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MEDIALAWLETTER

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Enforceability of Foreign Libel Judgments Discussed at ALI Annual Meeting

By Tom Leatherbury

Background

Trends in foreign forum shopping and whether the enforcement of a foreign libel judgment would violate United States public policy took the spotlight for a short time at this year's Annual Meeting of the American Law Institute in Chicago.

In anticipation of the Annual Meeting, NYU Law Professors Andreas Lowenfeld and Linda Silberman, who serve as the Project Reporters, circulated a Tentative Draft of the International Jurisdiction and Judgments Project. This Project proposes a federal statute to bring more uniformity to the law of enforcement of foreign judgments.

The proposed statute generally would make it easier to enforce foreign judgments and lists certain mandatory grounds upon which a United States court should deny requests for enforcement of foreign judgments and certain discretionary grounds upon which a court may deny requests for enforcement. As one of the mandatory grounds, in Section 5(a)(vi), the proposed draft statute provides that a

There has been considerable disagreement over the scope of the public policy exception, with the Reporters advocating an extremely narrow view of what constitutes fundamental public policy.

“foreign judgment shall not be recognized or enforced in a court in the United States if the person resisting recognition or enforcement establishes that . . . the judgment or the claim on which the judgment is based is repugnant to the public policy of the United States.”

Yet there has been considerable disagreement over the scope of the public policy exception, with the Reporters advocating an extremely narrow view of what constitutes fundamental public policy.

Reporter's Notes and First Amendment

The Reporters' Notes concerning “the public policy exception and the First Amendment,” question whether

the First Amendment qualifies as fundamental public policy in every case. While the Reporters' Notes have continued to evolve in response to criticism and comments and to recent case developments and while the Reporters have retreated somewhat from the more overtly pro-libel plaintiff stance of previous drafts, the Notes still remain critical of cases declining to enforce British libel judgments and, in my view, both create unnecessary uncertainty in this sensitive constitutional area and encourage further foreign forum shopping by libel plaintiffs.¹

Comments on these Notes

When the Tentative Draft was issued, MLRC's Ad Hoc Committee, established to review and respond to this ALI project, convened a conference call, and discussed the available courses of action. As a member of ALI, I volunteered to submit written comments to make available to the ALI membership at the Annual Meeting.²

ALI's Annual Meeting

The discussion of the International Jurisdiction and Judgments Project occupied the entire morning of May 13. The discussion was wide-ranging and fairly lively, with some commentators expressing fundamental doubts about whether this Project should go forward at all and, if it does, whether it should take the form of a model statute or a Restatement or some other form.

No motion was made to take action on this Tentative Draft, and it is clear the Reporters have a number of points to study and work through if this Project is to move forward with any appreciable chance of success. Mark Hornak of Buchanan Ingersoll aptly summarized the attitude toward the Tentative Draft as one of “enormous skepticism.”

On the particular portion of the Reporters' Notes dealing with foreign libel judgments, several of us spoke. Joe Steinfield of Prince, Lobel, Glovsky & Tye LLP in Boston led off and asked the Reporters point blank if their intention was to overrule *Bachchan* and *Matusevitch*. Professor Silberman said that that was not their intention and that they had simply

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tried to lay out the issues and the arguments on both sides.

I highlighted the filed written comments, and Eric M. Freedman of Hofstra Law School batted clean up and emphasized that there was no “debate” in the caselaw, urging the Reporters to move their “debate” with these cases out of the Reporters’ Notes (which may be meaningless in the context of a proposed statute) and into the law reviews.

To the suggestion that this specific commentary on libel cases be deleted pending further caselaw development, however, Professor Lowenfeld was clearly resistant, stating that not talking about these cases in the Reporters’ Notes was like not talking about “the elephant in the living room.”

Interestingly, especially in light of the recent inclusion of the *Gutnick* case in the latest iteration of the Reporters’ Notes, after our discussion of this portion of the

Notes, ALI President Michael Traynor (of Cooley Godward in San Francisco) introduced two Australian High Court Justices who were in attendance.

Outside of the meeting room, both the written comments and the oral comments drew favorable remarks from a number of people. I will be contacting ALI to see if they will post my written comments on their

website and will be making some follow up calls. Since the next step in the life of this Project is unclear, it would still be very helpful for you to educate your colleagues who are ALI members about this controversy so we may call on them for their advice and assistance should we need it. If anyone wishes to join

the MLRC’s ad hoc committee, please send me an e-mail at tleatherbury@velaw.com

Tom Leatherbury is a partner in the Dallas office of Vinson & Elkins L.L.P.

It would still be very helpful for you to educate your colleagues who are ALI members about this controversy so we may call on them for their advice and assistance should we need it.

¹ The pertinent portion of the Reporters’ Notes from the Tentative Draft is reprinted below.

Reporters’ Notes

(d) *The public policy exception and the First Amendment.* The appropriate scope for the public-policy exception has given rise to sharp debate in the context of several recent libel cases in the United States. In both *Bachchan v. India Abroad Publications, Inc.*, 154 Misc. 2d 228, 585 N.Y.S.2d 661 (Sup. Ct. N.Y. Cty. 1992) and *Telnikoff v. Matuskevitch*, 347 Md. 561, 702 A.2d 230 (1997), *aff’d (table)*, 159 F.3d 636 (D.C. Cir. 1998), libel judgments obtained in England were denied enforcement in courts in the United States on the ground that the libel law of England is incompatible with the values reflected in the First Amendment of the U.S. Constitution, and hence, that enforcement would be contrary to U.S. public policy. In *Telnikoff*, the libel judgment had been obtained by one resident of England against another resident of England, both of whom were Russian émigrés; the offending letter and published comments had no connection with the United States. In *Bachchan*, an Indian plaintiff had sued a foreign news agency operating in New York and elsewhere that had distributed an allegedly libelous news story both in New York and in the United Kingdom; the libel related to alleged misconduct by the Indian plaintiff in India and the story was reported in numerous countries in the world. Several aspects of § 5(a)(vi) are raised by these cases. The first is whether the differences between American and English libel law – with respect to issues such as the standard for liability in actions brought against the press and differences over where the burden of proof lies – are so fundamental that they are repugnant to basic concepts of justice and decency in the United States. That issue remains subject to intense debate. Compare Scoles, Hay, Borchers, Symeonides, *Conflict of Laws* (Third ed., 2000) 1211 n.12; Joachim Zekoll, “The Role and Status of American Law in the

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Hague Judgments Convention Project.” 61 Alb. L. Rev. 1283, 1305-1306 (1998) (criticizing the implicit holding in *Bachchan* that even minor deviations from American free-speech standards violate public policy and render judgments unenforceable) with Kyu Ho Youm, “Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law,” 16 Hastings Comm. & Ent. L.J. 235 (pointing out that American libel law offers publishers significantly more protections than does British law and thus the *Bachchan* decision was “no surprise”). The second aspect relates to the territorial connection or nexus with American interests necessary to trigger the exception of U.S. public policy. If the reason for enforcement in the United States is simply the presence of assets here, the values represented in differences about the limits of free expression do not appear to be engaged. In contrast, where expression emanates from the United States or is directed or connected to the United States in some way – e.g., an alleged libel in Singapore by the Asian Wall Street Journal – consideration of the effect of the differences in approach to freedom of expression is an appropriate consideration in the public-policy calculus. Of course, not all interests are purely territorial, and the public-policy exception clearly allows for consideration of basic universal principles that should be applicable to any judgment for when such recognition is sought. Thus, a judgment for damages in a dictatorship that punished all critique of government might be denied enforcement irrespective of any connection with the United States. See generally Craig A. Stern, “Foreign Judgments and The Freedom of Speech: Look Who’s Talking,” 60 Brook. L. Rev. 999 (1994) (arguing that *Bachchan* misconstrues the First Amendment by making it a universal declaration of human rights rather than a limitation designed specifically for American civil government).

An illustration of the approach called for by § 5(a)(vi) may be seen in *Yahoo!, Inc. v. La Ligue Contre le Racisme et L’Anti-semitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001). A French court had issued an order pursuant to French law purporting to restrain an Internet Service Provider based in the United States from making accessible to users in France offers to purchase Nazi texts and memorabilia. Prior to an action by the French plaintiffs to enforce the order in the United States, the U.S.-based Internet Service Provider applied to the U.S. District Court for a declaratory judgment stating that enforcement of the order of the French court would impermissibly infringe on its rights under the First Amendment to the U.S. Constitution. In granting a judgment to this effect, the court wrote:

The Court has stated that it must and will decide this case in accordance with the Constitution and laws of the United States. It recognizes that in so doing, it necessarily adopts certain value judgments embedded in those enactments, including the fundamental judgment expressed in the First Amendment that it is preferable to permit the non-violent expression of offensive viewpoints rather than to impose viewpoint-based governmental regulation upon speech. The government and people of France have made a different judgment based upon their own experience. In undertaking its inquiry as to the proper application of the laws of the United States, the Court intends no disrespect for that judgment or for the experience that has informed it.

169 F. Supp. 2d at 1187.

The U.S. court in *Yahoo!* appears to concede that the French court acted according to acceptable principles of private international law in applying French law to determine what forms of speech and conduct are acceptable within its borders. At the same time, it insisted upon the right to refuse recognition and enforcement to such a judgment if enforcement in the United States would be inconsistent with U.S. values. This somewhat unusual dichotomy between acceptance of jurisdiction to prescribe but denial of enforcement can be found in another recent decision by the highest court in Australia. In *Dow Jones & Co., Inc. v. Gutnick*, [2002] HCA 56 (2002), the High Court of Australia (its Supreme Court) upheld the assertion of judicial jurisdiction over the U.S. company, Dow Jones, which operated a subscription news site on the World Wide Web that carried an allegedly defamatory article about the plaintiff, a South African living in Victoria, Australia. The plaintiff had limited his claim to damages caused to his reputation in Victoria resulting from

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publication there. In holding both that Australia was not an “inappropriate” forum and the Australian law was properly applied to the plaintiff’s claim of defamation, Justice Kirby’s opinion underscored the practical difficulty that remained. He observed that a foreign publisher with no assets in the jurisdiction could wait until an attempt was made to enforce the judgment in its own courts where the judgment might be regarded “as unconstitutional or otherwise offensive to a different legal culture.” As Justice Kirby wrote:

However, such results are still less than wholly satisfactory. They appear to warrant national legislative attention and to require international discussion in a forum as global as the Internet itself. In default of local legislation and international agreement, there are limits on the extent to which national courts can provide radical solutions that would oblige a major overhaul of longstanding legal doctrine in the field of defamation law. Where large changes to settled law are involved, in an area as sensitive as the law of defamation, it should cause no surprise when the courts decline the invitation to solve problems that others, in a much better position to devise solutions, have neglected to repair.

Apart from concerns under the First Amendment, statutory provisions, such as 47 U.S.C. § 230 (2002), which protect internet providers from liability, may also be relevant in assessing whether the public-policy threshold for denial of recognition/enforcement is met.

The discussion above suggests that perhaps certain “public law” issues, particularly those involving internet defamation, are the ones most likely to raise the public-policy question. At the same time, the impact of particular developments in Europe, such as the European Convention on Human Rights and the International Covenant of Civil and Political Rights, on domestic law in England and other countries, may result in greater sensitivity to principles akin to the First Amendment, thus making recognition and enforcement of their judgments more likely. See Michael Traynor, “Conflict of Laws, Comparative Law, and The American Law Institute,” 49 Am. J. Comp. L. 391, 396 (2001).

² Below is the full text of those comments:

I appreciate the immense amount of work that has gone into this Tentative Draft to be discussed at the 2003 Annual Meeting. Nonetheless, I am writing as a member of the Working Group on this project to voice my continuing concern about the Reporters’ Notes on the “public-policy exception and the First Amendment” included at pages 60-64 of the Tentative Draft.

My fundamental concern is that it seems premature and particularly unwise for the Institute to single out First Amendment cases for comment at this time. The legal and practical realities of international libel litigation are changing extremely quickly to try and keep pace with the rapidly changing and increasingly global nature of communications. The ALI, as well as practitioners, would benefit greatly from additional experience and caselaw developments in this field before formulating meaningful commentary.

Moreover, while there may be a “sharp debate” about the enforcement of foreign libel judgments within academic circles, as demonstrated by some of the several articles the Notes cite, no such debate, dull or sharp, has developed in the cited caselaw. See *Bachchan v. India Abroad Publications, Inc.*, 154 Misc. 2d 228, 585 N.Y.S.2d 661 (Sup. Ct. N.Y. Cty. 1992) (declining to enforce British libel judgment when British common law imposed strict liability for false statements about matters of public concern, including statements concerning bribes allegedly paid by arms manufacturers to politically well-connected Indians); *Telnikoff v. Matusevitch*, 347 Md. 561, 701 A.2d 230 (1997), (certified question), *answer conformed to*, 1998 U.S. App. LEXIS 10628 (D.C. Cir. May 5, 1998) (declining to enforce British libel

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judgment involving core political speech); *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F.Supp. 2d 1181 (N.D. Cal. 2001) (barring enforcement of French injunction requiring *Yahoo!* to block French internet users from accessing online auctions of Nazi memorabilia). Given the existing caselaw declining to enforce such foreign judgments, the Notes create unwarranted uncertainty. The better course of action would be to delete this portion of the Notes and await further caselaw development to see if these cases warrant specific comment.

The need for caution and further caselaw is highlighted, too, by the Notes' reliance on the *Yahoo!* case, currently on appeal, and on a December 2002 decision from the High Court of Australia, *Dow Jones & Co., Inc. v. Gutnick*, [2002] HCA 56 (2002). According to one press account, the *Yahoo!* trial court's reasoning/holding was not well-received by the Ninth Circuit panel at oral argument. Jason Hoppin, *French Order is Greek to 9th Circuit*, THE RECORDER, Dec. 3, 2002, available at http://www.law.com/jsp/newswire_article.jsp?id=1036630517051. While the press account may not accurately predict the Ninth Circuit's holding, it still seems premature to use this case as the key illustration of the application of the proposed public policy exception in the First Amendment area.

Moreover, much like this portion of the Notes, the Australian Court's decision in *Gutnick* raises more questions than it answers. *Gutnick* highlights the problem American publishers face as more and more libel plaintiffs shop for friendly foreign forums in which to challenge publications originating in the United States. The Australian Court's decision to exercise personal jurisdiction over Dow Jones stands in sharp contrast to recent federal decisions declining to exercise personal jurisdiction over out-of-state publishers for Internet publications. *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002); *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002). These federal cases, not mentioned in this portion of the Notes, again underscore that this portion of the Notes should be deleted pending further developments in this area.

Additionally, the substance of the Notes continues to give me great pause in the following respects:

1. The Notes indicate agreement with a law review article which suggests that *Bachchan* was wrongly decided because Britain's law contains only "minor deviations from American free speech standards." An examination of the briefs in *Bachchan* (and *Matusevitch*) reveals that the publishers did not argue that "minor deviations" between British and American law should be grounds for non-enforcement. Both cases involved fundamental distinctions between American and British law that went to the very core of the First Amendment. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964).
2. The Notes state, without analysis or citation, that "[i]f the reason for enforcement in the United States is simply the presence of assets here, the values represented in differences about the limits of free expression do not appear to be engaged." This dangerous and unsupported statement ignores the well-established chilling effect of large actual and punitive damage awards and litigation costs on the press. *New York Times*, 376 U.S. at 279 ("The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute. . . . Whether or not a newspaper can survive a succession of judgments, the pall of fear and timidity imposed upon those who would give voice to public criticism is an atmosphere in which the First Amendment freedoms cannot survive."); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971) (plurality) ("It is not simply the possibility of a judgment for damages that results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to steer far wider of the unlawful zone thereby keeping protected discussion from public cognizance."); *Ollman v. Evans*, 750 F.2d 970, 996-97 (D.C. Cir. 1984) (en banc) (Bork, J., concurring) ("[I]n the past few years a remarkable upsurge in libel actions, accompanied by a startling inflation of damages awards, has threat-

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ened to impose self-censorship on the press which can as easily inhibit debate and criticism as would overt governmental regulation that the First Amendment most certainly would not permit.”).

With respect, the Notes run the risk of fueling another upsurge in libel actions —foreign libel actions brought against United States-based publishers with subsequent enforcement actions brought in this country. The “simple” collection, in this country, of a foreign libel judgment which would not pass muster under the First Amendment has a direct impact on the quality and quantity of speech in this country and abroad and directly implicates First Amendment values. The chill is frankly more frosty when the judgment is obtained in Australia and subsequently sought to be “collected” in New York than when the original action is brought in New York. Indeed, in light of *Gutnick* and other recent libel cases brought overseas against United States-based publications, the chill resulting from real and threatened foreign libel litigation is increasing substantially, and the Notes can and will be construed as encouraging more forum shopping and more foreign libel litigation against United States-based publishers and broadcasters—without the prospect of meaningful constitutional review when the judgment is brought to the United States for collection.

3. The Notes’ stated standard of acceptable foreign procedures is still far too low to accommodate the core constitutional values embodied in the First Amendment when the Reporters write, “Thus, a judgment for damages in a dictatorship that punished **all critique** of government **might** be denied enforcement irrespective of any connection with the United States.” (emphasis added) Surely the ALI has no interest in appearing cavalier to the very real censorship and suppression of core political speech that takes place on a daily basis throughout the world (either through the threat of large damage actions under a rule of strict liability for false statements or through use of criminal processes or through harsher physical means). The Notes will again encourage forum shopping and the application of a sort of lowest common denominator in an area where the highest constitutional standards should be uniformly applied by United States courts.

In closing, I appreciate this and previous opportunities to comment. Although the facts and circumstances of foreign libel litigation are frequently fascinating, the desire to single out First Amendment cases in these Notes remains puzzling. The point about the scope of the public policy exception can be made and amply supported without reference to libel cases while we await further technological and legal developments in this fast-changing field. There are numerous cases outside the realm of the First Amendment where United States courts have declined to uphold foreign judgments on public policy grounds. See, e.g., *Victrix Steamship Co. v. Salen Dry Cargo*, 825 F.2d 709 (2d Cir. 1987) (declining to enforce British arbitration award, deferring instead to bankruptcy proceeding that was filed and ruled on in Sweden); *Ackermann v. Levine*, 788 F.2d 830 (2d Cir. 1986) (declining in part to recognize German judgment for attorney’s fees); *In re Chromalloy Aeroservices*, 939 F.Supp. 907 (D.D.C. 1996) (declining to recognize Egyptian judgment which nullified arbitration award). These cases and many others serve as possible examples for the Reporters to use to illustrate the impact of the draft statute.

By and large, the Tentative Draft embodies the wisdom of then-Judge Cardozo’s oft-quoted statement, “We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.” *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918). However, I must continue to disagree with the Notes which single out the First Amendment for far less favorable treatment than it receives under current caselaw and fail to treat the First Amendment as the fundamental constitutional value that it is. I respectfully suggest that this portion of the Notes be deleted.

Mark R. Hornak has authorized me to indicate that he joins in these comments.

Reporter Files Article 19 Free Expression Claim Over Jurisdiction in Gutnick

William Alpert, the American reporter for Dow Jones whose reporting is at issue in the Australian libel case of *Gutnick v. Dow Jones*, has filed a petition with the United Nations Human Rights Commission alleging that Australia's exercise of jurisdiction in the case violates his right to free expression guaranteed by Article 19 of the International Covenant on Civil and Political Rights ("ICCPR"). Although the UN can only issue a non-binding opinion on his petition, a decision in his favor could spur Australia to reform its libel law.

International Treaty Protects Free Expression Rights

Article 19 provides in relevant part that

"1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

The full text of the ICCPR is available online at www.unhchr.ch/.

Article Accessed in Australia

At issue in the underlying libel case is a claim by Australian resident Joseph Gutnick over a *Barrons* magazine article entitled "Unholy Gains" that focused on Gutnick's dealings with New York religious charities and American stock regulations. While Barron's is published in the US for an American readership, the article was available worldwide on wsj.com, a subscription site.

Dow Jones challenged Australia's jurisdiction over the claim, arguing that there was no publication in Australia. Dow Jones argued that as a matter of law in Internet defamation cases publication occurs where the publisher's web servers are located and not every place the

publication is accessed. Last year the Australian High Court affirmed that Dow Jones was subject to jurisdiction in Australia, reaffirming the English common law rule that in defamation actions publication occurs where the challenged statement is comprehended by a reader. *Dow Jones & Company, Inc. v. Gutnick*, [2002] HCA 56 (Dec. 10, 2002).

Petition Asks UN to Declare Australia in Breach of Treaty

The petition to the UN is made in the name of the reporter because only individuals may petition the UN for human rights violations. The petition argues that

Australia is violating Article 19 by requiring Alpert to defend his article in Australia under its restrictive libel laws. The petition notes that the article complies with all American laws and professional standards and that it has not been challenged legally or

factually in the US where it was written and published.

The petition also argues more generally that the major human rights treaties – the Universal Declaration of Human Rights, the European Convention on Human Rights and the ICCPR – all recognize freedom of expression as a fundamental right, while the right to reputation is only a secondary right.

Procedure for Hearing Claims

The UN Commission can ask the Australian government to respond in writing to the petition within six months. It may also ask both sides to make further written submissions (no oral testimony is taken) in a process that can take several years to adjudicate. The Commission's decisions are not legally binding, but a decision in favor of Alpert could spur Australia to reform its libel laws to comply with the ICCPR.

William Alpert is represented by Paul Reidy of Gilbert & Tobin in Sydney, Australia.

North Dakota Supreme Court Upholds \$3 Million Award Against Web Site

Court Addresses Internet Jurisdiction “Quasi-Judicial Privilege”

The North Dakota Supreme Court has upheld a \$3 million award to a University of North Dakota (UND) professor who a jury found was defamed by a website maintained by a former student. *Wagner v. Miskin*, 660 N.W.2d 593, 2003 ND 69 (N.D. May 6, 2003).

In its decision, the court addressed two issues of first impression: whether there is a privilege for statements made during “quasi-judicial” proceedings, and the basis for Internet jurisdiction in North Dakota. On the later issue, citing *Young v. New Haven Advocate*, 315 F.3d 256 (4th Cir. 2002), cert denied, May 19, 2003, the court found the site was “particularly and directly” targeted at North Dakota.

The trial award, which consisted of \$2 million for libel, \$500,000 for slander, and \$500,000 for interference with the professor’s business relationships, stemmed from an article that former UND student Glenda Miskin posted on her website, undnews.com. The article alleged that UND physics professor John L. Wagner had harassed Miskin with sexually provocative phone calls. See *LDRC MediaLawLetter*, May 2002, at 10.

Miskin was suspended from the university in 1990 after an internal disciplinary committee found that she had stalked Wagner.

Miskin appealed the jury verdict to the state’s highest court, and represented herself *pro se*. Wagner also appeared *pro se*, and responded only with a motion to dismiss pursuant to N.D. R. Civ. Pro. 12(b), arguing that the appeal was frivolous.

Pro Se Litigants Make Errors

The North Dakota Supreme Court, in a unanimous opinion by Chief Justice Gerald W. VandeWalle, began by rejecting Wagner’s motion, since the cited rule applies only to trial courts and because “we have a strong preference for deciding cases on the merits.” Slip op., ¶ 8, quoting *First Nat’l Bank v. Candee*, 488 N.W.2d 391, 396 (N.D. 1992).

The court then proceeded to reject all of Miskin’s

alleged grounds for appeal, mostly because they were not supported by the record before the court. “Our review of the multiple issues Miskin raises on appeal is hindered by the lack of a complete transcript of the district court’s proceedings,” the court wrote, adding that it was Miskin’s responsibility to provide the transcript. “This Court will not review alleged errors supported only by Miskin’s personal recollections and factual assertions.” Slip. op., ¶ 9.

Two Points of First Impression

Nevertheless, the court considered two of Miskin’s arguments, both points of first impression in the state.

First, the court ruled that while there may be a “quasi-judicial privilege” against liability for statements made in proceedings such as the UNC internal discipline proceedings, in this case the statements at issue were not made in this context. ¶ 13. The court concluded that, even if such a privilege exists, it does not attach to statements made outside the context of the quasi-judicial proceeding. ¶ 14.

Second, while stating that the record was insufficient to undertake a full analysis of the issue, the court rejected Miskin’s argument that the North Dakota courts “have no jurisdiction over the internet” – also noting that other, non-Internet based communications provided sufficient basis for jurisdiction and the claims.

The court discussed the different approaches that various courts have taken: some courts have looked at the level of interactivity and transactional activity of the web site, see, e.g., *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119, 1124 (W.D. Pa. 1997), while others, starting from the “effects test derived from *Calder v. Jones*, 465 U.S. 783 (1984), have looked at whether a web site is targeted at a particular jurisdiction, citing *Young v. New Haven Advocate*, the recent Fourth Circuit decision (315 F.3d 256 (4th Cir. 2002), cert denied, May 19, 2003).

Clearly working from the *Young* analysis, the court concluded that both the URL of the site and its content regarding UND in general and Professor Wagner in particular showed that Miskin had “particularly and directly” targeted the state. ¶ 20.

Both sides appeared pro se.

Supreme Court Cuts Back on Constitutionally Permissible Punitive Damages

By Paul M. Smith

In *State Farm Mutual Automobile Insurance v. Campbell*, 123 S. Ct. 1513 (April 7, 2003), the U.S. Supreme Court strengthened the constitutional limits on punitive damage awards in tort cases that the Court had previously erected in *BMW of North America v. Gore*, 517 U.S. 559 (1996). The result is a set of constitutional principles that may be of substantial assistance to media defendants facing punitive damage claims in defamation and other tort litigation.

In particular, the *State Farm* case provides useful ammunition to fight off efforts by plaintiffs to convince a jury that a defendant should pay a large punitive award because the tort at issue is part of a larger pattern of misconduct. Moreover, the Court went further toward capping how much punitive awards may exceed compensatory damages, stating that, in practice, few awards that exceed a single-digit ratio between punishment and compensation (*i.e.*, more than 9-to-1) will satisfy constitutional requirements.

The State Farm case provides useful ammunition to fight off efforts by plaintiffs to convince a jury that a defendant should pay a large punitive award because the tort at issue is part of a larger pattern of misconduct.

Facts and Proceedings Below

The case involved a fairly standard insurance tort claim. After a fatal automobile accident, State Farm's insured, respondent Campbell, was found by investigators likely to be at fault. But the company refused to settle claims for the policy limits and took the case to trial, assuring Campbell that his assets were safe and he need not procure separate counsel. When the jury returned a compensatory judgment far in excess of the rejected settlements and the policy limits, State Farm initially refused to pay the excess or to post a supersedeas bond allowing an appeal. Campbell obtained separate counsel, took an unsuccessful appeal, and State Farm ultimately paid the full amount of the judgment, including the excess. Campbell then sued State Farm for bad faith, fraud and intentional infliction of emotional distress.

In a first phase of the trial, a jury determined that State Farm's refusal to settle was unreasonable. In a second

phase, addressing the fraud and intentional infliction claims, State Farm argued that it had made an honest mistake, and the plaintiff introduced evidence that the "mistake" resulted from a national policy to limit payouts through aggressive and allegedly fraudulent practices – most of which bore no resemblance to the conduct in the case at hand. The jury found against State Farm and awarded \$2.6 million in compensatory damages and \$145 million in punitive damages.

The trial court reduced the awards to \$1 million and \$25 million respectively, but the Utah Supreme Court reinstated the \$145 million punitive award. It reasoned that State Farm's conduct was reprehensible, that the company had massive wealth, and that a large ratio between compensatory and punitive damages was warranted because so few victims

would enforce their rights. The Utah Supreme Court also said the large award was not excessive as compared to civil and criminal penalties that might apply under state law, including a \$10,000 fine for each act of fraud, suspension of a license to conduct business, disgorgement of profits, and imprisonment.

The Supreme Court's Ruling

The U.S. Supreme Court reversed by a vote of 6-3, with the majority opinion written by Justice Kennedy. It reaffirmed and applied the three factors affecting the constitutionality of a punitive damage award that had been identified in *BMW v. Gore*: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." 123 S. Ct. at 1520.

In applying the first factor, the Court emphasized that reprehensibility cannot be augmented by proving other conduct by the defendant that was lawful where it occurred or (generally) that occurred outside the jurisdiction. Here, the trial court had not only allowed that, but had allowed admission even of conduct not resembling the tort proven the case.

(Continued on page 12)

Supreme Ct. Cuts Back on Permissible Punitive Damages

(Continued from page 11)

As for the comparison of actual or potential injury with the punitive award, the Court again refused to create a bright-line upper-limit ratio. But it went so far as to say that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”

Finally, as to civil penalties, the Court said that the \$10,000 penalty provided under state law was “dwarfed” by punitive damages of \$145 million. The Court discounted the Utah Supreme Court’s references to other penalties such as loss of a business license, disgorgement of profits, and imprisonment, stating that these additional sanctions were only relevant to the much broader fraudulent scheme painted by the plaintiff’s evidence of dissimilar out-of-state conduct.

Justices Scalia, Thomas and Ginsburg, in dissent, maintained their view that the U.S. Constitution does not impose substantive limits on punitive damage awards.

This case will be particularly useful for publications subject to claims of a pattern or defamation or other tortious conduct. There is much useful language supporting an argument that a jury awarding punitive damages should generally look at the circumstances of the case at hand – rather than at the defendant’s wider ranging conduct involving different facts in different places.

Although the case obviously did not refer to First Amendment concerns, its statements about the dangers posed by unrestricted punitive jury awards certainly will play well with First Amendment arguments. And the strong presumptive 9:1 ratio cap should put some greater punch in general excessiveness arguments. It is particularly significant that the Court announced such a limit in a case where there were substantial arguments that a higher ratio was justified by the fact that only a few of the tort victims of the defendant actually enforced their rights.

For Petitioner: Sheila L. Birnbaum, Barbara Wrubel, Douglas W. Dunham, Ellen P. Quackenbos, Skadden, Arps, Slate, Meagher & Flom, LLP, New York City, for Petitioner.

For Respondent: L. Rich Humpherys, Roger P. Christensen, Karra J. Porter, Christensen & Jensen, Salt Lake City, UT, Laurence H. Tribe, Kenneth Chesebro, Cambridge, MA, Jonathan S. Massey, Jonathan S. Massey, P.C., Washington, D.C., for Respondents

Paul M. Smith is a partner in the D.C. office of Jenner & Block L.L.C.

UPDATE: Supreme Court Denies Certiorari in *Healthgrades.com v. Northwest Healthcare Alliance*

Ninth Circuit Decision Finding Personal Jurisdiction for Out-of-State Website Stands

The Supreme Court denied defendant Healthgrades.com’s application for certiorari without comment in *Healthgrades.com v. Northwest Healthcare Alliance, Inc.* (02-1250) The denial lets stand a October 7, 2002 decision by the Ninth Circuit in which the court held that personal jurisdiction could be exercised in a libel suit over an out-of-state website “when the harm suffered by plaintiff sounds in tort”. 50 Fed. Appx. 339, 2002 WL 31246123. Applying the “effects test” of *Calder v. Jones*, the Ninth Circuit held that Healthgrades.com, incorporated in Delaware but with its principle base of business in Colorado, purposefully interjected itself into Washington state by posting ratings of Washington health care providers on its site.

Northwest Healthcare Alliance, a health care provider in Washington state, sued Healthgrades.com for defamation after the website posted a negative evaluation of Northwest Alliance. The district court granted Healthgrades.com’s motion to dismiss for lack of personal jurisdiction.

The Ninth Circuit reversed holding that by evaluating Washington state providers, Healthgrades.com intentionally targeted its business into Washington state and should have been aware this information would be of use to Washington residents. In creating its evaluation, Healthgrades.com also gathered information in Washington state, while the comments at issue concerned, “the Washington activities of a Washington resident”. Only Healthgrades.com’s Washington state activities were evaluated by the court. The Ninth Circuit finally noted that the alleged harm was foremost felt in Washington state. *(For more information see LDRC MediaLawLetter October 2002, pg. 33.)*

Any developments you think other MLRC members should know about?

Call us, send us an email or a note.

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Ohio Jury Returns Defense Verdict In Hidden Camera Case

By Kenneth A. Zirm

After seven years of litigation and a two-week trial, a Cuyahoga County, Ohio jury returned a unanimous defense verdict last week in favor of Cleveland television station, WJW-FOX 8, and its former "I-Team" reporter, Carl Monday, in a lawsuit over a hidden camera investigation of heating contractors. *AAA All City Heating Air Conditioning v. New World Communications of Ohio*, No. CV-98-369034 (Ohio C.P. Ct., Cuyahoga County jury verdict May 15, 2003).

Furnace Repair or Scare

At issue in the trial before Judge Brian J. Corrigan was a two-part investigative report broadcast in February 1996 entitled "Furnace Repair or Scare." Launched in the wake of numerous tragic deaths from carbon monoxide poisoning, the hidden camera investigation caught a number of heating contractors exploiting public concern over carbon monoxide by using scare tactics in an attempt to sell furnaces to homeowners when new furnaces were not really needed.

One of the contractors caught on hidden camera was the plaintiff, David Benson, a subcontractor for plaintiff AAA All City Heating, Air Conditioning and Home Improvement, Inc. Benson told the homeowner that there was a big hole in her furnace, that it was leaking a "bad amount" of carbon monoxide into her home, and that it was dangerous to even operate. He told the homeowner that he was required by law to shut her furnace off and have her sign a release that said she was "on her own" if she turned the furnace back on and it killed her.

Three other contractors, including one contractor cooperating with the station, all disagreed with Mr. Benson's statements, and assured the reporter that the furnace was safe and was operating properly.

When Mr. Benson was later interviewed by the I-Team, he denied ever telling the homeowner that her furnace was leaking carbon monoxide, and insisted that he merely told her there was a potential of carbon monoxide leakage and that she should consider purchasing a new furnace. Benson insisted that, in a separate conver-

sation with the homeowner that took place in the kitchen and was not captured by the hidden cameras in the basement, he told the homeowner she could continue to operate the furnace safely as long as she purchased a carbon monoxide detector.

(Continued on page 14)

Update: FBI Returns AP Parcel

By David Tomlin

There have been some fresh developments in the case of the Federal Express document parcel shipped by The Associated Press, seized enroute by Customs agents and passed to the FBI, without any notice to AP.

After protests lodged last month by U.S. Sen. Chuck Grassley, R-Iowa, and AP President and CEO Louis D. Boccardi, FBI officials asked to meet in Washington with AP to discuss the matter.

On May 8, FBI representatives returned the seized documents, minus the AP cover letter and the Federal Express envelope that contained them, and acknowledged that taking the parcel was against the agency's rules and should not have happened.

But they said they were unable to say exactly who made the decision to seize the documents without giving AP a chance to challenge the action, why the FBI took custody of the parcel without obtaining the required warrant, and why the FBI didn't return AP's correspondence as soon as supervisory agents found out what the field agents had done.

The parcel contained a non-classified FBI laboratory report from a 1995 terrorism trial.

David Schulz of Clifford Chance, who accompanied the AP editors at the meeting, said the FBI agreed to see what it could find out about these details and also to take part in further discussions with AP about what might be done to prevent future abuses.

David Tomlin is a former reporter, editor and bureau chief for The Associated Press, where he now works in the president's office as an attorney.

OH Jury Returns Defense Verdict In Hidden Camera Case

(Continued from page 13)

Claims and Response

The initial complaint, filed in April 1997, asserted defamation, fraud, invasion of privacy, tortious interference, intentional and negligent infliction of emotional distress, and illegal wiretapping. Only defamation and fraud survived summary judgment, and the fraud claim was dismissed by the court at the close of plaintiffs' case at trial.

FOX 8 and Monday asserted that the gist of the broadcast, i.e., that plaintiffs had used scare tactics to frighten the homeowner into the purchase of a new furnace when a new furnace was not necessary, was substantially true. Defendants also argued that the evidence did not support a finding that the station was negligent in investigating and preparing the report. Defendants emphasized at trial that three other contractors had inspected the furnace a total of five different times, and that each contractor told the I-Team after each inspection that the furnace was fine.

Defendants also successfully barred the testimony of plaintiffs' journalism expert, arguing that such testimony would not be helpful to the jury because Ohio has adopted the reasonable man standard for private figure defamation cases, and specifically rejected the use of a professional negligence standard.

Bad Reputation Evidence Admissible

Probably the strongest evidence for defendants was from the Better Business Bureau establishing the prior bad reputation of the plaintiff company as one of the factors leading to its selection as a target for the I-Team investigation. The BBB documents showed that AAA All City had the worst complaint record of any company in the heating and air conditioning industry in the Cleveland area in the three-year period leading up to the broadcast. Because AAA All City had disagreed with the contents of the BBB reports, there were numerous letters in the BBB file explaining exactly why those reports were so bad. None of those letters or reports were

helpful to the plaintiffs, who tried unsuccessfully to keep the BBB records out of evidence.

The hidden camera outtakes were introduced as evidence in the case, as were the outtakes of the I-Team interview with Mr. Benson. Plaintiffs' counsel played them extensively to the jury, and argued that the actual broadcast had been unfairly edited to make the plaintiffs look worse than they really were. Although the outtakes did contain some favorable evidence for the plaintiffs, the jury was ultimately unpersuaded by the plaintiffs' unfair editing arguments.

After only 1-½ hours of deliberations the jury returned with a defense verdict, answering all three jury interrogatories on falsity, negligence and causation/damages unanimously in favor of the defendants. In interviews with the jurors afterwards, they pointed primarily to the plaintiffs' prior bad reputation as the reason for the defense verdict.

Probably the strongest evidence for defendants was from the Better Business Bureau establishing the prior bad reputation of the plaintiff company

Defendants WJW-FOX 8 and Carl Monday were represented by

Michael McMenamin, Kenneth Zirm and Susan Zidek of Walter & Haverfield LLP in Cleveland. The plaintiffs were represented by Charles Gruenspan, of Charles Gruenspan Co, LPA, also of Cleveland.

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Tenth Circuit Affirms Libel and Wiretap Judgment Against ADL

Press Conference to Discuss Federal Civil Rights Lawsuit Held Not a Matter of Public Concern

By Steven D. Zansberg

In a 2-1 ruling issued April 22nd, the United States Court of Appeals for the Tenth Circuit upheld the largest libel judgment in Colorado history against the Anti-Defamation League of the B'nai B'rith ("ADL") and its then-regional director Saul Rosenthal. *Quigley v. Rosenthal*, -- F.3d --, 2003 WL 1909284 (CA 10 (Colo.)) Apr 22, 2003.

Neighborly Welcome Turns Hostile

The case arose out of a dispute between neighboring families in a Denver suburb in late 1994. Shortly after Mitch and Candice Aronson moved from New York into the upscale Denver suburb of Evergreen, Colorado, the Aronsons were invited to a "welcome party" by William and Dorothy Quigley, who lived two doors away from them. But soon after the initial exchange of niceties, things got ugly. Disputes arose between the two couples concerning their two dogs, their kids, and there were cross-allegations of vehicular assault.

On October 20, 1994, Mitch Aronson, using a police scanner radio inside his house, overheard a cordless phone conversation between Mrs. Quigley and another woman. In the course of that conversation, Mrs. Quigley and the woman on the phone jokingly discussed setting a lit scarecrow atop the Aronson house, painting an oven door on the Aronson garage door, and tossing lampshades and bars of soap into the Aronson yard as reminders of the Holocaust.

The Aronsons also overheard conversations in which Mrs. and Mrs. Quigley talked about their having made repeated complaints to local law enforcement about the Aronsons' dog such that someday, when the time was right, the Quigleys would "come down on them like a ton of bricks." (Although it was omitted from the panel's opinion, it was also undisputed that the Aronsons heard Mrs. Quigley in another phone conversation refer to the

Aronsons as "those fucking New York Jews," whom she intended to drive out of the neighborhood within one year.)

Told Law Allowed Taping

Concerned by what they had overheard on the police scanner, the Aronsons turned to the Colorado office of the ADL and reported that the Quigleys were engaging in threatening, anti-Semitic behavior. The Aronsons were concerned, however, that they themselves may have violated the law by having overheard and recorded their neighbors' cordless phone conversations. The ADL referred the Aronsons to a private criminal defense attorney, Gary Lozow, who was also a member of the ADL's regional advisory board.

The next day, the Aronsons met with Lozow and played for him portions of the tapes. Lozow and his associate, a former Assistant U.S. Attorney, on that day researched whether the federal Wiretap Act prohibited interception (or use or disclosure) of

cordless phone conversations, and determined that such communications were expressly exempt from the Act's definition of "wire" or "electronic" communications. Lozow also contacted an Assistant District Attorney and the District Attorney and were informed by both officials that it was not unlawful to intercept cordless phone conversations.

Based upon that advice and his own legal research, Lozow advised the Aronsons that they could bring the audiotapes to the D.A.'s office. The Assistant D.A. expressed interest in listening to the tapes in order to decide whether charges might be brought against the Quigleys.

Civil Rights Claims Filed

Subsequently, on two occasions (Nov. 5th and 8th), the Aronsons met with Lozow and Stuart Kritzer, another attorney Lozow brought in to the case to assist him in repre-

(Continued on page 16)

Lozow also contacted an Assistant District Attorney and the District Attorney and were informed by both officials that it was not unlawful to intercept cordless phone conversations.

10th Cir. Affirms Libel and Wiretap Judgment Against ADL*(Continued from page 15)*

senting the Aronsons, as well as two individuals who were employees of the regional ADL office. During those meetings, the participants agreed to continue providing tapes (and transcripts) of the Quigleys' phone conversations to the District Attorney and Sheriff in the hopes that they might file criminal charges against the Quigleys. Alternatively, the group agreed that a civil lawsuit would be prepared on behalf of the Aronsons alleging various torts and statutory violations on the part of the Quigleys.

On December 6, 1994, attorneys Lozow and Kritzer filed a verified complaint in federal court, fashioned *Mitch and Candice Aronson v. Bill and Dorothy Quigley*. In the complaint the Aronsons alleged that the Quigleys had conspired with each other and others to harass the Aronsons and to interfere with the Aronsons' civil and property rights in violation of 42 U.S.C. §§ 1982 and 1985, engaged in ethnic intimidation in violation of Colorado's statutes, and committed slander *per se*, assault, civil conspiracy, and outrageous conduct. The verified complaint contained verbatim excerpts of several of the Quigleys' cordless phone conversations that the Aronsons had intercepted and recorded.

Press Inquires About the Suit

[Later that same day, the ADL's regional director Saul Rosenthal was contacted by a reporter for *The Denver Post* and asked to comment on the Aronsons' civil complaint that had been filed in federal court. Rosenthal had not seen the complaint and later obtained a copy from attorney Kritzer. That afternoon, Rosenthal prepared a "press advisory" announcing a press conference for the next day to discuss the Aronsons' lawsuit against the Quigleys. The next morning, the Aronsons' lawsuit was covered in both of Denver's daily newspapers.] (The undisputed facts set forth above in brackets are omitted from the panel's opinion.)

The day after the Aronsons' complaint was filed, Rosenthal held a press conference, as had been announced, at the ADL's offices, and summarized the allegations of the Aronsons' complaint against the Quigleys, and further described the case as "one of the most astonishing cases of anti-Semitic harassment our office has ever confronted." In mimicking the allegations in the Aronsons' complaint, Rosenthal described the joking banter of the October 20th phone call that made references to the Holocaust as actual plans the Quig-

leys had to burn a cross on the Aronsons' property, tape a facsimile of an oven door on their home, and conducting other criminal and violent attacks against the Aronsons. He concluded by describing the Quigleys' conduct as "not only anti-Semitic, [but] anti-Christian, anti-democratic, and anti-American."

Later that same day, Rosenthal appeared as an invited guest on a local radio program to discuss the *Aronson v. Quigley* lawsuit. On that program, Rosenthal again summarized the allegations in the Aronsons' complaint. He also appeared to endorse the allegations stating "we have the evidence to support and sustain these charges . . . that evidence we believe in a court of law will stand up very comfortably against any form of scrutiny." Rosenthal described the Quigleys' conduct as "the worst [case of anti-Semitic behavior] that I've seen in so many years, since the [Alan] Berg murder [a Jewish radio personality who was murdered in Denver in 1983]."

Three days after the Aronsons filed their civil complaint in federal court, the District Attorney filed criminal charges against the Quigleys alleging felony menacing and violation of Colorado's ethnic intimidation statute.

Discover Wiretap Act Amendments Made Taps Unlawful

In mid-December 1994, the District Attorney, and the Aronsons' attorneys (Lozow and Kritzer) discovered that the federal Wiretap Act had been amended on October 25, 1994 to remove the express exemption for the radio portion of cordless phone communications. Lozow and Kritzer then filed a first amended complaint that deleted any conversations intercepted after October 25, 1994.

Subsequently, the Quigleys responded to the Aronsons' lawsuit and countersued the Aronsons, their attorneys Lozow and Kritzer, Saul Rosenthal, and the ADL, alleging violation of the Wiretap Act, defamation, intrusion, and false light invasion of privacy, among several other causes of action.

The Quigleys also sued the District Attorney, who subsequently dropped all charges against the Quigleys except a felony menacing count against Mr. Quigley (he ultimately pleaded *nolo contendere* to a reduced charge of reckless driving).

(Continued on page 17)

10th Cir. Affirms Libel and Wiretap Judgment Against ADL*(Continued from page 16)*

All of the parties later settled all claims (the Quigleys receiving \$425,000 from the Aronsons' attorneys and the District Attorney) and dismissed all claims and counter-claims against each other.

The only claims not settled were the Quigleys' claims against the ADL and its regional director Saul Rosenthal. Those claims were tried to a jury in federal district court in March and April of 2000. The jury found the ADL liable for defamation, false light invasion of privacy, intrusion, and violating the federal Wiretap Act by "using" illegally intercepted conversations in the filing of the Aronsons' civil lawsuit against the Quigleys. The jury found that the ADL had not procured any interceptions of the Quigleys' phone calls. The jury awarded the Quigleys \$1.5 million in a lump sum compensatory damages award, \$1.5 million in state punitive damages, and \$7.5 million in punitive damages under the federal Wiretap Act.

The Appellate Decision: Matter of Public Concern

On appeal, the ADL and Rosenthal challenged the district court's ruling that Rosenthal's statements at the press conference and on the radio program were not on a matter of public concern, and therefore the actual malice standard (applicable under Colorado law even in private figure cases when the statements are on a matter of public concern) did not apply to the Quigleys' defamation claims. Thus, the jury was instructed that only the negligence standard was required to be met.

In finding that Rosenthal's statements were not on a matter of public interest or general concern, the majority relied upon the private figure status of the plaintiffs, the erroneous assumption that the defendants were not a media entity, and the panel's conclusion that the allegations in the Aronsons' civil lawsuit were not addressed to any public entity or a private entity that impacts the general public.

The majority also rejected the ADL's arguments that because Rosenthal's statements were describing the allegations in an already-filed federal lawsuit, his statements were on a matter of public concern; the majority expressly

disavowed a rule that statements concerning filed lawsuits were on matters of public concern.

Finally, and according to the panel "most importantly," Rosenthal's statements were not on a matter of public concern because, he "knew or should have known" that the allegations in the Aronsons' verified complaint were "baseless" and not even colorable.

Fair Report Privilege Inapplicable

The panel also rejected the ADL's argument on appeal that the trial court erroneously denied the ADL's tendered instructions on the fair report privilege. The panel affirmed the trial court's ruling that under Colorado law statements that summarize a filed complaint (before any court action has occurred on that complaint) are not subject to the fair reports privilege. Moreover, the panel concluded that Rosenthal's statements went beyond merely summarizing the contents of the Aronsons' complaint.

"Most importantly," Rosenthal's statements were not on a matter of public concern because, he "knew or should have known" that the allegations in the Aronsons' verified complaint were "baseless" and not even colorable.

False Light Claim Rejected

In the wake of the Colorado Supreme Court's decision (*Denver Publ'g Co. v. Bueno*, 54 P.3d 893 (Colo. 2002)) rejecting the claim of false light invasion of privacy, the judgment on the false light claim was reversed. However, because the majority concluded that the submission by the ADL of a lump sum compensatory damages verdict form effectively conceded that the Quigleys' damages were unitary in nature, this reversal (and reversal of the intrusion judgment, *see below*) did not require vacating any of the damages awarded or a new trial on damages.

Wiretap Claims: Distinguishing Bartnicki

The majority of the panel rejected all of the ADL's challenges to the judgment against ADL on the Quigleys' federal wiretap claims. ADL had challenged the imputation of attorneys Lozow and Kritzer's conduct (in filing the Aronsons' civil complaint – the only act that gave rise

(Continued on page 18)

10th Cir. Affirms Libel and Wiretap Judgment Against ADL*(Continued from page 17)*

to liability under the Wiretap Act) to the ADL organization under two alternative theories. The ADL contended that it was plain error to submit the “civil conspiracy” theory of liability because the federal wiretap statute contains no textual basis for a private cause of action against conspirators. See *Central Bank of Denver N.A. v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) (rejecting implied right of action for secondary liability where federal statute lacks textual basis for such liability). The panel concluded that the submission of the civil conspiracy theory did not rise to the “extraordinary, nearly insurmountable burden” of the plain error exception.

The panel also rejected the ADL’s challenge to the alternative theory of imputing Lozow and Kritzer’s conduct to the ADL on the grounds that the attorneys were acting as agents of ADL. The panel found no abuse of discretion in the district court’s refusal to deliver the ADL’s tendered instruction requiring that a principal have the ability to control “the manner of work performed” by the agent, which is language the trial court used in its ruling denying the ADL’s motion for summary judgment, and thus was law of the case. The panel found that such an instruction would have been proper only if plaintiffs contended that Lozow and Kritzer were servants of the ADL rather than independent contractors. The panel also found sufficient evidence to support the jury’s possible finding of an agency relationship, concluding that “it was unnecessary . . . for the ADL to have the ability to control the attorneys’ representation of the Aronsons.”

The panel also rejected ADL’s argument under *Bartnicki v. Vopper*, 532 U.S. 514 (2001), that the First Amendment prohibits the imposition of liability on the ADL for violating the Wiretap Act when the conduct giving rise to liability was the filing of a federal lawsuit alleging threats of violence on account of the Aronsons’ race, especially when the jury had found that the ADL had not participated in procuring the interceptions.

The panel distinguished the instant case from *Bartnicki* on several grounds:

First, the content of the Quigleys’ intercepted conversations were not matters of public concern.

Second, according to the panel, “unlike the defendants in *Bartnicki*,” the defendants in this case did not accurately portray the content of the Quigleys’ recorded telephone conversations.”

Third, unlike the defendants in *Bartnicki*, here it was uncontroverted that the ADL was aware that the Aronsons were intercepting the Quigleys’ telephone conversations.

Punitive Damages

The majority of the panel rejected the ADL’s argument that there was insufficient evidence to warrant the imposition of punitive damages against ADL for violating the federal Wiretap Act. The ADL had argued that Lozow and Kritzer’s independent research into the legality of the cordless phone conversation interception and use scheme, combined with the official assurances they had received from the District Attorney’s office, negated the necessary element of “wanton, willful, or reckless” violation of the Wiretap Act.

The majority of the panel rejected this argument, finding that Lozow and Kritzer were reckless in having researched only whether *interception* of cordless phone calls was legal, and not the independent question whether *use* of such conversations was lawful. Furthermore, the majority of the panel found Lozow and Kritzer were reckless in not having re-checked the law in early December 1994 (prior to filing the lawsuit) to see whether it had changed in the interim since their initial inquiry of October 22, 1994. In addition, the panel found that punitive damages were warranted because Lozow and Kritzer had selectively “used” portions of the intercepted communications in the Aronsons’ verified complaint to create a false impression about the Quigleys.

The majority rejected the ADL’s contention that to uphold punitive damages on this basis violates the First Amendment because the factfinder was not required to find both falsity and actual malice by clear and convincing evidence. The majority found that such a finding was not required because (a) the allegations of the Aronsons’ complaint were not a matter of public concern, and (b) the allegations were false[!].

No Intrusion for Use or Disclosure of Information

The only portion of the judgment below reversed by the panel was the plaintiffs’ intrusion claim. The jury was instructed that it could find the ADL had committed the tort

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10th Cir. Affirms Libel and Wiretap Judgment Against ADL*(Continued from page 18)*

of intrusion by either intercepting the Quigleys' phone conversations or using the contents of those conversations (in the preparation and filing of the Aronsons' civil complaint). Finding plain error, the panel reversed the intrusion judgment because

"Colorado tort law does not recognize a cause of action for invasion of privacy for mere use of information that was lawfully obtained from others without committing any act of intrusion into a zone of privacy."

However, because the panel finds that the lump sum verdict award constituted a concession that the Quigleys' losses were unitary, the reversal of the judgment on intrusion does not require the panel to vacate the damages awards.

Dissent by Judge Hartz

Judge Harris Hartz filed a separate opinion concurring in part and dissenting in part. Judge Hartz dissented from the majority's rulings that Rosenthal's statements were not on a matter of public concern and that punitive damages were properly awarded for violation of the Wiretap Act.

On the defamation claim, Judge Hartz found that the panel erroneously considered the falsity of the defendants' speech in determining whether the speech is on the matter of public concern:

"If only true statements can be matters of public concern, Colorado's public-concern doctrine would be an empty gesture, because true statements can *never* be the basis for a defamation cause of action."

Rejecting the majority's view that allegations must implicate a public entity or have the potential to impact upon a significant number of individuals in the community, Judge Hartz stated that

"a purely social concern can be a matter of public concern. I would have thought that *the* social concern of our day is bigotry. Surely, faith-based intolerance, particularly when combined with threats of violence, is matter of concern to the community at large."

Accordingly, Judge Hartz concluded, the jury should have been required to find actual malice under Colorado law.

Judge Hartz also would reverse the punitive damages awarded under the federal Wiretap Act. Judge Hartz concluded that there is insufficient evidence of wanton, willful, or reckless violation of rights protected by the Wiretap Act as demonstrated by the undisputed evidence that Lozow and Kritzer thoroughly researched whether their conduct violated the law before engaging in that conduct. As such, their conduct cannot be found to have been committed "with malice or reckless indifference to the federally protected rights of an aggrieved individual."

Judge Hartz found that the sufficiency of the evidence argument was not properly preserved. He would, nevertheless, reverse and remand for a new trial on the basis of erroneous jury instructions given on the punitive damages issue. Specifically, the jury was not required to find that ADL acted with knowledge or reckless disregard of whether it was violating the federal Wiretap Act. In addition, the trial court instructed the jury that it must disregard the ADL's good faith belief that it was acting lawfully when considering liability for damages under the Wiretap Act. On that basis, Judge Hartz would remand for a new trial on the issue of whether punitive damages should be awarded, and if so, the amount.

Petition for Rehearing Filed

On May 7, 2003, the ADL and Saul Rosenthal filed a petition for rehearing and request for rehearing *en banc* with the Tenth Circuit Court of Appeals. On May 13, 2003, an *amicus* brief was filed in support of the ADL's petition by Professors Erwin Chemerinsky and Catherine Fisk on behalf of the American Jewish Committee, the American Jewish Congress, Americans United for Separation of Church and State, the Asian Law Caucus, and the Lambda Legal Defense and Education Fund.

Steven Zansberg, along with Thomas B. Kelley, Faegre & Benson, Denver, were appellate counsel for defendants. Trial counsel for the plaintiffs (Quigleys) were Jay Horowitz and Philip Gordon of Horowitz & Wake, Denver, and appellate counsel for Quigleys were Lawrence Treece and Charlotte Wiessner of Sherman & Howard, Denver. Trial counsel for defendants ADL and Rosenthal were Joseph Jaudon and David Yun of Jaudon & Avery, Denver.

UPDATE: Defamed Company's Threats Limit Book Sales, Ads

A California technology company that a jury found had been libeled by numerous web postings by two former employees has taken action to limit sales of a book by the former employees detailing their grievances while their appeal awaits oral argument. Meanwhile, a Colorado man was arrested for sending threatening e-mails and posting threatening messages about the former employees.

In December 2001, a jury found that Michealangelo Delfino and Mary Day, both former employees of Varian Medical Systems, Inc., had libeled their former employer and its executives in numerous postings to various Internet bulletin boards, and awarded the company \$775,000. *See Varian Medical Systems v. Delfino*, No. CV 780187 (Cal. Super. Ct. jury verdict Dec. 18, 2001); *see also LDRC LibelLetter*, Jan. 2002, at 13.

The court also enjoined the pair from making additional postings, but they have ignored this order, stating that "we'll post until we're dead." A contempt proceeding based on these postings has been folded into Delfino and Day's appeal on the merits. *See Varian Medical Systems, Inc. v. Delfino*, No. H024214 (Cal. Ct. App., 6th Dist. filed March 8, 2002); *see also LDRC MediaLawLetter*, April 2002, at 16. On May 16, the appellate court notified that parties that it would decide the case without oral argument.

In addition to their postings on various sites, Delfino and Day have also chronicled their grievances and developments in the case on their own site, www.geocities.com/mobeta_inc/slapp/.

The pair has now turned their story into a self-published book, *Be Careful Who You SLAPP*, which was published in December 2002. The book was available at various booksellers and the authors advertised the book in several California newspapers.

But Barnes & Noble's web site (www.bn.com) stopped selling the book and several newspapers stopped running the ads after receiving a letter from Varian's attorney stating that the book may be defamatory. The letter quoted the *Second Restatement of Torts* for the principle that "one who only delivers or transmits defamatory material published by a third person is subject to liability if, and only if, he knows or has reason to know of its defamatory character," *Restatement (Second) of Torts* § 581,

adding that "this letter constitutes notice of the defamatory content of *Be Careful Who You SLAPP*."

A barnesandnoble.com spokeswoman did not respond to inquiries.

Other retailers continue to sell the book, as do the authors.

Meanwhile, Cameron Moore of Loveland, Colo. was arrested by FBI officials in February on charges that he made death threats against Delfino and Day via e-mails and web postings. Moore has no apparent direct connection to either Delfino or Day, although he once worked with the wife of a Varian executive.

Moore was released on \$10,000 bond, and then arraigned on March 13. At the arraignment, Magistrate Howard Lloyd of the federal district court in San Jose, Cal. warned Moore to avoid any interaction with Delfino and Day. *See U.S. v. Moore*, No. 5:03m00023 (N.D. Cal. filed Feb. 12, 2003).

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New Jersey Court Rules Reporter Alleging Libel is a Public Figure

By Bruce Rosen

An *Asbury Park Press* reporter who is suing a former public official and his lawyer for libel has been designated a limited-purpose public figure by a New Jersey trial judge because she voluntarily wrote about the public official, and that there was an issue of public concern at the heart of the suit. (No transcript of the decision has yet been issued).

In an opinion delivered from the bench on April 24, 2003, Superior Court Judge William Gilroy, sitting in Monmouth County, N.J., dismissed a negligent defamation count from the complaint of *Press* reporter Carol Gorga Williams. Williams claimed that two prominent New Jersey lawyers, one a former television commentator, conspired to spread a false allegation that she was having an affair with a source. Both Williams and the source are married. Judge Gilroy's ruling in *Williams v. Kenney*, MON-L-202-03, requires Ms. Williams to prove actual malice in her remaining defamation, invasion of privacy and intentional infliction claims.

Although the issue of reporters' public figure status is one of first impression in New Jersey, it has been decided in a handful of other jurisdictions, primarily involving well-known columnists. But the designation would make sense under New Jersey's liberal public-figure analysis. New Jersey courts have extended limited-purpose public figure status to policemen, teachers and other minor public officials and also to private figures who are involved in matters of public interest. *Sisler v. Gannett*, 104 N.J. 256 (1986). In addition it has endorsed an additional category in which fair comment on matters of public interest require proving actual malice. *Dairy Stores v. Sentinel Publishing Co.*, 104 N.J. 125 (1986).

Kansas Case Cited

But Judge Gilroy also relied on a Kansas Supreme Court ruling cited by defendants with similar facts, *Knudsen v. Kansas Gas & Electric Co.*, 807 P.2d 71 (1991). There, a reporter sued a nuclear power plant official who

complained about an article concerning the public's right to use the plant's cooling lake. The high court affirmed the trial court's grant of summary judgment for the utility, finding that the reporter – by choosing to take on an issue of public controversy – had voluntarily injected himself into the public's attention and thus became a public figure. That reporter similarly complained unsuccessfully that “publication of his articles in a newspaper does not give others the right to destroy his professional reputation.”

The ruling is the first in New Jersey to tacitly acknowledge that public figure analysis can be used to designate persons who have high public visibility or public activity within a confined geographic area.

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Reporter Wrote Critical Articles

There are two defendants: Robert Tarver, the African-American former regional chief Public Defender who was a frequent television legal commentator in the 1990s and

who was the subject of an internal investigation for allegedly not having authority to moonlight and for not properly reporting his time when he was making television and other appearances and his attorney Linda Kenney, a Red Bank, N.J. employment attorney who represented Tarver in a discrimination case against the state.

Williams is a veteran newswoman who had been the primary courthouse reporter in Ocean County, N.J. for the county's largest newspaper. She wrote stories, using named and unnamed sources, highly critical of Tarver and described the dispute involving Tarver, his superiors and Tarver's staff attorneys. Tarver resigned and retained Kenney to file a discrimination claim on his behalf.

One exhibit to the suit was a transcript of a telephone call between Tarver and Acting Public Defender Peter Garcia, made during the height of the investigation. In the transcript, Garcia told Tarver that Tarver would be cleared of the charges, adding that he had discovered

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N.J. Court Rules Reporter Alleging Libel is a Public Figure

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that one of Tarver's staff attorneys had been Williams' source and that the two were sleeping together.

Kenney's Press connection

Kenney, who was a part-time columnist on employment matters for the *Press*, wrote a letter on Tarver's behalf critical of Williams' coverage to her editor, pointing out the transcript had just been filed and including a copy without rendering an opinion as to its veracity. Although Williams' name was redacted in the exhibit, Williams claims Tarver and Kenney told *Press* editors and the NAACP of the allegation, thus defaming her. Williams claims she was interrogated by *Press* editors and moved off her beat after the letter was received.

Tarver, who is expected to enter private practice shortly, is vice president and general manager of www.thenorthstarnetwork.com, an African-American web news source. The discrimination suit brought by Tarver was settled last year.

Bruce S. Rosen of McCusker, Anselmi, Rosen, Carvelli & Walsh in Chatham, N.J., represents Tarver in this matter. Michael Canning of Giordano, Halleran & Ciesla in Middletown, N.J., represents Kenney. Williams' attorney is Richard Ragsdale of Carchman, Sochor, Schwartz & Ragsdale in Princeton, N.J., who was a defense counsel in the 1986 Sisler case.

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Court Refuses to Enjoin Lobbying Effort in Illinois

A federal district court for the Northern District of Illinois refused to grant a motion for preliminary injunctive relief to enjoin a public lobbying campaign that the plaintiffs contended was replete with false and defamatory statements. *Ameritech v. Voices for Choices, Inc.*, No. 03 C 3014, 2003 WL 21078026 (N.D. Ill. May 12, 2003). The plaintiffs were Ameritech Corp, Illinois Bell Telephone Company and SBC Properties. The defendant was Voices for Choices, Inc. a not-for-profit corporation set up by the plaintiffs' competitors (e.g., MCI, AT&T).

At issue was a bill in the Illinois General Assembly that would allow the plaintiffs to raise the leasing rates it charges competitors for use of their network. The plaintiffs specifically wanted to enjoin the defendant from stating that the bill

***Silencing one side of a public debate
is a drastic measure that would
severely harm the public interest in
freedom of speech and the
legislative process."***

"would cause consumer phone rates in Illinois to double or skyrocket."

Recognizing that a prior restraint comes before the courts with "a heavy presumption against its constitutional validity," the court also, in this instance, felt that an injunction would "detrimentally affect democracy generally."

Chief Judge Kocoras concluded that the statements at issue were more in the line of prediction than statement of fact, that damage to business reputation and good will were all amenable to recompense by money damages, and that the balance of harms suggested that both sides should be given the freedom to pummel one another in the arena of public debate.

"While the public has an interest in honest public debate, we believe silencing one side of a public debate is a drastic measure that would severely harm the public interest in freedom of speech and the legislative process."

For Ameritech: Brian L. Crowe, Ronald Jay McDermott, Lynn A. Ellenberger, Jared Matthew Wayne of Shefsky & Froelich (Chicago)

For Voices for Choice: Richard J. O'Brien, David W. Carpenter and Eric Stephen Mattson of Sidley Austin Brown & Wood (Chicago)

UPDATE: Texas Court of Appeals Reverses Summary Judgment for Paramount Pictures on Hard Copy Sweepstakes Segment

Broadcast was "Of and Concerning" Plaintiff

On March 20, a Texas Court of Appeals (Eastland) reversed a summary judgment win for Paramount Pictures (Paramount) in a defamation suit over a *Hard Copy* segment on sweepstake scams. (*Allied Marketing Group, Inc. v. Paramount Pictures Corp. et al*, 2003 WL 1391069 (Tex. App.-Eastland). The court, in an opinion by Chief Justice W.G. Arnot III, held that *Hard Copy*'s creation of a fictional contest, which inadvertently bore the name of plaintiffs sweepstakes, could reasonably be understood as "of and concerning" the Plaintiff.

The court also found that the made-up sweepstakes could be viewed as factual — rejecting plaintiffs argument that it could only be seen as a piece of fiction — and that the segment could have a defamatory meaning.

Finally, the court also held that an earlier appellate decision in this case did not preclude Allied from raising the "of and concerning" issue in the present appeal.

Expose on Sham Sweepstakes

The litigation is based on a segment on sham sweepstakes the television program *Hard Copy* broadcast in February, June and July of 1996. In the segment, a *Hard Copy* producer went to several homes and told the residents they had "won" the "Sweepstakes Clearing House" contest. Before being given a "check" for \$10,000, "winners" had to give the producer a personal check for \$250 payable to "I.R.S." for tax purposes. After writing their checks, the residents were told this was a scam and the crew was really from *Hard Copy*. The segment suggested that this type of scam was done throughout the country, while a *Hard Copy* anchor referred to the scam as "nationwide" during the segment.

Hard Copy believed the name "Sweepstakes Clearing House" was not used by any other company. However, Allied had been using the name "Sweepstakes Clearinghouse" since the mid-1980s. Allied's sweepstakes contest was in fact very similar in form to the sham one depicted on *Hard Copy*. After *Hard Copy* refused to broadcast a clarification, Allied sued Paramount (*Hard Copy*'s producer) and other individual defendants for defamation and other claims.

Paramount brought a motion for summary judgment arguing that Allied was a public figure and could not success-

fully prove actual malice. The motion was granted by the trial court but this was overturned in March 2002 by a Texas appellate court in Dallas. (28 *Media L. Rep.* 1637 (Tex App. March 17, 2000)) The appellate court held that Allied was neither a general nor limited purpose public figure. Allied's actions did not rise to the level inviting public scrutiny of a general public figure, nor did Plaintiff's actions in a public controversy connect it to the segment. The case was thus remanded to the trial court. (*For a more detailed discussion, see LDRC LibelLetter May 2000 at page 21*).

Paramount submitted traditional and no-evidence summary judgment motions on remand claiming the segment was not "of and concerning" Allied; that the segment was a "fictional" work; the segment was not capable of a defamatory meaning; and that if the defamation claim failed, the other claims must therefore fail as well. The trial court granted Paramount's motion, without stating the grounds for its decision. In its present appeal Allied claimed that summary judgment was not proper because the segment was "of and concerning" its sweepstakes. Allied further contended that the trial court should not have granted summary judgment on its other claims.

Segment was "Of and Concerning" Plaintiff

Chief Justice Arnot first held that the segment was "of and concerning" Allied's sweepstakes because a reasonable viewer could have concluded that the broadcast referred to the contest conducted by the Plaintiff. Summary judgment for Paramount was improper due to the fact that the names of the *Hard Copy* scam and Allied's contest were identical. In the scam portrayed on *Hard Copy*, the film crew said they were with "Sweepstakes Clearing House", and "winners" were presented with a fake check with the name "Sweepstakes Clearing House" on it.

The court also noted that *Hard Copy* used the name "Sweepstakes Clearing House" in connection with a contest very similar in form to the contest run by Allied. As with the *Hard Copy* "sweepstakes", Allied's contest personally delivers checks for \$10,000. The producer posing as the contest representative stated on air that this kind of scam was

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Texas Court on Hard Copy Sweepstakes Segment

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“perpetrated all over the country”, and later testified that *Hard Copy* intended for the sham scam to be “close to the real scams”. *Hard Copy* also never acknowledged during the segment that its “Sweepstakes Clearing House” was not a real company. Based on the identical name and form, the court ruled it was possible for a reasonable jury to understand the segment to have been “of and concerning” the Plaintiff.

Broadcast Was Not Work of Fiction

Paramount next argued that the segment was “an obvious work of fiction” and that “no viewer could reasonably understand that it referred to Sweepstakes Clearinghouse”. Viewing the segment in its entirety, the court disagreed and held that the broadcast was a “news report about an actual problem,” and not a piece of fiction. Even though the broadcast depicted an imaginary sweepstakes, *Hard Copy* identified the segment as a “report”. *Hard Copy* itself admitted it was not fiction when the *Hard Copy* producer posing as the sweepstakes representative, and one of the individual defendants, testified that the “segment was a ‘news report.’”

This issue of whether the segment was a fictitious work was immaterial, the court also concluded, because the audience could have “reasonably concluded that the segment referred to Sweepstakes Clearinghouse”. The court described the various similarities between the fake sweepstakes and Plaintiff, including the respective sweepstakes’ names and format. There was also evidence that those who watched the broadcast associated the invented sweepstakes with Plaintiff. A witness for Allied testified that he associated the fake sweepstakes company in the segment with the Plaintiff’s sweepstakes. Allied also introduced evidence that its business suffered after the segment was aired. Specifically, Allied experienced a decrease in consumer response rates to mailings as well as profits.

Defamatory Meaning May Exist

The court also dismissed Paramount’s contention that even if the segment was “of and concerning” Allied, it was not capable of a defamatory interpretation. Paramount claimed that the segment concerned how con-men imitate legitimate sweepstakes companies to commit fraud, not that Allied’s contest was fraudulent.

Chief Justice Arnot held that this was not the only inter-

pretation a reasonable jury could adopt. “One reasonable interpretation of the segment is that Sweepstakes Clearinghouse was a sham company...,” stated the court. While Paramount claimed the segment was about the use of legitimate sweepstakes companies’ “trappings” by nefarious individuals to commit a crime, at no point did *Hard Copy* identify Allied’s contest as a legitimate contest.

A reasonable person watching the segment could have interpreted the story in claiming that Allied’s Sweepstakes Clearinghouse was a fraud. In fact, Allied presented a witness who stated they believed, based on the segment, that Allied was engaging in this kind of scam. As a charge of fraud would injure Allied’s reputation, the court found that the segment could have a defamatory meaning and the question should be presented to a jury.

Law of the Case Does Not Apply

Finally, the court held that the “law of the case” principle was not applicable in this situation because the issues before the court of appeals in the first appellate decision and in the present appeal were different. Paramount argued in the present appeal that because the Dallas appeals court ruled in Paramount’s favor in the “of and concerning” issue in the earlier appeal, Allied was precluded from arguing the point again now.

Chief Justice Arnot disagreed. The issue in the first appeal was Allied’s status as a limited public figure. The question in the present appeal related to whether the segment was “of and concerning” Allied. The court explained that the two issues involve “different inquiries.” According to the court,

“The ‘of and concerning’ inquiry is whether viewers of the publication understood that it referred to the plaintiff; the limited purpose public figure test does not take into consideration the understanding of the publication’s viewers.”

Because the court was not currently deciding whether Allied was a limited purpose public figure, Allied could not be prohibited from raising the “of and concerning” issue now.

For Allied Marketing Group: S.A. Khoshbin and Michael Wilson

For Paramount Pictures Corp. et al: Rex Heinke, Dan Davison, William J. Boyce and Jessica Weisel

A "Promised" Retraction Does Not Toll The Statute Of Limitations For Libel

By Slade R. Metcalf and Jeffrey O. Grossman

A convicted felon cannot hold back the running of the clock by claiming that a newspaper reporter had promised a retraction. On March 12, 2003, a New York State judge, for the first time, directly addressed the question of whether the limitations period for a libel claim may be tolled, or a defendant estopped from asserting it, when a plaintiff claims to have refrained from suing in reliance on a promise to print a retraction. The New York trial court granted the motion of NYP Holdings, Inc., the publisher of the *New York Post*, to dismiss as time-barred a libel complaint seeking damages in connection with a December 2000 article in the *Post*. *Kotlyarsky v. New York Post*, 757 N.Y.S.2d 703, 31 Media L. Rep. 1545 (NY Sup. Ct., Kings Co. 3/12/03).

"Insure Scam" Articles

The case arose out of a December 11, 2000 article headlined: "Insure-scam medical mills linked to mob \$\$ laundering." The article reported that plaintiff Boris Kotlyarsky was under a federal indictment charging him with conspiracy and money laundering for members of an organized crime group. The article, citing extensively to court documents, further described the alleged scheme and reported that the government had stated that plaintiff Reliable Rehabilitation Center, Inc., a medical clinic run by Boris Kotlyarsky and his wife, plaintiff Alla Kotlyarsky, was "a medical mill set up to defraud insurance companies."

Plaintiffs commenced an action for defamation (*Kotlyarsky v. New York Post*, Index No. 32016/02, N.Y. Sup. Ct. Kings Co.) 20 months later, on August 12, 2002, well beyond the one year provided by New York's statute of limitations for defamation actions. See N.Y.C.P.L.R. § 215(3).

Plaintiff Claims Retraction Promised

Plaintiffs claimed that the statute of limitations did not bar their action because of what transpired at a meeting between Boris Kotlyarsky and *Post* reporter Susan Edelman on April 20, 2001, a little more than four months after

the article was published. By the time of that meeting, Boris Kotlyarsky had already pled guilty to one count of conspiracy to money launder and was set to begin serving his sentence in five weeks time.

Notwithstanding this, Plaintiffs alleged in the complaint that when Boris Kotlyarsky met with Edelman, he showed her documents that led Edelman to promise that the *Post* would shortly print a retraction of the article reporting on the indictment against him. (Edelman and the *Post* adamantly deny that any such promise was ever made.) No retraction was ever printed. Plaintiffs claimed, however, that in reliance on Edelman's alleged promise, they refrained from instituting an action until after the statute of limitations had already expired. Thus, they argued, their action was timely by virtue of the doctrines of equitable tolling, equitable estoppel, and promissory estoppel.

Plaintiffs' complaint made clear that after Kotlyarsky's meeting with Edelman, neither Plaintiffs nor anyone acting on their behalf attempted to contact anyone at the *Post* prior to the expiration of the statute of

limitations (eight months later) to inquire about the retraction that had allegedly been promised.

Kotlyarsky did send a letter to the *Post* on or about January 22, 2002, more than a month after the statute of limitations had already expired, making the first such inquiry; Edelman had responded on February 12, 2002 and informed Kotlyarsky that after efforts to contact his lawyer had not been successful, the *Post* had long ago decided that no retraction would be printed. Plaintiffs claimed that until this February 12, 2002 correspondence from Edelman, the statute of limitations was tolled by virtue of Edelman's alleged promise and that they still had approximately eight months thereafter (until October 2002) to commence their action.

Motion Argues No Tolling

In moving to dismiss the action as time-barred, NYP argued that even assuming the truth of the allegation (which it disputed) that a promise of a retraction had been made, Plaintiffs had failed to demonstrate that such a promise would support either a tolling of the statute of limitations or

Because there was no contention that [the New York Post] had somehow concealed the existence of Plaintiffs' claims, equitable tolling was therefore inapplicable.

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A “Promised” Retraction

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the application of an estoppel in a manner that would render Plaintiffs’ action timely.

In particular, NYP argued that tolling or equitable estoppel did not apply where a plaintiff “possesses ‘timely knowledge’ sufficient to place him or her under a duty to make inquiry and ascertain all the relevant facts prior to the expiration of the applicable Statute of Limitations.” *Gleason v. Spota*, 194 A.D.2d 764, 599 N.Y.S.2d 297 (2d Dept. 1993)).

NYP also argued that even where a plaintiff additionally alleges that he or she was induced by fraud, misrepresentation or deception to refrain from timely commencing suit, a plaintiff is required to demonstrate that it was reasonable for him or her to refrain from commencing an action during the limitations period in reliance on the defendant’s statements, *Donahue-Halverson, Inc. v. Wissing Constr. & Build. Svcs. Corp.*, 95 A.D.2d 953, 954, 464 N.Y.S.2d 268, 269 (3d Dep’t 1983), or, stated somewhat differently, that he or she exercised “due diligence” in pursuing his or her claim. *Netzer v. Continuity Graphic Assoc., Inc.*, 963 F. Supp. 1308, 1316 (S.D.N.Y. 1997). NYP asserted that Plaintiffs had failed to satisfy these requirements.

No Equitable Tolling or Estoppel

The New York Supreme Court, Kings County, assuming for the purposes of the motion that a retraction had been promised, agreed with NYP and granted it summary judgment dismissing the Complaint as time-barred.

The court found that equitable tolling was not applicable to extend the time within which Plaintiffs could file their action because the doctrine was only applicable “where the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action.” (Op. at 4.) The court agreed with NYP that it was “undisputed that plaintiffs in this case possessed timely knowledge of the article” and that Boris Kotlyarsky was “aware of his cause of action for libel,” because Kotlyarsky had called Edelman shortly after the article was published to complain about it. (Op. at 4.)

The court also stated that Boris Kotlyarsky “had constructive knowledge [of the article] through his criminal lawyer, who was contacted both before and after the publication of the article.” (Op. at 4). Because there was no contention that NYP had somehow concealed the existence

of Plaintiffs’ claims, equitable tolling was therefore inapplicable.

The court rejected the application of equitable estoppel as well. In order for a defendant to be equitably estopped from asserting the statute of limitations, the court held, a plaintiff is “required to demonstrate that the failure to timely commence the lawsuit [was] not attributable to a lack of diligence on his or her part.” (Op. at 5). According to the court, Plaintiffs’ months of inactivity following Kotlyarsky’s meeting with Edelman failed to demonstrate the requisite diligence. The court explained:

The facts of this case establish that Boris Kotlyarsky waited approximately nine months . . . before writing a letter requesting a copy of the newspaper in which the retraction had been printed. Plaintiffs’ nine months of inactivity between the meeting and the first correspondence does not support a finding of due diligence. Had the plaintiffs exercised some effort they could have easily discovered that the retraction was not going to be printed. (Op. at 5).

Too Much Time Passed for Reliance

The court found that Plaintiffs’ failure to pursue their claims in reliance on the alleged promise from Edelman was additionally unjustified in light of the fact that the claimed injury to their reputations – the basis for their libel claims – would not have been redressed in any significant way by such a retraction. Focusing in particular on the length of time that had passed between the publication of the article and the alleged promise of a retraction, the court held that it was “long enough that a retraction would have been of little benefit” in rehabilitating the alleged damage to Plaintiffs’ reputations, since it was “simple logic that the longer the time span between [an] article and a retraction,” the less likely it is “that a damaged reputation can be rehabilitated.” (Op. at 6).

The court observed that by the time of the alleged promise, plaintiff Reliable Rehabilitation Center, Inc. had, in fact, already gone out of business. (Op. at 6). In light of the fact that Plaintiffs, “[e]ven with the promise of a retraction . . . could still have instituted an action for libel” (Op. at 6), Plaintiffs’ failure to do so was fatal to their equitable estoppel argument.

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A "Promised" Retraction

(Continued from page 26)

Lastly, the court rejected the Plaintiffs' argument that the doctrine of promissory estoppel prevented NYP from asserting the statute of limitations as a defense to Plaintiffs' action. The court found that Plaintiffs had not alleged the existence of any relevant promise concerning the statute of limitations, and that even if they had, the doctrine of promissory estoppel was "only available where a party reasonably relies on the promise" – a finding precluded by the

Plaintiffs' lack of due diligence in asserting their claim. (Op. at 6) (citing *Steele v. Delverde*, 242 A.D.2d 414, 415, 662 N.Y.S.2d 30, 31 (1st Dep't 1997)). The plaintiffs have filed an appeal.

Slade R. Metcalf is a partner and Jeffrey O. Grossman is an associate with Hogan & Hartson L.L.P. in New York, NY. They represented NYP Holdings, Inc. in the case.

Mixed Ruling on Public Official Taped in Las Vegas Casino

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

On March 3, 2003, Judge Marsha Pechman of the United States District Court for the Western District of Washington granted, in part, and denied, in part, a Rule 12 (b)(6) motion to dismiss filed by defendant KING Broadcasting Company in a case brought by Ruby Dell Harris, a Seattle public official, against KING, the City, its former mayor and city attorney, a City council member, and others. *Harris v. City of Seattle, et al.*, 2003 WL 1045718 (W.D. Wash., March 3, 2003). Despite dismissal of the plaintiff's claims for defamation, invasion of privacy, intrusion, and racketeering, the court allowed plaintiff's claims of outrage, intentional infliction of emotional distress, and false light to remain alive – for the time being.

In April 2001, KING Broadcasting (which is owned by Belo Corp.) aired on its TV station an investigative report on the budgetary problems of the City of Seattle's Public Safety Civil Service Commission and the activities of the commission's Secretary and Chief Examiner, Ruby Dell Harris. The report covered cost overruns by the commission and Harris's attendance at a conference – paid for by tax payers – in Las Vegas, Nevada.

The report also discussed complaints by individuals directly supervised by plaintiff alleging a hostile work environment was created by plaintiff. Harris filed a Second Amended Complaint (the "Complaint") in preexisting litigation against various other defendants which had initially been filed in state court and was removed to federal court. When the plaintiff's jury demand was then struck as untimely, she dismissed her existing federal civil rights claims, forcing the case to be remanded to state court. In her brief time in state court, Harris added her claims against KING, filed a new jury demand, and claimed dam-

ages in excess of \$40,000,000 from all named defendants, including substantial punitive damages. Because the new claims involved RICO, the defendants (now including KING) removed the case once again to federal court.

Insufficient Pleading of Defamation Claim

Plaintiff's Complaint, which largely addressed other defendants and other claims,¹ barely even hinted at KING. As KING argued in its dismissal motion, both under the Federal Rules and the First Amendment, the failure to identify the specific statements plaintiff alleged to be defamatory required dismissal of the claims. In its motion to dismiss, KING also attached a transcript and VHS copy of the broadcast to its motion to dismiss (there is case law allowing the defendant to attach the full transcript or text of the defamatory broadcast or article without concerting the motion to dismiss into a summary judgment motion). The broadcast, on its face, clearly refuted several of the vague allegations asserted in the Complaint.

In granting KING's motion to dismiss, Judge Pechman held that plaintiff's failure to plead her defamation claim with specificity, coupled with the fact that the broadcast itself proved false some of plaintiff's allegations, warranted dismissal of the claim.

Invasion of Privacy and Intrusion Claims

Harris further claimed that her privacy was invaded and that her private space was intruded upon by KING's filming of her activities at the slot machines in a Las Vegas casino. The defense motion to dismiss cited ample case law that one's privacy cannot be invaded in a public space, plus Nevada cases that specifically established that Nevada

(Continued on page 28)

Mixed Ruling on Public Official Taped in Vegas Casino

(Continued from page 27)

law allows videotaping in public areas like casinos.

In her dismissal order, Judge Pechman found that Harris had failed to state a claim for invasion of privacy or intrusion. The Court thus dismissed plaintiff's claims of intrusion and illegal tapping or surveillance, stating that KING did not film plaintiff in a place where there was a reasonable expectation of privacy because anyone in a Las Vegas casino could be expected to be filmed by the casino's security officers.

Failure to Plead Predicate Acts

The RICO claims met a similar fate. Harris had alleged that KING violated the RICO statute, 18 U.S.C. § 1962(c). In its motion to dismiss, KING argued that the RICO allegations must fail because they failed to provide sufficient information to even discern the basis for a racketeering claim. KING also argued that the fact that the dismissal of plaintiff's other claims would leave no basis for any predicate acts as required by the RICO statute.

The Court held that the acts plaintiff alleged did not constitute "predicate" acts within the meaning of § 1961(1) because they were civil, not criminal, allegations. The Court also stated that plaintiff's failure to specifically identify the predicate acts required dismissal of the RICO claims.

Finally, Judge Pechman also struck plaintiff's punitive damages claim because Washington does not permit the recovery of punitive damages, and plaintiff's special damages claims because they were pleaded generally, and failed to comply with the requirements of the Federal Rules.

False Light, Intentional Infliction of Emotional Distress and Outrage

Notwithstanding the dismissal of Harris's defamation claim, the Court declined to dismiss plaintiff's claims of false light, intentional infliction of emotional distress and outrage. The Court stated that a plaintiff can plead both defamation and false light from the same circumstances, that the two torts are intended to compensate for different injuries, and that there were no cases requiring that false light be pleaded with the specificity required for defamation claims.

The Court also held that a false light claim can be alleged separate from a defamation claim when a plaintiff alleges that a non-defamatory statement places the plaintiff in a false light. Specifically, the Court found that plaintiff's

allegation – that she was taped playing slot machines during her free time, but that the KING report implied that she was gambling during her work time, placed her in a false light – was sufficient to withstand the motion to dismiss.

The Court noted that Harris's claim for outrage was inseparable from her intentional infliction of emotional distress claim. Judge Pechman suggested, however, that these two claims could rest on the plaintiff's claims of defamation or false light. In language that suggested that the court was confusing damage to her that arose from an allegedly false portrayal with substantive elements of an outrage or emotional distress claim, the court found that her claims for intentional infliction of emotional distress and outrage could survive the pleading stage of the case on the basis of the false light claim, despite the dismissal of the defamation claim.

Bruce E.H. Johnson is a partner and Diana C. Tate is an associate at the Seattle office of Davis Wright Tremaine LLP. They represented defendant KING Broadcasting Company. Jennifer D. Bucher, Garvey Schubert Barer, Seattle, represents defendants City of Seattle, Noreen Skagen, Marilyn Sherron, Mark Sidran, Susan Cohen, Carolyn Van Noy, Jim Compton, Rachel Schade, Rose Alves, Valerie Harris, Rhonda Weston and Paul Schell. Medora A. Marisseau, Bullivant Houser Bailey, Seattle, represents The Washington Firm Ltd., Nina Sanders, Desree Griffin and Kristina Moris. Phillip Aaron, Seattle, represents the plaintiff.

¹ Harris filed a Second Amended Complaint (the "Complaint") in preexisting litigation against various other defendants which had initially been filed in state court and was removed to federal court. When the plaintiff's jury demand was then struck as untimely, she dismissed her existing federal civil rights claims, forcing the case to be remanded to state court. In her brief time in state court, Harris added her claims against KING, filed a new jury demand, and claimed damages in excess of \$40,000,000 from all named defendants, including substantial punitive damages. Because the new claims involved RICO, the defendants (now including KING) removed the case once again to federal court.

² The court simultaneously with another order again striking plaintiff's jury demand, since plaintiff's basic factual allegations had not changed.

Court Dismisses Privacy, Likeness Claims Against Creators, Producers of Cartoon

Finds That No Reasonable Person Would Equate "Foamation" Character with Plaintiff

By **Jamie L. Secord**

A federal district court judge dismissed a Chicago man's claims against entertainer Eddie Murphy and other creators and producers of the TV cartoon "The PJ's" stemming from allegations that plaintiff was the inspiration for a character on the show. *Collier v. Murphy*, 2003 WL 1606637 (N.D.Ill. Mar 26, 2003).

Tally Collier asserted claims for violation of the Illinois Right of Publicity Act and common law right of publicity, unjust enrichment, negligent infliction of emotional distress, intentional infliction of emotional distress, defamation of character, and an accounting. He asserted that defendants saw a videotape of him living in the Robert Taylor Homes, a Chicago housing project, and patterned the "foamation" character "Sanchez" after him.

Collier alleged that the videotape was prepared by another long-time Robert Taylor Homes resident and sent to Oprah Winfrey with a request that she forward the tape to certain well-known producers. Collier cited "Sanchez's" use of a voice box and cane, among other things, as evidence that the character was based on him.

Defendants: 1st Amend. Protects Artistic Expression

In their motion to dismiss, defendants pointed out that Collier never explained how defendants came to see the videotape and noted that Collier had no explanation for the fact that a drawing of "Sanchez" was prepared nearly two months before the videotape was allegedly sent to Winfrey. A copy of the drawing was attached as an exhibit to the Complaint.

Accepting Collier's factual allegations as true for purposes of the motion to dismiss, defendants argued that the First Amendment's protection of artistic expression applies to "The PJ's" and should inform the court's analysis of all of Collier's statutory and common law claims. As to Collier's statutory claim, defendants noted that the plain language of the Right of Publicity Act precludes a cause of action for artistic works like "The PJ's." This law prohibits the use of an

individual's identity for *commercial purposes* without written consent. As for Collier's common law claims, defendants asserted that the disclosure of publicly available information in a fictional cartoon could not give rise to claims for invasion of privacy, emotional distress, or defamation.

District Court Dismisses All Claims

Judge Robert Gettleman of the U.S. District Court for the Northern District of Illinois dismissed all of Collier's claims and entered judgment in favor of defendants. The court agreed that the Illinois Right of Publicity Act does not extend to television shows such as "The PJ's."

The court also dismissed Collier's common law claims, finding that the common law invasion of privacy claim could not stand in light of the fact that Collier was a willing partici-

***The court saw the claim as really
a form of derivative misappropriation of the documentary
producer's idea or "nothing
more than an untenable
copyright claim in disguise."***

pant in the videotape that was intended to be marketed and that allegedly inspired the creation of "Sanchez." The court saw the claim as really a form of derivative misappropriation of the documentary producer's idea or "nothing more than an untenable copyright claim in dis-

guise."

The court further held that Collier could not satisfy the "highly offensive" standard for privacy claims, especially in light of his willing participation in the videotape.

The court found that Collier could not state a claim for negligent infliction of emotional distress because he alleged that defendants' actions were intentional. Collier's claim for intentional infliction of emotional distress failed because no reasonable person would impute the actions of a cartoon character to Collier.

Collier's defamation claim similarly was dismissed because, the court held, "it would simply be impossible to conclude that plaintiff was defamed by having a cartoon character" engage in fictitious antics.

It is unclear whether Collier will appeal the district court's ruling.

Mark Blocker, Eric Mattson and Jamie Secord of Sidley Austin Brown & Wood represented the defendants. Marc Blumenthal and James Karamanis represented plaintiff.

UPDATE: Retrial in Rocky Mountain News Case; Colorado Supreme Court Declines to Review Reversal of Directed Verdict

The Colorado Supreme Court has declined to review a lower court's reversal of a directed verdict for the *Rocky Mountain News* on a libel claim, meaning that the case may now go to trial on that claim. *Bueno v. Denver Publishing Co.*, cert. denied, No. 03SC89 (Colo. April 21, 2003). If the trial takes place, it will be the second in the case; the result of the previous trial, in which the newspaper was found liable for false light invasion of privacy, was previously reversed.

Jury Awarded on False Light Reversed

In 1997 Colorado District Judge Jeffrey Bayless granted the *Rocky Mountain News* a directed verdict on a defamation per se claim on the grounds that the article contained no statement of fact specifically directed at the plaintiff which could be the basis for such a claim. Judge Bayless also directed a verdict on the defamation per quod claim on the grounds that plaintiff failed to prove special damages.

He permitted the false light claim to proceed to the jury, which awarded a total of \$106,507.80 in compensatory and punitive damages. See *LDRC LibelLetter*, June 1997, at 8. That award was upheld by the Colorado Court of Appeals in 2000, see *Denver Publishing Co. v. Bueno*, 32 P.3d 491 (Colo. App. 2000); see also *LDRC LibelLetter*, March 2000, at 27, but reversed by the Colorado Supreme Court. See *Denver Publishing Co. v. Bueno*, 54 P.3d 893 (Colo. Sept. 16, 2002); see also *LDRC MediaLawLetter*, Oct. 2002, at 23. The Colorado Supreme Court based its reversal on the grounds that the tort of false light should not be recognized in Colorado.

Dismissal of Libel Claim Reversed

Meanwhile, the plaintiff appealed the directed verdict and in an unpublished December 2002 ruling, the Court of Appeals reversed. The appellate court said that the trial court had incorrectly concluded that a libel per se claim required proof the publication had been directed specifically at plaintiff, and that the proof of special damages was lacking in this case. But the court held that "it is not necessary that the publication be specifically directed at the plaintiff. Rather, it can constitute libel per se if, as here, a member of a group or class involving twenty-five or fewer members can point to general defamatory comments about the

group." See *Denver Publishing Co. v. Bueno*, 2002 Colo. App. LEXIS 2210 (Colo. Ct. App. 2002); see also *MLRC MediaLawLetter*, Jan. 2003, at 28. The Court of Appeals decision did not address the fact that the article expressly stated that the plaintiff was one of two brothers that had "stayed out of trouble" and the effect of that exclusionary language on the application of a group libel theory.

In April, the Colorado Supreme Court denied review in the case. *Bueno v. Denver Publishing Co.*, cert. denied, No. 03SC89 (Colo. April 21, 2003). This sends the case back to the district court in Denver for trial.

The Rocky Mountain News is represented by Marc D. Flink of Baker & Hostetler in Denver and Bruce W. Sanford and Bruce D. Brown of Baker & Hostetler in Washington, D.C.. The plaintiff is represented by Roger T. Castle of Denver.

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UPDATE: Kournikova v. General Media Communications

District Court Grants Summary Judgment for Penthouse Publisher on False Advertising and False Endorsement Claims

The Central District Court of California granted defendant General Media Communications's motions for summary judgment on false advertising and false endorsement Lanham Act claims filed by Anna Kournikova. Case No. CV02-3747 (C.D. Cal., May 5, 2003). In his opinion, Judge Gary Feess held that Kournikova did not suffer any competitive injury so as to justify a claim for false advertising.

Summary judgment was proper for General Media on the false endorsement claim as well because Kournikova could not establish that there was a issue of material fact as to whether a reasonable consumer would "conclude that she [Kournikova] had voluntarily associated herself with Penthouse."

Lastly, the false endorsement claim also failed because even if Kournikova could prove that consumers were confused over her involvement with the magazine, she could not prove that General Media acted with actual malice in using Kournikova's name and likeness.

The court concluded that both Kournikova and General Media competed, to some degree, "for the same dollars from the same target audience – namely men."

house acknowledged the error one day later and the two parties eventually settled. (*For further discussion of the Soltsez-Bennetton litigation see LDRC MediaLawLetter May 2002 at 3.*)

Kournikova filed a lawsuit in the federal district court of Central California. She alleged defamation, as well as false advertising and false endorsement claims under the Lanham Act. She also sought a preliminary injunction so as to, among other things, freeze \$15 million of General Media's assets.

Judge Feess, in an August 9, 2002 order, denied the motion. (*For further discussion of the decision see LDRC MediaLawLetter August 2002 at 15*). The Ninth Circuit

affirmed the denial of the preliminary injunction holding that the district court had not abused its discretion because General Media had already stopped distributing the June 2002 issue. (*51 Fed. Appx. 739, (C.A. 9 (Cal.), 2002*). General

Media subsequently filed for summary judgment on both the false advertising and false endorsement claims.

Background and Procedural History

The litigation stems from the June 2002 issue of Penthouse magazine (of which General Media is the publisher). Inside the issue were nude photographs supposedly of tennis star Anna Kournikova. The cover of the issue proclaimed "Exclusive Anna Kournikova Caught Close Up On Nude Beach" while the spine stated "Anna Kournikova...Pet of the Year Playoff". General Media also stated it would post the photographs on its Penthouse website, but because of subsequent events, the photos never appeared online.

However, the pictures were not of Kournikova but of Judith Soltsez-Bennetton, the daughter-in-law of fashion designer Luciano Benetton. Soltsez-Bennetton filed claims against Penthouse and General Media for misappropriation under New York Civil Rights Law §§50 and 51. The court granted her a temporary restraining order enjoining the magazine from further distribution. Pent-

False Advertising – Parties Were Competitors But No Evidence of Competitive Injury

Judge Feess held that General Media should receive summary judgment on the false advertising claim because Kournikova suffered no apparent competitive injury as a result of the issue. The court first declared that the parties were competitors in the entertainment industry. According to the court, parties are competitors when they "vie for the same dollars from the same consumer group". The court looked beyond the apparently different industries the parties engaged in (athletics and publishing) and concluded both in fact competed against each other in the entertainment industry.

While her primary business role might be of a tennis star, Kournikova also worked as a model and "sex symbol" who promoted various products (including calendars) depicting her in bikinis. Kournikova advertised these prod-

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Kournikova v. General Media Communications*(Continued from page 31)*

ucts on her own personal website. General Media, through Penthouse magazine and related other merchandise, is also in the business of selling sexually explicit images. The court concluded that both Kournikova and General Media competed, to some degree, “for the same dollars from the same target audience – namely men.”

Even though they were competitors, the court next found that Kournikova had not presented sufficient evidence of competitive injury as a result of the issue. Kournikova claimed that the use of her name would lead consumers to conclude that she endorses Penthouse magazine, and helped General Media “increase their sales and their public exposure on the strength of Ms. Kournikova’s worldwide marketing, advertising, and consumer recognition.” The court cited precedent holding these types of alleged harms were not sufficient to meet the standard for “competitive harm”,

“Although Penthouse and Kournikova may be competing for the use of Kournikova’s name and identity, this is not sufficient to constitute a ‘competitive injury’ for standing under a false advertising claim.” (*citing Waits v. Frito-Lay*, 978 F. 2d 1093, 1110 (9th Cir., 1992))

When the alleged harm is the misuse of a “celebrity’s image, likeness, or distinctive qualities” the proper cause of action is false endorsement, not false advertising. (*again citing Waits*)

Kournikova also did not provide any evidence of any kind of financial loss stemming from the issue, such as a measurable drop in sales of her calendars or exercise tape

False Endorsement – No Likelihood of Confusion Over Endorsement

The court next granted summary judgment to General Media on the false endorsement claim. Kournikova was found to have standing to bring the false endorsement claim because unlike false advertising claims the parties do not have to be competitors nor must plaintiff provide proof of competitive injury. Instead, a plaintiff may bring a false endorsement claim when the plaintiff has “an economic interest akin to that of a trademark

holder in controlling the commercial exploitation of his or her identity.” (*Quoting Waits*, 978 F. 2d at 1110) In the present case, Kournikova had standing because of her interest in preserving the integrity of her own “mark” or image. The use of that image by Penthouse posed a potential commercial injury to Kournikova.

Judge Feess explained that the “determinative issue” in deciding a false endorsement claim is the likelihood that consumers will be confused over whether the plaintiff does in fact endorse the product at issue. (*quoting Calms v. Franklin Mint Co.*, 292 F. 3d 1139, 1149 (9th Cir., 2002)). The court described a two-step approach in deciding the likelihood of confusion issue. First, did the defendant use the plaintiff’s identity? This is an obvious yes in the present situation as Kournikova’s name was prominently positioned on the Penthouse cover.

If the plaintiff’s identity was used, did the use suggest “that plaintiff sponsored or approved the defendant’s product?” (*Citing Waits at 1110-11*) To answer this question, the court analyzed eight factors:

- i. Level of plaintiff’s recognition among the consumer population that defendant’s product was aimed at.
- ii. Relatedness between plaintiff’s and defendant’s goods.
- iii. Similarity between the “marks” used by plaintiff and defendant.
- iv. Evidence consumers actually confused over endorsement.
- v. Marketing channels used.
- vi. Likely degree of purchaser care.
- vii. Intent of defendant to adopt “mark” similar to that of plaintiff.
- viii. Likelihood of expansion of product lines.

The court analyzed each factor but noted that all eight did not have to be accorded the same weight. Holding it to be the most persuasive of the factors, the court spent considerable time discussing the evidence of actual consumer confusion, the fourth factor, Kournikova presented before the court.

Several of the factors the court dispensed with rather quickly and most in Kournikova’s favor. First, both sides agreed that Kournikova’s mark was highly recog-

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Kournikova v. General Media Communications

(Continued from page 32)

nizable among the consumer population.

Second, the court reiterated that because the parties are competitors in the same industry (entertainment) it would be reasonable for consumers to believe the separate products sold by each party came from the same source if they had been sold under the same mark.

Third, clearly Penthouse used Kournikova's name, or "mark", in the issue so the similarity between the two marks was exact.

Fifth factor: because they are competitors it is likely both parties will use similar marketing channels in selling their goods. The likely degree of purchaser care was not given much consideration by the court because neither party could provide satisfactory evidence of its position. Seventh, under any one of several standards cited it was plain that General Media intended to use Kournikova's "mark".

Actual Confusion over Endorsement

Only two of the eight factors weighed in General Media's column. Because Kournikova had clearly articulated her intent not to enter the adult-entertainment industry, it was doubtful the parties would expand their product lines to compete with each other.

The second was evidence of confusion. According to Ninth Circuit precedent, evidence that consumers were actually confused by the supposed endorsement would be "strong evidence that future confusion is likely..." (*Quoting Official Airline Guides, Inc. v. Goss*, 6 F. 3d 1385, 1393 (9th Cir. 1993)).

Kournikova's evidence of actual confusion consisted of an expert's opinion which focused on the interpretation of the word "caught"; one precedent; and a public opinion survey with results suggesting actual confusion existed. The court dismissed all three.

As for Kournikova's expert witness, Dr. Peter Tiersma, the court first agreed with General Media that expert witness testimony is inadmissible on the issue of the plain meaning of a word and how a reasonable consumer might interpret that word. However, even if it were admissible, the testimony did not create a genuine issue of material

fact because his conclusions, the court found, were not supported by the evidence he cited.

The court also rejected as evidence of confusion a class action suit filed by Penthouse readers based on the readers' disappointment in discovering the photographs were not of the tennis star. Kournikova claimed that this suit proved that consumers were confused over whether Kournikova endorsed the magazine. The court disagreed holding that the suit only indicated that consumers purchased the magazine in the belief that the pictures were of Kournikova, not that the readers "believed that Kournikova *voluntarily* posed for the pictures or endorsed Penthouse." (Italics added by author.)

The public opinion survey submitted by Plaintiff was held to be inadmissible and given no weight because it was neither relevant nor conducted according to established scientific principles. Furthermore, the survey did not rise to the acceptable standard as it only indicated, "a reasonable consumer might believe", not that the consumer would "likely" think Kournikova was involved with the photographs.

The court agreed that expert witness testimony is inadmissible on the issue of the plain meaning of a word and how a reasonable consumer might interpret that word.

Weighing the Factors

Even though the factors numerically were against General Media, the court placed considerably more weight in the actual confusion factor. Kournikova's evidence only led to a conclusion that consumers "could" be confused over her support for Penthouse, not that it was "likely" they would. Thus, the court held that regardless of General Media's use of Kournikova's "mark", there were no genuine issues of material fact which would preclude summary judgment for General Media on the false endorsement claim.

Kournikova Cannot Prove Actual Malice

If evidence was presented of consumer confusion, Kournikova's false endorsement claim would fail because there was no evidence that General Media acted with actual malice. In order to protect First Amendment rights, courts

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Kournikova v. General Media Communications*(Continued from page 33)*

have required public figure plaintiffs to prove “defendant acted with actual malice in creating the false impression of endorsement.” (*Quoting Hoffman v. Capital Cities/ABC, Inc.*, 255 F. 3d 1180, 1186, 1189, n. 3 (9th Cir. 2001)) Clearly a public figure, Kournikova then had to present sufficient clear and convincing evidence that General Media acted with actual malice so “that the average reader – or average browser– believe that Kournikova voluntarily posed in Penthouse, or otherwise approved use of her name and likeness.” (*Citing Hoffman at 1189 n. 3*).

Contrasting the facts of the present case with that in *Solano v. Playgirl, Inc.*, 292 F. 3d 1078 (9th Cir. 2002), Judge Feess held that Kournikova had not presented any evidence of actual malice on the part of General Media. In fact, the court noted that if General Media had intended to confuse consumers on Kournikova’s endorsement, more direct language could have been used on the magazine cover (ex. “Exclusive Nude Photos of Anna Kournikova”).

Further Discovery Rejected

The court rejected Kournikova’s separate request for additional time so as to conduct further discovery. Plaintiff’s request was invalid because the party did not use proper procedure in presenting the motion to the court, merely mentioning the request in its main opposition brief. Plaintiff also did not specify which kind of information she wished to gather, nor how it would help her position.

For Anna Kournikova: William E. Wegner (Los Angeles), Ethan D. Dettmer (Los Angeles) and Randy M. Mastro (New York) of Gibson, Dunn & Crutcher

For General Media: Stephen G. Contopoulos, Bradley H. Ellis and Frank J. Broccolo of Sidley Austin Brown & Wood (Los Angeles).

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**Two Embed Reporters
Removed From Units**

Two of the journalists who remained with their units as the war in Iraq ended were “disembedded” in late April after they were said to have violated the ground rules of the program.

Brett Liberman of *The Patriot-News* in Harrisburg, Pa. was told to leave Iraq after the commanding officer of the 2nd Battalion, 25th Marines decided that an April 25 article on the unit’s patrols of Nasiriyah revealed sensitive military information. While the Pentagon’s rules for the embedding program allow for appeals “through the chain of command,” the action against Liberman was taken on a weekend, when Pentagon officials were not available. Thus Liberman was forced to leave for Kuwait before he was able to appeal the decision.

Getty images staff photographer Paula Bronstein was removed from her slot at the American Air Force base in Ali Al Salem in Kuwait on charges that she had entered a restricted area and tampering with live ordnance. According to Bronstein, soldiers wrote messages on many of the bombs that were carried by planes leaving the base, but she was prohibited from photographing the messages. When a flight mechanic offered Bronstein a pen to write such a message, she used her own pen to write, “This war sucks. It will only breed hatred.”

Bronstein was removed from the unit, even though she apologized to military officials. Later, however, she was unrepentant. “If I’m invited to express my opinion, should my opinion only be what the military finds acceptable?” Bronstein told *Photo District News*.

Earlier, two reporters who had not been officially embedded yet had attached themselves to military units – Geraldo Rivera of the Fox News Channel and Phillip Smucker of the *Christian Science Monitor* – were ordered to leave Iraq after they were accused of revealing troop locations in their dispatches. See *MLRC MediaLawLetter*, April 2003, at 65.

Lanham Act Claims – Non-Commercial, Private Figures Need Not Apply

Trial Court Holds That Plaintiff Must Assert a Present Commercial Injury

By Christopher P. Beall

In a case that should be quite useful for disposing of tag-along federal Lanham Act claims in private-figure libel cases, a federal trial court in Fresno, California has held that a plaintiff must plead – and later prove – that she has a commercial interest in her name and likeness before she may bring a claim for false association or false advertising under the unfair competition prong (Section 43(a)) of the Lanham Act. *Condit v. Star Editorial, Inc.*, No. F- 02-6004 OWW, 2003 WL 1961712 (E.D. Cal. Apr. 15, 2003).

Carolyn Condit's "Own Story"

The case arose from a story published on September 11, 2001 by the *Star* newspaper concerning Carolyn Condit, wife of then-Congressman Gary Condit. On the cover page of the weekly newspaper, the *Star* published a capsule photograph of Mrs. Condit, with the words "Her Own Story" superimposed over the photograph.

The story's cover-page headline read "Condit Wife's Agony," with a sub-headline reading

"She trashes home and destroys their family photos / Her suicide threat over Chandra / How he brain-washed her for 34 yrs."

Inside the newspaper, on page 4, the story began with a headline "Agony of Condit's Wife," and included a sub-headline that repeated a quotation from the body of the story: "'She Picked Up Their Family Photo & Smashed It To The Floor.'"

In his decision, District Judge Oliver W. Wanger listed in footnotes the various specific statements in the story that Mrs. Condit alleged to be false and defamatory, including the assertion that Mrs. Condit suffered an emotional breakdown, "went berserk," and threatened suicide as a result of learning of the "truth" of Congressman Condit's affair with Chandra Levy.

In her suit against the *Star*, Mrs. Condit raised three state-law claims – two libel claims and one claim for common-law misappropriation of likeness. Mrs. Condit also alleged a

claim for violation of Section 43(a) of the Lanham Act, 15 U.S.C. 1125(a). Mrs. Condit claimed that by placing her photograph and the words "Her Own Story" on the cover-page of the newspaper, the *Star* had falsely advertised that she had agreed to tell her story to the newspaper.

Mrs. Condit also claimed that the cover-page photograph and headline created a false association between her and the newspaper that was likely to cause confusion. Mrs. Condit alleged that this false advertising and false association caused her damages in excess of \$15 million, and that she was entitled to an award of all profits for the publication of the offending article.

Private Figure Has No Competitive Harm

In an opening motion to dismiss under Rule 12(b)(6), the

The Star argued that Mrs. Condit's vigorous assertion of her purported private-figure status – primarily for purposes of her libel claims – doomed her Lanham Act claim.

Star argued that Mrs. Condit's vigorous assertion of her purported private-figure status – primarily for purposes of her libel claims – doomed her Lanham Act claim. The *Star* pointed out that in order to state a claim for either false advertising or false association under

Section 43(a) of the Lanham Act, a plaintiff must plead that she has suffered a commercial injury and that her name and likeness are "akin to a trademark."

Because federal trademark rights arise solely in connection with words or symbols that are used "in commerce," it is impossible as a matter of law for a private-figure plaintiff who claims not to have injected herself into the limelight of public attention to establish the elements of a Lanham Act claim.

Additionally, with respect to the false advertising prong of Section 43(a), not only must a plaintiff show that the alleged misrepresentations occurred in the context of actual advertising or other forms of commercial speech, the plaintiff must also establish that the alleged false advertising has caused a competitive harm.

In support of these points, the *Star* pointed to several cases from the Ninth Circuit Court of Appeals, including *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), and

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Lanham Act Claims

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Barrus v. Sylvania, 55 F.3d 468 (9th Cir. 1995), as well as a host of cases from other circuits. See, e.g., *Landham v. Lewis Galoob Toys, Inc.*, 271 F.3d 619 (6th Cir. 2000); *Dovenmuehle v. Gilldorn Mortgage Midwest Corp.*, 871 F.2d 697 (7th Cir. 1989); *Colligan v. Activities Club of New York, Ltd.*, 442 F.2d 686 (2nd Cir. 1971). Although these cases all stand for the proposition that a plaintiff must show a commercial injury in order to have standing to bring a Section 43(a) claim, none of these cases involved the scenario present in the Condit case, where a purportedly private figure libel plaintiff asserts a Section 43(a) claim on top of her defamation claims.

In support of its view that the Lanham Act could not be construed to reach so far, the *Star* also cited portions of the legislative history related to recent amendments to Section 43(a), which demonstrate that Congress did not intend for the statute to be transformed into a federal cause of action for invasions of privacy or claims of false light. See *Halicki v. United Artists Communications, Inc.*, 812 F.2d 1213 (9th Cir. 1987) (discussing the legislative history and legislative intent behind P.L. 100-667).

“Congress has not evinced intent to create a federal ‘false light’ tort claim for misappropriation of image or identity, absent commercialization. . .”

Condit Argues Broad Construction

In response to these arguments, Mrs. Condit argued that the provisions of Section 43(a) should be construed broadly to implement the remedial nature of the statute. Mrs. Condit attempted to rely primarily on *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249 (9th Cir. 1997), where the Ninth Circuit held that a false implication that the actor Clint Eastwood had consented to an interview with the tabloid newspaper was sufficient to state a false association claim under Section 43(a). Mrs. Condit also argued that in light of the broad expansion of rights under Section 43(a) since the statute’s enactment more than fifty years ago, it would be appropriate for the court to protect against consumer confusion even in situations involving a private-figure plaintiff who has not sought to commercialize her name or likeness.

Court Finds No Claim

The court, however, rejected all of Mrs. Condit’s arguments. First, the court observed that the *Eastwood* case was

inapplicable to circumstances of Mrs. Condit’s case because Clint Eastwood, unlike Mrs. Condit, was a celebrity who had a commercial interest in his name and image. The court held that a requirement of standing under Section 43(a) is a commercial interest in the plaintiff’s name or likeness.

Second, although the court observed that Mrs. Condit had withdrawn any theory of liability for false advertising under Section 43(a), the court nevertheless concluded that Mrs. Condit could not make out a claim for false advertising. The court stated that the headline and photograph on the cover page of the *Star* did not constitute “commercial speech,” not did it constitute a use of Mrs. Condit’s name and likeness in connection with commercial advertising or promotion. As a result, no claim under Section 43(a) could be made for false advertising solely on the basis of a newspaper’s publication of a private figure’s name and photograph on the cover page of the publication.

Third, in connection with the separate false association theory under Section 43(a), the court held that a claim for false association based on publication of a person’s name or likeness is doctrinally similar to a claim for false association with a trademark. As a result, a plaintiff bringing a false association claim must show, at a minimum, that she has a commercial interest in her name or likeness, or at least that she has a present, existing intent to commercialize her name and likeness.

The court held that to allow a plaintiff to proceed with a false association claim based on a non-commercial interest in her name or likeness would be to extend the scope of the Lanham Act beyond the confines that Congress intended:

“Congress has not evinced intent to create a federal ‘false light’ tort claim for misappropriation of image or identity, absent commercialization. . . . Congress knows how to enact a statute to afford protection for non-commercial false association. It has not done so. Plaintiff attempts to extend the Lanham Act beyond the remedies Congress intended it to provide. Only Congress, not a federal trial court, can legislate to provide the remedy Plaintiff seeks.” *Condit*, 2003 WL 1961712, at *6.

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Lanham Act Claims

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Leaves California Claim Standing

In light of its holding on the requirements for standing under Section 43(a), the court dismissed Mrs. Condit's Lanham Act claim. The court noted, however, that Mrs. Condit was free to pursue her California common-law misappropriation of likeness claim because no similar requirement for asserting a commercial interest applied to such claims.

The court's conclusions on this issue are likely to be helpful in the many cases involving a libel plaintiff who has added a tag-along Lanham Act claim, either as a means of securing federal court jurisdiction in the absence of diversity of citizenship between the parties or as a way of escaping damages caps that may apply under a particular state's tort

reform legislation. In those contexts, this case clearly establishes that a private-figure plaintiff, or even a public-figure plaintiff who has no existing intent to commercialize his name or likeness, cannot bring a Lanham Act case.

Mrs. Condit is represented by Neville L. Johnson, Brian Anthony Rishwain, and James T. Ryan, of Johnson & Rishwain LLP, Los Angeles, California.

Thomas B. Kelley, Steven D. Zansberg, Christopher Beall, and Adam Lindquist Scoville of Faegre & Benson LLP (Denver, Colorado) represent the defendants, Star Editorial, Inc. and American Media, Inc. Also representing the defendants are Bruce A. Odom, of Dietrich Glasrud Mallek & Aune (Fresno, California), and Michael B. Kahane, General Counsel, of America Media, Inc. (Boca Raton, Florida).

Sixth Circuit Reinstates Rosa Parks' Suit Over Rap Song Title

Lanham Act and Right of Publicity Claims Revived

In a surprising decision, the Sixth Circuit reinstated Lanham Act and right of publicity claims brought by civil rights icon Rosa Parks against a rap music duo, their record company, and music distributors Arista and BMG, for the duo's use of her name as a title of a song. *Parks v. LaFace Records*, 2003 WL 21058571 (6th Cir. May 12, 2003) (Holschuh, J., joined by Norris, J. and Cole, J.)

Applying a test formulated by the Second Circuit in *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989) (holding the movie title *Ginger and Fred* to be a protected use), the Sixth Circuit held that the First Amendment protects such use if there is an artistic relationship between the title and the underlying work and the title does not explicitly mislead as to the source or content of the work.

Reviewing the lyrics of the song – decoded in part with the help of a “rap dictionary” translation supplied by plaintiff – the court held that there was no obvious artistic relationship between the title and the content of the song, at least as a matter of law. While the song repeatedly used the phrase “move to the back of the bus,” which is obviously related to Park's historical role in the Civil Rights

Movement, the Court found that in context the phrase had “absolutely nothing to do with Rosa Parks.” Instead, the song's message – as determined by the Court – was that the rap duo Outkast was better than rival groups.

Whether there is any relevance between the song title and its content is now a jury question. If a jury concludes there is no relevance, it could then determine whether the title was merely a commercial use designed to boost album sales.

The Sixth Circuit held that the First Amendment protects such use if there is an artistic relationship between the title and the underlying work and the title does not explicitly mislead as to the source or content of the work.

Rap Song Nominated for Grammy Award

The song “Rosa Parks” was contained on Outkast's 1998 album called *Aquemini*. The album sold over two million copies and the song “Rosa Parks” was nominated for a Grammy Award. The song does not mention Parks in the lyrics and it is not about her or the Civil Rights Movement. The song, however, includes a chorus containing the words “ah, ha, hush that fuss. Everybody move to the back of the bus.” The group acknowledged that the song was not about Rosa Parks. It was “symbolic, meaning that we comin' back

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6th Cir. Reinstates Rosa Parks' Suit Over Rap Song

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out, so all you other MC's move to the back of the bus." *Id.* at *12.

District Court Dismissed All Claims

In 1999, a Michigan federal district court granted summary judgment to the defendants on the Lanham Act and right of publicity claims, as well as on defamation and tortious interference claims (the latter rulings were summarily affirmed on appeal). 76 F. Supp. 2d 776 (E.D. Mich. 1999). The District Court, following the test of *Rogers v. Grimaldi*, held that there was an obvious relationship between the content of the song and the title in a "metaphorical and symbolic" sense. The court noted that whether the song was vulgar or tasteless was immaterial, adding that it is "fundamental" that courts not muffle expression by passing artistic judgment on such expression.

The title, moreover, was not explicitly misleading as to its source or content. Indeed, the district court decision sensibly notes that "the slight risk that such use of a celebrity's name might implicitly suggest endorsement or sponsorship to some people is outweighed by the danger of restricting artistic expression." *Id.* at 783.

No Artistic Relationship Between Content and Title

Reversing summary judgment on the Lanham Act and right of publicity claims, the Sixth Circuit applied the same framework from *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989), but in a narrow and artistically judgmental manner that raises the very danger noted below in the District Court. As to whether there is an artistic relationship between the title and the song, the court concluded the song's sole "sole message is that Outkast's competitors are of lesser quality and, therefore must 'move to the back of the bus.'" 2003 WL 21058571 at *11.

Because the message of the song was the

"egomaniacal" superiority of the rap duo, there was no symbolic or metaphorical connection to Rosa Parks. According to the court's analysis, the song title was not symbolic of Parks because the lyrics "contain absolutely nothing that could conceivably, by any stretch of the imagination, be considered ... a

reference to courage, to sacrifice, to the civil rights movement or to any other quality with which Rosa Parks is identified."

Nor was the title an obvious metaphor. While the court acknowledges a metaphorical suggestion in the lyrics that Outkast's rap rivals "go to the back of the bus" "it is difficult to equate Outkast's feelings of superiority ... to the qualities for which Rosa Parks is known around the world." Or put more bluntly, "crying artist does not confer carte blanche authority to appropriate a celebrity's name." *Id.* at *13.

Court Distinguishes Result from "Barbie" Case

The Sixth Circuit distinguished the Ninth Circuit's decision in *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002) which involved a similar suit over a song title. There the Ninth Circuit held that the song "Barbie Girl" by the Danish band Aqua, which satirizes the famous

Mattel doll, is protected by the First Amendment. The *Mattel* case, according to the Sixth Circuit, is completely distinguishable because as a satire the title is clearly relevant to

"Crying artist does not confer carte blanche authority to appropriate a celebrity's name."

the song itself.

Indeed, to this extent, the Court notes that the result in *Mattel* supports its decision. But this is an arguable proposition. In *Mattel*, Judge Kozinski, noted that in general, literary and artistic titles do not violate the Lanham Act unless the title has *no* relevance to the underlying work – a standard straight from *Rogers v. Grimaldi* where the Second Circuit found that a Lanham Act violation could be found only where the use of plaintiff's name or likeness in the title "has no artistic relevance to the underlying work, whatsoever." 875 F.2d at 999.

Conclusion

The decision concludes by noting that whether the song is "repulsive trash or a work of genius" is immaterial to the legal issues, though the Court seems to clearly tip toward the former interpretation.

Rosa Parks is represented by Johnnie Cochran, Cochran Sherry Giovens & Smith, in Los Angeles; and Gregory J. Reed of Gregory J. Reed & Associates in Detroit. Defendants are represented by Joseph Beck and Christopher Kellner of Kilpatrick Stockton LLP, Atlanta.

Fourth Circuit Orders Open Hearing in Moussaoui Prosecution

By Tom Curley

In response to an access motion filed by a coalition of media groups, the U.S. Court of Appeals for the Fourth Circuit has ruled that oral argument in an appeal related to the prosecution of Zacarias Moussaoui must be partially open to the public and that redacted transcripts of the closed portions must be made public promptly after argument. In addition, the Fourth Circuit ordered the unsealing of various pleadings in the appeal, which had been filed almost entirely under seal. *United States v. Moussaoui*, No. 03-4162 (4th Cir. May 13, 2003).

Opening Appeal on Deposition of Terror Suspect

The Fourth Circuit's ruling reverses an earlier order by the appellate court granting the government's motion to close oral argument in its entirety, which is the order challenged by the media intervenors. Instead, the Fourth Circuit will hold a public argument on June 3 in which it will hear all issues in the appeal that do not implicate classified information, including various jurisdictional and separation of powers issues.

A closed argument will also be held in which classified information can be discussed. Departing from its usual practice, the court ordered that the closed proceeding be recorded by a stenographer rather than by audiotape, that the stenographer produce a transcript within 24 hours, and that the government propose redactions promptly thereafter.

The prosecution of Moussaoui, whom the government alleges was a participant in the planning of the September 11 attacks, is the subject of simultaneous proceedings in both the Fourth Circuit and the Eastern District of Virginia. While pre-trial discovery continues in the trial court, the Fourth Circuit is hearing an interlocutory appeal by the government from a trial court order granting leave for Moussaoui to depose another alleged al Qaeda operative in government custody, reportedly Ramzi Bin al-Shibh.

Affirming Access Rights

The Fourth Circuit's ruling is a robust reaffirmation of the public's First Amendment and common law rights of access to judicial proceedings and documents, even where the government's justification for secrecy is rooted in national security concerns related to terrorism. The value of openness, "of providing to the community at large a sense that justice has been done, is particularly relevant in the prosecution of Moussaoui," Chief Judge Wilkins wrote for a three-judge panel.

"In this vein, it is significant that no small amount of interest in the trial stems from concern about whether the government is affording sufficient protection to Moussaoui's constitutional rights and the rights of other terrorism suspects."

The value of openness, "of providing to the community at large a sense that justice has been done, is particularly relevant in the prosecution of Moussaoui," Chief Judge Wilkins wrote for a three-judge panel.

In the Fourth Circuit, the principal appellate briefs by the parties were filed completely under seal, including even the tables of authorities to the briefs. In addition, the government not only requested the closure of oral argument, but also insisted that its motion providing the justification for such an unusual request

remain entirely under seal.

In April, a coalition of eleven publishers and broadcasters moved to intervene in the appeal and to unseal the record and argument pursuant to the public's rights of access to judicial proceedings. While cognizant that properly classified material implicating the national security might properly be maintained under seal, the media intervenors argued that the blanket sealing of most pleadings and the closure of the courtroom during argument could not be reconciled with the public's rights of access.

Government Relying on CIPA

Following the filing of the media intervenors' motion for access, the government released versions of the principal briefs in the case with classified matters redacted, but it continued to insist that oral argument and other filings remain completely closed the public. Specifically,

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Media Groups Intervene to Unseal Moussaoui Filings

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the government took the position that the sealing of pleadings and the closure of argument were proper because the prosecution was being conducted pursuant to the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3.

Broadly summarized, CIPA establishes a mechanism for trial courts to make evidentiary rulings concerning the admissibility of classified information in advance of trial. CIPA was enacted to prevent criminal defendants, most typically in espionage cases, from threatening to reveal classified information at trial in hopes of forcing the government to withdraw or to reduce the criminal charges. Thus, CIPA allows a trial court to determine in advance and, if necessary, outside of public view whether classified material the defendant seeks to introduce would be admissible.

At bottom, the government argued that CIPA effectively supplanted the public's rights of access. The Fourth Circuit squarely rejected that argument.

"We disagree with the Government's contention that because this appeal is related to CIPA, all of the materials and the oral argument must be held under seal. As Intervenor note, CIPA alone cannot justify the sealing of oral argument and pleadings."

Balancing the public's right of access against the need to prevent disclosure of information designated classified by the government, the Fourth Circuit ordered that a bi-furcated oral argument be held so that non-classified matters could be discussed in public. Also, undertaking a document-by-document review of filings in the appeal, the court determined that the government's motion to seal oral argument should be made public, together with other pleadings that do not contain classified information.

Notably, a subset of the media intervenors in the Fourth Circuit have also filed a motion for access to various pleadings filed under seal in the Eastern District of Virginia. In the trial court, more than fifty pleadings have been filed under seal in recently. In response to this access motion, the government agreed that approximately twenty pleadings should be unsealed and the

court ordered their unsealing in a May 6 ruling.

Following the Fourth Circuit's ruling, the trial court issued a second ruling on May 16 in which it gave the government two weeks to justify why a host of other pleadings, orders, opinions, transcripts and *pro se* filings that remain under seal should not be released to the public, in redacted form if necessary. "[T]he United States must reconsider its original positions, and either offer specific, legitimate justifications for maintaining these filings under total seal, or propose reasonable redactions to them."

Jay Ward Brown, Cameron Stracher, Thomas Curley and Adam Rappaport of Levine Sullivan & Koch, L.L.P. of Washington, D.C. represented Media intervenors in this matter. Media intervenors in the trial court were ABC, Inc., the Associated Press, The Hearst Corporation, The New York Times Company, The Reporters Committee for Freedom of the Press, the Tribune Company, and The Washington Post. They were joined in the Fourth Circuit by Cable News Network, LP, LLLP, CBS Broadcasting Inc., National Broadcasting Company, Inc., and the Star Tribune Company.

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Connecticut's Secret Court System

By Stephanie S. Abrutyn

Journalists in the State of Connecticut recently unearthed the existence of an administrative practice, documented by memoranda issued by the Office of the Chief Court Administrator, that has resulted in the wholesale removal from public view of thousands of court files and dockets. In some cases – designated “Level 1” – the entire case file is sealed and the very existence of the file is secret. In others – designated “Level 2” – the case name and docket number are disclosed, but the rest of the file, including what is commonly known as a docket sheet, is sealed.

No Statute Allowed the System

The system of levels of sealing appears to have come about as a result of a desire to standardize the handling of sealed files in the clerk's office. There is no statute or provision of the Connecticut Practice Book that creates, references, or supports the Level 1 and Level 2 designations. Rather, the terms – and the sealing that follows designation of a particular case – flow from memoranda issued from the Office of the Chief Court Administrator.

Chief Justice William J. Sullivan testified last month in a Connecticut Judiciary Committee hearing that this type of sealing started in the 1970's, “when it became an unwritten

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Postscript: Connecticut Judges Eliminate Super Secret Cases

On May 14, the Connecticut state judges adopted the proposed rules which spell out criteria judges would follow when deciding to close proceedings and seal documents. The new rules would eliminate the controversial super-secret Level 1 cases, and require that every case filed in the Superior Court, except those exempted by statute, be identified in the court's file by docket number and parties' names. This information shall be made available to the public. The rules are available at the Connecticut Judicial Branch website. (<http://www.jud.state.ct.us/Publications/PracticeBook-5-5-03.pdf>).

It must be noted that these are prospective rules only and will not require the unsealing of court files which were sealed before the rules' effective date of July 1, 2003. Therefore, because of the delayed effective date, the new rules do not preclude The Hartford-Courant lawsuit from proceeding.

Under the new rules, there is a presumption of openness regarding courtroom proceedings and court documents in civil cases, unless otherwise provided by statute. A proceeding may be closed, and documents relating to the proceeding or filed with the court sealed, only if the judge decides that closure is necessary to protect an interest that outweighs the public's interest in access. Reasonable alternatives to closure must first be considered, and the closure order shall not be broader than nec-

essary to protect the interest at stake. The judge must describe the overriding interest that mandates closure, but may seal any findings supporting closure which would reveal confidential information.

An entire court file may also be sealed, but only if the court finds that there are no alternatives available which are more narrowly tailored (such as redaction) to protecting the interest at issue. Pseudonyms may also be used by parties in court documents only if the court finds beforehand that pseudonyms are necessary to protect an interest that overrides the public's; and that the use of pseudonyms will not be broader than necessary so as to protect the interest at issue.

The above rules also apply to proceedings and documents involving family matters. However, the rules do place under seal sworn statements regarding income and finances involving family matters such as divorce. This information is only available to the court, parties, and anyone else cited by the court. Anyone may submit a motion requested access to these documents.

The presumption of openness and rules also apply to criminal proceedings and documents. Affidavits supporting an arrest warrant are to be considered open to the public unless the court grants a request by the prosecution to seal the documents. Any seal order must be for a limited time, and not to exceed two weeks after the date of the arrest.

Connecticut's Secret Court System

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rule” among Superior Court judges that they would seal an entire file “whenever they felt it was necessary.” When the judicial branch was computerized in the mid-1980’s, the clerks came up with the Level 1 and 2 designations. (There also is a Level 3 designation, which operates only to seal a specific document or portion of a file.)

The types of cases that have been sealed by being designated appear to vary, although the majority of Level 1 cases about which journalists uncovered some information involved the wealthy and/or well-connected. According to a series of stories appearing in *The Hartford Courant*, Clarence Clemons, Bruce Springsteen’s saxophonist, has benefited from Level 1 sealing, as has the University of Connecticut’s president. A center for the Boston Celtics, a CEO of MasterCard, several state court judges, and a soap opera star have benefited from Level 2 sealing.

On the non-celebrity front, the sealing of cases raises even more significant public policy concerns. In one Level 2 case several years ago that would have foreshadowed more recent events had it not been conducted behind closed doors, a New Haven judge held a secret trial in a claim brought against a Hartford archdiocese priest accused of sexual abuse. Similarly, a lawsuit by the state insurance commissioner against Arthur Anderson involving the failure of a Connecticut life insurance company, filed many years before the collapse of Enron led to the firm’s downfall, is sealed. As is a civil action brought by Connecticut’s attorney general against a firearms manufacturer involving accusations that gun companies were colluding to punish Smith & Wesson for agreeing to improve handgun safety.

In total, according to *The Courant*, there are just over 100 Level 1 cases and nearly 7,000 active Level 2 cases.

Secret System Even to Judges

The existence of Level 1 and 2 cases came as a great surprise to many. In fact, according to Justice Sullivan, “the majority of [Connecticut] judges didn’t know about this until they read it in the paper.”

Not long after the stories broke in the news media, Chief Justice Sullivan and the Chief Court Administrator initiated the process to amend the rules to eliminate Level 1 cases and provide the judiciary with more specific crite-

ria for sealing cases that tracks the test set forth in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) and *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984). The proposed new rules would not, in their current form, eliminate Level 2 sealing. They also would be prospective, leaving thousands of already-sealed cases behind lock and key.

Courant Sues for Access

In February, *The Hartford Courant* filed suit in federal court against Joseph Pellegrino, Connecticut’s Chief Court Administrator, alleging that the refusal of the clerks under his jurisdiction to provide docket sheets in thousands of cases previously designated as Level 1 and Level 2, pursuant to rules promulgated by him and documented in a series of memoranda, violates the newspaper’s constitutional rights. The case seeks an injunction requiring that the docket sheets be disclosed, but does not seek to have any of the underlying information in specific case files unsealed.

At this time, *The Courant* is seeking only basic information to indicate whether a sealing order has been entered in each case, and if so, to make an informed judgment as to whether to seek to intervene in any specific case to obtain access.

The Connecticut Law Tribune has moved to intervene in the case as a plaintiff.

Judge Pellegrino has moved to dismiss the case, arguing among other things that the federal court should abstain from considering the case at all and instead leave the matter to the state judiciary. The motion is pending.

Stephanie S. Abrutyn is Sr. Counsel/East Coast Media for Tribune Company, owner of The Hartford Courant. Outside counsel for The Courant in its action against Chief Court Administrator Joseph Pellegrino is Ralph G. Elliot of Tyler, Cooper, and Alcorn (Hartford, CT). Judge Pellegrino is represented by James K. Robertson of Carmody & Torrence (Waterbury, CT). The case has been assigned to The Honorable Christopher Droney, United States District Court for the District of Connecticut.

S.D. Fla. Has Secret Docket, Defense Lawyer Seeks Listing of All Documents – Public and Sealed – in Criminal Case Docket

Famed Miami defense attorney Roy Black has asked the 11th Circuit Court of Appeals to order the federal district court for Southern Florida to reveal the entire docket in an ongoing prosecution, after discovering that the docket did not list several documents that had been sealed by the court. Meanwhile, the *Miami Daily Business Review*, which revealed in March that the 11th Circuit held a closed oral argument in a case that was missing entirely from the Southern District of Florida's public files, reported on two drug prosecution cases that are also entirely missing from the court's public listing of cases.

Black made his request as part of his defense of accused Columbian drug lord Fabio Ochoa Vásquez, whose trial began May 5. In April, Black discovered that several documents in the case had been sealed by the court, and that the existence of the documents and the fact that they were sealed had been excluded from the court's public docket for the case.

Black filed a motion asking the court to account for all of the sealed documents. *U.S. v. Bernal-Madriral*, Crim. No. 99-6153 (S.D. Fla. motion # 1270, filed April 19, 2003). But the court has agreed to release the docket only on a piecemeal basis, prompting the 11th Circuit appeal.

In his appeal, Black says that he has found several other criminal cases before the Southern District of Florida in which sealed documents were similarly omitted from public dockets. He cites three such cases, all drug prosecutions: *U.S. v. Ramon*, Crim. No. 99-711 (S.D. Fla. 1999); *U.S. v. Prado*, Crim. No. 99-27 (S.D. Fla. 1999); and *U.S. v. Escaf*, Crim. No. 99-433 (S.D. Fla. 1999).

Normally, the existence of sealed documents in a case is noted on the case's public docket, with the notation that the documents themselves are sealed.

In Other Cases, Entire Dockets Hidden

Black's accusations come after the *Miami Daily Business Review* revealed in March that oral argument before the 11th Circuit in *Bellahouel v. Wetzel*, No. 02-11060 (11th Cir. argued March 5, 2003), a case involving detention of an Algerian man in the aftermath of Sept. 11, had taken place in a closed courtroom. The argument was removed from the court's argument calendar, and the case docket was removed from the appellate court's PACER public information system. There was also no docket for the case available at the Southern District of Florida, where the case apparently originated. See *MLRC MediaLawLetter*, March 2002, at 46.

On May 12, the *Business Review* reported on two additional cases whose existence are entirely missing from the Southern District of Florida's public files: the drug prosecution cases against Nicholas Bergonzoli and Julio Correa. Bergonzoli apparently

pled guilty in a cooperation deal with prosecutors. (The case caption was *U.S. v. Bergonzoli*, Crim. No. 99-196 (S.D. Fla. filed March 1999).) The newspaper quoted a source familiar with the *Bergonzoli* case as saying that it was sealed in order to protect the safety of the defendant.

In 1993, the 11th Circuit held that a system in which the Middle District of Florida in Tampa maintained both a public docket of cases and non-public docket which included additional cases not included on the public docket was "an unconstitutional infringement on the public and press's qualified right of access to criminal proceedings." See *U.S. v. Valenti*, 987 F.2d 708, 715, 21 Media L. Rep. 1236 (11th Cir. 1993), *reh'g denied*, 999 F.2d 1425, 21 Media L. Rep. 1949 (11th Cir. 1993).

Secret Dockets "Offensive"

Several judicial officials refused to comment for the *Business Review's* article. In written answers, Southern District of Florida Court Clerk Clarence Maddox wrote that the court "does not employ a 'dual' docketing sys-

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In April, Black discovered that several documents had been sealed, and that the existence of the documents and the fact that they were sealed had been excluded from the public docket.

S.D. Fla. Has Secret Docket*(Continued from page 43)*

tem,” but added that the court “in its discretion is the authority for what is sealed and this is unavailable to the public.”

But several defense attorneys contacted by the *Business Review* thought that keeping entire case dockets secrets was unnecessary. “I find it offensive,” co-founder and

former president of the National Association of Criminal Defense Lawyers Albert Krieger, who is of counsel to the Law Offices of Scott A. Srebnick in Miami, told the newspaper. “While it’s possible to conceive of a situation sealing a docket might be required, I’m at a loss to see it at the moment.”

California Court Imposes Partial Closure Order in Gang Case

Press Allowed in Court, Public Excluded to Protect Witnesses

By Roger Myers and Rachel Matteo-Boehm

In a case that illustrates the value, in court access cases, of proposing creative alternatives to closure when the circumstances warrant it, a California court has taken the somewhat unusual step of closing a portion of a preliminary hearing in a criminal prosecution to everyone *but* the press — a compromise position the court adopted so that the public could read reports of the testimony of two confidential witnesses in a gang-related murder case, while still offering a limited measure of protection to the witnesses from the risk of intimidation by gang members who might otherwise be in the audience.

Confidential Witnesses

The case stemmed from the alleged stabbing of a young man by four purported gang members, all of whom were charged with murder with special circumstances. The prosecution moved to close the portion of the preliminary hearing during which two confidential witnesses were scheduled to testify, arguing that gang members, friends, and family members had attended prior court hearings, and that if the identities of the witnesses were revealed, they would be subject to retaliation as snitches. The prosecution also contended that the witnesses would be intimidated by having any unknown members of the public in the courtroom, on the theory that the witnesses would fear they were associated with the gang.

The prosecution’s motion was based on a section of the California Penal Code, § 868.7, that purports to allow closure of preliminary hearings upon motion by the prosecution. As parties commonly do when seeking courtroom closure orders, the prosecution argued that the public and

press would not miss anything by being excluded only during the testimony of the two confidential witnesses, since they would be allowed to attend the remainder of the preliminary hearing.

Press Intervenes

The *Press Democrat* in Santa Rosa opposed the closure motion, arguing that the prosecution could not meet the constitutional test for closure for two reasons.

First, the defendants themselves — whom the prosecution had not moved to exclude — would be present in the courtroom when the witnesses testified and would learn the witnesses’ identities. Since there were many ways for those defendants to convey that information to individuals excluded from the courtroom, closure would not be effective to avert the asserted risk of retaliation, and for that reason alone it was unconstitutional.

Second, *The Press Democrat* articulated several alternatives to complete closure during the witnesses’ testimony, one of which was to exclude members of the public but not members of the press, so that witnesses could be assured that none of the defendants’ associates or family members would be in the courtroom — an option the newspaper argued would minimize, if not eliminate, any witness intimidation in the courtroom.

Although the newspaper was reluctant to suggest that the press should be treated differently than the public, it offered this proposal as a fallback because otherwise the court had no alternative but complete closure if it accepted the prosecution’s argument that the presence of unknown members of the public might alter the witnesses’ testimony out of fear

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Calif. Court Imposes Partial Closure Order in Gang Case

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that someone in the audience might be a spy for the gang. This proposal would at least allow the press to observe the testimony of the two witnesses and ensure that by their reports of the testimony, the public would be informed about that testimony.

Court Protects Witnesses by Barring Public

The hearing on the prosecution's closure motion got off to a rocky start when the court, over the press' objection, granted the prosecution's unnoticed oral request to close the argument on the motion to close the preliminary hearing. But on the merits, the court agreed with *The Press Democrat's* argument that closure of the preliminary hearing would be ineffective to prevent disclosure of the witnesses' identities, and refused to close the hearing to the press.

However, in an effort to give the witnesses some measure of protection from intimidation by perceived gang members or their affiliates who might be in the audience if

the public was admitted, the court excluded all other members of the public from the testimony of the two witnesses, while allowing the press to attend. The result was thus a unique example of the press' role, recognized by the U.S. Supreme Court more than 20 years ago in *Richmond Newspapers*, as "surrogates for the public."

Not satisfied, the prosecution then asked the court to prohibit the press from printing anything about the testimony of the two witnesses, a request that *The Press Democrat* vigorously opposed, and the judge quickly rejected, as an unconstitutional prior restraint. In the end, the court also granted *The Press Democrat's* request that the transcript of the hearing on the closure motion be released to the public.

Mr. Myers, Ms. Matteo-Boehm and Lisa Sitkin, who are with Steinhart & Falconer LLP in San Francisco, CA, represented The Press Democrat in this matter. Ms. Matteo-Boehm argued the case.

Connecticut FOIC Orders City to Re-Obtain "Lost" Cell Phone Records

By Alan Neigher

In March, the Connecticut Freedom of Information Commission ("FOIC") ordered the City of Bridgeport to reacquire "lost" cell phone records of now former Mayor Joseph Ganim and other City Hall officials. The Complainants, the *Connecticut Post* ("the Post") a daily located in Bridgeport, and reporters Marian Gail Brown sought for nearly two years to obtain cell phone records from the Mayor and other top officials of Bridgeport before the Mayor's October 31, 2001 federal indictment. The City's Attorneys office vigorously contested production of the records and caused numerous hearings before the Connecticut FOIC.

The Comptroller redacted virtually all relevant information including the numbers called, the dates called and the times of the calls.

1999. In 2000, stories began circulating about widespread corruption in the Ganim Administration. By June 2001, several persons closely associated with Ganim's Administration pleaded guilty to various counts of RICO and related corruption charges; these persons became government witnesses. By the end of 2002, ten people and one business had pleaded and were cooperating with the government. *The Post* began a series on the allegations, and the indictments of those cooperating witnesses, which included accounts of business being transacted over cell phones assigned to the Mayor's office and paid for with public funds.

The First Request: July 2001 – July 2002

On July 24, 2001, Brown sent FOIA requests to City Comptroller Michael Lupkas requesting cell phone records for Mayor Ganim, Christopher Duby, his Chief of Staff

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Background

Mayor Joseph Ganim, once a candidate for Governor of Connecticut and Mayor since 1991 of Bridgeport, the state's largest city, won his fifth term for reelection in

Conn. FOIA Orders City to Re-Obtain Cell Phone Records*(Continued from page 45)*

and Gregory Conte, the Deputy Chief of Staff for the period 1997 through June 30, 2001. The Comptroller provided one year's worth of records for certain employees but redacted virtually all relevant information including the numbers called, the dates called and the times of the calls.

On January 4, 2002, the reporter renewed her July 2001 request, as well as other information regarding other City Hall personnel. When these requests were ignored, the reporter and *The Post* appealed to the FOIC, requesting compliance with what were clearly "public records" pursuant to C.G.S. § 1-200(5).

At the first hearing before the FOIC on this matter, the City claimed that the telephone numbers of the outgoing calls, telephone numbers of the cell phones from which the calls were placed and related information are exempt from disclosure as an invasion of personal privacy pursuant to C.G.S. § 1-210(b)(2). The City also claimed that certain numbers also may be unlisted, constituting a further invasion of privacy. Finally, the City claimed that cell phone records should not be disclosed based on "executive privilege," arguing that the government should be able to conduct business without "ancillary" information released to the public.

The First FOIC Ruling

On June 26, 2002, the FOIC rejected the City's claim of personal privacy and "executive privilege," finding that cell phone records paid for with public funds are neither "personnel" or "medical" records but rather financial and accounting records of telephone use by public officials paid for by public funds. The FOIC also found that information pertaining to public employees' use of government-owned equipment, on government time, is presumptively a legitimate matter of public concern; the City failed to rebut this presumption by describing which calls may have been personal in nature or reimbursed to the City by the employees. The City's blanket claim of exemption was summarily rejected.

The FOIC also summarily rejected the claim of "executive privilege" as being outside of any Connecticut

or federal law. The FOIC criticized the City for its unwarranted delays and for flouting the law. Then the FOIC fined the Chief of Staff and the Comptroller \$1,000 each. The Commission also admonished counsel for the Respondent for "unprofessional conduct" throughout the case and advised that it would "countenance no further repetition of such conduct". Docket No. FIC 2002-03 Final Order and decision of June 26, 2002 at 8 (herein "June 26 Order").

The Post and its reporter reasonably believed that this matter was drawing to a conclusion. No such assumptions would be realized.

Round Two: City Can't Find the Records

The City did not appeal the FOIC's ruling of June 26,

2002. Instead, in purporting to meet the June 26 Order, the City filed a series of affidavits through its comptroller stating that it could no longer locate most of the cell phone records. Prior to the June 26 Order, the Comptroller had twice told Reporter Brown that the City's Office of Information Technol-

ogy Services (ITS) had the subject cell phone bills. However, the affidavits were a myriad of contradictory statements about who had what cell phone numbers, who had control of the actual records and where such records might be located.

On August 20, 2002, *The Post* filed a motion to compel compliance with the June 26, 2002 order, on the basis of the "now you see it, now you don't" shell game which it believed the City was playing. In so moving, *The Post* sought an order requiring the City to produce the unredacted cell phone records of all calls, from all cellular telephone records of the Mayor and his finance director for the years 1997 - 2001.

The Post argued that, taking the City's word that it no longer had the records at issue, the service provider, primarily Verizon, did have them, and the FOIC had the power to subpoena the records pursuant to C.G.S. § 1-205 (d): "to provide the relief that the Commission, in its dis-

Cell phone records paid for with public funds are neither "personnel" or "medical" records but rather financial and accounting records of telephone use by public officials paid for by public funds.

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Conn. FOIA Orders City to Re-Obtain Cell Phone Records*(Continued from page 46)*

cretion, believes appropriate to rectify the denial of any right conferred by the Freedom of Information Act. *The Post's* argument was that because the Act vindicates the public right to know under *Hartford Police Department v. FOIC*, 252 Conn. 577, 746 A.2d 1264, 1270 (2000), the Commission may order the City to seek duplicate invoices from Verizon to provide all records due *The Post* under the Commission's June 26 Order.

The City resisted the motion for compliance, arguing that the Commission had no such power and could not order the City to seek duplicate records from a third party.

On September 22, 2002, and October 7, 2002, the FOIC's hearing officer heard arguments on *The Post's* motion to compel. At those hearings, the City presented evidence from Comptroller Lupkas and corporate counsel that while Verizon had sent the original cell phone records at issue to the City, those records were no longer within the custody and control of the City and, accordingly outside the reach of the FOIA; *The Post* could not force it to reacquire those records from the service provider. *The Post* argued that the missing records had not been accounted for, and the absence of the records was never an issue until after the Order of June 26. Further, to leave the press and the public with no recourse from a municipality's own carelessness (or worse) would encourage governmental entities to "disappear" such records whenever it was convenient.

The FOIC's Second Ruling and Mayor Ganim's Trial

Mayor Ganim's criminal trial began on January 8, 2003, in the United States District Court, New Haven. The trial continued for more than 2 months, and featured a parade of cooperating witnesses who testified to an elaborate pattern of kickbacks and extortion where City contracts were attended by payments from contractors and vendors to go-betweens working for the Mayor. Those go-betweens kept some consideration, and passed much of it on to the Mayor in the form of cash and elaborate gifts. During the trial, but before verdict, on March 6, 2003, the FOIC issued its latest ruling on the cell phone records, stating in relevant part the following:

It is found that [the City and the individual Respondents] failed to credibly account for the whereabouts

of the remainder of the requested detailed billing records and failed to prove how such records came to be missing. In the absence of credible evidence to the contrary, the Commission may infer that spoliation may have occurred and finds that any records which have not been produced are the result of spoliation on the part of the Respondent.

FIC Docket No. 2002-03, Final Order and Decision of March 6, 2003. Concluding that it had subject matter jurisdiction to enforce its Order of June 26, the Commission ordered that the City contact the telephone service provider (Verizon) and request copies of the detailed cell phone billings not yet provided to *The Post* and its reporters. Further, in the event that such records were not received by the Post, the Commission directed its general counsel to seek an order of compliance from the Superior Court and to refer this matter to the appropriate state's attorney for criminal prosecution.

The Resolution

Mayor Ganim was convicted on 16 counts of the indictment on March 19, 2003. The City Attorney's office appealed the FOIC ruling to the Superior Court on or about the same day as the conviction. However, on April 4, 2003, the Mayor resigned and was replaced by City Council Chair John Fabrizi, who promptly ordered the City Attorney's office to turn over all of the cell phone records to the City. In substantial part this has been done. It is not clear whether the cell phone records were suddenly "found" by the City, or Verizon had been contacted in order to produce those records. But it is clear that the tenacious determination of reporter Marian Gail Brown, and the *Connecticut Post*, resulted in an important precedent for the press when it seeks "disappeared" records that third parties can produce.

Alan Neigher of Byelas & Neigher, Westport, CT represented Complainants Marian Gail Brown, and The Connecticut Post. Arthur Laske, III, office of the City Attorney, Bridgeport, CT., represented respondent Michael Lupkas, Comptroller, Christopher Duby, Chief of Staff, Mark Anastasi, City Attorney, and Gregory Conte, Deputy Chief of Staff, City of Bridgeport.

Access on Terror War

While the war in Iraq wound down, issues continued to be raised regarding access to information about the war on terrorism.

U.S. Officials Block Report Disclosure

Bush Administration officials are blocking release of a Congressional report detailing the government failings that allowed the Sept. 11 terrorist attacks to occur, according to story posted on *Newsweek's* web site in early May.

The report was completed in December 2002 by a joint Congressional committee charged with examining the performance of American intelligence and law enforcement in the months leading up to the attacks. Some general information was released at that time, while the entire report was submitted to the administration for security review. According to the story, a "working group" of administration intelligence officials has refused to declassify many of the report's conclusions, and is even attempting to declare classified some information that administration officials have discussed in various public hearings.

According to the *Newsweek* story, the Congressional report includes revelations that could be embarrassing to the administration as it gears up for a reelection bid in 2004.

The *Newsweek* story is online at <http://www.msnbc.com/news/907379.asp>.

All But One Wiretap Approved

All 1,228 applications for intelligence wiretaps and all but one of 1,359 applications for other wiretaps sought by federal and state prosecutors in 2002 were granted, the Administrative Office for the U.S. Courts reported in early May.

The report was issued one month after the U.S. Supreme Court declined to review a decision regarding the government's use of a wiretap authorization procedure, originally intended only for intelligence investigations, in other criminal investigations. See *MLRC MediaLawLetter*, April 2003, at 66. Use of the procedure, which is conducted in secret

without notice to the subject of the wiretap, was exclusively limited to intelligence investigations until passage of the USA Patriot Act in 2001; the Act permits use of the secret procedure as long as intelligence is a "significant purpose" of the investigation. See *LDRC LibelLetter*, Dec. 2001, at 49.

The 1,228 approved intelligence wiretaps include two which were initially rejected by the Foreign Intelligence Surveillance Court, which considers such applications, but were granted after an appeal to the Foreign Intelligence Surveillance Court of Review. These denials, which stemmed from a single case, were the first ever to proceed to the appellate court. Also, the fact that both courts released their decisions – the appellate decision in redacted form – was unprecedented. See *LDRC MediaLawLetter*, Nov. 2002, at 43. The Supreme Court declined to review the appellate decision. See *MLRC MediaLawLetter*, April 2003, at 66.

A spokeswoman for the Administrative Office of the U.S. Courts told *The Washington Times* that the only decision rejecting a non-intelligence wiretap was made by a California state court, but did not have any further details.

Libel Defense Seeks Access to Aziz

Attorneys for the London *Daily Telegraph*, preparing to defend the newspaper in a lawsuit threatened in British court over stories reporting that documents discovered in Iraq revealed that Parliament Member George Galloway was paid by the regime of Saddam Hussein, were reportedly preparing to ask American military officials for access to former Iraqi foreign minister Tariq Aziz. Aziz turned himself in to American forces on April 25, and is likely to be prosecuted for war crimes.

"Working group" of administration intelligence officials is even attempting to declare classified some information that administration officials have discussed in various public hearings.

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Maryland Appeals Court Orders Three Reporters to Testify at Police Administrative Hearing

By Kevin Hardy

Rejecting arguments that the reporter's privilege barred their testimony, the Maryland Court of Special Appeals has reversed a lower-court order that quashed subpoenas issued to three reporters in connection with their coverage of an incident of conduct allegedly unbecoming a police officer. *Prince George's County v. Hartley*, -- A.2d --, 2003 WL 2004521 (Md. Ct. Spec. App. May 2, 2003).

Reporting Cop's Remarks Leads to Subpoenas

On August 13, 2001, Prince George's County, Maryland police officer, Brian Lott, was in the federal courthouse in Greenbelt, Maryland attending the trial of two of his fellow officers, who allegedly had released a police dog on two homeless men in 1995. During the lunch break, Officer Lott remarked, as he stood in the courtroom vestibule: "I wish I would have been there in '95. I would have shot the bastards, and we wouldn't have all this crap."

This statement, which was made in a public area during the lunch hour, was reprinted in an article by Ruben Castaneda in *The Washington Post*, in an article by Gregory Johnson in *The Gazette Newspapers*, and in Eric Hartley's article in *The Prince George's Journal*. All three reporters were in the courthouse that day covering the trial of the two police officers for their respective newspapers.

Apparently based on these press reports, the Prince George's County police department initiated an inquiry into Officer Lott's conduct at the courthouse that day and issued summonses to the three reporters to appear and give testimony at an internal police administrative hearing. The County wished to hear live testimony from each of the reporters for the three newspapers simply to confirm that they did indeed hear Officer Lott utter the words that were recited in their respective articles. According to the County's investigator, no one other than the three reporters heard Officer Lott's entire statement.

After receiving the summonses, each of the three reporters expressed his belief that the County was seeking testi-

mony that was protected by a qualified privilege under the First Amendment and/or the Maryland Shield Law. One of the reporters, Mr. Hartley, offered an affidavit confirming the substance of his article as an alternative to his live testimony.

Motions to Quash Granted

The County subsequently filed an *ex parte* application to require the reporters' attendance at the hearing. The Circuit Court granted the County's motion, and the three reporters responded by filing a motion to vacate the Court's order and quash the summonses.

The Circuit Court for Prince George's County granted the reporters' motions. The Court reasoned that while the information sought was relevant, the summonses should be

"The alternative source rule is inapplicable when the information sought is the reporter's own observations as a percipient witness of a transitory event."

quashed, because the County had alternative sources of the information sought—namely, the news articles themselves and Mr. Hartley's affidavit. In so holding, the Court noted the County's "important interest in the disclosure," but ultimately found that the

reporters' First Amendment interests, when combined with the specter of a broad and intrusive cross examination by counsel for Officer Lott, outweighed the County's interest.

The County appealed, and the Court of Special Appeals reversed, holding that neither the First Amendment nor the Maryland Shield Law entitled the reporters to refuse to testify at the administrative hearing.

Court of Special Appeals Reverses

The Court of Special Appeals began by addressing the First Amendment privilege. The Court first reviewed *Branzburg v. Hayes*, 408 U.S. 665, 682 (1972), where the Supreme Court held—by a 5-4 vote—that the First Amendment did not afford reporters an absolute, unqualified privilege to refuse to testify before a grand jury concerning possible criminal conduct which the reporters had observed.

The Court then went on to address the relevant Maryland caselaw. The Maryland Court of Appeals has addressed the reporter's privilege just twice—in *Tofani v. State*, 465 A.2d

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MD Court Orders Reporters to Testify

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413 (1983), and *WBAL-TV Div., Hearst Corp. v. State*, 477 A.2d 776 (1984). Like *Branzburg*, *Tofani* involved a grand jury subpoena, and the Court of Appeals accordingly held that *Branzburg* controlled.

In *WBAL*, a case in which a television station was subpoenaed for outtakes of an interview with a criminal defendant, the Court applied (without deciding whether to adopt) the three-part test that has been articulated in a number of decisions from other jurisdictions: (1) whether the information is relevant; (2) whether the information can be obtained by alternative means; and (3) whether there is a compelling and overriding interest in its disclosure. *WBAL-TV*, 477 A.2d at 781. See, e.g., *Gonzales v. Nat'l Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999); *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980). The Court in *WBAL* then held that the State had made the necessary showing and was entitled to the subpoenaed information.

“The argument that a reporter’s affidavit should be received as an alternative to the reporter’s testimony constitutes a waiver of whatever privilege might be applicable.”

Focus on Alternative Sources for Information

In this case, the Court of Special Appeals never squarely addressed whether the First Amendment requires application of the three-part test applied in *WBAL*, but it nevertheless addressed the three factors. The relevance of the reporters’ information was never disputed, so the Court focused on the availability of alternative sources.

In that regard, the Court relied on a concurring opinion in *Delaney v. Superior Court*, 789 P.2d 934 (Cal. 1990), and held that “the alternative source rule is inapplicable when the information sought is the reporter’s own observations as a percipient witness of a transitory event.” *Hartley*, 2003 WL 2004521, at *5 (quoting *Delaney*, 789 P.2d at 957-58 (Mosk, J., concurring)). In so holding, the Court distinguished information that “had been gathered from documents, interviews, public meetings, and the like.” *Id.* (quoting *Delaney*, 789 P.2d at 957-58 (Mosk, J., concurring)).

The Court reasoned that “two percipient witnesses of the same event are not in any sense fungible. And unlike the document or the interview, the transitory unrecorded event is not subject to subsequent independent verification.” *Id.* (quoting *Delaney*, 789 P.2d at 957-58 (Mosk, J., concurring)). Because the reporters in this case were unquestionably eyewitnesses to the relevant event, the Court held that the County had thus satisfied its burden with respect to alternative sources.

The Court further noted that the newspapers’ articles alone could not be admitted at the administrative hearing, because while the hearsay rules are less strict in administrative settings, Officer Lott nevertheless has a right to cross-examine the reporters. The Court concluded its analysis of the First Amendment reporter’s

privilege by noting that, while there are First Amendment interests at stake, “[a]djudicating and disciplining the wrongdoing of errant officers is of utmost importance” and that the County “has a compelling and overriding interest in calling [the reporters] to testify.” *Hartley*, 2003 WL

2004521, at *8.

Maryland Shield Law Analysis

The second part of the Court’s ruling was regarding the applicability of the Maryland Shield Law, MD. CODE ANN., CTS. & JUD. PROC. § 9-112, which codifies the traditional three-part test. The Maryland Shield Law is limited, however, as it expressly applies only to sources and unpublished information. *Id.* § 9-112(c).

Because these reporters were being subpoenaed to confirm the accuracy of published information, the Court held that the Shield Law was inapplicable. *Hartley*, 2003 WL 2004521, at *9. But even if it were, the Court indicated that, for the reasons set forth in the First Amendment discussion, it was persuaded that the County had satisfied the three part test. *Id.* at *10.

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MD Court Orders Reporters to Testify*(Continued from page 50)***Reporter Affidavit Was Waiver**

One additional element of the Court's decision in *Hartley* deserves mention. In an effort to compromise with the County, counsel for the Eric Hartley of *The Prince George's Journal* offered an affidavit in lieu of testimony. The County rejected the offer, and at the hearing counsel for the reporters argued that the affidavit was an alternative source of the information sought by the County.

The Court of Special Appeals, however, noted that "[t]he argument that a reporter's affidavit should be received as an alternative to the reporter's testimony constitutes a waiver of whatever privilege might be applicable. Unlike an offer of compromise excluded under Maryland Rule 5-408, when a reporter asks the court to

substitute an affidavit for the reporter's testimony, that argument constitutes a waiver." *Id.* at *6 n.7. It is unclear what impact this footnote will have on reporters' ability in the future to offer affidavits in lieu of testimony in an effort to settle any dispute regarding a subpoena.

Kevin T. Baine and Kevin Hardy of Williams & Connolly LLP, as well as Eric N. Lieberman of The Washington Post, represent reporters Ruben Castaneda and Gregory Johnson in this matter. Eric Hartley is represented by Alice Neff Lucan. Prince George's County is represented by Associate County Attorney Eugene H. Pickett II.

News Source Who Violated Protective Order in Civil Case by Leaking Documents Begins 45 Day Jail Sentence

Robert Mullally, a legal researcher hired by plaintiffs in a civil suit against the LAPD, began serving a 45 day prison term on May 14 for violating a federal judge's protective order in the case that barred information submitted to the court by the LAPD from being disseminated to the public. Mullally violated the order by passing along to a local television news reporter in 1997 some of the information provided to plaintiffs by the police.

The Ninth Circuit upheld the conviction last October ruling that key provisions of the protective order were not ambiguous, and that the collateral bar rule prohibited Mullally from challenging the constitutionality of the order.

(Mullally v. City of Los Angeles, 2002 WL 31420128 (9th Cir. (Cal.) 2002)) However, the original jail sentence of 60 days was vacated as the Ninth Circuit believed the district court based its decision on inaccurate findings. On remand Judge Keller of the district court again sentenced Mullally to prison, but this time for 45 days.

The Ninth Circuit also found no evidence to support the district court in finding that Mullally was motivated by his own ego when he released the information.

Protective Order and Original Sentence

The underlying litigation concerned a civil suit brought against the LAPD claiming the department did not properly investigate domestic abuse complaints made against members of the department. *(Wynn v. City of Los Angeles, No. CV 93-3026-WDK)* The suit was brought on behalf of a woman who was killed by her husband, a police officer. The LAPD agreed to give department materials to the plaintiff only after the protective order was issued which forbid the information from being distributed to the public. Eventually the parties settled the suit.

Mullally was hired as an expert witness for the plaintiff. In 1997, after examining the LAPD materials, Mullally passed documents along to a reporter for KCBS in Los Angeles. Mullally believed the public should be made aware of the LAPD's wrongdoing in shielding its officers from domestic abuse charges. Indeed, the publicity generated by the disclosures is credited with forcing police reforms on these issues. *(Arnold Friedman,*

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News Source Begins 45 Day Jail Sentence

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"Leaking LAPD Documents Leads to Jail Time", *The Natl. Law J.* <http://www.law.com/jsp/newswire_article.jsp?id=1052440734466>).

After a court-ordered investigation into the leak began Mullally soon admitted to being the source. In a nonjury trial, Judge Keller of the Central District of California found Mullally guilty of criminal contempt of court. Judge Keller stated that with his actions, Mullally had "set himself above the law" and acted with "continued defiance". The government prosecutor recommended probation but Judge Keller rejected probation as insufficient in maintaining the court's integrity.

Ninth Circuit Upholds Conviction

The Ninth Circuit upheld Mullally's conviction on October 11 of last year. According to the three judge panel, the protective order unambiguously stated that Mullally had to return the documents at issue to Los Angeles. The constitutionality of the order could not be challenged by Mullally due to the collateral bar rule. Mullally also appealed the denial of his motion to disqualify the trial judge but the Ninth Circuit held that it could not rule that the judge erred in denying the motion.

Despite affirming the conviction, the Ninth Circuit vacated the 60 day prison sentence. The Ninth Circuit found the district court erred in concluding that all aspects of the protective order were unambiguous. The Ninth Circuit also found no evidence to support the district court in finding that Mullally was motivated by his own ego when he released the information. The district court was also mistaken in finding that Mullally showed "utter defiance" of the court because Mullally's website described the "so-called protective order". The website in fact referred to the "so-called confidential files." Finally, the district court did not appear to take into consideration the sentencing recommendation of the prosecutor who advised jail time would be "extreme".

Sentence Reduced on Remand

On remand, Judge Keller rejected the advice of the Ninth Circuit and again sentenced to Mullally to jail, this time to 45 days. Judge Keller stated that he would have sentenced Mullally to the maximum six months if not for

Mullally's objective to disseminate information he believed would benefit the police department and public interest.

Mullally decided not to appeal this sentence deciding that another appeal would not be worth the effort. (*Associated Press*, "Man who leaked information about LAPD starts prison term", <<http://www.signonsandiego.com/news/state/20030515-0214-ca-cops-domesticviolence.html>>).

Before the Ninth Circuit:

For Mullally: James Weinstein of Arizona State University (Tempe, AZ.); James B. Lebow of Arnold Laub, APC (San Francisco)

For City of Los Angeles: James K. Hahn of the Office of the City Attorney (Los Angeles)

Reporter Dies in Iraq

Elizabeth Neuffer of the *Boston Globe* was killed May 9 in a car accident in Iraq that was unrelated to any military action, bringing the number of journalists who have died while covering the conflict to 16. Four of these journalists, including Neuffer, died for reasons unrelated to military operations in Iraq. (See April *Media-LawLetter* for a complete list.)

Meanwhile, two reporters for Britain's Independent Television News (ITN) – Frederic Nerac and Hussein Othman – remain missing. According to colleagues who escaped, the pair was operating independently when they disappeared while caught in a firefight between American and Iraqi forces.

Customs Seizes Journalists' Souvenirs

In late April, the U.S. Customs Service announced that it had seized several items of "Iraqi heritage" from journalists returning to the United States, and the Fox News Channel fired an engineer who returned with Iraqi bonds and 12 paintings allegedly from the palace of Uday Hussein, one of Saddam Hussein's sons.

On April 25, the service displayed a number of items that it said had been seized from reporters returning from Iraq. The items included 15 paintings, gold-plated guns, ornamental knives and Iraqi government bonds.

Ex-Salt Lake Tribune Reporters Reveal Sources in Elizabeth Smart Kidnap Case

By Jeffrey J. Hunt

In a case that raises troubling questions about journalists' reliance upon and disclosure of confidential sources, two *Salt Lake Tribune* reporters were fired last month after it was revealed they peddled unpublished information on the Elizabeth Smart kidnapping case to the *National Enquirer* in exchange for \$20,000.

Relying on the information provided by the two reporters – Kevin Cantera and Michael Vigh -- the *Enquirer* published a sensational story about the Smart kidnapping case last July 2 under the headline "Utah Cops: Secret Diary Exposes Family Sex Ring." In a settlement with the Smart family, the *Enquirer* later admitted that key portions of the story were false and issued an apology to the Smart family.

Elizabeth Smart, then 14, was abducted from her bedroom early on the morning of June 5, 2002, spurring a nationwide search. She was found nine months later walking along a suburban Salt Lake City street with Brian David Mitchell and Wanda Barzee, who have been charged with multiple counts in the abduction.

Reporters Give Up Sources

Vigh and Cantera were the *Tribune's* lead reporters on the Smart abduction story, often relying upon confidential law enforcement sources to break stories on the investigation. After losing their jobs, and under threat of litigation, the two reporters revealed those confidential sources to attorney Randy Dryer, who was hired by the Smart family to uncover the identities of the unnamed sources and stop the leaking of salacious information about the case.

Following a two-hour interview with Vigh and Cantera, Dryer conducted a press conference at which he announced that law enforcement officers from four state and federal agencies had leaked information and rumors about the Smart kidnapping investigation. Dryer declined to identify the employees, but sent their names to the Utah Attorney General's Office, the Salt Lake District Attorney's Office, and the U.S. Attorney's Office for investigation and possible prosecution.

After investigating the matter, Salt Lake District Attorney David Yocum concluded earlier this month that Salt Lake City Police officers who may have provided information on the case did not violate any state laws. The Utah Attorney General's Office also cleared the Utah Department

of Public Safety of any criminal wrongdoing in connection with the alleged leaks.

The U.S. Attorney's Office is continuing to investigate the allegations, and investigators from the Office of the Inspector General for the Justice Department and Department of Homeland Security arrived in Salt Lake City earlier this month to investigate alleged leaks from the FBI and U.S. Secret Service.

Although the *Tribune* did not publish the information that Vigh and Cantera provided to the *Enquirer*, *Tribune* Editor James E. Shelledy resigned following criticism that he did not fire the reporters sooner. *Tribune* Publisher Dean Singleton, CEO of Media News Group, which owns the *Tribune*, met privately with members of the Smart family and apologized for the paper's involvement in the July 2 *Enquirer* article.

The *Tribune* commissioned an independent investigation of the scandal by two local journalism professors, who concluded that Vigh and Cantera had violated the newspaper's internal policies and ethical guidelines, but that the *Tribune's* coverage of the Smart abduction story was accurate and based upon legitimate sources.

Fallout: Fewer Sources

The journalistic and legal fallout from the *Tribune* scandal is likely to continue in Utah. Local law enforcement officials are understandably reluctant to speak off-the-record to reporters following Vigh and Cantera's identification of their confidential sources and the subsequent government investigation of leaks. As a result, many local reporters fear they will have less access to background information that helps put stories in context and paints a fuller and more accurate picture for reporters – and the public.

The scandal already has impacted access to information in the criminal proceedings against Mitchell and Barzee. The presiding judge in the case has issued an order preventing the release of any documents relating to the Smart kidnapping investigation. Citing concerns about the "extraordinary media coverage" of the case and the "actions of others not associated with this matter", Judge Judith Atherton ruled that closure of the records was warranted to protect the fair trial rights of Mitchell and Barzee and to protect witnesses and victims from harassment, abuse, and invasion of privacy.

Jeffrey J. Hunt is a partner in Parr Waddoups Brown Gee & Loveless, Salt Lake City, Utah.

Editor's Note: This column was originally published by *The Wall Street Journal* on Tuesday, April 15, 2003. It is republished here with the permission of the *Journal* and the author. It raises ethical issues, but potentially legal ones as well. I believe it is very provocative, and would be very interested in the views of MLRC members.

Deep Betrayal

By Leonard Garment

Some say that Bob Woodward and Carl Bernstein, the reporters who brought us Deep Throat, simply invented him; but I have evidence to the contrary. Some years after Watergate, a book about Richard Nixon by the psychohistorian Fawn Brodie quoted me as saying some awful things about my former boss. Her stated source was Bob Woodward. It is no secret that I was one of Mr. Woodward's sources for "The Final Days." But he promised me, as he promised Deep Throat and others, confidentiality—no conditions, no limits. I told Mr. Woodward I was angered by his breach. In response, he diverted me from my complaint by sending me his exhaustive notes of a conversation we had had over dinner at a Chinese restaurant in Washington. Mr. Woodward's notes showed that I had said not only what Ms. Brodie had me saying about Nixon, but worse. I subsided.

* * *

So, when the University of Texas announced last week that it had agreed to pay Messrs. Woodward and Bernstein \$5 million for their Watergate papers, I thought the university was getting its money's worth.

But to judge from the ritual accompanying the agreement, it was not just a fair bargain but a moment of moral and historic importance. The parties signed the deal at a formal ceremony complete with a red felt tablecloth the likes of which we haven't seen since SALT. Messrs. Woodward and Bernstein announced that they were contributing \$500,000 to programs for the study of Watergate and journalistic ethics. Most important, the reporters and the university announced that their arrangement was designed to preserve the confidentiality of the reporters' sources and to affirm the importance of the protection of sources to a free press.

In fact, the parties agreed only that the identity of a confidential source would remain confidential until his death. I was initially unfazed by these terms. I have spent several careers talking to the press. Almost nothing that anyone could reveal to my wife and children after my death could be worse than what crosses their minds here and now, while I am living.

Then I recalled that conversation in the Chinese restaurant. At the time, those of us who had attended the recent death of the Nixon presidency were emerging, scarred and angry, from a time whose hatreds are largely unimagined today. From Mr. Woodward's notes I know I said things that night that I do not believe and did not believe even then. I am now not so sure that I want those sentiments to be a posthumous present to my family and reputation. I do know that I never gave Mr. Woodward or Mr. Bernstein a postmortem release.

The issue of confidentiality after death reached the Supreme Court not long ago in the

context of attorney-client privilege. The lawyer involved in the case was attorney to Clinton White House aide Vincent Foster during the scandal over the disappearance of records related to the Clintons' business dealings. After Foster committed suicide, investigators subpoenaed the lawyer's notes of his conversations with Foster, claiming that their confidentiality was no longer protected because the client was dead. The court disagreed, reasoning, "Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime."

The same is true of relations between sources and journalists. I can only imagine how Deep Throat—who has committed what he probably views as a betrayal of friends, however justified—looks forward to the full revelation of his infidelity. And I know that as the identity of each deceased source is revealed, it will become easier to identify as-yet-unnamed sources, many of whom are still living.

The reporters and the university would probably answer by pointing to the demands of

History. In this view, the events chronicled by Messrs. Woodward and Bernstein are too important to remain hidden by individual sensitivities. That is the argument that the cameras and red tablecloth were meant to reinforce. But it is not true. Nixon was forced from office by prosecutors, courts, congressmen, public opinion, and his own culpability. Deep Throat was a titillating sideshow. More important than Deep Throat's role in Watergate was

his role in creating the myths of pervasive public corruption and of investigative journalism as the only antidote. Those myths corroded our politics for decades. We are just beginning to repair the damage.

According to "All the President's Men," Mr. Woodward "promised Deep Throat that he would never identify him or his position." If Deep Throat later agreed to be identified upon his death, so be it. For the many sources who agreed to no such thing, it is hard to see any justification for not waiting a decent interval—say, 20 years—before abrogating the reporters' promises of confidentiality. The legitimate demands of history would be met. The protection of sources would be defended. The only desire not satisfied would be the present impulse to breach walls of privacy wherever they remain standing.

Messrs. Woodward and Bernstein, instead of protecting their sources against this impulse, have made concessions to it. If History is a guide, these concessions will only hasten the pace at which the appetite for secrets eats away at the remaining pieces of our privacy.

Mr. Garment, a New York lawyer and counsel to President Nixon, is the author, most recently, of *"In Search of Deep Throat"* (Basic Books, 2000)

According to "All the President's Men," Mr. Woodward "promised Deep Throat that he would never identify him or his position."

Developments in FCC Indecency Regulation — The Big Chill

By Steven A. Lerman

In an unprecedented decision, the Federal Communications Commission ("FCC" or "Commission") recently warned the broadcasting industry that the broadcast of indecent or obscene programming could result in the revocation of the broadcaster's license or dramatically increased fines under a new approach to calculating forfeitures. In *Infinity Broadcasting Operations, Inc.*, Notice of Apparent Liability for Forfeiture, FCC 03-71 (rel. Apr. 3, 2003), the Commission found a radio broadcaster apparently liable for the maximum allowable forfeiture for the broadcast of indecent programming and threatened license revocation for future violations. The Commission's shocking departure from its previous enforcement mechanism represents an additional and significant erosion of the First Amendment rights of broadcasters.

The Precarious Balance: Freedom of Speech, Freedom from Censorship and the Commission's Indecency Regulation

As a government agency, the Commission is bound to respect and uphold the Constitutional protections afforded by the First Amendment, which states, unequivocally, "Congress shall make no law ... abridging the freedom of speech."

Section 326 of the Communications Act of 1934 similarly places restraints on the Commission's authority to regulate the speech of broadcasters:

"Nothing in this Act should be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communications." (47 U.S.C. § 326)

Although these Constitutional and statutory prohibitions would appear to afford broadcasters unfettered freedom of speech, numerous jurisprudential exceptions exist that countervail the absolute protection of speech which the First Amendment and Section 326 appear to provide.¹

A significant restraint on broadcaster speech is embodied in a criminal statute, which prohibits the utterance of "any obscene, indecent or profane language by means of radio communications." 18 U.S.C. § 1464 (1988). The FCC is responsible for administratively enforcing Section 1464, including regulation of "indecent" material. Unlike obscenity — a narrow category of speech outside the purview of the First Amendment and principally defined by the Supreme Court's *Miller*² decision — indecent speech encompasses substantially broader material and is entitled to Constitutional protection.

Declining and Channeling Indecency

Since the regulation of indecency is a content-based restriction, it is sustainable only if it advances a "compelling interest" and is implemented by "the least restrictive means." *Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989). The compelling governmental interest in regulating indecency is the protection of children and to that end, the Commission requires broadcasters to "channel" indecent speech to "safe harbor" hours (10:00 p.m. to 6:00 a.m.), during which children are presumed less likely to be in the listening or viewing audience.

The FCC defines indecent speech as

"language or material that, in context, depicts or describes, in terms patently offensive as measured by community standards for the broadcast medium, sexual or excretory activities or organs."

Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCCR 7999, 8000 (2001) ("Indecency Policy Statement").

The Supreme Court first addressed the FCC's regulation of indecent speech in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), a case centered on a George Carlin monologue entitled "Filthy Words" which featured the repetitive and deliberative use of expletives, and in which the Court quoted the Commission's indecency definition with apparent approval. The Court noted attributes unique to the broadcast media warranting greater governmental

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Developments in FCC Indecency Regulation

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intrusion into broadcasters' First Amendment freedoms in the indecency context: broadcast media intrudes the sanctity of the home, is uniquely accessible to children and is licensed in the public interest due to the perceived scarcity of the broadcast spectrum. *Pacifica* at 731.

Subsequently, while recognizing the generic definition to be "inherently vague," the United States Court of Appeals for the District of Columbia Circuit upheld the FCC's generic indecency regulatory scheme against Constitutional challenge in the so-called "ACT" series of cases.³

Historically, in light of the courts' narrow holdings in favor of its regulatory scheme, the FCC has proceeded with caution and restraint in its regulation of indecency. The Commission limited sanctions for indecency violations to the imposition of forfeitures, and maintained procedural safeguards to insure that broadcast licensees were afforded the benefits of due process.

One such procedural safeguard was that the Commission initiated indecency proceedings only in response to complaints filed by listeners or viewers and required complainants to include either a tape or transcript of the broadcast in question, recognizing that "given the sensitive nature of these cases and the critical role of context in an indecency determination, it is important that the Commission be afforded as full a record as possible to evaluate allegations of indecent programming." Indecency Policy Statement, 16 FCCR 7999, 8015 (2001).

The Erosion of Administrative Prudence: Discarding the Tape or Transcript Requirement

In the past year the Commission has jettisoned its prudent sensitivity to the paramount importance of the First Amendment, making two abrupt changes to its approach to indecency enforcement. First, in May 2002, the FCC effectively gutted its "tape or transcript" requirement. *Infinity Broadcasting Corporation of Los Angeles*, 17 FCCR 9892 (2002).

This case called into question whether a Los Angeles

radio station had aired an edited or unedited version of a sexually oriented song. The station possessed both versions of the song and the disc jockey, who was taking requests when the song aired and therefore did not hear the song, stated that he did not know whether he had mistakenly aired the unedited version. The licensee submitted declarations by its management suggesting that it was likely that the station had in fact broadcast the edited version of the song. The complainant submitted no tape or transcript to bolster her charge against the broadcaster.

Abandoning the approach which it had followed for some twenty-five years, the FCC held that the failure to provide a tape or transcript was not fatal to the processing of an indecency complaint, and credited the uncorroborated recollection of a complainant, thereby effectively adopting a

"preponderance of the evidence" standard in determining whether material aired in the absence of a tape or transcript.

The cavalierly discarded tape or transcript requirement was a bedrock procedural protection guaranteeing that

the Commission had a "sufficient basis for identifying *prima facie* violations of the statute before requiring broadcasters to respond to complaints." *Infinity Broadcasting Corporation of Pennsylvania*, 3 FCCR 930, 938 (1987). Consequently, and perhaps for the first time, the Commission imposed a forfeiture — in FCC parlance, a fine — in an indecency case on the basis of what *may* have been broadcast, in the face of conflicting evidence about what was *in fact* broadcast.

Further Erosion of Administrative Prudence: Threat of License Revocation

Further tightening the regulatory screws, the Commission's most recent *Notice of Apparent Liability* ("NAL"), mentioned above, constituted yet another dramatic and ominous departure from the historically cautious approach to indecency regulation. There, after concluding that a discussion of several matters on a Detroit radio station constituted an "egregious" violation, the Commission issued an overt

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The Commission's threat of license revocation, coupled with its earlier elimination of the "tape or transcript" requirement, constitutes a radical departure from the "least restrictive means" limitation imposed by Sable.

Developments in FCC Indecency Regulation

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threat to deploy the ultimate sanction in its regulatory arsenal — the initiation of license revocation proceedings — for future “serious violations” of its indecency regulations. Specifically, the FCC stated:

We take this opportunity to note that given the egregiousness of this violation, additional serious violations by [the licensee] may well lead to the initiation of a revocation proceeding. Moreover, other broadcasters are on notice that the Commission will not hesitate to adopt strong enforcement actions in the future, including the potential initiation of revocation proceedings.

Infinity Broadcasting Operations, Inc., Notice of Apparent Liability for Forfeiture, FCC 03-71, ¶ 13 (rel. Apr. 3, 2003).

Thus, faced with an alleged, isolated violation by one of its licensees and without any evidence of a systemic failure of its historical approach to indecency regulation, the Commission has threatened, for “serious violations” (which remain undefined), to take steps to remove the broadcaster’s right to speak by revoking its license.

The Commission’s threat of license revocation, coupled with its earlier elimination of the “tape or transcript” requirement, constitutes a radical departure from the “least restrictive means” limitation imposed by *Sable*. Moreover, the Commission’s implicit suggestion that there has been a catastrophic failure of its forfeiture-based approach to indecency regulation has no factual support.

In any event, if the Commission is inclined to deviate from its long-standing approach to indecency enforcement, it is inappropriate to do so in the context of an adjudicative proceeding. Instead, a rulemaking proceeding is a far more appropriate procedural mechanism to consider the adoption of this new and far-reaching policy. In the context of a rulemaking, the FCC could more adequately consider all relevant issues and invite the participation of all interested parties to offer their views in a structured, orderly manner. Whether the Commission can be persuaded to abandon its present course remains to be seen. Or heard.

Stay tuned.

Steven A. Lerman is a member and manager and Jean W. Benz is an associate of Leventhal Senter & Lerman PLLC in Washington DC.

¹ Obscenity is unprotected speech (*Miller v. California*, 413 U.S. 15 (1993)), as is incitement (*Brandenburg v. Ohio*, 395 U.S. 444 (1969)), child pornography, (*New York v. Ferber*, 458 U.S. 747 (1982)), “fighting words” (*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)) and defamation (*see e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964)).

² The definitional parameters of obscenity established by the Supreme Court in *Miller* are:

(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary artistic, political, or scientific value.

³ *Action for Children’s Television v. FCC*, 852 F.2d 1332 (DC Cir. 1988) (“*ACT I*”); *Action for Children’s Television v. FCC*, 932 F.2d 1504 (DC Cir. 1991), *cert denied*, 112 S.Ct. 1282 (1992) (“*ACT II*”); *Action for Children’s Television v. FCC*, 58 F.3d 654 (DC Cir. 1995), *cert denied*, 116 S.Ct. 701 (1996) (“*ACT III*”).

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Former Reporters Cannot Base Whistleblower Claim On Editorial Dispute Over Television News Report

By Tom Hentoff

In February 2003, Florida's Second District Court of Appeal held that two television news reporters could not invoke Florida's private-sector "whistleblower" statute to allege that their news colleagues' edits to an investigative news report violated an FCC policy against deliberately "distorting" the news. *New World Communications of Tampa, Inc., d/b/a WTVT-TV v. Akre*, 2003 WL 327505 (Fla. 5th DCA Feb. 14, 2003) (opinion by Judge Patricia J. Kelly). The court's decision reversed and vacated a \$425,000 jury award for one of the reporters and affirmed a defense verdict against the other reporter. It also closed one chapter in a long-running legal battle – between the plaintiffs, husband-and-wife investigative reporting team Steve Wilson and Jane Akre, and Fox's WTVT Channel 13 in Tampa – that has raised, but not entirely answered, legal questions about the place of whistleblower laws in the newsroom.

A Whistleblower Lawsuit Based on an FCC Policy Regarding the Content of News Stories

In April 1998, the reporters filed a lawsuit against WTVT in Florida state court, alleging violations of Florida's private-sector whistleblower statute. The complaint alleged that news management and outside counsel had ordered the reporters to "deliberately misrepresent[] important information" in a never-aired news report about the safety risks of BGH, a synthetic hormone injected into dairy cattle to increase milk production. According to the reporters, management and counsel acted for fear that telling the truth would offend the chemical company Monsanto, which manufactures the hormone. The complaint further alleged that the reporters' employment contracts were non-renewed in retaliation for objecting to this purported distortion of the news and threatening to report it to the FCC.

WTVT's answer, and defense, refuted all the factual

allegations. In particular, WTVT presented evidence that its editors and counsel sought only to present a fair, balanced, and accurate news report and that, upon examination, the reporters' claims of "deliberate misrepresentations" boiled down to disputes over word choice, emphasis, and what facts and themes to include in the news story – in other words, everyday newsroom editing.

This novel lawsuit rested on two legal premises:

- the Florida whistleblower statute, which permits employees to sue when retaliated against for objecting to, or threatening to report, employer conduct "that is in violation of a law, rule, or regulation," §§ 448.102(1), (3), *Fla. Stat.*;
- the contention that the requirement of a "law, rule, or regulation" whose alleged violation triggers the statute's protection is met by the FCC's "news distortion policy."

The FCC policy, never adopted as a regulation, has instead been developed in a series of administrative cases. The FCC has explained that, on a case-by-case basis, it may act against a station's license on proof that (i) senior station or news management has (ii) engaged in deliberate distortion of the news, (iii) about a subject that affected the basic accuracy of a news report. *See, e.g., In re CBS Program "Hunger in America,"* 20 F.C.C.2d 143 (1969). WTVT argued that although the FCC has never definitively defined "news distortion," the policy must be limited to intentional falsification of facts, and does not and cannot cover editorial disputes over what to include or emphasize in a news report.

The FCC has explained that, on a case-by-case basis, it may act against a station's license on proof that (i) senior station or news management has (ii) engaged in deliberate distortion of the news, (iii) about a subject that affected the basic accuracy of a news report. *See, e.g., In re CBS Program "Hunger in America,"* 20 F.C.C.2d 143 (1969). WTVT argued that although the FCC has never definitively defined "news distortion," the policy must be limited to intentional falsification of facts, and does not and cannot cover editorial disputes over what to include or emphasize in a news report.

Newsroom Editing Dispute Leads to Litigation

The reporters began working on the BGH news report shortly after arriving at the station in late 1996. The report was slated to air as a four-part series during the February 1997 sweeps period. WTVT witnesses testified that with less than a week to go before the scheduled air date, the

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The complaint alleged that news management and outside counsel had ordered the reporters to "deliberately misrepresent[] important information" in a never-aired news report.

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story was not yet ready and the station began to receive complaints by interviewees about perceived bias in the reporting. Station management and counsel decided that further work needed to be done on the story. Shortly thereafter, the station received correspondence from a Monsanto-hired lawyer threatening a defamation lawsuit over the report.

News management and counsel's usual desire to see that the story was well supported and defensible was only heightened by the threat of a defamation lawsuit. What followed, in the words of the court of appeal, was "an eight-month tug-of-war between the reporters and WTVT's management and lawyers over the content of the story."

Reporters Disavow Series

In the summer of 1997, a new news director arrived at the station, and he made one final attempt to get the story on the air with everyone's approval. WTVT presented evidence at trial that after a July 1997 "summit" meeting, news management, counsel, and the reporters agreed on a four-part series on the BGH controversy that was a hard-hitting report on possible safety problems with BGH, but that also gave the products' defenders their say. Plaintiff Akre laid down the voice tracks for the series. Plaintiff Wilson drafted a letter to a local columnist praising the news director's "refreshing commitment to good journalism" and announcing that the story was only days from completion.

Before finally completing the story, however, the reporters took a vacation that overlapped with the "window period" during which WTVT was contractually obligated to decide whether to continue with the second year of their employment contracts. The station sent notice of its intent to let the contracts expire in December.

After receiving this notice, and upon returning from vacation, the reporters did not complete the story. Instead, they disavowed it, writing letters to the station manager alleging that, on reflection, editing had caused the story to become "slanted" in favor of BGH; that this constituted unlawful "news distortion" in violation of FCC policy; and that plaintiffs were planning on filing a formal complaint to the FCC saying so. The letters also

announced the reporters' intention to file a lawsuit against the station under Florida's private whistleblower statute.

The reporters did not file an FCC complaint (and still have not done so). In April 1998, they filed their whistleblower suit. The story the reporters repudiated never aired, although WTVT did produce a new multi-part investigative piece on BGH and has continued to cover the controversy.

Pre-Trial Litigation and the Trial

During two-plus years of pretrial proceedings, WTVT twice moved unsuccessfully for summary judgment. The station argued, *inter alia*, that:

- editorial freedom granted by the First Amendment, as articulated in cases such as *Miami Herald Pub'g Co. v. Tornillo*, 418 U.S. 241 (1974), bars a lawsuit based on editorial choices regarding what to include in a news story;
- the FCC news distortion policy was too informal to qualify as a "law, rule, or regulation" under the Florida statute, which imposes liability on employers *only* when they were shown to have violated an underlying statute or rule that has been formally and clearly set forth in a legislative or administrative enactment; and
- even assuming that a lawsuit could be based on the FCC's news distortion policy, the First Amendment would require, at a minimum, that the defendant acted with reckless disregard for the truth, and the evidence showed that WTVT's news management and counsel acted in a good-faith to attempt to produce a news story that was fair, balanced, and accurate.

The summary judgment motions were denied with brief orders asserting that "issues of material fact" remained to be tried. And the court ruled that under the Florida whistleblower statute the plaintiffs were required to prove only that they held "a reasonable, good-faith belief" that WTVT had engaged in deliberate news distortion, even if the plaintiffs' belief was *mistaken* and news management had acted lawfully and in good faith. The court rejected WTVT's argument that this ruling turned

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New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny on their head, permitting plaintiffs to recover based on what *they* thought of the defendant's subjective state of mind regarding the accuracy of its news report.

Mixed Jury Verdict

The case was tried to a jury for more than four weeks in July and August 2000. WTVT presented the testimony of the news professionals who had worked with the plaintiffs on the story. They uniformly testified that their goal was to present a fair, balanced, and accurate story, which was documented sufficiently well to withstand a libel lawsuit. WTVT also presented testimony about the acrimonious editing process and other grounds explaining the station's decision not to continue the reporters' employment.

The jury reached a split decision. It returned a defense verdict on all of Wilson's retaliation claims. And applying the jury instruction that plaintiffs had won – that

Akre need only show a "reasonable, good-faith belief" in news distortion, even if WTVT committed no news distortion – the jury returned a \$425,000 verdict in favor of Akre on one of her whistleblower claims (alleged retaliation for threatening to file a complaint with the FCC) and a verdict against Akre on her other whistleblower claim (alleged retaliation for objecting to the claimed news distortion). The jury did not explain why it distinguished between the two reporters, and Florida law prohibits juror interviews without court approval.

The Appeals

All three parties appealed. Akre sought review of the denial of her second whistleblower claim, but later abandoned the appeal. Wilson argued that a jury instruction improperly stated the causation element of his claims. The appellate court affirmed the judgment for WTVT in an unpublished order.

WTVT principally argued that state law – as necessarily influenced by the news media's First Amendment rights – required reversal of the judgment in favor of Akre.

In particular, WTVT argued that, wary of the First Amendment implications of formally adopting a "news distortion" rule, the FCC never defined the term news distortion and announced that it would review news distortion allegations on a case-by-case basis. Accordingly, the FCC news distortion policy simply was not the kind of the "adopted" "rule or regulation" – a clearly defined prohibition enacted by a legislative or administrative body – that could trigger liability under the Florida whistleblower statute. WTVT also argued that court rulings permitting recovery based on *plaintiffs'* view of *defendants'* state of

mind with respect to the truth of a news report on a matter of public concern violated the First Amendment. Television station owners Belo Corp., Cox Television, Inc. Gannet Co., Inc., Media General Operations Inc. and Post-Newsweek Stations, Inc. filed an *amicus* brief supporting

The court held that the FCC news distortion policy was too undefined to support liability, and that businesses should not be held liable under the whistleblower statute for alleged violations of government policy that is less formal than a rule or regulation.

WTVT's First Amendment arguments.

In defense of her \$425,000 verdict, Akre drastically scaled back her original claims that she had been ordered to deliberately misrepresent information. Instead, she argued that a broadcaster could violate FCC policy if it merely "slants" the news by "omitting details" from the story that would have been "salient" to a viewer. WTVT replied that the FCC had never articulated such a vague and broad standard, which would in any event violate the First Amendment. Akre also argued that her "reasonable, good-faith belief" that news distortion had occurred was sufficient proof to sustain her verdict.

FCC Policy Cannot Support Whistleblower Claim

On February 14, 2003, nearly five years after the lawsuit was filed, the court of appeal issued an opinion reversing Akre's judgment and directing that judgment be en-

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Whistleblower Claim On Editorial Dispute

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tered for WTVT. Consistent with the rule that, if possible, cases should be decided without reaching constitutional questions, the court did not address the First Amendment issues, ruling instead on what it termed a “threshold” issue that disposed of the case in WTVT’s favor.

The court held that the FCC news distortion policy was too undefined to support liability, and that businesses should not be held liable under the whistleblower statute for alleged violations of government policy that is less formal than a rule or regulation. The court explained:

“Recognizing an uncodified agency policy developed through the adjudicative process as the equivalent of a formally adopted rule . . . would expand the scope of conduct that could subject an employer to liability beyond what Florida’s Legislature could have contemplated when it enacted the whistle-blower’s statute.”

For the station, the decision came as a vindication. Although the court reached only a “threshold” question, it did pause to cast doubt on the reporters’ claims of journalistic misconduct, noting:

“Each time the station asked Wilson and Akre to provide supporting documentation for statements in the story or to make changes in the content of the story, the reporters accused the station of attempting to distort the story to favor [its subject].”

And, days after the opinion issued, the court issued two more orders – directing the reporters, under the statute’s fee-shifting provision, to pay WTVT’s attorneys’ fees on appeal.

The reporters did not appeal the merits decisions. They moved for reconsideration of the attorneys’ fees orders. That motion is still pending.

WTVT was represented at trial and on appeal by William E. McDaniels, Thomas G. Hentoff, and John E. Joiner of Williams & Connolly LLP; Patricia Fields Anderson of Patricia Fields Anderson, P.A.; and Gary D. Roberts and Theodore A. Russell of the Fox Group

Legal Department in Los Angeles. Media amici were represented by Robert Corn-Revere and Brad C. Deutsch of Hogan & Hartson, LLP. The plaintiffs were represented on appeal by Stuart C. Markman, Robert W. Ritsch, and Katherine Earle Yanes of Kynes, Markman & Felman,

Notable News

- **Reporters’ Calls Captured Under Wiretap:** Scott Peterson’s conversations with journalists were taped by law enforcement as a result of a wiretap on Peterson’s phone from January 10-February 4. Reporters who learned in May that they were overheard under the court-ordered wiretap, have now filed motions in the Stanislaus County Superior Court in Modesto California requesting to be allowed to listen to the tapes of their own calls. They may follow with motions to protect the contents of those calls under the reporters privilege.

The prosecutor was reported as stating that his office would not oppose the motions by the reporters to hear the tapes.

- **Hachette Sues Conde Nast and its Managing Director in the UK:** The French publisher is suing for libel over alleged claims by Nicholas Coleridge, Managing Director of Conde Nast, UK, that Saddam Hussein profited from a 2% stake held in Lagardere, a division of Hachette. According to press accounts, the equity share was frozen by the UN in 1991 at the time of the Gulf War. Coleridge’s statements appeared in the London Evening Standard in February. The Standard issued an apology that mollified Hachette, but Coleridge did not.

- **Former KGB Agent Sues Amazon.com Over Posted Book Reviews:** Alexander Vassiliev, a former KGB agent and co-author of a book entitled *The Haunted Wood: Soviet Espionage in America - The Stalin Era*, is suing in the UK over a customer book review filed on the U.S. Amazon.com site. The author of the comment was John Lowenthal, a UK resident, who contended that the documents that Vassiliev relied upon, cannot be verified as either authentic or accurate.

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