The Iowa Supreme Court affirmed. In a unanimous decision, the Court expressly adopted the principle of defamation by implication. "Otherwise," the Court stated, "by a careful choice of words in juxtaposition of statements in a publication, a potential defendant may make statements that are true yet just as damaging as if they were actually false. "

The Court said it was a "closer questions" whether public figures can maintain defamation claims over literally true statements, noting conflicting authority on the issue. *See, e.g.,*

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Diesen v. Hessburg, 455 N.W.2d 446, 452 (Minn.1990) ("we hold an allegedly false implication arising out of true statements is generally not actionable in defamation by a public official").

But it rejected this conclusion, citing instead to *Saenz v. Playboy Enter., Inc.*, 841 F.2d 1309, 1314 (7th Cir.1988) (nothing in Supreme Court cases justifies denying a public official a cause of action premised on defamatory innuendo). *See also* C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan*, 78 Iowa L.Rev. 237, 308 (1993) (denying cause of action for defamation by implication "would invite a publisher who deliberately seeks to harm the reputation of a public person to manipulate statements purposefully or to omit critical facts with the design of implying a false, defamatory meaning.").

The court concluded that a reasonable jury could find sufficient evidence of deliberate falsity or recklessness where "the article stated that Stevens rarely attended events about which he wrote, without revealing to the reader what defendant Harman knew – that personal attendance was not required by professional standards."

Finally, the court affirmed dismissal of plaintiff's other claims. The statement that his column contained "numerous factual errors" was substantially true. The statement that his column contained "near libelous characterizations" was not defamatory as a matter of law. "We agree with the district court and the court of appeals that the "near libelous" statement is so nebulous it is incapable, as a matter of law, of bearing a defamatory meaning."

Plaintiff was represented by Theodore F. Sporer of Sporer & Ilic, P.C., Des Moines. Iowa Newspapers and reporter Susan Harman were represented by Michael Cox and Elizabeth M. Callaghan of Koley Jessen, P.C., Omaha, Nebraska.

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Florida Appeals Court to Hear Online Libel Case

Will Decide If Retraction Statute and Single Publication Rule Apply Online

By Susan Tillotson Bunch

In a case of first impression for a Florida appellate court, the Second District Court of Appeal will hear arguments on April 17, 2007 about the applicability of the single publication rule and the state's retraction statute to online speech. *Holt v. Tampa Bay Television, Inc. et al.*, No. 03-11189 (March 17, 2006), *appeal pending*, Case No. 2D06-1815 (Fla. 2d DCA) (Little, J.).

Background

Alice Holt sued WFTS-TV of Tampa, Florida and its reporter, claiming that they had defamed her in stories broadcast by the television station and posted to its website. According to the amended pleadings, WFTS published statements to the effect that Ms. Holt was violating a judge's order and boarding dogs illegally, that she had no business being at a boarding kennel, that she was running a boarding kennel in violation of a judge's order, and that she had been ordered to stay away from animals and never to work with animals again. The broadcasts were contemporaneous with two website stories recapping the information in the broadcasts.

The station argues that Florida's retraction statute should apply equally to news stories posted online by media entities.

Because Florida requires plaintiffs in defamation cases to serve a timely demand for retraction on a media defendant as a condition precedent to bringing suit, Ms. Holt sent a letter to the television station threatening to bring suit. WFTS moved for summary judgment, arguing that the letter failed to meet the specificity requirements of the retraction statute, because it did not identify any of the allegedly false statements in the television broadcasts or how they were false.

Ms. Holt contended that the retraction statute did not require specificity is required with regard to identifying allegedly false statements in television broadcasts. In addition, her letter made no reference to the stories on the station's website and she took the position that the retraction statute did not apply to stories posted online.

On March 17, 2006, Hillsborough County Circuit Judge Perry Little granted the motion for summary judgment, declaring in an unpublished opinion that both the single publication rule and Florida's retraction statute applied to news stories published on media-hosted Internet sites.

The trial judge held that plaintiff's presuit letter failed to identify the allegedly false and defamatory statements in such a way as to allow the station an opportunity to retract any errors. In addition, Judge Little disagreed with the plaintiff's argument that the retraction statute did not apply to online news stories, finding that the Internet fell within the statutory reference to "other medium." Finally, because the statute of limitations had expired without the plaintiff satisfying the jurisdictional prerequisites in the retraction statute, the defamation claims were barred.

The Pending Appeal

On appeal, Ms. Holt argues that her presuit notice letter was adequate with respect to the television broadcasts, contending that she is not required to specify the allegedly false statements in her presuit notice. Ms. Holt further argues on appeal that no retraction demand was necessary as to the stories posted on the station's online website because the Internet did not fall within the statutory phrase "other medium."

Finally, Ms. Holt argues that the statute of limitations had not expired as to the online stories. Although she contends that the single publication rule did not apply to stories posted on the Internet, she concedes that this is inconsistent with the majority of published opinions but argues that further discovery was necessary to determine whether the website stories had been changed since their original publication.

Defense Arguments

The station contends that Ms. Holt's presuit letter, even under the most liberal scrutiny, failed to give the station enough information to ascertain whether a retraction was warranted because it did not identify the false statements or the broadcast in which they allegedly occurred (almost two years before the letter was sent). The station argues

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that Florida's retraction statute should apply equally to news stories posted online by media entities.

To date, only one court has authored an opinion on this issue; the Georgia Supreme Court has interpreted its retraction statute as applying to Internet publications. *See Mathis v. Cannon*, 276 Ga. 16, 573 S.E.2d 376 (2002).

The station also argues that Florida should follow the majority view and apply the single publication rule to online speech; to do otherwise would allow the endless tolling of the applicable statutes of limitation each time an Internet user viewed the story online. Although Ms. Holt contends that additional discovery is necessary, the station contends that it would make no difference to the outcome because of Ms. Holt's failure to comply with the presuit notice requirements prior to filing suit and prior to the expiration of the statute of limitations.

Gregg D. Thomas and Susan Tillotson Bunch, of Thomas & LoCicero PL in Tampa, Florida, represent the defendants in this case.

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New York Federal Court Orders Injunction After Violation of Protective Order

By George Freeman

Practitioners will recall that in the Procter & Gamble/ *BusinessWeek* case and the Conoco/*Wilmington Star-News* case, federal district judges were extremely upset and issued prior restraint and contempt orders (respectively) when their sealing or protective orders – with the help of the media – were violated. Ultimately, those rulings were reversed by Circuit Courts.

In a similar situation this winter in a multi-district litigation in the Eastern District of New York, a very angry Judge Jack Weinstein issued a more nuanced injunction. *In re Zyprexa Injunction*, No. 07-CV-0504, 2007 WL 460838 (E.D.N.Y. Feb. 13, 2007). (Weinstein, J.).

In this case, a discovery protective order was violated, somewhat, but not wholly, different from the (improper) sealing order applying to litigation filings in the Procter & Gamble case and the inadvertent release by a court clerk of (procedurally defective) sealed settlement documents in the *Wilmington Star-News* case. Moreover, in this case, Judge Weinstein believed, rightly or wrongly, that the press, here *New York Times* reporter Alex Berenson, was a co-conspirator in violating the protective order, acting less passively than the media in those other cases.

In the end, Judge Weinstein's injunction ordered that two of the conspirators and certain individuals who received the protected documents from them be enjoined to return them to the court. As interestingly, however, the judge did not enjoin further publication of the materials on websites, since he felt such remedy would not successfully and practically prevent the feared harm. For media attorneys, the opinion is also noteworthy for its harsh treatment of *The Times* reporter, though, in the end, he was not enjoined or sanctioned.

Facts

This was a case involving some 30,000 personal injury suits against Eli Lilly regarding the anti-psychotic drug Zyprexa. Millions of Lilly documents were obtained by plaintiffs in discovery, but were subject to a typical protective order. However, notwithstanding the protective order, according to the judge's opinion, three conspirators desired to make some of the Lilly documents public: David Egilman, an expert for plaintiffs; James Gottstein, an Alaska attorney unconnected to this litigation but involved in other drug-related cases for plaintiffs in Alaska; and Alex Berenson, the *Times* reporter.

Egilman possessed the Lilly documents in his role as expert, but had signed an agreement binding him to the protective order. According to the judge, Egilman and Gottstein were put together, with some degree of help by Berenson, and they determined that Gottstein would subpoena the documents from Egilman as part of an unconnected Alaska litigation he was involved in.

Pursuant to the protective order, Egilman gave notice of the subpoena to Lilly. However, according the opinion, to expedite the transfer of the documents, Gottstein, hurriedly and without notice, then served an amended subpoena that required Egilman to deliver the documents to him forthwith.

Once Gottstein acquired the documents, he began sending them electronically to individuals to whom he thought they would be of interest, including *Times* reporter Berenson, two congressional staffers, some public interest groups, and others. *The Times* ran a number of exclusive first page stories based on the documents. Once all this became known by the parties to the lawsuit, both Lilly and the plaintiffs' committee petitioned the court for an injunction requiring Gottstein to return the documents.

A preliminary injunction was soon entered ordering Gottstein not to further disseminate the documents; to return them to the court; to provide a list of all individuals and organizations to whom he had sent them; and to take steps to retrieve them. Judge Weinstein then held a hearing at which Gottstein testified; the expert Egilman did not, citing his Fifth Amendment privilege against self-incrimination; and, as will be described below, *The Times* declined the judge's "invitation" to testify.

The Injunction

In his February 13, 2007, 78-page decision, Judge Weinstein carefully justified the need for a protective order in a case such as this one. He reasoned that "even if ones believes, as apparently did the conspirators, that their ends justified their means, courts may not ignore such illegal conduct without dangerously attenuating their power to conduct necessary litigation effectively on behalf of all the people.

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Such un-principled revelation of sealed documents seriously compromises the ability of litigants to speak and reveal information candidly to each other; these illegalities impede private and peaceful resolution of disputes." The court also cited *Seattle Times v. Rhinehart* for the proposition that litigants do not have unrestrained rights, under the First Amendment or otherwise, to disseminate information obtained through pretrial discovery.

Thus, the judge enjoined Gottstein, Egilman and the individuals to whom they delivered the documents, who both had not so far returned them and against whom an injunction had been sought by Lilly and the plaintiffs' committee, to return the improperly disseminated documents. The judge noted that if those individuals believed that access to the protected documents "was essential to their pursuit of the public interest," they could have and still could petition for the court for modification of the protective order and declassification of the documents in question.

The judge noted that he was not enjoining any media entities; and, indeed, Lilly had not sought an injunction against *Times* reporter Berenson. The court also noted that it "is not now punishing anyone for any alleged violation of court orders."

Perhaps more interesting is the court's opinion regarding the possible injunction on publication of the protected materials. The court concluded that "prohibiting five of the internet's millions of websites from posting the documents will not substantively lower the risks of harm posed to Lilly. Websites are primarily fora for speech. Limiting the fora available to would-be disseminators by such an infinitesimal percentage would be a fruitless exercise of the court's equitable power."

Therefore, "mindful of the role of the internet as a major modern tool of free speech, in the exercise of discretion the court refrains from permanently enjoining websites based on the insubstantial evidence of risks of irreparable harm. Restrictions on speech, even in the context of content-neutrality, should be avoided if not essential to promoting an important government interest."

The Times

Finally, the court had harsh words for Berenson, calling his conduct "reprehensible" and describing the three conspirators' actions as a "brazen flouting" of the protective order "raising serious questions about their responsibility."

The judge opined that by the reporter's purported involvement in the scheme, this was not a case, like the Pentagon Papers, of a newspaper receiving documents with "clean hands." Citing *Bartnicki v. Vopper*, but strangely saying it left the question open, he contrasted "affirmatively inducing the stealing of documents" from "passively accepting stolen documents of public importance for dissemination." Nonetheless, since no injunction against him had been sought by Lilly, Berenson was not enjoined.

Before the hearing, Judge Weinstein "invited" Berenson to appear and testify as to his involvement. Berenson declined. Through undersigned counsel, *The Times* wrote that:

> as a matter of long-held principle, we believe that it would be inappropriate for any of our journalists voluntarily to testify about newsgathering at *The Times*, our reporters' communications with their sources or the editorial judgments that are made in deciding what is and what is not published by *The Times*, just as we would vigorously resist any effort by any party to compel such testimony. We guard quite zealously our role as a member of a free and independent press and believe quite passionately that, consistent with the principles embodied in the First Amendment, it is not the role of the newspaper or its reporters to submit to cross-examination about such matters even where may otherwise serve our particular interests in a particular case to do so.

Because *The Times* declined to appear, it was somewhat estopped from affecting or later disputing Judge Weinstein's findings. A review of both Gottstein's testimony and, more importantly, Gottstein's first letter to the court which explained his actions, shows convincingly that Berenson's involvement was far more limited and minor than as depicted by the judge.

In the end, in the last week, Gottstein and Egilman both have appealed the injunction against them. Lilly has said it will seek sanctions against them, but not against Berenson.

George Freeman, in-house counsel at The Times, represented the newspaper and reporter in this matter.

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Court Denies Prior Restraint Seeking to Bar News Reports About a Public Utility's Privileged Communications

By Alia L. Smith

Late last month a New York trial court flatly rejected a prior restraint against the press. *Nicholson v. Keyspan Corp.*, 14 Misc.3d 1236, 2007 WL 641414 (N.Y. Sup. Ct. Feb. 28, 2007) (unpublished) (Sgroi, J.). The injunction would have prohibited any news reporting about documents prepared in 1993 by attorneys for a major power company that described extensive ground water contamination at its facilities and proposed remedial actions that were never carried out.

In *Keyspan*, the defendant sought to restrain any further dissemination or use of reports prepared by its attorneys that were "leaked" to the press by plaintiff's counsel after they were inadvertently filed in an unrelated antitrust proceeding. The court held that the documents remained privileged despite their mistaken disclosure, found that plaintiff's counsel had acted improperly in distributing them to the press, and ordered plaintiffs and their counsel to return or destroy all copies. But, the court flatly rejected as unconstitutional defendant's request to enjoin the press from reporting on newsworthy material already in its possession.

The court flatly rejected as unconstitutional defendant's request to enjoin the press from reporting on newsworthy material already in its possession.

Background

In an on-going environmental tort case pending in Suffolk County, New York, several individuals allege that they have been exposed "to environmental contaminants" that have migrated in an large underground plume from a decommissioned manufactured gas plant owned by energy giant Keyspan Corporation.

The case has attracted significant public interest both because of the environmental and health consequences of the extensive underground pollution and because the massive costs of "remediating the plume of contaminants" may have to be borne by Keyspan's rate payers.

Recently, counsel for plaintiffs provided journalists for both *Newsday* and News 12, a local cable news channel, with copies of several documents containing information about the alleged pollution. Most notably a December 27, 1993 report prepared by counsel discussed the extent of the pollution existing at two sites and proposed a strategy to remediate the pollution in a manner that would "minimize the Company's environmental, legal and public relations liabilities" (the "Strategy Report"). Both news organizations discussed the Strategy Report with local public officials and reported on its contents. Plaintiff also posted the Strategy Report on an Internet website.

Prior Restraint Sought by Keyspan

Upon learning that plaintiffs had made the Strategy Report (and other documents) publicly available, defendants moved for an injunction restraining plaintiffs, their attorneys, and "*any third parties to whom Plaintiffs have disseminated*" the documents "from any further use or dissemination of such documents (or copies thereof), and from otherwise divulging the contents of such documents." Defendants argued that the documents were protected by the attorney-client privilege, and that an injunction was needed even against the press in order to protect the privilege effectively.

Newsday and News 12 moved to intervene to oppose any injunction against the press. They asserted that extending the injunction to the press would be an unconstitutional prior restraint elevating a common law privilege above a constitutional right. They also argued that an injunction could not in any event be effective given the widespread dissemination of the information on the Internet that had already occurred.

Keyspan responded that a prior restraint was appropriate under the circumstances, and indeed essential in order to uphold a privilege that is a bedrock of our justice system. Keyspan relied heavily on Judge Weinstein's recent holding in *Zyprexa*, enjoining the dissemination of confidential documents obtained by a reporter acting in concert with a lawyer to gain access to the sealed records. *In re Zyprexa Injunction*, 2007 WL 460838 (E.D.N.Y. Feb. 13,

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2007). *See also* the article on this decision in this issue of the *MediaLawLetter*.

On reply, the news organizations pointed out that the *Zyprexa* injunction expressly did *not* extend to the press, but enjoined only those non-journalists "who participated in the conspiracy [to violate the protective order] or aided the conspirators." 2007 WL 460838 at *8. In fact, Judge Weinstein made clear that an injunction against the press would undoubtedly lead to significant constitutional concerns, even where the press may have been complicit in improper behavior.

The Court's Decision

In a decision dated February 28, 2007, the court found that the Strategy Paper remained protected by the attorney-client privilege. It therefore issued an injunction against the plaintiffs and their attorneys, requiring them to turn over all copies of privileged documents in their possession, delete any electronic copies, and refrain from using the information contained in the documents in the litigation.

The Court declined, however, to impose any prior restraint upon *Newsday* and News 12. Noting that, unlike *Zyprexa*, "there is no allegation herein that the intervenors have conspired with Plaintiffs ... to improperly obtain the documents that are the focus of this decision," the court found that any restraint "on their right to publish would violate the protections afforded them under both the United States Constitution and the New York State Constitution." Slip. Op. at 7.

Although underscoring that the "attorney client privilege is an important tenet of this Country's jurisprudence and a cornerstone protection for the rights of its citizens," the court found that it could not "be used to restrict the properly exercised, constitutionally protected freedom of the press to publish." Slip. Op. at 8.

David A. Schulz, Alia L. Smith and John B. O'Keefe of Levine Sullivan Koch & Schulz, LLP represented the intervenors Newsday and News 12. Defendants were represented by John E. Reilly and John Hastings of Keyspan Corp. in New York and Bruce W. Felmly of McLane, Graf, Raulerson & Middleton, P.A., in New Hampshire. Plaintiffs were represented by Irving Like of Reilly, Like & Tenety in New York.

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Kansas City Court Issues Short-Lived Prior Restraint Order

By Mark Sableman

An anonymous leak of a Kansas City, Kansas public agency's memo in early March led to an usual prior restraint and takedown order against two newspapers, which was lifted two business days later. *State of Missouri ex rel. The Kansas City Star and The Pitch Newspaper v. Hon. Kelly J. Moorhouse*, No. WD 68104 (Mo. Ct. App. March 6, 2007). (Breckenridge, PJ).

The case illustrates yet again that even in the well-settled area of prior restraint, courts are often tempted to interfere with media publications. In this case, the court's motivation was the desire to somehow protect the sanctity of a two-year-old attorney-client privileged document that had already been leaked to the press, and reported in two newspapers.

Background

On Friday, March 3, two Kansas City, Missouri newspapers, the McClatchey-owned *Kansas City Star* and Village Voice Media-owned *Pitch*, received over-the-transom copies of a November 2004 memo written to the Kansas City, Kansas Board of Public Utilities by its outside counsel, Stanley A. Riegel of Stinson Morrison Hecker. The memo reviewed various of the utility's power plant projects, and opined that the utility could be found in violation of EPA regulations with respect to many of them.

Reporters for the *Star* and the *Pitch*, after receiving the memo, called the agency for comment, and also prepared and posted articles on their news websites that afternoon. The agency's lawyers responded by informing both newspapers that they were headed to Jackson County Circuit Court that afternoon to request an injunction against publication of anything about the memo.

TRO Granted

The agency filed its three-page Petition and two-page Motion for a Temporary Restraining Order shortly before the close of the court day. Neither the assigned judge nor the presiding judge were available, and the parties ended up before Circuit Judge Kelly J. Moorhouse, who heard argument beginning around 5:20 p.m., with counsel for the *Star* and the *Pitch* participating by telephone.

In the course of the argument, Judge Moorhouse stated that she was a great believer in the First Amendment, but that she also felt a great duty to protect the confidentiality of attorney-client documents. Neither precedents (including Supreme Court cases) that stressed the extremely high standard for a prior restraint, nor the fact that the disclosures had already been made, on the two newspaper websites, could dissuade her from her concern for the privilege.

At one point, Judge Moorhouse told the newspapers that she would take no action on the motion, and leave it for the assigned judge to handle the following Monday, if they would voluntarily take down their articles and refrain from further publications about the memo in the interim. Both newspapers declined this offer.

At 7:30 p.m., Judge Moorhouse granted the TRO motion, and entered an injunction against further publication, and a mandatory order requiring the newspapers to withdraw their previously published articles from distribution. The order was contingent on posting of a $10,000 bond or $1,000 cash deposit by the plaintiff, which was satisfied the next day. The *Star* and *Pitch* both removed their articles, and posted articles about the TRO.

Appeal

Counsel for the *Star* and *Pitch* immediately prepared a petition for a writ of prohibition to the Missouri Court of Appeals. The petition and supporting papers were served on plaintiff's counsel around noon on Saturday. The *Star's* counsel, in Kansas City, called several judges of the appeals court on Saturday, to try to get an immediate ruling, but was unsuccessful.

Counsel also considered taking their petition directly to the Missouri Supreme Court on Saturday, based on its inherent authority to issue remedial writs. By coincidence, six of the seven members of that court were scheduled to participate that afternoon in a symposium at Washington University in St. Louis marking the 150th anniversary of the *Dred Scott* case. Despite the attractiveness of seeking a redress of one miscarriage of justice at a symposium concerning another, counsel decided to follow the customary appeals route through the intermediate appeals court.

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Kansas City Court Issues Short-Lived Prior Restraint Order

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The petition for a writ of prohibition and supporting papers were filed with the Court of Appeals on Monday morning, March 5. That afternoon, the court issued an order requiring respondents to file a response by noon on Tuesday. Around 4:30 p.m. Tuesday, March 6 – just two business days after the case began – the court issued a Preliminary Order in Prohibition, which commanded Judge Moorhouse to "take no further action with respect to" the TRO. Although somewhat ambiguous, this order appeared to embrace the relief sought by the newspapers – an order preventing enforcement of Judge Moorhouse's TRO. The newspapers immediately reposted their articles.

The following day, plaintiff dismissed its action.

Mark Sableman of Thompson Coburn LLP in St. Louis, Missouri and Steve Suskin of Village Voice Newspapers in Phoenix, Arizona represented the Pitch. Sam L. Colville of Holman, Hanson, and Colville, P.C. in Overland Park, Kansas represented the Kansas City Star. R. Dennis Wright of Stinson Morrison Hecker LLP in Kansas City represented the plaintiff, the Kansas City, Kansas Board of Public Utilities.

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Showtime Knocks Out Restraint on Mixed Martial Arts Broadcast

California Court Dissolves Temporary Restraining Order

By Thomas R. Burke

A California state court issued a temporary restraining order against a fight scheduled to be aired on Showtime only to dissolve the order two days later after the network intervened. *West Coast Prods., LLC v. Frank Alisio Juarez III, a.k.a. Frank Shamrock*, No. 107CVO78600 (Cal. Super. Ct. Jan. 29, 2007) (Murphy, J).

On Jan. 24, a Santa Clara County Superior Court judge in San Jose issued a temporary restraining order against a fighter, Frank Shamrock, who was to headline a Feb. 10 "Mixed Martial Arts" series of fights on Showtime. The TRO was won by Shamrock's former promoter, who didn't sue Showtime Networks or give it notice of the TRO. The promoter sought to enforce a purported two-fight deal and prevent Shamrock from participating in the fight.

But the sweeping TRO went beyond prohibiting Shamrock from participating in the Showtime fight. It also prevented him from "taking any additional steps to promote, market, or otherwise publicize the Showtime Fight" and extended to "all persons or entities in active concert or participation with Shamrock," apparently including Showtime Networks and the promoter from which the network had licensed the event. Adding to the company's uncertainty, the court set an order to show cause (OSC) hearing regarding a preliminary injunction just four days before the fight.

The network had committed hundreds of thousands of dollars to advertise and promote the event, creating television advertisements, radio advertisements, a Las Vegas billboard, Internet banner ads, and trade ads.

Intervening to Dissolve a Prior Restraint

The network filed an ex parte application to intervene and dissolve the TRO just two days after it was issued, on January 26. Showtime Networks claimed, among other things, that the order operated as a prior restraint that appeared "to prohibit Showtime, which was not even a party to this dispute and was given no notice, from disseminating information about a matter of public interest."

Partially relying on *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) and *Alexander v. United States*, 509 U.S. 544, 549 (1993), Showtime Networks argued that because such an order would "freeze," not just chill, Showtime's exercise of its First Amendment rights it qualifies as a classic example of a prior restraint. The Supreme Court had made clear, Showtime Networks argued, that even entertainment programming such as the fight was entitled to protection against prior restraints.

Showtime Networks noted that in *Nebraska Press* the Court made clear that "prior restraints on speech are the most serious and the least tolerable infringement on First Amendment rights," and that California courts also reject prior restraints. Indeed, as the court in *In re Marriage of Candiotti*, 34 Cal. App. 4th 718 (1995) held, because the guarantee of free speech and press found in the California Constitution is more definitive and inclusive than the First Amendment, the burden on a party seeking a prior restraint in California may be insurmountable.

Showtime also argued that the prior restraint was so disfavored as to be determinative on the question of balance of harm. In contrast to plaintiff's claimed contract-related harms in which plaintiff's potential damages were quantifiable, Showtime argued that the TRO caused it immediate and irreparable harm because, in the words of the Ninth Circuit, "the damage resulting from a prior restraint—even a prior restraint of the shortest duration—is extraordinarily grave." *CBS v. District Court*, 729 F.2d 1174 (9th Cir. 1983).

The network added that the infringement of its First Amendment rights was all the more egregious in this case, since it was not a party to the dispute and was not informed of the proceedings until after the TRO was issued.

Dissolution and Resolution

At the Friday, January 26 hearing, just two days after the TRO was issued, the court dissolved the TRO insofar as it would affect the right of Showtime to promote or advertise the fight. The court also advanced the Order to Show Cause to Monday, January 29, at which time it noted that it had reached "the absolute conclusion that this case screams out to be resolved now rather than going through maybe years of litigation."

Apparently agreeing with the court, the disputing promoters entered a settlement that allowed the fight to go forward.

Jennifer Brockett and Rory Eastburg in Davis Wright Tremaine LLP's Los Angeles Office and Thomas R. Burke and Michelle Fife in the firm's San Francisco Office represented Showtime Networks Inc.

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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.

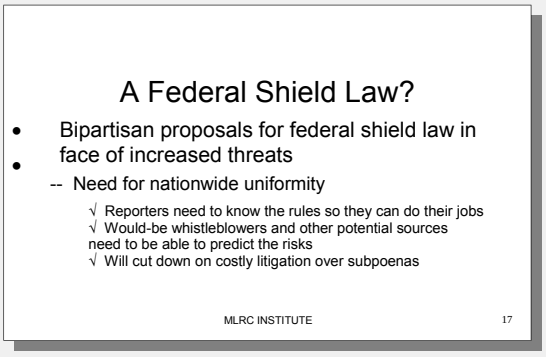
We hope to expand this project so that the reporter's privilege is the first in a number of topics addressed by the speakers bureau.

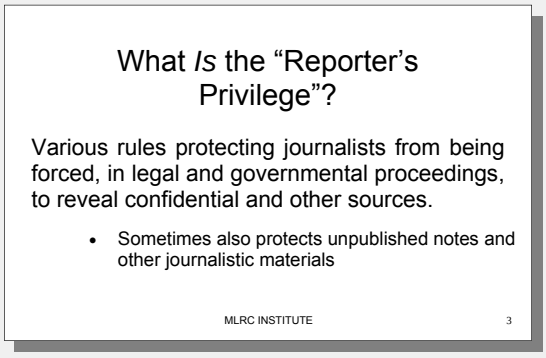
If you are interested in joining the speakers bureau or in helping to organize a presentation in your area, please contact:

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

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.





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German Constitutional Court Bolsters Protection of Journalists' Sources

By Christoph Arhold

In an important decision, the German Constitutional Court ruled last month that searching journalists' offices and seizing their materials to identify their sources interferes with the freedom of the press. *Judgment of the German Constitutional Court*, Feb. 27 2007, Case 1 BvR 538/06; 1 BvR 2045/06.

According to the court, the risk that confidential documents may be published, even if they contain State secrets, does not normally justify such interference.

Background

The plaintiff is editor in chief of the German political magazine CICERO and the person in charge under the terms of the German Press Law. In April 2005, CICERO published an article about the terrorist Abu Musab al-Zarqawi which quoted information from a classified Federal Office of Criminal Investigation (*Bundeskriminalamt*) document .

This led the public prosecutor's office to start an investigation of the editor and the journalist. The Potsdam local court issued a search warrant for the plaintiff's office and private apartment in Berlin and the editorial offices of CICERO in Potsdam.

To justify its decision, the court stated that the journalist had published a state secret within the meaning of Section 353b of the German Criminal Code, and could thus be accused of aiding and abetting the betrayal of State secrets.

According to the court, the journalist knew the official of the *Bundeskriminalamt* who passed him the relevant information acted with the criminal intention of making the State secret public. This also allegedly applied to the editor in chief of CICERO, who was informed of these circumstances and approved the publication of the article.

During the search, data devices of different kinds were seized and the hard disk of the journalist's computer was copied. A complaint by the plaintiff against the search warrant was rejected by the Potsdam District Court.

The plaintiff then filed a constitutional complaint against this decision with the German Constitutional Court (*Bundesverfassungsgericht*). In February 2006 the public prosecutor's office stayed proceedings, subject to payment of EUR 1,000.

Constitutional Court's Decision

The plaintiff claimed that neither the local court nor the District Court had given sufficient consideration to the constitutional protection of freedom of the press. The Constitutional Court decided in his favor. Its judgment is reasoned as follows.

The search of editorial offices interfered with press freedom, as it disturbed editorial work in the office. More importantly, the seizure of evidence gave the public prosecutor's office the possibility to access editorial data, thus violating the confidentiality of the editorial work which was part of the freedom of the press.

Most importantly of all, the proceedings violated the confidential relationship with the journalist's sources, and thus interfered with the protection of journalistic sources. This interference was not justified. The suspicion that the journalist had aided and abetted the betrayal of official secrets was not a sufficient reason for a search of the editorial offices and the seizure of evidence.

The suspicion that the journalist had aided and abetted the betrayal of official secrets was not a sufficient reason for a search of the editorial offices and the seizure of evidence.

A journalist and an official who betrays a secret must have agreed to publish the confidential information

§ 353 b Criminal Code penalises the unauthorised betrayal of official secrets. However, publishing a secret in the press does not necessarily and automatically add up to the offence of aiding and abetting the betrayal of official secrets. For instance, no statutory criminal offence in the meaning of § 353 b Criminal Code is committed if the information was accidentally leaked, or leaked by someone under no obligation to respect its confidentiality. Moreover, if an official who must respect confidentiality only intends to give a journalist background information, and they do not agree to publish this information, the offence is already committed when the information is revealed to the journalist, and its publication can no longer be considered as aiding and abetting the betrayal. In other words, the journalist can only have committed a crime if there is an agreement between him and the official to betray the confidential information by pub-

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lishing it. It is up to the prosecutor's office to prove such an agreement. The mere fact that a journalist has published confidential information can therefore not justify a search of his offices.

Not all forms of suspicion are sufficient for the issuance of a search warrant

In such situations the public prosecutor's office must investigate the facts thoroughly before deciding how to treat the journalist. All forms of suspicion are not sufficient to justify a search warrant against members of the press, or the public prosecutor's office would be able to violate press freedom at its discretion - there must be specific indications beyond mere publication that an agreement between the journalist and the official is probable.

Identifying the journalistic source must not be the main objective

Even when there is an indication of such an agreement between the journalist and the official, the search and seizure are still constitutionally prohibited if they are conducted solely or mainly to identify the informant. Even when there is enough reason to suspect the journalist (or editor) of an offence, the search and seizure of evidence may only be conducted to clarify the suspicion, and not to obtain grounds for suspecting the informant. The risk of infringing the protection of journalistic sources is especially high when the suspicion of aiding and abetting is based solely on the publication of the official secret.

Applying these standards, the Constitutional Court came to the conclusion that the search and seizure in CICERO's editorial offices infringed press freedoms. The search warrant was issued in a situation where there were no concrete indications of an intended betrayal of secrets other than publication in the press, and all attempts to find such indications were unsuccessful. Consequently, the search of the editorial offices was ordered with the main aim of identifying the alleged informant in the *Bundeskriminalamt* .

Comments

This is a milestone judgment by the Constitutional Court, which considerably strengthens the right of the press to protect journalistic sources.

For a long time, prosecutors' offices and local courts have circumvented this fundamental right by charging journalists with aiding and abetting the betrayal of official secrets. Their goal was to discourage whistleblowers in the public administration, and deter journalists from quoting confidential documents, as otherwise the journalist took the risk of being prosecuted and the whistleblower risked being identified by a search of the journalist's home and office.

This practice has now been ruled out. In particular, by requesting clear indications of an agreement between the whistleblowing official and the journalist, the Constitutional Court has set the hurdles so high that searches based on the suspicion of betrayal of State secrets should be out of the question. And rightly so.

Public administration must be controlled by public opinion, which depends on the availability of objective, uncensored and politically uninfluenced information, for instance in the press. But to fulfil this task, the press in turn needs more than just the official information made available by the authorities, and it therefore tries to obtain first-hand, uncensored and neutral information from the actors, i.e. from informants (sources) in the administration, who are willing and able to provide objective information.

Of course, the uncensored publication of that information may go against the interests of these responsible for the institutions, who are therefore potential targets of review and criticism.

This is why the protection of journalistic sources is a highly valued part of the freedom of the press indispensable in a free and democratic society. When a criticised institution seeks to detect its critics so that it can ignore or at least manipulate public opinion, this is an extremely serious interference with one of the most important pillars of democratic society. It then becomes the task of the courts to uphold and, when necessary, restore the freedom of the press. This is exactly what the Constitutional Court in Germany has done. The judgment should serve as a model for decisions by courts in other jurisdictions.

Christoph Arhold is a lawyer with White & Case in Brussels, Belgium.

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Northern Irish Libel Verdict Leaves a Bad Taste

By Karyn Harty

As one who originally hails from County Antrim in Northern Ireland, home of the Giant's Causeway and the overdone steak, I was intrigued by a recent jury award of £25,000 in libel damages by a Northern Irish jury to the proprietors of a Belfast restaurant in respect of a restaurant review published in the *Irish News*. *Convery v. Irish News.*

Some have heralded the verdict as the end of serious restaurant reviews, and many are concerned at the precedent of a restaurant securing significant damages over criticism in a review, given the extremely damning remarks published in such reviews on a weekly basis in the press.

The case certainly raises serious questions about the restrictions on the ability of the press to 'tell it like it is.' It might be useful to take a closer look at what was actually published, how the law in Northern Ireland operates and how those factors combined culminated in a jury award equivalent to about $50,000.

Background

In general one wonders about the wisdom of bringing libel proceedings over a bad review. I admired the Dublin proprietor who, having been subject to a scathing review in the *Irish Times*, took out a prominent advertisement in the same newspaper thanking its loyal patrons for their custom and looking forward to many more years of good food at the restaurant. Or the client who said rather than sue he planned to meet a false allegation that he used processed ham in his organic pies by placing a platter of ham on the counter with a sign saying "*You decide.*"

The defendant to the libel action which led to the recent award, the *Irish News*, is a Belfast based newspaper with a circulation of about 50,000 copies. To place that in context, the population of Northern Ireland is about 1.7 million, with around 600,000 people living in the greater Belfast area. The *Irish News* is broadly Irish nationalist in outlook and is well regarded for its coverage of current affairs and local issues.

In August 2000 the *Irish News* weekend section carried a restaurant review written by Caroline Workman, an experienced food writer and author of the *Bridgestone Food Lover's Guide to Northern Ireland*. Ms. Workman had dined at Goodfellas, a popular Italian themed restaurant in West Belfast. She was clearly unimpressed with her dining experience. Published under the headline "*Not good, fellas*," the review took the restaurant severely to task. The following is a flavour (if you'll excuse the pun) of Ms. Workman's criticisms.

> "*We were happy just to order a cola – until it arrived. Flat, warm and watery, you can be sure it was on tap.*"
>
> "*after one ring of squid, a mouthful of prawns and a taste of the paté, it became clear that these dishes were made with the cheapest ingredients on the market. You get what you pay for these days, although Goodfellas doesn't pass on any savings to its customers. At £3.55 for squid (overcharged at £4.25) I did not expect reconstituted fish meal. The translucent grey rings cannot have been real squid and the hard batter coating and bottled thousand island dressing did little to make them more appetising.*"
>
> "*My chicken marsala (£8.55) was inedible. The meal itself looked fine, but it was coated in a sickly saccharine sauce that clashed horribly with the savoury food.*"
>
> "*The sloppy sauce had generous quantities of dodgy looking seafood. Even the pizza (£7.95) was a let down, covered with nasty processed salami*."
>
> "*We didn't witness any theatrical tossing and stretching of dough, so it's possible that frozen pizza rounds are brought in.*"

Libel Trial

Ms. Workman gave the restaurant one out of a possible 5 stars, and rated it "Stay at home." Ciaran Convery, owner of Goodfellas, sued. The *Irish News* pleaded justification and fair comment and, when the matter finally came on for hearing before a jury in Belfast in February 2007, Ms. Workman gave evidence that review and the 'stay at home' rating she

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had given to Goodfellas were "completely honest." Mr. Convery described the review as a "hatchet job."

The judge allowed both justification and fair comment to go before the jury. James Fitzpatrick & Co, the Belfast solicitors who defended the *Irish News*, say the jury answered some of the questions put to them in the issues paper in favor of the newspaper's justification defense but found against the *Irish News* on fair comment. They jury awarded Mr. Convery £25,000 in damages, a verdict which is now the subject of an appeal.

It is worth noting some peculiarities in relation to Northern Ireland's legal system. Northern Ireland sits as a separate and distinct legal jurisdiction within the United Kingdom. Although it shares a border with the republic of Ireland, its system is essentially UK based although it has some legislation of its own. Culturally, its courts system is probably closer to the English system than the Irish system although there are many similarities between the three jurisdictions.

In the area of libel, it is a hybrid of the two. Libel judgments in the English courts are binding on Northern Irish judges, whereas Irish decisions are not. Curiously, only 7 people sit on a Belfast jury, as compared with the practice of using juries of 12 in other jurisdictions.

Northern Irish juries are famous for their generosity and, although it is rare for cases to run to trial in Belfast, when they do the results can be surprising. Take for example, the libel action brought by a Queen's Counsel (a senior barrister) over a false allegation by a tabloid newspaper that he had been seen fighting over the last chocolate éclair in a Belfast bakery, for which he received £50,000 in damages. Or the action brought against boxer Barry McGuigan by his manager, Barney Eastwood, which led to a jury award of £600,000 in libel damages.

It may be that the practice of selecting just 7 jurors for libel juries in Belfast is tougher on defendants, because there is perhaps less scope for a balanced view emerging than might be the case with the jury of 12 used in other jurisdictions. Or it may be that Belfast people are just very generous when it comes to spending other people's money.

As regards the law though, there is always a risk in straying into the dangerous area of factual assertions and the law applies to restaurant reviews just as it does to news items and comment articles. In that context this case is particularly curious.

The defense of fair comment does not exonerate a defendant who makes pure statements of fact, as opposed to opinions or inferences drawn from facts either generally known or stated elsewhere. Comment, if it is truly comment, may be exaggerated, unreasonable and even unfair, but it must be honest. Malice defeats the defense, and if there has been a distortion of the facts for emphasis, or matters have been omitted that results in the facts being taken out of context, then the defense may not succeed.

With justification, the defendant's state of mind is immaterial. The facts stated are either substantially true or they are not. However with fair comment, the defendant's state of mind is key and much depends on the jury's perception of the author's evidence. The extent to which the opinion or inference expressed is based on the publisher's honest belief is thus usually the crux of the matter.

It is not uncommon for judges to withdraw fair comment from the jury, having ruled that the defendant has taken something out of context or has been unfair to the plaintiff by leaving out key pieces of information. In cases where the court does allow fair comment to go before the jury, because of the emphasis on the need for the facts on which the comment is based to be shown to be true, often fair comment flounders along with the defendant's justification defense.

Curiously in this case against the *Irish News* the jury held that the restaurant review was at least partially true, but the jury found against the newspaper on fair comment. It appears therefore that the jury felt there was an element of malice in the way in which the facts were portrayed.

Of course one might well ask whether a reviewer should not be entitled to speculate as outrageously as they like as to the origin of the squid if it really tasted that bad, or whether the cola was out of a bottle or a tap, without risking liability in defamation, particularly if they have got their facts right.

We await the appeal hearing with interest.

Karyn Harty is a partner with McCann FitzGerald solicitors in Dublin. She qualified in Belfast before joining McCann FitzGerald in 1998.

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UK Libel Action Collapses Prior to Six Week Trial

By Niri Shan & Lorna Caddy

February 2007 saw the dismissal by the English courts of Alberta Matadeen's libel case against newspaper owners, Associated Newspapers Limited. *Matadeen v. Associated Newspapers Ltd*. This case had been expected to be one of the largest UK libel actions to take place in recent years, with the trial involving some 52 witnesses scheduled for six weeks between April and May this year.

Background

Mrs. Matadeen is the owner of the former Alexandra Nursing Home in Erdington, Birmingham. Her claim arose from front page news articles published in the *Evening Standard* in October 2002, alleging mistreatment of elderly and vulnerable residents of the Alexandra Nursing Home, which Mrs. Matadeen owned. The articles were based upon a three-week undercover investigation carried out by one of the *Standard's* journalists. Mrs. Matadeen vigorously denied the allegations.

Associated Newspapers could concentrate on its defense rather than worrying about effectively being held to ransom over costs.

Associated Newspapers relied, primarily, on the defense of justification, i.e., the sting of the allegations made in the articles was true. In the UK, the burden of proof in this defense lies with the defendant.

As a consequence, the defense became tantamount to a public inquiry into the treatment of residents and conditions at the Alexandra. A six-lawyer team from Taylor Wessing subsequently conducted a thorough investigation over just short of a four-year period, serving a resultant expert report and 20 detailed witness statements that corroborated the journalist's published observations.

These included statements from the Government regulators, the Commission for Social Care Inspection, and relatives of the nursing home's residents, a staff member and a neighbour.
Two months before the trial was due to begin, Mrs. Matadeen agreed to withdraw her claim, and the court dismissed the action on 15 February 2007.

Conditional Fee Problem

In this case, Mrs. Matadeen had instructed solicitors on a conditional fee agreement (CFA) without "after the event" insurance. Publishers in the UK are all too familiar with facing libel claims from claimants represented by lawyers on CFAs. These are effectively "no win, no fee" agreements, with Courts allowing claimants' lawyers to seek a 100% uplift on their fees in case of a win (to compensate them for those cases that they lose), effectively doubling the cost for the defendant.

Given the claimant has no risk of paying his or her own costs, there is no commercial check on the claimant's lawyers' rates or the overall level of their fees. Consequently, claimants' costs in libel actions often spiral out of control. It is not uncommon in a UK libel action, with the uplift on the claimant's lawyer's fees, to see a successful claimant claiming in excess of £1 million by way of costs.

Defending libel actions against claimants represented on a CFA is a notoriously expensive business. The stakes are high. If the defendant is successful, the claimant may well not be able to meet the defendant's costs. Equally, if the claimant is successful, the defendant will have to pay a large proportion of the claimant's costs plus face a claim for an uplift on the costs of up to 100%.

Cost Capping

Early on in proceedings, Associated Newspapers made an application to the court that Mrs. Matadeen's costs be capped at a reasonable amount. It was argued that there was a real and substantial risk that, if Associated Newspapers was successful at trial, Mrs. Matadeen would be unable to meet all or a very substantial part of its costs.

Equally, if Mrs. Matadeen was successful at trial, Associated Newspapers would have to meet a large proportion of her costs plus face a claim under the CFA for an uplift on the costs of up to 100% by way of the success fee. Associated Newspapers argued that this scenario could have a chilling effect on freedom of expression.

In 2005, the Court agreed and made the first costs-capping order ever awarded in the context of libel proceedings, establishing this as a seminal case in the field. *See Matadeen v. Associated Newspapers* (Master Eyre, 17.3.05).

The order was made with the proviso that Associated Newspapers' costs were capped at the same level. The effect

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of the cap was that neither party would be able to recover costs exceeding the cap from the other. The case was referred to a costs judge to decide the level of the cap. In the meantime, the parties negotiated the level of the cap between themselves to £447,500.

This order represented an important first step in bringing proportionality to costs incurred by lawyers representing claimants on CFAs. It recognizes that publishers need to be able to report candidly on important issues of public interest without being overly fettered by cost concerns.

In this case, it meant that Associated Newspapers could concentrate on its defense rather than worrying about effectively being held to ransom over costs. In doing so, it was able to preserve the integrity of the articles written on a subject of important public interest.

Niri Shan and Lorna Caddy are media and entertainment lawyers at Taylor Wessing in London. They acted for Associated Newspapers in this case. The claimant was represented by solicitors firm Charles Russell.

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Media Coalition Challenges Proposed Access Restrictions in AIPAC Trial

By Michael Berry

Since a federal grand jury charged two lobbyists with violating the Espionage Act by receiving and disclosing classified information, the press has monitored the case closely, as First Amendment advocates have warned that the prosecution raises troubling implications for journalists covering the national security beat. *US v. Rosen*, No. 1:05-cv-00225-TSE, hearing (E.D.Va. March 15, 2007) (Ellis, J.).

Now, as the case moves towards its June 4, 2007 trial date, a coalition of news organizations has committed itself to monitoring the proceedings to preserve the public's right to access the filings, hearings, and evidence in the case.

Recently, the coalition sought to intervene in the case when the public docket suggested that the government had requested in a sealed pleading to "close the trial." Judge T.S. Ellis, III, the federal judge in the Eastern District of Virginia who is presiding over the case, denied the coalition's motion as moot and without prejudice.

The court and parties have begun to address whether the court should adopt special procedures to prevent classified information from being revealed at trial unnecessarily.

At the same hearing, though, Judge Ellis ordered that all briefing regarding any potential closure of the proceedings be filed publicly and that previously filed briefs be redacted and placed on the public record, thereby allowing the press and public an opportunity to review the government's request.

Background

In August 2005, two former lobbyists for the American Israel Public Affairs Committee ("AIPAC"), Steven Rosen and Keith Weissman, were charged with conspiring to violate the Espionage Act by receiving classified information relating to the national defense and transmitting that information to individuals who were not authorized to receive it.

In accordance with the Classified Information Procedures Act ("CIPA"), the court and parties have begun to address whether the court should adopt special procedures to prevent classified information from being revealed at trial unnecessarily. As part of that process, in December 2006 the court entered an order scheduling a CIPA hearing for March 15, 2007.

In February, the government filed a sealed motion relating to the upcoming CIPA hearing. The defendants responded on March 9 by filing an "Under Seal and In Camera Motion to Strike the Government's CIPA 6(c) Requests and to Strike the Government's Request to Close the Trial." The defendants' response was not docketed publicly until March 12. That same day, the court entered an order granting "defendants' motion to suspend the CIPA schedule pending resolution of defendants' motion opposing the government's proposed trial procedures" and specifying that the previously scheduled March 15 hearing would "first address defendants' challenge to the government's proposed trial proceedings."

Although neither party's filings were publicly available, the March 12 docket entries provided the first public notice that the government might have moved to restrict public access to the trial. The media coalition moved to intervene the following day, seeking to be heard in connection with the government's request.

Media Motion to Intervene

The Reporters Committee for Freedom of the Press spearheaded an effort to organize a media coalition to vindicate the public's First Amendment right to access the proceedings, and by March 13, the day the coalition filed its motion to intervene, the coalition included the Reporters Committee and eleven other members: ABC, Inc.; the American Society of Newspaper Editors; the Associated Press; Dow Jones & Company, Inc.; the Newspaper Association of America; the Newspaper Guild, Communications Workers of America; the Radio-Television News Directors Association; Reuters America LLC; the Society of Professional Journalists; Time Inc.; and The Washington Post. And, additional members, including The Hearst Corporation, continue to join the coalition's efforts.

In its motion, the coalition explained that "the First Amendment guarantees the public and the media the right to attend criminal trials," stressing that intervention is the appropriate procedural vehicle for the press to ensure that access is preserved.

The coalition's brief recited well-established First Amendment principles of access: A court must provide the public with adequate notice that a party has requested that filings or proceedings be sealed and then must give the public "an opportunity to object to the request *before* the court ma[kes] its decision."

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As the motion explained, a court can seal a part of the proceedings from public view only if it finds "a compelling government interest" in secrecy and concludes that the remedy afforded is "narrowly tailored to serve that interest." Relying on Fourth Circuit precedent, the media coalition emphasized that these requirements apply in all cases, even when the government argues that closure is justified by national security interests.

Based on these principles, the coalition asked Judge Ellis to consider its motion to intervene on an expedited basis and to provide it with an opportunity to review the parties' briefing on the government's "request to close the trial" and any other pending or future requests to restrict public access.

March 15 Hearing

On March 15, the court held a hearing at which Judge Ellis said he would dispel misconceptions about briefing on the government's request and the upcoming CIPA process. During the hearing, which was open to the public and press, Judge Ellis stated that the case against the former lobbyists "isn't a closed trial" and "[i]t won't be a closed trial."

He also described the defendants' depiction of the government's motion as a "request to close the trial" as "hyperbolic." Nevertheless, the Judge's brief outline of the government's proposal scarcely suggests that the government advocates a truly open proceeding. The court explained in general terms that the government had proposed a procedure through which the court, the parties' attorneys, the defendants, and the jurors could see and hear evidence that contained classified information, "but the public would not have the information."

Judge Ellis expressed some skepticism about this proposal, noting that "CIPA does not answer whether or not this novel procedure is warranted or sanctioned." He said that the government's proposal "raised important issues and that any arguments about it "can be open to the public, and should be open to the public." To that end, Judge Ellis instructed the parties and the Court Security Officer to arrange for the previously filed papers to be made publicly available with references to specific classified information redacted.

The court then ordered additional briefing on the government's proposal and ordered that those papers be filed publicly (although classified material may be filed under seal if necessary). The court also set a schedule for considering the government's proposal: The defendants will file a supplemental brief on March 21. The government will respond on March 28, and the defendants may reply on or before April 3. The court will hold a hearing on the government's request on April 16.

During the hearing, Judge Ellis took another important step in support of the public's right of access. Recognizing that "we have some [other] pleadings in this case that don't need to be under seal," the Judge directed the Court Security Officer to review the docket to determine whether any sealed filings can be unsealed and to ensure that such information is placed on the public record.

Despite these steps toward greater openness, the court noted that the proceedings mandated by CIPA would continue to be closed. In those proceedings, the court will review parties' requests to use classified information at trial, determine whether the classified information is admissible as evidence, and decide the precise form in which that evidence may be presented.

In light of his rulings concerning the government's requested procedure, Judge Ellis denied the media coalition's motion to intervene "as moot and without prejudice." The Judge told the coalition's attorneys that they could renew their motion as the case proceeds if the coalition objects to any motion or order as an effort to restrict access.

Conclusion

The media coalition will continue to monitor pretrial proceedings for developments relating to public and press access. If appropriate, the coalition will move to intervene to oppose any measures that would unduly restrict access to the proceedings or evidence. If your organization is interested in joining the coalition or learning about its efforts, please contact Lucy Dalglish, Executive Director of the Reporters Committee for Freedom of the Press, at (703) 807-2100 or ldalglish@rcfp.org.

Michael Berry is an associate in the Philadelphia office of Levine Sullivan Koch & Schulz, L.L.P. The Media Coalition is represented by Jay Ward Brown, Ashley I. Kissinger, and John B. O'Keefe of Levine Sullivan Koch & Schulz, L.L.P.

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Judge Permits Access to Juror Questionnaires in Bakersfield Quintuple Murder Trial

By Thomas R. Burke

The trial court judge presiding over *People v. Vincent Brothers*, a quintuple murder trial currently underway in Bakersfield, California, granted *The Bakersfield Californian*'s motion for access to written questionnaires completed by potential jurors in the case. *People v. Brothers* (Cal. Super. Ct. Jan. 2007) (Bush, J.).

Over objections from the prosecution and defense, Kern County Superior Court Judge Michael G. Bush ruled in late January that he would make publicly available the questionnaires completed by hundreds of potential jurors in the case. This is the first time in recent years in California that juror questionnaires have been contemporaneously made available for inspection during jury selection in a high profile murder trial.

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Background

Brothers, a former elementary school vice principal, faces the death penalty for the 2004 murders of five members of his immediate family, including three children under the age of three. The case, one of the most notorious crimes in Bakersfield's history, has received considerable news coverage.

Although prospective jurors were told that their responses to the questionnaires were not confidential, defense counsel objected to allowing the juror questionnaires to be made public, insisting that their release would be "highly prejudicial," rendering the jury selection process more difficult.

Brothers's defense attorney, Michael Gardina argued "the fact that the jurors were advised early on that their answers would be made public or open to public scrutiny had a chilling effect on a lot of their responses. I think jurors are less candid when they know that their information is going to be disclosed to the public. There is no public interest defeated . . . by not giving the questionnaires to the [media] till this process is completed or at all."

Kern County Assistant District Attorney Lisa Green argued release of the questionnaires would be prejudicial, but insisted that the questionnaires should be withheld by the court only until after the jury was impaneled. Green told the court, "the Court could fashion an order, a narrow order, based on protecting the defendant's due process rights, rights to a fair and impartial jury, that would limit access to the questionnaires until the jury is actually selected. And once that happens, then the media would have access to the questionnaires of any of the jurors [selected]."

Newspaper's Argument

Counsel for *The Bakersfield Californian* emphasized that the answers given by prospective jurors in their written questionnaires were "part of the voir dire" process, citing to the California First District Court of Appeal's decision in *Lesher Communications, Inc. v. Contra Costa Superior Court*, 224 Cal.App.3d 774 (1990) ("The fact that a lawyer does not orally question a juror about a certain answer does not mean that the answer was not considered in accepting or rejecting the juror.")

Counsel for the newspaper argued that the prosecution and defense were seeking to make the jury selection process secret – a process that has historically remained open to the public. "If the same question could be asked orally during voir dire in open court, what [the prosecution and defense] want to be able to do is to avoid having the public and the media know about a question that they may not want to have discussed openly, but [they] know the answer to, because they have the completed jury questionnaire."

Judge Bush, relying on *Lesher*, ordered that the completed juror questionnaires be made "available as soon as the juror is called into the jury box" for individual voir dire. Practically speaking however, the Court's order did not mean that a physical copy of the individual juror questionnaires were publicly available in the courtroom.

Indeed, Judge Bush expressly forbid this, out of a concern that the "public" copy would be removed from the courtroom. Instead, when prospective juror questioning commenced a few weeks later, the Court arranged to have

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Judge Permits Access to Juror Questionnaires in Bakersfield Quintuple Murder Trial

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the juror questionnaires stored on a computer that was available (for reading only; no printing) in the court clerk's office during business hours.

In high profile jury trials in California – but also in lesser known trials – obtaining contemporary access to jury questionnaires is often difficult, if not impossible. Often, jurors are not told that the information they reveal in the questionnaires is not confidential; other times, trial courts refuse to make "extra" copies available for the media so access falters due to practical barriers erected during the course of a trial schedule. A few years back, one California trial judge required the local newspaper to pay $700 dollars in copying costs *before* it could see the questionnaires it sought.

The order permitting access to the juror questionnaires in *Brothers* illustrates the need for a uniform statewide procedure that not only requires that completed juror questionnaires be made publicly available, but ensures that the access is contemporaneous – so that media and courtroom observers can actually follow along while the prosecution and defense are questioning prospective jurors about their individual answers.

Anything less means that the public and media are being barred from fully participating in the jury selection process, which has historically involved, and flourished from, public oversight.

Thomas R. Burke is a partner in the San Francisco office of Davis Wright Tremaine LLP and represented The Bakersfield Californian in this access matter.

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Court Denies FOIA Request for John Walker Lindh's Petition to Reduce Sentence

Privacy Interests Bar Disclosure

By Ashley I. Kissinger

On March 7, a federal district court in New York granted summary judgment for the government in the Associated Press's FOIA action seeking to obtain the petition for commutation of sentence filed by John Walker Lindh, the so-called "American Taliban." *Associated Press v. Dep't of Justice*, No. 06 Civ. 1758, 2007 WL 737476 (S.D.N.Y. 2007) (Preska, J.).

Although Lindh's petition apparently argues that he received unfair disparate treatment vis-à-vis other Americans captured during the initial fighting in Afghanistan, the court held that Lindh's personal privacy interests trump the public interest in the petition's disclosure, even though Lindh himself may not be asserting those privacy interests.

Lindh's personal privacy interests trump the public interest in the petition's disclosure, even though Lindh himself may not be asserting those privacy interests.

Background

John Walker Lindh is the 25-year-old American citizen who was captured on the battlefield in November 2001 in Afghanistan, only two months after the September 11 terrorist attacks and very shortly after the United States invaded Afghanistan. After Lindh was captured, he reportedly was strapped naked to a stretcher by U.S. forces, blindfolded, and placed in a metal shipping container.

The U.S. government brought him to Virginia and charged him with eleven criminal counts, including conspiracy to murder U.S. nationals, providing material support to foreign terrorist organizations, and using explosives in the commission of a felony. He faced a life sentence if convicted. Lindh moved to suppress a confession he had given, arguing that it had been coerced through torture, and six international human rights organizations submitted a brief *amicus curiae* supporting the motion.

There was intense national public interest in Lindh's case. Many will recall the image of him dirty, dishevelled and unshaven that was repeatedly broadcast on television. Several people, including United States Senators and others of prominence, called for him to be harshly punished.

Instead of facing trial in this milieu, Lindh pled guilty to two counts of providing services to the Taliban Army and using explosives in the commission of a felony. The guilty plea was entered on Monday, July 15, 2002, the same day the court was scheduled to hear Lindh's motion to suppress. Lindh is now serving a twenty-year prison sentence in California for his crimes.

It has been widely reported that, as part of the plea bargain, Lindh was required to waive his right to appeal and drop any claim that he had been mistreated or tortured by U.S. military personnel. He was also required to consent to being silenced; he is prohibited from communicating in any way with "any member or representative of the news media, in person, by telephone, by furnishing a recorded message, through the mail, through his attorney, through a third party, or otherwise."

Petition for Commutation of Sentence

In September 2004, Lindh filed a petition for commutation of his sentence with the Office of the Pardon Attorney, an agency of the Department of Justice. He supplemented the petition in December 2005. In connection with the petition, his father spoke publicly about Lindh's motives for being in Afghanistan, framing his son's actions in historical context and arguing that he was the unwitting victim of circumstance – Lindh was involved in a civil war that the U.S. intervened in only after he was already there, and the United States had "switched sides" from earlier support of the Taliban to support for the Northern Alliance.

Lindh's attorney has also spoken publicly about Lindh's petition, drawing a comparison between Lindh's treatment and that of Yaser Hamdi – another American citizen captured on the battlefield in Afghanistan at the same time and same place as Lindh, but set free after less than three years

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– and with other Guantanamo Bay detainees from Afghanistan who have been released or transferred without charge.

It has been reported by one local newspaper that Lindh argues in his petition that he received an excessively harsh sentence in comparison with these others, principally because he was placed in the criminal justice system and moved toward trial so soon after the September 11 attacks on the United States. Others, too, have raised questions about the government's conduct in prosecuting Lindh, contending that he had been coerced into a plea on trumped up charges and was made a 9/11 scapegoat by the government.

AP's Efforts to Obtain the Petition

The Associated Press asked Lindh's counsel for a copy of the petition after the supplement was filed in December 2005. An AP reporter was told at the time that Lindh was willing to release the petition, but his counsel was concerned that providing AP with a copy might be viewed as an improper attempt by Lindh to communicate with the media in violation of the government's plea agreement conditions imposed upon him.

AP thus submitted a request for the petition directly to the Office of the Pardon Attorney ("OPA"), the Department of Justice agency responsible for receiving such petitions, pursuant to the Freedom of Information Act ("FOIA"). OPA denied the request solely on the ground that it required "Mr. Lindh's prior written consent before releasing his clemency petition to a third-party." Because AP's request did not include such a release, OPA withheld the petition "in [its] entirety pursuant to Exemptions 6 and 7(C) of the FOIA."

The DOJ denied AP's administrative appeal of OPA's decision, and AP filed a complaint under FOIA in the United States District Court for the Southern District of New York.

Court Affirms on Privacy Grounds

On March 7, Judge Loretta A. Preska granted summary judgment for the government, accepting its argument that the petition was wholly exempt from disclosure under FOIA's two exemptions designed to protect personal privacy, Exemptions 6 and 7(c).

Exemption 6 protects information contained in "personnel and medical files and similar files" where disclosure "would constitute a clearly unwarranted invasion of personal privacy." Exemption 7(c) protects records "compiled for law enforcement purposes" where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

To determine whether these exemptions apply, "a court must balance the public interest in disclosure against the interest Congress intended the Exemption[s] to protect." *U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 772 (1989). AP argued that disclosure of the petition was essential to enable the public to assess the propriety of the government's long delay in acting on the petition, which was then over a year old, as well as to assess its ultimate decision.

AP also provided a substantial amount of independent evidence suggesting that Lindh's petition likely addresses several matters that are, in and of themselves, of serious public interest: whether he was being treated the same as other similarly situated individuals, whether the government ignored exculpatory evidence in his case, and whether he was abused by the officials detaining him.

In response, the government submitted an affidavit affirmatively stating that the petition did not contain arguments contending that the government "has engaged in any form of misconduct, in violation of any law or regulation or otherwise," in relation to Lindh's arrest, detention, treatment in Afghanistan, plea agreement or conviction, thus appearing to expressly negate the second and third arguments AP posited might be contained in the petition.

The government allowed that the petition may well address the first posited argument – that "the length of his sentence is excessive, unfair, and/or disproportionate in comparison to sentences imposed on other [similarly situated] defendants." It contended, however, that such an argument does not amount to a charge of "government misconduct" and thus, pursuant to a D.C. Circuit case, *Davis v. Department of Justice*, 968 F.2d 1276 (D.C. Cir. 1992), it is not subject to disclosure under FOIA.

The court in *Davis* required the FOIA requestor to substantiate its contention that releasing the records requested – transcripts of wiretapped telephone conversations – would shed light on government misconduct because the content of those records had nothing to do with government activity.

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In this case, AP noted, the requested record is an official document submitted to the government to request official action and thus its disclosure will *necessarily* shed light on the government's decision making with respect to that petition. AP thus argued that the context-specific *Davis* requirement for substantiation of government misconduct did not apply, and in any event the disparate treatment of American citizens standing accused of crimes against the United States would constitute "government misconduct" for FOIA purposes.

The court nevertheless both applied the *Davis* requirement in this case and adopted the government's cramped definition of "government misconduct." It did not acknowledge any distinction between arguments concerning abuse and improper conviction, on the one hand (which the government expressly denied were in Lindh's petition), and differential treatment in sentencing on the other (which the government implicitly acknowledged might be contained in the petition).

Without asking to inspect Lindh's petition, the court accepted the government's representation that it did not have "anything to do with any alleged Government misconduct" and thus its release would not "reveal what the 'government is up to.'"

The court also heavily relied on another case, *Judicial Watch, Inc. v. Department of Justice*, 365 F.3d 1108 (D.C. Cir. 2004), in which the D.C. Circuit upheld the DOJ's withholding of pardon petitions under Exemption 6. The court in *Judicial Watch* held that the privacy interest in pardon petitions outweighed the public interest in disclosure because such petitions consist primarily of personal information about the applicants and their lives before and after their convictions, such as their employment success, mental and physical well being, and family life and activities in the community.

Pardon applications also typically include personal information provided by third parties, such as letters from friends, family members and employers. In contrast, AP argued, Lindh's petition for commutation likely focused on the reasons for believing he had received disparate treatment from the government, information likely to shed light on "what the government is up to."

The court rejected any such distinction, instead describing a commutation petition as "a subset of the information requested for pardons."

David A. Schulz, Ashley I. Kissinger and Michael Berry of Levine Sullivan Koch & Schulz, L.L.P. and David Tomlin, AP's Deputy General Counsel represented The Associated Press in this matter.

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AIPAC Update: Court Denies Defendants' Discovery Request Ruling May Have Larger Implications for Espionage Act Prosecutions

By Michael Berry

Last month the federal court presiding over the Espionage Act prosecution of two former lobbyists issued a discovery ruling that seems to highlight several practical hurdles the government faces in prosecuting private parties for receiving and disclosing national defense information. *United States v. Rosen*, No. 1:05cr225, 2007 WL 518444 (E.D. Va. Feb. 14, 2007) (Ellis, J.).

Although the ruling focuses on the narrow question of whether to permit the defendants to depose three foreign officials, its implications appear more significant – both for the prosecution of the two lobbyists and the government's ability to prove similar charges in the future.

The court explained that the defendants could offer "potentially exculpatory" evidence through testimony that U.S. government officials regularly passed information through the lobbyists and that the officials and others in the diplomatic community thought the disclosure of that information was beneficial to the United States. In doing so, the court suggested plausible, and potentially powerful, defenses against similar Espionage Act prosecutions against the press.

Procedural History

In August 2005, federal prosecutors indicted Steven Rosen and Keith Weissman, two former lobbyists for the American Israel Public Affairs Committee ("AIPAC"), on charges of conspiring to violate the Espionage Act, 18 U.S.C. § 793(g). Weissman also was charged with aiding and abetting an Espionage Act violation under § 793(d).

The indictment alleges that the defendants conspired with a Defense Department employee, Lawrence Franklin, to communicate information relating to the national defense to people who were not authorized to receive it. Specifically, the government charged that Franklin provided the two lobbyists with classified information, which they in turn passed on to other AIPAC employees, a think tank analyst, foreign officials, and reporters.

From the moment the indictment was issued, First Amendment advocates have watched the case closely because Rosen and Weissman's alleged misconduct arguably parallels practices regularly employed by lobbyists, academics, and journalists covering national security issues.

Last year, the defendants moved to dismiss the charges, arguing that the Espionage Act is unconstitutionally vague as applied and that the prosecution violated their First Amendment rights to freedom of speech and to petition the government.

On August 9, 2006, Judge T. S. Ellis, III, the judge presiding over the case, denied the motion. *See United States v. Rosen*, 445 F. Supp. 2d 602 (E.D. Va. 2006); *see also MLRC MediaLawLetter* August 2006 at 3. In that ruling, Judge Ellis held, among other things, that the prosecution was constitutional in light of the statute's *mens rea* requirements.

The court explained that the government must prove the defendants (1) knew that the information in question was "closely held by the United States," (2) knew "that disclosure of this information might potentially harm the United States," (3) knew "that the persons to whom the defendants communicated the information were not entitled under the classification regulations to receive the information," and (4) "communicated the information . . . with 'a bad purpose either to disobey or to disregard the law.'"

Additionally, because the prosecution involves the alleged transmission of intangible information, the government must "demonstrate the likelihood of defendant's bad faith purpose to either harm the United States or to aid a foreign government" – that is, it must establish that the defendants "intended (or recklessly disregarded) the effect of the disclosure."

Denial of Defendants' Discovery Motion

As Rosen and Weissman prepared for trial, they moved to depose three Israeli government officials pursuant to Rule 15 of the Federal Rules of Criminal Procedure. Judge Ellis denied the defendants' motion as futile because the Israeli officials refused to be deposed and there seemed to be no vehicle to compel their appearance. Later, however, the court allowed the defendants to renew their motion to argue the testimony could be compelled under the United States-Israeli Mutual Legal Assistance Treaty ("MLA Treaty") or through letters rogatory.

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Unlike in civil cases, depositions in criminal cases are disfavored. Rule 15 provides that depositions are allowed only "to preserve testimony for trial," and a motion seeking deposition testimony may be granted only in "exceptional circumstances." This standard requires that the witness be unavailable for trial and that the testimony be "material" and "necessary to prevent a failure of justice." Under the materiality requirement, the witness's testimony must be exculpatory and cannot be cumulative of other evidence.

In reviewing the defendants' motion, Judge Ellis focused on the materiality requirement. Rosen and Weissman argued that the Israeli officials' testimony would provide exculpatory evidence in several areas, including the relationship between AIPAC and Israel, the lobbyists' regular meetings with the Israeli officials, and ongoing policy cooperation between Israel and the United States.

Judge Ellis acknowledged that the defendants sought the depositions to demonstrate they did not have "all the culpable mental states" and that the Israeli officials' testimony likely would be exculpatory in certain respects. Nevertheless, the court concluded that the testimony would be cumulative of evidence available from other sources, notably U.S. government officials and other AIPAC employees. The court therefore held that the defendants could not meet the Rule 15 standard.

The court also ruled that the defendants could not use the MLA Treaty and letters rogatory to compel the Israeli officials to testify. Although the MLA Treaty provides a mechanism for taking Israeli witnesses' testimony, the procedure is available only to the United States government, not private parties. Private parties can ask the court to exercise its discretion to compel testimony through letters rogatory. In this case, however, Judge Ellis refused to do so. He explained that the Israeli officials' testimony "either is not exculpatory or is cumulative," and that the potential delay caused by issuing letters rogatory is not justified because the testimony "is not necessary to ensure a fair trial."

Possible Implications

Although Judge Ellis's decision dealt with a relatively narrow and somewhat novel discovery issue, it might have larger implications. The opinion recognized that three aspects of the Israeli officials' proposed testimony would be "potentially exculpatory" in light of the *mens rea* standard set forth in the earlier decision ruling on the defendants' constitutional challenge.

First, Rosen and Weissman argued that the proposed testimony would show that they regularly met with Israeli officials, that those meetings "were not inherently improper," and that the U.S. and Israeli governments "used AIPAC as a diplomatic 'back channel.'"

The court explained that this testimony could bear on the defendants' *mens rea* because the practice of using the defendants as a back channel "could affect (i) defendants' perception of the propriety of any disclosures made by or to them, and (ii) the reasonableness of defendants' assumption that the circumstances of such disclosures indicated that further disclosures by defendants were explicitly or implicitly authorized."

Second, the defendants contended the officials' testimony would establish that the transmission of the national defense information benefited the United States. According to Judge Ellis, testimony that the defendants or "their contacts in the diplomatic establishment" viewed the information "as beneficial to the United States' interests" would be exculpatory.

Specifically, such testimony would rebut the elements that (i) the defendants knew "the contemplated disclosures were illegal and could harm national security" and (ii) the defendants "had 'reason to believe' that the contemplated disclosures could harm the United States or aid a foreign government." In this regard, however, the court stated that U.S. officials, other AIPAC employees, and experts could testify on the same topic and the Israeli officials' testimony would not "be in any sense unique or especially credible."

Third, the defendants argued that the proposed testimony would show that Israel and the United States cooperated on policy issues. The court concluded that this testimony might bear on the "reason to believe" element, noting that "the more specific the details of the alleged cooperation between the two governments, and the more congruent the relationship between the alleged policy cooperation and the [national defense information] at issue in the case, the more probative such cooperation becomes."

On first blush, the court's discussion appears to impact only the case against the two lobbyists. Nevertheless, each of these lines of inquiry could have ramifications if the government seeks to prosecute reporters or other private parties who receive and transmit classified information in the future.

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If faced with the prospect of Espionage Act charges, national security reporters likely could point to the same kind of evidence the court described as "potentially exculpatory" in its latest decision.

For instance, if government officials regularly provided information relating to the national defense to the journalist in the past knowing that it would be reported, the officials' pattern of conduct would seem to demonstrate that the journalist reasonably believed her receipt and reporting of the information was permissible and appropriate.

Likewise, if the government officials who provided the information – or other government officials or third parties – believed that providing the information to the journalist would benefit the United States, that evidence could undercut the prosecution's ability to prove the journalist knew or had any reason to think that the information in question could harm the United States. Indeed, as Judge Ellis's opinion suggests, each of these defenses would seem to be bolstered if the previously disclosed information were closely connected to the information at issue or congruent with the government officials' objective in providing the information to the reporter in the first place.

Although these potential lines of defense are highly fact specific – and do not provide legal defenses to an Espionage Act prosecution – they highlight the practical hurdles the government would face in prosecuting a journalist for simply doing his job, even if that job entailed receiving and reporting classified information.

Judge Ellis's ruling on the defendants' discovery motion, when read in conjunction with his earlier ruling laying out the "culpable mental states," signals that prosecuting journalists and others who regularly receive classified information and disclose it with government officials' knowledge would be unwarranted as matter of fact and could be unconstitutional as a matter of law. The true import of these potential defenses will become more clear as the *Rosen* case proceeds and Judge Ellis rules on evidentiary issues and instructs the jury on the requisite *mens rea*.

Michael Berry is an associate in the Philadelphia office of Levine Sullivan Koch & Schulz, L.L.P. Kevin DiGregory and William N. Hammerstrom, Jr. are prosecuting the case on behalf of the United States of America. The defendants in the case are represented by John N. Nassikas, III, of Arent Fox PLLC and Abbe Lowell, Chadbourne & Park LLP.

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MLRC Calendar

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Tower Bridge House
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London

November 7, 2007

New York City
MLRC ANNUAL DINNER

November 9, 2007

New York City
Defense Counsel Section Breakfast

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Reporters Privilege Case Update

Contempt Of Court Order Against Chronicle Reporters Vacated

California

On March 1, U.S. District Judge Jeffrey White vacated the contempt of court findings and sanctions against Lance Williams and Mark Fainaru-Wada, two *San Francisco Chronicle* reporters ordered to reveal who had given them confidential grand jury testimony related to the BALCO steroids investigation.

A criminal defense attorney for one of the BALCO defendants admitted in February that he gave Fainaru-Wada access to the grand jury transcripts and allowed him to take verbatim notes of the transcripts. The reporters, who faced up to 18 months in prison, did not confirm or deny that the defense attorney was their confidential source.

Kansas

On March 2, a Kansas judge ordered *The Wichita Eagle* to turn over all notes and KWCH-TV to turn over all unaired footage relating to interviews with a criminal defendant charged with the murder of a 14-year old girl. Finding that it appeared that the man confessed in the interviews to raping the girl, the court held that the government's need for the information as evidence in the criminal case outweighed the journalists' First Amendment rights. *The Wichita Eagle* subsequently published its reporter's notes on the paper's website.

Minnesota

On February 2, a Minnesota judge ordered three journalists with *The Free Press* to comply with a subpoena for notes and other information relating to a phone interview with a man while he was in a standoff with the police. (The suspect took his own life a few hours later during the standoff).

The state shield law requires journalists to disclose confidential information if there is probable cause to believe the information is clearly relevant to a criminal investigation. Finding the shield law inapplicable, the judge wrote: "Freedom of the press is not quite as sacrosanct or absolute as *The Free Press* would like it to be. The right claimed by *The Free Press* to seek the 'truth' must never be allowed to take precedent over the compelling and overriding interest of law enforcement authority to maintain human life."

The Free Press and its corporate parent say they intend to appeal the ruling.

At the hearing, the judge also ruled on an unrelated matter involving one of the journalists who had been subpoenaed for notes and testimony regarding a conversation he had with a suspect in a robbery case. In that case, the journalist had gotten the suspect's cell phone number from court documents, called the suspect, and described the conversation in an article. The judge rejected the government's petition, noting that the suspect was in police custody and that the information being sought by authorities could be obtained in other ways.

South Dakota

In February 2007, a South Dakota criminal court judge rejected a defense attempt to subpoena the notes of an editor covering a high-profile juvenile offender trial. The defendant was a high school wrestling champion accused of sexually molesting younger teammates. His lawyer subpoenaed Sarah Ebeling, the editor the *New Era*, a local weekly newspaper, demanding she turn over all of her notes and recordings from interviews she conducted while covering the trial. Circuit Judge Steven Jensen quashed the subpoena on relevance grounds.

Tennessee

The Supreme Court of Tennessee declined to review a ruling on the application of the state shield law in the context of a libel action. In the 2000 presidential campaign WorldNetDaily and two freelance writers published an 18-part series accusing Al Gore and some of his Tennessee supporters of corruption. WND and the reporters were sued by Clark Jones, a Tennessee businessman and Gore supporter. In a pretrial ruling, the court of appeals ruled that defendants would have to identify their sources if they introduced evidence that their publications were true.

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Reporters Privilege Case Update

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District of Columbia: United States v. Libby

On March 6, 2007, former White House official I. Lewis "Scooter" Libby was found guilty on two counts of perjury, one count of obstruction of justice, and one count of making false statements for his statement to a federal grand jury and to federal investigators in the Plame investigation.

The trial was notably marked by the testimony of news reporters, including Judy Miller who spent 85 days in jail resisting a grand jury subpoena. On March 1, District Judge Reggie B. Walton decided a number of motions relating to Libby's request to call NBC reporter Andrea Mitchell to testify and to introduce additional statements and evidence from NBC reporter Tim Russert. *United States v. Libby*, (No. 05-394, 2007 WL 623646 (D.D.C. March 01, 2007).

With respect to Mitchell, Libby wanted her to testify about a 2003 comment she made on CNBC, indicating that before Plame's identity became public, there was a rumor among Washington reporters that Plame worked for the CIA. The defense argued that this would bolster Libby's claim that he first learned of Plame's identity from Mitchell's colleague, Russert. The government filed a motion to preclude her testimony, which the judge granted. According to the court, "Mitchell recanted this exchange" that she had "misunderstood [the] question and screwed it up." In the circumstances, Mitchell's statement was hearsay and it could not be introduced for the sole purpose of impeaching her.

Libby also wanted to introduce statements that Russert had made on the air in 1997 and 1998 which suggested that Russert had greater knowledge of grand jury procedure than he said he had when appearing before the grand jury. The court concluded that these statements involved collateral matters and could not be used to impeach Russert.

Finally, Libby sought to introduce a letter the government had written to Russert concerning his testimony to the grand jury. The government letter stated that if Russert challenged his grand jury subpoena, the government would not argue that he had waived any privilege by speaking to an FBI agent in 2003 about his conversation with Libby, but rather the government would compel testimony under *Branzburg v. Hayes* (1972).

Judge Walton agreed with the government that the letter was an understanding between attorneys, and not a concession to secure Russert's testimony. Because it was of little importance, and Russert likely did not know about it, the court concluded that the letter could not be admitted to impeach Russert or demonstrate bias, and should not be admitted.

Sixth Circuit Denies Shared Interest Privilege to News Source

In *Williams v. Detroit Board of Education*, (*Williams v. Detroit Bd. of Educ*. No. 05-2365, 2007 WL 663348 (6th Cir., March 5, 2007) (Boggs, Cook, Carr, JJ.), the Sixth Circuit addressed the issue of the shared interest privilege. In *Williams*, a former high school principal claimed that the Detroit Board of Education defamed him by releasing an audit report regarding his school's finances to the *Detroit News.*

The Board of Education argued that its statements made to the press were protected by Michigan's "shared interest privilege." If a shared interest privilege exists, a plaintiff must overcome the privilege by demonstrating actual malice. The District Court agreed that a shared interest privilege protected the Board because it has an interest in the way administrators employees handle school funds and taxpayers have an interest in any misuse or mishandling of their tax dollars.

The Sixth Circuit reversed, finding that the shared interest privilege did not apply. The Court held that the shared interest privilege only applies to "bona fide communications concerning any subject matter in which a party has an interest or a duty owed to a person sharing a corresponding interest or duty." The Court found no legal interest or duty running between the Detroit Board of Education and the *Detroit News* that would allow it to claim the privilege.

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State Shield Law Efforts Making Gains Across the Country

Efforts to enact a statutorily-based reporter's privilege are currently underway in seven states: Kansas, Massachusetts, Missouri, Texas, Utah, Washington and West Virginia. With the exception of Kansas and West Virginia, shield law bills were introduced in all of these states last year (or, in the case of Texas, the prior legislative session).

Only the proposal under consideration in Washington provides absolute protection for confidential sources. All of the bills, except the one introduced in West Virginia, contain definitions for who or what kind of media may claim the privilege. Three of the bills—Texas, Washington and West Virginia—make reference to the internet as a means of disseminating information to the public.

Highlights from each proposal follow below.

Kansas

Bill No. 313 was introduced in the Senate in early February 2007. It remains pending before the Judiciary Committee.

- The bill covers sources and information.
- "Journalist" defined as: "a publisher, editor, reporter or other person employed by a newspaper, magazine, news wire service, television station or radio station who gathers, receives or processes information for communication to the public."
- Balancing test: the party seeking to compel must show that the information is "material and relevant," unavailable by other means and "of a compelling and overriding interest for the party seeking the disclosure and is necessary to secure the interests of justice."
- Upon satisfaction of the balancing test, the subpoenaed information becomes subject to in camera inspection; the court will compel disclosure only if it then determines that "disclosure is likely to be admissible as evidence" and that "its probative value is likely to outweigh any harm done to the free dissemination of information to the public through the activities of journalists."

To access the bill, go to: www.kslegislature.org/bills/2008/313.pdf

Massachusetts

Identical bills were introduced in the Senate (No. 808) and in the House of Representatives (No. 1672) in early January 2007. The Senate bill has been referred to the Judiciary Committee, and the House bill to the Joint Committee on Public Service.

- The bills cover sources (and information that would "tend to identify" the source) regardless of any promise of confidentiality, and unpublished "news or information."
- "Covered person" defined as: "a person who engages in the gathering of news information and has the intent, at the beginning of the process of gathering news or information, to disseminate such news or information to the public."
- "News media" defined as including: "a newspaper, a magazine; a journal or other periodical; radio; television; any means of disseminating news or information gathered by press associations, news agencies or wire services, including dissemination to the news media such as identified herein; or any printed, photographic, mechanical or electronic means of disseminating news or information to the public."
- Disclosure of sources may be compelled if "(i) disclosure of the identity of a source is necessary to prevent imminent and actual harm to public security from acts of terrorism; (ii) compelled disclosure of the identity of a source would prevent such harm; and (iii) the harm sought to be redressed by requiring disclosure clearly outweighs the public interest in protecting the free flow of information."
- Balancing test for compelling disclosure of unpublished news or information: the party seeking to compel must show that the news or information is "critical or necessary" and unavailable by alternative means, and that "there is an overriding public interest in the disclosure."

To access the Senate bill, go to: www.mass.gov/legis/bills/senate/185/st00/st00808.htm

To access the House bill, go to: www.mass.gov/legis/bills/house/185/ht01pdf/ht01672.pdf

Missouri

A shield law bill, HB 774, passed the House of Representatives on March 15, and a public hearing before the Senate is scheduled for March 28. Two bills had also been introduced in the Senate: SB 58 and SB 307.

- HB 774 covers sources and "unpublished or nonbroadcast information."

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- "Covered person" defined as: "any person or entity whose revenue comes principally from the business of gathering, creation, or distribution of news or from charitable contributions that disseminates information by print, broadcast, cable, satellite, mechanical, photographic, electronic, or other means, and that meets one of the following three criteria: (a) Publishes, in either print or electronic form, a newspaper, book, magazine, pamphlet, or any other periodical; or (b) Operates a radio or television broadcast station, a network of such stations, a cable system, a satellite carrier, or a channel or programming service for any such station, network, system, or carrier; or (c) Operates a news agency or wire service, or a news or feature syndicate." (The revenue requirement was added when the bill passed out of the House General Laws Committee.)
- Factors for the court to consider in deciding to pierce the privilege: "the nature of the proceedings, the merits of the claim or defense, the adequacy of any remedy otherwise available, the possibility of establishing by other means that which it is alleged the source or information will tend to prove, the public interest in protecting the confidentiality of any source as balanced against the public interest in requiring disclosure, and the relevancy of the source or information."
- Balancing test: before compelling disclosure, the court must find that the subpoenaed information does not relate to matters or details "necessary" to be kept secret, that all other sources have been exhausted and that disclosure is "essential to the protection of the public interest involved in the proceedings."

To access the House bill, go to: www.house.mo.gov/bills071/biltxt/perf/HB0774P.HTM

Texas

Three shield law bills have been introduced in Texas, one in the Senate (SB 966) and two in the House (HB 382 and HB 2249). The sponsor of HB 382 (the first of the three to be introduced) subsequently co-sponsored HB 2249, which is identical to the Senate bill. A public hearing on the bills is scheduled for March 28. It is expected that HB 2249 and SB 966 will be the main focus of the hearing.

- HB 2249 and SB 966 cover confidential and nonconfidential information, and the sources of such information.
- "Journalist" defined as: "a person who for financial gain, for a substantial portion of the person's livelihood, or for subscription purposes gathers, compiles, prepares, collects, photographs, records, writes, edits, reports, investigates, processes, or publishes news or information that is disseminated by a news medium or communication service provider and includes: (A) a person who supervises or assists in gathering, preparing, and disseminating the news or information; (B) a person who is or has been a journalist, scholar, or researcher employed by an institution of higher education; or (C) a person who is on a professional track to earn a significant portion of the person's livelihood by obtaining or preparing information for dissemination by a news medium or an agent, assistant, employee, or supervisor of that person."
- "News medium" defined as: "a newspaper, magazine or periodical, book publisher, news agency, wire service, radio or television station or network, cable, satellite, or other transmission system or carrier or channel, or a channel or programming service for a station, network, system, or carrier, or an audio or audiovisual production company or Internet company or provider, or the parent, subsidiary, division, or affiliate of that entity, that disseminates news or information to the public by any means, including: (A) print; (B) television; (C) radio; (D) photographic; (E) mechanical; (F) electronic; and (G) other means, known or unknown, that are accessible to the public."
- Balancing test: the party seeking to compel must show that "(1) all reasonable efforts have been exhausted to obtain the information from an alternative source; (2) to the extent possible, the subpoena or compulsory process does not require the production of a large volume of unpublished material and is limited to the verification of published information and the surrounding circumstances relating to the accuracy of the published information; (3) reasonable and timely notice was given of the demand for the information, document, or item; (4) nondisclosure would be contrary to public interest; (5) the subpoena or compulsory process is not being used to obtain peripheral, nonessential, or speculative information; and (6) the information, document, or item: (A) is relevant and material to the proper administration of the official proceeding for which the testimony or production is sought and is essential to the maintenance of a claim or defense of the person seeking the testimony or production; or (B) is central to the investigation or prosecution of a criminal case regarding the establishment of guilt or innocence and, based on an independent source, reasonable grounds exist to believe that a crime has

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occurred." (This test resembles that found in the federal shield law bill introduced by Senator Lugar in May 2006 (S. 2831).)

- Additionally, disclosure may be compelled if (1) the party seeking the information shows that the information was obtained as a result of a journalist's eyewitness observations of criminal conduct or any criminal conduct on the part of the journalist and the court is satisfied that reasonable efforts to obtain the information from alternative sources has been exhausted; and (2) it is "reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm." The bill explicitly provides that this section of the bill does not apply where the act of "communicating, receiving, or possessing" information is the alleged criminal conduct.

To access the Senate bill, go to: www.legis.state.tx.us/BillLookup/History.aspx?LegSess=80R&Bill=SB966

To access the HB 2249, go to: www.capitol.state.tx.us/BillLookup/Text.aspx?LegSess=80R&Bill=HB2249

Utah

The Advisory Committee on the Rules of Evidence to the Utah Supreme Court has put forward two proposals for an evidentiary rule that would create a reporter's privilege in the state (Rule 509). The proposals are identified as the "majority draft" and the "alternative draft." The alternative draft has the backing of the state Attorney General, as well as the media.

- The majority draft covers confidential sources (and information that would "directly lead" to the disclosure of such sources) and "confidential unpublished news information."
- The alternative draft would also cover all unpublished news information.
- Under the majority draft, "news reporter" means: "a publisher, editor, reporter or other similar person gathering information for the primary purpose of disseminating news to the public and any newspaper, magazine, or other periodical publication, press association or wire service, radio station, television station, satellite broadcast, cable system or other organization with whom that person is connected."
- The alternative draft uses the same definition for "news reporter" and expands it to also include authors.
- Under the majority draft, disclosure of "confidential unpublished news information" may be compelled if the party seeking the information "demonstrates a substantial need for that information which outweighs the interest of a continued free flow of information to news reporters." (Note that the test weighs the flow of information to reporters, not to the public.)
- The majority draft further outlines six broad situations where no privilege may be claimed: (1) "If the news reporter's failure to disclose the information enables or aids anyone to commit or plan to commit a crime or tort;" (2) "If there is a clear and imminent threat of harm to any person or place if the information is withheld;" (3) "As to relevant information in a defamation action against the news reporter or the organization or entity on whose behalf the news reporter was acting; however, the privilege exists until the person maintaining the action has demonstrated a good faith evidentiary basis for the claim of defamation;" (4) "As to any information that falls within a statutory duty to report sexual or physical abuse, neglect, or exploitation of a child or vulnerable adult to law enforcement or another governmental agency;" (5) "As to any personal direct observations the news reporter makes that involve the commission of a crime or tort;" or (6) "As to any physical or tangible evidence of a crime or tort in the possession of the news reporter or organization or entity on whose behalf the news reporter was acting, except for notes, documents, photographs, audio and video recordings and other records that the news reporter created."
- The alternative draft contains no such exceptions to the privilege and instead proposes this balancing test: the party seeking to compel must show that (1) reasonable efforts to obtain the information from elsewhere have been unsuccessful, (2) the information is "of certain relevance to an issue of substantial importance and goes to the heart of the matter" and (3) "interests in compelling disclosure of the information outweigh the interests in protecting the free flow of information to the public."

To access the majority draft, go to:
www.utcourts.gov/resources/rules/comments/2007/03/URE0509.pdf

To access the alternative draft, go to:
www.medialaw.org

Washington

A shield law bill passed the House (HB 1366) on February 16 and in the Senate (SB 5358) on March 8. A hearing before the Senate Judiciary Committee on the House bill is scheduled

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for March 30. A hearing before the House Judiciary Committee on the Senate bill is scheduled for March 28.

- Both bills cover sources (and information that would "tend to identify" the source) where there is a "reasonable expectation of confidentiality," and "news or information." (The bills exclude from the scope of "news or information" any physical evidence of a crime.)
- Both bills provide absolute protection for confidential sources.
- Under the House bill, "news media" defined as: (a)(i) "Any newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, or any person or entity that is in the regular business of disseminating news or information to the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, internet, or electronic distribution; (ii) Any person who is or has been a journalist, a scholar or researcher employed by any institution of higher education, or other individual who either: (A) At the time he or she obtained or prepared the information that is sought was earning or about to earn a substantial portion of his or her livelihood by obtaining or preparing information for dissemination by any person or entity listed in (a)(i) of this subsection, or (B) obtained or prepared the information that is sought while serving in the capacity of an agent, assistant, employee, or supervisor of any person or entity listed in (a)(i) or (ii)(A) of this subsection; or (iii) Any parent, subsidiary, or affiliate of the entities listed in (a)(i) of this subsection."
- The Senate bill contains the same definition of "news media" except as follows:
  - Subsection (i): "... audio or audiovisual production company, or any entity that is in the regular business of news gathering and disseminating news or information to the public by any means ..."
  - Subsection (ii) : "... Any person who is or has been an employee, agent, or independent contractor of any entity listed in [i] of this subsection, who is or has been engaged in bona fide news gathering for such entity, and who obtained or prepared the news or information that is sought while serving in that capacity."
- Balancing test for "news or information" under both bills: the party seeking to compel must show that "(a)(i) In a criminal investigation or prosecution, based on information other than that information being sought, that there are reasonable grounds to believe that a crime has occurred; or (ii) In a civil action or proceeding, based on information other than that information being sought, that there is a prima facie cause of action; and (b) In all matters, whether criminal or civil, that: (i) The news or information is highly material and relevant; (ii) The news or information is critical or necessary to the maintenance of a party's claim, defense, or proof of an issue material thereto; (iii) The party seeking such news or information has exhausted all reasonable and available means to obtain it from alternative sources; and (iv) There is a compelling public interest in the disclosure. A court may consider whether or not the news or information was obtained from a confidential source in evaluating the public interest in disclosure."
- Both bills also provide protection against subpoenas to third-party service providers.

To access the House bill, go to: www.leg.wa.gov/pub/billinfo/2007-08/Pdf/Bills/House%20Bills/1366.pdf

To access the Senate bill, go to: www.leg.wa.gov/pub/billinfo/2007-08/Pdf/Bills/Senate%20Bills/5358-S.pdf

West Virginia

Bill No. 2735 was introduced in the House in late January 2007. It remains pending before the Judiciary Committee.
- The bill covers "information, documents and items" obtained in newsgathering.
- The privilege may only be claimed by a party who is not a party to the underlying proceeding.
- The privilege applies to: "A person, company, or entity engaged in or that has been engaged in the gathering and dissemination of news for the public through a newspaper, book, Internet, magazine, radio, television, news or wire service, or other medium." (The bill does not define who may claim the privilege.)
- Balancing test: the party seeking to compel must show that the subpoenaed information is "material and relevant," not reasonably available by other means and is "necessary."

To access the bill, go to: *www.legis.state.wv.us/Bill_Text_HTML/2007_SESSIONS/RS/BILLS/hb2735%20intr.htm*

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ABA Model Rule 1.18: Lawyering and the "Prospective Client"

By William L. Chapman

Introduction

Your firm serves as counsel for several media clients and one sunny day you receive a phone call from a Mr. Buffett, the principal of New Media, LLC, a private equity fund. He is interviewing lawyers for the purpose of retaining counsel to sue Worldwide Media Companies, a holding company with a number of different media properties.

Knowing that your firm has never represented Worldwide (although the firm has made overtures for its business), you ask about the case. Mr. Buffett tells you New Media purchased one of Worldwide's new media businesses based on false and misleading financial information and undisclosed copyright infringement claims, and New Media wants its money back and punitive damages.

Mr. Buffett identifies some of the people involved in the deal and some critical evidence his staff has gathered, including several incriminating documents his IT person found on a hard drive acquired in the transaction. That prompts Mr. Buffett to add that New Media wants to sue the law firm Worldwide used because one of the documents is from the firm. You immediately tell him your firm cannot take the case because it has close ties to several lawyers in the other firm.

A month later one of your partners tells you she has been asked by the other law firm to defend a case brought by New Media, involving a transaction with Worldwide. May she take the case? Do you need to do anything? Can or should you tell her about your phone call with Mr. Buffett?

A prospective client is almost anyone who discusses with a lawyer "the possibility" of retaining the lawyer with respect to a matter.

ABA Model Rule 1.18

In 2002, the ABA adopted Model Rule 1.18 to address the situation posed by the foregoing hypothetical. It did so to acknowledge that a prospective client almost always communicates confidential information to a lawyer so the lawyer can determine whether representation is proper, and that the prospective client "should receive some but not all of the protection afforded clients." Model Rules of Professional Conduct Rule 1.18, Comment [1] (hereinafter "Comment [ ]").

Rule 1.18: Duties to Prospective Client, reads:

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

Model Rule 1.18, or a rule substantially similar to it, has been adopted by twenty jurisdictions (Arkansas, Connecti-

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cut, Delaware, Florida, Idaho, Indiana, Iowa, Louisiana, Minnesota, Nebraska, Nevada, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Washington, Wisconsin, and Wyoming), while nine jurisdictions (Arizona, District of Columbia, Maryland, Missouri, Montana, New Jersey, North Carolina, North Dakota, and Oregon) have adopted rules more permissive of representations adverse to a prospective client than Model Rule 1.18. Virginia has not adopted Model Rule 1.18.

Who is a "Prospective Client"?

A prospective client is almost anyone who discusses with a lawyer "the possibility" of retaining the lawyer with respect to a matter. Comment [1]. That said, Comment [2] makes clear that some who communicate with a lawyer will not be considered prospective clients under Model Rule 1.18, giving the example of a person "who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship …."

Where a lawyer learns of significantly harmful information, the lawyer is disqualified from representing a client in the same or substantially related matter.

The Duty of Confidentiality

Under Model Rule 1.18(b), a lawyer must keep confidential all information received from a prospective client regardless of whether a client-lawyer relationship is established. Paragraph (b) states that a lawyer "shall not *use or reveal* information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client" (emphasis added). This blanket prohibition applies "regardless of how brief the initial conference may be," Comment [3], and it mirrors the protection clients receive under Model Rule 1.6 ("A lawyer shall not reveal information relating to the representation of a client ….").

The exception to the duty of confidentiality is set forth in Model Rule 1.9(c). It permits use or disclosure of otherwise confidential information in two circumstances: where the Model Rules "would permit or require with respect to a client," and "when the information has become generally known."

Unlike Model Rule 1.9(a) and (b), paragraph (c) does not permit a lawyer to seek client consent to use or disclose confidential information. *See* Model Rule 1.9 Comment [9] (discussing client waivers under paragraphs (a) and (b), but not (c)).

What is "Significantly Harmful Information"?

Model Rule 1.18(c) prohibits a lawyer subject to paragraph (b) from representing "a client with interests materially adverse to those of a prospective client in the same or a substantially related matter *if* the lawyer received information from the prospective client that could be *significantly harmful* to that person in the matter, except as provided in paragraph (d)" (emphasis added).

The Model Rules do not define "significantly harmful information." Instead, Comment [4] to Model Rule 1.18 describes what can be viewed as a process definition, a practice rule that is intended "to avoid [a lawyer] acquiring disqualifying information." The rule is that a lawyer should acquire only that much information as is necessary to determine whether representation is proper.

To make that determination, a lawyer will need information necessary to identify whether a conflict of interest exists and to assess whether the lawyer is competent to handle the matter. At a minimum, this will mean the prospective client must reveal the name of the adverse party, its principals, the nature of the matter – type of transaction or litigation – and the "key players."

If from this information, the lawyer concludes that representation would be improper, Comment [4] states that the lawyer should "so inform the prospective client or decline the representation."

However, even following this practice rule, a lawyer might still acquire significantly harmful information, a possibility recognized by Model Rule 1.18(d)(2). Assuming that does not happen, the lawyer will not be "prohibited from representing a client with interest adverse to those of the prospective client in the same or a substantially related matter." Comment [6].

On the other hand, where a lawyer learns of significantly harmful information, not only is the lawyer disqualified from representing a client in the same or substan-

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tially related matter, but the lawyer's disqualification is imputed to other lawyers in the firm pursuant to Model Rule 1.10. Comment [7]. They may not "knowingly undertake or continue representation in such a matter, except as provided in paragraph (d)." Model Rule 1.18(c).

Representation with "Significantly Harmful Information"

Model Rule 1.18(d) sets forth two circumstances in which a prospective client provides significantly harmful information but disqualification does not occur. The first, set forth in paragraph (d)(1), is where "both the affected client and the prospective client have given informed consent, confirmed in writing." "Informed consent" and "confirmed in writing" are defined in Model Rule 1.0(b) and (e) and Comments [1] and [6] and [7].

The second circumstance, described in paragraph (d)(2), is where a lawyer has taken "reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client," and two further conditions are met: (i) the lawyer is "timely screened from participation in the matter" and receives no part of the fee from the representation, and (ii) written notice is "promptly" given to the prospective client.

As to condition (i), Model Rule 1.0(k) and Comments [8] – [10] define what a screen involves. It requires a law firm to put in place measures that are "reasonably adequate … to protect information that the isolated [disqualified] lawyer is obligated to protect …." The measures should include written acknowledgement by the disqualified lawyer to have no communication with firm personnel or access to firm information about the matter.

Written notice should be given to all firm personnel that a screen is in place and they can have no communication about the matter with the disqualified lawyer. Further, periodic written reminders about the screen should be given to all personnel.

As to condition (ii), Comment [8] states that the notice to the prospective client should include "a general description of the subject matter about which the lawyer was consulted, and…the screening procedures employed." It recommends that the notice be given "as soon as practicable after the need for screening becomes apparent."

Should a Lawyer Ask for a Waiver?

Comment [5] to Model Rule 1.18 suggests a means to avoid the potentially difficult issue of whether a lawyer has acquired significantly harmful information and faces disqualification under paragraph (c).

The comment states that a lawyer "may condition conversations with a prospective client on the person's *informed consent* that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter … [including] subsequent use of the information …." (emphasis added). At first blush this may seem like a prudent and practical approach.

Yet, viewed from the prospective client's position, does it have the taste of the lawyer "wanting to have his cake and eat it too"? Moreover, a lawyer who has had no prior communication with a prospective client may be loathe to state at the outset of their discussion that, in effect, the lawyer wishes to have the right to use anything the client says against it.

The inherent awkwardness of such a request is made all the more so by what the lawyer must discuss to comply with "informed consent" under Model Rule 1.0(e) and Comment [6](discussion should include "the material advantages and disadvantages of the proposed course of conduct and … the client's … options and alternatives," noting that "it may be appropriate … to advise a client … to seek the advice of other counsel"). At the very least, to obtain the prospective client's informed consent, a lawyer should tell the client of its rights under Model Rule 1.18.

Whether a court might look askance at a lawyer defending against a motion to disqualify on the basis of the prospective client's informed consent remains to be seen, but a lawyer may come to regret asking for that consent should the lawyer represent the client in a litigated matter. If the client has waived the confidentiality afforded by Model Rule 1.18, what is to prevent the information communicated to the lawyer from being discoverable?

Barton v. U.S. District Court, 410 F.3d 1104 (9th Cir. 2005), is instructive on this point. There, the defendant sought the responses to an Internet questionnaire posted by the plaintiffs' law firm which contained the following disclaimer: "I agree that the above does not constitute a request for legal advice and that I am not forming an attor-

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ney client relationship by submitting this information. I understand that I may only retain an attorney by entering into a fee agreement." Fortunately for the plaintiffs, the Ninth Circuit found the disclaimer too ambiguous to waive the attorney-client privilege and denied the discovery request.

A Final Thought

While the opening hypothetical is not drawn from the facts of any case, in the early 1990's the author was subject to a motion to disqualify brought by a plaintiff in a libel case.

The plaintiff claimed that he initially sought to retain the author and in doing so had a far-ranging discussion with the author about his case, possible witnesses and damages. However, the court denied the motion based on the author's testimony that, although he had no recollection of speaking with the plaintiff, for more than ten years he had followed a simple rule and had no reason to believe he had departed from that rule in the case at hand.

The rule was (and remains) that at the outset of an inquiry from a prospective client, he would ask for the name of the adverse party. He would not take a case against the media, and upon being told the case involved a newspaper, he would decline the representation and offer to recommend several lawyers whom the prospective client might wish to call.

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