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LDRC Libel Defense Resource Center

LIBELLETTER

May 1996

44 LIQUORMART V. RHODE ISLAND: THE SUPREME COURT UPS THE ANTE FOR REGULATION OF COMMERCIAL SPEECH

By P. Cameron DeVore

On May 13, 1996, the Supreme Court announced its decision in 44 Liquormart, Inc. v. Rhode Island, ___ U.S. ___, 1996 WL 241709, unanimously reversing the 1st Circuit and holding a Rhode Island ban on advertising the price of alcohol beverages to be impermissible under the First Amendment.

"Unanimously" somewhat mischaracterizes the Court's decision, which was truly unanimous only in reversing the 1st Circuit's approval of the Rhode Island ban, and also the circuit court's assertion that the 21st Amendment legitimized such regulation.

However, the unanimous judgment, as did the unanimous result in 1995 in Rubin, highlighted the most significant aspect of 44 Liquormart: the Supreme Court not only agreed that commercial speech merits First Amendment protection, it once again enhanced that protection and collected additional justices to join in the enhancement. Indeed, there were five justices who would -- at least when reviewing a total ban on commercial speech -- bypass or overrule the Central Hudson four-part test as being inadequate protection for free speech:

* Justice Stevens' lengthy opinion largely restated the view expressed in his Rubin concurrence that unless commercial speech regulations target false, misleading or coercive advertising, or require disclosure of information

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PRIOR RESTRAINT HOUMA, LA STYLE

This story, of a prior restraint imposed in Houma, Louisiana, on a local television station, cries out for a writer who can evoke a languid, old-boy-style image of justice. Here in the *LDRC LibelLetter*, we can only do our best to give you an historical overview of how the local DA, with the acquiescence of local judges, local elected officials, has managed for almost a year to prevent the station from airing an extraordinary videotape the station obtained through an FOIA request to the local sheriff's office.

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WIRE SERVICE DEFENSE APPLIED TO TV AFFILIATE

In a decision filed on April 26, 1996, a United States District Court for the District of Arizona held that a network affiliate could rely upon the "wire service defense" against libel and privacy claims arising out of a network news program. *Medical Laboratory Consultants v. American Broadcasting Companies, Inc.*, CIV-95-2494-PHX-ROS (D.Ariz. April 26, 1996)

The suit was brought by Medical Laboratory Consultants, a corporation that operated a lab engaged in pap smear testing, and an individual co-owner, John Devaraj, and his wife. Mr. Devaraj was interviewed by ABC personnel posing as persons interested in setting up their own laboratory. The conversation was taped by a hidden camera and excerpts used in the broadcast report on ABC's prime time magazine program, *Prime Time Live*. ABC also sent pre-tested slides to the plaintiff-corporation for testing and

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EUROPEAN COURT OF HUMAN RIGHTS HOLDS IN FAVOR OF REPORTER'S PRIVILEGE

The European Court of Human Rights of the Council of Europe has held that requiring a reporter to disclose his confidential sources is not compatible with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") unless justified by "overriding requirement in the public interest." *In the case of Goodwin v. TheUnitedKingdom* (16/1994/463/544) (March 27, 1996)

The ruling came on a petition of an English journalist, and the 11-7 decision held that an English court order requiring a journalist to reveal to a corporation the identity of his source for certain confidential corporate documents violated Article 10.

The European Court found England liable to the journalist for damages arising from the anxiety caused by the proceedings and the overhanging contempt sanction, albeit none were assessed, and for certain of his costs in the proceeding. This decision is the first to establish that disclosure of reporter sources is protected by the right of free expression found in the Convention, and that damages can be assessed for the violation of that right. Twenty-three European countries are bound by virtue of treaties to implement the decision of this court within their own national law; to conform their local law to meet its requirements. Thus, this decision should result in local law throughout the bound nations of Europe to protect journalists from having to disclose their confidential sources in all but the most extraordinary circumstances.

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Cases Worth A Note:

1. 6th Circuit Denies Rehearing In Business Week

The Procter & Gamble Company v. Bankers Trust Company/McGraw-Hill Com-panies, Inc., No. 95-4078 (6th Cir. May 8, 1996)

The Sixth Circuit has denied the petition of Bankers Trust seeking rehearing en banc of the panel decision on the injunction issued against Business Week magazine, barring it from publishing material contained from the sealed discovery files of the underlying suit between Procter & Gamble and Bankers Trust. (*See LDRC LibelLetter*, March 1996 at p. 1 re panel decision, and April 1996 at p. 9 re petition for rehearing/rehearing en banc) The order of the court stated that no judge of the Circuit requested a vote on the issue.

In addition, the original panel denied the request for rehearing, concluding that the issues raised in the petition were fully considered upon the original submission and decision. Judge Brown dissented for the reasons stated in his dissenting opinion.

Bankers Trust's motion raised three questions for rehearing: (1) whether the panel erred in questioning the propriety of the underlying stipulated protective order; (2) whether the dispute was moot; (3) whether a district court is, in Bankers Trust's words, "powerless" to issue a TRO barring publication in order to obtain time for judicial review.

2. Supreme Court Update: *Auvil* Denied Cert.

The United States Supreme Court has denied certiorari in *Auvil v. CBS "60 Minutes,"* letting stand a district court summary judgment grant and subsequent Ninth Circuit affirmance in favor of CBS. *Auvil v. CBS "60 Minutes,"* 64 U.S.L.W. 3722 (4/30/96, No. 95-1372). Plaintiffs, Washington state apple growers, had alleged claims of product disparagement arising out of a 1989 "60 Minutes" report which dealt with daminozide (Alar), a chemical growth regulator sprayed on apples. The district court ruled that the plaintiffs had failed to raise a genuine issue of material fact regarding the falsity of the statements in the report.

3. An Apology and Even Some Cash for Libel Plaintiff in England

The British press reported that Stephanie Powers, the American actress, won not only an in-court apology from *The Sun*, but as much as £ 70,000 in damages and £ 30,000 in legal costs in an out-of-court settlement of her libel claim. Even by U.S. standards these are significant sums. The Sun had reported that she had sexually harassed, assaulted, and threatened the life of a former male employee, and was an alcoholic.

4. Newsmen As Public Figures

The San Antonio Express News v. Dracos, Appeal No. 04-95-00755-CV (Ct.App.4th Dist. Texas April 17, 1996)

Coming to what may seem to be an obvious conclusion, the Texas Fourth District Appeals Court ruled that a former television journalist and commentator was a public figure in a libel suit based upon statements made about the termination of his employment with the local station. The opinion, however, has an extensive listing of cases in which journalists of various types and stripes have been held to be public figures, a good resource for future litigants.

The court also held that the statements in the local newspaper, commenting on the plaintiff's resignation -- that he had quit, that he had departed "just like that," that the news director and assistant news director did not know why he had quit, and that he had "done that kind of thing before" -- were not defamatory, were substantially true and were not made with actual malice.

5. *Matter of Winner International Corporation* (NYCo.) (N.Y.L.J, May 9, 1996 at p. 30)

Second Circuit Reporters Privilege Decision Already Cited

The decision in *In re National Broadcasting Company Co., Inc.*, 79 F.3d 346, 24 Media L. Rep. 1599 (2d Cir.4/4/96) (See *LDRC LibelLetter*, April 1996 at p. 1) has already been cited in support of quashing a third party subpoena against a news organization. The court found that the outtakes of an interview with a party to a civil litigation would not meet a critical aspect of the test set out in the NBC decision -- that is that to meet the "critical or necessary" prong of the three part test set out in the New York State Shield Law (Civil Rights Law Section 79-h(c)) the party seeking unpublished news materials from the third party news media must show that his case "virtually rises or fall with the admission or exclusion of the proffered evidence."

Also In This Issue . . .

New York Courts Find Talk Show Format Context For Opinion and First Amendment Trumps Tortious Interference

By Elizabeth A. McNamara and Edward J. Klaris

Three separate New York State courts have dismissed almost identical complaints asserted by actress/singer Melba Moore's former husband and manager, Charles Huggins, against media defendants, ruling that, where the broadcast involves matters of public concern, media defendants are immune under the First Amendment from suits for tortious interference with contractual relations.

The cases, Huggins v. Maury Povich, Index No. 131164/94 (Sup. Ct. N.Y. Co. Apr. 10, 1996), Huggins v. NBC, Inc., Index No. 119272/95 (Sup. Ct. N.Y. Co. Feb. 5, 1996)(See *LibelLetter*, February 1996, p.1) and Huggins v. Jane Whitney, Index No. 127882/94 (Sup. Ct. N.Y. Co. Aug. 7, 1995) (See LDRC *LibelLetter* "Tortious Interference with Contract" November 1995 at p.17), arose out of the stormy and highly litigious divorce between Huggins and Moore in which Huggins originally obtained a divorce in Pennsylvania, but Moore succeeded in having it vacated by New York Supreme Court Justice Elliott Wilk on the ground that the Pennsylvania court lacked jurisdiction over the marriage. Ultimately, the cases were resolved by settlement agreement, which significantly contained a confidentiality provision, prohibiting either party from discussing the settlement or otherwise publicly criticizing, demeaning, maligning or commenting disparagingly about the other. The confidentiality provision was enforceable by injunction.

Notwithstanding the confidentiality provision, Moore embarked on a media campaign against Huggins. She appeared on numerous talk shows and gave interviews to a number of television news magazines, local tabloids and national publications. In each interview, Moore claimed that Huggins had obtained a "fraudulent, secret divorce," had "blackballed" her in the entertainment industry and had improperly managed her assets and career, leaving her broke and on welfare.

Huggins moved before Justice Wilk for a temporary injunction restraining Moore from further media contacts that would violate the confidentiality provision. The injunctive relief was granted and Moore was directed to refrain from communicating with the press concerning Huggins or their marriage. At about the same time, Huggins commenced a defamation action against Moore and the Daily News.

Despite the confidentiality agreement, the restraining order and the defamation suit, Moore continued her media campaign. She appeared on the "Jane Whitney Show," a television talk show, in a segment entitled "Scammed by Her Man," charging that her husband was responsible for her current financial straits. However, once the producers of the "Jane Whitney Show" were informed of the confidentiality agreement they attempted to pull the program and the commercial advertising off the air. This effort was successful in most of the "Jane Whitney Show" markets, although a few affiliates still broadcast the commercial and/or the show. Nonetheless, Huggins brought another defamation action against the show and appended claims for tortious interference with contractual relations.

Next, Moore appeared on "The Maury Povich Show." On December 18, 1993, the broadcast entitled "Riches to Rags via Divorce" was taped, and on December 20, 1993, before the show was broadcast, Povich and his producers were put on notice as to the non-disclosure provision of the Moore and Huggins agreement. Unlike the "Jane Whitney Show," Povich and his producers proceeded to broadcast the "Rags to Riches" segment on January 5, 1994. Huggins brought suit for libel and tortious interference with contract in November 1994.

Finally, Moore appeared on Live at Five with Sue Simmons on August 8, 1994 and reiterated many of the same allegedly defamatory statements complained of in the Povich and Jane Whitney actions. Huggins therefore brought an almost identical action against NBC in August 1995, asserting defamation and interference with contractual relations claims.

Each of the broadcast defendants successfully moved to dismiss the actions.[1]

The Libel Claims: Talk Shows Forum for Pure Opinion

In determining that all of Moore's statements were opinions, not verifiable facts, each court analyzed the leading cases that set forth the parameters of constitutionally protected opinion under New York and federal law. But, more importantly, the courts looked to Behr v. Weber, 172 A.D.2d 441, 568 N.Y.S.2d 948 (1st Dep't 1991) as the touchstone for concluding that the talk show format is premised on the exchange of opinions and therefore what is said on the shows is constitutionally protected.

The series of Huggins decisions significantly extend Behr, providing broad protection to the talk show format. In Behr, a Long Island juvenile furniture company, which extensively advertised its slogan "We Deliver When You Do," alleged that Karen Weber, a Long Island housewife and consumer activist, defamed the plaintiffs by displaying a picket sign on a "Donohue" program devoted to the topic of consumer advocacy, that read "Behr's Does Not Deliver," and by complaining about plaintiff's poor service and incomplete delivery of a furniture order. While Weber's contentions were factually based -- and presumably challenged by the plaintiff -- the First Department concluded that the

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New York Courts Find Talk Show Format Forum For Pure Opinion and First Amendment Trumps Tortious Interference

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complaint was properly dismissed against the media defendants (including the "Donohue" show). The court's finding was buoyed by the fact that talk shows, such as "Donohue," are "unrehearsed and unscripted program[s] which generally focus[] upon controversial current topics of public interest and debate." Id. at 950.

Each of the Huggins decisions relied on and cited this language, finding that the "Maury Povich Show," the "Jane Whitney Show" and "Live at Five" are all fora in which current topics of public interest and debate are offered in an unscripted, unrehearsed manner and, therefore, reasonable viewers would conclude that what is said on such talk shows is mere opinion and not statements of fact.

For example, Justice Beverly Cohen in Huggins v. Povich found that "Moore's comments were made as part of the give and take of a television talk show," and that "the host and other guests repeatedly pointed out, and Moore confirmed, that her statements were her own personal views on the subject of her bitter divorce and its financial aftermath, and that her ex-husband denies her 'charges' or 'allegations'." The court concluded that all the statements at issue were opinion and noted that "the Povich show generally focuses upon current controversial topics of interest and debate by presenting invited guests with relevant backgrounds to share their experiences, observations and opinions with members of the studio audience."

The NBC court took this reasoning even a step further, finding that merely a one-on-one interview with Sue Simmons – rather than the typical, multi-guest and audience-participation format – created a context which signalled that opinions alone were being expressed. The court found that "[t]he interview with Ms. Moore was an unscripted, unrehearsed live interview at the close of the show. Its loose structure and conversational tone signalled to the viewers that they were hearing Ms. Moore's own beliefs and perspectives."

The Tortious Interference Claims

The decisions' collective dismissal of the tortious interference claims is perhaps even more significant in the wake of CBS's decision to pull the interview of Jeffrey Wigand on "60 Minutes" because of its concern that Brown & Williamson might bring a tortious interference claim. Each court appeared to have no trouble concluding that, given the public interest in the programs, the First Amendment barred any such claim.

In the Povich decision, the court acknowledged that "there was a valid contract, the divorce settlement agreement, that defendants had knowledge of the agreement and the interview with Moore, which was publicly aired, violated the confidentiality provisions of the agreement." However the court also noted that, to determine whether plaintiff has made out a prima facie case, "[t]he factors to be considered include the motive of the person who interferes and the societal interest in protecting the freedom of action of the person who interferes."

As to that, the court agreed with defendants' argument that the claim was barred by the First Amendment:

> [A] broadcaster whose motive and conduct is intended to foster public awareness or debate cannot be found to have engaged in the wrongful or improper conduct required to sustain a claim for tortious interference with contractual relations. Here the broadcaster's first amendment right to broadcast an issue of public importance, its lack of any motive to harm the plaintiff, and the obvious societal interest in encouraging freedom of the press, negate essential elements of the tort.

In addition, the Povich court not surprisingly found that Moore needed no inducement from defendants to breach the confidentiality agreement, an essential element of the claim: "She initiated an all-out media blitz, including local and international newspapers, radio and television with the assistance of a press agent." Thus, the court dismissed the tortious interference claim.

The NBC and Jane Whitney courts came to the same conclusion. With extremely definitive language, for example, the Jane Whitney court held that "[d]efendants' act of asking Ms. Moore to discuss allegedly confidential information on The Jane Whitney Show is immune under the First Amendment from a tortious interference claim."

With the relative paucity of cases in this area, this trio of cases taken together should provide significant precedents for establishing a strong First Amendment defense to tortious interference claims.

Endnote

1 The Daily News completed discovery before moving for summary judgment and that motion is still pending.

Elizabeth A. McNamara and Edward J. Klaris are with the DCS member firm Lankenau Kovner & Kurtz in New York City.

DENTIST SETTLES SANCTIONS AWARD TO ABC

LDRC reported in the *LDRC LibelLetter* of October 1994 that ABC had been awarded $256,360 in sanctions against plaintiff-dentist-Owen Rogal arising out of his libel and false light suit against the network. *Rogal v. ABC*, 23 Med.L.Rptr. 1001 (E.D.Pa. 1994) Dr. Rogal, on appeal of the award to the Third Circuit, obtained a reversal and remand for an evidentiary hearing on the issue of sanctions, a hearing that the district court had found was unnecessary. *Rogal v. ABC*, 74 F.3d 40, 24 Med. L. Rptr. 1497 (3d Cir. 1996)

Last month, however, prior to a hearing on the issue, the plaintiff agreed to pay defendants $200,000 to settle the dispute. That sum equals the largest sanction award to a defendant ever upheld by the Third Circuit. Both parties have expressed satisfaction with the resolution.

Dr. Rogal had been featured in an ABC *20/20* report by John Stossel, also named as a defendant in the suit. The case was tried in federal district court in Philadelphia and the jury found for defendants. After the jury was excused, the district court judge asked defense counsel to review the record and present evidence in support of a sanctions motion. ABC complied, filing a motion seeking sanctions against Dr. Rogal and against his then-counsel, M. Mark Mendel. Based upon the motion and the record in the trial, the judge found ten separate subject areas in which Dr. Rogal had testified falsely.

[Mr. Mendel was found to have committed various violations of ethical and legal standards in connection with his closing arguments. He was sanctioned in the amount of $13,573, a sum that represented one-half of the fees that defendants incurred in preparing their motion for sanctions. The trial court also directed that its sanctions order be forwarded to the Disciplinary Board of the Supreme Court of Pennsylvania. Mr. Mendel did not appeal.]

The trial court denied Dr. Rogal's request for an evidentiary hearing, noting that all of the sanctionable conduct had taken place in court and that Rogal had "every opportunity to justify the numerous inconsistencies and contradictions" in his testimony. 74 F.3d at 43.

The Third Circuit panel disagreed, albeit in most polite and respectful tones toward the trial judge. The appeals panel noted that the requirements of due process in the context of sanctions are not reducible to a set formula or to rigid procedures. The party subject to sanctions is due fair notice, which the panel found Dr. Rogal had in the case, and an opportunity to be heard at a reasonable time and in a reasonable manner. Because the plaintiff in a libel and privacy case may have strategic reasons for not answering all contradictions in his testimony (although his credibility, the panel noted, is clearly an important factor at the trial) , where his efforts are focused on proving the defendants malfeasance, the panel disagreed with the trial court's view that Rogal had "every opportunity to explain" and/or justify his testimonial inconsistencies.

The Third Circuit panel concluded that in this set of circumstances -- and emphasizing that its holding was a "narrow one" -- an evidentiary hearing on sanctions would have a different focus on these issues than a trial on the merits of the substantive claims.

The panel stated, however, that the evidence cited by the trial court in its sanctions opinion was sufficient to support an award of sanctions unless rebutted by Dr. Rogal. In addition, the panel rejected Dr. Rogal's argument that amount awarded was excessive, an important ruling in a jurisdiction in which the largest previously upheld sanctions award was $200,000 and then with only $100,000 of that coming from a single plaintiff, the rest split among a number of other plaintiffs. *Project 74 Allentown Inc. v. Frost*, 143 F.R.D. 77 (Ed Pa. 1992), aff'd per curiam, 998 F.2d 1004 (3d Cir. 1993).

Also noteworthy, the panel rejected Dr. Rogal's argument that in order to sanction a plaintiff, the trial court must

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ENGLISH COURT OK'S SERVICE VIA INTERNET

The English High Court, in what may be a first in cyberspace history, authorized distribution of an injunction order and notice of a proceeding via the two Internet addresses from which the individual-defendant was known to operate. According to Mark Stephens, of DCS-member firm Stephens Innocent in London, this made new law in England.

The case arose when a source using the Internet threatened to post defamatory material about a famous personality on the Internet at two addresses. Newspapers in England had received the information as well and had declined to publish it, presumably because they found it inaccurate.

The public figure-plaintiff sought an injunction, but did not know the location of the source. It was thought that the source had posted the information from one site in Europe and one in the United States. The plaintiff sought and obtained an injunction in an ex parte proceeding, restraining publication. The court was asked for and it granted leave to serve at the Internet addresses and to dispense with other forms of service given the paucity of information available.

As Mark Stephens notes, allowing Internet service clearly has implications for the service of proceedings outside the jurisdiction, and is faster and less expensive than more traditional methods. Questions of enforcement and jurisdiction remain unresolved in such a case, however.

Interestingly, the plaintiff did not serve the proceedings on the service provider.

LDRC wants to thank Mark Stephens for bringing the facts of this event to our attention.

WIRE SERVICE DEFENSE APPLIED TO TV AFFILIATE

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reported the results. The broadcast did not identify Mr. Devaraj or Medical Lab by name.

Plaintiffs sued ABC, KTVK-TV, ABC's then-affiliate in Phoenix, Diane Sawyer and other individuals involved in the news report. Claims in the case include libel; intrusion, false light and private facts invasions of privacy; trespass; fraud; intentional and negligent infliction of emotional distress; trade libel; interference with contractual relations; and unfair business practices.

The Motions

The court had before it defendants' motions to dismiss the claims and to strike certain counts and allegations. The plaintiffs sought to have the case returned to state court where it was initially filed.

The district court ultimately dismissed all claims against KTVK-TV; the private facts, emotional distress, trade libel, unfair business practice claims against the other defendants. The judge declined to return the case to state court.

The Removal

The removal of the case came about when, after the suit was filed, the plaintiff-corporation filed a Chapter 11 bankruptcy petition. The defendants removed the case to federal court pursuant to 28 U.S.C. Section 1452(a), which provides for removal if federal jurisdiction exists under 28 U.S.C. Section 1334, which confers original, but not exclusive jurisdiction upon federal courts over civil actions related to Chapter 11 proceedings.

Plaintiffs moved to remand, or in the alternative to abstain, arguing that the inclusion of the local ABC affiliate station as a defendant defeated the only basis for jurisdiction of the federal courts of the claims. Defendants argued that the station was fraudulently joined, and that the claims against the station could be disposed of in summary motions.

The district court agreed. And it cited three considerations unique to First Amendment protections to be applied in analyzing the jurisdictional issues. One, federal courts have long been sensitive generally when First Amendment rights are at stake. Two, First Amendment considerations have special relevance to issues of diversity jurisdiction and removal, because diversity jurisdiction is designed to avoid local prejudice and guarantee vindication of federal rights. And three, recognition that under the "voluntary-involuntary" rule, a case sent back to state court could not then be removed if the nondiverse defendant station was dismissed at a later stage unless dismissal resulted from a voluntary act of the plaintiff.

The district court also rejected plaintiffs' request that it exercise discretionary authority to abstain from or remand the case, noting among its reasons that the case involves serious First Amendment issues, and not merely state law issues.

The Dismissal Motions

Converting the station's motion to dismiss to one for summary judgment, the court found uncontroverted evidence that the affiliate played no role whatsoever in the planning or reporting of the report at issue. It received the program via satellite from ABC approximately two hours before broadcast. The court applied the wire service defense, citing *Auvil v. CBS "60" Minutes*, 800 F. Supp.928, 931 (E.D.Wash. 1992), the Washington State apple growers disparagement case in which the federal district court dismissed the local CBS affiliate from the suit on similar reasoning.

[The court suggests that a private figure plaintiff in Arizona in a suit involving a matter of public concern would have to prove actual malice, as well as falsity, although the wire service defense generally is applicable even where the fault standard in the case is negligence.]

The court rejects the other claims against the station based upon an analysis that, while not as clearly articulated as one might wish, suggests that (1) First Amendment principles do not allow a plaintiff to side-step the requirements of libel by pleading other claims; and (2) the other claims themselves require either intentional or negligent acts that plaintiff cannot prove against the station.

The Privacy Claims

- **Undercover taping not "outrageous"**

Arizona law requires application of the Restatement as authority in the absence of state cases addressing some of the issues raised. Indeed, the court dismissed all of the privacy claims brought by the corporate plaintiff, holding that corporations have no privacy rights, citing the Restatement as authority.

Also citing the Restatement, the court dismissed the emotional distress claims. But of note, in its analysis the court stated that the undercover taping in this case could not be deemed outrageous, citing both the holding and similarity of circumstances to *Desnick v. American Broadcasting Companies, Inc.*, 44 F.3d 1345 (7th Cir. 1995)

The private facts claims of Mr. Devaraj were dismissed because nothing reported about him (e.g., his place of employment) was a private fact.

Various other claims were dismissed for failure to state a claim cognizable under Arizona law. Seemingly remaining in the case are the libel claims against ABC, Diane Sawyer and others involved in the report, as well as the trespass, intrusion, fraud and false light claims against those same defendants.

Uniform Act on Criminal Witness Subpoenas and Reporter's Privilege

By Robert D. Balin and Elizabeth A. McNamara

In New York State, the press is afforded broad shield law protection against compelled disclosure of confidential as well as non-confidential news gathering materials. Unfortunately, in a quirky and relatively unnoticed 1993 decision, In re Codey v. Capital Cities, American Broadcasting Corp., 82 N.Y.2d 521 (1993), the New York Court of Appeals restricted the ability of New York media organizations to invoke privilege in opposing interstate subpoenas served under the Uniform Act To Secure The Attendance Of Witnesses From Without The State In Criminal Proceedings (the "Uniform Act").

Adopted in all 50 states, the Uniform Act provides a relatively simple procedure by which parties to a criminal proceeding in one state may subpoena witnesses and evidence located in another state. In In re Codey, the Court of Appeals held that when a New York court receives a request under the Uniform Act to compel a New York media entity to produce news materials in an out-of-state criminal proceeding, it may not ordinarily consider or rule upon the availability of a shield law privilege -- but, instead, must generally leave it to the court in the requesting state to determine privilege questions. Since many states do not provide the same high level of shield law protection as does New York -- or, in some cases, do not provide any shield law protection at all -- the Codey decision can effectively strip a New York media organization of any privilege from compelled disclosure in Uniform Act proceedings.

That is precisely what recently occurred in In re Magrino, ___ A.D.2d __, 640 N.Y.S.2d 545 (1st Dep't 1996). In a decision issued on April 16, the New York Appellate Division, First Department, granted an application under the Uniform Act to compel HBO Sports to produce unaired video outtakes in a manslaughter proceeding pending in Broward County, Florida. Even though the New York Shield Law extends a strong qualified privilege to unpublished, non-confidential material (such as video outtakes), and Florida provides absolutely no privilege to non-confidential news gathering materials, the Magrino court -- relying on In re Codey -- held that HBO could not invoke this state's shield law in this proceeding.

Given the ever-increasing use of interstate subpoenas to obtain news gathering materials from New York-based media, the provisions of the Uniform Act and the decisions in Codey and Magrino merit closer attention.

The Uniform Act

The Uniform Act sets forth a two-step process under which a witness located in one state may be compelled to testify and produce evidence in a criminal proceeding pending in another state. The court where the proceeding is taking place (the "requesting court") first issues a certificate verifying that the witness (or evidence) is material to the prosecution or defense of the case. Armed with this certificate, a prosecutor or criminal defendant may then apply to a court in the state where the witness resides (the "responding court") for a subpoena directing the witness to testify (or produce evidence) in the out-of-state criminal proceeding. This may be the first notice to the witness that his or her testimony is sought.

Under the Uniform Act, a responding court must issue a subpoena if it determines that the witness or evidence is "material and necessary." In practice, this is a relatively light burden for parties to satisfy. Evidence is deemed "material" within the meaning of the Uniform Act if there exists any "relation between the propositions for which the evidence is offered and the issues in the case." In re Codey, 82 N.Y.2d at 528. Evidence will be deemed "necessary" upon a mere showing that it is "useful, legally significant and noncumulative." Id. at 529.

Even where evidence is deemed material and necessary, the Uniform Act further provides that a responding court may not compel out-of-state testimony if to do so would cause "undue hardship" to the witness.

Finally, while requiring that a determination of materiality, necessity and no undue hardship be made before a subpoena may issue, the Uniform Act is silent regarding whether a responding court may also consider the availability of evidentiary privileges (such as an applicable shield law). And it was this issue that the New York Court of Appeals tackled in In re Codey.

In re Codey

The Codey case arose from a New Jersey grand jury investigation of illegal gambling activities. In 1990, ABC news broadcast a report concerning a point shaving scheme among college basketball players, which included an interview with a player who was shown in silhouette to protect his anonymity. The player subsequently came forward and agreed to cooperate with the New Jersey prosecutor in connection with the grand jury investigation.

Invoking the procedures of the Uniform Act, the New Jersey Prosecutor then applied to Justice Herbert Adlerberg of the Supreme Court, New York County -- where ABC is located -- for a subpoena directing ABC to produce outtakes from the interview, as well as reporters' notes. ABC opposed the application on the ground that the requested material was clearly privileged under New Jersey's Shield Law. Justice Adlerberg nonetheless issued the requested subpoena and specifically declined to consider the shield law issue, holding that the question of privilege

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Has the Uniform Act to Secure the Attendance of Witnesses From Without The State in Criminal Proceedings been applied in a different manner in your jurisdiction? If so, please let us know.

UNIFORM ACT

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holding that the question of privilege was one for resolution by the courts of New Jersey, rather than the courts of New York. On appeal, the New York Court of Appeals agreed.

In upholding the lower court's refusal to consider ABC's shield law defense, the Court of Appeals, citing comity concerns (as well as concerns about efficiency and consistency in the application of a Unifom Law), stated that "evidentiary questions such as privilege are best resolved in the state -- and in the proceeding -- in which the evidence is to be used." Codey, 82 N.Y.2d at 530. Noting that ABC had apparently conceded the applicability of New Jersey's Shield Law, the Codey court reasoned that "it would make little sense to construe [the Uniform Act] as authorizing the courts of [the responding] state to determine questions of privilege that arise out of the law of another state," especially since "the courts of the demanding jurisdiction are better qualified, . . . because of their superior familiarity with local law." Id.

As a further rationale for its holding, the Codey court also emphasized that a "highly mobile news organization" such as ABC would not suffer "undue hardship" by being required to travel across the Hudson River to litigate the shield law privilege in New Jersey. The Court importantly indicated, however, that "the 'hardship' balance might be different" where a media witness is required to make a "transcontinental, 'border-to-border'" trip merely to raise evidentary privileges. Id. at 531.

Since ABC had relied on the New Jersey Shield Law (as opposed to New York's), it was not unreasonable for the Codey court to determine that the privilege question in that case should be ruled upon by the requesting court in New Jersey, rather than the responding court in New York. However, the logic of the general rule suggested in Codey -- that privilege issues should not be resolved by a responding court -- falls apart in two situations (one which the Codey court anticipated and one which it did not).

First, in those cases where an interview takes place in New York, and where the interview is published or aired in New York by a New York news organization, the law governing compelled production of news gathering materials should logically be that of New York (regardless of where the criminal proceeding takes place). In this situation, there is no principled reason for a New York court to defer to the courts of the requesting jurisdiction since -- under the very reasoning of Codey -- New York courts are better equipped to resolve questions arising under New York's Shield Law. Unfortunately, the Codey court simply did not address this issue, and its resolution will have to await another day.

Second, even where another state's privilege law would otherwise apply under general choice of law principles, New York courts will generally not defer to another jurisdiction's law if to do so would be repugnant to the public policy of New York. In this regard, in marked contrast to the press-protective public policy embodied in New York's strong shield law, some states do not provide any privilege to non-confidential news gathering materials (or even to certain confidential materials). In an apparent reference to this dichotomy, the Codey court (by way of footnote) recognized an important exception to its holding:

> Our holding should not be construed as foreclosing the possibility that in some future case a strong public policy of this State, even one embodied in an evidentiary privilege, might justify the refusal of relief under [the Uniform Act] even if the "material and necessary" test set forth in the statute is satisfied.

In re Codey, 82 N.Y.2d at 530 n.3.[1]

And it was this public policy exception that was raised by HBO in the recent Magrino case -- which is one of only two other reported New York decisions involving the interplay between the Uniform Act and the shield law.[2]

In Re Magrino

The Magrino case arose from a criminal prosecution in Florida against Brian Blades, who was charged with negligent manslaughter in connection with the shooting death of his cousin, Charles Blades, in July 1995. Because Brian Blades is a well-known wide receiver for the Seattle Seahawks, his case generated wide-spread media attention.

Shortly after the shooting incident, Blades gave a brief, nationally televised press conference in which -- reading from a prepared statement -- he stated that the shooting was an "accident", and admitted that "[t]he gun that shot Charles was a gun that I owned." Other than this one press conference, Blades refused to talk to the press and declined to give a statement to the police -- sparking a feeding frenzy of speculation regarding the circumstances of the shooting.

In the fall of 1995, "Real Sports with Bryant Gumble" -- an investigative sports news program produced by HBO Sports -- arranged for an exclusive interview of Brian Blades. Before the interview took place, Blades' agent informed HBO that Blades would not answer any questions about the shooting incident underlying the criminal prosecution.

On November 16, 1995, Blades was interviewed in Florida by James Lampley, an independent journalist who frequently reports for HBO Sports. HBO then aired a report about Blades and about guns in the NFL in December 1995. Excerpts from Lampley's interview with Blades were interspersed throughout the report; and, as Blades' agent had previously forecast, Blades explicitly refused in the telecast to "discuss anything" relating to the shooting itself, but did provide incidental details regarding his whereabouts before the shooting that were consistent with the public record and were not disputed in the criminal proceeding.

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California Legislature: * Prior Restraints in Emergencies * Criminal Libel

By Celeste Phillips

Two proposed bills recently introduced in the California State Legislature bear watching. One bill, introduced in the Assembly by Richard Rainey (R-Walnut Creek), would authorize civil penalties for continuing a live broadcast of an emergency incident after being ordered to cease by law enforcement; the other bill, authored by Senator Charles M. Calderon (D-Montebello), seeks to criminalize defamation in certain instances.

Sponsored by the California State Sheriff's Association, Assembly Bill 2132 defines a:

> "law enforcement emergency incident" as a "temporary situation during which law enforcement officers are discharging, or attempting to discharge, their duties, a suspect is holding a hostage or is barricaded in a dwelling or other building, and where a live broadcast of the situation could *jeopardize the safety of persons* involved or could prolong the incident."

Any person who continues after having been ordered to stop may be found liable for a civil penalty not to exceed $5,000.

The Criminal Libel Bill

The preamble states that this bill is designed to go after the "small, but nonetheless noticeable segment of our society" who are willing to make false defamatory statements either for fame or money, and "an increasing number of disreputable publications" which disseminate these statements "with no questions asked." Because civil remedies, according to the sponsors, are *inadequate, and to avoid potential* retaliation by victims, a criminal libel bill is required.

Under Senate Bill 2051, a person who makes a false defamatory statement of fact with actual malice and with knowledge that the recipient may publish, broadcast or disseminate it,is guilty of a misdemeanor.

A publication which has a practice or pattern of paying for the right to publish malicious false defamtory statements of fact, and does publish such statements with actual malice is guilty of *the offense of accessory to criminal* defamation.

The proposed statute calls for criminal penalties of imprisonment in a county jail for not more than one year and/or a fine of not less than one hundred dollars or more than ten thousand dollars. The prosecution is required to prove beyond a reasonable doubt that the defamatory statement was false, and that the defendant, for profit, made the statement with knowledge of falsity or reckless disregard as to its truth or falsity.

The bill also provides that truth is an absolute defense, and that a defendant may not be prosecuted for a communication that is privileged. A privileged communication is defined as *a statement made in the proper* discharge of an official duty, in a legislative or judicial proceeding, any other official proceeding authorized by law, or a statement that is protected from criminal prosecution by the California or United States Constitution. Under the statute, a conviction for criminal defamation would be entitled to full res judicata effect in a civil action.

A "defamatory statement of fact" is defined, and statements that could not reasonably be expected to be taken literally (e.g., satire, parody, or humorously intended situations) are specifically protected.

First Amendment Concerns

Both measures clearly raise serious First Amendment concerns. Assembly Bill 2132's definition of a "temporary emergency incident" suffers from both overbreadth and vagueness in that the bill makes no distinction between crime scenes and other disaster scenes and provides no objective criteria for determining when or if an emergency incident exists.

California courts have long-permitted law enforcement to preclude the media's access to crime scenes. (See generally *Los Angeles Free Press, Inc. v. City of Los Angeles*, 9 Cal. App. 3d 448, 455 (1970)). Insofar as disaster scenes are involved, the bill runs contrary to another provision of the California Penal Code (Section 409.5(d)) which specifically allows the press to be present at the scene of the disasters and emergencies.

The California Court of Appeal in *Leiserson v. San Diego*, 184 Cal.App.3d 41, 51 (1986), discussing Section 409.5, held that "[p]ress representatives must be given unrestricted access to disaster sites unless police personnel at the scene reasonably determine that such unrestricted access will interfere with emergency operations. If such a determination is made, the restrictions on media access may be imposed for only so long and to such an extent as is necessary to prevent actual interference." (emphasis in original).

Moreover, the Assembly bill clearly raises troubling prior restraint issues. Under this bill, for instance, police authorities would have had authority to order television stations to cease their simulcast of the now infamous "Bronco chase" involving O.J. Simpson's flight from arrest, despite the fact that the station's helicopters were engaged in a lawful activity, upon the mere conclusion that such coverage could prolong the chase or jeopardize freeway bystanders or the police.

As stated by the Ninth Circuit in the case of *CBS, Inc. v. District Court* 729 F.2d 1174 (9th Cir. 1984), if a member of the media is in a place he has a lawful right to be, or is otherwise engaged in lawful activity (i.e., a radio broadcaster on the phone with an individual involved in a hostage situation), the dissemination of information it thus obtains cannot be

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California Legislature

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constitutionally restrained unless the "extraordinarily exacting" standard set forth in *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) is met. The statute, however, does not impose the exacting criteria required by the First Amendment for the proper issuance of a prior restraint order.

Senate Bill 2051 raises the issue of the constitutionality of criminal libel. Generally, courts and commentators have criticized the concept of criminal libel and noted the dearth of prosecutions. Commentators have noted that "Criminal libel lives on in American law, but barely." Sack and Baron, *Libel, Slander and Related Problems* 174 (1994). For example, the Supreme Court in *Garrison v. Louisiana*, 379 U.S. 64 (1964) stated:

> It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security.... It seems evident that personal calumny falls in neither of these classes in the U. S. A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country....

Garrison at 69-70, quoting Model Penal Code, Tent. Draft No. 13, 1961, § 250.7, Comments, at 44.

Indeed, few criminal libel statutes have passed constitutional muster where the speech at issue is directed at public officials or public figures. See *Fitts v. Kolb*, 779 F.Supp. 1502 (D.S.C. 1991) (statute unconstitutionally overbroad for failure to incorporate actual malice requirement); *State v. Defley* 395 So.2d 759, (La. 1981) (criminal defamation statute unconstitutional insofar as it punishes public expression about public officials); *Commw. v. Armao*, 286 A.2d 626 (Pa. 1972) (criminal libel statute found unconstitutional, applying *Garrison v. Louisiana*, where no provision for truth as a defense, only limitation was with respect to public officers or candidates, and negligence standard was used); *Gottschalk v. State*, 575 P.2d 289 (Ala. 1978) (statute unconstitutionally vague and overbroad, but a narrowly drawn statute might be proper); *State v. Powell*, 839 P.2d 139 (N.M.App. 1992) (statute unconstitutional as applied to charge of libel predicated on public statements that involve matters of public concern). Indeed, California courts have already held one attempt to impose criminal liability for speech unconstitutional. *Eberle v. Municipal Court*, 55 Cal. App. 3d 423, 430 (Cal. App. 1976) ("statutes dealing with criminal libel are required to be narrowly drawn to reach speech calculated to evoke a clear and present danger of public or social disorder").

However, such statutes have been upheld where speech about private individuals was at issue. *People v. Heinrich*, 470 N.E.2d 966 (Ill. 1984), appeal dismissed 471 U.S. 1011 (1985) (upholding statute where no suggestion that individual was a public official or public figure); *People v. Ryan*, 806 P.2d 935 (Colo. 1991), cert. denied 502 U.S. 860 (criminal libel statute unconstitutional as applied to public officials or figures on matters of public concern, but enforceable where private individual allegedly defamed).

In the case of *Tollett v. U.S.*, 485 F. 2d 1087, 1097-8 (8th Cir. 1973), the court, in explicating the deficiencies of a criminal libel statute, provides a useful drafting primer:

> The Act does not in any way attempt an objective definition of "libelous" and "defamatory"; there exists no statutory language limiting the application of the present penal statute to private libel in contrast to libel relating to public officials, public figures, or public affairs; there is no clarification within the statute as to whether Congress intended truth to be a defense to any defamation or, if so whether truth would still be punishable unless coupled with good motives; there is no clarification in the Act as to whether Congress deemed it necessary that "malice" be an element of the offense for either private or public libels; there is no clarification as to whether libel must be knowingly falsely made or may be "negligently" made; there is no clarification as to whether the libelous or defamatory statements must necessarily lead to an immediate breach of peace and, if so, there is no narrow approach as to the meaning of "breach of peace" encompassed by the statute.

Tollett at 1097-8 (footnotes omitted) (citations omitted).

The drafters of S.B. 2051 were clearly mindful of the parameters set forth in *Tollett*. However, the statute's attempt to impose criminal liability for speech involving private persons, or speech involving matters of public concern, even with its inclusion of the actual malice standard, probably cannot pass constitutional scrutiny. Further, the statute's failure to provide definitions of key terms, such as "defamatory" or a statement made "for profit," makes the law subject to further First Amendment challenge.

No action has yet been set for Senate Bill 2051. Assembly Bill 2132 went before Public Safety in April.

Celeste Phillips is with the firm Ross Dixon & Masback.

LDRC wishes to acknowledge intern John Maltbie's contributions to this month's *LibelLetter*.

UNIFORM ACT

(Continued from page 8)

Nonetheless, in January 1996, the Florida prosecutor, armed with a certificate of materiality from the Florida court, applied to the Supreme Court, New York County, for an order under the Uniform Act compelling HBO to produce outtakes from the Blades interview in the Florida manslaughter proceeding. As in the Codey and Grace cases, the application in Magrino was assigned to Justice Herbert Adlerberg, who granted the requested subpoena.

On appeal to the Appellate Division, First Department, HBO raised two substantive grounds for reversal. First, HBO argued that the outtakes were not "material and necessary", as required under the Uniform Act, inasmuch as the Florida prosecutor had no basis (other than sheer speculation) to believe that the outtakes contained incriminating or new information about the shooting -- especially since, in the aired portion of the interview, Blades had explicitly declined to talk about the shooting incident.

In a short memorandum decision affirming the lower court, the Appellate Division cursorily rejected HBO's "material and necessary" argument. Exemplifying the low threshold which the Uniform Act sets for interstate discovery, the Magrino court held that there was a "logical relationship" between the aired interview and the subject matter of the manslaughter trial and that, as such, "it is likely that the outtakes will contain material information about the shooting." Magrino, 640 N.Y.2d at 545. Similarly, without providing any support from the record, the Appellate Division ruled that the outtakes were "necessary" because the aired portions of the interview "are the most detailed accounts of the incident ever made by the defendant himself." Id. This conclusion is troubling since, given that Blades had declined in the aired interview to discuss the shooting itself, the Court could only be relying on incidental details that were neither germane to guilt or innocence nor even contested in the prosecution.

As a second ground for reversal, HBO argued for application of New York's Shield Law under the public policy exception of Codey. In this regard, the New York Shield Law provides a strong qualified privilege to non-confidential news gathering material, which may be overcome only where a party shows that the material is (1) highly material and relevant to its claim or defense, (2) critical or necessary to the maintenance of its claim or defense, and (3) not obtainable from any alternative source.

Strictly applying this three part test, courts in New York have repeatedly held that evidence is "critical or necessary" within the meaning of the Shield Law only when a party's claim or defense "virtually rises or falls" on the evidence (see, e.g., In re Application to Quash Subpoena to NBC, 79 F.3d at 350) -- an extremely heavy burden that can be met in only the most exceptional cases and that HBO argued could not even begin to be met by the Florida prosecutor.

In stark contrast, Florida's appellate courts have repeatedly and recently held that, under Florida law, there exists no privilege for non-confidential news gathering materials. See, e.g., Gold Coast Publications, Inc. v. Florida, 669 So.2d 316 (Fla Dist. Ct. App. 1996); Tampa Television, Inc. v. Norman, 647 So.2d 904 (Fla. Dist. Ct. App. 1994).

HBO argued that this dichotomy between New York law -- which provides broad protection to non-confidential news material -- and Florida law -- which provides no protection whatsoever -- squarely presented the public policy exception envisioned by Codey and necessitated application of New York's Shield Law. Simply put, the Magrino court ducked the issue. Without any discussion or analysis, the Appellate Division summarily rejected "HBO's contention that this state's shield law should be invoked to prevent disclosure of the videotapes." Magrino, 640 N.Y.S.2d at 545.

Shortly after the Appellate Division ruling, Brian Blades pleaded no contest to the manslaughter charge, thus rendering further litigation of the Magrino decision academic. The contours of Codey's public policy exception, and its availability in shield law cases, will therefore have to be resolved another day. In the meantime, media defense counsel should beware the treacherous waters that may be encountered in Uniform Act proceedings.

Endnotes

1 Since New Jersey's Shield Law and New York's Shield Law are remarkably similar, the Court of Appeals was not faced with this public policy issue in Codey.

2 In the other case, In re Robert Grace, ___ A.D.2d ___, 634 N.Y.S.2d 473 (1st Dep't 1995), the Los Angeles County District Attorney instituted a Uniform Act proceeding in New York (also before Justice Adlerberg) to compel a reporter from Vibe magazine to testify and produce interview notes in the Los Angeles murder trial of "Snoop Doggy Dog." In an unreported bench decision on September 22, 1995, Justice Adlerberg granted the requested subpoena and, citing In re Codey, ruled that "any privilege that might arise under the shield law ... would be determined in the State of California." Although the reporter subsequently appealed to the Supreme Court, First Department on several grounds (including that the requested evidence was not material and necessary), he did not pursue his shield law argument. In a decision dated December 5, 1995, the First Department affirmed the lower court, holding that there was "ample basis for [the] determination that appellant's testimony was both material and necessary to the pending California prosecution." 634 N.Y.S.2d at 473.

Ms. McNamara and Mr. Balin, who are partners at the New York firm of Lankenau Kovner & Kurtz, represented HBO in the In re Magrino proceeding.

Prior Restraint Houma, LA Style

(Continued from page 1)

The television station at the center of this dispute is HTV, owned and operated by Folse Productions. Martin Folse is the principal of Folse Productions.

THE VERY DANGEROUS VIDEOTAPE

The tape that HTV obtained was a copy of a surveillance videotape from a Houma school bus; a tape showing four black teenage students brutally assaulting a white student, seemingly without provocation, an assault that severely injured the victim. One of the assailants, Donald Mart, used a stick in the assault. The assault took place on November 8, 1994. The four were arrested for the assault, three as adults and one as a juvenile All were charged with aggravated battery, a felony. Yet the adults were allowed to plead in May of 1995 to misdemeanor charges of simple battery. As a result, the defendants were sentenced to a small fine and some community service.

Later claiming that a mistake had been made by his staff in allowing the plea to the lesser offense, Douglas H. Greenburg, the Houma District Attorney, re-charged Donald Mart with aggravated assault, contending that when Mart picked up a stick and began beating the white student with that weapon, he committed a separate and segregable crime. Court records indicate that Greenburg re-indicted Mart on August 2. Mart pled not guilty and began the process that would lead to a ruling in his favor in the appellate courts this spring that the efforts by the DA to re-charge him constituted double jeopardy.

As schools in Louisiana prepared for an August opening in 1995, HTV began to research a story on the parish school system's new "zero tolerance" policy on student misbehavior. The story led HTV to re-examine the school bus beating case. On August 10, 1995, HTV put in a FOIA request to the sheriff's office where the surveillance tape was being held. After reviewing criminal records, the Sheriff determined that no criminal prosecutions were currently pending and allowed HTV to copy the surveillance tape. Those records did not indicate any pending prosecution of Mart.

On August 14, as it prepared to air the tape, HTV sought comment from the DA about the case. The DA allegedly told Folse and his reporters that he was re-charging Mart, and that he considered it his ethical duty to prevent airing of the tape. August 14 was also the day that Donald Mart was arraigned on the new charges.

THE SUBPOENA STOPS THE BROADCAST

That same day, August 14, shortly before the news report was to air, Greenburg obtained from Judge John R. Walker, acting as duty judge, and sent his men to the station to enforce, a subpoena for all copies of the tape. HTV turned over its copy of the surveillance tape and effectively destroyed those portions of the tape of the about-to-be broadcast news report in which the surveillance tape footage was contained.

By motion of August 17, HTV moved to quash the subpoena, or in the alternative, for immediate return of the seized videos. The station argued that the subpoena constituted an invalid prior restraint, that it had obtained the tape legally, and that it had a constitutional and statutory right to examine public records.

The DA argued that the tape must not be broadcast in order to protect the case from unreasonable pre-trial publicity, that the tape was exempt from disclosure under Louisiana FOIA because it was part of an on-going criminal prosecution, and that HTV had obtained the tape with unclean hands because knew of the re-filed indictment. The DA also took a swipe at the sheriff's office for not contacting the DA before it turned over the tape.

Putting aside the potential political embarrassment to the DA from an airing of this graphic tape, what the DA was willing to say publicly was that the airing of the tape could jeopardize the ongoing case and "[a]dditionally, it could easily cause grievous problems in this community...Televising this type of senseless violence, unfortunately racial in nature, to one and all in this community, especially when HTV wanted to do it, i.e., three days before the beginning of school, constituted a reckless, insensitive and highly dangerous undertaking. One the D.A. was and is totally repulsed by and against." State's Memorandum in Opposition to Motion to Quash, filed September 25, 1995 at p.7.

While Judge John R. Walker ordered an expedited hearing for August 18 on the matter, Judge Walker did not issue an opinion on HTV's motion to quash until April 2, 1996, the day on which HTV filed a motion with him to dismiss the original motion as moot -- to be discussed further down in this article.

RE-INDICTMENT OF MART DISMISSED/DA RETURNS TAPE, BUT WITH A CATCH

In December, 1995, District Judge Paul Wimbish rejected Mart's double jeopardy argument and refused to quash Mart's new indictment. On March 8, the Louisiana Court of Appeal, First Circuit, reversed and held the Mart re-indictment barred by double jeopardy. On March 22, 1996 the Louisiana Supreme Court declined to review that decision.

On March 26, recognizing that his case against Mart was over, DA-Greenburg returned the seized tape to HTV and the original surveillance tape to the Terrebonne Parish School Board. BUT, the DA warned HTV publicly that it might face "legal consequences" if it actually ever aired the tape. What those consequences would or could be were not specified.

The DA also filed a motion in the trial court in which the Mart case was pending, before Judge John T. Pettigrew, asking that all copies of the surveillance tapes in the court records

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PRIOR RESTRAINT HOUMA, LA STYLE

(Continued from page 12)

and all other copies anywhere except for the tapes returned to HTV and the School Board be returned to the court and destroyed. While no longer arguing that there were any due process problems, the DA was now concerned about the privacy rights of the students seen on the tape, who include the perpetrators, the victim and by-standers.

HTV had sent a request to the School Board seeking a new copy of the tape from its original, only to be told that the School Board would not make any copies of the tape available because of concern of violating the Buckley Amendment, 20 U.S.C. Section 1232(g), which protects the privacy of "student records." Just for the record, HTV also sent a request for copies of the tape to the DA's office, the Sheriff's office, and the clerk of the court, none of which provided a copy.

The Houma *Courier*, the local newspaper owned by The New York Times Company, also sought a copy of the tape. In a letter to the paper, dated March 26, 1996, DA-Greenburg stated that he was returning the original to the School Board, but that the School Board has "a legal obligation to protect all matters involving their students' private and privileged school records (this tape forming part of the disciplinary records of the students involved), as well as the privacy of other students shown on the tape."

Let's summarize here:

1. HTV has its tape back, but along with it came a warning from the DA of unspecified "legal consequences" if the station broadcast its contents.

2. The School Board has the original, but contends that any distribution of the tape would constitute a violation of federal law guarding the privacy of the students, including, if not specifically, those who were charged and pled guilty to assault.

3. The DA has moved the trial court in the criminal case to order destruction of all other outstanding copies of the tape.

That would seem to go a long way toward ensuring that the tape – a graphic display of an assault for which the DA's office took misdemeanor pleas with no jail time imposed -- never is made public. Public interest in this case might be heightened moreover, because this is an election year and the post of Houma DA is up for election.

THE DA'S LIBEL CLAIM

On January 8, 1996, as a result of various year-ender news reports on HTV, Douglas Greenburg and his wife filed defamation claims against HTV. He alleged that the station has accused him falsely of intentionally hiding the videotape evidence and of re-charging Mart only when he knew that the television station was aware of the tape and was going to make it public. Greenburg alleged that the station knew that Greenburg had admitted that it was all a mistake, that the DA's office was trying to rectify the error by re-charging Mart, and that the DA, as the man in charge, had taken responsibility for the matter.

Greenburg further alleged in his complaint that Folse threatened him with "hell" over this matter, and that Folse is motivated by a desire to replace Greenburg as DA.

Greenburg's wife's claims appear to be akin to vicarious libel and loss of consortium.

With the service of the libel suit, HTV retained Jack Weiss and LDRC member firm Stone, Pigman, Walther, Wittmann & Hutchinson of New Orleans as counsel.

SO WHERE IS THE RULING ON THE MOTION TO QUASH? THIS PRIOR RESTRAINT IS NOW 6 MONTHS OLD!

HTV wrote Judge John R. Walker on February 8 restating its objection to the tape seizure as a prior restraint.

Judge Walker wrote a response dated March 14 in which he told counsel for HTV that he was waiting to see what the courts did with the Mart case, that he planned to rule as soon as the criminal trial was over. Note that the issue of whether there was going to be a trial was still pending. A trial itself, had there been one, could have been months, if not further, away.

Of course, on March 26, the DA returned HTV's copies of the surveillance tape to it after the case against Mart was dismissed, albeit with a warning of legal consequences if the station aired any of them. On April 2, HTV filed a motion to dismiss its motion to quash the subpoena as then moot.

On that same day -- nearly 8 months after the motion to quash had been filed and approximately two hours after HTV filed its motion to dismiss -- Judge Walker released a lengthy opinion denying HTV's motion, holding that the issue was not moot because it was capable of repetition yet evading review. He also found that the seizure of the tapes was entirely justified, denying the motion to quash.

With only superficial mention of any prior restraint law, Judge Walker found that once there was a pending criminal case, only the DA had the right under Louisiana law to release any evidentiary material. The judge then cited *Seattle Times* as authority for limiting release of information that is really part of the discovery material in the case, and he suggested that if the media could get the tape from the sheriff, it would afford the press more rights to materials pre-trial than were available to the defendants in the criminal case. Judge Walker failed to address *Nebraska Press* in rejecting HTV's prior restraint argument.

HTV has sought appellate review of this ruling.

THE DA WANTS TO DESTROY THE TAPES AND THUS FAR THE TRIAL JUDGE AGREES

In response to the DA's motion seeking destruction of all outstanding copies of the surveillance tape, save the copies in the hands of HTV and the School Board, HTV filed a motion to

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Prior Restraint Houma, LA Style

(Continued from page 13)

recuse the DA and his office arguing that he had a personal interest in the issue due to his defamation suit against HTV which in turn related to the public dissemination of this tape. Indeed, among its arguments, HTV noted that the DA may seek to prevent introduction of HTV's tape into evidence in the libel case on the basis of his contention that they were not lawfully obtained.

On April 4, without seeking a response from the DA to this motion, Judge Pettigrew denied HTV's motion to recuse. The motion on the destruction of the tapes was set for April 22.

On HTV's petition, the Court of Appeal granted a writ ordering a hearing on the recusal motion and ordering that all copies of the tape be deposited into the registry of the district court, to be held in safekeeping no less than 180 days after any ruling on the state's destruction motion. That order came down on the afternoon of Thursday, April 18. On Friday morning, April 19 -- less than one business day in advance -- Judge Pettigrew set the motion to recuse he had already rejected for trial at 9 a.m. on Monday, April 22. After the Judge rejected HTV's motion to continue that hearing to afford HTV an adequate chance to prepare subpoena witnesses, and the appellate courts refused to intervene, HTV withdrew the motion to recuse when court opened on Monday morning. At the DA's request, Judge Pettigrew promptly declared the dismissal to be prejudice.

SEAL AND DESTROY

The hearing on the destruction issue was then held on April 22. The Houma Courier Newspaper Corporation d/b/a The Houma Daily Courier was also served with the DA's motion to unseal and destroy and appeared before Judge Pettigrew asserting both constitutional and common law access rights.

Judge Pettigrew ruled from the bench that the copies of the tape in the court records were to be sealed and then destroyed at the end of three years. He ordered that HTV was not to make copies from the tape in its possession and was not to provide the tape to any other individual or entity. The only attorneys who were allowed to retain copies were those retained by HTV in connection with the defamation case. All other copies were to be delivered up to the court for destruction.

As of May 20, Judge Pettigrew still had not entered a written order reflecting his ruling on April 22. When it comes to restraints in Houma, justice can move awful slow.

Dentist Settles Sanctions Award to ABC

(Continued from page 5)

find that the plaintiff's conduct met the criminal standards for perjury. The Third Circuit held, instead, that what is required is "a determination that the party 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" 74 F.3d at 46., 24 Med.L.Rptr. At 1501.

As one might have imagined, Dr. Rogal was represented by different counsel after the initial award of sanctions. ABC and John Stossel were represented by Jerome J. Shestack (Wolf, Block, Schorr and Solis-Cohen) and Burt M. Rublin (Ballard Spahr Andrews & Ingersoll), both of Philadelphia.

According to the American Tort Reform Association, the following State Legislatures have adjourned for 1996:

Alaska	Indiana	Utah
Arizona	Kentucky	Vermont
Colorado	Maine	Virginia
Connecticut	Maryland	Washington
Florida	Minnesota	West Virginia
Georgia	Nebraska	Wyoming
Hawaii	New Mexico	
Idaho	South Dakota	

No regular session in 1996: Arkansas; Montana; Nevada; North Dakota; Oregon; and Texas.

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EUROPEAN COURT OF HUMAN RIGHTS HOLDS IN FAVOR OF REPORTER'S PRIVILEGE

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Moreover, due to the impact that British law has as persuasive authority and precident within the legal systems of the 50 Commonwealth countries, this decision will have indirect effect on the law of the Commonwealth nations as well.

Article 10 of the Convention provides, *inter alia*, in paragraph 1 that everyone has a right to freedom of expression, and, in paragraph 2, that exercise of these freedoms carries with it duties and responsibilities and thus may be subject to legal requirements and restrictions "as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary." Slip op at 13.

Tetra's Lost Confidential Memorandum

William Goodwin is a British journalist. In November 1989, he received information from a source about the expected, but as yet non-public, losses and financial problems of Tetra Ltd. While the reporter had received information previously from this source on the activities of various companies, the reporter neither solicited nor paid for the information. As chance would have it, the information came from a highly confidential document, of which only 8 numbered copies had been created. One of those copies had disappeared from the company's accountant's offices during a one-hour period when it had been left unattended.

Prior to publication, Tetra learned of the leak of the information and obtained, ex parte, an injunction from the High Court barring Goodwin's publication *(The Engineer)* from publishing any of the information. Tetra argued that if the information was made public, it could result in a complete loss of confidence in the company, which was in the middle of refinancing negotiations, with ultimate risk of bankruptcy for the organization. Tetra also notified all of the national British newspapers and relevant journals of the injunction. The opinion suggests that the information was, in fact, never published in the U.K.

The British Courts' Analysis

The High Court, on application of Tetra, also ordered the publishers, and later Goodwin himself, to disclose Goodwin's notes from his telephone conversation with his source which disclosed the identity of his source. The Court of Appeal affirmed, as did the House of Lords.

English Law, in Section 10 of the Contempt of Court Act 1981, provides:

> "No court may require a person to disclose, nor is a person guilty of contempt of court for refusing to disclose the source of information contained in the publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

The English courts all emphasized the balancing of interests that this provision required. Each acknowledged the import of maintaining the confidentiality of journalistic sources. But each found persuasive grave damage allegedly was threatened to the economic well-being of Tetra, the likelihood (if not certainty) that the information passed on to the reporter was stolen, that none of the information seemed to point to wrongdoing, malfeasance, previously false information in public hands by or from Tetra, and that without knowledge of how the document was removed from Tetra's possession (or its accountants), Tetra could not prevent further dissemination of the information or, conceivably, theft and distribution of other confidential materials from its premises.

Moreover, English law provides in its general provisions that if one inadvertently gets mixed up in the tortious acts of another (e.g, a journalist in receipt of stolen information), while the innocent bystander may not be liable for the tort itself, he is under an obligation to assist the victim by giving him full information, including the identity of the wrongdoer(s).

Thus, while each level of the English court system acknowledged the general public interest in maintaining the confidentiality of journalistic sources, each also felt that the result of the balancing required by Section 10 resulted in favor of Tetra.

There had been a previous decision in the House of Lords that interpreted Section 10 language about allowing required disclosure of a source "in the interests of justice" to apply only in the technical sense of the administration of justice, rather than more generally. It would seem that in this opinion, the House of Lords rejected that narrow characterization of the provision, and interpreted the phrase to include more broadly those instances in which applicants are seeking "to exercise important legal rights and to protect themselves from serious legal wrongs whether or not resort to legal proceedings in a court of law will be necessary to attain these objectives." Slip op. at 9, quoting Lord Bridge in the House of Lords.

Lord Bridge went on to enumerate various kinds of factors that might be

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European Court of Human Rights Holds in favor of Reporter's privilege

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considered in the balancing analysis between the "importance of enabling the ends of justice to be attained in the circumstances " versus the "importance of protecting the source." Slip op. at 9. The factors included the nature of the information, the manner in which the information was obtained by the source, as well as the import in real economic or other terms of knowing or not knowing the source to the party seeking the disclosure.

Following the House of Lord's dismissal of Goodwin's appeal, the High Court, on April 10, 1990, fined Goodwin the sum of £5,000 for contempt of court.

The European Court's Analysis

Because the parties agreed that requiring disclosure of the source constituted an interference with the applicant's right to freedom of expression under paragraph 1 of Article 10, the analysis was to focus on whether it was justified under paragraph 2 of Article 10.

Goodwin argued that the English provision governing disclosure of sources was too vague, that it did not provide sufficient notice of what was foreseeable. The Court rejected that argument, finding that the law did not confer an unlimited discretion on the English courts, and that the issue did not lend itself, and might even be hampered, by inflexible rules. And the court accepted that the aim of the British courts to protect Tetra's rights was legitimate.

Where the European Court parted company with the British courts was on the issue of whether the test that had to be met before the journalist could be ordered to disclose his source -- an exceptional circumstance where vital public or individual interests were at stake -- was met in this case. Noting that protection of journalist sources "is one of the basic conditions for press freedom," (Slip op at 17) it stated that it can be overcome consistent with Article 10 of the Convention only if justified by "an overriding requirement in the public interest." *Id.*

While deference must be accorded to the national authorities assessment on this issue, any action taken by the national authorities must be "proportionate to the legitimate aim pursued" and will be subject to "the most careful scrutiny by the European Court." *Id.*

Here, according to the Court, Tetra obtained most of what it sought by virtue of the injunction, which had prevented publication of the information not only by *The Engineer*, but by anyone else. While recognizing that the injunction did not prevent dissemination of the information to Tetra's customers, competitors, or others, and it would not allow Tetra to determine whether or not it had a disloyal employee or to otherwise contain future leaks of confidential information, none of these reasons were sufficient to support the disclosure order.

It was not enough that the party seeking disclosure would be "unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he or she basis his or her claim in order to establish the necessity of disclosure." Slip op.at 19.

There was not, in the Court's opinion, "a reasonable relationship of proportionality between the legitimate aim pursued by the disclosure order and the means deployed to achieve that aim." *Id.*

Goodwin had sought damages based upon mental anguish, shock, dismay and anxiety that he alleged were the result of the proceedings and the specter of punishment for contempt. While finding a causal link between the anxiety and distress and the breach of the Convention, the Court held that its finding of a violation was sufficient recompense on this damage issue. It did, however, award him £37,595.50 (VAT included) of the £49,500 (+VAT) that Goodwin sought in reimbursement of costs and expenses.

The dissenting opinion, joined in by 7 members of the panel, agreed with the majority that protecting the confidentiality of sources was "one of the basic conditions for press freedom" (Slip op.at 23). The dissenters, however, felt that the government had made its case for disclosure; that the government met the test of necessity.

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Clearly a potentially very powerful tool in the journalist arsenal has been awarded by the European Court of Human Rights of the Council of Europe. The Court is perhaps the most influential human rights arbiter in the world as a result both of allowing individuals from the European community to petition the court and of the obligations undertaken by the 23 European countries to conform their local, national laws to the requirements that this Court finds within the Convention.

It is therefore understood that the result of this decision is protection for journalists and their confidential sources throughout Europe, including journalists who operate and publish in these countries regardless of their own, individual nationality. And, as noted above, the modifications required in British law to meet the decision of the Court will indirectly effect the law of the 50 countries of the Commonwealth.

Geoffrey Robertson, QC, of Doughty Street Chambers, London, represented William Goodwin throughout the proceedings. Dow Jones & Company, with Gibson Dunn & Crutcher (Robert D. Sack and his colleagues) as counsel, gave amicus support to Mr. Goodwin that Mr. Robertson credits as very helpful in the process, bringing American free speech principles and applications to the European forum. Because the extraordinary impact of this judicial body, American counsel should perhaps look again to support and assist efforts of litigants before it. While as the dates here suggest, the process to the Court is slow, the result can be very great.

LDRC wants to thank Geoffrey Robertson, QC, for his assistance in reviewing this case with LDRC.

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helpful to consumers, strict First Amendment scrutiny should apply. Justice Stevens apparently was the lone proponent of that view after Justice Blackmun's retirement from the Court, but he was joined here by Justices Ginsburg, Kennedy, and Souter.

* Justice Thomas, expanding on his opinion for the Court in Rubin, would hold all "paternalistic" regulatory schemes aimed to keep consumers in ignorance, whatever their motivation, to be per se impermissible and would overrule Central Hudson and "return to the reasoning and holding of Virginia Pharmacy. . . ."

Note that both Justices Thomas and Stevens stressed the historic role of commercial speech in America as strong justification for additional First Amendment protection.

The opinion by Justice Stevens for the majority result, read with the concurrences of Justices Scalia, Thomas, and O'Connor, clarified and resolved several pending issues in the commercial speech doctrine:

* Central Hudson "lives" as the threshold test for commercial speech regulations. While Justice Stevens questioned the usual rationales for applying only intermediate scrutiny to commercial speech (i.e., "hardiness" and "objectivity"), he ultimately applied the Central Hudson test and found the Rhode Island ban wanting both under part three ("directly advancing") and part four ("reasonable fit"). Justice O'Connor would have applied Central Hudson, and even Justice Scalia, while stating that he "share[s] Justice Thomas' discomfort with the Central Hudson test," would not have overruled that case and would have applied it as a part of "our existing jurisprudence."

* The second prong of Central Hudson, requiring that government have a substantial interest underlying its regulation, continued to be the easiest Central Hudson test to meet. Here, Justice Stevens in footnote 4 duly noted that there were allegations that the Rhode Island ban was motivated by a desire to protect small alcohol beverage retailers from price competition. However, he ultimately simply "accepted" the state's assertion that its true goal was temperance.

* Central Hudson part three ("directly advancing") got a strong reading by Justice Stevens, requiring the trial court to provide findings of fact and "evidentiary support" that the regulation "significantly advanced" the state's interest. "Speculation and conjecture" cannot suffice "when the state takes aim at accurate commercial information for paternalistic ends."

* Part four was stressed and enhanced in the opinions by Justices Stevens, Thomas, and O'Connor. Although he reiterated the "reasonable fit" rubric of S.U.N.Y. v. Fox (1989), Justice Stevens stressed that Rhode Island had available "alternate forms of regulation that would not involve any restrictions on speech [and which] would be more likely to achieve the state's goal of promoting temperance . . . . [Even] educational programs . . . might prove to be more effective." Note that Justice Thomas, who apparently would overrule Central Hudson, observed that "both Justice Stevens and Justice O'Connor appear to adopt a stricter, more categorical interpretation of [part four]," and that "that view would go a long way toward the position I take [here]."

* The most confusing and dispiriting of the Court's commercial speech decisions, Posadas de Puerto Rico Assocs. v. Tourism Co. (1986), gave the flabbiest reading in the Central Hudson test of any commercial speech decision by the Supreme Court, substantially deferring to the judgment of the Puerto Rico Legislature in banning advertising of casino gambling to Puerto Rico residents. In 44 Liquormart, Posadas disappeared as a legitimate authority in commercial speech cases. Justice Stevens stated categorically that Posadas "erroneously performed the First Amendment analysis":

> [W]e decline to give force to its highly deferential approach. Instead, in keeping with our prior holdings, we conclude that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the Posadas majority was willing to tolerate.

Justice Stevens does not call for overruling Posadas, but his analysis eviscerated it as a viable First Amendment authority, somewhat echoing (and citing) Justice Brennan's dissent in Posadas. Justice O'Connor, joined by Chief Justice Rehnquist and Justices Souter and Breyer, completed the relegation of Posadas to the First Amendment dustbin, observing that later cases such as Edenfield, Discovery Network, Ibanez, Rubin, and Went For It, Inc., require a "closer look" at state justifications for regulation of commercial speech. Chief Justice Rehnquist's joinder in Justice O'Connor's concurrence seems to reflect his acquiescence that his 5-to-4 majority opinion in Posadas is no longer authoritative.

44 Liquormart not only dispatches Posadas without overruling it, but provides powerful authority against the most frequent argument of government regulators that their judgments are entitled to deference, if only they are "rational" or

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"reasonable," and against the Rehnquist dictum in Posadas that the power to regulate a product includes the "lesser" power to regulate commercial speech about the product.

✡ Justice Stevens also dealt critically with the assertion that regulation of "vice" products or activities somehow merits a greater deference to regulatory prerogatives:

> Almost any product that poses some threat to public health or public morals might reasonably be characterized by the state legislature as relating to "vice activity." Such characterization, however, is anomalous when applied to products such as alcoholic beverages, lottery tickets, or playing cards, that may be lawfully purchased on the open market.

Also in this portion of his analysis, Justice Steven's opinion usefully cabined Edge Broadcasting not as a "vice" case, but as one dealing with regulation of state lottery activities, illegal in the state where advertised.

In the wake of its decision in 44 Liquormart, the Court vacated the judgment in Hospitality Investments of Philadelphia, Inc.v. Pennsylvania State Police, 658 A.2d 854 (1994), and remanded the case to the Pennsylvania Supreme Court "for further consideration in light of 44 Liquormart . . . ," (No. 94-1247), ___ U.S. ___ (May 20, 1966). The Pennsylvania Supreme Court had upheld a state ban on alcohol beverage licensees from advertising in any manner the price of such beverages, based largely on a Twenty-first Amendment rationale.

On the same day, the Court granted certiorari, vacated, and remanded "for further consideration in light of 44 Liquormart . . ." the decision of the Fourth Circuit in Anheuser-Busch, Inc. v. Schmoke, ___ F.3d ___, 1995 U.S. App. LEXIS, 24515 (4th Cir. 1995), in which the circuit court had affirmed a district court judgment upholding a Baltimore ordinance restricting outdoor advertisement of alcohol beverages based solely on a "reasonable belief" by government that its regulation constituted a reasonable fit.

As of May 22, the certiorari petition was still pending in Penn Advertising v. Baltimore (in which the 4th Circuit upheld a ban on tobacco billboard advertising in Baltimore.)

P. Cameron DeVore is with the firm Davis Wright Tremaine in Seattle, WA and is Chair of the LDRC Defense Counsel Section.

DO YOU SPEAK RUSSIAN?

LDRC has been approached about assisting in the development of a conference in Moscow. We would be part of the planning as well as providing materials and speakers. While it is hardly a sure deal -- indeed, it seems little more than an interesting idea at this juncture -- we are interested in knowing who in the membership speaks Russian. Please give me a call or drop me a note. Thank you.

-- Sandy Baron

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7:30 p.m.
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TWO HUNDRED PARK AVENUE, 56TH FLOOR
NEW YORK CITY

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DEFENSE OF FREEDOM AWARD TO

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Chairman of the Executive Committee
The Washington Post Company
and
ARTHUR OCHS SULZBERGER
Chairman of the Board
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The New York Times Company

TO HONOR THE 25TH ANNIVERSARY OF
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