

MULRC Media Law Resource Center
MEDIA LAW LETTER

Reporting Developments Through May 25, 2005

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"News Boycott" Issues

This month's newsletter contains two reports on "news boycott" cases — *Youngstown Publishing v. McKelvey* and *Baltimore Sun v. Ehrlich*. See pages 5-8. MLRC has observed an increasing number of "news boycott" issues facing our membership – whether it be the efforts of government officials to prohibit employees from speaking to certain reporters or to ban specific media outlets from attending events because of dissatisfaction with their coverage.

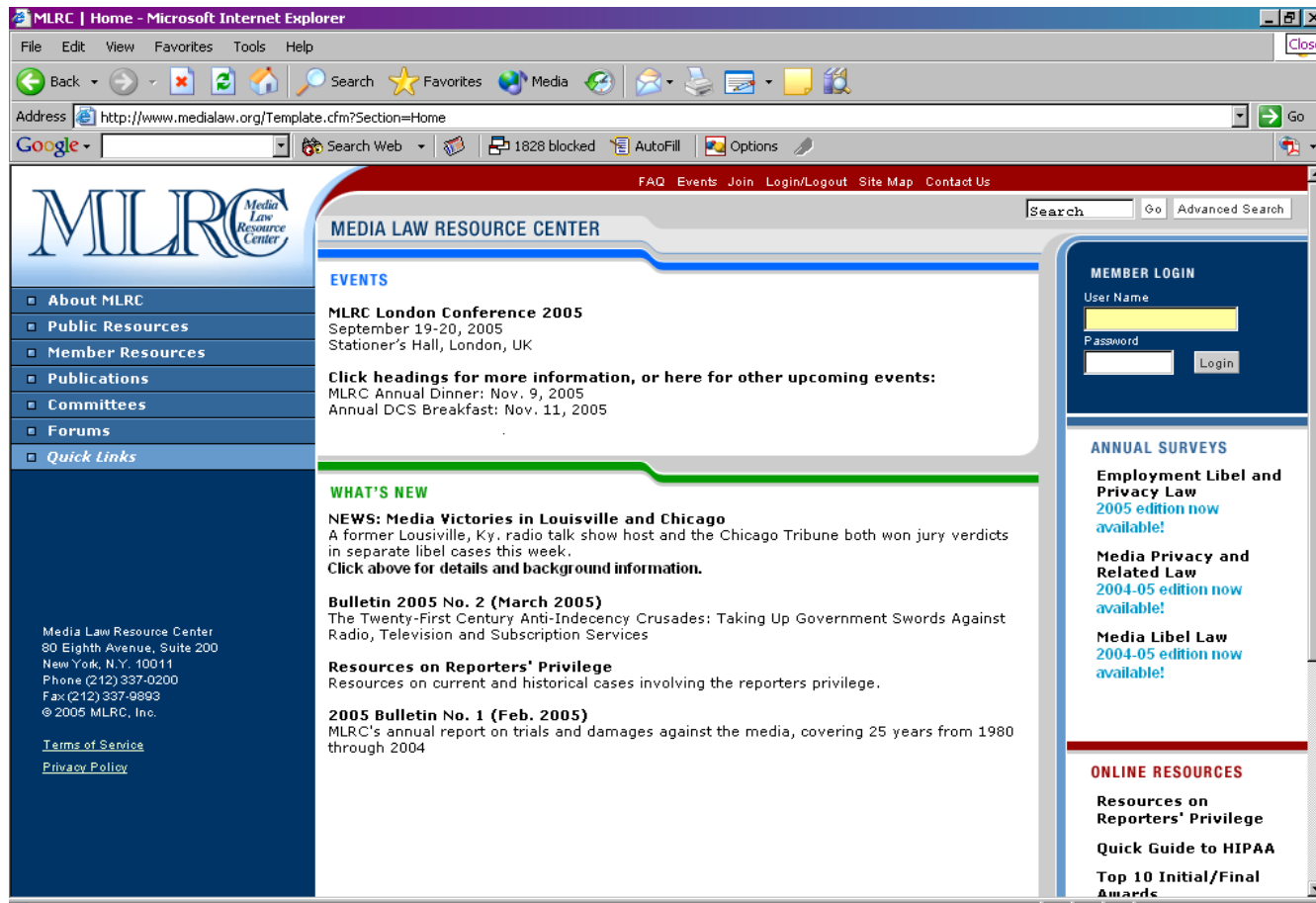
We are interested in speaking with those members who have confronted such situations to find out how they are being addressed.

If you or someone you work with has dealt with such a matter and would be willing to discuss your experience, please contact Jennifer O'Brien, MLRC Legal Fellow, at jobrien@medialaw.org or (212) 337-0200 (ext. 203).

MLRC's New Web Site Is Now Online!

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The new Media Law Resource Center web site offers 24/7 access to the materials and information members have come to rely on.



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- MLRC's valuable resources are now archived and searchable
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Note: Media and Enhanced DCS members have access to the entire site. Basic DCS members may purchase annual subscriptions to online materials – or upgrade to full access.

Contact Debby Seiden, dseiden@medialaw.org, for details.

Ohio Federal Court Dismisses Publisher's Retaliation Claim Against Mayor

By Maureen Haney and Gary Steinbauer

A federal court in Ohio dismissed a newspaper publisher's complaint against the Mayor of Youngstown, Ohio after the Mayor directed city officials not to speak to reporters from the paper. *Youngstown Publishing Co. v. McKelvey*. No. 4:05 CV 00625, 2005 WL 1153996 (N.D. Ohio May 16, 2005) (Economus, J.).

The publisher sought relief pursuant to 42 U.S.C. § 1983 alleging that the Mayor unlawfully retaliated against the publisher for exercising its First Amendment rights by directing various city officials not to speak to reporters from the *The Business Journal*.

Background

The Business Journal is a general bimonthly newspaper published in Youngstown, Ohio, which regularly reports on the business of Youngstown City government and Mayor McKelvey. The dispute between *The Business Journal* and Mayor McKelvey began in February 2003 when *The Business Journal* published articles criticizing Mayor McKelvey and his administration for actions associated with planning and constructing a convocation center. In response, Mayor McKelvey issued an oral directive prohibiting City Officials from speaking with reporters from *The Business Journal*.

The oral directive prompted City officials to deny employees of *The Business Journal* information concerning the convocation center project. As a result, *The Business Journal* then issued a series of public records requests to obtain pertinent information on the project, which the City later denied. After *The Business Journal* initiated a mandamus action, the City complied with the public records request and was initially ordered to pay *The Business Journal's* attorney's fees.

Shortly thereafter, in a letter to the publisher of *The Business Journal*, Mayor McKelvey detailed his policy expressly forbidding City employees from discussing any City business with *Business Journal* reporters and

representatives. The letter confirmed the Mayor's instructions regarding the No-Comment policy, and specified that City employees were not to make statements to *The Business Journal* except as necessary to respond to public records requests. As a result of Mayor McKelvey's issuance of the policy, City employees refused to speak with *Business Journal* reporters.

The Business Journal responded by filing a complaint under § 1983 asserting a claim for unlawful retaliation for exercise of its First Amendment rights. *The Business Journal* simultaneously filed a motion for preliminary injunction seeking to enjoin Mayor McKelvey and the City from enforcing the policy at issue. The City subsequently filed a motion to dismiss, alleging *The Business Journal's* complaint failed to state a claim upon which relief could be granted, and arguing that *The Business Journal* sought the creation of a heretofore unrecognized constitutional right to compel speech on the part of public officials.

The court found that unless the City opened a forum inviting the public or press the information sought by The Business Journal was not otherwise available to the public and therefore not protected under the First Amendment.

District Court Decision

In a consolidated ruling the court denied both the preliminary injunction and granted the City's motion to dismiss *The Business Journal's* complaint. Addressing the preliminary injunction issue the court was unpersuaded by *The Business Journal's* argument that it was engaged in the constitutionally protected activity of publishing news reports questioning the actions of local government officials. Instead, the court noted that there is no constitutional right of access to information that is not otherwise available to the public. The court also stated that granting the press access to information not otherwise available to the public would be tantamount to giving the media a special privilege.

Specifically, the court found that unless the City opened a forum inviting the public or press the information sought by *The Business Journal* was not otherwise available to the public and therefore not protected under

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Ohio Federal Court Dismisses Publisher's Retaliation Claim Against Mayor

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the First Amendment. The court went on to state that *The Business Journal's* history of access to City employees was not a right that could be enforced under the First Amendment.

While the court did recognize that the publication of news reports questioning City government officials is a constitutionally protected activity, it nevertheless held that *The Business Journal's* complaint failed to allege actions that adversely affect this protected activity.

Furthermore, the court interpreted the Mayor's policy as *not* adversely affecting *The Business Journal's* ability to publish reports questioning the acts of City government officials. Finally, despite the numerous allegations in the complaint, the court found that *The Business Journal* had failed to allege sufficient facts demonstrating that the pol-

icy was motivated by Mayor McKelvey and the City's displeasure with *The Business Journal's* reporting.

In denying the preliminary injunction claim the court noted that although the Mayor's policy did not provide a basis for a retaliation claim, it may have been an unconstitutional prior restraint on speech in so far as it forbid City employees – who themselves enjoy First Amendment rights – from speaking on issues of public concern. The court refused, however, to address this issue head on.

Maureen Haney and Gary Steinbauer are with Frost Brown & Todd LLC in Cincinnati, Ohio. Ms. Haney, Jill M. Vollman, and Richard P. McLaughlin represent The Business Journal in this matter. Subodh Chandra and Gregory G. Morgione represented Mayor McKelvey and the city of Youngstown.

Youngstown Publishing Co. v. McKelvey. No. 4:05 CV 00625, 2005 WL 1153996, *4-7 (N.D. Ohio May 16, 2005)

The right of access sought by *The Business Journal* and impeded by the No-Comment Policy is the ability to conduct one-on-one interviews with and receive comments from City employees. Three courts, including a decision arising from this District, faced with similar facts have classified such interviews and comments as “information not otherwise available to the public.” See *Raycom National, Inc. v. Campbell*, 361 F.Supp.2d 679 (N.D.Ohio 2004); *The Baltimore Sun Co. v. Ehrlich*, 356 F.Supp.2d 577 (D. Md.2005); *Snyder v. Ringgold*, 40 F.Supp.2d 714 (D.Md.1999) (*Snyder II*); see also *Snyder v. Ringgold*, No. 97-1358, 1998 WL 13528 (4th Cir. Jan.15, 1998) (*Snyder I*). This set of cases concerns government officials who, in response to unflattering stories published and aired by the news media, instituted policies forbidding government employees from speaking to specific television and print journalists.

* * *

The No-Comment Policy impedes *The Business Journal's* access to information obtained through one-on-one interviews and off-the-record comments. The Court determines that this information is information not otherwise available to the public because the City has opened no forum inviting the public or press to solicit comments from City employees. The mere fact that a City employee may be approached or reached via telephone by any member of the press or public does not indicate that the City has opened a forum to all members of the press for the receipt of interviews and comments. Although Plaintiffs claim that *Business Journal* reporters have, for years, enjoyed access to one-on-one interviews and comments, such access, when it occurred, was privileged. Removal of this privilege does not, as Plaintiffs assert, “place [*The Business Journal*] in an inferior position to that of any other member of the public,” rather, it places *The Business Journal* “on equal footing with members of the public,” who likewise are not guaranteed to receive comments from City employees. The fact that one newspaper or reporter may gain access to an interview or comment by a City employee does not require that all reporters be given access to the same information. A reporter may achieve privileged access to government information, but a reporter does not have a constitutional right to maintain privileged access.

Courts Err in Assessing Reporters' "News Boycott" Claims

By Charles D. Tobin

The courts are perhaps understandably uncomfortable with any notion that they can force a mayor or a governor to speak with a particular journalist. But the biggest flaws with both Judge Peter Economus' recent decision in *Youngstown v. McKelvey* and Judge William Quarles' February decision in *Baltimore Sun v. Ehrlich*, 356 F.Supp.2d 577, 33 Media L. Rep. 1476 (D. Md. Feb. 14, 2005) is that *neither newspaper asked for that relief*. Once the judges misdefined that as the issue to be decided – intentionally or otherwise – they predetermined the outcome of the cases in their courts.

Government Cast Cases as "Access" Issue

Youngstown's mayor and Baltimore's governor were successful at the district court level in recasting the disputes as *government access* litigation. That's not what they are. Instead, the lawsuits seek redress for *government retaliation* based on the content of a citizens' expression. This is the point the newspapers need to drive home in appeals and all future litigants must make crystal clear.

These civil rights lawsuits ask the courts to treat the journalists like ordinary citizens – no better, and certainly no worse. As *The Sun* and its journalists have argued in their Fourth Circuit appeal brief this month, government may not banish journalists on the basis of their speech, any more than it may "ban executive branch contacts with registered Democrats or atheists."

Yet in placing people in time-out based on disapproval of their reporting and commentary, the government has relegated these journalists to a position inferior to everyone else.

Today, Youngstown executive officials will not answer questions from *The Business Journal*, and Maryland's executive branch will ignore calls from two of *The Sun's* journalists.

The rest of the press corps, however, continues to gather the news as usual, and any other citizen stands a

reasonable chance of having local or state government answer their questions. The executive edicts direct that government give these journalists, and only them, the cold shoulder because of what they have written. That is retaliation, pure and simple.

The point did not seem entirely lost on the Ohio court. For example, Judge Economus in *Youngstown v. McKelvey* correctly labeled the case a First Amendment retaliation lawsuit (by contrast, nowhere does Judge Quarles' decision in *Baltimore Sun v. Ehrlich* mention the word "retaliation"). He also correctly identified the appropriate test in these cases, which asks whether:

By using the First Amendment yardstick to measure what the government took away, instead of looking to the constitutional protections for the activity that drew the punishment, courts erroneously have raised the bar in retaliation claims brought by journalists.

- the plaintiff "is engaged in a constitutionally protected activity,"
- the plaintiff, by virtue of "the defendant's adverse action," has "suffer[ed] an injury that would likely chill a person of ordinary firmness from con-

tinuing to engage in that activity[.]"

- "the adverse action was motivated at least in part as a response to the exercise of plaintiff's constitutional rights."

But the Ohio judge, as did Judge Quarles in Maryland, missed the mark by applying the Constitution to the wrong part of the newspapers' case. Both judges looked for a constitutional right to question the executive branch of government – what Judge Economus described as the right to a "give-and-take of information, in the form of one-to-one interviews with and comments from City employees." Finding that the First Amendment does not provide the journalists with a right to a compel a discrete interview, the judges both determined that the First Amendment does not bar the executive officials' edicts.

These "one-to-one interviews," however, are not the "constitutionally protected" activities – the first step in the proper analysis of a retaliation claim – that prompted the mayor's and governor's bans of the journalists.

As *The Business Journal's* and *The Sun's* complaints and injunction papers clearly allege, the retaliation re-

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Courts Err in Assessing Reporters' "News Boycott" Claims

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sulted from their news reports and commentary. In fact, Maryland's governor's email communicating the edict explicitly condemns the banned Baltimore journalists for, in his view, "failing to report objectively" on his administration.

By using the First Amendment yardstick to measure what the government took away (the opportunity to have questions answered), instead of looking to the constitutional protections for the activity that drew the punishment (reporting and commentary the officials did not like), these courts erroneously have raised the bar in retaliation claims brought by journalists.

Once these plaintiffs alleged that the contents of the journalism caused their banishment, and that they are now on unequal footing with all others in their jurisdictions, they stated a *prima facie* case of First Amendment retaliation. These plaintiffs simply have asked to be restored to the same position as every other citizen and journalist.

Charles D. Tobin, with Holland & Knight LLP in Washington, D.C., represents The Sun and journalists David Nitkin and Michael Olesker in the litigation against the Maryland governor, Baltimore Sun Co. v. Ehrlich.

"News Boycott" Issues

MLRC has observed an increasing number of "news boycott" issues facing our membership – whether it be the efforts of government officials to prohibit employees from speaking to certain reporters or to ban specific media outlets from attending events because of dissatisfaction with their coverage.

We are interested in speaking with those members who have confronted such situations to find out how they are being addressed.

If you or someone you work with has dealt with such a matter and would be willing to discuss your experience, please contact Jennifer O'Brien, MLRC Legal Fellow, at jobrien@medialaw.org or (212) 337-0200 (ext. 203).

Chicago Tribune Wins Libel Trial

After an 11-day trial, an Illinois jury rendered a verdict in favor of the *Chicago Tribune* in a libel case brought by a former prosecutor. *Knight v. Chicago Tribune Co.*, No. 2000-L-004988 (Ill. Cir. Ct. jury verdict May 20, 2005).

The case stemmed from the newspaper's coverage of a 1999 criminal trial in which the plaintiff and other government officials were accused of framing a criminal defendant for murder.

The jury found that the complained of section in the article was false, but not defamatory or published with actual malice.

Background

Plaintiff Thomas Knight was the lead prosecutor in the 1983 murder trial of Rolando Cruz, Stephen Buckley and Alex Hernandez, who were accused of the murder of a 10-year-old girl in Naperville, Ill. Cruz and Hernandez were convicted in the trial and in a subsequent retrial, and spent more than 11 years on death row before they were acquitted in a third trial in 1995. The jury was unable to reach a verdict as to Buckley; charges against him were later dismissed and he was released from custody.

Knight and six other law enforcement officials, known as the "DuPage Seven," were later accused of fabricating evidence and withholding evidence in the Cruz case. Knight and the other defendants in this trial were all acquitted.

In January 1999, as part of its coverage of the case against Knight and the other officials, the *Tribune* published a five-part series titled, "Trial and Error: How Prosecutors Sacrifice Justice to Win."

One of the articles, a 5,000-word story published on Jan. 12, 1999 written by Maurice Possey and Ken Armstrong, stated that shoe imprint expert John Gorajczyk had told the grand jury that Knight had "told him to keep his mouth shut" about his conclusion that a boot print found on the girl's front door did not match Hernandez's boots. (The article is available at www.chicagotribune.com/news/specials/chi-020103trial3,1,6651284.story; the disputed quote appears on page 4).

The statement in the article was incorrect, since

Gorajczyk had not testified before the grand jury. But the story regarding Knight's alleged comment had been related to the grand jury by private investigator Steven Kirby, who testified before the grand jury that Gorajczyk had told him (Kirby) that Knight had told Gorajczyk, "don't discuss this with anyone."

Trial Testimony

Testimony during the 11-day trial showed that the original drafts of the article reported that Gorajczyk had recalled the statement subsequent to his grand jury testimony. But as the article was being edited, an editor found the reference vague and asked whether the recollection could be attributed to testimony before the grand jury. The article was changed to state that Gorajczyk has testified to the grand jury about Knight's alleged statement, and Possey forgot to correct the change.

Knight alleged that the editing change, and the failure to correct it, showed actual malice; he also contested the paraphrase of his statement to Gorajczyk.

In his closing argument, Knight argued that the phrase in the article "keep his mouth shut" was a false and damaging mischaracterization of his statement to the investigator "not to discuss the matter with anyone."

The *Tribune* argued that the mistakes were minor, and inadvertent. In addition, the *Tribune* argued that any damage to plaintiff's reputation was caused by the numerous media reports of his indictment for framing a criminal defendant – and not the minor inaccuracy in a few sentences in the article.

At the close of evidence, Judge Robert Gordon issued a directed verdict in favor of reporter Ken Armstrong (who is now with the *Seattle Times*), since testimony showed that he had had nothing to do with the contested passage in the article.

The *Tribune's* lead counsel at trial was Charles Babcock of Jackson Walker LLP for Possey and Nancy Hamilton of Jackson Walker for Armstrong, assisted by Cedric Scott and Gary Washington of Jackson Walker. Knight, now a lawyer in private practice, represented himself.

A full report on the trial will appear in the June issue of the MediaLawLetter.

Kentucky Jury Finds Radio Host Not Liable

At press time, a Kentucky jury rendered a defense verdict on libel, invasion of privacy and emotional distress claims brought against a radio show host and Clear Channel Broadcasting. *Divita v. Zielger* No. 03CIO9214 (Jefferson Co. Cir. Ct., jury verdict May 24, 2005). At issue were on-air statements by former WHAS radio show host John Ziegler about a Kentucky TV show host who he had briefly dated. Among other things, Ziegler called plaintiff “pathological,” “the devil” and made comments about her “fake breasts” and physical appearance. After the comments, Ziegler was fired from WHAS in Louisville (a Clear Channel Broadcasting station) but was later rehired at a Clear Channel station in Los Angeles. Plaintiff was deemed a public figure and the case was tried under the actual malice standard.

Next month’s *MediaLawLetter* will contain a full report on the trial and verdict by Richard Goehler, Frost Brown Todd LLC, who represented Clear Channel.

Directed Verdict for S. Carolina Broadcaster Reversed on Appeal

The Court of Appeals of South Carolina this month reversed a directed verdict that had been entered in favor of a broadcaster in a defamation case over off-air statements made by a former station news director. *Murphy v. Jefferson Pilot Comm.*, No. 3988, 2005 WL 1115211 (S.C. App. May 2, 2005) (Stilwell, Golsby, Huff, JJ.). See also *MLRC MediaLawLetter* June 2003 at 12.

The appeals court held that the jury, which rendered a \$9 million damage judgment against the (indigent) former news director, should have been allowed to decide whether the broadcaster was vicariously liable for the statements – which involved a series of strange fabrications about plaintiff, a South Carolina lawyer.

Background

At issue in the case were statements made in 1999 by Donald Feldman when he was the news director of WCSC, a Charleston television station, owned by Jefferson Pilot Communications. Feldman claimed that he was on a flight with plaintiff and that she was drunk and made slanderous remarks about WCSC and another lawyer, Sandra Senn, a regular panelist on a WCSC public affairs show.

Feldman vowed to “scare the crap out of plaintiff” for slandering the station and Senn; wrote a letter on station letterhead threatening legal action against her; claimed he had obtained the flight manifest and service log (showing what plaintiff drank on the flight); and claimed plaintiff had agreed to sign an agreement to stop defaming Senn.

In early 2000, Feldman’s story began to unravel when a copy of the letter was actually delivered for the first time to

plaintiff. It then became clear that Feldman was never on a flight with plaintiff. Feldman apparently concocted the fabrications because he was infatuated with Senn. That year Feldman was arrested for embezzling \$2.4 million from WCSC over more than ten years with the station. Thus at the time of the defamation trial in 2003, Feldman was in federal prison.

The trial court described the facts as “bizarre” and “unique” and noted that “in the written history of the law there has never been another case like it.” The court granted the station’s motion for a directed verdict, finding that “to extend vicarious liability to the facts of this case would be beyond reason.”

Court of Appeals Decision

Reversing, the Court of Appeals held that the trial court erred as a matter of law. Although the court agreed that the facts of the case were bizarre, it found that there was conflicting evidence as to whether Feldman was acting within the scope of his employment or simply pursuing a personal matter. Since this involved issues of credibility regarding Feldman, station employees and witness, the court concluded these issues should have been decided by the jury.

The broadcaster has filed a motion for reconsideration.

The media defendants were represented by John J. Kerr, Buist Moore Smythe McGee, P.A., in Charleston, S.C. Plaintiff was represented by John E. Parker and Ronnie L. Crosby, both of Hampton, S.C.

Texas Appeals Court Dismisses Lawyer's Libel Suit on Interlocutory Appeal

By Thomas Leatherbury

The Texas interlocutory appeal statute again proved to be a valuable weapon for libel defendants when the Dallas Court of Appeals reversed the denial of the motions for summary judgment and rendered judgment for the Associated Press, *The Dallas Morning News*, and Belo Corporation in the defamation lawsuit filed by Dallas attorney Samuel Boyd. *Associated Press v. Boyd*, No. 05-04-01172-CV, 2005 WL 1140369 (Tex.App.-Dallas May 16, 2005) (Morris, Francis and Lang-miers, JJ.).

Background

The lawsuit arose out of an Associated Press report about the opening statements in the federal action the Securities and Exchange Commission filed against Boyd. The SEC had charged Boyd and others, including one of Boyd's former clients, with multiple counts of civil securities fraud over several alleged investment schemes. *The Dallas Morning News* published an eight sentence condensed version of the AP report.

Just a few days before the statute of limitations ran, Boyd sued these defendants and the Valley Morning Star in Cameron County, Texas, down in the Rio Grande Valley. After some preliminary procedural motions and some written discovery, Boyd non-suited the *Valley Morning Star*, and the case against the AP, the *Morning News*, and Belo was transferred to Dallas.

Boyd argued that the AP report and *The Dallas Morning News* story were false and defamatory because they implied that Boyd had been charged with criminal securities fraud rather than civil securities fraud. The alleged implication arose from the omission of the word "civil" in the description of the SEC charges and the inclusion of the true fact that Boyd's former client was in jail at the time of Boyd's trial.

The defendants moved for summary judgment on multiple grounds, including truth, public figure, no actual malice, and the judicial report privilege. The trial court denied the motions for summary judgment.

Court of Appeals Decision

In a succinct opinion, the Dallas Court of Appeals held that the AP report and *The Dallas Morning News* article were substantially true. The Court acknowledged that the defendants were free to republish the allegations made by the SEC and wrote:

"The 'gist' or 'sting' of the articles in question was that in its lawsuit against Boyd, the SEC alleged in opening statement that Boyd knowingly participated in a complex security fraud scheme masterminded by (his client) and that Boyd had denied any wrongdoing. . . . (It is undisputed that Boyd had been accused of the unlawful conduct of participating in securities fraud. The forum in which those accusations were made, be it criminal or civil, did not materially affect the sting caused by the accurately reported allegations of Boyd's participation in a fraudulent scheme."

In a succinct opinion, the Dallas Court of Appeals held that the AP report and The Dallas Morning News article were substantially true.

The Court, in an opinion that is designated to be published, then summarized some of the SEC's charges and wrote, "The implication that Boyd may have committed a crime came from the very nature of the acts alleged rather than the omission of the words 'civil trial' from the articles."

Finding no false and defamatory meaning as a matter of law, the Court declined to discuss the other issues raised in the appeal, including the applicability of the wire service defense to the republication by the Morning News.

Thomas Leatherbury and Michael Raiff of Vinson & Elkins LLP in Dallas represented The Dallas Morning News and Belo Corp. Peter Kennedy and David Donaldson of Graves, Daugherty, Hearon, & Moody in Austin represented the Associated Press. J. Ken Nunley represented plaintiff.

Pa. Libel Case Dismissed for Lack of Prosecution

A Pennsylvania appeals court affirmed dismissal of a libel claim, finding that six years of inactivity was sufficient grounds to dismiss. *Zotter v. North Hills News Record, et al.*, slip op., No. 1338 WDA 20004 (Pa. Super. May 10, 2005). See also *MLRC MediaLawLetter* July 2004 at 31.

While granting a motion to dismiss for such inactivity would be simple in other jurisdictions, the procedure ordinarily is not so kind to Pennsylvania defendants. Plaintiff, a former local police chief, sued over a North Hills News Record story headlined “Zotter to plead guilty, avoid jail.” Plaintiff argued that he had instead entered an “accelerated rehabilitative disposition program” that did not require an actual guilty plea. The case then remained inactive for six years.

Although Pennsylvania’s common law is generally hostile to lack of prosecution motions, the trial court and appeals court found that plaintiff’s relocation, concern with adverse publicity and “political atmosphere” did not constitute acceptable grounds for delay.

Chuck Tobin, Holland & Knight, D.C., along with Perry A. Napolitano and Steven E. Klein, of Reed Smith LLP in Pittsburgh, represented the newspaper in this action.

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Fear and Loathing in Orlando

By Katherine A. Rabb and Elizabeth A. McNamara

A Florida district court this month dismissed an invasion of privacy complaint against *Rolling Stone* magazine over an article recounting a reporter's "undercover" experiences in a 2004 Bush campaign office in Orlando, Florida. *Mills v. Wenner Media, LLC*, No. 605CV132ORL28KRS, 2005 WL 1126662 (M.D. Fla., May 5, 2005) (Antoon, J.).

The article, entitled *Bush Like Me: Ten Weeks Undercover in the Grass Roots of the Republican Party*, quoted a sheriff's deputy who had stopped by the office and, having no idea he was speaking to a journalist, shared his ideas about national security – including the advantages of using a "clone army."

The deputy later brought an invasion of privacy action in Florida state court. After removal, the Middle District of Florida granted *Rolling Stone's* motion to dismiss on May 5, 2005, finding that the deputy's ideas on national security were not "private" and that the article addressed issues of public concern.

Background

The plaintiff, Ben Mills, is a sheriff's deputy in Tampa, Florida who volunteered at the Bush campaign office in Orlando, Florida during the 2004 presidential race. The author of the article, Matt Taibbi, is a freelance journalist.

Pursuing his quest to be "the great pain in the ass of American history," Taibbi set out to volunteer in the Bush campaign in the President's Orlando, Florida campaign office.

"As a professional misanthrope," Taibbi wrote to explain the purpose of his undercover reporting, "I believe that if you are going to hate a person, you ought to do it properly. You ought to go live in his shoes for a while...."

He described himself as far worse than the Republicans' fear of a Kerry mole; he was "a dissolute, drug-abusing anarchist who reads the battle diaries of Vietnamese generals on rainy days, roots for Russia at the Olympics and once published an article titled 'God Can Suck My Dick'."

Taibbi chose Orlando because of its location on the I-4 corridor, home to the bulk of undecided voters in Florida, a crucial battleground state in the election.

Though opposed to Bush's reelection, Taibbi worked for the President's campaign so earnestly that he gained the trust of volunteers and organizers in the Orlando office. Within a few weeks he was given keys to the office and offered a full-time job working for the Bush campaign.

Taibbi remained a volunteer and the other volunteers came to see Taibbi as an ally and kindred spirit, sharing their views on race, religion, homosexuality and national security. The resulting article was an exploration of the quirky ideas and beliefs of certain Bush supporters.

Among the views published were those of plaintiff. Taibbi identified Mills by name, including him among the group of "very lonely people" who would visit the Bush campaign office as it was the "one place where they could share certain deeply held ideas without being ridiculed."

The following exchange between Mills and Taibbi, recounted in *Bush Like Me*, became the subject of plaintiff's invasion of privacy claim.

Part of my job, I soon came to understand, was to be supportive when people like portly Tampa sheriff's deputy Ben Mills came in to share their very serious utopian ideas – like the benefits of having a society guarded by a clone army.

"We'd save a hell of a lot of benefits and medical expenses," he said. "Cause you now if they got wounded..." "You could just shoot them," I said. "Exactly – pow! Just shoot 'em dead, right in the ground." He went on. "We'd just have a big breeding farm in Colorado," he said. "Course, it'd be a security problem if they got out, you know, if you had rouge clones running around. You'd have to have a special security force to maintain 'em."

After publication, according to his complaint, his co-workers created a mock-up of *Rolling Stone's* cover which featured Mills' face surrounded by various cap-

(Continued on page 14)

Fear and Loathing in Orlando

(Continued from page 13)

tions, including: “Cloning: Does it Really Work?,” “We Take You Inside the Mind of a Madman,” and “America’s Top 10 Portly Sheriff’s Deputies.”

Without denying the accuracy of his depiction in *Bush Like Me*, plaintiff brought an invasion of privacy claim to recover for the “great mental pain” he suffered due to the “contempt, ridicule,” “injury of personality and self-respect” and “disturbance of peace of mind” resulting from the article’s publication.

Plaintiff filed his suit in the Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida, and defendants, defeating plaintiff’s motion to remand, successfully removed to the US District Court in the Middle District of Florida.

District Court Opinion

The Honorable John Antoon II granted defendants’ motion to dismiss plaintiff’s invasion of privacy action for failure to state a claim. Although Mills did not expressly identify the type of privacy claim he asserted, the Court concluded that he intended to plead public disclosure of private facts. The Court held that the plaintiff’s claim failed because the facts in the article were not private and addressed issues of public concern.

The Court found that plaintiff’s physical description and his ideas, openly shared with Taibbi in the public campaign office, were not private. Of greater import, the Court held that Taibbi’s on-the-ground analysis of the Bush campaign, written from the perspective of its volunteers, addressed significant issues of public concern.

The Court found that

“[t]hrough first-hand experience, Taibbi sought to better understand, and to help his readers understand, the nature of support for president Bush. To this end, Taibbi recounted various conversations with Mills and other campaign volunteers in order to illustrate what he perceived to be some of the more peculiar aspects of Bush’s supporters. Regardless of how one assesses the quality of Taibbi’s insights or the manner in which he conveyed them, they clearly dealt with an issue of public interest.”

In addition to its findings on the merits, the Court held that it was appropriate to dismiss the case at an early stage so as to limit any potential chilling effect that litigation might have on speech.

According to the Court, the cost of waiting for a later stage in litigation to decide this case “might well have been a high one for publishers, writers, and, indeed, for the right to speech itself. In constitutional parlance, the specific risk would have been to chill the speech, not merely of Defendant, but of all writers and publishers who happen to offend the subjects of their publications.”

Elizabeth A. McNamara and Katherine A. Rabb with Davis Wright Tremaine LLP in New York represented Rolling Stone together with Judith M. Mercier, Holland & Knight Orlando, FL. Ben Mills was represented by Damon A. Chase, Chase Law Offices, PA Altamonte Springs, FL.

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Libel Case Over Report of Meeting Ends in Directed Verdict

Plaintiff Councilman Claimed Article Mischaracterized Statements

A libel case that had been pending against the *Marion Star and Mullins Enterprise* newspaper of Marion, South Carolina for seven years ended May 3rd when a South Carolina Circuit Court judge issued a directed verdict at the close of the plaintiff's case. *Davis v. Marion Star*, No. 1998-CP-3300372 (S.C. Cir. Ct., Marion County directed verdict May 3, 2005).

The case stemmed from the newspaper's coverage of a meeting of the Marion City Council on June 9, 1998. At that meeting, plaintiff Bobby Davis – who was then and still is a member of the Council – criticized mayor Bobby Gerald, who still holds that position, for alleged impropriety in overseeing the city's purchase of automobiles at the same time that he owned a car dealership.

Davis also made a statement at the meeting that supporters of the mayor had made unfair comments about the mayor's critics, spreading rumors and misconceptions.

In an article published on June 17, 1998, the newspaper reported that:

[Davis] spoke of rumors and untrue statements concerning the previous council meeting. He said that the rumors were intended deceptions by white council members meant to protect the mayor.

Davis challenged the characterization of his comments and demanded a retraction, saying that he had said that the rumors had been spread by the white community in

general, and had not referred to the white council members in particular.

After several years of delay, the case went to a jury trial before Circuit Judge J. Michael Baxley on May 2. The 12-member jury was equally split along racial and gender lines.

Plaintiff's Theme at Trial

The theme of the plaintiff's day-and-a-half presentation was that publisher Tom Brown, who covered the Council meeting, had not listened closely to the proceedings and did not accurately quote Davis' statements. The plaintiff called Brown as a witness during his case to make this point, but Brown testified that what he had written was what he had understood Davis to mean, based on his language, his demeanor, and the history of the controversy.

At the close of plaintiff's case, the defense moved for a directed verdict on the grounds that the plaintiff had not shown actual malice. The court granted the motion.

The former corporate owner of the *Marion Star and Mullins Enterprise* (Pee Dee Newspapers LLC) and former publisher Tom Brown were represented by David E. Hudson and Timothy E. Moses of Hull, Towill, Norman, Barrett and Salley, P.C., in Augusta, Ga. The plaintiff was represented by Jamila Beatrice Minnicks of Reddix-Small & Carter in Columbia, S.C.

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No Preaction Discovery by Publisher Against Former Employee

In an unusual action, a New York trial court rejected a publisher's request for pre-action discovery to determine whether a former employee's unpublished novel violated a confidentiality agreement with the publisher. *Matter of American Media Inc. v. Green*, May 6, 2005 (N.Y. Sup. Ct. May 6, 2005) (Madden J.).

Background

Plaintiff American Media (AMI) publishes several national magazines, including the *Star*, a weekly publication based in New York City which reports on celebrity news and gossip. Defendant Stephanie Green worked at *Star* for about six months as a fact checker / researcher. As part of her employment, Green signed a confidentiality agreement in which she agreed, among other things, to "hold in confidence all Confidential Information ... regarding the Company" during and after her employment with AMI." The agreement provided that Green not "discuss with the media any aspect of [her] employment with [AMI]." And it also contained a non-disparagement clause.

New York Post Article

On September 10, 2004, *The New York Post* reported that Green had written a "tell-all" book called "Dischalcious" about her experiences at the magazine and that the book was being shopped to New York publishers. According to the *Post* article the characters in the book were based on real employees at *Star* and AMI. The article quoted Green as saying, "Yes, it was inspired by my life, but I haven't talked about what went on at the *Star*. The book is obviously a work of fiction."

Following publication of the *New York Post* article, AMI brought an action for preaction discovery, seeking a copy of the manuscript, in order to plead specific statements to support a complaint for breach of the confidentiality agreement and breach of fiduciary duty. AMI also sought discovery of Green's communications with prospective publishers "to give the publishers notice of Green's contractual obligations so that they won't tortiously interfere with such obligations."

No Cause of Action Over Novel

Under New York law a court has discretion to grant preaction disclosure to aid in bringing an action where the party bringing such a petition has a meritorious cause of action and the information being sought is material and necessary. Preaction discovery is appropriate to frame a complaint, but not to discover whether a cause of action exists.

The court concluded that AMI did not meet its burden of demonstrating that it had a cause of action for breach of contract or breach of fiduciary duty.

"[The] Confidentiality Agreement cannot be enforced to prevent Green from using her observations regarding employees and supervisors at the Star, to write a fictional account since such information does not qualify as a trade secret, and is not otherwise entitled to confidentiality."

Furthermore, the court found no proof on the application that statements in the novel disparaged the services provided by *Star* or resulted in economic harm to AMI. And the court finally noted that preaction disclosure was not a proper device to identify publishers to notify them of potential liability in the event they publish Green's manuscript.

Plaintiff has filed a notice of appeal.

David Wolf and Ellis Levine of Cowan, DeBaets, Abrahams & Sheppard LLP in New York represented Stephanie Green. Kenneth Taber, Pillsbury Winthrop, represented AMI.

New York's CPLR 3102(c) provides for preaction disclosure "to aid in bringing an action (or) to preserve information." ... Specifically, CPLR 3102(c) has been held to authorize discovery "to allow plaintiff to frame a complaint and to obtain the identity of prospective defendants." Stewart v. New York Transit Authority, 112 AD2d 939 (2d Dept 1985).

Pennsylvania Court Affirms Summary Judgment for Lack of Actual Malice

A Pennsylvania appellate court affirmed summary judgment in favor of a newspaper and letter writer in a police officer's libel claim over a "letter to the editor." *Weaver v. Lancaster Newspapers, Inc.*, No. 337 MDA 2004, 2005 WL 1006429 (Pa. Super. Ct. May 2, 2005) (Stevens, McCaffery, Tamilia, JJ.).

Background

The libel plaintiff, Robin Weaver, is a police officer in Lancaster, Pennsylvania. In 1991, he was involved in a murder investigation that ultimately led to the conviction of Lisa Michelle Lambert.

In post-conviction *habeas corpus* proceedings, Lambert, among other things, accused Weaver and other police officers of raping her. The district court vacated Lambert's conviction citing problems with the "credibility, character, and reputation" of the entire police department. And the court specifically accused Weaver of "fabricating and destroying evidence and likely perjuring himself." The Third Circuit, however, later reversed and reinstated the conviction.

During the "extensive media coverage and public commentary" that followed the district court's opinion, defendant Lancaster Newspapers published a "letter to the editor" by Oscar Lee Brownstein in the *Intelligencer Journal*.

The letter read in part:

Now, here is an unanswered question: How did Weaver – who knew Lambert . . . and who presumably led two other policemen into Lambert's apartment – know that Lambert would be home alone, that the door to the apartment had been broken by Yunkin in a fit of anger, and that Yunkin would not return while they were allegedly in the apartment raping Lambert at gunpoint? Of course, maybe Lambert just made up the whole story, knowing that five years later Weaver would be arraigned for the sexual abuse of women and children. Sure.

Weaver sued the newspaper and Brownstein for libel arguing that he had never raped or was charged with raping Lambert, and that he was never charged with sexual abuse. The trial court granted summary judgment to all defendants.

Summary Judgment Affirmed

The appellate court affirmed, applying a stringent actual malice standard. Since the rape allegation was made during a federal court hearing, defendants' "act of authoring/publishing a statement indicating that [plaintiff] allegedly raped Ms. Lambert was not done with knowledge that such an allegation was not made or with reckless disregard."

Turning to the second statement – that Weaver had been arraigned on charges of sexual abuse – the court accepted that the statement was false. But the issue was whether plaintiff had set forth a *prima facie* case of actual malice.

The trial court concluded that the letter writer, Brownstein, had not acted with actual malice, but rather made a "good faith" mistake in confusing plaintiff with another officer in the same department who had been accused of sex abuse.

The appellate court agreed. Even though Brownstein was "hell bent" on proving Lambert's innocence and discrediting plaintiff, his motive, or ill will, alone would not support a finding of actual malice. Interestingly, Brownstein allowed another website to reprint his letter just months after the libel suit was filed against him. Plaintiff argued that granting permission was evidence of actual malice. The appellate court disagreed, reasoning that here the question of actual malice depended on Brownstein's mental state at the time he published the letter in the newspaper, and not upon its subsequent republication on the Internet – at least where no claim was brought against that republication.

Turning to the newspaper defendants, the court found "no evidence from which a finder of fact could reasonably conclude that they doubted the veracity of the letter." Moreover, their failure to investigate the claims did not amount to actual malice.

In a separate concurrence, Judge McCaffery agreed in the result, but took issue with the strict "actual malice" standard the court was required to apply, arguing such a "rigorous, if not impossible" standard had allowed "an egregious and damaging misstatement of fact" to go unpunished.

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Maryland Court: No Actual Malice Means No False Light

By Leo G. Rydzewski and Charles D. Tobin

A Maryland state court has rendered summary judgment in a false light claim filed against Fox's Washington, DC area television station, WTTG, by a sole proprietor who sued based on the depiction of his towing business. *Terrence D. Ross, Sr. v. Fox Television Stations, Inc.*, Case No. CAL04-09318 (P.G. Co. Cir. Ct., May 6, 2005).

The Circuit Court of Prince George's County held that the deposition testimony of a WTTG writer, who gave written instructions to pull file footage from an earlier story, did not support an inference of actual malice as state law requires in false light cases.

Background

On February 21, 2002, WTTG aired a brief voice over for the morning newscast that was based on a single Associated Press wire story about two matters of legitimate public concern: (1) the D.C. mayor's announcement of new towing regulations designed to ameliorate owners' inability to locate towed vehicles until exorbitant charges had mounted; and (2) the FBI's simultaneous announcement that a number of towing company employees had been arrested in a stolen-car and parts ring.

A WTTG morning news writer had prepared the broadcast script based on the AP story. She had recalled working on a broadcast a month earlier about a class-action lawsuit involving several towing operators. The earlier story included an interview with the lead class action plaintiff, who had accused R&R Towing of purposely failing to inform him that his car had been towed until the impound costs had reached \$1,700, which was the vehicle's approximate value.

In the February script about the FBI arrests and the new towing regulations, the writer wrote an instruction to the production staff to pull the prior story and use "file of towing companies, impound lots." The script of the newscast never mentioned R&R Towing or its owner and Terrence D. Ross, Sr.

The footage selected by a tape editor, however, showed brief images of the R&R logo on the side of the

tow truck and a shot that panned R&R's storage lot. Some of these images appeared on the screen as an anchor read portions of the script concerning the FBI arrests, which did not involve plaintiff's business.

The writer testified in deposition that she had intended the file footage as "wallpaper" – the generic illustration of an activity to accompany a script related to some aspect of that activity. She testified that she was unaware of the names "R&R Towing" or Terrence Ross at the time she called for the use of the file footage. The morning news producer also testified in affidavit that she was unaware in February that the earlier footage contained images related to that towing company.

No Actual Malice

At the summary judgment hearing, the judge ruled that the station did not act with actual malice, *i.e.*, knowledge of falsity or entertainment of doubt, in preparing the newscast. Maryland's case law and jury instructions, as plaintiff conceded, prescribe actual malice as the standard of liability for a false light claim.

At the hearing, the judge noted that in her deposition, the writer testified that while she remembered working on the previous story involving R&R Towing, she had not specifically recalled what was on that video.

The judge noted that the writer's only contemporaneous memory was that the earlier story involved towing companies. He rejected plaintiff's efforts to portray portions of the writer's testimony as some evidence of actual malice, specifically finding that the deposition does not contain "clear and convincing evidence," the quantum of proof necessary to survive summary judgment in actual malice cases. He dismissed the lawsuit on actual malice grounds alone.

Plaintiff has filed a notice of appeal in the case.

Leo G. Rydzewski, Charles D. Tobin and Judith F. Bonilla with Holland & Knight LLP in Washington, D. C., represent Fox's television station WTTG. Plaintiff was represented by Timothy F. Maloney, Claire E. Buchner and David S. Coaxum of Joesph, Greenwald & Laake, P.A., Greenbelt, MD.

Tenth Circuit Affirms Libel Verdict Against Trade Magazine

The Tenth Circuit affirmed a damage award for libel and related claims against the owner and publisher of a martial arts trade magazine over statements made in a review of plaintiff's products. *Century Martial Art Supply, Inc. v. National Association of Professional Martial Artists*, No. 03-6238, 2005 WL 896433 (10th Cir. Apr. 19, 2005) (unpublished) (Seymour, Anderson, Briscoe, JJ.).

The jury found the statements were made with actual malice. On appeal the Tenth Circuit affirmed without reviewing the finding on actual malice. Instead, the court found that defendant's vague objections to the verdict were not properly preserved for appeal.

Background

Plaintiff Century Martial Art Supply ("Century") sells martial arts supplies, including student uniforms. Defendant National Association of Professional Martial Artists ("NAPMA") is a trade association that publishes educational resources for martial arts schools, including *Martial Arts Professional Magazine*, described as "a sort of *Consumer Reports* for the martial arts industry." The second defendant, International IKON (IKON), also sold martial arts supplies. Both defendants were wholly owned by the same individual, John Graden.

In 2001, IKON began selling its own line of martial arts supplies, and in a monthly mailing NAPMA published a chart comparing IKON and Century's uniforms, reporting that IKON's uniforms were of higher quality fabric, weighed more, and cost less.

Century complained to NAPMA that the information about the quality of its uniforms was false, but Graden informed plaintiff that "he would print whatever he wanted; it was his magazine." NAPMA republished the comparison chart in an e-mail sent to its website subscribers as well as in *Martial Arts Professional Magazine*, and subsequently claimed that plaintiff was "threatening" and "attacking" it by challenging the information in the publications.

Century sued defendants for defamation, tortious interference with existing and/or prospective business relationships; deceptive trade practices; and unfair competition. Century presented evidence that its sales suffered as

a result of defendants' actions, including testimony from one of its major customers that after reading NAPMA's review, he had ceased buying Century's uniforms.

The jury found for plaintiff on all claims, including finding by clear and convincing evidence that defendant published its statements with reckless disregard. (The jury awarded compensatory and punitive damages, but the amounts are not disclosed in the decision).

Appeals Court Decision

Although the case was apparently tried under the actual malice standard, the Court did not undertake a review of that issue. Instead, it found that defendant's vague arguments that the jury improperly "considered privileged or constitutionally protected statements" could not be raised for the first time on appeal.

Defendant had moved for a judgment as a matter of law at trial on the grounds that the "statements were not defamatory, were at the most product disparagement, and were constitutionally protected or otherwise privileged."

The Court found that defendants had failed to adequately plead the grounds underlying their motion in that "incanting a generic argument that there was insufficient evidence to support any of [plaintiff's] claims ... failed to provide guidance to the district court or the opposing counsel regarding how Century's evidence fell short as a matter of law." The court thus held that "defendants' motion and other arguments or objections upon which they now rely were not sufficiently specific to preserve their arguments."

The court went on to reject defendants' argument that Century failed to prove the special damages, finding that the testimony of a major customer lost after publication of the article – in addition to additional evidence of revenue losses – was sufficient to support the award.

Plaintiff was represented by Mark K. Stonecipher, Kevin R. Donelson, Jay P. Walters of Fellers, Snider, Blankenship, Bailey & Tippens, Oklahoma City. Defendant was represented by Clyde A. Muchmore and Mary H. Tolbert, Oklahoma City.

Kansas Federal Court Upholds Constitutionality of Kansas Criminal Libel Statute

The federal district court in Kansas issued a ruling upholding the constitutionality of a local criminal libel ordinance that contains the identical language as the state's criminal libel statute. *How v. Baxter Springs*, No. 04-2256, 2005 WL 1119789 (D. Kan. May 10, 2005), *Thomas v. Baxter Springs*, No. 04-2257, 2005 WL 1119788 (D. Kan. May 10, 2005).

The rulings came in companion civil actions brought by a newspaper columnist and a former city council candidate who had both been threatened with prosecution under the ordinance for criticizing the Baxter Springs City Clerk.

Plaintiffs were seeking a declaratory judgment that the ordinance was unconstitutional and damages for deprivation of their civil rights under 42 U.S.C. § 1983.

Granting defendants' motion to dismiss, in part, District Court Judge John W. Lungstrum swept aside the constitutional challenge, holding that the actual malice requirement of the law was sufficient to overcome arguments that the statute was vague and overbroad.

Background

On March 13, 2003, criminal libel charges were filed against Larry Hiatt, publisher of the weekly *Baxter Springs News* in Baxter Springs, Kansas; newspaper columnist Ron Thomas, and city council candidate Charles How, Jr. *City of Baxter Springs v. Hiatt*, No. 03-CR000909 (Kan. Municipal Ct., Baxter Springs filed March 13, 2003).

The Baxter Springs ordinance provides in relevant part:

Criminal defamation is communicating to a person orally, in writing, or by any other means, information, knowing the information to be false and with actual malice, tending to expose another living person to public hatred, contempt or ridicule; tending to deprive such person of the benefits of public confidence and social acceptance; or tending to degrade and vilify the memory of one who is dead and to scandalize or provoke surviving relatives and friends.

The ordinance is identical to the state criminal libel statute, K.S.A. 21-4004.

The charges stemmed from a column and political advertisement in the March 11, 2003 edition of the newspaper that criticized Baxter Springs City Clerk Donna Wixon. The newspaper column stated that if mayoral candidate Art Roberts is elected, Donna Wixon would run the city. "Those Roberts for mayor signs should be taken down and to (sic) read 'Wixon for Mayor.'" The political advertisement by Charles How, Jr., apparently in support of the incumbent Mayor John Murray, said, "For mayor? Art Roberts voted to hire Donna Wixon and almost doubled her salary over the previous clerks pay in three years – plus bonuses. Palzy walzy with defeated council member Bob St. Clair. You folks want two more years of this hateful city clerk?"

The prosecutions were eventually dismissed without prejudice when the city attorney recused himself and a special prosecutor could not be found. *See City of Baxter Springs v. Hiatt*, No. 03-CR000909 (Kan. Municipal Ct., Baxter Springs dismissed June 3, 2003); *see also MLRC MediaLawLetter*, June 2003, at 11.

Thomas and How then sued local officials for civil rights claims, malicious prosecution, and abuse of process. They also sought a declaration that the ordinance was unconstitutional. *See MLRC MediaLawLetter*, June 2004, at 15.

District Court Decision

The government defendants moved to dismiss, arguing official immunity and that the ordinance is constitutional because it requires proof of actual malice. They relied on two previous cases upholding the Kansas criminal libel statute. In *Phelps v. Hamilton*, 59 F.3d 1058 (10th Cir.1995) the court held that a prior version of the statute could be construed to incorporate the actual malice standard. The statute was later amended to require knowledge of falsity. And last year, the Kansas Court of Appeal affirmed the criminal libel conviction of an editor of a fringe newspaper based in part on the actual malice requirement in the statute. *State v. Carson*, 95 P.3d 1042 (table), 2004 WL 1878312, *3 (opinion)

(Continued on page 22)

Kansas Federal Court Upholds Constitutionality of Kansas Criminal Libel Statute

(Continued from page 21)

(Kan.App. Aug.29, 2004). See also *MLRC Media-LawLetter*, Aug. 2004 at 27.

Plaintiffs argued that being threatened with prosecutions for engaging in core political speech is unconstitutional – notwithstanding the actual malice requirement – because the statute is vague and overbroad. Indeed, the fact that plaintiffs were threatened with criminal prosecutions for criticizing a public official is powerful evidence that the statute is vague and arbitrarily enforced.

The court, however, disagreed, simply concluding that the statute provides sufficient guidance to law enforcement. Judge Lungstrum reasoned that the statute is limited to statements “tending to expose another living person to public hatred, contempt or ridicule; tending to deprive such person of the benefits of public confidence and social acceptance; or tending to degrade and vilify the memory of one who is dead and to scandalize or provoke surviving relatives and friends” – though this conclusion begs the question of what, if anything, these

words mean in the criminal context.

The court also added that the U.S. Supreme Court’s decision in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986) and *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) limit the application of the statute to false statements of fact.

The court did rule that plaintiffs’ claims for abuse of process could proceed. But after the ruling, plaintiffs filed an amended complaint seeking damages for deprivation of civil rights only — dropping the request for a declaratory judgment and other state claims.

Plaintiffs were represented by Sam L. Colville, Holman Hansen & Colville, PC, Kansas City, MO, and Kate Bohon McKinney and Thomas S. Busch, Holman Hansen & Colville PC, Overland Park, KS. Defendants were represented by James J. Rosenthal, David R. Cooper, Terelle A. Carlgren, Fisher, Patterson, Sayler & Smith, Topeka, KS, and Richard W. James, Edward L. Keeley, McDonald, Tinker, Skaer, Quinn & Herrington, PA, Wichita, KS.

For more information about criminal libel laws in the U.S. see

MLRC Bulletin 2003:1

Criminalizing Speech About Reputation: The Legacy of Criminal Libel in the U.S. After Sullivan & Garrison

“It is hard to square modern First Amendment principles with laws that purport to criminalize statements that allegedly harm reputation. This is particularly so because prosecutions are so selective that most cases seem to be used as political weapons.”

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Virginia Man Acquitted of Charges Under Virginia Criminal Libel Statute

By Craig Merritt

In a recent decision, a Virginia Circuit Court acquitted a man of criminal libel charges under Virginia law. *Commonwealth of Virginia v. Ned Cary, Jr.*, Case No. CR04014275-00 (Circuit Court, City of Williamsburg and James City County, March 7, 2005).

Background

On October 19, 2004, Ned Cary, Jr. was parked on the shoulder of U.S. Route 60 near the entrance to the Anheuser-Busch Brewery in Williamsburg, Virginia. Mr. Cary and Anheuser-Busch had an unhappy history dating to the early 1990's, when Anheuser-Busch terminated Mr. Cary's employment.

Following that termination, and after a favorable ruling from the EEOC, Mr. Cary brought a decade-long series of unsuccessful federal court lawsuits against the brewer.

Feeling that the system had let him down, Mr. Cary resorted to the time honored tactic of picketing his former employer.

Before starting his picketing campaign, Mr. Cary contacted the local County Attorney's Office to identify any local restrictions on picketing. He received a letter providing explicit directions as to where he could park his vehicle and how far he needed to be from the edge of the highway. Beginning in January, 2004, Mr. Cary parked in front of the Anheuser-Busch plant several times a week for a few hours at a time, displaying hand-made signs that were propped up against the side of his van.

On the afternoon of October 19, 2004, Mr. Cary was displaying a sign that read "Shaun Miller of Human Resources is a Negro Nazi." Shaun Miller was an African American woman who worked in the Anheuser-Busch Human Resources Department. (Mr. Cary himself is an African-American in his early 60's.)

James City County police officers arrived on the scene and parked behind Mr. Cary on the shoulder of the road, as they had done on prior occasions. After a dis-

cussion with Mr. Cary, they confiscated the sign and charged Cary with violating Va. Code § 18.2-417.

The relevant portion of that statute makes it a crime to "falsely write and publish, of and concerning another person, any words which from their usual construction and common acceptance are construed as insulting and tend to violence and breach of the peace." On November 4, 2004, Cary was convicted in the General District Court of violating the statute.

Trial de Novo

Cary's appealed his conviction to the Circuit Court for the City of Williamsburg and James City County. Under Virginia criminal procedure, the Defendant is entitled to trial *de novo* in the Circuit Court. The case was tried in the Circuit Court on March 7, 2005.

The Commonwealth's evidence consisted of the testimony of Shaun Miller and her husband Craig Miller. Shaun Miller testified that she had seen Mr. Cary in front of the brewery on a number of occasions, and was surprised on October 19th to see a sign near Cary's van referring to her.

She testified that she had never seen or met Cary prior to that date. She called the plant security manager and asked him to go outside and look at the sign. The Commonwealth placed into evidence photos of Cary and his van taken that October afternoon.

Mr. Miller claimed that he took still pictures and a video of Mr. Cary, after receiving a call from his wife. He testified that he was tempted to pull over and confront Mr. Cary, but acknowledged on direct examination that his only purpose would have been to reason with Mr. Cary, not assault him.

After the close of the Commonwealth's evidence, defendant moved to strike (Virginia's equivalent of moving for judgment as a matter of law). The Court granted the motion, finding that the Commonwealth's evidence was insufficient to meet the statute's requirement that the words used have a tendency to violence and a breach of the peace. Cary was acquitted.

The case illustrates the ability of local police agencies to use the threat of criminal punishment to discourage vigorous speech.

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Virginia Man Acquitted of Charges Under Virginia Criminal Libel Statute

(Continued from page 23)

Prior to trial, defendant filed a memorandum in support of dismissal, arguing that Va. Code §18.2-417 is both unconstitutional on its face and unconstitutional as applied to the facts of Cary's case.

It seemed clear on the facts that Mr. Cary was being prosecuted for vigorous, if offensive, speech that held no likelihood of meeting the "fighting words" doctrine that has developed in the line of cases following *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). However, the Circuit Court avoided the constitutional claims by concluding that the evidence did not support a finding that the statute was violated.

Conclusion

The case illustrates the ability of local police agencies to use the threat of criminal punishment to discourage vigorous speech. The local prosecutor evinced greater concern over the use of disturbing speech near the premises of a major corporate citizen than he did over the First Amendment-based rights of Cary.

Although the outcome was favorable, the case was not resolved in a manner likely to leave a lasting impression on local police. Unfortunately, the Court did not take the opportunity to send a message to local officials that the criminalization of speech raises grave constitutional concerns.

Craig Merritt, a partner at Christian & Barton L.L.P. in Richmond, VA, and associate Susan Renton, represented Ned Carey in this action.

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Reporters Petition Supreme Court to Reverse Contempt Ruling

Lawyers for Judith Miller, Matt Cooper and Time, Inc. filed separate petitions to the U.S. Supreme Court this month requesting review of the D.C. Circuit's February decision affirming contempt orders against the reporters. *In re Grand Jury Subpoena*, Nos. 04-3138 to 04-3140, 2005 WL 350745 (D.C. Cir. Feb. 15, 2004) (Sentelle, Henderson, Tatel, JJ.). See also *MediaLawLetter* Feb. 2005 at 5.

Miller and Cooper, together with Time Inc., received subpoenas last year as part of the criminal investigation into whether any government officials violated the Intelligence Identities Protection Act of 1982 by leaking the name and identity of CIA agent Valerie Plame. Miller and Cooper face up to 18 months in jail for refusing to answer questions that would divulge the identities of their confidential sources.

Arguments Made in Miller Petition

Miller's petition, filed on May 9, by Floyd Abrams, argues that:

This Court has not considered the issue of whether journalists have any right not to reveal the identity of confidential sources since its decision in *Branzburg*, decided more than 30 years ago. That decision has been described by both courts and commentators as "confusing," "enigmatic," and filled with "internal contradiction." As one commentator has put it, "[t]he lower courts have struggled to interpret the conflicting principles of *Branzburg*, and the level of constitutional protection extended to newsgathering remains unsettled." In an area of law where predictability is of paramount importance, the current state of the law is, to put it mildly, confused.

In the years since *Branzburg*, the courts of appeals have continued to wrestle with the issue of whether there is any constitutional or common law privilege at all, with the impact of Justice Powell's critical concurring opinion in that case and with the application of the privilege in varying contexts. A reporter gathering information for an article thus cannot be sure which circuit's law may be held to govern the question of whether (and, if so, to what extent) a promise to protect the identity of confidential

sources will be legally honored; in at least four circuits, such protection is provided in criminal cases; in at least ten circuits, similar protection is provided in civil cases. Nor can journalists predict whether a subpoena will issue in connection with a state court proceeding (49 of the states now provide total or qualified protection for journalists) or a federal tribunal (which may, as the court of appeals determined here, provide no protection at all).

The cacophony, if not utter chaos, among the circuit courts is well illustrated by the simultaneous progress of distinct judicial proceedings involving Ms. Miller and the same federal prosecutor in two circuits. In this case, the Court of Appeals for the District of Columbia has determined that, when subpoenaed by a federal grand jury, journalists have no recourse to the First Amendment to protect the identity of their confidential sources. At the same time, a federal district court in New York, in another case involving Ms. Miller and Mr. Fitzgerald, has ruled precisely to the contrary relying on Second Circuit precedent and that of other circuits. See *New York Times Co. v. Gonzales*, No. 04 Civ. 7677 (RWS), 2005 WL 427911 (S.D.N.Y. Feb. 24, 2005).

All this conflict arises about a journalistic practice that has had the most direct impact on the ability of our citizens to be informed. Throughout our country's history much significant reporting about serious national issues would have been impossible but for information provided by sources who insisted that their identities remain confidential.

Miller also raised the following due process argument:

For all its internal disagreement on other issues, the court of appeals agreed on a single proposition: based upon an *ex parte* submission of the Special Counsel that neither Ms. Miller nor her counsel was permitted to examine, the government had met whatever burden the First Amendment imposed upon it to justify an order requiring Ms. Miller to reveal her sources. The basis of that conclusion is

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Reporters Petition Supreme Court to Reverse Contempt Ruling

(Continued from page 25)

set forth in eight pages of Judge Tatel's opinion—pages that are simply blank in the version of the opinion made available to Ms. Miller, her counsel and the public. Never before, to our knowledge, has a court of appeals sanctioned the imprisonment of a party on the basis of facts the party was never permitted to see or rebut in a passage of an opinion that neither the party nor the public was permitted to read.

Arguments Made in Cooper Petition

The petition filed on behalf of Cooper and Time Inc. on May 10, by Theodore Olsen, Gibson Dunn & Crutcher, similarly argues that current law is “in serious disarray.”

This Court has not considered the issue whether federal law provides protection for confidential sources since its sharply divided and perplexing decision more than 30 years ago in *Branzburg v. Hayes*, 408 U.S. 665 (1972). Since that time, the *Branzburg* majority opinion and Justice Powell's “enigmatic” concurrence have been subject to sharply differing interpretations. The courts of appeals have been vexed by whether there is any common law or constitutional privilege at all, and how to apply the privilege in varying contexts. Some courts have found *Branzburg* to bar recognition of a privilege, while many have read the collection of opinions affirmatively to support it, and still others have held that the privilege applies in some proceedings but not others.

The intervening three decades have witnessed significant changes in the legal landscape that strongly support recognition of a federal reporter's privilege. In 1975, Congress adopted Federal Rule of Evidence 501, instructing federal courts to recognize new privileges as appropriate in light of “reason and experience.” In embracing this flexible approach, Congress declined to adopt the privilege rule originally promulgated by this Court—which had set forth nine specific, enumerated privileges—in favor of an open-ended grant of lawmaking authority that

“directed federal courts to ‘continue the evolutionary development of testimonial privileges.’” *Jaffee v. Redmond*, 518 U.S. 1, 8-9 (1996) (quoting *Trammel*, 445 U.S. at 47).

Moreover, at the time *Branzburg* was decided—in the pre-Watergate era—only 17 States recognized a reporter's privilege. Today, 49 States and the District of Columbia do. This fact is highly relevant to the question whether a federal common law privilege should be recognized under Rule 501. As this Court held in *Jaffee*, which itself was decided more than 20 years after *Branzburg*, “the existence of a consensus among the States indicates that ‘reason and experience’ support recognition of the privilege.” 518 U.S. at 9.

The petition also asks the Court to consider due process questions.

The Court should also grant review to resolve the important due process questions presented by the lower courts' reliance on the prosecutor's *ex parte* submissions in holding Cooper and Time in contempt. The D.C. Circuit's holding—that a witness may be imprisoned based on secret evidence—conflicts with rulings from the Second and Ninth Circuits, as well as decisions of this Court recognizing the due process right of defendants to review and challenge the evidence against them.

Media Amici Briefs

Numerous news organizations and media groups have joined to urge the Supreme Court to grant certiorari.

In a petition filed by Levine Sullivan Koch & Schulz amici¹ argue that:

The court of appeals' refusal in this case to recognize *any* First Amendment protection for a reporter's commitment to an anonymous source once a grand jury is convened cannot be squared with this Court's jurisprudence affording First Amendment protection to anonymous speech. As the Court has recognized, the First Amendment properly limits

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Reporters Petition Supreme Court to Reverse Contempt Ruling

(Continued from page 26)

government's ability to coerce the disclosure of the identity of anonymous speakers because, without some constitutional protection, a significant amount of protected speech will inevitably be lost to the public. The decision below construes this Court's holding in *Branzburg v. Hayes*, 408 U.S. 665 (1972), in a manner that conflicts with the Court's decisions affording constitutional protection to anonymous speech, decisions that are expressly based on the historic role the press has played in safeguarding the anonymous speaker. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

In a second brief filed by Paul Smith, Jenner & Block, amici² argue that:

The division among the circuits over whether and how the First Amendment protects journalists from forced disclosure of their confidential sources reflects an underlying inconsistency in the law. This Court's First Amendment jurisprudence, much of it developed since *Branzburg* was decided, includes cases taking two quite different approaches to the question whether the Constitution demands heightened scrutiny when facially neutral, generally applicable laws are being applied in a manner that will burden the exercise of First Amendment rights. On the one hand, in cases like *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), the Court has stated that generally applicable laws unrelated to expression categorically do not create First Amendment issues, even when they are applied in a way that will burden expression. But in a wide variety of other cases, the Court has taken just the opposite approach, holding that generally applicable laws *do* require heightened scrutiny when they pose a genuine risk to First Amendment values.

A grant of review here would provide the Court with an opportunity to resolve this doctrinal tension. Moreover, as we show, it is possible to articulate workable standards that reconcile these seemingly inconsistent lines of cases. Where, as in *Cowles Me-*

dia and similar cases, the claim of burden on freedom of expression is facially unpersuasive, no heightened scrutiny of the application of general laws in particular cases is required. But where application of any law threatens to impose *real* burdens on free speech rights, the Court should apply heightened scrutiny under the First Amendment, as it has done many times in the past. Such an application of heightened scrutiny is particularly appropriate where a mechanism already exists for measuring the burdens the law imposes on First Amendment rights.

Under this approach, heightened First Amendment scrutiny should apply when journalists resist compelled revelation of their confidential sources. Forcing reporters to breach promises of confidentiality would seriously damage the press's news gathering role, which in turn would deprive the citizenry of information of great public concern. Moreover, here there already exist procedural and judicial mechanisms that can accommodate the reporter's privilege, easing any concerns about workability. Independently, the same considerations would warrant recognition of a common law (but constitutionally infused) privilege. The Court should grant certiorari to resolve these pressing issues.

¹ *Amici* are: ABC, Inc., Advance Publications, Inc., The Associated Press, The Association of American Publishers, Inc., Cable News Network LP, LLLP, CBS Broadcasting Inc., Dow Jones & Company, Inc., Dr Partners D/B/A Stephens Media Group, Gannett Co., Inc., Gray Television, Inc., Gruner + Jahr USA Publishing, The Hearst Corporation, Landmark Communications, Inc., Magazine Publishers of America, Media General, Inc., The National Newspaper Association, National Public Radio, Inc., NBC Universal, Newsweek, Inc., Random House, Inc., Reporters Committee for Freedom of the Press, Society of Professional Journalists, Tribune Company and The Washington Post.

² *Amici* are: American Society of Newspaper Editors, Bloomberg News, The Copley Press, Inc., Cox Newspapers, Inc., Daily News, L.P., The E.W. Scripps Company, Fox News Network, L.L.C., Knight Ridder, The McClatchy Company, The McGraw-Hill Companies, Inc., National Association of Broadcasters, Newspaper Association of America, New York Press Club, NYP Holdings, Inc., Radio-Television News Directors Association, Reporters Without Borders, Reuters America LLC, and White House Correspondents' Association.

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Florida Court Restrains Reports on Juror Identities in High-Profile Terror Trial

In the high-profile trial criminal trial involving Sami Al-Arian, a University of South Florida professor accused of aiding terrorists, a federal district court judge has refused to lift a restraint placed on the media preventing it from publishing any “written or verbal descriptions of any information that would assist a person in determining the identity of a juror or prospective juror.” *United States v. Al-Arian*, No. 8:03-cr-77-T-30TBM (M.D. Fla. May 17, 2005) (Moody, J.).

After concluding that defendants’ right to a fair trial under the Sixth Amendment was being compromised by the “widespread news coverage” the trial was attracting, district judge James Moody Jr. decided to empanel an innominate jury to prevent juror names from being revealed to the public.

Subsequently, on the eve of *voir dire*, Judge Moody entered an order further preventing the media from visually depicting or verbally describing any jurors in a way which could reveal their identity.

Media Challenge

In challenging the order, a number of media companies argued that alternatives existed to better address the threat to defendants’ fair trial right, and that the order was an ineffective means of protecting defendants’ rights. In addressing the media’s arguments, the court found that the media’s contention that the court could “sanction the public from discussing the case with the jurors or subject the jurors to additional security measures” was without merit.

The court concluded that the public’s “visceral reaction” to the trial and pervasive news coverage negated the media’s argument that jurors would not be “confronted and pressured” if their identities were revealed, and that increased security personnel would “only exacerbate the problem of jury impartiality.”

The court went on to discuss a number of other measures outlined by the U.S. Supreme Court in *Nebraska Press v. Stuart*, 427 U.S. 539 (1976). The court concluded that postponing trial; sequestration; or temporarily closing the proceedings or changing the venue – some of which had already been implemented in the

case – would fail to eliminate the danger to defendants’ Sixth Amendment right in light of the pervasive media coverage and incendiary issues implicated in the trial.

The court thus concluded a “temporary restriction on the dissemination of juror identities” would offer the only means of assuring juror impartiality under the facts at issue.

Thus while the public and press will be able to attend that trial, the order imposes strict rules on reporting information that would lead to identification of jurors.

As entered, the order in relevant part states:

3. To protect the impartiality of the jurors in this case, no photographs, sketched drawings, or other images of the jurors or prospective jurors inside or outside the courtroom may be created.

4. No written or verbal descriptions of any information that would assist a person in determining the identity of a juror or prospective juror may be made. This includes, among other things, the physical description, telephone number, address, employer name and membership affiliations of each juror or prospective juror. The disclosure of the sex, race, age, religion, and any other demographic trait of a juror or prospective juror, however, is permissible. A general description of job title (i.e., attorney, engineer, baker, etc.) of a juror or prospective juror is also permitted.

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Government Can't Bring Declaratory Judgment Actions Over Open Meetings Law

By Hugh Stevens

In a series of recent rulings, North Carolina's appellate courts have barred government agencies from suing private citizens who dispute the government's interpretations of the state's open meetings and public records laws. In the latest decision, the state Supreme Court let stand a ruling that held that such practice would have a chilling effect on the public. *City of Burlington v. Boney Publishers, Inc.*, No. 518PA04, 2005 WL 1038824 (May 5, 2005) (per curiam).

The latest case began in July, 2002 when Tom Boney, Jr., publisher of *The Alamance News*, questioned whether the Burlington, N.C. city council violated the open meetings law by allowing Sonny Wilburn, the executive director of the local chamber of commerce, to sit in on a closed session called to discuss several pending lawsuits with the city's lawyers.

In letters to city officials and remarks at subsequent council meetings, the publisher acknowledged that the council and its attorneys could have discussed the litigation behind closed doors, but argued that the city waived its attorney-client privilege by including the chamber of commerce executive into the closed meeting.

The publisher asked the city to acknowledge that the closed session was improper, and to release minutes and other information that would show what transpired. The city refused, but offered no justification for Mr. Wilburn's participation except that his presence was "essential to the discussions conducted in [the] closed session."

On August 6, 2002, while the publisher and the city were wrangling over the closed session, the North Carolina Court of Appeals ruled in favor of *The Alamance News* in an open meetings suit against the city that the newspaper had filed in November, 2000. In *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 566 S.E.2d. 701, the Court of Appeals ruled that the

city council violated the open meetings and public records laws by refusing to identify the location, owner or potential use of a parcel of real property that the city was negotiating to purchase.

The publisher referred to the court's opinion in his correspondence with the city over the Wilburn issue, saying that he hoped it would not become necessary for the newspaper to sue the city again. The city did not wait to see what Mr. Boney would do. On August 22, 2002 it sued his newspaper, seeking a declaratory judgment vindicating its interpretation of the open meetings law.

Boney and his newspaper counterclaimed and moved to dismiss the city's complaint on the grounds that it was an unconstitutional SLAPP suit, and that the city did not have standing to sue a citizen for declaratory relief to resolve a dispute arising out of the open meetings or public records laws.

The trial court disagreed, and the newspaper appealed. On September 6, 2004 the Court of Appeals reversed the trial court, holding that neither the open meetings law nor the public records law authorizes a government entity to sue a private citizen for declaratory judgment.

Drawing heavily on the California Supreme Court's decision in *Filarsky v. Superior Court*, 28 Cal.4th 419, 49 P.3d 194, 121 Cal. Rptr. 2d 844, 30 Media L. Rep. 2089 (2002), the court ruled that allowing a governmental agency to bring a declaratory judgment action against someone who has not initiated litigation would have a chilling effect on the public, in essence eliminating the protections of the state's sunshine laws by requiring them to defend civil actions they otherwise might not have commenced. *City of Burlington v. Boney Pub., Inc.*, 600 S.E.2d 872, 877, 33 Media L. Rep. 1370, 1374 (2004).

On December 2, 2004 the Supreme Court of North Carolina granted the city's petition for discretionary review of the Court of Appeals' decision. The North Carolina League of Municipalities filed an *amicus* brief in

(Continued on page 32)

Allowing a governmental agency to bring a declaratory judgment action against someone who has not initiated litigation would have a chilling effect on the public.

**Government Can't Bring Declaratory Judgment
Actions Over Open Meetings Law**

(Continued from page 31)

support of the city. The American Civil Liberties Union, the John Locke Foundation of North Carolina, the North Carolina Association of Broadcasters and the North Carolina Press Association weighed in on behalf of the newspaper.

The court heard oral arguments in the case on April 19,

2005. Approximately two weeks later, the court issued a one-sentence order dismissing the city's appeal as having been "improvidently granted," thereby allowing the Court of Appeals' decision to stand. *City of Burlington v. Boney Publishers, Inc.*, No. 518PA04, 2005 WL 1038824 (May 5, 2005).

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Priest Sex Abuse Records to Be Made Open to the Public

Maine Supreme Court Orders Disclosure of Names of Deceased Priests Accused of Sexual Abuse and Related Investigative Records

By Jonathan S. Piper & Sigmund D. Schutz

In a hard-fought triumph in the battle for public access to investigative records, the Maine Supreme Judicial Court (SJC) ordered disclosure of law enforcement records relating to the priest sex abuse scandal in the state. *Blethen Maine Newspapers, Inc. v. Maine*, 871 A.2d 523 (Me. Apr. 22, 2005) (Levy, J.).

In a 44-page decision, a plurality of the Justices sided with newspaper publisher Blethen Maine Newspapers, Inc.'s request that investigative records on deceased priests accused of sexual abuse be made public, finding that disclosure would not constitute an unwarranted invasion of personal privacy so long as the names of victims and witnesses are redacted from the records.

Open Records Request

As part of its investigation into an alleged pattern of sexual abuse of minors by priests in Maine over many years, the Maine Attorney General requested and voluntarily received from the Catholic Diocese of Maine files relating to priests accused of sexual abuse.

Blethen's reporting revealed that 18 priests accused of abuse had since died. Recognizing that interests of "personal privacy" are weak at best once a person is deceased, Blethen issued an open records request to the Attorney General limited to records concerning deceased priests accused of abuse.

The Superior Court sided with Blethen, ordering the complete release of the records. The court declined to require any redaction, including of victim and witness names. *Id.* at ¶ 9. On appeal, the SJC issued a decision containing four separate opinions: a three justice majority, a concurrence, and two dissents.

Balance of Privacy and Public Interest

The majority adopted the Supreme Court's opinion in *United States Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989) in so far as it requires a balancing of privacy interests on the one

hand and public interests on the other. *Blethen*, 2005 ME at ¶ 14.

It also applied what has come to be known as the "central purpose doctrine" – that the public interest to be balanced is the citizen's right to know what government is up to, as opposed to information about private persons which happens to be mentioned in government files. *Id.* at 28.

Turning first to privacy interests, the majority found that privacy interests had been weakened by both the manner in which the information had come into the possession of the Attorney General and the death of the priests who were the subjects of the allegations. *Id.* at ¶ 21.

Privacy interests in the records "are diminished to the extent the information was voluntarily reported to church and public authorities with the expectation that it would be used to investigate possible wrongdoing." *Id.* The majority also noted that none of the information was reported either under the protection of the confessional, or under circumstances where there was an express or implied understanding of confidentiality. *Id.*

With respect to the privacy interests of the deceased priests and their families, the majority concluded that the death of the priests and the passage of time had "dissipated or extinguished" those interests. *Id.* at ¶ 24. The length of time from both the alleged misconduct by the priests and their deaths was measured in decades, not years. *Id.*

Maine Rejects Favish Decision

The Court next considered whether to analyze the public interest in the same manner as had the Supreme Court in *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157 (2004). The FOIA privacy exemption at issue in *Favish* contains language that tracks the privacy exemption in Maine's Criminal History Record Information Act, 16 M.R.S.A. § 611 *et seq.* Compare 16 M.R.S.A. § 614(1)(C) with 5 U.S.C. § 552(b)(7)(C).

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Priest Sex Abuse Records to Be Made Open to the Public

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In *Favish*, the Supreme Court determined that FOIA's privacy exemption required that photographs of the corpse of former White House Deputy Counsel Vincent Foster, Jr. be kept confidential based on the privacy interests of Foster's surviving family members. *Id.* at 160-61, 168-69.

The U.S. Supreme Court held that the only generally cognizable public interest in disclosure of investigative records is whether the records show government impropriety, and that a requestor "must produce evidence that would warrant a belief by a reasonable person" that the some "government impropriety might have occurred." *Id.* at 173-74.

In a stunning rejection of *Favish*, the *Blethen* majority held:

The public's interest in knowing what its government is up to surely extends beyond the specific concern of governmental impropriety considered in *Favish*. The records sought by *Blethen* are necessary for the public to understand why the Attorney General exercised his discretion not to pursue criminal prosecutions in connection with the sexual abuse allegations. An informed citizenry has not less an interest in information that might document governmental efficiency or effectiveness than it does in information documenting governmental negligence or malfeasance. Absent the unique cultural and familial interest confronted in *Favish*, the public's interest in knowing what its government is up to encompasses a broader universe of concerns than simply the possibility of governmental wrongdoing.

Blethen, at ¶ 32.

Also unlike *Favish*, the majority refused to impose any evidentiary burden on a requestor seeking public access to records. *Id.* at ¶ 31. Accepting the position urged by *Blethen* on appeal, the majority remanded for disclosure of the records after redaction of the names and other identifying information of persons named in the records other than the deceased priests. *Id.* at ¶ 40.

Concurring Opinion

The concurring opinion, by the SJC's Chief Justice, endorses *Favish*, but found a credible allegation of government misconduct on the unique facts present in the case. *Blethen*, at ¶ 47. The opinion explains:

I would conclude that the serious allegations of child sexual abuse, involving many children, made or alleged to have occurred over decades, without prosecution, is equivalent to an allegation of governmental misconduct in the present case. The number of alleged separate incidents, perpetrators, and child victims, as well as the many decades over which the allegations span is substantial. Hence, I would conclude that the present case, unique in its factual background, presents a sufficient allegation of governmental wrongdoing to require a balancing against the private interests to be protected.

Id.

Finding that that any remaining privacy interests had "all but evaporated over time" the Chief Justice concurred in release of the records as redacted. *Id.* at ¶ 48.

Dissent Argues that Favish Compels Secrecy

The heart of the three justice dissent is the *Favish* position that the only public interest to be considered in balancing privacy interests against the public interest is in determining the existence or extent of government impropriety. *Blethen*, at ¶ 63.

The dissent argued that in the absence of evidence of wrongdoing it would be "impractical" to implement a more relaxed standard in view of the many criminal cases of interest to the public. *Id.* at ¶ 64. In stronger language, the dissent also reasoned that a low threshold of public interest would have a chilling effect on the willingness of individuals to cooperate in criminal investigations and report crimes.

The dissent warns that victims and witnesses may be deterred from reporting crime without blanket assurances of confidentiality. *Id.* at ¶ 73.

The dissent may be criticized for having minimized the significance of redaction of witness and victim

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Priest Sex Abuse Records to Be Made Open to the Public

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identifying information. With that information confidential, it is hard to see why victims or witnesses would be deterred from coming forward. The dissent also brushes aside the majority's recognition that the Attorney General had not argued that disclosure would interfere with law enforcement and that it had not assured anyone of confidentiality when it took possession of the records. Instead, the records were voluntarily produced by the Diocese for the express purpose of investigation and possible prosecution.

Conclusion

The SJC's opinion in *Blethen* is the rare case in which the media has successfully obtained investigative information from law enforcement and is remarkable for

the three Justice majority's rejection of the Supreme Court's decision in *Favish*. The records are expected to be released by the end of May.

Jonathan S. Piper and Sigmund D. Schutz of Preti Flaherty LLP in Portland, Maine represented Blethen. G. Steven Rowe, Attorney General, Leanne Robbin, Asst. Atty. Gen, and William R. Stokes, Asst. Atty Gen. represented the Department of the Attorney General. Frederick C. Moore and Thomas R. Kelly of Robinson, Kriger & McCallum represented amicus curiae Roman Catholic Bishop of Portland. Keith R. Varner of Lipman, Katz & McKee, P.A. represented amici curiae Survivors Network of Those Abused by Priests and the Voice of the Faithful.

Weekly Newspaper Publisher Settles "Newspaper Raid" Lawsuit for \$435,000

By Ashley Kissinger

Ken Rossignol, publisher of the weekly community newspaper *St. Mary's Today*, has settled a five-year-old civil rights lawsuit against the former Sheriff of St. Mary's County, Maryland, six of his deputies, the State's Attorney for the county, and the Board of County Commissioners for \$435,000.

The defendants bought the lion's share of the 1998 Election Day edition of *St. Mary's Today* to retaliate for the newspaper's past criticism of them and to suppress its "unsavory" contents, including Election Day articles about both the Sheriff and the State's Attorney, who were candidates in that day's election.

Mr. Rossignol filed a federal action alleging that, by engaging in this conduct, the defendants violated the First, Fourth and Fourteenth Amendments; violated analogous provisions of the Maryland Constitution; and committed intentional interference with business relations and civil conspiracy.

The trial court granted summary judgment to the defendants, but the Fourth Circuit later reversed, issuing

an opinion highly solicitous of the First Amendment. *Rossignol v. Voorhaar*, 316 F.3d 516 (4th Cir.), cert. denied, 540 U.S. 822 (2003).

On remand the district court granted summary judgment for Mr. Rossignol on all of his claims except those against the county itself. *Rossignol v. Voorhaar*, 321 F. Supp. 2d 642 (D. Md. 2004) (Nickerson, J.).

The case made its way to the brink of oral argument in a second appeal before the defendants agreed to settle the action. More detailed discussions of the facts underlying the case and the courts' various decisions are contained in articles published in the *MediaLawLetter* Feb. 2003 at 5 and May 2004 at 35.

Mr. Rossignol was represented by Lee Levine, Seth Berlin, Ashley Kissinger and Audrey Critchley of Levine Sullivan Koch & Schulz, L.L.P., and by Alice Neff Lucan. The defendants were represented by Daniel Karp and Kevin Karpinski of Allen, Karpinski, Bryant & Karp, and John Breads of the Local Government Insurance Trust.

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The Seventh Circuit Rethinks Right of Publicity Preemption

By Samuel Fifer and Gregory R. Naron

The Seventh Circuit Court of Appeals recently did an about face, vacating a prior decision, *Toney v. L'Oreal U.S.A. Inc.*, 384 F.3d 486 (7th Cir. 2004) (“*Toney I*”), that had held a model’s state law right of publicity suit was preempted by the federal Copyright Act. *Toney I* had potentially far-reaching impact on the right of publicity – a cause of action which has been the subject of state legislation and extensive common law development, and for the most part has been held beyond the preemptive reach of federal law.

However, the Court of Appeals acted quickly to grant plaintiff’s petition for rehearing, vacating *Toney I*. The court further ordered supplemental briefing on whether the court’s much-maligned decision in *Baltimore Orioles, Inc. v. Major League Baseball Players Ass’n*, 805 F.2d 663, 674-79 (7th Cir. 1986) – on which *Toney I* had relied – should “remain the controlling law in this circuit.” *Toney v. L'Oreal U.S.A. Inc.*, 400 F.3d 964, 965 (7th Cir. 2005).

After rehearing, on May 6, 2005, the court issued a new opinion, *Toney v. L'Oreal U.S.A. Inc.*, No. 03-2184, 2005 WL 1083775 (7th Cir., May 6, 2005) (“*Toney II*”) (Kanne, J.), which squarely and unambiguously held that claims under the Illinois Right of Publicity Act, 765 ILCS 1075/1, *et seq.* (“IRPA”) are not preempted, while also clarifying and narrowing the scope of *Baltimore Orioles*.

Background

In November 1995, June Toney, a model, authorized Johnson Products to use her likeness on the packaging of a hair-relaxer product called “Ultra Sheen Supreme” from November 1995 until November 2000. Toney also authorized the use of her likeness in national magazine advertisements for the product from November 1995 until November 1996.

The agreement contemplated additional uses – i.e., to promote other products, for extended time periods – but specifically provided that such uses and extensions were

to be negotiated separately. Toney did *not* own the copyright in the photographs of her that were taken for the packaging and promotion.

In August 2000, L'Oreal acquired the Ultra Sheen Supreme line of products; later, in December 2000, Wella purchased and assumed control of the line and brand from L'Oreal. Toney sued L'Oreal and Wella in Illinois state court, alleging they used her likeness in connection with the packaging and promotion of the Ultra Sheen product beyond the authorized time period, and thereby violated her right to publicity in her likeness under the IRPA.

The IRPA allows an individual the “right to control and to choose whether and how to use an individual's identity for commercial purposes,” 765 ILCS 1075/10; it provides that “[a] person may not use an individual's identity for commercial purposes during the individual’s lifetime without having obtained previous written consent from the appropriate person ... or their authorized representative.” 765 ILCS 1075/30.

Identity is defined as “any attribute of an individual that serves to identify that individual to an ordinary, reasonable viewer or listener, including but not limited to (i) name, (ii) signature, (iii) photograph, (iv) image, (v) likeness, or (vi) voice.” 765 ILCS 1075/5.

Defendants removed the case to federal court. On defendants' motion to dismiss, the district court found plaintiff’s IRPA claim was preempted under § 301 of the Copyright Act, 17 U.S.C. § 301. *Toney I* affirmed, holding the IRPA claim sought to vindicate the same rights as those enumerated in the Copyright Act, and hence, the claim was preempted.

Read broadly, *Toney I* would generally preempt all right of publicity claims. This would be a truly breathtaking development. Most of the several states recognize causes of action for right of publicity, misappropriation of name or likeness, and similarly denominated torts, under their common law. Some state legislatures – including that of Illinois – have adopted statutes specifically adopting and adumbrating the right of publicity.

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The Seventh Circuit recently did an about face, vacating a prior decision, that had held a model's state law right of publicity suit was preempted by the federal Copyright Act.

Seventh Circuit Rethinks Right of Publicity Preemption

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But alas, *Toney I* was short-lived; in *Toney II*, the court promptly reversed itself – and reversed dismissal of Toney’s IRPA claim.

Plaintiff Did Not Waive Her Best Argument

As a preliminary matter, defendants argued that plaintiff “waived any claim that the IRPA protects her ‘identity,’ as compared to her likeness fixed in photographic form, noting that the “word ‘identity’ does not appear in her complaint,” and plaintiff’s response to the motion to dismiss had “expressly stated that her claim ‘is narrowly directed to the use of her likeness, captured in photograph or otherwise.’” *Toney II*, Slip Op., p. 4.

Toney I accepted defendants’ waiver argument – somewhat uncharitably, in light of the liberal federal notice pleading standard, *see* Fed. R. Civ. P. 8(a)(2). *Toney I*, at 489.

In *Toney II*, the court changed its mind and found “that Toney provided the defendants with adequate notice of her claim. The identity claim was not waived.” *Toney II*, Slip Op., p. 4.

This was perhaps the most significant turnabout the court did, because injury to “identity” generally is the very gravamen of the right of publicity claim. The subject matter of such a claim “is *not* a particular picture or photograph of plaintiff,” but rather, “the very identity or persona of the plaintiff as a human being”; the photograph “is merely one copyrightable ‘expression’ of the underlying ‘work,’ which is the plaintiff as a human being.” *Toney II*, Slip Op., p. 5, quoting McCarthy, *THE RIGHTS OF PUBLICITY & PRIVACY*, § 11:52 (2d ed. 2004).

Thus, the court explained, “[a] persona, defined in this way, ‘can hardly be said to constitute a ‘writing’ of an ‘author’ within the meaning of the copyright clause of the Constitution.” *Id.*, quoting *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1003-4 (9th Cir. 2001).

Preemption Rejected

Section 301 of the Copyright Act, 17 U.S.C. § 301 “delineates two conditions which, if met, require the preemption of a state-law claim, such as one brought under the IRPA, in favor of the rights and remedies available under” the Act.

First, “the work in which the right is asserted must be fixed in tangible form and ... come[] within the subject matter of copyright as specified in § 102” – that is, it must be an “‘original work[] of authorship fixed in any tangible medium of expression,’ including ‘pictorial’ works.” 17 U.S.C. § 102(a).”

Second, “the right must be equivalent to any of the rights specified in § 106” – i.e., “reproduction, adaptation, publication, performance, and display.” *Toney II*, Slip Op., pp. 5-6.

Having defined the “identity” protected by the right of publicity in terms of an ineffable “persona” (of which “likeness” was just one possible aspect) the preemption inquiry all but answered itself:

Toney’s identity is not fixed in a tangible medium of expression. There is no “work of authorship” at issue in Toney’s right of publicity claim. A person’s likeness – her persona – is not authored and it is not fixed. The fact that an image of the person might be fixed in a copyrightable photograph does not change this. From this we must also find that the rights protected by the IRPA are not “equivalent” to any of the exclusive rights within the general scope of copyright that are set forth in § 106. Copyright laws do not reach identity claims such as Toney’s. Identity, as we have described it, is an amorphous concept that is not protected by copyright law; thus, the state law protecting it is not preempted.

Toney II, Slip Op., pp. 7-8.

The court also noted that the IRPA required an “extra element” not found in the Copyright Act: that defendant is *commercially exploiting* plaintiff’s identity. “Unlike copyright law, ‘commercial purpose’ is an element required by the IRPA.” *Id.*, p. 8; *see* 765 ILCS 1075/5.

Baltimore Orioles Redux

Perhaps the most interesting aspect of the *Toney v. L’Oreal* saga is the court’s treatment of its prior decision in *Baltimore Orioles*, *supra*, 805 F.2d 663 (7th Cir. 1986). There, Major League Baseball players claimed they had rights of publicity in their performances. However, the players had entered into “work for hire” contracts with the

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Seventh Circuit Rethinks Right of Publicity Preemption

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baseball clubs for their game performances; the clubs owned the copyrights in the telecasts of those performances.

As Ninth Circuit Judge Alex Kozinski once explained, *Baltimore Orioles* refused to allow the players to use their state law right of publicity “to veto the telecast of their performance.... The Seventh Circuit recognized ... that the players and the clubs were fighting over the same bundle of intellectual property rights.” *Wendt v. Host Int’l*, 197 F.3d 1284, 1287 (9th Cir. 1999) (Kozinski, J., dissenting from denial of rehearing *en banc*).

Having found plaintiff waived her “identity” argument, *Toney I* examined what she misguidedly argued in the district court: that her IRPA claim was based on “her right of publicity in her *likeness*, as distinguished from her *likeness in photographic form*.”

The court found this would-be distinction flew directly in the teeth of *Baltimore Orioles*. *Toney I*, at 489. *Toney I* emphasized that plaintiff did not own the copyright in the photographs – but was seeking to control exercise of those same rights anyway, through the “back door” means of a right of publicity action:

[B]ecause the exercise of the [copyright owner’s] rights to reproduce, adapt, publish, or display the photos would also infringe upon Toney’s right to publicity in her likeness in photographic form, her publicity right is equivalent to the rights encompassed by copyright listed in § 106.

Toney I, at 492.

This was the essential rationale of *Baltimore Orioles*: plaintiffs in both cases were parties to agreements by which the other party secured a copyright in the same “bundle of rights” that plaintiffs sought to enforce through state law claims.

However, by focusing on plaintiff’s “identity” rather than her “likeness,” *Toney II* reached precisely the opposite conclusion:

The fact that the photograph itself could be copyrighted, and that defendants owned the

copyright to the photograph that was used, is irrelevant to the IRPA claim. The basis of a right of publicity claim concerns the message – whether the plaintiff endorses, or appears to endorse the product in question. One can imagine many scenarios where the use of a photograph without consent, in apparent endorsement of any number of products, could cause great harm to the person photographed. The fact that Toney consented to the use of her photograph originally does not change this analysis. The defendants did not have her consent to continue to use the photograph, and therefore, they stripped Toney of her right to control the commercial value of her identity.

Toney II, Slip Op., p. 8.

Perhaps the most interesting aspect of the Toney v. L’Oreal saga is the court’s treatment of its prior decision in Baltimore Orioles.

While reaching an apparently irreconcilable conclusion, *Toney II* did not explicitly overrule *Baltimore Orioles*. It did, however, acknowledge that *Baltimore Orioles* “has been

widely criticized by our sister circuits and by several commentators,” and took the opportunity to “clarify” its holding. *Id.* at 9.

First, the court held that *Baltimore Orioles* “simply does not stand for the proposition that the right of publicity as protected by state law is preempted in all instances by federal copyright law; it does not sweep that broadly.”

Second, the court appears to limit *Baltimore Orioles* to the proposition that “state laws that intrude on the domain of copyright are preempted even if the particular expression is neither copyrighted nor copyrightable”; for example, “states may not create copyrightlike protections in materials that are not original enough for federal protection.” *Id.* Thus, to the extent the pre-emption teaching of *Baltimore Orioles* survives *Toney II*, it does so in a diminished capacity.

Samuel Fifer is a partner, and Gregory R. Naron is of counsel at Sonnenschein Nath & Rosenthal LLP, Chicago. Plaintiff was represented by Thomas Westgard, Chicago.; defendant, by John Letchinger, of Wildman, Harrold, Allen & Dixon in Chicago.

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UK Court of Appeal Issues Landmark Privacy Decision

A Boost for Privacy Rights in England; A Blow for Those Who Wish to Trade in Them

By Godwin Busuttil

In this latest instalment of a long-running legal saga centring on photographs taken at the wedding of the actors Michael Douglas and Catherine Zeta-Jones in New York in November 2000, the Court of Appeal of England & Wales has handed down a landmark privacy judgment recognising for the first time that the Court has a duty to protect individuals' privacy rights. *Douglas v Hello! Limited* [2005] EWCA Civ 595 (18 May 2005).

Background

The Douglases granted *OK!* magazine an exclusive licence to publish photographs of their wedding reception. They went to great lengths to ensure that only approved photographers took photographs of the event.

A paparazzo managed to get into the reception and take some snaps of the happy couple. These unauthorised photographs were sold to *Hello!* magazine, a rival of *OK!*'s.

Hello! were going to publish these photos as a 'spoiler.' *OK!* found out. The Douglases and *OK!* obtained an interim injunction preventing *Hello!* from publishing. The Court of Appeal discharged the injunction ([2001] QB 267) and *Hello!* published them. The Douglases and *OK!* pursued *Hello!* for damages.

After a trial in London in 2003, Mr. Justice Lindsay awarded the Douglases £3,750 each for the distress caused to them by the publication of the unauthorised photographs, an additional £7,000 for the cost and inconvenience of having to deal hurriedly with the selection of authorised photographs for *OK!*, to counteract the effect of the 'spoiler', and to *OK!* just over £1 million mainly in respect of loss of profit from the exploitation of the authorised photographs. See [2003] 3 All ER 996 for a report of Lindsay J's judgment on liability.

Hello! appealed against the Judge's rulings on liability and his award of damages to *OK!*. The Douglases cross-appealed on the quantum of damages, *OK!* on the footing that the damages awarded to it could be sustained with reference to other economic tort-based causes of action.

Right of Privacy

The Court of Appeal upheld the award of damages to the Douglases, holding that their privacy had been violated by the publication of the unauthorised photographs. It declined to increase the damages on a 'notional licence fee' basis principally because they had granted *OK!* an exclusive licence to publish photographs of the wedding.

The Court also overturned the substantial award of damages to *OK!*, deciding that *OK!* had no legal right to enforce against *Hello!*. The Court held that private information was capable of being exploited commercially and legal rights in such information could be transferred to a commercial publisher. But the licence in this case had not achieved this.

The judgment has far-reaching ramifications for the rapidly evolving law of privacy, commercial confidentiality and image rights in England & Wales, particularly in the media context.

A full account of these will be provided in a later edition of this newsletter. But to highlight some of the more important points now:

English Courts, following the decision of the European Court of Human Rights in *Von Hannover v Germany* [2004] EMLR 379 (24 June 2004), are under a positive duty to protect individuals' privacy:

"[it has been observed] that the Strasbourg jurisprudence provides no definite answer to the question of whether the Convention *requires* states to provide a privacy remedy against private actors.

That is no longer the case...the European Court of Human Rights [in *Von Hannover*] has recognised an obligation on member states to protect one individual from an unjustified invasion of private life by another individual and an obligation on the courts of a member state to interpret legislation in a way which will achieve that result." (paras [47] – [49]).

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UK Court of Appeal Issues Landmark Privacy Decision

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The test for what constitutes ‘confidential information’ has been reformulated:

“It seems to us that information will be confidential if it is available to one person (or a group of people) and not generally available to others, provided that the person (or group) who possesses the information does not intend that it should become available to others.” (para 55)

Similarly the test for ‘private information’:

“What is the nature of ‘private information’? It seems to us that it must include information that is personal to the person who possesses it and that he does not intend shall be imparted to the general public. The nature of the information, or the form in which it is kept, may suffice to make it plain that the information satisfies these criteria.” (para 83)

There is no fundamental objection in law to private information being exploited for profit:

“Recognition of the right of a celebrity to make money out of publicising private information about himself, including his photographs on a private occasion, breaks new ground...we do not see this as any reason to draw back. We can see no reason in principle why equity should not protect the opportunity to profit from confidential information about oneself in the same circumstances that it protects the opportunity to profit from confidential information in the nature of a trade secret.” (para 113)

And the commercial value of such information may be protected in the same way as a trade secret:

“Where an individual (‘the owner’) has at his disposal information which he has created or which is private or personal and to which he can properly deny access to third parties, and he reasonably intends to profit commercially by using or publishing that information, then a third party who is, or ought to be, aware of these matters and who has knowingly obtained information without authority, will be in breach of duty if he uses or publishes the information to the detriment of the owner.” (para 118)

Albeit that the owner’s right in such information is not in the nature of an intellectual property right:

“... confidential or private information, which is capable of commercial exploitation but which is only protected by the law of confidence, does not fall to be treated as property that can be owned and transferred.” (para 119) “[the Douglasses’] interest in the private information about events at the wedding did not amount to a right to intellectual property. Their right to protection of that interest does not arise because they have some form of proprietary interest in it. If that were the nature of the right, it would be one that could be exercised against a third party regardless of whether he ought to have been aware that the information was private or confidential. In fact the right depends on the effect on the third party’s conscience of the third party’s knowledge of the nature of the information and the circumstances in which it was obtained.” (para 126)

The Court of Appeal was wrong to have discharged the interim injunction. The injunction should have been maintained because the Douglasses had a very strong case that their privacy had been infringed and damages were never going to be an adequate remedy:

“The sum of [damages awarded to the Douglasses] is...small in the sense that it could not represent any real deterrent to a newspaper or magazine, with a large circulation, contemplating the publication of photographs which infringed an individual’s privacy.” (para 257)

The last of these rulings - although obiter - may be of concern to the media as it suggests that prior restraint should be granted more readily in privacy cases.

Injunctive relief, however, presupposes that an individual finds out before publication that his privacy is about to be violated. In the light of *Douglas v Hello!*, the media may be well advised to take greater care to avoid this happening.

Godwin Busuttill is a barrister at 5 Raymond Buildings in London. Plaintiffs in the case were represented by barristers Desmond Browne QC and David Sherborne of 5 Raymond Buildings. Defendants were represented by James Price QC and Giles Fernando of 5 Raymond Buildings.

Update: European Reporters Privilege Case Continues

Hans Martin Tillack Fights to Protect Sources

By Christoph Arhold

This past Fall, MLRC reported on German journalist Hans Martin Tillack's fight to protect his journalistic sources in a leak investigation that has interesting parallels to the Plame case in the U.S. See *MediaLawLetter* Nov. 2004 at 33.

In 2004, police in Belgium searched Mr. Tillack's home and office, seizing his computer and files in search of the identity of an EU official who may have leaked information to him.

Since the last report, Tillack has exhausted his remedies under Belgian law and his interim remedies under European Community law. While the main proceedings before the EC courts continue, Mr. Tillack may in parallel petition the European Court of Human Rights with respect to the Belgian rulings.

Background

In 2002 the German magazine *Stern* published articles by its Brussels-based EU correspondent, Hans-Martin Tillack, on allegations of fraud and mismanagement in Community Institutions, and the investigation of those allegations by the EC's Anti-Fraud Office ("OLAF").

The magazine articles relied on internal OLAF documents, so OLAF began to investigate the source of the leak and issued a press release which stated, on the basis of internal rumors, that a journalist (clearly Mr. Tillack) might have bribed an EU official to obtain the documents.

Mr. Tillack complained to the European Ombudsman, who decided in November 2003 that OLAF wrongly accused Mr. Tillack of bribery on evidence no more solid than rumor and hearsay.

Mr. Tillack published further articles critical of the Commission, including one in November 2003 on

OLAF's Director-General. In February 2004 OLAF complained officially to the Belgian and German judicial authorities that Mr. Tillack had bribed Commission officials to obtain EU documents, and asked them to launch simultaneous investigations against him.

The German authorities (*Untersuchungsrichter*) found the evidence insufficient to justify a search warrant. The Belgian *Procureur du Roi* (Public Prosecutor), however, requested a *juge d'instruction* (magistrate) to investigate the case. On March 19, 2004, Belgian police searched Mr. Tillack's home and office, and sealed or seized nearly all his and *Stern's* archives, working documents and computers.

In 2004, police in Belgium searched Mr. Tillack's home and office, seizing his computer and files in search of the identity of an EU official who may have leaked information.

The rumor of bribery arose from a claim by a then Commission spokesman that he had heard something to that effect from a former colleague, although the supposed source subsequently denied making any such allegation.

Because there was no real evidence that Tillack had illegally obtained the information, it was clear that OLAF's real aim is to identify the source of the leak. But because OLAF claims it is the victim of an alleged bribery, it could become a party to the Belgian proceedings and thus gain access to the seized files and presumably the identity of the source.

No Protection of Sources

Mr. Tillack petitioned the Belgian *juge d'instruction* in March 2004 to have the Belgian seizure measures lifted, arguing that the investigation violated the protection of journalistic sources laid down in Article 10 of the European Convention on Human Rights.

The *juge d'instruction*, however, refused to acknowledge a breach of Article 10. The judge's decision was based mainly on the allegation that the source had breached his or her duty of confidentiality and that Tillack had possibly obtained the information wrongfully.

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Update: European Reporters Privilege Case Continues

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The judge said it would in general be unacceptable “to use the right to keep sources secret in order to conceal offences,” since this would “be likely to endanger public safety by creating a state of impunity.”

Mr. Tillack challenged the order by a petition to the *Chambre des mises en accusation*, which confirmed the order and its reasoning in September 2004. He then appealed to the *Cour de Cassation*, Belgium’s Supreme Court.

The Belgian Supreme Court rejected Tillack’s appeal on December 1, 2004, despite the *Avocat Général*’s (court prosecutor’s) opinion, which supported Mr. Tillack and stressed that the Belgian courts had not bothered to double-check the evidence presented by OLAF before ordering the searches and seizures, but simply accepted it as the “truth.” See “*Conclusions du Ministre public*” filed with the “*Greffe de la Cour de Cassation*” (Registrar of the Supreme Court) on November 29, 2004: “*Force est de constater que, de cette manière, la chambre des mises en accusation a fondé sa décision relative à la régularité des actes d’instruction sur des pièces dont elle n’avait pas pu prendre connaissance.*”

All national remedies have now been exhausted. Mr. Tillack may, however, file an application with the European Court of Human Rights (“ECHR”) to declare the search and seizure by the Belgian authorities a violation of Article 10. The deadline to file is June 1, 2005.

Belgium’s New Shield Law

Until recently Belgium did not recognize a journalist’s right to protect the identity of sources. However, that changed last month with the enactment of a new law in the wake of the Tillack case and an earlier decision by the ECHR that Belgium had violated Article 10 of the Convention by searching a journalist’s home for evidence in a third party criminal investigation. See *Ernst v. Belgium*, No. 33400/96, ECHR, July 15, 2003, not published.

The new Belgian shield law grants journalists the right to protect their sources, and prevents them from being compelled to disclose any information, or

documents and their contents, that would lead to the identification of their sources.

The law also allows journalists the right to remain silent if called as witnesses, and expressly stipulates that they are protected against searches, seizures and phone-tapping. In addition, it prevents them from being sued for illegal retention of stolen documents or complicity in violation of professional secrecy by a third party.

Indeed, journalists will only be forced to identify their sources if the information sought is of crucial importance for assisting in the prevention of crimes that constitute a serious threat to the physical integrity of any person, and only if there is no other way to obtain it.

This new law is a major step towards protection of journalistic sources in Belgium, and illustrates the country’s previous deficiencies in that regard.

European Court of Justice Proceedings

In June 2004, Tillack also brought an action in the European Court of Justice to try and protect the identity of his sources. The European Court of Justice is an institution of the EU that has jurisdiction to hear and determine actions brought by individuals and the member states over EU treaties and provisions.

Tillack applied to the European Court of Justice for an interim measure (a preliminary injunction) to stop OLAF from obtaining, inspecting, or examining the contents of the documents and information seized by the Belgian judicial authorities. (Interim measures are granted if three basic conditions are satisfied: the applicant must establish a *prima facie* case, immediate relief is needed and the balance of interests favor the applicant.)

Tillack argued that OLAF violated EU regulations by having Belgian judicial authorities seize his files and computer. On October 15, 2004, the Court dismissed the request, on the ground that a *prima facie* case was lacking. See Case T-193/04 R, *Tillack v. Commission*, available through www.curia.eu.int.

The court reasoned that OLAF’s decision to forward information to Belgian authorities did not “cause injury” to Tillack because Belgian judicial authorities had discretion whether to search Mr. Tillack’s premises.

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Update: European Reporters Privilege Case Continues

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Tillack's appeal of this decision was dismissed on April 19, 2005. See Order in Case C-521/04 P(R), *Tillack v Commission*, available at www.curia.eu.int.

The court agreed that OLAF's "forwarding of information" had no legal binding effect on the decision whether to search Mr. Tillack's premises. OLAF's decision was not the *determining* cause, since Belgian law enforcement was left with sole discretion to decide what kind of measures to take. Consequently, no causal link between OLAF's action and the injury resulting from the search and seizure measures could be established. The reasoning of the decision is very brief, and it does not address some of Mr. Tillack's main arguments, especially on points of causation.

Conclusion

Although the legal steps taken by Tillack in Belgium and at the EU level were unsuccessful, they have been useful in three aspects. The decisions by the European Court of Justice have increased awareness, including among many Members of the European Parliament ("MEPs"), of the shortcomings of the legal construction on which OLAF is based, and the limited judicial control over it. The European Courts' judicial restraint may lead to further efforts by the EU's elected officials to reform OLAF.

In addition, just recently on May 17, 2005, the pressure on OLAF was further increased by a European Ombudsman

special report to the European Parliament according to which OLAF made incorrect and misleading statements in its submissions during its inquiry of the Tillack case (see <http://www.euro-ombudsman.eu.int/release/en/2005-05-17.htm>).

Another positive side-effect of the legal actions is that some MEPs have already put the European Commission under immense political pressure to abstain from trying to learn the identity of Tillack's sources through the material seized by Belgian police.

The Tillack case may also have helped convince the Belgian legislature to enact statutory protection for reporters' sources.

The new Commissioner responsible for OLAF, Mr. Siim Kallas, has confirmed in reply to MEPs' questions that "*the Commission does not intend, for the time being, to become a party ("partie civile") in the criminal action.*" (Answer to written question

E-3026/04.) The Commission is not legally bound by this statement, but to act contrary to it would amount to political hara-kiri. Mr. Tillack's sources can therefore feel relatively safe for the moment.

Finally, the Tillack case may also have helped convince the Belgian legislature to enact statutory protection for reporters' sources. The statute will certainly provide strong protection going forward.

Christoph Arhold is a senior associate with White & Case LLP in Brussels and represents Hans-Martin Tillack before the EC courts with colleagues Ian Forrester QC and Nathalie Flandin.

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New Zealand Television Allowed to Report on Contents of Leaked Document

By William Akel

The High Court in New Zealand has recently delivered an important decision on breach of confidentiality and contempt as relates to the media. *Berryman v The Solicitor General and Scott*, Wild J, 3 May 2005, CIV 2003-485-1041.

The case concerned the crucial area of express and implied undertakings as to confidentiality involving a sensitive document obtained in discovery in litigation; the leaking of that document to the media; and then the posting of the document on the Internet.

The issue the High Court had to determine was whether the television channel that obtained the leaked document should be enjoined from broadcasting or otherwise using the document, despite it being posted on the Internet.

Background

The facts were relatively straight forward as related to the injunction. The plaintiffs were involved in litigation with the Solicitor-General of New Zealand. They sought non-party discovery from the New Zealand Defense Force (NZDF) of a crucial engineer's report relating to the collapse of a bridge which resulted in the death of a person driving over it.

The bridge had been built for the plaintiffs by the Army but the materials were supplied by the plaintiffs. The plaintiffs assumed full responsibility for the bridge's maintenance. A Coroner's Inquest into the death found the bridge collapsed as a result of plaintiffs' failure to maintain it.

The NZDF did not produce or refer to the report at the Coroner's Inquest. The plaintiffs' counsel claimed a "cover up" by the Army in not producing the report. The plaintiffs sought a further Coroner's Inquest into the collapse of the bridge and the death that resulted from it.

The NZDF produced the crucial report to the plaintiffs counsel during the course of litigation seeking that the High Court order a new inquest. Plaintiffs' counsel then leaked a copy of the report to Television New Zealand after the High Court ruled the report could not be used in the

litigation before it because of a statutory prohibition against use of the report (having been prepared for an Army inquiry).

The NZDF found out about the leaking of the report. It sought return of the document from TVNZ and advised TVNZ that if it broadcast the contents of the report it would be at risk of committing, or being a party to the commission of, a contempt of court.

TVNZ declined to hand the report back but gave an undertaking not to broadcast the contents of the report pending determination of an urgent injunction hearing.

As this was going on, the plaintiffs' counsel then took the extraordinary step of posting the sensitive report on the Internet.

As well as seeking injunctive relief against TVNZ, the NZDF also sought orders against the plaintiffs' counsel arising from his breach of undertakings as relates to discovery. Counsel for the NZDF said "*It would be hard to imagine a more calculated, deliberate and extreme breach of court rules than that committed in this case by the plaintiffs' counsel.*"

On 26 April 2005 the High Court adjourned the contempt application against plaintiffs' counsel but proceeded to deal with the injunction against TVNZ.

Injunction Against TV New Zealand

On March 3, 2005 the High Court Justice Wild delivered the decision. It summarized the arguments for the NZDF and TVNZ. For the NZDF it was argued:

1. The ability to prevent publication of confidential material in the mass media, as opposed to the Internet, was still a result which was of substantial benefit to the NZDF in terms of damage control arising out of the plaintiffs' counsel's actions.
2. TVNZ would itself be in contempt of court if it broadcast a report knowing the document had been obtained by way of discovery.
3. The High Court should impose safeguards for abuse of its discovery process and contempt of court by not allowing TVNZ to broadcast the sensitive report.

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New Zealand Television Allowed to Report on Contents of Leaked Document

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4. In this respect the law of contempt was a justifiable limitation on freedom of expression rights. There was no public interest defense to a civil contempt.

For TVNZ it was argued that:

1. The fact that the sensitive report had made its way into the public domain released TVNZ from any obligation it may have to return the report. TVNZ should not be enjoined given that it could obtain the report from a public domain source, that is the Internet.
2. There was a distinction between NZDF's remedies against those who breach their obligations, and the rights of TVNZ and the New Zealand public once the confidential information was in the public domain.
3. The integrity of the court process, particularly as related to the confidentiality of discovery, was an issue between the plaintiffs' counsel and the Army, and not between the Army and the television company.
4. Any limitation on TVNZ's freedom of expression rights, and those of the New Zealand public to receive information, could not be demonstrably justified bearing in mind that the report had been published on the Internet.
5. There is no difference in principle between confidential information making its way into the public domain by way of breach of contract and as a result of contempt.

High Court Decision

After considering many of the leading authorities in both England and New Zealand on the importance of freedom of expression, breach of confidence, contempt, and publication on the Internet, Justice Wild held in TVNZ's favor principally for the following reasons:

1. There was a certain futility and pointlessness enjoining TVNZ from using the report when it was already in the public domain.

2. The court could not be blind to the realities of the situation. The court does not uphold the administration of justice and, in particular, the integrity of its discovery process, by making "futile" and "stupid" orders.
3. Discovery obligations involve duties of confidence, and the difference between an undertaking and a court order was not a point of distinction as submitted by NZDF.
4. TVNZ should not be subject to any greater restriction than other branches of the media (although they also had been put on notice that to publish the report would be in contempt of court).

There was a certain futility and pointlessness enjoining TVNZ from using the report when it was already in the public domain.

The High Court referred in particular to the distinction between a party in contempt and third parties made by Lord Nicholls in the UK House of Lords decision in *Attorney-General v Punch Ltd*[2003] 1 All ER 289 at 301.

“¶ 55 Disclosure of information which is already fully and clearly in the public domain will not normally constitute contempt of court in the type of case now under discussion. Contempt lies in knowingly subverting the court's purpose in making its interlocutory order by doing acts having some significant and adverse effect on the administration of justice in the action in which the order is made. If the third party publishes information which is already fully and clearly in the public domain by reason of the acts of others, then the third party's act of publication does not have this effect.”

Although Justice Wild referred to the plaintiffs' counsel's action placing the court in a dilemma, the end result is a pragmatic and common sense one. The integrity of the court process is protected by NZDF's contempt proceedings against the counsel involved. The administration of justice is not advanced by making orders that would make the courts look stupid. Freedom of expression rights are enhanced.

William Akel is a partner at Simpson Grierson in Auckland, New Zealand and represented Television New Zealand in this matter.

“Storms Across the Border” Conference Examines Canadian Media Law Landscape & Risks for U.S. Publishers

On May 12-13, 2005, MLRC members and Canadian media lawyers met in Toronto for MLRC and Ad IDEM’s (Advocates in Defense of Expression in the Media) “Storms Across the Border” Conference.

The Conference was planned by John Borger, Faegre & Benson (co-chair); Brian Rogers (co-chair); Susan Grogan Faller, Frost Brown Todd LLP; Daniel Henry, CBC; Bruce E.H. Johnson, Davis Wright Tremaine LLP, Seattle; Thomas Kelley, Faegre & Benson; James Stewart, Butzel Long; and Kurt Wimmer, Covington & Burling. It was presented with the support of Media/Professional Insurance and First Media Insurance.

MLRC member and Ad IDEM co-founder Brian Rogers and MLRC Executive Director Sandy Baron welcomed over 60 lawyers from Canada and the US for a discussion of recent developments and trends in the law to better assess the risks of cross-border publishing in the new global media environment.

Jurisdiction Developments

Paul Schabas, Blake Cassels & Graydon in Toronto and Bob Lystad, Baker & Hostetler, Washington, D.C., led the discussion on jurisdiction developments. The session focused on the impact of the decision in *Bangoura v. Washington Post* where the trial court justified taking jurisdiction in part because the *Post* is a prominent publication that ought to be prepared to defend itself any where in the world.

An appeal in the case was heard in February Paul Schabas, who represents the *Post*, and Brian Rogers, who together with Kurt Wimmer, Covington & Burling, coordinated an amicus brief with over 50 signatories, reported that the Court of Appeal was receptive to the defense arguments that the lower court incorrectly applied Canada’s “real and substantial interest test” in asserting jurisdiction.

Bob Lystad described the U.S. approach illustrated by the Fourth Circuit’s decision in *Young v. New Haven Advocate* and related cases and the focus on whether the defendant’s publication “targeted” the forum jurisdiction.

The discussion turned to the question of how lawyers

should advise their clients. One cautious approach would be for U.S. newspapers and magazines to remove from their website editions contentious articles concerning Canadian residents. US publishers are generally not censoring their web content. Some US publishers on the border are simply assuming that they will be sued in Canada.

Several recent cases were discussed. The NY Post is currently defending an action in Vancouver, Canada. The newspaper was sued by a former NHL General Manager who was described by a sports columnist as a “bully.”

Several years ago the Detroit Press was sued in Canada by an NHL player. The newspaper then sued in the U.S. for a declaratory judgment that the Canadian action would be unenforceable in the U.S. The U.S. court never reached the merits because plaintiff ended up dropping the case, apparently to avoid litigating both in Canada and the U.S.

This mirrors the approach taken by Dow Jones and Yahoo! in recent cases – although U.S. courts in both cases declined to enjoin the foreign actions for jurisdictional reasons.

This issue has come up again in the case of U.S. author Rachel Ehrenfeld who defaulted in a UK libel action brought against her by a Saudi citizen. Ehrenfeld has now brought an action in New York seeking a declaratory judgment that the English award is unenforceable in the U.S.

The delegates discussed the merits and practicality of responding to foreign libel actions by defaulting.

Libel Developments

Jim Stewart, Butzel Long, Ann Arbor, Michigan, and Fred Kozak, Reynolds Mirth Richards & Farmer LLP, Edmonton, Alberta, led the discussion on libel developments.

They contrasted the result of the mock jury exercise that was held last year at the MLRC/NAA/NAB Libel Conference with an exercise held at Ad IDEM’s annual conference. Both exercises used the same news article, but the presumption of falsity under Canadian law led to a verdict for plaintiff in that exercise.

Both juries thought the mock news article was unfair to plaintiff but U.S. jurors concluded they could not do anything about it under the instructions they received. Al-

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“Storms Across the Border” Conference Examines Canadian Media Law Landscape & Risks for U.S. Publishers

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though under U.S. law, plaintiffs’ bear the burden of proving falsity, several U.S. lawyers noted that in cases that go to trial, jurors might ignore the burden and find for plaintiff.

The contrasting role of summary judgment as a defense was discussed. In Canadian practice summary judgment is not the robust defense it is in the U.S. Instead it is limited to defenses like statute of limitations or absolute privilege.

Although the defense of qualified privilege was rejected in Canada in *Hill v. Scientology*, Canadian lawyers opined that the defense could still be argued in Canada on the right facts.

The session also touched on the problem in Canadian libel litigation of having to plead particular facts to support a defense at the earliest stage of the case – and how this can limit a media defendant’s efforts to mount a defense of truth or privilege.

Lawyers from Quebec noted that province’s separate law under which a media defendant can be liable for truthful publications. Quebec applies a fault standard to all claims under which truthful publication that do not meet “professional standards” can be actionable.

Reporting on Courts

Daniel Burnett, Owen Bird, Vancouver, British Columbia and Herschel Fink, Honigman Miller Schwartz & Cohn, Detroit, Michigan, led the discussion on the issues and problems that arise in reporting on Canadian court cases under the country’s law of contempt.

Under Canadian law the publication of material that *might* influence a jury can be a contempt of court and therefore certain information on trials can be subject to publication bans. In Canada jurors are not sequestered. And it was noted that “Michael Jackson-style” trial coverage would violate Canadian law.

Several recent high profile murder trials illustrated these difficulties. In one case, a U.S. newspaper containing trial coverage was blocked from entry into Canada and Canadian cablecasters blocked feeds from U.S. stations. A Michigan newspaper was worried that its papers would not be allowed into Canada – and the pa-

per later closed its Canadian advertising office. And in an even more unusual response, a Canadian library far away from the location of the criminal trial nevertheless censored articles from U.S. papers for fear of violating the contempt rules.

This was contrasted with the U.S. approach of greater *voir dire*, sequestration and change of venue – and well as self imposed restraints on reporting sensitive information. The ban on publishing documents mistakenly released in the Kobe Bryant case was noted as a rare exception to the rule against prior restraints in the U.S.

Delegates also discussed the problem of how the rules of contempt are to be applied to publication on the Internet. And it was debated whether the Canadian rules allowed reporters access to more information than is available in the U.S. – albeit under restrictions on when they could report the information.

Broadcast Regulations

Greg Schmidt, LIN Television; Jack Goodman, Wilmer Cutler & Pickering, and Daniel Henry, Canadian Broadcasting Corporation led the Broadcast Regulations session. The U.S. lawyers began by discussing the current climate surrounding indecency complaints against broadcasters – from Janet Jackson to Olympics ceremony controversy – and how such complaints are being used by the FCC in license renewals to coerce payments of fines.

This was contrasted to the more permissive Canadian standards with respect to indecency. But it was noted that Canadian regulations have instead been applied against Canadian broadcasters for statements considered offensive to minorities and women. For example, radio broadcasts by Howard Stern that insulted French Canadians contributed to Canadian broadcaster dropping his show – although U.S. signals make the show available in Canada.

Canadian regulators also refused to renew the license of a radio broadcaster (CHOI) for a “shock jock’s” offensive statements about minorities – even where some comments were apparently true. The regulators cited the “impact” of the statements on minorities.

The session also considered recent privacy law developments in Canada, including the law in Quebec which provides decidedly more protection than other provinces.

DC Circuit Court Vacates FCC's Broadcast Flag Rules

By Kathleen Kirby and Jake Riehm

A unanimous three-judge panel of the United States Court of Appeals for the District of Columbia Circuit has thrown out the FCC's broadcast flag rules on the grounds that the agency has no authority to adopt such rules. *American Library Ass'n, et al. v. FCC*, No 04-1037, 2005 WL (D.C. Cir. May 6, 2005) (Edwards, Sentelle, Rogers, JJ.).

In a strongly worded opinion written by Judge Edwards, the court chastised the Commission repeatedly for overstepping its jurisdiction, noting that in 70 years, "the FCC [has] never before asserted such sweeping authority." *Id.*, slip op. at 2.

Background

The Commission adopted the broadcast flag regulations in 2003 in response to concerns from content owners and television broadcasters that, in the absence of a mechanism to protect digital television ("DTV") broadcast content from widespread unauthorized redistribution via the Internet, high-value content such as movies or sports programming would migrate from broadcast television to the more secure distribution platforms provided by cable and satellite. See *Digital Broadcast Content Protection*, 18 FCC Rcd. 23550 (2003) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-273A1.pdf).

In simple terms, the broadcast flag is a piece of digital code that can be embedded into a digital broadcasting stream for the purpose of preventing reception equipment from indiscriminately redistributing that content over the Internet.

Under the FCC's broadcast flag rules, devices capable of receiving broadcast DTV signals manufactured on or after July 1, 2005 are required to recognize and give effect to the broadcast flag. Thus, under the broadcast flag regime, if a broadcaster chooses to embed the broadcast flag in a given DTV broadcast, DTV receivers must detect the presence of the flag in the broadcast stream and prevent the redistribution of that content.

The FCC's broadcast flag rules were challenged by a coalition of various organizations representing libraries and consumer interest groups. These parties raised three arguments to overturn the rules: that the Commission acted without statutory authority, that the broadcast flag regime

conflicts impermissibly with copyright law, and that the FCC's decision was arbitrary and capricious. The court, however, only needed to consider the first argument to strike down the rules.

D.C. Circuit Decision

In adopting the broadcast flag rules, the Commission did not identify any statutory provision giving it specific authority to do so, but instead relied exclusively on its "ancillary jurisdiction" to regulate "communication by wire and radio" under Title I of the Communications Act of 1934.

The court noted, however, that the FCC may only exercise its ancillary jurisdiction if "(1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." *American Library Ass'n, et al. v. FCC*, supra n. 1, slip op. at 4.

After examining Title I of the Act, the court determined that Congress gave the FCC jurisdiction to regulate devices used for the receipt of "wire or radio communication" (*i.e.*, television receivers) only when those devices are actually in the process of receiving such communication (*i.e.*, broadcast content).

Because the FCC's broadcast flag rules seek to regulate such devices *after* the process of receiving the broadcast content is complete, the court held that the rules are not within the Commission's Title I jurisdiction and, therefore, that the agency acted without any statutory authority. Accordingly, the court reversed and vacated the FCC's broadcast flag rules insofar as they would have required television reception devices manufactured on or after July 1, 2005 to recognize and give effect to the broadcast flag.

It is important to note that the court vacated the broadcast flag rules on *jurisdictional* grounds. The court did not address the *merits* of the broadcast flag regime. In response to the court's decision, content owners have already approached Congress to ask for legislation giving the FCC specific authority to impose broadcast flag regulations.

Kathleen Kirby is Counsel and Jake Riehm an associate at Wiley Rein & Fielding, LLP in Washington, D.C.

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**THE TWENTY-FIRST CENTURY ANTI-INDECENCY CRUSADES:
TAKING UP GOVERNMENT SWORDS AGAINST
RADIO, TELEVISION AND SUBSCRIPTION SERVICES**

**PROTECTED SPEECH IN THE DEEP FREEZE:
FROM CAUTION AND RESTRAINT TO REGULATORY EXCESS**

By Steven A. Lerman and Jean W. Benz

“[C]ommencing in 2003, the FCC’s approach to indecency enforcement metamorphosized from one grounded in judiciousness and restraint to one of zealous intrusion into content matters utilizing a significantly expanded, confusing and obscure indecency definition, coupled with an erosion of procedural safeguards.”

**STEMMING THE TIDE:
CAN THE FCC’S ANTI-INDECENCY CRUSADE BE EXTENDED TO
CABLE TELEVISION AND SATELLITE RADIO**

By Robert Corn-Revere

“The ability to regulate “indecent” speech is a limited constitutional exception, not the general rule, and the Supreme Court has invalidated efforts to restrict indecency in virtually all other media.... In these circumstances, any effort to extend indecency regulation to cable television or other non-broadcast media would be almost certain to fail a constitutional challenge.”

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The Family Entertainment and Copyright Act – “Sanitizing Hollywood”

By Kent Raygor

Tired of all that sex, violence, nudity, blasphemy, and profanity in your home video fare? Congress has stepped into the breach to give you a legislative remote control so you can fast-forward through all those naughty bits.

On April 27, 2005, President Bush signed into law the Family Entertainment and Copyright Act of 2005, which imposes criminal and civil liability for certain uses of copyrighted works.

The text of the Act can be found at <http://www.copyright.gov/title17/>. The sections of primary concern are found in Titles I (“Artists’ Rights and Theft Protection Act”) and II (“Family Movie Act”).

The Family Movie Act

Title II of the Act embodies the Family Movie Act, which was tacked on late in the day because the proponents of what may now be considered a State-sanctioned

copyright program knew that the film studios, who opposed any legislation that might allow someone to view their work in a version other than the one they had authorized, wanted something close to their hearts, namely stiff criminal penalties for film piracy. In order to get those penalties, the studios tacitly agreed to accept the Family Movie Act.

Two types of practices are at issue: (1) technology that filters material someone deems offensive by skipping over or muting it without fixing the changed content in a new copy; and (2) businesses that alter tapes and discs to remove such material and then sell those altered copies.

The first is practiced by companies such as ClearPlay (www.clearplay.com), which sells DVD players fitted with its filtering software, and the second by companies such as CleanFlicks (www.cleanflicks.com), CleanFilms (www.cleanfilms.com), and Family Flix (www.familyflix.com), all four of which, incidentally, are located in Utah.

The Act protects the filtering technology used by ClearPlay, and leaves the second practice open to attack under the copyright and trademark laws.

Film Piracy

Title I makes it a felony to use a camcorder to tape a film in a theater, and imposes prison terms of up to six years. It also imposes criminal sanctions for willful copyright infringement if the act of infringement was (a) for commercial advantage or private financial gain, (b) by reproducing or distributing during any 180-day period copies of copyrighted works with a total value of more than \$1,000, or (c) by making a work being prepared for commercial

distribution available on a computer network accessible to the public if the infringer knew or should have known that the work was intended for commercial distribution.

Subsection (c) applies to computer programs, musical works, motion pictures and other audiovisual works, and sound recordings if at the time of the

unauthorized distribution (a) the copyright owner had a reasonable expectation of commercial distribution, and (b) the copies had not yet been commercially distributed. It also applies to motion pictures if at the time of the unauthorized distribution the motion picture has been exhibited in a theater but has not yet been made available in a home video format for sale to the US general public.

Title I also imposes civil liability for copyright infringement of a work being prepared for commercial distribution but that has not yet been published. New regulations will now allow the preregistration of such a work, and the Act then allows a civil action for republication infringement.

Title II contains the so-called “censorship” blessing. It exempts from copyright and trademark infringement liability

the making imperceptible, by or at the direction of a member of a private household, of limited portions of audio or video content of a motion picture, during a performance in or transmitted to that household for

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The Family Entertainment and Copyright Act

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private home viewing, from an authorized copy of the motion picture, or the creation or provision of a computer program or other technology that enables such making imperceptible and that is designed and marketed to be used, at the direction of a member of a private household, for such making imperceptible, if no fixed copy of the altered version of the motion picture is created by such computer program or other technology.

In short, it exempts creators and users of filtering technology that mutes or skips content from copyright and trademark liability, but only for private and in-home use, for the household of the purchasing consumer only, and only where no fixed copy of the alternate version is created.

The somewhat awkward “making imperceptible” phrase was used to make clear that the Act does not provide a shield to those who make fixed copies of the altered works and instead is giving a pass only to those who filter out, mute, or fast-forward past the offensive material.

In a further indication that Congress was responding to the studios’ concerns, the Act provides that “making imperceptible” does not include the addition of audio or video content that is performed or displayed over or in place of existing content in a motion picture.

What About Altered Films?

The Act leaves unresolved the dispute between Hollywood and the companies who edit and then sell or rent altered films. The Hollywood side argues that the editing and fixing of altered works in new copies violates the artistic expression of the director without his or her authorization and deprives the studios of revenues for perhaps making and selling such edited copies themselves.

The editing companies respond that, first, they do not deprive the studios of revenues because they buy an original DVD or tape before they edit it, and, second, they are doing no more than what the studios themselves allow with showing edited films on airplanes.

The studios respond that the airplane type of editing is done with their approval and in an environment where the films are shown to people locked into seats where they do not have the choice of turning off what they do not want to see, which is what they argue should be done with any of the disputed works – if a household does not want to see a film as the director intended it to be seen, then turn off the TV, change the channel, or do not rent it.

The issue of who gets to decide what message is delivered by a director's work of art is of great concern to the studios because of the simple fact that for every published work there are those who will take exception to one or more statements or images in it, and the Family Movie Act perhaps puts them

on a slippery slope toward more draconian State-sponsored censorship.

It is not hard to imagine segments of the population that might want anyone of a minority race edited out, others who might be offended at references to religion, others who

will want images of animals treated like pets deleted, others who will want images of smoking removed.

Even among the Utah editing companies identified above, standards diverge. Family Flix, for example, probably has the most comprehensive editing guidelines. Apart from the general prohibitions against sex, profanity and violence, Family Flix also edits out paintings and sculptures that show nudity, groping, passionate kissing between unwed couples, inappropriate dress, bodily functions, gross jokes, distasteful animal behavior, demoralizing humor, inappropriate references to “Deity (i.e. Oh my G**),” and “non-traditional family values,” described as homosexuality, lesbianism, perversions, and cohabitation. See <http://www.familyflix.net/editing.html>.

The Family Movie Act can best be viewed as analogous to the household finger on the remote mute and fast-forward buttons, and leaves the broader battle involving third-party editing of films to the courts – at least for the time being.

Now, I wonder if ClearPlay can get me a filter that allows me to see only the naughty bits?

Kent R. Raygor is a partner at Sheppard Mullin Richter & Hampton LLP in Los Angeles.

***The Act leaves unresolved
the dispute between
Hollywood and the
companies who edit and
then sell or rent altered films.***

LEGISLATIVE UPDATE

Reporters' Privilege and Access Bills

By Kevin M. Goldberg

Many of the legislative updates in 2005 have focused on three bills: the Free Flow of Information Act, the Open Government Act and the Faster FOIA Act. However, the updates have been largely repetitive in nature, as the bills were introduced and explained, but little concrete action has occurred requiring meaningful updates.

Therefore, this month's update will offer just a little on these three bills and introduce others which would impact specific government records – usually exempting them from access through FOIA – that are not as highly publicized.

Free Flow of Information Act (HR 581 and S 340)

- On February 2, 2005, Rep. Mike Pence (R-IN) introduced the “Free Flow of Information Act” (HR 581), which is largely based on existing Department of Justice guidelines for issuing subpoenas to members of the press. On February 9, 2005 Senator Richard Lugar (R-IN) introduced the same bill in the Senate as S 340.
- A hearing was scheduled to be held in the House Judiciary Committee's Subcommittee on Courts, Internet, and Intellectual Property on May 12, 2005. However, that hearing has now been canceled. The Department of Justice is currently reviewing the bill and will offer comment in the near future, which may jump start the legislative process.

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

- The Open Government Act was introduced by Senators John Cornyn (R-TX) and Patrick Leahy (D-VT) as S 394 on February 16, 2005; Rep. Lamar Smith (R-TX) introduced the bill as HR 867 in the House on the same day.
- Among the changes proposed in this bill are:
 - A broader definition of the “news media” for purposes of fee waivers
 - An increase in the circumstances where “fee shifting” would occur to award attorney's fees to a litigant who must go to court to obtain documents from a federal agency

- Creation of an annual report to track the use of the FOIA exemption for critical infrastructure information that was created in the Homeland Security Act of 2002
- Stricter enforcement of the 20 day deadline by which agencies must respond to a FOIA request and the penalties for non-compliance
- Maintenance of accessibility of records that have been given to private contractors for storage and maintenance
- The creation of a “FOIA Ombudsman” within a new Office of Government Information Services to oversee FOIA
- The subcommittee on Government Management, Finance and Accountability of the House Government Reform Committee held a hearing on the topic of FOIA generally, through this bill and the FASTER FOIA Act (discussed below) on May 11, 2005.

Faster FOIA Act

- Senators Cornyn and Leahy also introduced the “Faster FOIA” Act as S 589 on March 10, 2005. This bill is intended to support the Open Government Act by establishing an advisory commission on Freedom of Information Act processing delays. The bill was introduced in the House of Representatives on April 6, 2005 by Reps. Brad Sherman (D-CA) and Lamar Smith (R-TX). It was given bill number HR 1620.
- The May 11, 2005 hearing touched on the importance of the Faster FOIA Act to proper FOIA functioning.

National Farm Animal Identification and Records Act (HR 1254)

- This was introduced March 10, 2005 by Rep. Peterson (D-MN). It proposes an amendment to the Animal Health Protection Act to require the establishment of an electronic nationwide livestock identification system, to prevent the unauthorized release of information collected under the system, to

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promote an objective review of Department of Agriculture responses to livestock disease outbreak.

- More specifically, this bill would exempt information obtained through the livestock identification system from disclosure under FOIA, with certain exceptions. Disclosure would be allowed if: (1) the information involved livestock threatened by disease or pest, or (2) the person obtaining the information needed the information for reasons consistent with public health and public safety purposes. Further, disclosure would be *required* if the requester was (1) the person owning or controlling the livestock, (2) the attorney general, if the request was made for the purpose of law enforcement; (3) the secretary of homeland security, if the request was made for the purpose of national security; (4) a court of competent jurisdiction; or (5) the government of a foreign country, if the request was necessary to trace livestock threatened by disease or pest.
- Despite having been referred to both the Government Reform and Agriculture Committees in the 108th Congress, it has only been referred to the Agriculture Committee this time around.

Fairness in Asbestos Injury Resolution Act of 2005 (HR 1360 and S 852)

- Introduced on March 17, 2005 by Rep. Kirk (R-IL) in the House as HR 1360 and on April 19, 2005 as S 852 in the Senate by Sen. Specter (R-PA), this 100-plus page bill has the following 2 paragraphs neatly tucked into it:
 - IN GENERAL.-Section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act) shall apply to the Office of Asbestos Disease Compensation and the Asbestos Insurers Commission.
 - CONFIDENTIALITY.-Any person may designate any record submitted under this section as a confidential commercial or financial record for purposes of section 552 of title 5, United States Code. The Administrator and the Chairman of the Asbestos Insurers Commission

shall adopt procedures for designating such records as confidential. Information on reserves and asbestos-related liabilities submitted by any participant for the purpose of the allocation of payments under subtitles A and B of title II shall be deemed to be confidential financial records.

- Substitute language has been offered to Senate Judiciary Committee staff but it is unclear whether an amendment will be offered and accepted.

Medical Examiner Photos (HR 1513)

- This was introduced on April 6, 2005 by Rep. Freylinghuysen (R-NJ). Referred to the Government Reform Committee, this actually creates a 10th exemption to FOIA that covers:

copies, reproductions, or facsimiles of any photograph, negative, or print, including instant photographs and videotapes, of the body, or any portion of the body, of a deceased person, taken by or for a medical examiner at the scene of the person's death or in the course of a post mortem examination or autopsy of the person made by or caused to be made by a medical examiner

Anti-Terrorism and Port Security Act of 2005 (HR 173)

- This bill continues the long tradition of simply exempting information from public access without any concrete proof that the information's release would endanger national security. It was introduced on January 4, 2005 by Rep. Millender-McDonald (D-CA). It has been referred to the Homeland Security, Judiciary, Transportation and Infrastructure, and Ways and Means Committees.
- The bill places considerable power in the "Captain of the Port" of a US Seaport, who is the person designated as such by the Commandant of the Coast Guard for the given seaport. That captain has primary authority for coordinating security which, with regard to access to information, includes securing sensitive information as follows:

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- Not later than 90 days after the date of enactment of this Act, the Captain-of-the-Port of each United States seaport shall secure and protect all sensitive information, including information that is currently available to the public, related to the seaport.

- In this section, the term “sensitive information” means –
 - (1) maps of the seaport;
 - (2) blueprints of structures located within the seaport; and
 - (3) any other information related to the security of the seaport that the Captain-of-the-Port determines is appropriate to secure and protect.

For more information on any legislative or executive branch matters, please feel free to contact the MLRC Legislative Committee Chairman, Kevin M. Goldberg of Cohn and Marks LLP at (202) 452-4840 or Kevin. Goldberg@cohnmarks.com.

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Proposed Rule to Allow Citations to Unpublished Opinions

On April 18, 2005, the Advisory Committee on Appellate Rules (“Committee”) approved proposed Federal Rule of Appellate Procedure 32.1, which would allow for citation to unpublished opinions in the U.S. Courts of Appeals – an estimated 80% of the opinions issued by courts of appeals in recent years.

According to a study by the Federal Judicial Center, under current practice, courts in the Second, Seventh, Ninth, and Federal Circuits forbid citations to their unpublished opinions in unrelated cases; the First, Fourth, Sixth, Eighth, Tenth, and Eleventh Circuits discourage citations to unpublished opinions but will allow it when there is no published opinion on point; and the Third, Fifth, and District of Columbia Circuits “more freely” allow citations to such opinions.

The text of Proposed Rule 32.1, Citing Judicial Dispositions, as approved by the Committee reads:

- a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been designated as “unpublished,” “not for publication,” “non-precedential,” “not precedent,” or the like.
- b) Copies Required. If a party cites a federal judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database, the party must file and serve a copy of that opinion, order, judgment, or disposition with the brief or other paper in which it is cited.

The Committee noted that although the original justification for the no-citation rule – the unavailability of such opinions except to the “large institutional litigants who could afford to collect and organize” them – was no longer relevant with the advent of services such as Lexis and Westlaw.

The Committee outlined the three main arguments in favor of the no citation rule.

1. That there is nothing of value in unpublished opinions, since they merely inform the parties and lower courts why the lower courts did or did not err and do not create, expand, narrow, or clarify the law;
2. that such opinions are necessary for busy courts in

that they take less time to draft than published opinions; and

3. that abolishing the no-citation rule will increase the costs of legal representation by creating a larger body of case law that attorneys will have to research and make case law more difficult to understand.

Although the proposed rule was initially approved by the Committee in April, 2004, the Standing Committee on Rules of Practice and Procedure returned the rule to the Committee for further review.

The Committee subsequently commissioned the Federal Judicial Center to conduct an empirical study to address the argument raised by supporters of the no citation rule, which surveyed all 257 sitting circuit judges; a sample of federal appellate attorneys; and 50 random case files from each circuit.

In reviewing the preliminary report synthesizing the results of the survey as well as research completed by the Administrative Office, the Committee concluded that the studies “at the very least, demonstrated that the arguments against Rule 32.1 were ‘not proven.’ ... Some Committee members – including one opponent of Rule 32.1 – went further and said that the studies in some respects actually refuted those arguments.”

Following discussion, the proposed rule as amended was approved. The proposed new rule will return to the Standing Committee, with a recommendation it be approved and conveyed to the Judicial Conference.

A preliminary report of The Federal Judicial Center’s study is available online at: [http://www.fjc.gov/public/pdf.nsf/lookup/Citatio1.pdf/\\$File/Citatio1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/Citatio1.pdf/$File/Citatio1.pdf).

Any developments you think other MLRC members should know about?

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