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MEDIALAWLETTER

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D.C. Circuit Stays Extraordinary and Unprecedented Contempt Sanction Against Reporter

Orders Expedited Briefing and Argument on Common Law Reporter's Privilege

By Leslie Paul Machado

After a week in which the D.C. Circuit granted two emergency motions – one by former USA TODAY reporter Toni Locy to stay an unprecedented contempt order issued by the United States District Court for the District of Columbia in the matter of *Hatfill v. Mukasey*, Case No. 03-1793, and one filed by Dr. Hatfill to expedite briefing and argument – the Circuit is scheduled to hear argument on May 9, 2008 and decide, among other issues, the availability and scope of a common law reporter's privilege. The panel is scheduled to be comprised of Judges Ginsburg, Rogers and Kavanaugh.

First, some background: Only weeks after the terrorist attacks on the World Trade Center and the Pentagon, the sense of panic and fear that plagued the country was heightened when letters containing anthrax were sent to senators and newsman, and traces of the deadly chemical were found at post offices and other buildings throughout the United States. Ultimately, five people – two U.S. Postal Service employees in Washington, D.C.; an employee at America Media, Inc. in Boca Raton, Florida; a woman in Oxford, Connecticut; and a New York hospital supply room worker – died of exposure to anthrax.

In August 2002, then-Attorney General Ashcroft publicly identified Steven Hatfill, M.D. as a "person of interest" in the government's ongoing anthrax investigation. Around this time, the media published several articles relating to the investigation, including the fact that Dr. Hatfill had been named as a "person of interest." Dr. Hatfill quickly called a press conference to deny any involvement in the attacks. He has never been charged in the case.

Privacy Act Claim

In August 2003, Dr. Hatfill filed a Privacy Act lawsuit against Attorney General Ashcroft, the Department of Justice, the Federal Bureau of Investigation, and several DOJ and FBI employees, alleging that a pattern of leaks from the FBI and DOJ had destroyed his life. The lawsuit sought a declaration that government officials violated Dr. Hatfill's constitutional rights, and sought an injunction against future violations. It also sought an undetermined amount of monetary damages.

A small part of Dr. Hatfill's Privacy Act lawsuit was based on two articles written by Ms. Locy in mid-2003. In the first article, published May 29, 2003, she reported that Dr. Hatfill had been under "24/7" surveillance since he was publicly identified as a "person of interest." Her May 29 article also reported that the evidence against Dr. Hatfill was "largely circumstantial;" that the term "person of interest" had no legal significance; that investigators had been unable to rebut Dr. Hatfill's claims that he had never visited Trenton or Princeton (where the anthrax letters were mailed); that investigators had found no traces of anthrax in Dr. Hatfill's apartment, his girlfriend's home, his cars, a dumpster near his house or several places he visited; and that one law enforcement source reported that investigators "sometimes wonder whether they focused on Hatfill too soon, and ignored someone who deserved more attention." In the second article, published June 10, 2003, Ms. Locy reported that the FBI had begun draining a pond near Dr. Hatfill's house.

In April 2006, Dr. Hatfill subpoenaed Ms. Locy to appear for a deposition to answer questions about her confidential sources for the two articles. At that deposition, she testified that she could not recall the names of the specific individuals who provided her with the information contained in the two articles. She explained that she had thrown out her notes shortly after writing the two articles years earlier (as was her practice); that she was not required to tell her editor her confidential sources in 2003, and did not do so; and that there were no drafts or other documents that could refresh her recollection.

Ms. Locy testified, however, that she had a broad "universe" of sources that she relied upon for her general anthrax/terrorism reporting. She refused to reveal the names of the members of this broader universe because that would implicate individuals who were not sources for the two articles at issue. However, because the two articles included references to her sources' employers, she was able to confirm that her sources were government officials.

More than one year later, Dr. Hatfill moved the district court to compel Ms. Locy (and five other reporters) to reveal the names of their confidential sources. In an opinion dated August 13, 2007, the district court granted that motion, finding

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that the qualified reporters' privilege set forth in *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) and *Lee v. Dep't of Justice*, 413 F.3d 53, 59 (D.C. Cir. 2005), *reh'g en banc denied*, 428 F.3d 299 (D.C. Cir. 2005) had been overcome.

Dr. Hatfill then deposed Ms. Locy a second time. At this second deposition, however, he did not ask her to name the sources of information for the two articles at issue. Instead, his questions were far broader and sought the names of confidential sources for information concerning her anthrax reporting in general. Ms. Locy respectfully refused to answer those broader questions, both to avoid disclosing the names of sources irrelevant to the issues in the case, and to preserve her ability to seek appellate review:

> I fully respect the court's order. I do not remember the confidential sources who provided me with information about Steven Hatfill. Refusing to answer is the only way for me to have an appeals court decide whether I must reveal confidential sources who may not have provided the information at issue in this case.

Prior to her second deposition and continuing after the deposition, Ms. Locy reached out to her universe of confidential anthrax sources to see if any would release her from her promises of confidentiality and/or if any refreshed her recollection as to whether they were the source for the two Hatfill-related articles. Based on her efforts, and the efforts of other reporters, two individuals released her from any promises of confidentiality and were deposed by Dr. Hatfill. While both individuals recalled speaking with Ms. Locy, neither recalled whether they were the source for any of the information contained in her two articles.

Contempt Motion

Dr. Hatfill thereafter moved to hold Ms. Locy and Jim Stewart, now we had reported on the anthrax investigation for CBS News, in contempt. Both reporters opposed that motion. For her part, Ms. Locy reiterated that forcing her to reveal *all* of her confidential sources for general terrorism reporting would necessarily disclose confidential sources of information having nothing to do with Dr. Hatfill's case. She also explained that she intended to appeal any finding of contempt to the D.C. Circuit and, as a result, urged that any sanction be nominal and be stayed pending appeal.

Ms. Locy showed that, in the three most recent cases in which D.C. federal district courts had ruled on similar motions, they stayed the contempt sanction pending the appeal. *See In re: Special Counsel Investigation*, 332 F. Supp. 2d 33, 34 (D.D.C. 2004); *Lee v. Dep't of Justice*, 327 F. Supp. 2d 26, 33 (D.D.C. 2004); *Lee v. Dep't of Justice*, 401 F. Supp. 2d 123, 144 (D.D.C. 2005).

On January 11, 2008, while his contempt motions were pending against Ms. Locy and Mr. Stewart, Dr. Hatfill announced to the district court that he was prepared to proceed to trial, and was requesting a trial date in 2008. In response to multiple questions from the district court, Dr. Hatfill's counsel expressly agreed that he was prepared to proceed to trial on the current record, *without* evidence of Ms. Locy's or Mr. Stewart's sources, because he had more than sufficient evidence to prevail on his claims. Consequently, the court set the case for a pretrial conference in October 2008, preceded by mediation and cross-motions for summary judgment.

On February 19, 2008, the district court heard argument on plaintiff's contempt motions. After acknowledging that Ms. Locy could not recall the names of the individuals who gave her information about plaintiff, and finding her failure of recollection credible, the district court ordered Ms. Locy to reveal the names of *all* of her many confidential sources, on the premise that "somebody, apparently, among the group [] provided information to her, told her, about Dr. Hatfill."

The court reasoned that if all of Ms. Locy's many anthrax sources were revealed, Dr. Hatfill could "follow up" to see if any of the sources might remember providing relevant information to Ms. Locy in 2003. The court acknowledged that its ruling would require Ms. Locy to reveal the names of confidential sources who *did not* provide Hatfill-related information, but decided that Dr. Hatfill's interest in "following up" trumped any constitutional privilege.

To enforce its decision, the court imposed an escalating fine, starting at $500 per day for the first seven days, escalating to $1000 per day for the next seven days, and then rising to $5000 per day for the next seven days for each day Ms. Locy refused to reveal her universe of anthrax sources. At the end of that period, the court would "reconvene a hearing to decide what further steps should be taken." The court temporarily

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stayed the sanction pending issuance of a written order.

At 9:15 p.m. on Friday, March 7, 2008, the district court issued a written Opinion and Order, confirming its earlier decision and acknowledging again that it was ordering Ms. Locy to reveal the names of sources unrelated to the two articles at issue in plaintiff's case. According to the court, because Ms. Locy could not identify the sources for the two articles about Dr. Hatfill, "discerning the identity of the pertinent sources necessarily requires deposing all [of her confidential sources] to eliminate those who did not implicate Dr. Hatfill."

In addition, the court intensified its financial sanction on Ms. Locy by prohibiting her "from accepting any monetary or other form of reimbursement for the payment of the monetary sanction imposed by the Court." The sanctions were to become "effective as of 12:00 midnight on March 11, 2008." Finally, despite the concededly unprecedented nature of its ruling, the court refused to grant a stay to enable Ms. Locy to seek appellate review.

The court intensified its financial sanction on Ms. Locy by prohibiting her "from accepting any monetary or other form of reimbursement for the payment of the monetary sanction imposed by the Court."

On Monday, March 10, Ms. Locy filed an emergency motion with the D.C. Circuit to stay the district court's order. In her motion, Ms. Locy argued that the district court's order, forcing her to reveal the names of confidential sources who were not sources for the two Hatfill articles, violated the constitutional reporter's privilege long recognized in the Circuit, which requires that the source be "crucial" to the plaintiff's case.

Ms. Locy also argued that Dr. Hatfill has amassed significant evidence in support of his case, including the names of six sources and the government agency employers of numerous other sources, all of which led him to ask the district court to order the case to trial. These facts, Ms. Locy argued, confirmed that her testimony was not "critical" or "crucial" to Dr. Hatfill's case.

Ms. Locy's motion also argued that her appeal would allow the Circuit to squarely address the availability and scope of a common law reporter's privilege, and would let the Circuit resolve whether the names of her confidential sources were crucial to Dr. Hatfill's case or whether their government agency employer was sufficient in a Privacy Act claim – an issue expressly left open in the Circuit's decision in *Lee v. Dep't of Justice*, 413 F.3d 53, 59 (D.C. Cir. 2005). Ms. Locy's emergency motion was supported by an amicus brief, drafted on 24 hours notice, and submitted on behalf of 29 companies.

After soliciting a response from Dr. Hatfill, the Circuit issued an Order on Tuesday, March 11 in which it granted the emergency motion for a stay, finding that Ms. Locy had "satisfied the stringent standards required for a stay pending appeal."

Two days later, on Thursday, March 13, Dr. Hatfill filed his own emergency motion with the D.C. Circuit, asking the Court to expedite briefing and argument of his appeal. In support of his motion, Dr. Hatfill argued that, absent expedited consideration of Ms. Locy's appeal, he might be denied access to her confidential sources before his trial date later this year.

He also argued that Ms. Locy's memory might fade while her case was on appeal; that the district court might delay consideration of his still-pending contempt motion against Mr. Stewart while Ms. Locy's case was on appeal, thereby depriving him of additional source information; and that his case could benefit from the Circuit's view on whether the identity of the leaker is necessary to prevail in a Privacy Act case, or whether the government agency employer is sufficient. After soliciting Ms. Locy's response, the D.C. Circuit granted Dr. Hatfill's emergency motion on Friday, March 14 and ordered expedited briefing and argument of the appeal.

Accordingly, Ms. Locy's merits brief, and any amici submission, is due March 28; Dr. Hatfill's opposition is due April 11; and Ms. Locy's reply brief is due April 18.

Robert C. Bernius, Leslie Paul Machado, Alycia A. Ziarno and Kimberly Jandrain of Nixon Peabody LLP represent Toni Locy. Stephen Hatfill is represented on appeal by Christopher Wright, Thomas G. Connolly, Mark A. Grannis, Tim Simeone and Patrick O'Donnell of Harris, Wiltshire & Grannis LLP. The amicus brief submitted in support of Ms. Locy's Emergency Motion for Stay was authored by Laura R. Handman, Brigham J. Bowen and J. Rory Eastburg of Davis Wright Tremaine LLP.

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Invasion Of The Privacy Act: How Recent Interpretations Threaten Confidential Sources

Editor's Note:

This article was recently published as a supplement to MLRC's New Developments Bulletin 2007:4. (Click here for that version of the article). In a very thoughtful discussion, the authors argue that the Privacy Act was not intended and should not be applied to unauthorized government disclosures about the status of ongoing criminal investigations. We are republishing it in the Media-LawLetter because of the importance of the issue, its relevance to the Toni Locy matter and related cases concerning the protection of sources in Privacy Act claims.

By Kevin Baine, Kevin Hardy and Carl Metz

In the wake of several recent high-profile confidential source cases, considerable time and attention has been devoted to the proposed enactment of a federal shield law which would create a statutory privilege in federal court comparable to the one already recognized in the overwhelming majority of state courts. *See, e.g.*, *In re Grand Jury Subpoena (Judy Miller)*, 397 F.3d 964 (D.C. Cir. 2005); *Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005); *In re Grand Jury Subpoenas (Mark Fainaru-Wada and Lance Williams)*, 438 F. Supp. 2d 1111 (N.D. Cal. 2006); *Hatfill v. Gonzales*, 505 F. Supp. 2d 33 (D.D.C. 2007).

A federal shield law, however, will not put an end to the battles over the disclosure of confidential sources. Even if Congress enacts such a law, courts will still have to determine, on a case-by-case basis, whether there is an overriding need for the identification of a confidential source. And in two of the recent source cases, the law has taken a questionable turn – we have argued, a wrong turn – that will continue to haunt reporters in the future, whether or not a shield law is enacted.

In the *Wen Ho Lee* and *Steven Hatfill* cases, the courts have interpreted the federal Privacy Act of 1974, 5 U.S.C. § 552a, to create a cause of action against the government for the unauthorized disclosure of information about the status of active criminal investigations. That has enabled Dr. Wen Ho Lee and Dr. Steven Hatfill – respectively, a government scientist investigated for providing classified nuclear technology to a foreign government, and a bioweapons expert investigated for possible involvement in the 2001 anthrax attacks – to claim a need for identifying confidential sources within the government who gave reporters truthful information about the investigations into their activities.

The drafters of the Privacy Act surely did not foresee these developments. As explained below, they thought they were protecting citizens against the accumulation of inaccurate information in government files and the disclosure of information that the public had no business knowing. And that is how the Privacy Act has been used for the most part.

In the more than thirty years since the law was enacted, there have been dozens of reported Privacy Act cases, but most are employment related cases that concern the disclosure of information contained in personnel files. For an illustrative list of adjudicated Privacy Act claims, *see* Wasil, *What Is 'Record' Within Meaning of Privacy Act of 1974*, 121 A.L.R. Fed. 465 §§ 7[a], [b] (West 1994 & 2006 Supp.).

Few cases that we have been able to identify have been premised on the theory that it is illegal for the government to disclose the status of an active criminal investigation, and the reported decisions in those cases either have not been on the merits or contain only superficial discussions of the Privacy Act. In *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), the D.C. Circuit's seminal decision on the reporter's privilege, reputed mobsters brought suit complaining that their rights under the Privacy Act were violated by the disclosure of transcripts of their conversations compiled from FBI wire taps. *Id.* at 707-08. After agreeing with the district court that the plaintiffs had not exhausted alternative sources, the Court affirmed summary judgment in the government's favor without passing on the merits of this Privacy Act theory. *Id.* at 716.

Two decades later, Dr. Lee and Dr. Hatfill expanded on the *Zerilli* theory to allege that the Privacy Act was violated not by the disclosure of intercepted private conversations, but by the disclosure of investigative information that does not implicate traditional notions of privacy. Wen Ho Lee complained, for example, of the statement by an unnamed government official that he had been removed from his position in a nuclear lab because of his refusal to cooperate with an FBI investigation into how the Chinese government may have acquired American nuclear secrets, an investigation in which Lee was reported to

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be a suspect. And Steven Hatfill complained, among other things, that Attorney General John Ashcroft violated the Privacy Act by confirming that he was a "person of interest" in the anthrax investigation—and that other unnamed sources committed separate violations by later confirming that Hatfill remained a person of interest. No sooner had Dr. Lee and Dr. Hatfill pressed these claims than an Oregon lawyer, Brandon Mayfield, sought recovery from the government for alleged violations of the Privacy Act, among other alleged wrongs, when he was wrongfully accused of participation in the 2004 train bombings in Madrid. *See* Compl. ¶¶ 38-40, *Mayfield v. United States*, No. 6:06-cv-00305 (D. Or.). (Mayfield's counsel subpoenaed several journalists in the summer of 2006, but the case was settled before the issues of privilege were joined.)

Whether the Privacy Act should be construed to permit such claims – and whether, if it is so construed, it should be amended – are questions of obvious importance to news organizations facing the prospect that any reporting they engage in concerning a federal criminal investigation could one day beget a Privacy Act case in which the plaintiff seeks to subpoena their reporters' sources. So how strong are these claims?

The Privacy Act's Language

The statutory prohibition forming the basis for the suits in *Lee* and *Hatfill* is the Privacy Act's ban on the unauthorized disclosure by the government of "any record which is contained in a system of records." 5 U.S.C. § 552a(b). Whenever "records pertaining to an individual have been improperly disclosed," that person is entitled to bring a civil action for damages and attorneys fees. *Lee*, 413 F.3d at 55. But what constitutes a "record" for these purposes is not always clear, as the statutory definition is less than precise:

> [T]he term 'record' means any item, collection, or grouping of information *about an individual* that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history *and that contains his name, or the identifying number, symbol, or other identifying particular* assigned to the individual, such as a finger or voice print or a photograph. . . .

5 U.S.C. § 552a(a)(4) (emphases added). Given this definition, it is perhaps unsurprising that the federal courts of appeals have split three ways on the proper interpretation of the term "record" as used in the statute. *Compare Boyd v. Secretary of Navy*, 709 F.2d 684, 686 (11th Cir. 1983) (per curiam) (A "record" must "reflect some quality or characteristic of the individual involved."), *with Quinn v. Stone*, 978 F.2d 126, 133 (3d Cir. 1992) (criticizing *Boyd* and holding that the "statutory definition of a record . . . [has] a broad meaning encompassing any information about an individual that is linked to that individual through an identifying particular"), *and with Bechhoefer v. Dep't of Justice*, 209 F.3d 57, 62 (2d Cir. 2000) (following *Quinn* but limiting it to "personal information" about the individual).

For its part, the D.C. Circuit remains largely undecided, saying only that it rejects the tests adopted by the Third and Eleventh Circuits, and otherwise reserving the question for later cases. *See Tobey v. NLRB*, 40 F.3d 469, 472 (D.C. Cir. 1994). The U.S. District Court for the District of Columbia has added to the confusion with its own inconsistent results. *Compare Houston v. Dep't of Treasury*, 494 F. Supp. 24, 28 (D.D.C. 1979) (Privacy Act merely prohibits "circulation of sensitive information about an individual's private affairs"), *with Scarborough v. Harvey*, 493 F. Supp. 2d 1, 13-14 & n.28 (D.D.C. 2007) ("[T]he Act's definition of information that is 'about' an individual is clearly drawn in broad and expansive terms. . . .").

Applicable Principles of Statutory Construction

Despite the obvious disagreement over what constitutes a protected "record" under the Privacy Act, there are well-recognized principles supporting a narrow interpretation that would not include the kind of current, newsworthy information about an active criminal investigation that was at issue in cases like *Hatfill* and *Lee*.

First and foremost, the Privacy Act is a statute that effects a limited waiver of the government's sovereign immunity. As a result, standard interpretive doctrine holds that it "must be construed strictly in favor of the sovereign, and not enlarged beyond what the language requires." *Tomasello v. Rubin*, 167 F.3d 612, 618-19 (D.C. Cir. 1999) (alterations and quotations omitted) (construing the Privacy Act). *See also Doe v. Chao*, 306 F.3d 170 (4th Cir. 2002) (same), *aff'd*, 540 U.S. 614

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(2004). As the D.C. Circuit explained in *Tomasello*, this means that courts cannot embrace an interpretation of the Privacy Act that would impose liability on the government so long as there is at least one "plausible" alternative reading that would allow the government to prevail. *Id.* at 618.

This principle was invoked most recently in *Sussman v. United States Marshals Service*, 494 F.3d 1106 (D.C. Cir. 2007). In that case, the court resolved a statutory ambiguity in the government's favor and imposed strict requirements for proving that an unlawfully-disclosed record was, prior to its disclosure, actually retrieved from a government file bearing the plaintiff's name (as opposed to being coincidentally within a file and disclosed by an official with personal knowledge of the information). *Id.* at 1123. The defendant agency did not dispute that information relating to the plaintiff had been released from a government file, but it argued as a defense that the information had been located in a file bearing another person's name, and that this fact took the disclosure outside the purview of the Privacy Act. *Id.* The court acknowledged that the Privacy Act could equally have been read to reject the government's argument, *id.*, but it found the language sufficiently ambiguous that it was required to side with the government and "construe [the statute's] waiver of sovereign immunity narrowly." *Id.* "Thus, for his action to survive, [plaintiff] must present evidence that materials from records *about him*, which the Marshals Service retrieved by *his name*, were improperly disclosed." *Id.* (emphasis added).

Second, and related, is the fact that a violation of the Privacy Act is not merely a tort for which damages may be recovered against the government, but also a misdemeanor for which individual government employees can be prosecuted. 5 U.S.C. § 552a(i)(1). This is important because of the "rule of lenity," an interpretive doctrine that requires (much like the sovereign immunity canon) that statutory ambiguities be resolved against a finding of wrongdoing. *See, e.g., United States v. Anderson*, 59 F.3d 1323, 1333 (D.C. Cir. 1995) (en banc).

From these principles, one can argue with some force that the notion of an "expansive" or "broad" reading of the Privacy Act is fundamentally at odds with the nature of the statute, which requires that it be read narrowly and with doubts about its meaning resolved against a finding of coverage. And when it comes to the question whether the Privacy Act prohibits the dissemination of current, newsworthy information about a criminal investigation, there is substantial room to doubt that the statute has anything to say about the matter.

Legislative History

As more than one Court has found, the "legislative history indicates [that] the Privacy Act was primarily concerned with the protection of individuals against the release of *stale personal information* contained in government computer files to other government agencies or private persons." *Cochran v. United States*, 770 F.2d 949, 959 n.15 (11th Cir. 1985) (emphasis added). The Congressional findings supporting the statute's enactment manifestly reflect that concern:

> [T]he increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use, or dissemination of personal information . . . .

Houston, 494 F. Supp. at 27-28 (*quoting* Privacy Act, Pub. L. No. 93-579, § 2(a), 88 Stat. 1896 (1974)); *see also* S. Rep. No. 93-1183, at 1 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6916 (The purpose of the Privacy Act is to "promote accountability, responsibility, legislative oversight, and open government with respect to the use of computer technology in the personal information systems and data banks of the Federal Government and with respect to all of its other manual or mechanized files."). The emphasis in the legislative history is on "the need to protect against governmental abuse of '*personal* information.'" *Bechhoefer*, 209 F.3d at 62 (emphasis added). There is no comparable suggestion of "any intent to prevent the disclosure by the government to the press of current, newsworthy information of importance and interest to a large number of people." *Cochran*, 770 F.2d at 959 n.15.

As an historical matter, the Privacy Act was at least in part a response to the abuses of the Watergate era, as reflected in the Report of the House Committee on Government Operations:

> Additional impetus in Congress to enact privacy safeguards into law has resulted from recent revelations connected with Watergate-related investigations, in-

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> dictments, trials, and convictions. They included such activities as the break-in at the Democratic National Committee's headquarters in June 1972, the slowly emerging series of revelations of "White House enemies lists," the break-in of the office of Daniel Ellsberg's psychiatrist, the misuse of CIA-produced "personality profiles" on Ellsberg, the wiretapping of the phones of government employees and news reporters, and surreptitious taping of personal conversations within the Oval Office of the White House as well as political surveillance, spying, and "mail covers."

H.R. Rep. No. 93-1416, at 8-9 (1974). No one was suggesting at the time that there needed to be a remedy for providing information about the status of legitimate government investigations,

Indeed, a great deal of the Privacy Act has nothing to do with unlawful disclosures of information, but is instead addressed to the manner in which the government is permitted to collect and maintain information about individuals. 5 U.S.C. § 552(d), (e). Under the act, "records" are supposed to be gathered in the first instance by requesting the information from the person to whom it pertains, *id.* § 552a(e)(2), and that person has a qualified right to insist upon reviewing records maintained about him or her in order to verify their accuracy, *id.* § 552(d). Even if such provisions do not exclude the possibility that Congress was attempting to restrain the dissemination of broader categories of information in the government's possession, they at least suggest that the Privacy Act was in substantial part understood as a vehicle for protecting individual citizens' right to control the use of personal and sensitive information that the government might have a need to collect from them over the course of time.

The statute's definition of a "record" supports this understanding. It includes an illustrative list of items that would qualify, specifying an individual's "education, financial transactions, medical history, and criminal or employment history." 5 U.S.C. § 522a(a)(4). Each of those items is the type of *historical* and *personal* information that one would expect to find listed if Congress's intention was, as the legislative history suggests, to prevent the dissemination of sensitive personal information gathered by the government over time. Indeed, an earlier draft of the Privacy Act passed by the Senate used the same illustrative list for its definition of the term "personal information," which meant "any information that identifies or describes any characteristic of an individual." *See* S. 3418, 93rd Cong. § 301(2) (as passed by Senate, Nov. 21, 1974). When Congress later substituted the term "record" in place of "personal information," it did not change this list of examples that comported with its definition of information protected by the Privacy Act. And while the statute says that the definition of a record is "not limited to" the listed items, canons of statutory interpretation suggest that anything else that could be called a record must share the same core attributes. *See, e.g.*, *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1200 (D.C. Cir. 2005) ("The words 'including, but not limited to' introduce a non-exhaustive list that sets out specific examples of a general principle. Applying the canons of *noscitur a sociis* and *ejusdem generis*, we will expand on the remedies explicitly included in the statute only with remedies similar in nature to those enumerated.").

This is not to suggest that the Privacy Act is wholly inapplicable to federal law enforcement agencies. Rather, the point is simply that not *everything* contained in a government file is information subject to the Privacy Act's restrictions on disclosure. A statute preventing the dissemination of *personal* information in the government's possession is not naturally read to encompass current, newsworthy information about a legitimate, ongoing criminal investigation, and there is ample basis in the text, structure and history of the Privacy Act to make it at least "plausible" that the statute does not restrict the disclosure of such information. And, as we have seen, plausibility is all the government needs to show to prevail in a Privacy Act case.

The Wen Ho Lee and Steven Hatfill Cases

To date, the federal courts in the District of Columbia have not seen it this way – at least, not in the course of considering the reporters' arguments that there is no overriding need for their testimony. In the *Lee* case, the district court focused attention on the information contained in the very first news article identifying Dr. Lee as a suspect in an FBI investigation, noting that the article included details that might reasonably be understood to contain core Privacy Act material – namely, information about his "employment history" and "personal financial situation." *Lee v. Dep't of Justice*, 287 F. Supp. 2d 15, 19

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(D.D.C. 2003). Although such disclosures were generally confined to one "seminal story" about Dr. Lee, *id.* at 22, the court ordered other reporters who had not published the same kind of information to disclose the identities of their sources as well, *id.* at 24-25. That holding was challenged on appeal, with three reporters in particular arguing that the information they reported was not personal to Dr. Lee and did not implicate the Privacy Act, but was instead newsworthy information about the status of the FBI's nuclear espionage investigation. The D.C. Circuit did not substantively address those arguments in its decision affirming the district court's finding of contempt. *See Lee*, 413 F.3d 53.

In the *Hatfill* case, the claims are potentially even broader than in *Lee*. Dr. Hatfill seeks recovery under the Privacy Act not just for the disclosure of the fact that he was named as a "person of interest" in the FBI's investigation into the 2001 Anthrax attacks – a fact that was disclosed on the record by then-Attorney General John Ashcroft in August 2002 – a but also for numerous additional disclosures about the status of the government's investigation. Dr. Hatfill challenges, for example, the public disclosure of the fact that in 2003 divers searched a pond in Maryland near his home, where they recovered a clear box originally thought to have been used in the anthrax attacks, but that could not be positively linked by lab tests to the case. *See* First Am. Compl. ¶ 97, *Hatfill v. Dep't of Justice*, No. 1:03-cv-01793-RBW (D.D.C.). He likewise challenges public reports to the effect that investigators' suspicions about him were raised when specially-trained bloodhounds reacted strongly to his scent, and when he was seen dumping belongings in a dumpster. Id. ¶ 62. And, he challenges various reports concerning agents' analysis of the strength of their case, including doubts about whether they had enough information to successfully prosecute him, or that they ever would. *Id.* ¶ 97.

None of these published reports – and there are other reports of the same character that we are not discussing for the sake of brevity – contained the kind of personal or private information one would expect to be covered by a Privacy Act. With few exceptions, the challenged disclosures describe facts witnessed by government investigators as they occurred, or subjective analyses of the strength of the government's case – not personal and sensitive information that Dr. Hatfill ever had any inherent right to control.

Reporters challenged Dr. Hatfill's subpoenas on that basis, but the district court rejected their arguments. Relying upon its recent opinion in *Scarborough*, 505 F. Supp. 2d at 2-4, the district court found that the definition of a "record" was written in "undeniably expansive" terms and required only a finding that published information was to some degree "about" Dr. Hatfill. *Hatfill*, 505 F. Supp. 2d at 38-39. The court found that standard to have been satisfied through the publication of "investigative information" that led the FBI to suspect Dr. Hatfill's involvement in the anthrax attacks: any reports containing "the identification of Dr. Hatfill by name and a description of his suspected involvement in criminal or otherwise suspicious activity are clearly about him and therefore not excluded from the Privacy Act's definition of records." *Id.* at 39.

Based on that interpretation of the Privacy Act, the district court ordered six journalists to identify their confidential sources. *Id.* at 51. (On March 7, 2008, the District Court held reporter Toni Locy, formerly of *USA Today*, in civil contempt for refusing to identify her sources. Ms. Locy has appealed that order to the D.C. Circuit, which stayed the order pending appeal. A motion to hold another reporter in contempt is pending before Judge Walton. See page 3)

If this is how the Privacy Act is to be interpreted, we can reasonably anticipate more such Privacy Act claims in the future by investigative subjects motivated to "fight back" against those who are pursuing them. It is hardly unusual for journalists to report that someone is a suspect in an investigation. Did Congress intend or contemplate that the Privacy Act would be invoked to challenge that disclosure? We don't think so. And we suspect that the Congress that passed the Privacy Act would have appreciated the irony in such an application. A law that was passed to guard against the misuse of personal information of no legitimate interest to the public is being invoked to challenge the release of information of current public interest. And a law that was prompted by Watergate-era abuses brought to light by confidential sources is being invoked to challenge reporters' rights to maintain their confidential source relationships.

The D.C. Circuit's recent opinion in *Sussman v. United States Marshals Service*, 494 F.3d 1106 (D.C. Cir. 2007), may prove to be a substantial first step towards correcting that interpretation. Although the decision does not directly speak to the definition of a protected "record" under the Privacy Act, the court's reliance on sovereign immunity principles to limit the

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Invasion Of The Privacy Act: How Recent Interpretations Threaten Confidential Sources

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statute's scope provides a strong guidepost for courts later addressing the question whether Congress knowingly made it a tort for government officials to discuss the status of high-profile criminal investigations of the kind that were at issue in *Lee* and *Hatfill*. Moreover, even if *Sussman* does not lead courts to construe the term "record" narrowly, plaintiffs who would use the Privacy Act to complain generally about the fact that they were identified as suspects in a criminal investigation may simply find it too difficult to prove (as *Sussman* requires them to) that such information was actually retrieved from a government file bearing the plaintiff's name prior to its disclosure. That alone may discourage, if not altogether deter, these types of Privacy Act suits. Only time will tell whether *Sussman* has that effect.

Two Ways Out

There are ultimately two paths to victory for journalists in these cases. Either the Privacy Act is interpreted (or amended) to narrow its application, or courts faced with reporters' privilege claims will—either on their own or as a result of a federal shield law—factor into their equation the strength of the public interest in vindication of a Privacy Act claim. As Judges Tatel and Garland of the D.C. Circuit have noted, in a leak investigation the plaintiff will almost always be able ultimately to establish relevance and exhaustion. *Miller*, 397 F.3d at 997 (Tatel, J., concurring in the judgment) ("[W]hen the government seeks to punish a leak, a test focused on need and exhaustion will almost always be satisfied, leaving the reporter's source unprotected regardless of the information's importance to the public."); *Lee v. Dep't of Justice*, 428 F.3d 299, 301 (D.C. Cir. 2005) (Tatel, J., dissenting from denial of rehearing en banc) (same); *id.* at 302 (Garland, J., dissenting from denial of rehearing en banc) ("Barring an unexpected confession by the leaker, in most such cases the subject of the leak will be able to satisfy the centrality and exhaustion requirements cited in the court's opinion. Thus, if the reporter's privilege is limited to those requirements, it is effectively no privilege at all.").

And if that is all that is required, the reporter's privilege becomes nothing more than a scheduling order, requiring that the journalist's deposition be scheduled last. If, on the other hand, the courts balance the public interest in the underlying reporting against the public interest in identifying the confidential source, the outcome is anything but a foregone conclusion. Judge Tatel, for one, has explained how he thinks the balance should be struck in a Privacy Act case like the one filed by Wen Ho Lee:

> Without slighting Lee's private interest in receiving compensation for governmental malfeasance, his claim *pales in comparison to the public's interest in avoiding the chilling of disclosures about what the government then believed to be nuclear espionage*. This case is thus very different from [*Miller*]. Not only was that a criminal case, but there we held that the grand jury's interest in securing the name of a source suspected of committing a felony outweighed any applicable privilege. [*Miller*], 397 F.3d at 973.
>
> *Lee's private interest in this civil suit implicates no similarly critical concerns, and it's hard to imagine how his interest could outweigh the public's interest in protecting journalists' ability to report without reservation on sensitive issues of national security*.

Lee, 428 F.3d at 302 (Tatel, J., dissenting from denial of rehearing en banc) (emphases added). Reporters, of course, have every reason to be nervous about a test that balances their rights against the interests of litigants. As Judge Tatel's analysis makes clear, however, a rigorously applied balancing test at least leaves room to hope that, as promised in *Zerilli*, confidential source relationships will be preserved in "all but the most exceptional cases." 656 F.2d at 712.

Kevin Baine, Kevin Hardy and Carl Metz are lawyers with Williams & Connolly LLP in Washington, D.C.

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Court-Martial Quashes Subpoena For Outtakes of *60 Minutes* Haditha Interview

By Nicole A. Auerbach

The military judge presiding over the court-martial of Staff Sergeant Frank D. Wuterich – one of the Marines charged with killing some two dozen Iraqi civilians in Haditha, Iraq – has quashed a subpoena issued by the prosecution to CBS News for outtakes of a *60 Minutes* interview with the accused.

The presiding judge, Lt. Col. Jeffrey Meeks, held that the government had failed to show that the material sought was necessary to its case, as required by the applicable evidentiary rule, Rules for Courts-Martial 703, which is analogous to Federal Rule of Criminal Procedure 17(c) in civilian courts.

Judge Meeks went on to find that, although not necessary to quash the subpoena, military courts would recognize a reporter's privilege under the First Amendment and the common law, and that the government also had not met the test under the reporter's privilege.

Background

Marine Staff Sergeant Wuterich is charged with manslaughter and other crimes in connection with his involvement in the killing of some 24 Iraqi civilians in Haditha, Iraq in November 2005. The government alleges that, contrary to the military "rules of engagement," which require troops to positively identify a threat before using deadly force, Staff Sergeant Wuterich instructed his men to "shoot first, ask questions later" as they used grenades and guns to "clear" several houses they believed to be hostile, although it turned out they were occupied by Iraqi civilians, including women and children.

On March 15, 2007, CBS aired a report concerning the incident on *60 Minutes* entitled "The Killings at Haditha." The centerpiece of the report was an interview of Staff Sergeant Wuterich by CBS News Correspondent Scott Pelley. In the interview, Wuterich described in detail the events surrounding the "clearing" of the houses in question and explained why he believed the killings had been warranted under the circumstances.

The Haditha incident was the subject of a formal investigation by military authorities, which resulted in criminal charges being brought against several of the Marines involved, including Staff Sergeant Wuterich. Wuterich and others gave statements to the military authorities as part of the investigation. Several of the Marines involved were eventually granted immunity in order to testify against Staff Sergeant Wuterich.

The Motion to Quash

In January, 2008, with the March 2008 date of Staff Sergeant Wuterich's court-martial approaching, the military prosecutors served a subpoena on CBS News calling for the outtakes from Scott Pelley's interview with the accused.

CBS filed a motion to quash the subpoena with the judge presiding over the court-martial, asserting two independent grounds. First, CBS argued that, under Rule 703 of the Rules for Courts-Martial (the military analogue to Federal Rule of Criminal Procedure 17(c)), the subpoena should be quashed because the government had failed to satisfy the standards of relevance, materiality and necessity applicable to pretrial subpoenas in criminal cases.

CBS also argued that, because the government had multiple statements by Staff Sergeant Wuterich concerning the events in question (including a sworn statement he provided to military authorities) and multiple accounts from cooperating eyewitnesses who are available to testify at trial, the government could not establish that the outtakes were necessary to its case.

CBS relied on *United States v. Rodriguez*, 57 M.J. 765, 773 (N-M. Ct. Crim. App. 2002), the only case in which the military appellate courts have applied Rule 703 to a subpoena for non-confidential press materials. There, the Navy-Marine Corps Court of Criminal Appeals affirmed an order denying a motion to compel NBC to produce outtakes of a traffic stop of the accused because, even though they captured some of the events at issue, they had not been shown to be "relevant and necessary" under Rule 703. *See also United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (affirming ruling that NBC's outtakes were not "relevant and necessary" under Rule 703).

Second, CBS argued that the qualified reporter's privilege rooted in both the First Amendment and the common law applied to criminal prosecutions in courts-martial, and that the government had failed to overcome the privilege by showing that the outtakes were: (1) highly material and relevant, (2) necessary or critical to the maintenance of the claim, and (3) not obtainable from other available sources.

In addition to citing to cases in the civilian courts concern-

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Court-martial Quashes Subpoena For Outtakes of 60 Minutes Haditha Interview

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ing the application of the privilege in the context of criminal trials, CBS also relied on prior military decisions in which the privilege had been recognized. *See United States v. Bennett*, U.S.M.C., Sierra Judicial Circuit, Apr. 6, 1999 (quashing subpoena for unedited videotape of "Dateline NBC" interviews with accused's alleged victims and other witnesses in sexual assault case); *United States v. Ashby*, U.S.M.C., Piedmont Judicial Circuit, Feb. 4, 1999 (quashing subpoena to CBS and *Rolling Stone* magazine for audio and video outtakes from interviews with the accused and an eyewitness, in case involving crash into Italian ski gondola cable resulting in 20 civilian deaths and causing international controversy).

In response, the government argued that statements made by Pelley during the broadcast indicated that Staff Sergeant Wuterich had made further admissions off-camera (for example concerning the direction from which he heard gunfire, or the reason he approached the houses that were "cleared") that were essential to its case, and that the necessity requirement of Rule 703 was therefore satisfied.

the court is persuaded that a qualified reporter's privilege under the First Amendment does, in fact, exist under federal common law

With respect to the privilege, the government relied heavily on the majority opinion in *Branzburg*, arguing that no reporter's privilege existed in criminal cases. Even if it did, the government argued, the government's need for access to admissions of the accused concerning the events underlying the criminal charges were sufficient to satisfy any applicable standard for overcoming the privilege.

The Court's Ruling

On February 22, 2008, Lieutenant Colonel Jeffrey G. Meeks heard argument on the motion at Camp Pendleton. Ruling from the bench that same afternoon, Lt. Col. Meeks quashed the subpoena under Rule 703, holding that the government had failed to show that the outtakes were necessary to its case. While the broadcast portions of the interview led the court to conclude that the outtakes were material and relevant, the court went on to state that "with respect to the outtakes, the contents of the accused's comments are speculative at this point and the court is concerned that the subpoena in this case likely qualifies as a fishing expedition."

The court continued: "Having evaluated the evidence currently presented to the court, it would appear, especially in light of the detailed information contained in the sworn statement of the accused . . . the information desired here by the government from CBS would be cumulative with what is already in the hands of the government." The court therefore found that the necessity requirement under Rule 703 had not been met, and quashed the subpoena.

With respect to the reporter's privilege, Lt. Col. Meeks stated that, "although not required based on these findings announced above, the court is persuaded that a qualified reporter's privilege under the First Amendment does, in fact, exist under federal common law**."** While noting that this conclusion was dicta, he observed that "as the court does not find the subpoena meets . . . the lower standard articulated under R.C.M. 703, it is a logical conclusion that the greater standard required for disclosure under this qualified privilege has not been met."

The Appeal

Since the Court's ruling, the government has noticed an appeal to the Navy-Marine Corps Court of Criminal Appeals. The government's brief in support of its appeal will be filed in early April, and the appeal should be fully briefed by early May. Staff Sergeant Wuterich's court-martial has been stayed pending resolution of the appeal.

CBS Broadcasting Inc. was represented by Susanna Lowy, Anthony Bongiorno, and Richard H. Altabef of CBS and Lee Levine, Seth D. Berlin and Nicole A. Auerbach of Levine Sullivan Koch & Schulz, L.L.P. The government was represented by Major Donald J. Plowman, and Captain Nicholas L. Gannon, U.S.M.C.

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Appeals Court Quashes Subpoena to Reporter Over "Stand-Off" Interview

The Minnesota Supreme Court this month declined to reinstate a subpoena to a reporter who interviewed a criminal suspect during a stand-off with police. *In Re: Death Investigation of Jeffrey Alan Skjervold*, 742 N.W.2d 686 (Minn. App. Dec. 24, 2007) (Dietzen, Wright, Huspeni, JJ.), *rev. denied*, No. A07-678 (Minn. Mar. 18, 2008).

The appellate court held that while the request for information was relevant to a crime and unobtainable from other sources, the state failed to show a compelling need for the information.

Background

In December 2006, police went to the home of Jeffrey Skjervold on a domestic abuse call. Skjervold exchanged gunfire with police and later barricaded himself in the house. Skjervold and two police officers were injured in the exchange of gunfire.

Reporter Daniel Nienaber of the *Mankato Free Press* had contacted and spoke to Skjervold during the stand-off which ended with Skjervold killing himself. The *Free Press* published an article the next day about the event, including Skjervold's admission that he shot a police officer.

The newspaper later published several articles explaining that its reporter did not intend to interfere with the police situation, but was trying to contact area residents to find out information about the police situation. The next month the county attorney sought to compel Nienaber to disclose the conversations he had with Skjervold. Minnesota's reporter's privilege law, Minn. Stat. § 595.023-024 provides qualified protection for a reporter's confidential information. One exception to the shield law is disclosure of information related to a felony or gross misdemeanor where there are no alternative means of access and the government can show by clear and convincing evidence a "compelling and overriding interest" in the information and failure to disclose would result in an "injustice."

The trial court found the state had met the criteria and ordered Nienaber to disclose the conversations.

Appellate Court

The Minnesota Court of Appeals began by addressing the criteria set out in Minn. Stat. § 595.024. The court first noted that the statute does not require that the felony or misdemeanor be "actually prosecuted" (as it was not in this case); the information only needs to be relevant to a crime. And there was clearly no alternative means to accessing Nienaber's information about Skerjvold.

But the court of appeals found no compelling need for the information. The state had argued that the information was necessary to understand the circumstances surrounding Skjervold's suicide and that this would prevent an "injustice." The court dismissed this rationale as a fishing expedition.

"Essentially, the county attorney argues that it needs to conduct discovery to find an injustice, but declines to connect the discovery to a particular injustice", the court wrote. "We conclude that the statute requires that the particular injustice be identified."

Mark Anfinson, Minneapolis, MN represented the reporter in the matter. John Borger, Faegre & Benson L.L.P., Minneapolis, MN, and the Reporters Committee for Freedom of the Press filed an amicus brief in support of the motion to quash.

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Supreme Court to Hear "Fleeting Expletives" Indecency Case

Court's First Broadcast Indecency Case Since FCC v. Pacifica

The U.S. Supreme Court this month granted certiorari in *FCC v. Fox Television Stations*, a case involving the FCC's recent enforcement policy against so-called "fleeting expletives." *See* 489 F.3d 444 (2d Cir. 2007) (Pooler, Hall, Leval, JJ.), *cert. granted*, 2008 WL 695624 (U.S. Mar. 17, 2008) (No. 07-582).

The Supreme Court is expected to hear the case in the fall. It will be the Court's first review of the broadcast indecency issue since *FCC v. Pacifica*, 438 U.S. 726, 732-35 (1978), which held that the FCC could regulate indecent material on public airwaves.

Fleeting Expletives

At issue was a November 6, 2006 FCC Order finding that unscripted statements made during the 2002 and 2003 Billboard Music Awards shows were indecent and profane. The order stated that "While prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law." Fox television stations, 489 F.3d at 450.

In an acceptance speech at the 2002 Billboard Music Awards broadcast by Fox, Cher stated: "People have been telling me I'm on the way out every year, right? So fuck 'em." And in 2003 Nicole Richie, a presenter on the show, stated: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."

Second Circuit Decision

Last year a divided Second Circuit panel, in a decision written by Judge Rosemary Pooler, held that the FCC's enforcement policy violated the Administrative Procedure Act because it failed to provide a reasoned basis for the new policy. The majority decision noted that "for decades broadcasters relied on the FCC's restrained approach to indecency regulation and its consistent rejection of arguments that isolated expletives were indecent." *Id*. 461.

Moreover, the majority noted that the FCC's new policy was "devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation" in the current landscape.

Fox and other media interveners had also briefed and argued constitutional objections to the policy. While the majority acknowledged that it was not necessary to decide these issues, the decision discussed at length the probable constitutional flaws with the policy and the FCC's regulation of indecency in general. "We are skeptical that the Commission can provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster." Id. at 462. Moreover, the majority found that "it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television." *Id.* at 464.

Judge Pierre Leval dissented, finding that the FCC clearly announced the adoption of a new standard for fleeting expletives and furnished a reasoned explanation for the change.

> "If anything, the change of standard has made the Commission more consistent rather than less, because under the new rule, the same context-based factors will apply to all circumstances. If there is merit in the majority's argument that the Commission's actions are arbitrary and capricious because of irrationality in its standards for determining when expletives are permitted and when forbidden, that argument must be directed against the entire censorship structure. It does not demonstrate that the Commission's change of standard for the fleeting expletive was irrational." *Id.* at 471.

Government Applied for Certiorari

The government's petition for certiorari argued that the FCC's policy was sufficiently justified under the Administrative Procedures Act. And that the majority decision "was in reality directed against the entire structure" regulat-

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ing indecency.

> [T]he court's approach is difficult to square with *Pacifica*, and effectively nullifies the prohibition on indecent language found in Section 1464, which was upheld as constitutional in [*Pacifica*]. That result would not be surprising, since the court of appeals made little effort to hide its hostility to *Pacifica's* reasoning.
>
> ***
>
> The court of appeals' decision places the Commission in an untenable position. Although it orders a remand, the decision signals that there is no way for the Commission to regulate isolated expletives consistent with the parameters the court of appeals established. But Congress gave the Commission authority to regulate; *Pacifica* suggests that contextual regulation is not forbidden by the First Amendment; and the public rightfully expects the Commission to exercise what authority it has to keep broadcast television suitable for children during certain hours. The court of appeals' decision suggests that the Commission retains some authority, but denies the Commission any permissible scope to exercise it, and leaves the Commission accountable for the coarsening of the airwaves while simultaneously denying it effective tools to address the problem. Petitioners Brief at pp. 29-30.

On March 17, the Court granted certiorari with the following question presented: "Did court of appeals err in striking down FCC's determination that broadcast of vulgar expletives may violate federal restrictions on broadcast of 'any obscene, indecent, or profane language,' 18 U.S.C § 1464, 47 C.F.R. § 73.3999, when expletives are not repeated?"

Other information regarding this case.

Second Circuit Argument available here.

Coverage in 2005:2 MLRC Bulletin here.

Second Circuit decision in Fox v. FCC available here.

Government's Petition for Certiorari available here.

Coverage on 2nd Cir. Decision in June, 2007 MLRC *MediaLawLetter* here.

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Federal Judges Reject Attempts to Take Down Documents Posted Online

By Laura Handman and Amber Husbands

In two recent cases, federal judges in Massachusetts and California rejected attempts by litigants to obtain injunctions requiring websites to take down newsworthy documents posted online, holding that First Amendment prohibitions on prior restraints apply.

Facebook Case

In November, Judge Douglas Woodlock in federal district court in Massachusetts rejected an attempt by Facebook and its founder, Mark Zuckerberg, to remove confidential documents from the website of *02138* magazine. *ConnectU, et al. v. Facebook, Inc., et al.*, No. 1:07-cv-10593-DPW (D. Mass).

Plaintiffs in the underlying lawsuit are three Harvard graduates and their company, social networking site ConnectU. Plaintiffs allege that Zuckerberg stole their idea when he was hired to write code for their website, and sued him over the dispute in 2004. The long-running lawsuit has been described by one judge as a "blood feud" and protective orders are in place to protect confidential information in the case.

The cover story in the November/December issue of *02138* magazine (a magazine directed at Harvard alumni, though not affiliated with the school) was called "Poking Facebook" and

examined the ongoing lawsuits regarding the origins of Facebook and Zuckerberg's claims to have created it. The article was based largely on documents filed in the federal lawsuit and which the reporter obtained from the court file, portions of which were filed under seal.

After the article was published and *02138* posted some of the documents on its website, Facebook filed an emergency motion on November 29, 2007 for a temporary restraining order requiring *02138* to remove four of the documents posted on its site: an email from Zuckerberg to Harvard administrators, a Facebook "statement of cash flow," excerpts from an online diary Zuckerberg had written while at Harvard, and excerpts from deposition testimony.

the appending of the source documents is, it seems to me, fundamentally beneficial to expression....[and] a salutary development in journalism generally

Facebook claimed the removal of the documents was necessary to prevent dissemination of personal, private, and commercially sensitive information, and a hearing was scheduled for the next day. *02138* filed a response the next morning, shortly before the hearing, in which it set out the caselaw on the heavy presumption against prior restraints, and explained that the documents were lawfully obtained and that it was not bound by any protective order in the case. Further, it argued that the "cat was out of the bag," as the documents had been on the Internet for three days, accessed by over 3200 visitors, and reproduced on other websites.

During the hearing, Facebook's lawyers were mainly concerned with how the reporter obtained the documents, as they were convinced that Plaintiffs were involved in the dissemination. They offered handwriting and metadata analyses, and requested discovery from Plaintiffs and from *02138* regarding the source of the documents. In fact, as made clear at the hearing, the documents (although filed under seal) had been provided to the reporter by the clerk's office. The reporter had identified himself as a reporter and copied documents from the court file over the course of several days.

At the hearing, Judge Woodlock focused on harm to unrelated third party (non-public-figure) individuals, including an individual identified in Zuckerberg's online diary by a perjorative and an individual identified in deposition testimony as being present at a party. Judge Woodlock asked whether *02138*, as a matter of editorial discretion, would be willing to redact sensitive information about these third parties (the magazine later agreed, although the judge's ruling was not conditioned on

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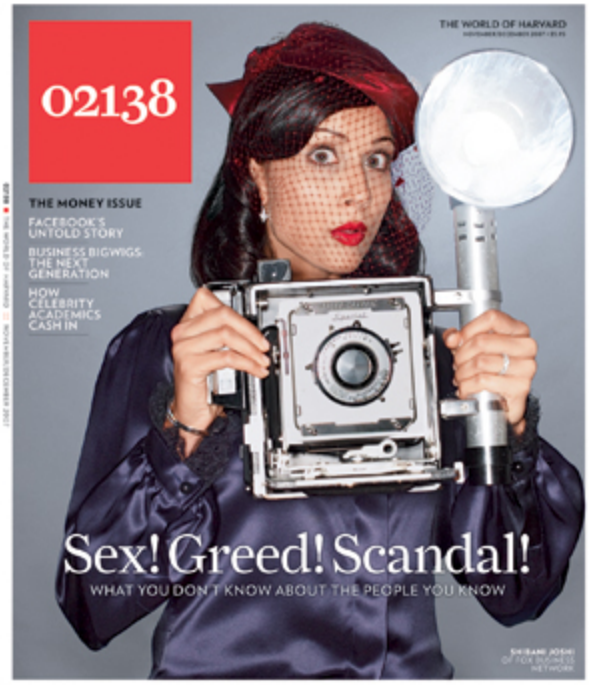
its agreement).

Judge Woodlock ruled from the bench on both the TRO and preliminary injunction, holding that when journalists obtain documents, "there is not a basis, unless there's something very compelling, for a court to restrain it. … that's not to say the magazine is not subject to ex post remedies." The judge specifically held that the selection of documents to post on the web was itself an editorial choice and that "this form of journalism, which I'll define as publication in the conventional sense of an article accompanied by opportunities to review the primary-source material … is perhaps a more democratic form of expression in the sense that it permits someone to read the article and then read the source materials."

The judge went on to hold that "what *02138* undertook was, it seems to me, core First Amendment activity, to comment upon matters of public interest. Moreover, the appending of the source documents is, it seems to me, fundamentally beneficial to expression....[and] a salutary development in journalism generally, one that one can treat as providing for a more democratic, if unruly, form of expressive activity."

In sum, the court found, "[t]here hasn't been shown to be a justification for inflicting the harm against the First Amendment which a prior restraint would impose. … My decision is not based on practicality or resignation but, rather, on the principled analysis of what the First Amendment means in this context for this case."

After the reporter and magazine voluntarily provided declarations detailing that the documents were obtained from the court (but declining to name additional documents in their possession but not posted), Facebook withdrew its request for further discovery.



WikiLeaks Case

As detailed in the February 2008 *MediaLawLetter*, Bank Julius Baer (which operates in Switzerland and the Cayman Islands) filed a complaint against Wikileaks, a website that invites users to post leaked materials with the goal of discouraging unethical behavior by businesses and governments, and against Wikileaks' domain name registrar, Dynadot, alleging various California state tort claims.

The bank alleged that in January 2008, a disgruntled ex-employee posted numerous stolen documents on Wikileaks that revealed confidential client information. The bank filed an *ex parte* motion for a temporary restraining order on February 8, to which Wikileaks did not respond, and on February 15, 2008, Judge White issued a permanent injunction (stipulated to by Dynadot) requiring Dynadot to shut down access to the site through www.wikileaks.org, and a TRO enjoining Wikileaks "all others who receive notice of this order" from disseminating any of the Bank's documents. *Bank Julius Baer, et al. v. Wikileaks, et al.*, No. 3:08-cv-00824 (N.D. Cal.).

Following the ensuing media outcry, an *amici* brief was filed on February 27 on behalf of twelve news organizations and media groups. The Media Amici argued that the permanent injunction was an overbroad prior restraint because it shut down the entire website. Further, the Media Amici argued that the TRO was an impermissible prior restraint; in addition to detailing the strong constitutional presumption against any prior restraint, the amici argued that privacy interests cannot justify a prior restraint and that the California tort laws cited by the bank did not authorize any punishment against Wikileaks.

Finally, the Media Amici argued that Section 230 of the Communications Decency Act barred the claims against Wikileaks. Additional groups applied to intervene as party defendants, raising in addition the lack of subject matter jurisdiction because the parties were not completely diverse and no federal claims were alleged.

On February 29, after hearing oral argument from the various *amici*, prospective intervenors, and the domain name registrant of wikileaks.org (but not from Wikileaks, which still had not entered an appearance), Judge White dissolved the perma-

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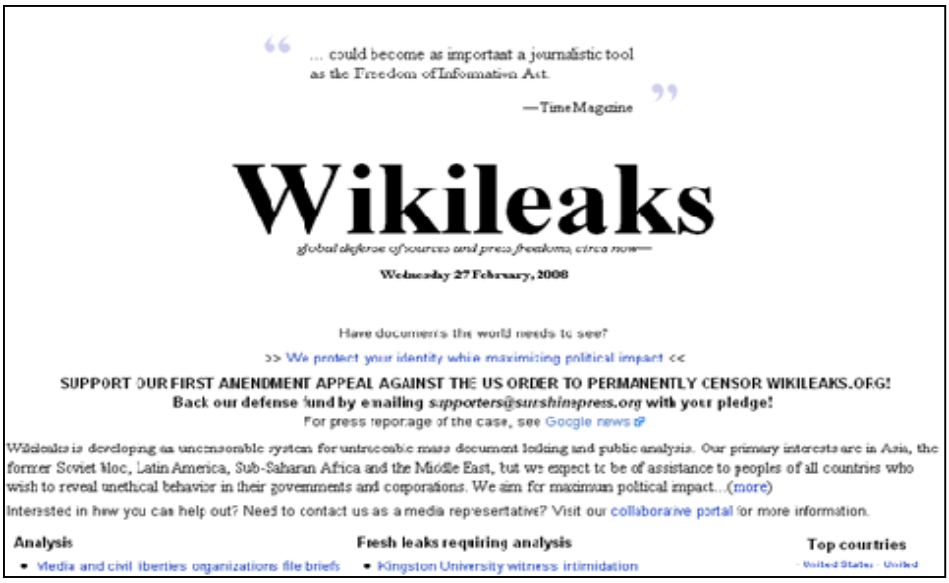
nent injunction shutting down the URL, declined to extend the TRO, and denied the motion for a preliminary injunction.

The same day, Judge White issued an order setting forth his rationale, first noting that the prospective intervenors' argument that the court may lack subject matter jurisdiction over the action was of concern, but not ruling on the argument. In rejecting the injunction, the court held that:

"[a]s made abundantly clear by the various submissions of the *amicus curiae*, the current request for an injunction, as well as the Court's original entry of a stipulated injunction, raises issues regarding possible infringement of protections afforded to the public by the First Amendment. … [I]t is clear that in all but the most exceptional circumstances, an injunction restricting speech pending final resolution of the constitutional concerns is impermissible."

The court also discussed the efficacy of an injunction, holding that "even the broad injunction issued as to Dynadot had exactly the opposite effect as was intended," and that the Bank had not made a showing that any injunction would be effective. The court indicated that it may be amenable to an injunction requiring a limited redaction of private identifying information, if the Bank could produce sufficient evidence to show that such an injunction was constitutionally permissible.



After the heavy media coverage and a drop in its stock following the court's order, however, the Bank voluntarily dismissed the underlying complaint without prejudice on March 5. The website was once again accessible through the www.wikileaks.org URL as of the afternoon of February 29.

Judge White dissolved the permanent injunction shutting down the website, declined to extend the TRO, and denied the motion for a preliminary injunction.

Laura Handman, Rob Balin, Amber Husbands, and David Shapiro of Davis Wright Tremaine and Liz Ritvo of Brown Rudnick represented 02318 magazine in the Facebook case. The Facebook defendants were represented by Steven Bauer and Mark Batten of Proskauer Rose and I. Neel Chatterjee of Orrick, Herrington & Sutcliffe.

Laura Handman, Tom Burke, Kelli Sager, Amber Husbands, and David Shapiro of Davis Wright Tremaine represented the Media Amici in the Wikileaks case. Dynadot was represented by Garret Murai of Wendel, Rosen, Black & Dean. Daniel Matthews (erroneously named by plaintiffs as an officer of Wikileaks) was represented by Joshua Koltun. John Shipton (the owner and registrant of wikileaks.org) was represented by James Chadwick of Sheppard Mullin and Roger Myers of Holme Roberts & Owen. Amici/Proposed Intervenors Project on Government Oversight, ACLU, Electronic Frontier Foundation, and Jordan McCorkle were represented by Ann Brick of the ACLU, Steven Mayer of Howard Rice, and Kurt Opsahl of the EFF. Amici/Proposed Intervenors Public Citizen and California First Amendment Coalition were represented by Karl Olson of Levy, Ram & Olson, Paul Alan Levy of Public Citizen, and Peter Scheer of the California First Amendment Coalition. Plaintiffs were represented by Marty Singer, William Briggs, and Evan Spiegel of Lavely & Singer.

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Sex, Lies and Text Messages

FOIA Request for Detroit Mayor's Messages Sparks Scandal

By Herschel P. Fink

Sex scandals involving high public officials seem an unfortunate part of American political life. But before there was Spitzer – and continuing very much on the front pages today – there is Detroit's young, flamboyant, "hip-hop" mayor, Kwame Kilpatrick. *See Detroit Free Press v City of Detroit*, 2008 WL 517398 (Mich. Feb. 27, 2008).

Now facing eight felony charges, from perjury to obstruction of justice, and a maximum of 80 years in prison, Kilpatrick might have escaped notice had the *Detroit Free Press* not broken a sensational sex scandal story last January, played out through steamy text messages between the mayor and his chief of staff, Christine Beatty. Beatty has been charged with seven felonies.

But the *Free Press'* investigation (the paper will not say how it obtained the text messages, sent using City of Detroit owned messaging devices) was about much more than sex. The messages revealed that Kilpatrick, married with two children, and Beatty, married to one of Kilpatrick's best friends, had both lied under oath in court last summer when they denied having a romantic affair, and having fired internal affairs police officers who were investigating the mayor's alleged misuse of city personnel and resources to further his trysts. Two of the officers filed whistleblower lawsuits, claiming they were fired for investigating the mayor. Kilpatrick and Beatty denied any affair in trial testimony, and further claimed the officers had resigned. The text messages published by the *Free Press* on January 24, however, revealed in explicit language a torrid affair, and an express admission that the two had agreed to "fire" one of the officers, the deputy police chief in charge of the internal affairs department.

The jury, even without knowledge of the text messages (the whistleblowers' lawyer says he received them pursuant to a subpoena only after the trial ended), believed the officers, awarding them $6.5 million in damages in a verdict delivered on September 11, 2007. Mayor Kilpatrick, reacting to the verdict, called it a miscarriage of justice perpetuated by a racist, mostly white jury, and vowed to appeal.

But, then the mayor, shockingly, on October 18 announced that he had "searched his soul" after consulting with pastors, and decided that settlement - - for $8.4 million in City funds - - "is the correct decision . . . for the entire Detroit community."

Free Press reporters wondered why. The next day they submitted a request for all settlement related documents under the state's FOIA, but received in response from city lawyers only a single, sanitized settlement agreement, similar to information city lawyers gave the nine-member City Council. It made no mention any confidentiality provision, and expressly said that it was the only document relating to the settlement.

The *Free Press* filed suit under FOIA on January 3, 2008, claiming that there had to be more to the mayor's sudden change of heart. The city continued to claim there was no confidential agreement relating to the settlement of the case. At a court hearing on January 25, the deputy city corporation counsel even directly told the judge hearing the FOIA case that she had "no knowledge of any confidential agreement."

At the request of *Free Press* counsel, however, the judge allowed the newspaper to depose the attorney for the whistleblowing police officers, and ordered him to produce any other documents relating to the settlement, including any confidential agreements.

The mayor's house of cards built on lies had collapsed. The whistleblowers' lawyer revealed at his deposition that the mayor, together with city lawyers, had entered into a conspiracy to conceal and destroy the text message evidence of the mayor's perjury after he first revealed it to the mayor's lawyers on October 17 during a court-ordered facilitation. An agreement to settle for every dollar that the whistleblowers requested was reached in hours and the deal reduced to writing. The incriminating messages were to be destroyed in exchange for $8.4 million in city funds. If the secret was revealed, the police officers and their lawyers were to forfeit the settlement amount. (The judge in ordering the deposition specified that disclosure would not be a breach of any confidentiality agreement.) The secret agreement, replete with a safety deposit box with two keys in which the incriminating text messages were to be placed

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Sex, Lies and Text Messages

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until the money changed hands, was spelled out in a confidentiality agreement signed by the city's deputy corporation counsel -- the same lawyer who had told the judge she had no knowledge of any confidential agreement.

At a FOIA case hearing on February 5 (by that time *The Detroit News* had been allowed by the court to join as an intervening plaintiff), the trial court judge ordered that the deposition of the whistleblowers' attorney, along with all the previously confidential settlement documents, should be publicly released as public records under FOIA. (The whistleblowers' lawyer had also revealed in his deposition testimony that the original October 17 settlement document which referenced destruction of the text messages in exchange for $8.4 million had been torn up when the *Free Press* submitted its FOIA request on October 19. The lawyers then reconstructed the same settlement terms in two parts: The "sanitized" agreement given to the *Free Press*, of which the City Council was also advised to induce it to authorize the settlement, and the confidentiality agreement requiring the destruction of the text messages, revealed only by the lawyers' deposition.)

The city's lawyers (who report to the mayor) appealed, first to the intermediate Court of Appeals, and then to the state Supreme Court, which on February 27, 2008 ruled that, "The Wayne Circuit Court did not err in concluding that the Settlement Agreement (and related documents) were 'public records,' MCL 15.232 (e), and subject to disclosure pursuant to the Freedom of Information Act, MCL 15.231, *et. seq.* Plaintiff Detroit Free Press' FOIA requests were sufficiently specific . . . and there is no exception for settlement agreements. In addition, the circuit court did not abuse its discretion when it dissolved the non-disclosure provision of its previous order, and permitted, with one redaction, the disclosure of the deposition (of the whistleblowers' attorney) in question." *Detroit Free Press v City of Detroit*, 2008 WL 517398 (Mich).

The resulting firestorm produced national publicity; an investigation by the Detroit City Council, whose members claim they were defrauded by the mayor and by the city's own lawyers (the Council has since hired private counsel to represent it); calls for the mayor's resignation, including from the state's attorney general, and a criminal investigation by the County Prosecutor into potential perjury and obstruction of justice charges.

On March 24, the Wayne County Prosecutor, following a lengthy investigation triggered by the *Free Press'* revelations, announced a 12 count criminal complaint, and suggested that more charges, perhaps also against City of Detroit lawyers, is yet to come. Kilpatrick, surrounded by a high-priced criminal defense team, defiantly announced he would never resign, and continued to claim he is the victim of racism and the media. The *Detroit Free Press* too, continues its quest for additional information – and additional mayoral text messages – as a part of its ongoing FOIA lawsuit.

Kilwame Kilpatrick

Herschel P. Fink, along with Brian Wassom, of Honigman Miller Schwartz and Cohn LLP, Detroit, Michigan represent the Detroit Free Press. The intervenor plaintiff The Detroit News is represented by James E. Stewart of Butzel Long, Ann Arbor, Michigan

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New York Court of Appeals Reverses Libel Judgment Against Weekly Newspaper

Political Column Was Protected Opinion

By Henry R. Kaufman and Michael K. Cantwell

On March 25, 2008, in its first substantive* media libel decision in more than a decade, and its first case to examine the constitutional protections available for statements of opinion in more than a dozen years (since *Brian v. Richardson*, 87 N.Y.2d 46 (1995)), the New York Court of Appeals reversed and dismissed a libel suit brought by a public official plaintiff against a local Westchester newspaper and its political columnist, broadly holding that the statements at issue, published in a column on the opinion page, were constitutionally-protected opinion. *Mann v. Abel*, No. 24, 2008 WL 762262, 2008 N.Y. Slip Op. 02675.

Background

The unanimous decision was the first and only favorable ruling for the media defendants in the case that had been commenced in 2003, and that had seen three summary judgment motions or cross-motions, a jury trial and two previous appeals, all of which were determined adversely to the defense, and that had systematically ignored the issue of constitutional protection for statements of opinion until the Court of Appeals' ruling.

Previous stages in the defendants' five-year journey to ultimate vindication were reported in the *MLRC MediaLawLetter*, Oct. 2005 at 20 (adverse trial verdict); and April 2007 at 15 (affirmance on intermediate appeal).

Early in the case, and prior to engaging in any discovery, the defendants had moved for summary judgment on the ground, inter alia, that the political column at issue was constitutionally protected opinion and that the suit had been brought in bad faith to chill the exercise of protected free speech. The trial court denied that motion, and the Appellate Division affirmed the denial, without ever addressing the issue of opinion.

On remand, the plaintiff, again without either party having taken any discovery, affirmatively moved for summary judgment on the issue of liability. The defendants cross-moved, again arguing that the articles were constitutionally protected statements of opinion, and the trial court denied both motions on the ground that there were disputed issues of fact as to falsity and actual malice, again without ever specifically addressing the issue of opinion.

Libel Trial

At the ensuing trial, no distinction was drawn between statements of fact and opinion, and the entire complained-of portion of the column was tried as if it was entirely a statement of fact, including the defendants' broad statements that the plaintiff's actions as a town official were "destructive." Without identifying which statements it deemed actionable, the jury found that one or more statements in the column had been proven defamatory, false and published with actual malice. The jury awarded compensatory damages totaling $75,000 against the publisher and punitive damages totaling $30,000 against the publisher and columnist.

Appeal

The defendants, represented by new counsel, appealed from the underlying denial of defendants' cross motion for summary judgment as well as from the plenary judgment, not only, the ground of protected opinion but also on the traditional grounds of failure of proof of defamatory meaning, substantial factual falsity and actual malice.

In a truncated opinion, the Appellate Division upheld the finding of liability, but dismissed the punitive damages and ordered a new trial unless the plaintiff stipulated to a reduction in the compensatory damages from $75,000 to $15,000.

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* In *Firth v. State*, 98 N.Y.2d 365 (2001), the Court addressed the procedural issue of application of the single publication rule in a defamation action involving a government agency website. The Court's most recent substantive decision in a media libel case was *Golub v. Enquirer/Star*, 89 N.Y.2d 1074 (1997) (affirming summary judgment based on lack of defamatory meaning).

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In affirming the finding of liability, the Appellate Division concluded merely that "the jury's finding that the plaintiff was defamed, and that he was entitled to compensatory damages, could have been reached on a fair interpretation of the evidence," a finding that seemed far short of the "independent appellate review" defendants had argued was required on constitutional grounds. For the second time, the intermediate appellate court never visibly addressed the issue of opinion.

Plaintiff thereafter stipulated to the remittitur and defendants pursued their appeal "as of right" to the Court of Appeals on the ground that the lower courts had violated defendants' substantial constitutional rights by sanctioning statements of constitutionally protected opinion and by entering and affirming a finding of liability where the public official plaintiff had failed to establish clear and convincing evidence of actual malice. (After the Court noted its subject matter jurisdiction, plaintiff moved to dismiss the appeal on the ground that no constitutional issues were presented or preserved, which motion was denied.)

The Court's acknowledgment that alleged factual errors are not fatal to an opinion defense, should offer substantial additional solace to media

New York's Protection for Opinion

The New York Court of Appeals had previously established extremely broad protection for statements of opinion in a series of decisions in the early to mid-1990s, based on Article I, Section 8, the free speech/press clause of the New York State Constitution. The Court's approach at that time was expressly said to be more protective of opinion than under the First Amendment.

However, of the judges who had participated in the most recent decision on that issue, *Brian v. Richardson*, 87 N.Y.2d 46 (1995), only Chief Judge Kaye and Judge Ciparik are still on the current Court. It was simply unknown whether the five new judges on the Court would share the expansive view of the constitutional protection for statements of opinion held by their predecessors on the Court.

Again in the Court of Appeals, defendants appealed both from the denial of summary judgment and from the plenary judgment, as modified and affirmed. They again argued that the context made clear that what the reasonable reader was encountering in the column were merely expressions of opinion. Even assuming that the Court could identify any separately actionable factual statements in the column, defendants argued that plaintiff had failed to demonstrate sufficient evidence of falsity and actual malice to defeat defendants' cross-motion for summary judgment and certainly had failed to present clear and convincing evidence of both substantial factual falsity and actual malice at trial.

Because of its focus on the threshold error of failure to protect opinion as a matter of law at the summary judgment stage, the Court of Appeals did not have to reach this second ground for reversal. Instead, it unanimously held that "when viewed within the context of the article as a whole, a reasonable reader would conclude that the statements at issue were opinion." Slip op. at 5. The Court noted the article's placement on the editorial page, accompanied by an editor's note that the article was an expression of opinion, as well as the overall tenor of the column, signaled to the reader that the piece was likely to be opinion, not fact. *Id.*

Perhaps the most significant statement in the decision was the court's acknowledgement that although "one could sift through the article and argue that false factual assertions were made by the author, viewing the content of the article as a whole, as we must, we conclude that the article constituted an expression of protected opinion." *Id.*

To understand the significance of this statement it is necessary to understand that the plaintiff had based his entire case on and had convinced the lower courts of the dispositive nature of alleged errors in certain factual statements contained in the column. Indeed, defendants had never denied that some statements in the column were factual and false. However, they argued that the admitted errors were insubstantial in the sense that they did not affect the substantial truth of the publication or its overall "gist or sting" in terms of defamatory meaning and, further, that the plaintiff had failed to meet his constitutional burden of proving a fact-based case of actual malice by clear and convincing evidence.

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Rather than disposing of the case by examining the entire record, as the Appellate Division had apparently failed to do, and by concluding that the plaintiff had failed to prove substantial falsity and actual malice, the Court of Appeals, with five new judges since it had last heard an opinion case, embraced the broadest and most speech-protective approach. In a ringing reaffirmation of the broad state constitutional protections it had adopted in *Immuno AG v. Moor Jankowski*, 77 N.Y.2d 235 (1991), it once again rejected a methodology that would "hypertechnically parse" an article for false statements of fact while ignoring the overall context and content which would make clear to the reasonable reader that the article was properly understood as protected opinion.

This decision, particularly the Court's acknowledgment that alleged factual errors are not fatal to an opinion defense, should offer substantial additional solace to media defendants seeking dismissal based on opinion as a matter of law on motion for summary judgment.

Indeed, on the record before court, the current decision goes beyond *Immuno* in its willingness to overlook admittedly false facts when the context, tone and apparent purpose of an article makes clear to the reasonable reader that what is being expressed are statements of opinion. In contrast, in *Immuno* the Court had held, on the summary judgment record in that case, that the plaintiff had failed to raise a triable issue "as to the falsity of any of the threshold factual assertions of the McGreal letter." 77 N.Y.2d at 246.

In sum, if faithfully followed, the decision in *Mann v. Abel* should expand the already broad protections previously adopted by the New York Court of Appeals for statements of opinion, and should also thereby definitively put to an end any future attempt to place statements of opinion on trial before a jury in New York State.

Henry R. Kaufman, Michael K. Cantwell and Beth A. Willensky represented the defendants on appeal. The plaintiff was represented on appeal by Mann and Mann, LLP. David Schulz, of Levine Sullivan Koch & Schulz, LLP, represented the amici curiae Advance Publications, Inc., The Associated Press, The Association of American Publishers, Inc., Bloomberg News, Daily News, L.P., Gannett Co., Inc., The Hearst Corporation, New York Press Association, The New York Times Company, Newsday, Inc. and NYP Holdings, Inc., in support of reversal.

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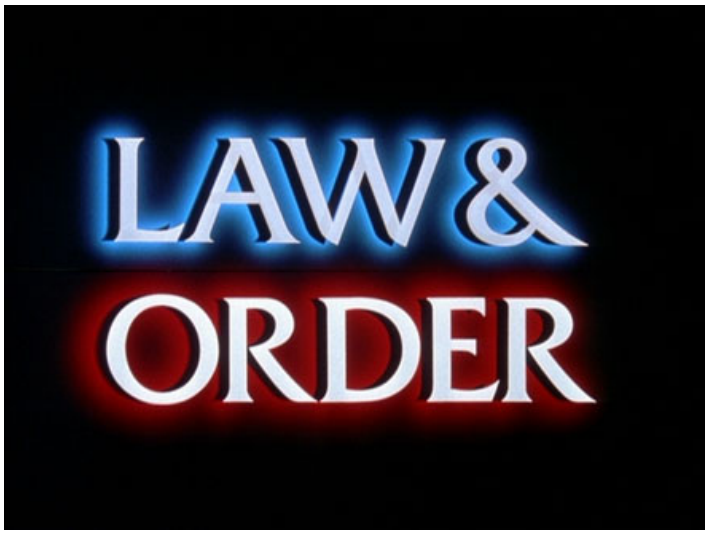
Libel in Fiction Claim Survives Motion to Dismiss

Law & Order Character Could Be "Of and Concerning" Plaintiff

A New York trial court this month denied a motion to dismiss a libel-in-fiction claim against the producers of the long-running NBC show "Law & Order." Batra v. Wolf, et al., No. 116059/04 (N.Y. Sup. March 18, 2008) (Shafer, J.).

The trial court held that at least for pleading purposes, the public figure plaintiff established that viewers could reasonably believe that an episode of the show depicted him and that viewers would understand the depiction to be factual.



Background

The plaintiff Ravi Batra is a prominent Indian-born lawyer active in Brooklyn Democratic Party politics, including serving on the Party's judicial screening committee. In 2003, he became the subject of intense press coverage in connection with a judicial corruption scandal in Brooklyn. A Brooklyn trial court judge, Gerald Garson, was arrested and ultimately convicted for taking money and gifts from Paul Simonovsky, a local matrimonial lawyer, in exchange for favorable treatment. After his arrest, Garson tried to make a plea deal with prosecutors, claiming that Batra was selling judgeships for $50,000. Garson wore a wire to a meeting with Batra but no evidence of corruption was obtained and Batra was never charged with any crimes.

That same year the producers of "Law & Order" used the scandal as the inspiration for an episode entitled "Floaters." In the episode, a corrupt lawyer named "Ravi Patel" bribes a fictional Brooklyn judge, a role played by a woman.

Trial Court Ruling

The trial court noted that under New York law the plaintiff in a libel-in-fiction case must show that the defamation is "of and concerning" him and that the viewer was "totally convinced that the episode in aspects as far as the plaintiff is concerned is not fiction at all." Slip op. at 4 quoting Welch v. Penguin Books USA, Inc., No. 21756/90 NY Misc. LEXIS 225 (N.Y. Sup. 1991).

In denying the motion to dismiss, the court reasoned that because of the uniqueness of plaintiff's name, his ethnicity and appearance, and the media attention surrounding the real scandal, viewers could reasonably "associate" Batra with the fictional character in the show.

Moreover, the court found "a reasonable likelihood that the ordinary viewer, unacquainted with Batra personally, could understand Patel's corruption to be the truth about Batra." Slip op. at 8.

In a troubling analysis for the "ripped from the headlines" genre of story-telling, the court noted that the misconduct depicted in "Law & Order" was not so "far-fetched" and, therefore, could be understood as stating actual facts about plaintiff to viewers who were only aware of plaintiff because of the press coverage of the real scandal.

Plaintiff's law firm, The Law Offices of Ravi Batra PC in New York, is representing him in this case. Defendants are represented by Davis Wright Tremaine.

Recent MLRC Bulletin Article Analyzes Libel in Fiction Cases

MLRC's recent New Developments Bulletin, 2007:4, contains an excellent article analyzing libel in fiction cases. "When Is a Fictional Character Defamatory?" by Jonathan Bloom, Weil, Gotshal & Manges LLP, surveys the use of real people as the inspiration of fictional works, and how courts have grappled with applying the elements of identity, fact and fault in this genre. Publishers, the article argues, "must be able to rely on the reasonable presumption that works presented as fiction – even where actual persons are used as models – are, in fact, fictional, absent some basis to suspect that the work is a vendetta in disguise."

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Civil Rights and Emotional Distress Claims Over Dateline "Predator" Episode Survive Motion to Dismiss

A New York federal district court refused to dismiss civil rights and emotional distress claims brought by the estate of a man who killed himself in his home as he was about to be arrested by the police for attempting to solicit a minor online. *Conradt v. NBC Universal*, No. 07 Civ. 6623, 2008 WL 501361 (S.D.N.Y. Feb. 26, 2008) (Chin, J.).

Reporters and crew from the show *Dateline* were present to cover the arrest as part of its ongoing "To Catch a Predator" segment. For that segment, *Dateline* coordinates with a private watch-dog group called Perverted Justice and local law enforcement to identify and arrest online "sexual predators." On November 5, 2006, Louis Conradt, Jr., an assistant district attorney in Texas, shot himself in his home as a police SWAT team was approaching to arrest him.

Relying on media "ride along" cases, including *Wilson v. Layne*, 526 U.S. 603 (1999) and *Hanlon v. Berger*, 526 U.S. 808, 809-10, (1999), the federal district court held that sufficient facts were pled to allege that the media defendants were "active participants in planned activity that transformed the execution of [the warrants] into television entertainment." *Conradt* at *9, *quoting Berger v. Hanlon*, 129 F.3d 505, 512 (9th Cir. 1997). The complaint alleged that Dateline did not just have a "passive role, as observers," but was involved in planning and "dramatizing" the arrest without any legitimate law enforcement purpose.

If plaintiff's allegations are proven, "a reasonable jury could find that NBC crossed the line from responsible journalism to irresponsible and reckless intrusion into law enforcement."

MLRC has asked defense counsel to submit a more detailed article on the case for the next issue of the *MediaLawLetter*.

Plaintiff is represented by Bruce Baron, Baron Associates P.C., Brooklyn, NY. Defendants are represented by Lee Levine, Amanda Leith Levine Sullivan Koch & Schulz, L.L.P.; and Susan Weiner and Hilary Lane, NBC Universal, Inc.

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Mass Mailing Seeking Evidence of Sexual Harassment Not Defamatory

Plaintiff's Failure to Recall Is Not a Denial

In an interesting decision, a California appellate court affirmed dismissal of a libel complaint brought by now deceased veteran Hollywood producer Aaron Spelling against a lawyer who sent out a mass mailing to actresses seeking evidence to corroborate a sexual harassment complaint against Spelling. *Spelling v. Sessions*, B192406, 2008 WL 484289 (Cal.App. 2 Dist. Feb. 25, 2008) (Wiley, Woods, Zelon, JJ.) (unpublished).

The court affirmed an anti-SLAPP motion to strike the complaint, holding that plaintiff failed to show sufficient evidence of falsity or actual malice.

Background

The defendant, lawyer Don Sessions, represented a private nurse who had provided home care to Aaron Spelling. The nurse accused Spelling of sexually harassing her while they were alone together, including touching and grabbing her and asking for sex. Prior to filing a complaint, Sessions sent a letter to 599 actresses (and one actor) who were credited in Spelling productions. The letter, marked personal and confidential, disclosed that Sessions was representing "a former female employee of Aaron Spelling who alleges that he sexually harassed her." The letter recounted Spelling's denial. It included three questions. 1) "Did *you* ever experience *any* sexual harassment by Aaron Spelling in his comments, requests, actions, etc? If yes, please describe such improper words or actions." 2) "Do you know if *anyone else* has experienced *any* sexual harassment by Aaron Spelling? If yes, please describe such improper words or actions and the victim's name if possible." 3) "Any suggestions or help you can give us?"

The *Globe* tabloid published an article about the letter under the headline "TOP TV STARS CAUGHT UP IN SEX SCANDAL. Dozens of actresses to be questioned." The article included statements from Sessions, Spelling and photographs of several high profile actresses who had starred in Spelling productions.

Spelling sued his former nurse for breach of contract and Sessions for defamation for the letters and statements to the *Globe*. (The claims between Spelling and the nurse were ultimately settled). In April 2006, a Los Angeles trial court granted Sessions' motion to dismiss the complaint under the state's anti-SLAPP statute, Cal. Code Sec. 425.16. Spelling had conceded that the speech at issue involved a matter of public concern and the trial court held the letters were protected by the litigation privilege. Aaron Spelling died in June 2006, but his executor continued to appeal the dismissal.

Appeals Court Decision

The appellate court affirmed dismissal on different grounds, holding that Spelling failed to establish a probability of showing the statements were false or published with actual malice. As to falsity, plaintiff had submitted affidavits from several employees and representatives stating that the nurse had never complained of sexual harassment or appeared upset. Aaron Spelling also submitted a declaration stating, "I have absolutely no recollection of engaging in any of the conduct that [Charlene Richards] alleges." Accepting the other employees' statements as true, the court nevertheless held there was insufficient proof of falsity. Their statements were not based on personal knowledge of the alleged incidents. Moreover, Spelling's affidavit was not a denial of the charges – only a statement that he did not recollect
engaging in the alleged conduct.

Plaintiff's lack of evidence of falsity also extended to claims over defendant's statements in the *Globe* where the defendant essentially repeated the claim that Spelling had harassed his client.

The appellate court also rejected plaintiff's attempt to introduce an expert's affidavit arguing that defendant's letter would be understood by readers as implying that Spelling sexually harassed employees as a matter of habit. "American judges," the court noted, "are trained to interpret the meaning of English words."

Finally, the court held that there was insufficient evidence to show that Sessions entertained any doubt as to the truthfulness of his client's allegations. The blanket denial of the allegations by plaintiff's lawyers "lacked minimal merit." Moreover, the attempt to obtain corroborating evidence did not prove that Sessions had doubts about his client. "Trial lawyers know there is a world of difference between knowing something is true and being able to prove it…. Case investigation shows a desire to win. It does not prove the lawyer doubts his client."

Plaintiff was represented by Robert Chapman and Aaron Moss of Greenburg Glusker Fields Claman & Machtinger, in Los Angeles. Defendant was represented by Timothy Grant and Michelle Morelli of Fredrickson, Mazeika & Grant in Los Angeles.

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Court Affirms Dismissal of Libel Complaint Against Finnish Magazine and Source

Court Affirms That Anti-SLAPP Law Applies Broadly

A California appellate court affirmed dismissal of libel and related claims against a Finnish magazine and a source, in a lawsuit brought by the source's former employer Nygard Inc. *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal.App.4th 1027, 72 Cal.Rptr.3d 210 (Cal. App. 2 Dist. Feb. 1, 2008) (Suzukawa, Epstein, Manella, JJ.) (affirming motion to strike under California's anti-SLAPP law, Cal. Code Sec. 425.16). The court held that plaintiff provided insufficient evidence of falsity on its libel claims and had no contract-based claims against the former employer or magazine.

Background

Plaintiff Nygard Inc. is a Canadian-based fashion company, founded by Peter Nygard, a Finnish-born businessman who is regularly covered by the Finnish press. The Finnish publisher A-Lehdet published an article that included complaints of a former employee: among other things, he called his experience at Nygard a "horror," that he "slaved … without a break," endured "pestering/taunting round the clock," felt "used" and that Nygard "didn't want to let his employees to even go see a doctor" when injured."

Nygard Inc. sued the former employee for defamation and breach of contract; and the publisher for defamation and interference with contract. The trial court granted defendants' motion to strike. The descriptions of work at Nygard Inc. were statements of opinion and the contract claims failed because California Labor Code section 232.5 prohibits employers from requiring employees to "refrain from disclosing information about the employer's working conditions."

Appeals Court Decision

The appeals court began by affirming that newspapers and magazines are public fora within the meaning of the anti-SLAPP statute. "[A] newspaper or magazine need not be an *open* forum to be a *public* forum-it is enough that it can be purchased and read by members of the public." 72 Cal.Rptr.3d at 218.

Moreover, the court affirmed that the public interest prong of the statute should be interpreted broadly – expressly rejecting a federal district court's suggestion that only a "political or community issue in which public opinion and input is inherent and desirable" can be an issue of public interest. *Citing to Condit v. National Enquirer, Inc.*, 248 F.Supp.2d 945, 954 (E.D. Cal. 2002). "The Legislature expressly rejected this limited view of the anti-SLAPP statute when it amended the statute in 1997 and, thus, we will not adopt it here," the court stated.

On the merits, the court affirmed that the defamation claim was based on nonactionable statements of opinion. "No reasonable reader could understand the description of Timo's work experience with plaintiffs as 'horrible' and a 'horror' to mean that Timo was literally struck with horror while working for the company. Instead, 'horrible' and a 'horror' colorfully convey Timo's subjective belief that working for the company was unpleasant."

The statement that defendant was not allowed to see a doctor was an opinion based on disclosed facts, notwithstanding affidavits from other employees disputing the assertion. Similar to the appellate court decision in *Spelling v. Sessions* (see page 27), the other affidavits were not based on personal knowledge of the defendant's experience and therefore were not prima facie evidence of falsity.

And because plaintiff failed to state a contract claim against the former employee defendant, the interference with contract claims against the magazine failed as well.

Plaintiff was represented by Todd Hunt and Daniel Hargis, Seyfarth Shaw LLP in Los Angeles. Defendants were represented by Malcolm S. McNeil and Ole Sandberg, Carlsmith Ball LLP in Los Angeles.

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Newspaper Prevails on Summary Judgment in Lawsuit Over Advertisement

By Brendan Healey

A heated dispute between two Chicago-area businesspeople over the "Soylove" soy milk processing device led a local newspaper to become embroiled in a defamation suit. Ultimately, though, the plaintiff ended up in hot water when the court dismissed all of her claims against the newspaper on summary judgment and allowed another defendant's counterclaim against her to go forward. *Cha v. Lee*, No. 03 L 5667 (Ill. Cir. Ct. Feb. 4, 2008) (Taylor, J.).

Background

Plaintiff is the former owner of Seoul Department Store, a store in the Chicago suburbs that specializes in products of interest to the Korean-American community. She sued in the Circuit Court of Cook County over an advertisement that ran in the *Korea Central Daily*, a Chicago-based Korean-language newspaper. Kay Park, who owns a competing store, purchased the advertisement. But for the word "Soylove," the advertisement was entirely in Korean and is styled as a "Notice." *Korea Central Daily* published the Notice verbatim as Ms. Park submitted it.

The Notice concerned the Soylove product and stated, among other things, that "S department store . . . disrupts the entire commercial rights in the United States through abnormal routes. . . . A newspaper notice is hereby given that there shall be no guaranty of any A/S or Warranty for any soylove purchase from S. Department Store."

Essentially, the Notice stated that Seoul Department Store was selling the Soylove product outside distribution channels established by the authorized importer and that the authorized importer would not warrant these products. Plaintiff, however, contended that the Notice "screams criminal conduct" and stated that it portrayed her as a "nefarious person."

During the course of discovery, the truth of the Notice became obvious, but the case also took an interesting turn. *Korea Central Daily* noticed the deposition of plaintiff Amy Cha, but her mother, Gloria Cha, showed up instead. As it turned out, even though Amy Cha owned the Seoul Department Store at the time the Notice was published, she had very little involvement with the store.

Instead, her mother Gloria Cha ran the store, and Gloria attempted to testify on Amy's behalf. When Amy ultimately testified, she disclosed that she had never seen the complaint filed in her name, could not read Korean (which meant she could not read the Notice) and had never seen a translation of the Notice before her deposition.

After it became abundantly clear that plaintiff's counsel had filed the lawsuit on behalf of the wrong person, plaintiff's counsel sought to amend the complaint to add Gloria Cha and Eric Cha, Amy Cha's brother, as plaintiffs. Because it was several years after the complaint was filed and plaintiff presumably should have known from the inception who should bring the lawsuit, the court denied the motion.

Substantial Truth

Korea Central Daily and Amy Cha then filed cross motions for summary judgment. *Korea Central Daily* argued that the statements at issue were simply not defamatory or, in the alternative, reasonably susceptible to an innocent construction. *Korea Central Daily* also argued that the Notice was substantially true – Kay Park's store was the exclusive authorized Midwest distributor of Soylove products and an uncontradicted affidavit from the Soylove importer substantiated the statements in the Notice. Finally, *Korea Central Daily* argued that plaintiff was a public figure in her community and had no evidence of actual malice.

The court determined that "no reasonable jury could find that Defendants would fail to establish substantial truth to their published statement." Moreover, the court stated that "Plaintiff fails to establish that Defendants' interpretation of the advertisement is not truthful or otherwise defamatory."

At this point, only the counterclaim remains pending. Because the case was not entirely disposed of on summary judgment, *Korea Central Daily* sought and received an order to start the appeals clock on plaintiff's claims against the paper. Plaintiff has until mid April to file a notice of appeal.

Steve Mandell, Brendan Healey, and Natalie Harris of Mandell Menkes LLC represent Defendant Korea Central Daily. Roy Amatore represents co-defendants Kay Park and World Invention Source. Kenneth Ditkowsky and Dan Lee represent the plaintiff.

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Libel Verdict Affirmed Against Civil Rights Organization

Allegations Not Privileged, Sufficient Evidence of Actual Malice

A Texas appeals court affirmed a $500,000 jury verdict to a city councilwoman over a memo written by a civil rights group and sent to government officials. *Clark v. Jenkins*, No 07-06-0385-CV, --- S.W.3d ----, 2008 WL 482007 (Tex. App.—Amarillo Feb. 22, 2008, no writ) (Quinn, Campbell, Pirtle, JJ.).

Affirming the libel verdict, the court held that the memo was not absolutely privileged as a communication to government under the "right to petition" clauses of the federal and Texas constitutions. Moreover, there was sufficient evidence that the defendants either made up or recklessly repeated the allegations against the plaintiff.

Background

The suit stemmed from a city council meeting and a subsequent private meeting held in November 2002 that discussed complaints of police brutality and discrimination against black residents of Athens, Texas.

Defendant Paul Clark, an official with Black Citizens for Justice, Law and Order (Citizens for Justice) in Dallas, attended both the public meeting and an informal session that followed in the home a local activist. He then wrote a memo, titled "Murder and Intimidation of Black Citizens in Athens, Texas (Henderson County)," summarizing the two meetings.

The memo stated, "Here are some observations that need attention and immediate action by Congress and the Justice Department." The memo repeated verbatim, without quotation marks or attribution, several statements made at the private meeting about Athens City Councilwoman Gladys Elaine Jenkins. At issue was the following portion of the memo: "The only black female Athens City Council member is Gladys Elaine Blanton Jenkins. She is a convicted felon having served prison time in Texas and California for Prostitution and Drugs. She is controlled by Athens Mayor Jerry King. No one in the State of Texas can hold elective office who has felony convictions. She must be removed from office immediately."

Clark and Citizens for Justice sent the memo to Texas Congressman Peter Sessions and the U.S. Department of Justice, in the hopes that that a civil rights investigation would be launched. Several local officials in Athens also eventually obtained the memo. The allegations of criminal conduct were false.

Jenkins sued Clark and Citizens for Justice for libel. At trial, the parties agreed that plaintiff was a public figure, and the jury was instructed on actual malice. The jury awarded Jenkins $300,000 in actual damages, jointly from the organization and Clark, and $100,000 in punitives from each defendant. *Jenkins v. Black Citizens for Justice, Law and Order*, No. 03-066 (Tex. Dist. Ct., Henderson County jury verdict June 15, 2006); *see MLRC MediaLawLetter*, Oct. 2006 at 42.

On appeal, defendants argued that Jenkins failed to present clear and convincing evidence of actual malice, and that the memo was absolutely privileged under the "right to petition" clause.

Memo Not Privileged Under Petition Clause

The appeals court addressed the petition issue first, noting that the Texas constitution includes not only a right to petition the government for redress of grievances, but also a free speech clause that guarantees the right to "speak, write or publish his opinions on any subject, *being responsible for abuse of that privilege*." (*quoting Bentley v. Bunton*, 94 S.W.3d 561, 578 (Tex. 2003) *quoting Turner v. KTRK Television, Inc.*, 38 S.W.3d 103, 116-17 (Tex. 2000) (emphasis in original)).

The court then examined several Texas cases exploring the limits of the petition privilege, and concluded that "absolute privilege attaches to all communications published in the course of judicial proceedings and … quasi-judicial proceedings before executive officers, boards, or commissions," slip op. at 11-12 (citations omitted), while "initial communications 'to a public officer . . . who is authorized or privileged to take action,'" including criminal complaints, are subject to a qualified privilege. Slip op. at 12.

Since the memo about the meetings in Athens "sought to instigate an investigation of alleged civil rights violations in Athens and, more specifically, Jenkins's immediate removal from the Athens City Council," the court held that it was not part of an *ongoing* legislative proceeding. The court also held that the memo was not communicated to the Department of Justice in an executive, judicial, or quasi-judicial proceeding. Slip op. at 13-14.

"While we recognize the Petition Clause is undoubtedly an important part of self-government," the court concluded, "one person's right to petition, in the absence of a common law

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privilege that is absolute, ends where his neighbor's reputational rights begin." Slip op at 14.

Noerr-Pennington Inapplicable

The court also declined to apply the *Noerr-Pennington* doctrine to the case. The "doctrine derives from the First Amendment's guarantee of 'the right of the people … to petition the Government for a redress of grievances… Under the *Noerr-Pennington* doctrine, those who petition any department of the government for redress are generally immune from statutory liability for their petitioning conduct." *Sosa v. DirectTV, Inc.*, 437 F.3d 923 (9th Cir. 2006).

This doctrine arose in the antitrust context, with the Supreme Court holding that a company could not be prosecuted for antitrust violations for petitioning the government to take an action that would harm a competitor. *See Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v.* Pennington, 381 U.S. 657 (1965). The principle has since been expanded to bar other claims, such as unfair competition, tortious interference and abuse of process.

Attempts to apply the *Noerr-Pennington* doctrine in the libel context have had mixed results. One court applied the doctrine to immunize letters to federal regulators accusing business rivals of banking regulation violations. *See Caixa General de Depositor, A.A. CQD v. Rodriguez*, 2005 WL 1541055 (D.N.J. 2005). But other courts rejected the doctrine as a rationale for immunity of statements made to public school employees (as government actors), *see Myers v. Levy*, 808 N.E.2d 1139, 283 Ill.Dec. 851 (2004); and a demand letter to the publisher of a an allegedly copyright infringing publication. *See Cardtoons, L.L.C v. Major League Baseball Players Association*, 208 F.3d 885 (10th Cir. 2000).

In the instant Texas case, the appeals court ruled that the *Noerr-Pennington* doctrine "has no application here," noting that the doctrine is "tailored for the business world." Slip op. at 15.

Evidence of Actual Malice

As to actual malice, Clark claimed that he was essentially a scrivener, simply recording what was said at the meetings. He testified in his deposition that he had no belief or disbelief as to the truth of the statements in the memo or the veracity of the speakers at the meetings. But this was disputed with respect to the allegations against plaintiff and with respect to the accuracy of the memo as a whole.

In his deposition testimony, Clark (who did not appear at the trial) identified the alleged source of the allegations against plaintiff. At trial, however, the alleged source testified that she said nothing about plaintiff and that another man at the private meeting claimed plaintiff "had engaged in drugs and prostitution in California" but no one accused plaintiff of serving time in prison, or being convicted. Thus, the jury could have inferred Clark "made up" or "imagined" the facts underlying his statement about plaintiff.

Moreover, there was substantial testimony at trial that several other allegations in the Memo were false. Thus Clark's "eyewitness account" of the meetings was a gross misrepresentation of the events that transpired. Thus rather than simply recording events at the meetings he plainly became an advocate for an investigation in Athens and Jenkins's removal from office.

Finally, the court distinguished the case from *St. Amant v. Thompson*, 390 U.S. 727 (1968), in which a candidate for public office quoted a statement from a single source, that the plaintiff had engaged in criminal activity. While acknowledging that "at first blush, these facts appear somewhat similar to our own," the court noted a critical distinction: in *St. Amant* the defendant knew the source (for nine months) prior, and that the defendant had verified other elements of the source's statement. Slip op. at 25.

"At best," the Texas appeals court concluded, "Clark repeated in writing a false, scandalous rumor consisting of trumped up felony charges, convictions, and imprisonment in furtherance of removing Jenkins from office. At worst, Clark made up or imagined the felony charges, convictions, and imprisonment of Jenkins to further a predetermined result. In either instance, Jenkins has established Clark acted with 'actual malice' by clear and convincing evidence."

Defendant Clark was represented by Kent Wade Starr of Starr & Associates, P.C. of Dallas, while Black Citizens for Justice, Law and Order was represented by Eliot D. Shavin of Dallas. Plaintiff was represented by E. Leon Carter of Munck Butrus, P.C. in Dallas and Shelli Morrison of the Law Offices of Jeffrey L. Weinstein in Athens, Texas.

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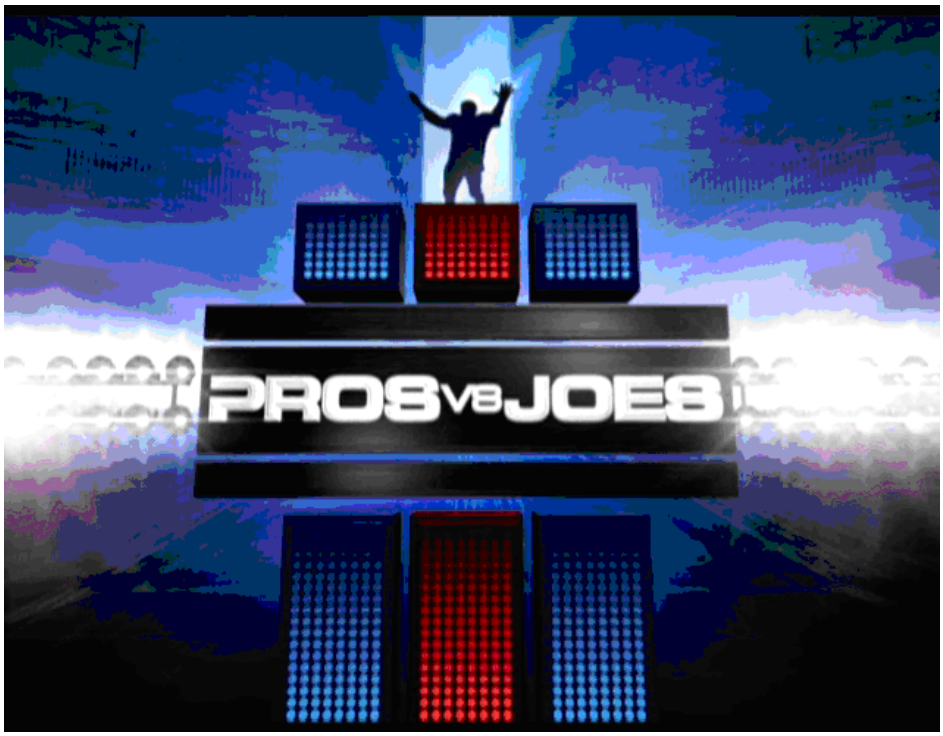
Entertainment Law: New Jersey District Court Rejects Copyright Challenge to Spike TV's *Pros vs. Joes*

By James Rosenfeld



In the latest copyright case involving reality television, a New Jersey federal court granted summary judgment for defendants Viacom, Inc., MTV Networks and Spike TV in a case involving sports-based reality television show *Pros vs. Joes*, broadcast on Spike. *Pino v. Viacom*, Civil No. 07-3313 (AET) (D.N.J. March 4, 2008) (Thompson, J.). In advance of discovery, the Court dismissed plaintiff's claim that the program infringed his copyright in the treatment and script for another sport-themed reality show.

The proliferation of televised reality shows, which tend to incorporate familiar conventions or formulas, has been met with several copyright and theft of idea claims brought by plaintiffs who claim to have pitched or created similar shows. In the District Court's opinion in *Pino* and in other recent decisions, courts have reaffirmed traditional copyright principles by disregarding the abstract ideas and common *scenes a faire* in such shows and ultimately concluding that the remaining elements fail to give rise to any claim. *See also Bethea v. Burnett*, No. CV04-7690JFWPLAX, 2005 WL 1720631 (C.D. Cal. June 28, 2005) (plaintiff alleged that *The Apprentice* infringed treatment for show called C.E.O.); *CBS v. ABC*, No. 02 Civ. 8813 (LAP), 2003 U.S. Dist. LEXIS 20258 (S.D.N.Y. Jan. 14, 2003) (plaintiff alleged *I'm a Celebrity, Get Me Out of Here*, infringed *Survivor*).

Background

Plaintiff Timmy Pino, a law enforcement official and aspiring screenwriter, drafted and copyrighted the treatment and screenplay for *Under Pressure* in early 2005. He made various efforts to elicit interest in the show, circulating it online and to entertainment industry professionals. However, Pino's program was never produced or broadcast.

Under Pressure was intended to be a reality television show in which three or four contestants competed in separate sports in different arenas against a corps of pros who appeared repeatedly throughout the season. Each contestant would participate in three consecutive "Pressure Situations" in a single sport, and would be rated on his performance on a scale of 1 to 10 by a panel of judges. The ultimate winner was to receive a cash prize.

Spike had produced and aired two full seasons of *Pros vs. Joes* when defendants filed their motion. Spike's program also pitted amateurs against pro athletes, but the two shows were different in many ways. For instance, the amateurs in *Pros vs. Joes* competed in multiple sports (rather than one sport each) during the course of an episode, and more pro athletes from a broader range of sports than was contemplated in Pino's materials appeared over the course of each season of Spike's show.

Pino filed a complaint on July 18, 2007, asserting a single claim for copyright infringement. Prior to discovery, defendants moved to dismiss or, in the alternative, for summary judgment based on the lack of substantial similarity of the parties' works. They argued that the few similarities between the works related to unprotected features – namely, the underlying idea of

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a reality show based on a sports competition between pro and amateur athletes and various stock elements that exist in most sporting events or reality shows – and that beyond these unprotected elements, the programs differed in almost every respect, from the format and rules of each competition, to the "characters" involved, to various details of setting and tone.

Courts routinely reject theories of substantial similarity based on random similarities across works.

District Court's Decision

The court issued its decision on February 29, 2008, granting summary judgment for defendants. The court's ruling rested on three grounds. First, it found that "elements common to both works, including, *inter alia*, the presence of hosts who provide witty commentary on the contestants and competition, introductory sequences that feature highlights of sporting events and sounds associated with various sports, spotlights on professional athletes and amateur contestants, camera shots of athletic fields or arenas, trash-talking exchanges, and sports contests are *scenes á faire* that flow necessarily from the idea of a sports-themed reality show that pits amateurs against professional athletes."

Second, the court found that the remaining protectible aspects of plot, dialogue, mood, setting, pace and sequence in the two works were not substantially similar. It noted a sole triable issue of similarity as to theme but concluded that overall, plaintiff had not met his burden of showing substantial similarity. Third, the Court rejected plaintiff's argument that the sequence of *unprotectible* elements in the two works was substantially similar.

"At best," the court stated, "Plaintiff lists random similarities between elements of the shows . . . However, courts routinely reject theories of substantial similarity based on random similarities across works."

The court's crisp and incisive decision will assist media and entertainment defendants in repelling meritless copyright and theft of idea claims brought by the creators of works with no similarities to those of defendants beyond abstract ideas and stock elements.

Elizabeth A. McNamara and James Rosenfeld of Davis Wright Tremaine LLP in New York City represented defendants Viacom, Inc., MTV Networks and Spike TV. Plaintiff was represented by James J. Schrager and Fernando M. Pinguelo of Norris, McLaughlin & Marcus in Bridgewater, New Jersey.

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The "Real" Wedding Crasher Loses Idea Theft Suit

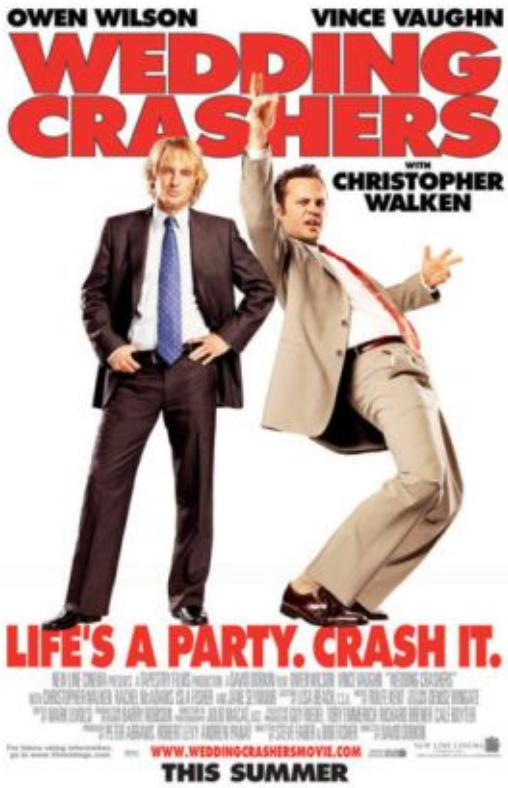
No Substantial Similarity Between Movie and Party Crasher Handbook

In an unpublished decision, a California appellate court affirmed summary judgment for the producers of the movie "Wedding Crashers" on an idea theft lawsuit brought by a veteran party crasher who claimed the movie was based on an idea he submitted to the defendants. *Reginald v. New Line Cinema Corp.*, 2008 WL 588932, No. B190025 (Cal. App. 2d Dist. Mar. 5, 2008) (Jackson, Vogel, Rothschild, JJ.).

After carefully comparing the movie as a whole to plaintiff's idea for a movie, the court affirmed that there was no actionable similarity between the two.

Background

The plaintiff Rex Reginald is a veteran Hollywood "party crasher" with a 30 year history of attending various events uninvited, including movie premieres, weddings and awards shows. He wrote about his techniques and stories in an unpublished autobiographical work titled *The Party Crasher's Handbook.*



In 1999, Reginald and an agent began approaching movie producers to discuss turning the handbook into a movie about his experiences as a party crasher. In 2002, he approached one of the defendants, United Talent Agency (UTA), with the idea of turning the handbook into a movie starring Jim Carrey. Reginald also crashed a movie premier to try and pitch his idea to a New Line Cinema executive. Both UTA and New Line turned him down.

Two years later, Reginald learned that New Line Cinema was producing a movie called *Wedding Crashers* that would star two UTA actors, Owen Wilson and Vince Vaughn. Reginald then filed suit, claiming breach of implied contract, breach of confidence and unjust enrichment. The trial court granted summary judgment for all defendants, finding no substantial similarity as a matter of law between the movie and Reginald's idea.

Appellate Court Decision

On appeal, plaintiff argued that there were sufficient similarities between the movie and his handbook to show that defendants used his ideas. Plaintiff also argued that where evidence of access to an idea is great, plaintiff can offer less evidence of similarity. The defendants had conceded access only for purposes of their summary judgment motion. The court, however, held that in the context of an idea theft claim, there must be a showing of substantial similarity – and the degree of similarity must be high. The claim requires the same proof of similarity as a plagiarism claim except the copied portions need not be protectable in the breach of contract claim. *See Weitzenkorn v. Lesser,* 40 Cal.2d 778, 795, 256 P.2d. 947 (1953).

Discussing several California Supreme Court cases, the appellate court noted that there is no precise formula for determining when substantial similarity exists between two works. In *Weitzenkorn*, the California Supreme Court considered a variety of factors: "form and manner of expression, basic dramatic core, similar moral message, the combination of characters, locale, use of a myth as an element, whether such items as the combination of characters, locale or mythical element are used for the same purpose, and divergence in characterizations, description, and events." *Reginald*, 2008 WL 588932 at *5.

In *Desny v. Wilder*, 299 P.2d 257 (Cal. 1956), the Court considered the sequence of events, attributes and types of key characters and the settings of each work.

These cases show that substantial similarity is not based on "merely words and phrases or the same basic idea" but is instead based on the same "material features of the works." *Reginald*, 2008 WL 588932 at *6.

Plaintiff sought to rely on *Fink v. Goodson Todman Enterprises, Ltd.*, 8 Cal. Rep. 679 (Cal. App. 1970) to argue that sub-

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stantial similarity could be found if the core elements of his work were used. This included, he claimed, the comedic nature of both, a story centering around two male buddies, and party crashing to "pick up beautiful women, eat gourmet food and drink and have fun."

The appellate court, however, found that "[m]ost of the alleged similarities can be readily dismissed, in that they are not material elements in defendants' motion picture." *Reginald*, 2008 WL 588932 at *7, *citing Klekas v. EMI Films, Inc.*, 150 Cal. App. 3d 1102 (Cal. App. 1984).

Substantial similarity is not based on "merely words and phrases or the same basic idea" but is instead based on the same "material features of the works

In *Klekas* the author of an unpublished novel claimed his work was used as the basis for the movie "*The Deer Hunter*." The plaintiff cited numerous similarities between the two, including the theme of a Vietnam veteran returning home to a mill town, and specific bar scenes and settings involving deer hunting. But taken as a whole the similarities were "devoid of legal significance [or] necessarily flow from a common theme, elements that are common in any story about soldiers returning home from war." 150 Cal. App. 3d at 1113.

Similarly in the instant case, although the two works shared a common theme of party crashing they were dissimilar in their material elements.

> The Handbook is about how to crash parties and examples of the types of fun a crasher can have and other benefits the crasher can enjoy by doing that. From a structural standpoint, plaintiff's concept does not include a dramatic sequence, an unfolding story…. *Wedding Crashers* is about relationships between people, some of whom are caught in a lie, and crashing the wedding is only the vehicle that gives rise to the relationships and the lie that creates the conflict which the rest of the motion picture focuses on resolving. It is structured as a story unfolding in a dramatic sequence which bears no resemblance to the illustrative vignette format of plaintiff's concept. *Reginald*, 2008 WL 588932 at *9.

Plaintiff was represented by Richard Sherman, Robert Young and Armand Arabian. The New Line defendants were represented by Michael O'Connor, Edward Weiman and Allison Roher of White O'Connor Curry in Los Angeles. The UTA defendants were represented by Bryan J. Freedman, Freedman & Taitelman in Los Angeles.

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Unsavoury Northern Irish Libel Award Reversed on Appeal

Erroneous Fair Comment Instruction Given in Restaurant Review Case

By Leslie Caplan

The Northern Ireland Court of Appeal has set aside a controversial unanimous verdict reached by a jury in February 2007 to award £25,000 (about $50,000) in libel damages to the proprietors of a Belfast restaurant in respect of a restaurant review published in the *Irish News. The verdict* raised serious questions about the extent to which the press could or should be restricted. *Convery v. Irish News Limited* [2008] NICA 14 (March 10, 2008) (Kerr, Campbell, Girvan, JJ.).

Many were concerned at the precedent of a restaurant securing significant damages over criticism in a review and the appeal was keenly awaited by newspapers, their reviewers and their legal advisors.

Background

The review at the center of the case written by Caroline Workman, an experienced food writer, and was published in the weekend section of the *Irish News* in August 2001. *The Irish News* is a Belfast-based newspaper with a circulation of about 50,000. The review described Ms Workman's less than enjoyable dining experience at Goodfellas, an Italian themed restaurant in West Belfast.

Ms Workman gave the restaurant one star out of 5, and rated it "Stay at home."

Published under the headline "Not good, fellas", the review was highly critical of the food, drink, attitude of staff and the smoky atmosphere. Ms. Workman gave the restaurant one star out of five, and rated it "stay at home." The owner of Goodfellas, Ciaran Convery, sued, claiming that the article was defamatory, damaging and hurtful.

The *Irish News* pleaded justification and fair comment, a defense that the statements were honest comment based on a matter of public interest. The jury found in favour of the newspaper in relation to its justification defense, but against it on the defense of honest comment. The jury's decision and the award of £25,000 were appealed, and the matter was heard by the Northern Ireland Court of Appeal, which delivered its verdict on 10 March.

Appeals Court Decision

The three-judge appeal Court found that the trial judge had misdirected the jury on the issue of fair comment. Where this defense is pleaded, the jury must be carefully directed on how to approach the difficult question of whether words in the article are statements of fact, or alternatively, are comment. In the words of the Lord Chief Justice Kerr, who delivered the leading judgment of the Court of Appeal

> "Only if the jury has a clear understanding of what is capable of constituting comment, can it begin to address the thorny issue of whether the facts on which the comment is based are capable of justifying the comment made."

The court held that the jury could not have properly recognized which statements in the review were fact and which were comment from the trial judge's directions. While it was possible, indeed the Lord Chief Justice considered it likely, that a properly directed jury would find in favor of the defendant, it was not a certainty and the court therefore ordered a retrial.

It is for Mr. Convery to decide if he wishes to bring the matter before the courts again, but the *Irish News* has stated that it is prepared to defend any further proceedings taken. The Court of Appeal's decision is certainly welcomed by reviewers and the press in general and we now await Mr. Convery's decision with interest.

Lesley Caplin is a solicitor in the Defamation and Media Group at McCann FitzGerald solicitors in Dublin.

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The Other Side of the Pond: UK and European Law Update

By David Hooper

Blasphemy

Attempts by a Christian organisation to appeal against the ruling upholding the dismissal of the attempt to bring blasphemy charges against the BBC for screening *Jerry Springer: The Opera* were rejected by the House of Lords. *See MediaLawLetter* Dec. 2007 at 33.

The days of blasphemy on the statute book appear to be numbered. A clause scrapping the law of blasphemy, which applies only to the established Church of England religion and not the many other religions practiced in the UK, has been added by the Government to the current Criminal Justice Bill and should soon be law.

More from the Town Called Sue

Amongst the litigants of impeccable reputation who have beaten a path to the Royal Courts of Justice are the widely-known and respected Ukrainian businessman Rinat Akhmetov, who successfully sued the widely-read in the UK *Kyiv Post* for its highly topical story headlined "Appalling Kyiv City Council Land Grab." In my local pub they have been talking of little else.

Mr. Akhmetov was followed by the Icelandic bank Kaupthing, which successfully sued the Danish tabloid *Ekstra Baladet* for its English translation available on the internet of a story which falsely suggested that the bank's tax advice amounted to involvement in a tax fiddle. Damages were said to be "very substantial," and the case to have cost the Danish paper €270,000 in costs and damages.

Germany: Publication on the Internet

In marked contrast to the facility with which the UK courts assume jurisdiction when foreign newspapers are published in the UK on the Internet was the decision in the Dusseldorf Regional Court of 9 January 2008. There a claim by Boris Fuchsmann and Innova Film Limited against the *New York Times* based on an FBI report on the activities of a US citizen called Ronald Lauder failed. The claimant could not prove that any copies of the *New York Times* had been published in Dusseldorf, so he relied simply on internet hits in the Dusseldorf jurisdiction.

This was insufficient in the view of a German court to find jurisdiction, as it was "not in accordance with the newspaper's intended use aimed at readers in the United States of America and particularly New York, where the subject of the article, Ronald Lauder, lived". The court further observed that circulation had to be "in the course of ordinary business or in accordance with the intended use and not merely by happenstance."

Privacy

Watch this space. Argument has recently been heard by the Court of Appeal in the *J K Rowling -v- Express Newspapers* decision. For background on the case see *MediaLawLetter* Oct. 2007, at 40. This raises the issue to whether the taking of photographs of J.K. Rowling's child in a public place by a long lens camera is a breach of privacy. The case will resolve the apparent conflict between the House of Lords in the Naomi Campbell case and the European privacy case of Von Hannover (Princess Caroline of Monoco). The Court of Appeal has reserved judgment.

On January 17, 2008, damages of £37,500 were ordered to be paid to the actress Sienna Miller, who was surreptitiously filmed entering a lake on a private estate naked during the filming of *Hippy Hippy Shake*, whence it ended up with the appropriately-named agency Xposure. News Group Newspapers published the photograph. Significantly, the claimant pursued the claim after publication and recovered fairly substantial damages. It may be a sign of things to come: namely that damages to privacy tended to be very modest and privacy cases were rarely about stopping publication in the first place. Now if courts are willing to award substantial damages, claims for privacy will be actively pursued by those who feel their privacy has been infringed.

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Libel Damages

Kate and Gerry McCann, parents of the missing child Madeleine, received agreed damages of £550,000 against Express Newspapers, which had published over 100 articles reporting some of the more shocking rumours and allegations circulating in Portugal about the parents suggesting that they were responsible for the death of their child and were guilty of a cover-up.

Commentators noted the incessant use of the name Madeleine in the headlines, when in reality there was no real news to report. Cynics noted that headlines in these papers alternated between the names Madeleine and (Princess) Diana and that purchasers who hoped to read anything remotely newsworthy were soon disappointed.

Cumulatively, the articles raised a suspicion of guilt about the McCanns. With two claimants and multiple cause of actions against four newspapers, damages could have been in the stratosphere. The newspapers each also carried a front-page apology.

Open Justice

There have been two interesting decisions recently. One concerned the public's right to inspect court documents including the detailed grounds of defence: in this case, why the UK government stopped the possible prosecution of BAE over allegations of corrupt arms dealing. *R -v- Cornerhouse Research* (decision of Mr Justice Collins 4 February 2008). The other concerned the disclosure of a Defendant's identity. *re Trinity Mirror plc*, 2008 All ER D12. The trial judge had attempted under Section 11 of the 1981 Contempt of Court Act 1981 to prevent the press reporting the name of a convicted child pornographer to prevent "significant suffering on the part of the defendant's own children."

The Divisional Courts held that there was no power to make such an order where the children were neither witnesses nor victims in the case nor did it have an inherent jurisdiction to produce what might be a desirable result (namely the avoidance of distress to the defendant's children). A group of papers led by Trinity Mirror successfully appealed against the trial judge's original order.

Press Complaints Commission

The recently published annual report of the PCC discloses a 31 percent increase in complaints dealt with. The figures are slightly skewed by the fact that 485 related to one report about the McCann case, captioned in immortal tabloid style designed to disparage anything foreign: "Up Yours Senor." Nevertheless, there has been a significant increase in matters being dealt with by the PCC, which must be a tribute to its increasing effectiveness. 483 of the complaints reached the resolution process. There are limits on what the PCC can do, as it cannot award damages and is not equipped to resolve disputed issues of fact. There is a feeling in some quarters that its composition makes it too sympathetic to the press, encouraging people to continue using the courts.

Reynolds Privilege – Latest Developments

Seaga v Harper, 30 January 2008, Appeal 90 of 2006

Edward Seaga, the leader of the Jamaican Labour Party, criticised at a public meeting the appointment of Leslie Harper as Commissioner of Police in Jamaica. Harper was successful in the slander action that he brought and this ultimately reached the Privy Council on the question of *Reynolds Privilege*. The council ruled that material should be looked at as a whole and in a practical manner and not piece by piece. Furthermore, there was no reason why the *Reynolds* defence could not apply in any medium. It was not restricted to print or broadcast. So far so good, but on the facts Seaga was found not to have exercised a sufficient of responsibility and what he alleged against Harper was felt not to rise above rumour, so the *Reynolds* defence failed.

Malik v Newspost Ltd 2007 EWHC 3063

Another *Reynolds* defense failure in that the defense was not available to a person who wrote an unsubstantiated defamatory allegation of fact in his reader's letter nor could the paper rely on *Reynolds* where it had not investigated the defamatory allegation of fact contained in the reader's letter.

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The Other Side of the Pond: UK and European Law Update

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European Court of Human Rights

Miroslaw Kulis v Poland, No. 00015601/02 18 (March 2008).

This case underlined the principle that people should have considerable latitude in criticising public figures. Kulis had published in a magazine comments made by a lawyer which criticised the deputy speaker in terms which were described as provocative and inelegant. The lawyer had represented two individuals who had been accused of kidnapping the politician's daughter. Kulis had been ordered by the Polish court to publish an apology and pay compensation.

The ECHR held that the deputy speaker had, as a public figure, to accept a higher degree of tolerance to criticism. The magazine had not gone beyond what was tolerable in public debate. The Polish court had failed to strike a fair balance between protecting the personal rights of a public figure and the magazine's freedom of expression on a matter of public interest.

Freedom of Information

There have been three significant cases. The first was *Export Credits Department v Friends of the Earth*, 2008 all ER(D) 2446. The Information Commissioner upheld the ECGD refusal to disclose its review of the social, environmental and human rights aspect of its decision to finance an oil and gas project off the coast of Russia. The ECG claimed that the performance of government functions required that the information should be kept confidential. The Commissioner felt that the applicants had failed to demonstrate sufficient public interest in the requested information.

The forces of light were more successful in FS50 165372 in securing access to government papers relating to the lead up to the Iraq war. The government had objected under Section 35 of the Freedom on Information Act that this related to the formulation of government policy and ministerial communications. However, this was subject to the public interest test. The Commissioner came down in favor of maximum transparency, not least because of the controversy relating to the changed legal advice by the Attorney General about the legality of the war and the fact that government ministers had resigned in protest against what they thought was an illegal war.

Interestingly, the first thing that crawled out the woodwork was the first draft of the UK's dossier on Saddam Hussein's weapons of mass destruction. Needless to say, this turned out to have been drafted by a government spin doctor with precious little knowledge of the subject matter. The demands for an enquiry into the decision-making that led to war are growing ever stronger this side of the pond. Americans, please note.

Another FOI triumph was the Commissioner's ruling that details of Members' of Parliament additional costs allowance, which totalled up to £22,000 a year and enabled our parliamentarians to refurbish their second homes at public expense, should be disclosed. There was, needless to say, a lot of parliamentary squealing on the grounds of invasion of privacy. On 25 March 2008, just before the order became effective, the House of Commons Commission appealed. The overwhelming feeling outside Parliament is that such information should be disclosed and indeed leading political figures are doing so voluntarily, so it is unlikely that the appeal will be successful; but watch this space.

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Eighth Circuit Upholds Preliminary Injunction Against Law Restricting Access to Video Games

By Leita Walker

Social science research indicating a causal connection between video game violence and aggressive behavior in children is insufficient to satisfy the strict scrutiny analysis applied to restrictions on video games, according to a recent decision of the Eighth Circuit.

In *Entertainment Software Association v. Swanson*, No. 06-3217, slip op. (8th Cir. Mar. 17, 2008), the Eighth Circuit upheld a preliminary injunction in favor of the Entertainment Software Association and Entertainment Merchants Association and against the State of Minnesota. The preliminary injunction barred enforcement of the Minnesota Restricted Video Games Act, which provides in pertinent part that:

The state's evidence of a link between video games and violence – fell short of establishing the necessary "statistical certainty of causation."

> [a] person under the age of 17 may not knowingly rent or purchase [a video game rated AO or M by the Entertainment Software Rating Board]. A person who violates this subdivision is subject to a civil penalty of not more than $25.

Id. at 2 (alterations in original). The Act also required retailers to post a sign notifying minors of the prohibition and penalty. *Id.*

The court noted that in *Interactive Digital Software Association v. St. Louis County*, 329 F.3d 954 (8th Cir. 2003), it had held that violent video games were protected free speech and that restrictions on the purchase or rental by minors of such games were subject to strict scrutiny. *Swanson*, *supra*, at 6. Thus, the state in *Swanson* had to show both that the Act was necessary to serve a compelling state interest and that it was narrowly tailored. *Id.*

In assessing whether the state had satisfied the first prong of the strict scrutiny test, the court accepted "as a given that the State has a compelling interest in the psychological well-being of its minor citizens." *Id.* at 7. However, it noted that "the alleged harms must be shown to be 'real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'" *Id.* at 6-7 (quoting *Interactive Digital*, 329 F.3d at 958). It then held that the state's evidence of a link between video games and violence – a meta-analysis and a joint statement of six medical and public health organizations – fell short of establishing the necessary "statistical certainty of causation**."** *Id.* at 7.

Having found that the state had failed to proffer "incontrovertible proof" of a causal relationship between video games and "psychological dysfunction," the Eight Circuit declined to address the lower court's additional holdings that the Act was under-inclusive and that its reliance on the Entertainment Software Rating Board was unconstitutional.

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Internet Law Update: Are the Walls Tumbling Down?

How Roommates.com May Be Eroding Section 230 Immunity

By Jack Greiner & Jeff Allison

In *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 489 F.3d 921 (2007), the Ninth Circuit dramatically narrowed the protection provided to Internet Service Providers by Section 230 of the Communications Decency Act ("CDA"). The Court held that Roommates.com ("Roommates"), was an "information content provider" with respect to questionnaires completed, and posted by users of the website. As a result, Roommates was not subject to the provision in Section 230, which states that a provider of an interactive computer service shall not be treated as a "publisher." In reaching this conclusion, the Court found that Roommates was responsible for the questionnaires because it "created or developed" the forms and the answer choices, thereby making the website a content provider.

Additionally, the Court found that "by categorizing, channeling and limiting the distribution of users' profiles," Roommates "provides an additional layer of information that it is responsible at least in part for creating or developing." The Ninth Circuit agreed to rehear the case en banc, s*ee* 506 F.3d 716 (Oct. 12, 2007), and oral argument was heard in December. If some or all of the Ninth Circuit's decision is allowed to stand, it could dramatically influence how Roommates and other similar websites such as Matchmaker and Craigslist publish content provided by third parties.

Sec. 230(c) (1) Background & Purpose

Section 230 (c) (1) of the CDA provides:

> "[n]o provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c).
>
> An information content provider is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet." 47 U.S.C. 230 (f) (3).

In enacting this section, Congress' purpose was twofold.

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Seventh Circuit Affirms Dismissal of Housing Discrimination Claims Against Craigslist

Section 230 Protects Online Classified Advertising Network

The Seventh Circuit this month affirmed dismissal of a housing discrimination lawsuit against craigslist, a network of online communities specializing in free classified advertisements for housing, goods and services. *Chicago Lawyers' Committee for Civil Rights Under Law v. Craigslist, Inc*., No. No. 07-1101, 2008 WL 681168 (7th Cir. March 14, 2008) (Easterbrook, Wood, Evans, JJ.). The court held that craigslist was protected by Section 230 of the Communications Decency Act and could not be liable as the publisher of the advertisements.

As in the *Roommates.com* case, craigslist was sued for violating 42 U.S.C. Sec. 3604(c) which prohibits the publication of discriminatory advertisements for housing rentals and sales. The housing advertisements on craigslist are created through a simple online template that contains input fields for price, location, description and poster's contact information.

The decision notes that "almost in passing" plaintiff argued that craigslist could be liable for causing the advertisements to be published. Without reference to the *Roommates*.com case, Seventh Circuit Chief Judge Frank Easterbrook responded by noting that "Doubtless craigslist plays a causal role in the sense that no one could post a discriminatory ad if craigslist did not offer a forum. That is not a useful definition of cause…. An interactive computer service 'causes' postings only in the sense of providing a place where people can post…. Nothing in the service craigslist offers induces anyone to post any particular listing, or express a preference for discrimination …." 2008 WL 681168 at *5.

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First, Congress sought to encourage "the unfettered and unregulated development of free speech on the Internet." *Batzel v. Smith*, 333 F.3d 1018, 1027 (9th Cir.2003)(citing 47 U.S.C. § 230(a)(3)-(4), (b)(1)-(2)).

As the Ninth Circuit in *Batzel* explained:

> "Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum. *Id.* at 1028.

Congress' second purpose was to promote self regulation by website operators of the content posted on their sites and to address the holding in *Stratton Oakmont Inc. v. Prodigy Sers. Co.*, 1995 WL 3230710 (N.Y. Sup.Co. May 24, 1995). In that case, Prodigy, a computer service that allowed third parties to post messages on its website, was sued for allegedly defamatory content posted by an anonymous individual on one of the website's bulletin boards. The court found that Prodigy could be held liable for the content posted because it advertised that it took an active role in screening and editing the messages. The court found that, by touting its filtering process, Prodigy placed itself in the role of a publisher with respect to the messages, as opposed to merely a distributor of them (distributors being subject to different and higher standards for purposes of finding liability for defamatory content). Section 230 was intended to remove the disincentive for websites to self regulate content on their sites.

Consistent with Congress' purposes, Section 230 provides that a website that posts content provided by a third party cannot be deemed the "publisher" of that content. Specifically, if a third party places defamatory or otherwise unlawful content on a website, Section 230 effectively immunizes the website from liability associated with the publication or republication of the information.

On the other hand, if the website is "responsible" for "creating or developing" the objectionable information, the website may be deemed the publisher of the information, and Section 230 protection will not apply. As a result, the issue in most Section 230 cases is whether the defendant website is itself an information content provider or whether it simply allows third parties to post information.

When Is An ISP An Information Content Provider?

Prior to the Ninth Circuit's decision in *Roommates*, the trend that had developed in cases applying Section 230 was to grant broad protection to websites for content originating from third parties. In the first case to address the issue, *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), the plaintiff, Ken Zeran, was defamed by an unidentified AOL subscriber who posted a message on an AOL bulletin board advertising that Zeran was selling "offensive and tasteless slogans" related to the April 19, 1995 bombing of the Alfred P. Murrah Building in Oklahoma City. In addition to the defamatory information, the posting listed the telephone number from which Zeran ran his home based business. As a result of the anonymous posting, Zeran received a high volume of calls, comprised of angry and derogatory messages, including death threats.

If some or all of the Ninth Circuit's decision is allowed to stand, it could dramatically influence how Roommates and other similar websites such as Matchmaker and Craigslist publish content provided by third parties.

Zeran contacted AOL and was told by company representatives that the individual account from which the messages were posted would soon be closed. However, five days after the original posting, Zeran was receiving a threatening call "approximately every two minutes."

Zeran sued AOL for defamation, arguing that AOL unreasonably delayed in removing the defamatory messages. However, the Fourth Circuit held that Section 230

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barred his claims:

> Section 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third party user of the service . . . "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions such as deciding whether to publish, withdraw, postpone or alter content are barred. *Id.* at 330.

Following in the footsteps of *Zeran*, other courts, including the Ninth Circuit, similarly granted broad protection under Section 230. In *Batzel v. Smith*, the Ninth Circuit held that the operator of an online newsletter was not an information content provider and therefore, immune from tort liability under Section 230 where it selected and edited potentially defamatory e-mails published in the newsletter. The court found that selecting and editing another's e-mail for publication did not constitute "creation or development" of the e-mail within the definition of information content provider. The court stated, "so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process." *Id.* at 1123.

Ninth Circuit's Decision In Carafano

Does providing prompts and/or pre-prepared answers make one an information content provider? In *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119 (9th Cir. 2003), the Ninth Circuit applied Section 230 to a website, Matchmaker.com ("Matchmaker") that provided prompts to its users to select from among various pre-prepared answers drafted by the website in filling out their respective profiles. In *Carafano*, an unidentified third party placed a false profile/personal ad for Carafano, a well know actress, on Matchmaker's website. The profile listed Carafano's actual phone number and address and claimed that the actress was looking for "a one-night stand" with a "controlling man."

Creating the profile required the unknown third party to complete a detailed questionnaire by selecting "answers to more than fifty questions from pre-prepared menus providing between four and nineteen options." As a result of the ad, Carafano began receiving sexually explicit voice messages and a threatening fax that also contained a threat to harm her son. After learning of the ad, Carafano brought suit alleging invasion of privacy, misappropriation of the right of publicity, defamation, and negligence.

As with other Section 230 cases, the issue before the court was whether Matchmaker.com was a content provider of the information contained in the profile. In concluding that the website was not, the court emphasized Congress' goal in passing Section 230:

> Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages. Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect. *Id*. at 1123.

The court reasoned that under § 230(c), "so long as a third party willingly provides the essential published content," Matchmaker would be entitled to full immunity regardless of the specific editing or selection process.

The court went on to hold that Matchmaker was not an information content provider with respect to the profile because it merely "facilitated" creation of the profile by providing a questionnaire and pre-prepared answers. The Court explained that because selection of the content was left to the user, Matchmaker was not responsible for creating or developing it:

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> Doubtless, the questionnaire facilitated the expression of information by individual users. However, the selection of the content was left exclusively to the user. The actual profile "information" consisted of the particular options chosen and the additional essay answers provided. Matchmaker was not responsible, even in part, for associating certain multiple choice responses with a set of physical characteristics, a group of essay answers, and a photograph. Matchmaker cannot be considered an "information content provider" under the statute because no profile has any content until a user actively creates it.

The court in *Prickett v. Infousa, Inc*., No. 4:05-CV-10, 2006 WL 887431 (E.D. Tex. Mar. 30, 2006), relied on the Ninth Circuit's analysis in *Carafano*. In that case, the plaintiffs sued the operator of an online database after the database published erroneous information about them. The database compiled information about businesses and consumer households in the United States and Canada from various sources, including third parties. Plaintiffs began receiving threatening phone calls after an unknown third party posted a new business listing indicating that the plaintiffs were adult entertainers.

The plaintiffs sued the defendant/operator claiming, among other things, defamation. The plaintiffs claimed that the defendant operated as an information content provider because the unknown third party was "prompted to select subcategories through the defendant's database gathering system." Therefore, the defendant directed the unknown third party's selections.

Citing the Ninth Circuit's decision in *Carafano*, the court stated:

> The fact that some of the content was formulated in response to the Defendant's prompts does not alter the Defendant's status . . . Doubtless, the [prompts] facilitated the expression of information by [the anonymous third party] . . . However, the selection of the content was left exclusively to the user. ... Like Carafano, [the Defendant] cannot be considered an `information content provider' under the statute because no [listing] has any content until a user actively creates it. *Id*. at *5.

In *Chicago Lawyers' Committee for Civil Rights Under the Law, Inc., v. Craigslist*, 461 F.Supp.2d 681 (N.D. Ill. 2006), the court addressed whether Section 230's immunity extended to a website accused of violating a Federal statute. In *Craigslist*, a group of law firms called the Chicago Lawyers' Committee for Civil Rights Under the Law, Inc. ("CLC"), brought suit against Craigslist for posting classified ads submitted by third party users of the site, which allegedly violated the Fair Housing Act ("FHA").

Craigslist facilitates the posting of the ads by providing prompts in the form of a link entitled "post to classifieds" that, when selected, displays a webpage that allows a user to select from various categories including "housing" and "jobs." If a user selects "housing" the user is directed to a web page that contains links titled "I am offering housing" and "I need housing." After selecting from among these two options, the user can then create an ad that will be posted on the Craigslist website. Examples of the ads posted included "NO MINORITIES" and "Only Muslims apply."

The trial court held that Section 230 applied to Craigslist, noting that the postings were information that originate, not from Craigslist, but from "another information content provider, namely the users of Craigslist's website … the plain language of Section 230(c)(1) forecloses CLC's cause of action." On appeal, a three judge panel of the Seventh Circuit affirmed that Craigslist could not be held liable, finding that Section 230(c)(1) does not allow the CLC to "sue the messenger just because the message reveals a third party's plan to engage in unlawful discrimination." *Chicago Lawyers' Committee for Civil Rights Under the Law, Inc., v. Craigslist*, No. 07-1101 (7th Cir. March 14, 2008).

In reaching its conclusion, however, the Seventh Circuit did not agree that Craigslist was entitled to the kind of broad immunity granted by other courts under Section 230 (c)(1). Rather, the panel held that the language of Section 230(c)(1) states only that a website may not be treated "as the publisher or speaker of any information" provided by a

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third party. The Court noted that Section 230(c)(1) could not be read as providing immunity from other tort claims not based on the website's publishing the third party information. In other words, Section 230(c)(1) only forecloses liability that "depends" on treating a website as a publisher or speaker of third party content. Because the FHA provision at issue provided only for publisher liability, Section 230(c)(1) applied and prevented Craigslist from being held liable for the third party content.

The Seventh Circuit's distinction, which could potentially limit Section 230's broad reach, was tempered by a recent case involving MySpace. In *Doe v. MySpace, Inc.*, 474 F.Supp.2d 943 (W.D.Tex. 2007), a Texas federal district court was confronted with a plaintiff who alleged that her claim was not dependant on treating the defendant website as a publisher or speaker of third party content. In *Doe*, the plaintiff brought suit against MySpace.com, claiming that the website failed to take adequate safety measures to keep children off the website. The plaintiff in *MySpace*, a 13-year-old girl, created a profile on the website falsely claiming that she was 18. The plaintiff began corresponding with the defendant, a 19-year-old male, through the website. At some point, the plaintiff and defendant decided to meet, and the defendant sexually assaulted the plaintiff. The plaintiff then brought suit alleging that MySpace was negligent for failing to take reasonable steps to prevent minors from using the site. The plaintiff claimed that Section 230(c)(1) was inapplicable because she was not suing MySpace in its capacity as a publisher. The court, however, disagreed:

> It is quite obvious the underlying basis of Plaintiffs' claims is that, through postings on MySpace, [defendant] and [plaintiff] met and exchanged personal information which eventually led to an in- person meeting and the sexual assault of [plaintiff] Julie Doe. If MySpace had not published communications between Julie Doe and [defendant] Solis, including personal contact information, Plaintiffs' assert they never would have met and the sexual assault never would have occurred. No matter how artfully Plaintiffs seek to plead their claims, the Court views Plaintiffs' claims as directed toward My Space in its publishing, editorial, and/or screening capacities. Therefore, . . . Defendants are entitled to immunity under the CDA. *Id.* at 9.

The *MySpace* court thus refused to treat a "negligent administration" claim as something other than a claim arising from publication. (The case is currently on appeal to the United States Court of Appeals for the Fifth Circuit.) It will be interesting to see if other courts follow suit.

Erosion of Section 230 Immunity

While the trend has clearly been to grant websites broad protection under Section 230, some courts have found websites liable for third party content in certain circumstances.

For example, in *Teva Pharmaceuticals USA Inc. v. Stop Huntingdon Animal Cruelty USA*, 2005 WL 1010454 (N.J. Super. Ct., Ch. Div. Apr. 1, 2005), plaintiffs, Teva Pharmaceuticals USA, Inc. ("Teva"), a manufacturer and distributer of pharmaceuticals, and an affiliate of Teva sought an injunction against Stop Huntingdon Animal Cruelty ("SHAC"), an animal rights group, and other animal activists preventing them from acting in concert to threaten or commit acts of violence against the plaintiff's employees. SHAC's website posted messages submitted by anonymous activists which contained threats to the "health and welfare" of the plaintiffs' employees and messages detailing prior illegal conduct engaged in by activists and directed at the plaintiffs' employees. Members of SHAC revised the messages and determined which submissions were to be posted. The website also contained the following disclaimer:

> While SHAC ideologically supports illegal actions, we do not fund, organize, carryout, or have any knowledge of them before they are carried out. As an aboveground, legal campaign we do not involve ourselves in the illegal elements of social struggles, though we do lend our moral support to those carrying them out, we publicize them after the fact, and will lend tangible support to those tried and/or convicted of them. *Id.* at *5.

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SHAC argued that that its website was immune from liability under Section 230. The court, however, held that the website could be held liable for the content contained in the postings that were selected and revised because SHAC's website "actively promoted" the illegal goals of the activists. The court explained that SHAC "ratifies the illegal activity every time it publicizes, and implicitly encourages, the activities on the website after the fact … SHAC's website, whether intentionally or not, treads heavily on plaintiffs' rights to privacy in their home, to live peaceably, without fear. SHAC is seeking to avoid responsibility by taking shield behind its website. This court cannot countenance such conduct." *Id*. at *11.

Ninth Circuit's Decision in Roommates

At the time *Roommates* was decided, it was believed by some that the Ninth Circuit's decision in *Carafano v. Metrosplash.com, Inc*., 339 F.3d 1119, (9th Cir. 2003), was controlling. In *Roommates*, the Fair Housing Councils of San Fernando Valley and San Diego ("the Councils") filed suit against Roommates.com, claiming that the website violated the Fair Housing Act ("FHA") with respect to profile listings posted by its members.

While the trend has clearly been to grant websites broad protection under Section 230, some courts have found websites liable for third party content in certain circumstances.

Users of the Roommates website are required to create a profile and complete a "My Roommate Preferences" form indicating their roommate preferences. To facilitate this process, members use drop down menus with pre-prepared responses which are drafted by the website. In filling out the "My Roommate Preferences" form, for example, members have to use a drop down menu to indicate whether they were willing to live with "Straight or Gay" males, only "Straight" males, only "Gay" males, or "No males," or they could choose to select a blank response. Users must make the same type of selections concerning whether they are willing to live with children. For example, members could select from options such as "I will live with children," "I will not live with children" or they could change the field to blank.

In addition to gathering the roommate preferences of its users, Roommates also "filtered" the information provided by its users in their respective profiles according to the users' stated preferences. For example, a female room-seeker with a child could only search profiles of room-providers who indicated they were willing to live with women and children.

The Councils alleged that requiring users to fill in their preferences with respect to potential roommates constituted discrimination because users could "state their desire to avoid homosexual roommates, roommates with children, or roommates from other groups protected under the FHA."

In determining whether Roommates was an information content provider with respect to the information contained in its users' profiles, the Ninth Circuit began its analysis by acknowledging that courts have treated Section 230 immunity as quite "robust." However, in direct contrast to its previous decision in *Carafano*, the court held that Roommates was a content provider with respect to the questionnaires it provided for its users stating that, "Roommates is 'responsible' for these questionnaires because it 'creat [ed] or develop[ed]' the forms and answer choices." As a result, the website did not qualify for Section 230 immunity for their publication.

Additionally, the Ninth Circuit stated that "by categorizing, channeling and limiting the distribution of users' profiles," Roommates "provides an additional layer of information that it is responsible at least in part for creating or developing."

There are obvious similarities between the websites at issue in *Roommates* and *Carafano*. Both are sites that provide forms and answer choices drafted by the website for the purpose of facilitating the expression of their users. However, the Ninth Circuit, in *Roommates*, distinguished its previous decision in *Carafano* by asserting that the information provided by the third party in that case was not solicited by the website, whereas the information provided to Roommates was "in direct response" to the questions drafted by Roommates:

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> *Carafano* differs from our case in at least one significant respect: The prankster in *Carafano* provided information that was not solicited by the operator of the website. The website sought information about the individual posting the information, not about unwitting third parties . . . we do not read [Carafano] as granting CDA immunity to those who actively encourage, solicit and profit from the tortious and unlawful communications of others. *Id.* at 928.

Depending on how the *en banc* panel decides the case, some, or all of the decision could remain intact.

Impact of the Roommates Decision

The Ninth Circuit's decision in *Roommates*, raises questions about the extent of Section 230 immunity websites like Roommates can expect when publishing third party content. What is clear is that the Ninth Circuit's decision conflicts with its prior decision as well as the decisions of other courts and the purposes for which Section 230 was enacted.

The Ninth Circuit held that Roommates was an information content provider with respect to information contained in its users' profiles because Roommates drafted the forms and answer choices from which its members could select to indicate potentially discriminatory preferences on their respective profiles. In *Carafano*, the use of similar pre-prepared answers was not deemed content provided by the website operator because "the selection of content was left exclusively to the user" and because no profile had any content "until a user actively creates it." The Ninth Circuit's decision in *Roommates* essentially overrules this portion of its decision in *Carafano*. Under the Ninth Circuit's current rationale, if a website drafts pre-prepared answer selections, it *is* the content provider of them and can be held liable if a third party's selection of any pre-prepared answer is deemed defamatory or otherwise unlawful.

However, the Ninth Circuit went a step further, indicating that anytime a website actively encourages or solicits "tortious" and/or "unlawful communications" by third parties, that website could be held liable. On the one hand, websites that encourage unlawful communications, such as the website at issue in *Teva*, could be held liable for that encouragement and the decision in *Teva* itself is already precedent on point that supports this. However, websites like Craigslist could also be subject to liability under the Ninth Circuit's rationale because such websites provide a forum for potentially unlawful communications and provide prompts to facilitate such communications. If merely providing a forum for and facilitating third party communications through prompts is deemed soliciting, then websites like Craigslist could be at risk for its members' communications if those communications are unlawful.

In its recent ruling in *Craigslist*, the Seventh Circuit did not address the Ninth Circuit's decision in *Roommates*. The fact that it applied Section 230(c)(1) protection to conduct that clearly violated the Fair Housing Act, however, suggests that the Seventh Circuit at least is not willing to adopt the "illegal encouragement" notion.

Finally, the Ninth Circuit found that Roommates' filtering of the information provided by its users based on the users' stated preferences amounted to an "additional layer of information that [the website was] responsible at least in part for creating or developing." With respect to this part of the decision, one commentator has noted that "this opinion can be read that any time a website reconstructs user data through its search engine, it loses 230 for that reconstruction. Read that way, this opinion could signal that Google and other search engines have no 230 protection for their search results." *See Technology & Marketing Law Blog*, Eric Goldman, available at http://blog.ericgoldman.org/archives/2007/05/ninth_circuit_s.htm.

Hopefully, the Ninth Circuit's en banc hearing will provide some badly needed clarity. If not, to continue with the "builder" analogy, the walls of 230 immunity may come tumbling down.

Another commentator noted that "MySpace.com attempts to restrict the ability to view underage profiles by

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preventing older users from accessing them. In effect, the website filters the content based on answers provided during registration to ensure that only minors of certain ages can view other profiles from that age group. [Applying the Ninth Circuit's holding in Roommates to the website's conduct] would almost certainly . . . bump MySpace out from under the protection of section 230." *See Ninth Circuit Decision Creates Liability Risk for Social Networking Sites*, Kevin Fayle available at http://technology.findlaw.com/articles/00006/010840.html.

A Spectrum Emerges

While the landscape is a little muddled as a result of the Ninth Circuit's decision in *Roommates*, there is something of a spectrum that emerges from the chaos. On one end of the spectrum is the interactive computer service provider who truly does nothing more than provide a forum for third party content. It is difficult to imagine how Section 230 does not apply in that scenario. On the other end of the spectrum is the interactive computer service provider who actively supplies content – for example, by responding to a blog posting. It's difficult to see how Section 230 could possibly apply to that situation.

Somewhere in the middle come a number of situations. For example, what if the interactive computer provider edits a posting? Clearly, the editing in itself does not waive Section 230 protection, but what if the editing process changes the meaning of the content? What if the posting, as submitted, is not defamatory, but becomes so as a result of a sloppy editing job? It doesn't seem fair to impose liability on the poster, and it would seem that a pretty strong argument could be made that the editor is the content provider in that setting.

And what to make of the situation involving prompts and pre-prepared responses? *Roommates* involved a set of specific prompts and pre-prepared responses. It is hard to imagine that courts would deny Section 230 immunity to interactive computer providers who merely suggest a topic, even if the ensuing discussion results in actionable statements. In a sense, the prompts and pre-prepared answers in *Roommates* are like bricks. The poster who selects the particular mix of prompts and pre-prepared answers to frame a posting is like a builder. He selects the materials to build the house. The courts that have applied Section 230 immunity in this setting have determined that the builder is the only content provider. In these cases, the brick supplier is not liable for the finished product. In *Roommates*, however, the Ninth Circuit determined that the brick supplier, as well as the builder, is a content provider. Apparently, the more specific the prompt, the bigger the risk that Section 230 will not apply.

Finally, *Roommates* and *Teva* involved illegal conduct, or at least an "invitation" to engage in illegal conduct. It is not clear the extent to which this factor was determinative in *Roommates*, and an open question is whether *Roommates* would apply to prompts and pre-prepared responses if those responses did not solicit potentially illegal speech.

As a result of the Ninth Circuit's decision in *Roommates*, websites like Roommates and other similar sites may shy away from attempting to facilitate the expression of their members by providing prompts and/or drafting any forms or multiple choice type answers that their respective users can select from. Additionally, websites may also shy away from attempting to structure or categorize any information provided by a third party user. Unless the decision is reversed, there will undoubtedly be additional lawsuits filed seeking to hold websites liable for content provided by a third party.

Hopefully, the Ninth Circuit's *en banc* hearing will provide some badly needed clarity. If not, to continue with the "builder" analogy, the walls of 230 immunity may come tumbling down.

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Ethics Corner: Ethical Issues In Representing Kentucky News Media Outlets

By Jon L. Fleischaker and Jeremy S. Rogers

In whatever area of law one practices, ethical questions constantly arise, and it's important to give ethics questions the consideration that they deserve. As lawyers, we look to the Rules of Professional Conduct as the starting point for analyzing ethics questions, and we often take the opportunity to mull over the rules and their commentary as well as to consult with our colleagues.

But what happens when there simply is not time to reflect? What happens when your client is a news media organization that needs advice right now because it goes on the air or goes to press in an hour? We represent a variety of media outlets, and this is sometimes the situation in which we find ourselves. News is a fast-paced business, and those who give legal advice to news media clients must keep up — both with the legal issues affecting news media and also with the legal ethics issues that govern our profession.

In addition to numerous print, broadcast and Internet companies we represent, we are also general counsel to the Kentucky Press Association and operate a "hotline" for that organization. Any of the KPA's members (virtually every newspaper in the state) can call the hotline for legal advice about any of the myriad legal issues that arise in the daily operation of a newspaper. A small representative list of the kind of questions we regularly field from our clients would include:

- Could you take a look at this news story or letter to the editor and let us know our exposure for defamation or invasion of privacy?
- What can we do about the denial of our Open Records Act request?
- A public agency wants to close its meeting to the public. What can we do?
- What are the requirements for publishing a particular legal notice advertisement?
- Our reporter has been subpoenaed to testify about a case upon which she has reported, what should we do?

Ethical issues can crop up in any of these questions, depending upon the underlying factual circumstances. While each of these questions appears to deal with legal issues affecting the news outlet itself, one of the first things we have to do is to determine whether we're speaking as counsel for the news organization or as a source for a news story. While the two are not always mutually exclusive, it helps to know whether you are giving your client legal advice or whether you are formulating a quote for tonight's broadcast or tomorrow's front page.

Am I Your Lawyer or A News Source?

The closest the Rules of Professional Conduct (Kentucky's Supreme Court has adopted the Kentucky Rules of Professional Conduct, which are patterned after the American Bar Association's Model Rules of Professional Conduct. *See* Ky. Sup. Ct. Rule 3.130.) come to addressing this issue is Rule 1.2, which deals with the 'scope of representation,'

> (a) A lawyer shall abide by a client's decision concerning the objectives of representation, … and shall consult with the client as to the means by which they are to be pursued. …

The bottom line is that you have to talk to your client and agree upon what the client should expect of you. Just as with any client, defining the scope of the representation is necessary before you can begin to comply with your other ethical duties.

Consider this hypothetical: A newspaper reporter calls you and says, "Our city council went into closed session last night to discuss changes to a smoking ordinance; can they do that in closed session?" After you and your client determine the scope of representation, the ultimate response to the reporter's question might vary significantly, depending in part upon the ethical implications, as shown in the following three examples.

1. After some follow-up questions, you determine that the reporter is simply calling to get a quote from a member of the bar who regularly practices Open Meetings Act cases for use in a story about the closed session. This is not about you being *the* lawyer for the newspaper; this is about you being *a* lawyer whom the reporter knows. You are the source who happens to be a lawyer. Here, the touchstone of your ethical duties is simply that of 'truthfulness in statements to others' under Rule 4.1.

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Your answer to the reporter's question might be something worthy of a sound bite, perhaps a statement about which of the exceptions to the open meetings law could arguably apply.

2. What if the hypothetical reporter was excluded from the meeting and is calling to discuss whether the newspaper should pursue a complaint against the city council? This is a pure attorney-client situation, and the ethical landscape is different. Ethically, you are required to explain the matter to the extent reasonably necessary to permit the client to make an informed decision about whether to pursue the complaint. *See* Rule 1.4(b). You also need to determine whether the newspaper or the reporter is your client (almost always it's the newspaper). *See* Rule 1.13 (discussing organization as client). Also, you are bound by the rule of confidentiality (Rule 1.6) and the rules related to conflicts of interest (Rules 1.7 - 1.11). In addition, in your capacity as advisor of the client with respect to whether to pursue a complaint against the city council, you might also take certain political or economic factors into consideration (Rule 2.1). With these ethical considerations in the background, your response to the reporter's question will likely be much more complicated and involved than a simple quote for a news story.

3. There is also a third, hybrid, scenario continuing under our open meetings hypothetical. What if the newspaper has decided to pursue an open meetings complaint, and the reporter needs a quote from the newspaper's attorney for the story? Here, there is an attorney-client relationship, but your audience is not your client; your audience is your client's readership. Contrary to the confidentiality provisions of Rule 1.6, you do not expect the full content of your communication with the reporter to be confidential in this scenario. At the same time, you must remember that the newspaper, not just the reporter, is your client. *See* Rule 1.13. In answering the reporter's question in this scenario, you are not likely to be wearing just your "counselor" hat but also your hat as a zealous advocate on behalf of your client. *See, e.g.,* Rule 3.1. Thus, your response to the reporter's question may be similar to the response in the first scenario, but with a bit more advocacy. Instead of giving an objective description of the open meetings law and which exceptions to open meetings could arguably apply, you might give all the reasons why the meeting should have been open and why the newspaper's position is that the city council violated the open meetings law.

Trial Publicity

One of the more perplexing of the Rules of Professional Conduct presents special considerations for the lawyer representing a news media client. That is the rule on trial publicity, Rule 3.6, which deals with the tension between fair trial and free press. Model Rule 3.6 provides,

> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

News media clients are in the business of disseminating information by means of public communication. Just as with determining whether you are the lawyer or the news source, in the course of representing a news media client in litigation, it is important to have an idea as to when your client intends to share your advice or other statements with its readers or viewers.

Turning back to our open meeting question hypothetical, Model Rule 3.6 would only apply to the third scenario where the lawyer is publicly commenting as counsel for the newspaper on an ongoing matter involving the newspaper. This is because, as Comment 3 to Model Rule 3.6 recognizes, "the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small," as such, Model Rule 3.6 "applies only to lawyers who are, or who have been involved in the investigation or litigation of a case, and their associates."

In Kentucky, however, the issue is further complicated by the fact that, unlike Model Rule 3.6, the scope of Kentucky's Rule 3.6 is not limited to lawyers who have participated in the investigation or litigation of a matter. Kentucky's Rule 3.6 provides:

> (a) A lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a

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> substantial likelihood of materially prejudicing an adjudicative proceeding.

Kentucky's Rule 3.6 also incorporates the language from Comment 5 of the Model Rule which lists numerous kinds of statements that will ordinarily have a prejudicial effect. The list is expansive, and includes exactly the kinds of things that most reporters would want to know:

> (b) A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:
>
> (1) The character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
>
> (2) In a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
>
> (3) The performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
>
> (4) Any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
>
> (5) Information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or
>
> (6) The fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

Ky. Sup. Ct. Rule 3.130(3.6(b)).

Unlike the Model Rule, Kentucky's Rule 3.6 might also apply to the first scenario of our open meetings hypothetical where the lawyer is commenting as a news source without actually being directly involved by representing a litigant or potential litigant in the matter.

Despite their differences in scope, Model Rule 3.6 and Kentucky's Rule 3.6 both create an essentially subjective approach to balancing the right to a fair trial and the right of free expression that can only be addressed on an *ad hoc* basis.

Does Negative Publicity Create a Conflict of Interest?

Aside from publicity's potential effect on an opposing litigant's interests, a lawyer representing news media clients must also consider that publicity can have significant effects on the lawyer's other clients. Does advising a news media client about a story or editorial concerning another of your clients create a conflict of interest?

The critical question to ask is whether advising the newspaper in the situation would constitute a concurrent conflict of interest, a representation "directly adverse" to the other client. Rule 1.7(a) (emphasis added). The general rule on conflicts of interest is:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client.

Rule 1.7(a). In addition, there is a concurrent conflict where representation of the client may be materially limited by the lawyer's responsibilities to another client. *Id.* This kind of determination, however, is necessarily specific to the clients and to the situation. The relationship with most clients could be adversely affected upon finding out that their lawyer helped a news media organization create negative publicity about the client. More than likely, the client is not going to consent to its lawyer doing so. At the same time, the news media client may not want the other client to know in advance that a particular story is coming out in tonight's broadcast or tomorrow's edition.

So what can you do when you are given a news story that goes to press or goes on the air in a matter of hours or less? There is no time to undertake the kind of full-scale conflict of

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interest check that most law firms do. You may not even know whether other lawyers in your firm represent the subject of a news story. Model Rule 1.7 contains 35 separate comments that attempt to illustrate the complexities of the rule against conflicts of interest, but none of them addresses this situation. Comment 10 to Kentucky's Rule 1.7 perhaps best sums up that, "Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. … The question is often one of proximity and degree." To put it simply, in this situation you just have to do the best you can under the circumstances.

Take the following hypothetical for example. A television news director calls you at four o'clock in the afternoon and asks you to review a script for a story in tonight's broadcast. The story is about a whistleblower who has come out with serious allegations of kickbacks being paid by Corporation X to the government in exchange for lucrative contracts. Your law firm represents Corporation X on various matters but not on the whistleblower case and not with respect to the government contracts.

It may be reasonable to determine under Rule 1.7(a) that the advice to the news media client simply won't be directly adverse to the existing client. With this, and the scope of representation under Rule 1.2 in mind, the best practice in this scenario may be to say to the news media client something like, "It does not appear that X is adverse to you here, but I need you to understand that my firm also represents X."

But what about indirect conflicts under Rule 1.7(a)(2)? The so-called "material limitation" conflict is much more difficult to assess. Rule 1.7(a)(2) provides that a concurrent conflict of interest also includes the situation where,

> [T]here is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

This kind of indirect conflict is inherently subjective and depends upon the nature of the situation, the outlook of the clients involved, and upon the lawyer and law firm. Comment 8 to Rule 1.7 provides that "[t]he mere possibility of subsequent harm does not itself require disclosure and consent." Instead, Comment 8 points out that "[t]he critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client." Thus, with our hypothetical in mind, the remote possibility that Corporation X might assert a defamation or similar claim against the television station does not necessarily create a material limitation. Rather, the lawyer is left to make a judgment as to how remote that possibility really is. This, however, resembles an exercise in circular logic because a primary job of the lawyer advising the television station in this situation is to minimize the television's exposure to any such claim.

Just as likely, the lawyer advising the television station does not also directly represent Corporation X, but another lawyer in the firm does. If you believe that there may be a direct or indirect conflict, Rule 1.7 provides that you can still undertake the representation if you believe that the representation won't affect the client relationships and each client consents, but there is no time to reach the other lawyers in your firm who represent Corporation X or for them to reach their contacts at Corporation X. Nor is there time to fully assess whether there is an indirect imputed conflict as described in Rule 1.10. In this respect, the best practice may be to contact your law partners who represent Corporation X and let them know what has happened. If necessary, your firm can erect a "Chinese wall" to segregate any pertinent information relating to the representation of Corporation X and the news media client.

Waiving Rule 4.2

Another unique ethical aspect of representing news media clients arises under Rule 4.2:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Ordinarily, lawyers will very rarely consent to permit opposing counsel to discuss a case with their clients. In the news media context, however, this rule is often waived or ignored

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because news media clients need to be able to speak with the adverse lawyers when reporting on the proceedings, and those lawyers want to and do communicate directly with the client.

A prime example occurred recently where our news media client was awarded a partial summary judgment in a libel case. The client's reporter, who was doing a story on the summary judgment, wanted to obtain a quote from the plaintiff's attorney. We, the lawyers, did not know about it until we got a call from a perplexed plaintiff's lawyer informing us that our client has tried to speak with him and that, under Rule 4.2, he could not do so. We promptly consented to the communication. Despite the waiver, the lawyer still told the reporter "no comment."

Adverse News Media Clients

News media clients do not often take positions adverse to each other, but it does happen, most often where newspaper legal notice advertisements are concerned.

The law in Kentucky requires government agencies to publish such items as Master Commissioner sales, proposed ordinances, local and state agency budgets, and a variety of other matters. Specifically, state law mandates that such legal notices be advertised in a newspaper with particular qualifications, for example, the highest *bona fide* circulation in the affected county or city. In most situations, it is obvious which newspaper is the so-called newspaper of record for a particular area, but what happens when it is not clear? For example, when two newspapers within the same county are very competitive in terms of circulation. Legal notice advertising, just like any other form of advertising, generates revenue for a newspaper. So, it's no surprise that, when a legal notice ad is placed with the newspaper on the other side of the county, disputes arise as between the newspapers.

In legal ethics terms, this is an easy one. Because we represent all of the newspapers by virtue of the KPA, we simply cannot take sides, and that is made clear in Rule 1.7.

Another very rare conflict arises in the case of plagiarism. With today's electronic access to most newspapers' and other media outlets' content, plagiarism of news content is almost certain to be exposed. But what about this hypothetical, which is based upon an actual situation?

Newspaper A's intern reporter from the local community college covers a city council meeting. She copies and pastes some content about the prior council meeting from Newspaper B's website and inserts it for background information into her own story, either not realizing that she wasn't supposed to do that or not remembering to take it out before going to press. Newspaper B's editor finds out about the plagiarism and alerts the editor of Newspaper A. Both newspapers are KPA members. The editor from Newspaper B calls us to inquire about the newspaper's legal options. What can we say? Not much. This is a clear Rule 1.7 conflict that most likely cannot be waived.

Is it a different situation if Newspaper A's editor calls and asks us to speak with Newspaper B — let them know that it was an intern's mistake, that it won't happen again, that Newspaper A is sorry and wants to make it up somehow? After all, wouldn't that benefit Newspaper B too? This kind of intermediary role among clients is governed by Kentucky's Rule 2.2 (Model Rule 2.2 has been deleted), which provides;

> (a) A lawyer may only act as intermediary between clients if:
>
> (1) The lawyer consults with each client concerning the implications of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's consent to the common representation;
>
> (2) The lawyer reasonably believes that the matter can be resolved on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
>
> (3) The lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

The reality is that Newspaper B is not likely to file suit against Newspaper A for copyright infringement or the like. It almost certainly wouldn't make business sense. Couldn't it be the job of the lawyer who represents both newspapers to set things straight? Maybe. This may be a close call, and ultimately it can be the clients' call. Consider, for example, Comment 4 to Kentucky's Rule 2.2, which cautions,

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> In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

The stakes can be high if the intermediation fails, and the intermediary lawyer will have to withdraw as to both parties. Thankfully, this situation is exceedingly rare.

On the other hand, a very common ethical consideration arises in the area of "scooping." Every reporter wants to break the story, to scoop the other news outlet. This presents a much more nuanced set of ethical issues.

Consider this hypothetical. Newspaper A is preparing a story alleging suspicious dealings between some in the local city government and a local building contractor. Newspaper A wants its lawyer to review the story and to assess the story's legal exposure. We review the story and determine that there are too many holes to go to press and some more fact checking must be undertaken. Meanwhile, the local competition, Newspaper B, has a similar story for review. Unlike Newspaper A, Newspaper B has corroborated all the necessary information and is ready to go to press. What can we tell Newspaper A?

This situation does not appear to be a conflict of interest in the Rule 1.7 sense because Newspaper A and Newspaper B do not have legal positions adverse to each other; their legal positions are more appropriately viewed as adverse to the city government and the local building contractor whose kickback scheme they are exposing. The newspapers in this hypothetical are more accurately considered "competing economic enterprises" as set out in Comment 6 to Rule 1.7,

On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

See also Comment 2 to Kentucky's Rule 1.7.

Thus, it is not necessarily a conflict of interest to advise both Newspaper A and Newspaper B about their similar stories. However, pursuant to Rule 1.6, the lawyer must still keep the confidentiality of information relating to the representation of the two. Therefore, it would likely be inappropriate to call Newspaper A to let them know that Newspaper B has already confirmed the information or even to disclose to the newspapers that they are working on the same story. But can you call Newspaper A back and just let them know, for unspecified reasons, that it is now OK to proceed with publishing the story?

What if the hypothetical situation were inverted and we learn from advising Newspaper A that the story Newspaper B is proposing to publish contains false information? Can we, or must we, tell Newspaper B? Must we obtain Newspaper A's consent before letting Newspaper B know that the story is false? This is much more difficult question. While Rule 1.6 safeguards the confidentiality of information related to the representation of a client, it does not necessarily prohibit sharing information about others that may be unrelated to the representation. Similarly, Rule 1.8(b) prohibits a lawyer from using information relating to representation of a client to the disadvantage of the client. The best practice in this situation may be to call Newspaper A and, without disclosing that Newspaper B is publishing a similar story or otherwise sharing how you obtained the information, let Newspaper A know that you have learned the information is false.

While differences in industry, factual circumstances, and the scope of representation often vary the nuances involved in ethical questions, ethical issues will constantly arise no matter in what area of the law one practices. Representing news media clients can make the issues more difficult, unique and interesting. This is especially true where deadlines are at play. But when deadlines loom and there is little time to reflect on ethical dilemmas, the simple ethical hallmark may be to do the best you can under the circumstances.

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MLRC Calendar

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May 15-16, 2008
Legal Frontiers in Digital Media
2008 MLRC/Stanford Digital Media Conference
Stanford University, Stanford, CA

September 17-19, 2008
NAA/NAB/MLRC Media Law Conference
Chantilly, VA

November 12, 2008
MLRC ANNUAL DINNER
New York City

November 13, 2008
MLRC Defense Counsel Section Annual Meeting and Lunch

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