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MEDIALAWLETTER

Reporting Developments Through May 31, 2006

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The Fastest Possible Answers in an Emergency

An Anxiety Reducing Project of the MLRC Newsgathering Committee

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California's Shield Law Covers Websites

Court Quashes Subpoenas in Trade Secrets Litigation

A California appeals court this month ruled that websites that publish news and information are clearly covered by the state's reporter's shield law, as well as a First Amendment-based privilege to protect confidential sources. *O'Grady v. Superior Court*, No. H028579, 2006 WL 1452685 (Cal. App. May 26, 2006) (Rushing, Premo, Elia, JJ.).

In a lengthy decision, the Court reasoned that there is no basis to distinguish such web publications from traditional hard copy publications for purposes of protecting confidential sources. Instead, the key factor for both the statutory and First Amendment privilege is simply whether websites engage in the gathering and dissemination of news, broadly defined.

The Court also gave a ringing endorsement to the primacy of free press rights over statutory trade secret rights, the issue in the underlying litigation.

Background

Apple filed suit in December 2004 against numerous John Doe defendants for misappropriation of trade secrets after information about a new Apple digital music recording device was published on several websites that report and discuss Apple's computer and software developments. In an effort to identify the source of the disclosures, Apple issued subpoenas to the publishers of the websites where the information appeared. These included "O'Grady's PowerPage," "Apple Insider" and "Mac News Network." Apple also issued a subpoena to the e-mail service provider of one of the websites to determine the source of the leak.

The web publishers moved for a protective order to prevent discovery on two separate grounds. First, they argued that they were covered by California's shield law, as well as a First Amendment-based privilege to protect the identity of confidential news sources. Second, they argued that the subpoena to the Internet service provider violated the Stored Communications Act, 18 U.S.C. § 2702(a) (1).

Last year a California trial court denied the web publishers' motion. *See Apple v. Doe*, No. 1-04-CV-032178, 2005 WL 578641 (Cal. Super. Mar. 11, 2005) (Kleinberg, J.). The court did not directly address whether the web publishers were "journalists" for purposes of the privilege, finding the issue not ripe for adjudication. Instead, the court essentially concluded that no privilege applies in trade secrets litigation because there is no public interest in publishing stolen information. And even assuming the publishers were journalists, the trial court stated "this is not the equivalent of a free pass."

Appeals Court Decision

The Court of Appeals reversed on every point, handing a complete victory to the web publishers. The Court first explained why it granted the web publishers' motion for an extraordinary interlocutory appeal. While noting that interlocutory review of discovery decisions should be rare, the court noted that:

> This case raises several novel and important issues affecting the rights of web publishers to resist discovery of unpublished material, and the showing required of an employer who seeks to compel a newsgatherer to identify employees alleged by the employer to have wrongfully disclosed its trade secrets. In part because of these issues and their implications for the privacy of

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California's Shield Law Covers Websites

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> internet communications, the First Amendment status of internet news sites, and the protection of trade secrets, the case has generated widespread interest within the technology sector, the digital information industry, internet content providers, and web and email users. The case also involves an attempt to undermine a claimed constitutional privilege, threatening a harm for which petitioners, if entitled to the privilege, have no adequate remedy at law.

Stored Communications Act

On the merits, the appellate court first considered the more arcane question of whether the Stored Communications Act ("SCA") prohibited the subpoena to the Internet service provider. The SCA provides in relevant part that except under certain circumstances:

> a person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service ....

18 U.S.C. § 2702(a)(1).

Among the circumstances where disclosure is authorized are those that are incidental to the provision of the intended service; incidental to the protection of the rights or property of the service provider; made with the consent of a party to the communication or, in some cases, the consent of the subscriber; related to child abuse; made to public agents or entities under certain conditions; related to authorized wiretaps; or made in compliance with certain criminal or administrative subpoenas issued in compliance with federal procedures.

Apple argued that a civil discovery subpoena was within the SCA's exception for disclosures that "may be necessarily incident ... to the protection of the rights or property of the provider of that service" because if the ISP refused to comply it could be subject to contempt. The appeals court dismissed this argument as entirely circular.

Apple also argued that the SCA includes an implicit exception for civil discovery subpoenas. The appeals court, after a lengthy review of the statute, declined to create such an exception. Congress, the court reasoned, could reasonably have concluded that civil discovery of stored messages from ISPs without the consent of subscribers would harm "digital media and their users."

> Prohibiting such discovery imposes no new burden on litigants, but shields these modes of communication from encroachments that threaten to impair their utility and discourage their development. The denial of discovery here makes Apple no worse off than it would be if an employee had printed the presentation file onto paper, placed it in an envelope, and handed it to petitioners.

Finally, on this issue, the court distinguished the instant case from John Doe lawsuits in which civil litigants have successfully subpoenaed ISPs to learn the identities of subscribers who posted anonymous defamatory messages on the Internet. Here the subpoenas do not concern an anonymous poster, "but the stored private communications of known persons who openly posted news reports based on information from confidential sources."

We can think of no workable test or principle that would distinguish "legitimate" from "illegitimate" news.

Shield Law

Addressing the reporters privilege issue, the court began by "declin[ing] the implicit invitation to embroil ourselves in questions of what constitutes legitimate journalism."

> The shield law is intended to protect the gathering and dissemination of news, and that is what petitioners did here. We can think of no workable test or principle that would distinguish "legitimate" from "illegitimate" news. Any attempt by courts to draw such a distinction would imperil a fundamental purpose of the First Amendment ....

Apple had argued that the websites merely republished "verbatim copies" of internal information and exercised "no editorial oversight at all." But the court welcomed the publication of source material.

> Courts ought not to cling too fiercely to traditional preconceptions, especially when they may operate to discourage the seemingly salutary practice of provid-

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California's Shield Law Covers Websites

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ing readers with source materials rather than subjecting them to the editors' own "spin" on a story.

The Court also dismissed Apple's argument that "anyone with a computer and Internet access could claim protection under the California Shield and conceal his own misconduct." This argument, the Court noted, rests on the "dismissive characterization" of the web publishers as simply "posting information on a website." The web publishers' conduct, the Court reasoned, was substantially different from that of a person who might occasionally "post" a comment to a website – activity that would not constitute newsgathering or reporting.

The Court next examined whether the web publishers fell within the scope of the shield law as "a publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication."

The Court found "no reason to doubt" that the operators of the website were "publishers" for purposes of the statute. And after a lengthy examination of the history and language of the statute, the Court held the web publishers fit within the definitions of "newspaper, magazine, or other periodical publication." The Court found the web publishers' sites "highly analogous" to printed publications, the only difference being that they are read on a screen, rather than from a hard copy.

It is the statutory quasi-property right that must give way, not the deeply rooted constitutional right to share and acquire information."

Finally, to the extent there are any ambiguities in the definitions of newspaper, magazines or periodical publications within the statute, the Court was guided by the "core purpose" of the shield law – to protect the gathering and dissemination of news to the public. Thus the web publishers were covered by the statute, notwithstanding the format of their publications.

Constitutional Privilege

The web publishers were similarly protected under a First Amendment-based privilege.

> [W]e can see no sustainable basis to distinguish petitioners from the reporters, editors, and publishers who provide news to the public through traditional print and broadcast media. It is established without contradiction that they gather, select, and prepare, for purposes of publication to a mass audience, information about current events of interest and concern to that audience.

Apple failed to overcome this separate constitutional privilege because it did not adequately pursue other means to identify the source who leaked Apple's trade secrets. Among other things, the Court noted that Apple did not fully exploit "internal computer forensics" to investigate the source of the leak.

Finally, the Court addressed the issue of First Amendment protections in the context of trade secret litigation.

> Apple first contends that there is and can be no public interest in the disclosures here because "the public has no right to know a company's trade secrets." Surely this statement cannot stand as a categorical proposition. As recent history illustrates, business entities may adopt secret practices that threaten not only their own survival and the investments of their shareholders but the welfare of a whole industry, sector, or community. Labeling such matters "confidential" and "proprietary" cannot drain them of compelling public interest. Timely disclosure might avert the infliction of unmeasured harm on many thousands of individuals, following in the noblest traditions, and serving the highest functions, of a free and vigilant press. It therefore cannot be declared that publication of "trade secrets" is ipso facto outside the sphere of matters appropriately deemed of "great public importance."

"In the abstract," the Court concluded, "it seems plain that where both [interests] cannot be accommodated, it is the statutory quasi-property right that must give way, not the deeply rooted constitutional right to share and acquire information."

Petitioners were represented by Richard R. Wiebe, Berman DeValerio, Tomlinson Zisko, Thomas E. Moore, III, and Kurt B. Opsahl and Kevin S. Bankston of the Electronic Frontier Foundation. Apple Computer was represented by George A. Riley, David R. Eberhart, Dhaivat H. Shah, James A. Bowman, Ian N. Ramage of O'Melveny & Myers.

D.C. Court Rejects Press's First Amendment, Common Law Privilege Claims in Libby Criminal Case

At press time, Judge Reggie B. Walton, the presiding judge in the criminal case against former White House official Scooter Libby for perjury, false statements and obstruction of justice, ruled that no First Amendment or common law privilege exists to protect reporters from having to disclose to Libby information that is relevant and admissible at trial. *U.S. v. Libby*, 2006 WL 1453084 (D.D.C. May 26, 2006).

The ruling came on motions to quash from NBC News, NBC reporter Andrea Mitchell, Time, Inc., reporter Matthew Cooper, The New York Times, and former Times' reporter Judith Miller. All had been subpoenaed by Libby's defense lawyers to produce documents concerning their conversations with Libby and other documents about conversations concerning former Ambassador Joseph Wilson and/or his wife, Valerie Plame.

Scooter Libby

The court narrowed most of the requests on relevance and admissibility grounds under Federal Rule of Criminal Procedure Rule 17(c) – but found that some information from Miller, Cooper and Tim Russert would be discoverable since they "did not simply report on alleged criminal activity, but rather they were personally involved in conversations with the defendant that form the predicate for several charges in the indictment."

Rule 17 (c) provides:

1) In General. A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

2) Quashing or Modifying the Subpoena. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

In contrast to civil rules which permit discovery of documents or other materials which could lead to admissible evidence, Rule 17(c) is narrowly limited to discovery of relevant and admissible evidence. *See, e.g., Nixon v. United States*, 418 U.S. 683, 698-99 (1974), U.S. v. Cuthbertson, 630 F.2d 139, 146 (3d Cir.1980) ("Courts must be careful that rule 17(c) is not turned into a broad discovery device, thereby undercutting the strict limitation of discovery in criminal cases").

The movants provided the court with responsive documents so that the court could review them in camera. And Judge Walton carefully worked through Libby's requests to see what documents would meet the Rule 17 standard. He ordered some to be produced to Libby immediately (prior drafts and notes for some of Matthew Cooper's articles); and found that other documents were potentially discoverable for impeachment purposes – contingent on the reporters' testimony at trial.

Privilege Issues

All the movants (except Judith Miller) argued that a First Amendment privilege and/or common law privilege protected them from compelled disclosure, notwithstanding Rule 17 (c). The court rejected this argument. Relying on *Branzburg* and the D.C. Circuit's decision in the Miller Cooper case, *In re: Grand Jury Subpoena*, 438 F.3d 1141, the court concluded that:

> the First Amendment does not protect a news reporter, or that reporter's news organization, from producing documents pursuant to a Rule 17 (c) subpoena in a criminal prosecution when the news reporter is personally involved in the activity that forms the predicate for the criminal offenses charged in the indictment.

While prior D.C. Circuit cases had not considered the issue in the context of a criminal prosecution at the trial

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D.C. Court Rejects Press's First Amendment, Common Law Privilege Claims in Libby Criminal Case

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stage, the court agreed with Libby's position that *Branzburg* applied with at least equal force in the context of a criminal trial. Indeed, the court noted that the defendant's right to obtain evidence in a criminal trial rested on a constitutional footing. Moreover, the court added, disclosure in the context of a criminal trial would be less invasive than in the more sweeping investigatory context of a grand jury proceeding.

Finally, the court found no need to decide whether to adopt Judge Tatel's suggestion that a common law privilege exists to protect reporters. *See In re: Grand Jury Subpoena*, 438 F.3d 1141, 1163-83 (in leak cases, "courts applying the [common law] privilege must consider not only the government's need for the information and exhaustion of alternative sources, but also the two competing public interests lying at the heart of the balancing test. Specifically, the court must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in news gathering, measured by the leaked information's value.")

Any common law privilege would be defeated under the circumstances of the case.

The court found that any common law privilege would be defeated under the circumstances of the case. At the trial stage, Libby's liberty interest and right to a fair trial "far outweigh" any other interest in the case. Second, all the documents at issue had already been narrowed under the Rule 17 (c) standard to those that would be relevant and admissible at trial.

Scooter Libby is represented by William H. Jeffress, Jr., and Alexandra M. Walsh, Baker Botts L.L.P., Washington, DC. NBC and Andrea Mitchell were represented by Lee Levine, Levine Sullivan Koch & Schulz LLP. Time, Inc. was represented by Theodore Boutrous and Thomas Dupree, Gibson Dunn & Crutcher. Matthew Cooper was represented by Richard Alan Sauber, Fried, Frank, Harris, Shriver & Jacobson, LLP. Judith Miller was represented by Robert Bennett, Skadden, Arps, Slate, Meagher & Flom LLP. The New York Times was represented by Charles Leeper, Drinker Biddle & Reath LLP.

The media briefs in this matter are available on MLRC's website www.medialaw.org

New Federal Shield Law Bill Introduced in Senate

On May 18, 2006, Senator Richard Lugar (R-IN) introduced the "Free Flow of Information Act of 2006," a bill to create a federal shield law. The bill (S. 2831) would provide a qualified privilege against disclosure of confidential sources and information received in confidence. It would exclude from coverage unpublished, non-confidential information, disclosure of which would continue to be subject to existing law.

Senator Lugar introduced a federal shield law bill last year, the "Free Flow of Information Act of 2005" (S.1419), which differed from the latest bill in that it provided absolute protection for confidential sources (except when disclosure was necessary to "prevent imminent and actual harm to national security") and a privilege for non-confidential information.

The new bill separately treats subpoenas from federal prosecutors in criminal cases, from criminal defendants and from civil litigants, with distinct balancing tests for each to overcome to compel disclosure. It also addresses application of the privilege in circumstances raised by Senators during a Judiciary Committee Hearing on the 2005 bill, namely: where a journalist is an eyewitness; where disclosure is necessary to prevent death or substantial bodily harm, or to prevent an act of terrorism or harm to national security; and the unauthorized disclosure of properly classified information by government employees.

Unlike the 2005 bill, the 2006 bill only covers journalists engaged in newsgathering "for financial gain or livelihood," but like the 2005 version, it does cover subpoenas to communication service providers for information that would disclose the privileged information.

Senator Arlen Specter (R-PA), whose office took the lead in drafting the 2006 bill, signed on as a co-sponsor to the bill on the day it was introduced by Senator Lugar, together with Senators Christopher Dodd (D-CT), Lindsey Graham (R-SC) and Charles Schumer (D-NY). Senator James Jeffords (Independent-VT) has since signed on as a co-sponsor. The full text of the bill is reprinted below.

Representative Mike Pence (R-IN), the main proponent behind last year's federal shield law, remains committed to the Free Flow of Information Act of 2005 (H.R. 3323), a bill identical to Senator Lugar's 2005 version. While Rep. Pence supports movement on a federal shield law in the Senate, the House Judiciary Committee's Subcommittee on Courts, the Internet, & Intellectual Property, of which Rep. Pence is a member, recently announced that it will hold a hearing on H.R. 3323 on June 29.

S 2831 IS

109th CONGRESS

2d Session

S. 2831

To guarantee the free flow of information to the public through a free and active press while protecting the right of the public to effective law enforcement and the fair administration of justice.

IN THE SENATE OF THE UNITED STATES

May 18, 2006

Mr. LUGAR (for himself, Mr. SPECTER, Mr. DODD, Mr. GRAHAM, and Mr. SCHUMER) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To guarantee the free flow of information to the public through a free and active press while protecting the right of the public to effective law enforcement and the fair administration of justice.

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Free Flow of Information Act of 2006.'

SEC. 2. PURPOSE.

The purpose of this Act is to guarantee the free flow of information to the public through a free and active press as the most effective check upon Government abuse, while protecting the right of the public to effective law enforcement and the fair administration of justice.

SEC. 3. DEFINITIONS.

In this Act--

(1) the term 'attorney for the United States' means the Attorney General, any United States Attorney, Department of Justice prosecutor, special prosecutor, or other officer or employee of the United States in the executive branch of Government or any independent regulatory agency with the authority to obtain a subpoena or other compulsory process;

(2) the term 'communication service provider'--

(A) means any person that transmits information of the customer's choosing by electronic means; and

(B) includes a telecommunications carrier, an information service provider, an interactive computer service provider, and an information content provider (as such terms are defined in sections 3 and 230 of the Communications Act of 1934 (47 U.S.C. 153 and 230)); and

(3) the term 'journalist' means a person who, for financial gain or livelihood, is engaged in gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing news or information as a salaried employee of or independent contractor for a newspaper, news journal, news agency, book publisher, press association, wire service, radio or television station, network, magazine, Internet news service, or other professional medium or agency which has as 1 of its regular functions the processing and researching of news or information intended for dissemination to the public.

SEC. 4. COMPELLED DISCLOSURE AT THE REQUEST OF ATTORNEYS FOR THE UNITED STATES IN CRIMINAL PROCEEDINGS.

(a) In General- Except as provided in subsection (b), in any criminal investigation or prosecution, a Federal court may not, upon the request of an attorney for the United States, compel a journalist, any person who employs or has an independent contract with a journalist, or a communication service provider to disclose--

(1) information identifying a source who provided information under a promise or agreement of confidentiality made by the journalist while acting in a professional newsgathering capacity; or

(2) any records, communication data, documents, or information that the journalist obtained or created while acting in a professional newsgathering capacity and upon a promise or agreement that such records, communication data, documents, or information would be confidential.

(b) Disclosure- Compelled disclosures otherwise prohibited under subsection (a) may be ordered only if a court, after providing the journalist, or any person who employs or has an independent contract with a journalist, notice and an opportunity to be heard, determines by clear and convincing evidence that--

(1) the attorney for the United States has exhausted alternative sources of the information;

(2) to the extent possible, the subpoena--

(A) avoids requiring production of a large volume of unpublished material; and

(B) is limited to--

(i) the verification of published information; and

(ii) surrounding circumstances relating to the accuracy of the published information;

(3) the attorney for the United States has given reasonable and timely notice of a demand for documents;

(4) nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in newsgathering and maintaining a free flow of information to citizens;

(5) there are reasonable grounds, based on an alternative, independent source, to believe that a crime has occurred, and that the information sought is critical to the investigation or prosecution, particularly with respect to directly establishing guilt or innocence; and

(6) the subpoena is not being used to obtain peripheral, nonessential, or speculative information.

SEC. 5. COMPELLED DISCLOSURE AT THE REQUEST OF CRIMINAL DEFENDANTS.

(a) In General- Except as provided in subsection (b), a Federal court may not, upon the request of a criminal defendant, compel a journalist, any person who employs or has an independent contract with a journalist, or a communication service provider to disclose--

(1) information identifying a source who provided information under a promise or agreement of confidentiality made by the journalist while acting in a professional newsgathering capacity; or

(2) any records, communication data, documents, or information that the journalist obtained or created while acting in a professional newsgathering capacity and under a promise or agreement that such records, communication data, documents, or information would be confidential.

(b) Disclosure- Compelled disclosures otherwise prohibited under subsection (a) may be ordered only if a court, after providing the journalist, or any person who employs or has an independent contract with a journalist, notice and an opportunity to be heard, determines by clear and convincing evidence that--

(1) the criminal defendant has exhausted alternative sources of the information;

(2) there are reasonable grounds, based on an alternative source, to believe that the information sought is directly relevant to the question of guilt or innocence or to a fact that is critical to enhancement or mitigation of a sentence;

(3) the subpoena is not being used to obtain peripheral, nonessential, or speculative information; and

(4) nondisclosure of the information would be contrary to the public interest, taking into account the public interest in compelling disclosure, the defendant's interest in a fair trial, and the public interest in newsgathering and in maintaining the free flow of information.

SEC. 6. CIVIL LITIGATION.

(a) In General- Except as provided in subsection (b), in any civil action, a Federal court may not compel a journalist, any person who employs or has an independent contract with a journalist, or a communication service provider to disclose--

(1) information identifying a source who provided information under a promise or agreement of confidentiality made by the journalist while acting in a professional newsgathering capacity; or

(2) any records, communication data, documents, or information that the journalist obtained or created while acting in a professional newsgathering capacity and upon a promise or agreement that such records, communication data, documents, or information would be confidential.

(b) Disclosure- Compelled disclosures otherwise prohibited under (a) may be ordered only if a court, after providing the journalist, or any person who employs or has an independent contract with a journalist, notice and an opportunity to be heard, determines by clear and convincing evidence that--

(1) the party seeking the information has exhausted alternative sources of the information;

(2) the information sought is critical to the successful completion of the civil action;

(3) nondisclosure of the information would be contrary to the public interest, taking into account both the public interest in compelling disclosure and the public interest in newsgathering and in maintaining the free flow of information to the widest possible degree about all matters that enter the public sphere;

(4) the subpoena is not being used to obtain peripheral, nonessential, or speculative information;

(5) to the extent possible, the subpoena--

(A) avoids requiring production of a large volume of unpublished material; and

(B) is limited to--

(i) the verification of published information; and

(ii) surrounding circumstances relating to the accuracy of the published information; and

(6) the party seeking the information has given reasonable and timely notice of the demand for documents.

SEC. 7. EXCEPTION FOR JOURNALIST'S EYEWITNESS OBSERVATIONS OR PARTICIPATION IN CRIMINAL OR TORTIOUS CONDUCT.

Notwithstanding sections 1 through 6, a journalist, any person who employs or has an independent contract with a journalist, or a communication service provider has no privilege against disclosure of any information, record, document, or item obtained as the result of the eyewitness observations of criminal conduct or commitment of criminal or tortious conduct by the journalist, including any physical evidence or visual or audio recording of the observed conduct, if a court determines by clear and con-

vincing evidence that the party seeking to compel disclosure under this section has exhausted reasonable efforts to obtain the information from alternative sources. This section does not apply if the alleged criminal or tortious conduct is the act of communicating the documents or information at issue.

SEC. 8. EXCEPTION TO PREVENT DEATH OR SUBSTANTIAL BODILY INJURY.

Notwithstanding sections 1 through 6, a journalist, any person who employs or has an independent contract with a journalist, or communication service provider has no privilege against disclosure of any information to the extent such information is reasonably necessary to stop or prevent reasonably certain--

(1) death; or

(2) substantial bodily harm.

SEC. 9. EXCEPTION FOR NATIONAL SECURITY INTEREST.

(a) In General- Notwithstanding sections 1 through 6, a journalist, any person who employs or has an independent contract with a journalist, or communication service provider has no privilege against disclosure of any records, communication data, documents, information, or items described in sections 4(a), 5(a), or 6(a) sought by an attorney for the United States by subpoena, court order, or other compulsory process, if a court has provided the journalist, or any person who employs or has an independent contract with a journalist, notice and an opportunity to be heard, and determined by clear and convincing evidence, that--

(1) disclosure of information identifying the source is necessary to prevent an act of terrorism or to prevent significant and actual harm to the national security, and the value of the information that would be disclosed clearly outweighs the harm to the public interest and the free flow of information that would be caused by compelling the disclosure; or

(2) in a criminal investigation or prosecution of an unauthorized disclosure of properly classified Government information by an employee of the United States, such unauthorized disclosure has seriously damaged the national security, alternative sources of the information identifying the source have been exhausted, and the harm caused by the unauthorized disclosure of properly classified Government information clearly outweighs the value to the public of the disclosed information.

(b) Rule of Construction- Nothing in this Act shall be construed to limit any authority of the Government under the Foreign Intelligence Surveillance Act (50 U.S.C. 1801 et seq.).

SEC. 10. JOURNALIST'S SOURCES AND WORK PRODUCT PRODUCED WITHOUT PROMISE OR AGREEMENT OF CONFIDENTIALITY.

Nothing in this Act shall supersede, dilute, or preclude any law or court decision compelling or not compelling disclosure by a journalist, any person who employs or has an independent contract with a journalist, or a communications service provider of--

(1) information identifying a source who provided information without a promise or agreement of confidentiality made by the journalist while acting in a professional newsgathering capacity; or

(2) records, communication data, documents, or information obtained without a promise or agreement that such records, communication data, documents, or information would be confidential.

Shield Bill Falters In Washington Legislature

Bill May Be Introduced Again In 2007 or 2008

By Bruce E. H. Johnson

In October 2005, Washington State Attorney General Rob McKenna, a Republican elected in 2004, announced his support for a strong shield law. McKenna said that the recent imprisonments of journalists on the East Coast had prompted him to support such a measure. Meanwhile, Gov. Christine Gregoire, a Democrat also elected in 2004, told the public and the media that she would sign such a measure.

Unfortunately, even bipartisan efforts can fall short.

Currently, 32 states (including most recently Connecticut) and the District of Columbia have shield laws, but Washington State has no reporter's shield statute. Since the mid-1980s, the state's courts have recognized a common law qualified privilege for the identity of confidential sources, but there are no published state court decisions regarding the scope of protection for reporters' notes, outtakes, and other journalist work-product information.

Many knowledgeable observers expected the bill to pass.

Many Washington state trial judges have recognized a qualified First Amendment privilege in these situations, usually citing federal (specifically Ninth Circuit) authority. But, not always – and the results have meant additional expense for the media in defending its independence.

In 2000, for example, several former *Arizona Republic* reporters sued their former editor in Arizona state court for libel. They then issued a subpoena against University of Washington journalism professor Doug Underwood, who had written an article in the *Columbia Journalism Review* about the problems between the reporters and their editor.

Serving the subpoena on Underwood, these ex-reporters demanded Underwood's notes and, when he refused to comply, obtained an order from King County Superior Court judge Sharon Armstrong, who decided to enforce the subpoena even as she refused to conduct an *in camera* review. Underwood managed to seek discretionary review with the Court of Appeals, Division I, which stayed Judge Armstrong's ruling, reviewed the notes themselves, and pronounced them "not relevant" to the case – but also refused to issue a published ruling explicitly acknowledging a journalist privilege and clarifying the case law.

As the *Underwood* case illustrates, lack of explicit shield law protection means that lawyers for Washington State journalists and news media must provide detailed briefing for even routine subpoenas seeking reporter's notes or outtakes, and even then some trial judges might misapply the law, uncertain whether the First Amendment, at least as construed by leading federal and state appellate courts, was applicable in Washington State.

The effect, of course, is to raise the cost of defending such subpoenas. As for the existing common law qualified privilege for confidential sources, how many reporters in Washington State or elsewhere make qualified promises to their sources? Obviously, not all potential sources feel comfortable with such conditional or qualified promises of confidentiality.

The Washington Shield Bill

The bill proposed by Attorney General McKenna would create an absolute privilege for confidential sources and a qualified or conditional privilege for journalist's notes. The bill covered "news or information obtained or prepared by the news media in its capacity in gathering, receiving, or processing news or information for potential communication to the public."

The definition of "news media" in the bill was sufficiently broad to allow recognition of protections for journalists in the newspaper, magazine, broadcast, cable, and electronic media, including bloggers who made or expected to earn their living from journalistic activities.

The term "news media" included "newspaper, magazine or other periodical, book publisher, news agency, wire service, radio or television station or network, cable or satellite station or network, or audio or audiovisual production company, or any person or entity that is in the regular business of disseminating news or information to

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Shield Bill Falters In Washington Legislature

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the public by any means, including, but not limited to, print, broadcast, photographic, mechanical, internet, or electronic distribution" and any "person who is or has been a journalist, a scholar or researcher employed by any institution of higher education, or other individual who either: (i) At the time he or she obtained or prepared the information that is sought was earning or on a professional track to earn a significant portion of his or her livelihood by obtaining or preparing information for dissemination" through any news organ. (A copy of the bill in its final form is available at: http://www.leg.wa.gov/pub/billinfo/2005-06/Pdf/Bills/Senate%20Bills/6216-S.pdf.)

The shield bill overwhelmingly passed the State House on February 13, 2006, by an 87-to-11 vote. Meanwhile, members of the State Senate Judiciary Committee, with the active support of Democratic Sen. Adam Kline, and ranking Republican Sen. Stephen Johnson (who later became a candidate for State Supreme Court), pushed through a slightly-revised version of the bill.

The risk that some bloggers might enjoy protection as members of the news media also posed problems for the bill's supporters.

Many knowledgeable observers expected the bill to pass the State Senate (and be signed by Gov. Christine Gregoire), but in the final days of the legislative session, Sen. Lisa Brown, the Democratic majority leader from Spokane, refused to let the bill reach the floor. So, it died.

Shield Bill Opponents

Why did this shield bill fail? One major culprit is U.S. Automobile Association, a Texas-based insurance company, which attacked the Washington shield bill as a type of grudge match.

USAA's executives were angered by WOIA-TV, a San Antonio television station owned by Clear Channel, which had obtained allegedly confidential USAA documents about the company's outsourcing plans and broadcast a story about USAA's plans to move jobs to India.

The company sued the station in 2004 and obtained an order compelling disclosure of the source of the information, but before an appeals court could consider the legal issues presented, the former USAA employee waived confidentiality – and the case soon died.

That lawsuit was not sufficient for USAA management – the company's executives decided to take their battle with the media nationwide. "We're in a whole different situation here, with bloggers and others saying that they're journalists, and it's very scary for us," William McCartney, a USAA vice president told Sarah Lai Stirland of *National Journal*. "The only reason we're aware of this is we were involved in this lawsuit, and we think it is in the interest of society to say: 'Wait a minute. Before we rush to enact all these laws, we ought to think about all the ramifications.'"

The Texas company therefore decided to spend significant sums on lobbying in Olympia, Washington. As Nina Shapiro wrote in *Seattle Weekly*, the bill had sailed smoothly through the House:

> Then the bill got to the Senate and ran into fierce opposition. "It's weird," says state Rep. Lynn Kessler, D–Port Angeles, a sponsor in the House. "All of a sudden, Cliff Webster was all over it." Webster is a high-powered lobbyist who had been hired, according to Kessler and others, by USAA. "It's like somebody came in and said, 'Stop this.'"
>
> USAA's involvement alone didn't kill the shield bill, judging by interviews with key players in the debate. The lethal injection was a mix of some resentment of the media, perhaps a tad of partisanship by Democrats against the Republican attorney general, and a whole lot of nonpartisan disagreement by people arguing either that the bill went too far or that it didn't go far enough.
>
> USAA, which had already helped kill a shield bill in Texas, amped up that debate. "It hurt," McKenna says, alluding to the company's local lobbyist. "He riled up members of both parties."

Meanwhile, there were other opponents as well, who assisted USAA's efforts to stop the shield bill. The Western Washington chapter of the Society of Professional Journalists opposed the bill, for example, because it pro-

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Shield Bill Falters In Washington Legislature

(Continued from page 16)

vided only qualified protections for journalists' work-product and they believed they should have absolute protection from any subpoenas. Some Democrats, particularly from the Seattle area, were hesitant to support a shield bill that was, after all, opposed by working journalists. The criminal and insurance defense bars, and several prosecutors (though not King County Prosecuting Attorney Norm Maleng, who endorsed the bill) also opposed the shield law, which they believed would interfere with their lawsuits and criminal proceedings.

The risk that some bloggers might enjoy protection as members of the news media also posed problems for the bill's supporters. Sen. Brian Weinstein, a Mercer Island Democrat, who strongly opposed the bill when it was presented to the Senate Judiciary Committee, noted, "Someone who blogs at night should not be afforded the same protections [as journalists]."

These various opponents managed to collect enough opposition to this bipartisan bill within the State Senate's Democratic ranks that Sen. Brown, the Democratic majority leader, recognized that her caucus was sharply divided and that there were other bills that she could bring to the floor that would receive strong Party support – and which would allow the Democrats to claim legislative victories from the shortened legislative session. So, on March 2, 2006, she killed the bill in the closing hours of the session.

The proponents of the Washington shield bill have not yet regrouped, but McKenna is still very supportive of the news media's independence and of a strong state shield law. Thus, it remains possible that the shield bill could be re-introduced, either in the longer legislative session that begins in January 2007, or in the 2008 Legislature.

Bruce Johnson is a partner at Davis Wright Tremaine LLP in Seattle, Washington. He was involved in the drafting of the proposed Washington State shield law on behalf of Allied Daily Newspapers of Washington and testified in favor of the bill. He also represented Doug Underwood in the 2000 case discussed in this article.

Speakers Bureau on the Reporter's Privilege

The MLRC Institute is currently building a network of media lawyers, reporters, editors, and others whose work involves the reporter's privilege to help educate the public about the privilege.

Through this network of speakers nationwide, we are facilitating presentations explaining the privilege and its history, with the heart of the presentation focusing on why this privilege should matter to the public. We have prepared a "turn-key" set of materials for speakers to use, including, a PowerPoint presentation and written handout materials.

We are looking for speakers to join this network and conduct presentations at conferences, libraries, bookstores, colleges, high schools and city clubs and before groups like chambers of commerce, rotary clubs and other civic organizations.

The MLRC Institute, a not-for-profit educational organization focused on the media and the First Amendment, has received a grant from the McCormick Tribune Foundation to develop and administer the speakers bureau on the reporter's privilege.

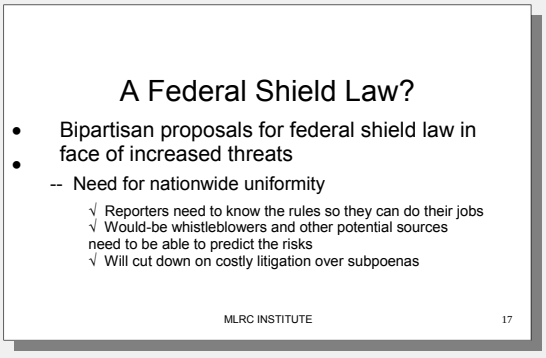
We hope to expand this project so that the reporter's privilege is the first in a number of topics addressed by the speakers bureau.

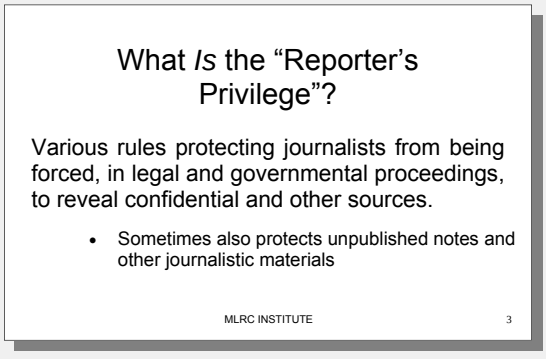
If you are interested in joining the speakers bureau or in helping to organize a presentation in your area, please contact:

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

Suggestion for background reading: Custodians of Conscience by James S. Ettema and Theodore Glasser. Great source re: nature of investigative journalism and its role in society as force for moral and social inquiry.

Presentation note: During the weeks leading up to your presentation, consider pulling articles from local papers quoting anonymous sources -- circle the references to these sources as an illustration for the audience of how valuable they are for reporters.





Federal Court Quashes Subpoena for 60 Minutes Outtakes Under New York Shield Law

By Alia L. Smith

A federal district court in New York denied a motion to compel outtakes from 60 Minutes in *United Auto Group v. Ewing*, No. M-85 (S.D.N.Y. May 3, 2006) (Mukasey, J.) under New York's Shield Law, holding that the information sought was not "critical or necessary."

Affirming that state law privileges apply when the underlying case asserts diversity jurisdiction, the court found that the plaintiff had not satisfied its burden under the Shield Law when it asserted only that the information sought "may" assist its case, and not that the case could not proceed without it.

Background

In April 2004, the CBS News program 60 Minutes broadcast a report entitled "The Best Possible Deal?" which focused on the practice – by some car dealers – of including undisclosed finance charges in car loan financing packages. The 60 Minutes report included interviews with Andrew Barbee and Adam Ewing, who had been finance managers at a dealership, owned by United Auto Group (UAG).

After they left the company, Barbee and Ewing brought employment discrimination claims against UAG. The discrimination case ultimately settled, and the confidential settlement agreement provided that no party would disparage, defame, denigrate and/or malign any other Party.

In their interviews with 60 Minutes, the former finance managers spoke about dealer reserve, explaining that their goal had been to charge the buyer the highest interest rate possible. The dealers would arrange for financing through other companies, and then would add on a few points for themselves, known as the dealer reserve. The financing companies would bury these extra points in their bills, and then send lump-sum checks back to the dealers. Barbee and Ewing reported that dealer reserve could often add thousands of dollars to the cost of a car.

Based in part on Ewing and Barbee's interview with CBS News, UAG sued the pair in federal court in Tennessee for breach of the settlement agreement. In December 2004, UAG subpoenaed the outtakes from the 60 Minutes interview out of the Southern District of New York. CBS objected on the grounds – among others – that UAG had not exhausted alternative sources because it had not yet even deposed Ewing and Barbee. After deposing Ewing and Barbee – who claimed not to remember what they had said to 60 Minutes that was not broadcast – UAG sought to enforce the subpoena early this year.

The Motion to Compel

In its motion to compel, UAG argued that it had overcome the qualified federal reporter's privilege in effect in the Second Circuit under *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999) because the outtakes were of likely relevance to a significant issue in the case, and [were] not reasonably obtainable from other available sources. Specifically, UAG sought the outtakes because it believed they may give rise to claims for additional breaches of the settlement agreement or provide assistance in responding to Ewing and Barbee's defenses. UAG asserted that because it had deposed Ewing and Barbee, who could not recall their statements, it had exhausted alternative sources.

In opposition, CBS News asserted that the New York Shield Law, N.Y. Civ. Rts. Law § 79-h, rather than the federal reporters' privilege, applied to UAG's subpoena, because the underlying Tennessee action was a diversity case for breach of contract. Under the New York Shield Law, CBS News argued, UAG had not satisfied its burden of establishing, among other things, that the outtakes were critical or necessary to plaintiff's claim, because UAG had conceded in its papers that it already had all the evidence it needed to prosecute its claim.

In its reply papers, UAG argued that the federal standard should apply because the underlying settlement agreement, the breach of which formed the basis of the lawsuit, settled a federal (Title VII) claim. Further, retreating from its earlier argument asserting that Second Circuit law applied, UAG urged the application of Sixth Circuit law (since the interviews were conducted in Tennessee), which does not recognize any sort of reporter's privilege.

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Federal Court Quashes Subpoena for 60 Minutes Outtakes Under New York Shield Law

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New York Law Applies

Chief Judge Michael Mukasey rejected plaintiff's arguments. First, the court held that state law governed because the Supreme Court has held that federal courts do not have jurisdiction to enforce an agreement settling a federal claim when the parties' obligations under that agreement are not included in the underlying judgment, absent an independent basis for jurisdiction. (Moreover, the court found, the underlying complaint appears to allege diversity of citizenship.)

Under these circumstances, the court held that New York law controls the determination of whether a court located in New York can compel a newsgathering organization in New York to produce subpoenaed outtakes, citing *In re NBC, Inc*., 79 F.3d 346, 351 (2d Cir. 1996).

Applying New York's Shield Law, the court found that UAG had not satisfied its burden of demonstrating that the information sought was critical or necessary to its claim, reading that portion of the statutory test to require that the claim "virtually rises or falls with the admission or exclusion of the proffered evidence." The court held:

> The outtakes sought here simply did not meet that standard. UAG has not shown that its case cannot be presented without the outtakes but has argued only that the outtakes would be useful in strengthening its claim against Ewing and Barbee. UAG professes to seek the outtakes because they may contain statements different from those that aired and such additional statements "may strengthen" its claim and "may" provide an independent basis for the breach of contract claim.... When UAG states in its brief that "statements Defendants made during the 60 Minutes broadcast were a blatant breach of their Settlement Agreements," ... it concedes that it can prove its case without the outtakes.

Accordingly, the court denied the motion to compel.

Michael D. Sullivan and Alia L. Smith of Levine Sullivan Koch & Schulz, LLP, and Naomi Waltman of CBS Broadcasting Inc. represented CBS News in this case. Plaintiff-Movant United Auto Group was represented by Marc Newman of Miller Shea, P.C. in Rochester, Michigan.

Missouri Newspaper Ordered to Produce Unpublished Photos

By Jean Maneke

Members of the media in Missouri took another blow recently when a court declined to quash a subpoena issued to a photographer for the *Columbia Tribune* in a wrongful death lawsuit. *O'Neal v. Rex Sharp et al.*, No. O5BA-CV03288 (Mo. Cir. Ct. April 26, 2006).

Background

At issue were some 622 photographs taken at a football practice session for the University of Missouri at which a player collapsed and died. The practice session was closed to the public but the newspaper had made arrangements for a photographer to attend the session. When the incident occurred, the photographer, Jenna Isaacson, shot a number of photographs of the student collapsed on the field and being carried off the field, as well as earlier shots of the intensity of the workout and the players' physical appearance during the session.

After the death of the player, Aaron O'Neal, the newspaper ran about 15 photos in the paper and placed them on the paper's website, but the rest were never published. The father of the victim filed a wrongful death suit against a number of persons connected with the University. In connection with that suit, the plaintiff's attorneys served the photographer with a subpoena seeking all of her photographs for use in their litigation.

After initial discussions with the attorneys for the paper, the counsel for the plaintiff filed a motion to compel, arguing that no reporter's privilege in Missouri would protect the photographer from producing the photos.

The newspaper responded primarily that the motion was untimely filed and that there was no refusal to produce at that time which would trigger a motion to compel to be heard by the court. The motion was heard by Judge Gary M. Oxenhandler, of the Boone County Circuit Court, who agreed with the newspaper that the motion was premature. In addition, that order included provisions that witness fees were still owed to the photographer in connection with the command to appear and produce the photographs.

About five days later, the deposition which was the subject of the subpoena was taken. Ms. Isaacson appeared with the photos which had been published and repeatedly refused to answer questions about the non-published photos or to produce those photos per the plaintiff's request.

Thereafter, the plaintiff renewed its motion with the court, seeking an order compelling the photographer to produce the unpublished photos. The plaintiff asserted that no reporter's privilege attached to the photographs, that they did not concern confidential matters and that the photographer did not grant confidentiality with respect to the photographs or that any privilege the photographer had was waived by her repeated use of the photos and her discussion of the nonpublished photos in trade journal articles or on Internet sites.

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MO Newspaper Ordered to Produce Unpublished Photos

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Reporter's Privilege in Missouri

Missouri has no statutory reporter's privilege. The state has had several cases address the reporter's privilege issue in the past, but there is only a limited body of case law supporting a privilege of limited proportions in the state.

Probably the strongest case in the state is *State ex rel. Classics III, Inc., v. Ely*, 954 S.W.2d 650 (Mo. App. 1997), in which the court held that if confidentiality had been promised to a source, the privilege could not be overcome unless it was shown in court that the material sought was relevant, that it was necessary or critical to the party's claim and that the party requesting the information had exhausted alternative sources.

Other, earlier cases have held that there is no privilege in regard to unpublished materials which much be produced to a grand jury.

Plaintiff's counsel argued that the photographer had discussed her photographs and what was in them in a wide variety of publications and therefore any privilege that might have existed had been waived by the photographer herself. Counsel for Ms. Isaacson likened her attendance at the closed practice session to a promise of confidentiality, which would have allowed the photographer to tap into the modest protection offered to the media in Missouri.

In a somewhat creative attempt to reach this position, her attorneys argued that there was an implied understanding with the University that the photos would be restricted to the newspaper itself and that they would not be released to the public and that her presence on the practice field that day was under these implied restrictions. Unfortunately, the University did not agree with this interpretation of the events of that day and joined with the plaintiff in asking the court to order production of the photos.

The court held that no promise of confidentiality existed in this set of facts. Further, the court found that the photos were relevant to the case, that they were unique and critical, and that they could not be duplicated from any other source. The court noted that she had voluntarily published a portion of the photographs and had generally and openly discussed the photos. The court held that there was no alternative source for the same materials and that therefore the motion to compel should be granted.

(Ms. Isaacson acknowledged before the court that as a witness to events on the field that day, she had an obligation as a citizen to give testimony if asked as to what she witnesses with her own eyes. The only issue before the court was access to the unpublished photographs.)

The court found that the photos were relevant to the case, that they were unique and critical, and that they could not be duplicated from any other source.

Newspaper Posts Photos

Editors at the newspaper decided an appeal was not advisable due to concerns over precedent that might be set by an appellate opinion on the matter. Instead, the *Tribune* decided to publish the photos on its website and then release them to the plaintiff.

The photographs are available at: http://www.columbiatribune.com/2005/Jul/0712FootballWorkout/index.html.

Of interest after the fact is the news forum which is hosted by the *Columbia Tribune* on its website at www.showmenews.com. Several discussion threads resulted from the court case. While a few people seemed to understand the principles behind protecting reporter's sources and information, most of those who wrote in to discuss the case seemed angry that the paper felt it had a right to withhold the photographs. Clearly, this is an issue on which the media will be challenged to rally public support to its side of an important First Amendment issue.

Jean Maneke, of The Maneke Law Group, LC., Kansas City, Mo. represented the Columbia Tribune in this matter. Lonnie O'Neal, father of the player, was represented by Christopher Bauman, of Blitz, Bardgett & Deutsch, L.C., St. Louis. The University of Missouri and its employees who were sued, who filed no pleadings, were represented by Hamp Ford, of Ford, Parshall & Baker, Columbia, Mo., who chose to sit with the plaintiff's counsel during the final arguments before the court to show his support for that position.

Newspaper Precluded from Relying on Confidential Sources in Libel Suit

Basketball Player's Libel Claim Survives Summary Judgment

By Jason P. Conti

A New York trial court last month ruled that professional basketball player Latrell F. Sprewell may proceed to trial with a portion of his defamation lawsuit against the *New York Post*, holding that the newspaper could not rely on confidential sources to contest the issue of actual malice. *Sprewell v. NYP Holdings, Inc.*, 11 Misc.3d 1091(A), 2006 WL 1222474 (N.Y. Sup. April 7, 2006) (Friedman, J.).

Background

Sprewell, a former member of the New York Knicks, commenced a defamation action against the *Post* and its reporter Marc Berman in October 2002 stemming from a series of four articles relating to an injury to Sprewell's hand. The complained-of articles published in early October 2002 concern the cause of a fracture Sprewell sustained while on his boat in September 2002.

Sprewell objected to two points in the article: how the hand injury occurred and the timing of his reporting of the injury to the Knicks. The article discussed two possible explanations as to the cause of the injury: one (given by Sprewell's agent) that he hurt his hand while taking his boat out into choppy waters, and the other that he hurt it in an altercation at a party on his boat while docked at his marina. (Sprewell claimed that he broke the bone in his hand after he fell down while inebriated on the deck of his docked boat.)

The *Post*, relying on two confidential eyewitnesses, reported that Sprewell was on his boat in September 2002 hosting a party, when he argued with the boyfriend of a woman who had vomited on the boat's white carpet, then took a swing at the boyfriend, missed, and hit the wall of the boat instead. To buttress this account, the *Post* reported that Sprewell suffered what is known as a "boxer's fracture" (an undisputed fact) – the fracture of the fifth metacarpal bone that is most commonly caused by punching a hard object like a wall or a pole. The articles also noted that Sprewell did not report his injury to Knicks management until he arrived at the Knicks training facility on September 30, 2002 – many days after he fractured his hand. The timing of his notifying the Knicks was also undisputed.

Sprewell's complaint alleged that the articles were false and defamatory for two reasons: first, for suggesting that he injured his hand while trying to assault someone, and second, by insinuating that he violated his players' contract by deliberately concealing the injury from team management until the start of training camp. (The court had previously denied a motion to dismiss on the ground that the passage was still capable of a defamatory *per se* meaning even though Sprewell was well-known for having been suspended for attempting to choke his professional basketball coach. *See* 772 N.Y.S.2d 188, 32 Media L. Rep. 2338 (NY Sup. 2003)).

Summary Judgment Motion

After extensive discovery, the *Post* and Berman filed a motion for summary judgment on the grounds that Sprewell could not prove constitutional malice and that the complained-of statements regarding Sprewell's failure to report his injury were substantially true. From the beginning of the case, defendants consistently invoked New York's Shield Law to protect the identities of the two confidential sources. Because of the defendants' reliance on the Shield Law, Sprewell filed a motion seeking to preclude the defendants from relying on the two confidential sources in determining the summary judgment motion.

In connection with that motion the defendants submitted to the court deposition testimony of two witnesses who heard shouting (consistent with the altercation) on the evening of the party at issue, and observed certain people (including an obviously inebriated woman) leaving the boat. This evidence could not be used on the constitutional malice issue because the evidence was not obtained until after the articles at issue were published.

In a decision dated April 7, 2006, Justice Marcy Friedman dismissed the portions of the libel claims pertaining to statements made in the articles that Sprewell concealed an injury, thus violating his employment contract with the Knicks. The court determined that Sprewell had failed to prove that the statements were published with constitutional malice, having submitted "no evidence whatsoever that these statements were published with knowledge of their falsity or reckless disregard of their truth or falsity."

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Newspaper Precluded from Relying on Confidential Sources in Libel Suit

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However, the court denied that portion of the summary judgment motion pertaining to the other statements in the articles related to the cause of Sprewell's hand injury. In granting Sprewell's motion to preclude defendants' reliance on the two confidential sources, the court cited authority suggesting that the Shield Law does not offer "complete immunity from all legal consequences of refusing to disclose evidence relating to a news source."

The court stated that the defendants were impermissibly putting the confidential sources at issue by relying on them to disprove the existence of any constitutional malice. The court concluded that without the two sources, the "defendants fail as matter of law to make a prima facie showing of the absence of malice in their publication of statements as to how the incident on the boat occurred," as no other submitted evidence went to the heart of that issue.

The defendants are appealing the order to the Appellate Division, First Department on the grounds that the lower court improperly precluded them from relying on information provided by the two confidential sources, and that, on a careful review of all the evidence in the record, the plaintiff could not show constitutional malice by clear and convincing evidence.

Defendants NYP Holdings, Inc., the publisher of the Post, and Marc Berman were represented by Slade R. Metcalf and Jeffrey O. Grossman of Hogan & Hartson L.L.P., New York City. The plaintiff Latrell Sprewell was represented by Lorne M. Reiter of Schoenfeld, Moreland & Reiter, P.C., New York City. Mr. Conti is associated with Hogan & Hartson L.L.P. , and is assisting Mr. Metcalf in representing the defendants on the appeal.

House Hearing on Leaks of Classified Information

On May 26, the House Intelligence Committee held a public hearing on the "Media's Role and Responsibilities in Leaks of Classified Information." The hearing was called in the midst of controversial comments by Attorney General Alberto Gonzalez that the press could be open to criminal prosecution for publishing classified information – an issue that has been debated in numerous articles and blogs.

Walter Isaacson, former editor of Time and now President of the Aspen Institute testified before the Committee, together with Professor Jonathan Turley, Professor John Eastman, and Gabriel Schoenfeld, Commentary magazine. Their testimony is available at http://intelligence.house.gov.

MLRC and other media organizations submitted letters to Committee. Below is a copy of MLRC's letter.

May 24, 2006

The Honorable Peter Hoekstra
Chairman
Permanent Select Committee on Intelligence
H-405, The Capitol
Washington, DC 20515

The Honorable Jane Harman
Ranking Member
Permanent Select Committee on Intelligence
H-405, The Capitol
Washington, DC 20515

Dear Chairman Hoekstra and Ranking Member Harman:

I am writing on behalf of the Media Law Resource Center ("MLRC"), a non-profit information clearinghouse organized by the media to monitor and report on developments in First Amendment law. Our membership includes the leading publishers and broadcasters in the U.S., all of whom have a deep interest in and commitment to the publication of news and information to the American public.*

MLRC appreciates the consideration this Committee is giving to the issue of national security and the publication of classified information. Because protecting the public's ability to receive information from a free press is an MLRC core concern, we welcome the opportunity to set forth our understanding of the media's role and responsibilities in this area and respectfully request that this letter be included in the record.

To begin, MLRC is very concerned with suggestions that Congress create a new statute akin to an "official secrets act" that would criminalize the press's publication of classified information. We believe that history and experience show that such a law is unnecessary and is fundamentally antithetical to the principle of a federal government that is by and for the citizenry.

As Professor Geoffrey R. Stone has written to the Committee, "in the entire history of the United States the federal government has never criminally prosecuted the press for publishing government secrets." Efforts to enact an official secrets law have been rejected as unnecessary and harmful to First Amendment rights and the public interest even in the midst of war and other serious threats to our national security. Even in the current war against terrorism, then-Attorney General John Ashcroft in his report to Congress dated October 15,2002 saw no need for new criminal legislation.

Our country's longstanding rejection of an official secrets law is based on the danger that such a law will inevitably be used against the press and public to stifle legitimate criticism and discussion of government policies and ac-

* Membership in the MLRC is made up of corporations, associations and other entities that publish, broadcast or otherwise disseminate news, information or other data to the public, and various related entities that support freedom of speech and press. MLRC also has a Defense Counsel Section made up of over 230 law firms in the United States and around the world that defend free press issues.

tions. Notwithstanding the current political debate over leaks of classified information, nothing that has happened justifies departing from this historical wisdom.

As good citizens, though, the press recognizes that national security does entail keeping some information secret. The press has a professional and civic obligation to respect that principle. It does so by acting with great caution before publishing leaked information relating to national security, including listening to the concerns of appropriate government officials prior to publication and sometimes delaying publication. For example, the *New York Times* waited at least one year before publishing its report on the NSA surveillance program. Indeed, there are countless instances in which the press has held stories, has edited stories, and has worked cooperatively with government officials so that reporting would not jeopardize highly sensitive national security matters. This reflects the relationship between two institutions of democratic society that routinely cooperate, notwithstanding the tensions that arise as both seek to serve the public.

Reporters and press organizations are committed to this cooperative approach and are ready to strengthen the ongoing dialogue with government officials and agencies on this subject. This approach is not only consistent with the government's interest in national security, but it ultimately serves the press's interest in preserving the public trust that newspapers and broadcasters have with their readers and viewers.

Of course, the border between national security and the public's right to know is not always clear. Government employees unremarkably may regard more information as secret than is actually critical. There is little if any penalty for exercising undo caution in stamping information as secret and placing it outside of public view. Over-classification – in addition to the creation of pseudo-classification categories such as "sensitive but unclassified" – undermines the basics of a democratic society by depriving citizens of information about how their government is operating. It can be used as a pretext to prevent the public from learning about embarrassing or controversial information. It prevents legitimate oversight. It also leads, inevitably, to "leaks" as the counterweight.

The broad threat of criminal punishment for publishing classified information would severely chill routine communications between government officials and the press and public. It would limit historical and investigative research into government. And it would deter whistleblowers from exposing government mismanagement and corruption. These sorts of disclosures all serve the public interest and have been and should continue to be left to the political forces that govern a democratic republic. Certainly nothing warrants making reporters and citizens criminals for receiving or publishing such information.

Instead, secret information that goes to the heart of national security can and should be guarded at the source. This means the government should judiciously designate what information is secret. The government should exercise appropriate oversight and control over officials who can designate information as classified and those who can access such information. And the government can enforce the existing criminal laws against officials who violate their obligations to preserve secrecy.

Finally, as a matter of law any sweeping criminalization of newsgathering and publishing is fundamentally incompatible with the First Amendment. Protecting national security is no doubt a compelling government interest. But a statute that broadly criminalizes the publication of information on matters of public interest and concern is certainly not the least restrictive means of accomplishing the government's purpose – the standard the statute would have to meet to pass constitutional muster.

Sincerely,

Sandra S. Baron
Executive Director
Media Law Resource Center

Romance Author Wins $230,000 on Libel and Privacy Claims Against Vanity Publisher

Ruling on Punitive Damages Pending

A Kansas jury this month awarded $230,000 in libel and privacy damages to best-selling romance author Rebecca Brandewyne and other members of her family against a vanity publisher. *Brandewyne et al. v. Author Solutions, Inc. d/b/a AuthorHouse*, No. 04 CV 4363 (Dist. Ct. Sedgwick County May 8, 2006). A hearing on punitive damages was held on May 25 and a decision was still pending as of press time.

Background

At issue is a book entitled "Paperback Poison: the Romance Writer and the Hit Man" written by Gary D. Brock and his wife Debbie Brock. Gary Brock is Brandewyne's ex-husband.

According to plaintiffs' complaint, the book falsely accused Brandewyne of child abuse, adultery, racism, plagiarism and hiring a hit man to try and kill her ex-husband. It also allegedly revealed private information about other family members.

The book was published by AuthorHouse, an Indiana-based "self-publishing company." According to the company's website, authors can "bypass the rejection letters and literary agents" and "take advantage of [its] comprehensive suite of book promotion tools." AuthorHouse apparently published only 74 copies of the book. Three books were sold. Twenty-one copies were allegedly distributed by Gary Brock in Kansas. And the remaining 50 were pulped by AuthorHouse after Brandewyne complained.

Plaintiff and three other family members sued AuthorHouse for libel, publication of private facts and the tort of outrage. They also sued Gary Brock and Debbie Brock. Claims against Gary Brock were stayed after he filed for bankruptcy. Claims against Debbie Brock were settled.

Author a Private Figure

According to plaintiffs' counsel, Rebecca Brandewyne was held to be a private figure for purposes of her defamation claims. The jury received a negligence instruction on the defamation claim and an actual malice instruction for awarding punitive damages. In addition to evidence on the general standard of care publishers exercise, plaintiffs presented evidence that AuthorHouse knew that the book had been rejected by other publishers because of the libelous content, but still took no steps to vet the content. Internal memos apparently showed that the company discussed the issue, and that some employees recommended canceling the book contract – a recommendation that was disregarded. On the private facts claims, the jury apparently agreed that the book contained personal information about the plaintiffs that did not involve any matters of public interest.

MLRC has contacted defense counsel and will publish additional information about the trial in next month's newsletter.

Plaintiffs were represented by Jay Fowler of Foulston Siefkin LLP, Wichita, Kansas. Defendant was represented by Robert Clemens and Bernie Keller, Bose McKinney & Evans LLP in Indianapolis, and Eldon Boisseau, Wichita, Kansas.

Neutral Report Privilege Protects Utah Newspapers

Relying on the neutral report privilege, the Utah federal district court this month dismissed libel and related claims against *The Salt Lake Tribune* and the *Deseret Morning News*, Utah's two major daily newspapers over their coverage of a contentious mine workers labor dispute. *International Association of United Mine Workers v. United Mine Workers of America, et al.*, No. 2:04CV00901, 2006 WL 1183245 (D. Utah May 1, 2006) (Benson, J.).

In a lengthy decision that reviews the complained-of articles in detail, the court held that the two Utah newspapers fairly reported both sides' positions in the dispute and were, therefore, protected by the privilege. But the court refused to apply the privilege to *The Militant*, a socialist party newspaper published in New York, that also covered the dispute, but which published one-sided reports on the dispute.

Background

The defamation lawsuit arose out of a heated labor dispute at a coal mine in Bear Canyon, Utah. The labor dispute received local and national media attention. *The Salt Lake Tribune* and *Deseret News* published at least nine articles each about the dispute. *The Militant* newspaper published at least 55 articles about the dispute.

Following a seven-month lockout and hearings before the National Labor Relations Board the labor dispute was settled. Immediately after the settlement of the labor dispute, the mine owner and a local union filed a lengthy defamation complaint against a national mine workers union, individual mine workers and the newspapers.

The newspapers all filed motions to dismiss, relying in part on the neutral report privilege.

Neutral Report Privilege

Last year the Utah Court of Appeals recognized the neutral reportage privilege in *Schwarz v. Salt Lake Tribune*, 2005 WL 1037843, 2005 UT App 206 (UT App. May 5, 2005). In *Schwarz*, a newspaper article discussed plaintiff's history of filing dozens of frivolous lawsuits. The state court ruled that the article was covered by the neutral reportage privilege because it contained "accurate and disinterested reporting" of information from public records, citing to *Edwards v. National Audubon Soc'y*, 556 F.2d 113, 120 (2d Cir.1977).

In the instant case, the federal court found held that the neutral report privilege applies in public figure cases and that the facts here closely paralleled those in *Edwards*. To begin, the articles in the Salt Lake Tribune and the Deseret Morning News chronicled a lengthy public dispute. The newspapers "almost invariably ... sought each party's position." In fact, the articles "clearly reveal that the reporters went to extensive lengths to interview and cull information from the miners, [plaintiffs] and other parties close to the dispute."

The court granted the Utah newspaper's motion to dismiss and awarded them reasonable attorneys fees.

But the court declined to apply the neutral report privilege to The Militant newspaper. Among other things, that newspaper leveled its one charges against the mine owner. For example, the paper wrote that "The mine owners, the Kingstons, are a capitalist family notorious in the region for their brutality against workers they employ in their $150 million business empire. They are widely despised by working people for their abuse of women."

These and similar reports "do not meet the requirements for protection under the neutral reportage privilege" where the paper did not seek out comments from the plaintiffs or appear to offer them the chance to rebut the published accusations.

Michael P. O'Brien, Jones Waldo Holbrook & Mcdonough, Salt Lake City, represented *The Salt Lake Tribune*. Jeff Hunt and David C. Reymann, Parr Waddoups Brown Gee & Loveless, in Salt Lake City, represented the *Deseret Morning News*. Randy Dreyer, Parsons Behle & Latimer, represented *The Militant* newspaper.

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November 8, 2006

MLRC Annual Dinner
New York, New York

Indiana Court of Appeals Upholds Anti-SLAPP Ruling For Newspaper

By Gerald F. Lutkus and Michael Anderson

The Indiana Court of Appeals, in what is only the second published opinion discussing Indiana's anti-SLAPP statute, has affirmed summary judgment in favor of *The Mooresville/Decatur Times*. *Shepard v. Schurz Communications*, No. 55A04-0508-CV-479, 2006 WL 1312962 (Ind. App. May 15, 2006) (Barley, J.). The Court of Appeals affirmed the entry of Summary Judgment on the plaintiff's defamation claim and the award of attorneys' fees and also awarded appellate attorneys' fees.

Factual Background and Trial Court Ruling

The plaintiff, Indianapolis Attorney Clifford W. Shepard, alleged in his complaint that *The Times* defamed him in a February 13, 2002 article with the headline: "Monrovia town attorney steamed over letter." Steven Litz is the Monrovia Town Attorney referred to in the headline.

The town brought a lawsuit against Mr. Shepard's client to collect a delinquent water and sewer bill. During the small claims court trial, Mr. Litz introduced into evidence a "Delinquent List" in support of the defendant's delinquency. The list allegedly contained the names, telephone numbers, and addresses of fifty-one of the town's other sewer and water customers.

On February 8, 2002, Mr. Shepard sent a letter to fifty-one citizens named on the Delinquent List stating he felt that it was "[his] civic duty" to advise the citizens of the potential invasion of privacy. The letter alleged that Mr. Litz invaded their privacy by publishing their names, telephone numbers, and addresses in open court.

On February 13, *The Times* published the article in question, which summarized Mr. Shepard's letter and quoted Mr. Litz.s response: "Cliff Shepard is a liar. His statement is false." On February 16, *The Times* published a second story with Mr. Shepard's response.

Mr. Shepard followed with a lawsuit against *The Times* and Mr. Litz alleging defamation but without identifying the specific published statement he believed to be defamatory. *The Times* moved to dismiss the complaint based on Indiana Code § 34-7-7-1 *et seq.*, which is Indiana's anti-SLAPP statute. The statute provides a defense to any lawsuit arising from an act or omission in furtherance of a person's right of free speech under the United States or Indiana Constitutions in connection with a public issue. IND. CODE § 34-7-7-2. Further, this act or omission must be undertaken in good faith and with a reasonable basis in law and fact. IND. CODE § 34-7-7-5.

The trial court granted the motion to dismiss, holding that *The Times* published the article in furtherance of its free speech rights on a public issue and that the article was published in good faith with a reasonable basis in law and fact. The court also ordered Mr. Shepard to pay *The Times* more than $36,000 in fees and costs. Mr. Shepard then appealed the ruling.

The Court of Appeals' Ruling

The Indiana Court of Appeals reviewed three issues: 1) the granting of *The Times*' Motion; 2) the attorney fee award; and, 3) *The Times*'s entitlement to appellate attorneys' fees.

The Court determined that the statement's public interest was unquestionable relying solely on Mr. Shepard's statement in his letter that he considered it his "civic duty" to inform the residents of the possible invasion of privacy. As a result of the public interest, the Court noted that under Indiana defamation law, Mr. Shepard was required to show that *The Times* acted with actual malice in publishing the statement. (Indiana still follows the *Rosenbloom v. Metromedia, Inc.* rule, applying the actual malice standard to publications and statements dealing with issues of public concern. *Journal-Gazette Co., Inc. v. Bandido's, Inc.*, 712 N.E.2d 446 (Ind. 1999), *cert. denied*, 585 U.S. 1005 (1999); *AAFCO Heating and Air Conditioning Co. v. Northwest Publ'ns, Inc.*, 321 N.E.2d 580, 585-86 (Ind. Ct. App. 1974), *cert. denied*, 424 U.S. 913 (1976).)

After review of Mr. Shepard's complaint and exhibits, the Court found that the only statement Mr. Shepard had alleged to be both defamatory and false was Mr. Litz's statement, "Mr. Shepard is a liar. His statement is false." The Court explained this statement was a direct quote of Mr. Litz and was neither adopted nor endorsed by *The Times*. Further, *The Times* afforded Mr. Shepard a prompt, published response. As a result, the Court held *The Times*

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Indiana Court of Appeals Upholds Anti-SLAPP Ruling For Newspaper

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had made a showing that it acted without actual malice and merely reported statements connected to a matter of public interest. The statement in question was incapable of being proved true or false, and Mr. Shepard provided no evidence tending to show *The Times* acted with actual malice. Therefore, *The Times* was entitled to summary judgment.

The Court also noted an inconsistency between the anti-SLAPP statute and Indiana Trial Rule 56. While the anti-SLAPP statute describes motions made pursuant to the statute as motions to dismiss, it articulates a standard that suggests that they shall be treated as motions for summary judgment, IND. CODE § 34-7-7-9(a)(1), but further instructs that the motion shall be granted if the court finds that the movant has proven by a preponderance of the evidence that the act underlying the claim was lawful. IND. CODE § 34-7-7-9(d). On the other hand, Indiana Trial Rule 56, governing motions for summary judgment, places the burden on the movant to show a *prima facie* entitlement to judgment. The Court resolved this conflict by reiterating that when a procedural statute conflicts with a procedural rule adopted by the Indiana Supreme Court, the latter will take precedence and therefore reviewed the trial court's decision under the summary judgment standard.

Additionally, *The Times* satisfied the anti-SLAPP statute's criteria that provide for attorneys' fees because the speech was both lawful and concerned an issue of public interest. However, Mr. Shepard challenged the dollar amount of attorneys' fees and costs awarded. In response, the Court noted that the novelty of anti-SLAPP issues combined with the experience, reputation, and ability of the attorneys involved made the amount of fees and costs appropriate. In this context, the award could not be said to be an abuse of the trial court's discretion.

The Court then went on to discuss the awarding of appellate fees, noting the anti-SLAPP statute does not expressly allow for appellate fees. However, the purpose of the statute is to place the financial burden of defending SLAPP actions on the party abusing the system by bringing a SLAPP lawsuit. As a result, fee shifting has a chilling effect on abusive lawsuits. Furthermore, parties lawfully exercising their First Amendment rights cannot be made whole if appellate fees are ignored. The Court then remanded the case to the trial court for a hearing on appellate fees. It is uncertain at this time if Mr. Shepard will seek transfer to the Indiana Supreme Court.

Mr. Lutkus is a partner and Mr. Anderson an associate at Barnes & Thornburg LLP, South Bend, Indiana. They, along with Jan Carroll, a partner in Barnes & Thornburg's Indianapolis office, represented Schurz in this matter.

Arizona Enacts Anti-SLAPP Statute

On April 28, 2006, Arizona Governor Janet Napolitano signed into law a new state anti-SLAPP statute, 12-751 – 12-752. Effective immediately, the statute provides for an expedited motion to dismiss cases that involve a party's exercise of the "right of petition." The statute also provides for the recovery of attorney fees and related litigation costs.

"Exercise of the right of petition" is defined to mean statements made as part of an initiative, referendum or recall effort or (a) made before or submitted to a legislative or executive body or any other governmental proceeding. (b) made in connection with an issue that is under consideration or review by a legislative or executive body or any other governmental proceeding. (c) made for the purpose of influencing a governmental action, decision or result.

The statute was drafted by State Representative Andy Biggs, R-Gilbert. It applies most directly to the paradigm SLAPP suit scenario where community groups or individuals are sued by developers for libel, slander or tortious interference for their opposition to development projects, zoning issues and other land use issues.

New York Appellate Court Dismisses "Dangerous Doctors" Defamation Case

By Elizabeth A. McNamara and Matthew A. Leish

A New York appellate court this month dismissed a defamation claim brought against *Reader's Digest* magazine and its reporter Derek Burnett by a doctor who had previously been named by the *New York Daily News* as the fourth most-frequently sued doctor in the state of New York. *Kamalian v. Reader's Digest Association, Inc.*, 2006 WL 1174079 (NY App. 2nd Dep't, May 2, 2006). The decision brings to an end an unusual case in which the plaintiff claimed to have been defamed even though he did not deny the underlying facts reported in the article about his malpractice record.

Background

The premise of the *Reader's Digest* article in question, entitled "Dangerous Doctors – When Medical Boards Don't Do Their Job, Patients Pay The Price," was that "lax medical boards" are endangering public health by failing to adequately discipline doctors accused of repeated acts of malpractice.

In the course of discussing the consequences of this failure, the article described four specific doctors who "have a high number of malpractice suits brought against them or [whose] behavior has forced anemic medical boards to act."

One of the four doctors in question was Dr. Michael Kamalian, an orthopedic surgeon whom, the article reported, had "paid out more than $4.6 million on a string of claims that stretch back to 1982." The article described the details of some of the cases that had been lost or settled by Dr. Kamalian and noted that he had been found at fault in five court decisions and had settled five other claims. The article also asked the rhetorical question "shouldn't his history be a concern to the state medical board?"

Dr. Kamalian responded to the story by commencing a defamation action against Reader's Digest and Burnett. Dr. Kamalian's complaint did not deny any of the factual allegations in the article about his malpractice claim history – and, indeed, public records submitted to the court by Reader's Digest demonstrated that Dr. Kamalian's malpractice record was actually *worse* than what was reported in the article.

Instead, Dr. Kamalian took issue with the headline "Dangerous Doctors"; the headline on the cover of the magazine, "Doctors' Deadly Mistakes"; the rhetorical question "shouldn't his history be a concern to the state medical board?"; and the statement that "Kamalian has faced twice as many charges of malpractice as his peers, on average."

In particular, Dr. Kamalian vigorously contended that he was not "dangerous" and that, even though nothing in the article accused him of killing any patients, the cover headline "Doctors' Deadly Mistakes" could be read as applying to him.

Reader's Digest moved to dismiss, relying primarily on the grounds that the headlines and the rhetorical question were protected statements of opinion; that the headlines were also nonactionable because, under New York law, they were a "fair index" of the contents of the article; and that the statement that Dr. Kamalian had "faced twice as many charges of malpractice as his peers, on average" was substantially true.

Reader's Digest also argued that New York's anti-SLAPP statute should apply because, as a licensed physician subject to state supervision, Dr. Kamalian was a "public permittee" and his lawsuit was "materially related" to Reader's Digest's efforts to "report on, comment on . . . challenge or oppose" his continued entitlement to a public license within the meaning of the statute. N.Y. Civil Rights Law §76-a.

Court Rulings

In a perfunctory opinion that did not address most of the arguments raised by Reader's Digest, the trial court denied the motion to dismiss, holding without analysis that, accepting the allegations of the complaint as true, the complaint stated a cause of action for defamation. The court also held that the anti-SLAPP statute did not apply to Dr. Kamalian's claims. *Kamalian v. Reader's Digest*, Index No. 5986-2004 (March 8, 2005).

On appeal, the Second Department reversed and dismissed the complaint. The court first held that the allegedly defamatory statements "constituted pure opinion" and did not imply that they were based on undisclosed facts.

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New York Appellate Court Dismisses "Dangerous Doctors" Defamation Case

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The court further reaffirmed New York's fair index doctrine and held that the headline "Doctors' Deadly Mistakes" "when read and evaluated in conjunction with the text it precedes, was a fair index of the article." The court also held that "the recitation of Kamalian's malpractice history upon which the article was based" was not actionable because it "was substantially true."

Finally, the court denied Reader's Digest's motion to dismiss pursuant to the anti-SLAPP statute as "academic" in light of the dismissal of the complaint on other grounds. Dr. Kamalian has indicated that he does not intend to appeal the decision.

Elizabeth A. McNamara and Matthew A. Leish, partners in the New York office of Davis Wright Tremaine LLP, represented Reader's Digest and Derek Burnett. Dr. Michael Kamalian was represented by Robert Sappe of Feldman, Kleidman & Coffey LLP in Fishkill, N.Y.

Supreme Court Refuses To Hear "Police Libel" Case

The Supreme Court has declined to review a Ninth Circuit decision ruling that struck down a California statute that makes it a misdemeanor to knowingly file a false report of misconduct against a peace officer. *Chaker v. Crogan*, 428 F.3d 1215 (9th Cir. 2005) *cert. denied* 2006 WL 542207 (U.S. May 15, 2006) (No. 05-1118). *See MediaLawLetter* November 2005 at 47.

The Ninth Circuit held the statute was not viewpoint neutral because it "leaves unregulated knowingly false speech supportive of peace officer conduct." The Court's decision relied on *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), where the U.S. Supreme Court struck down a law that prohibited the display of symbols which one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" because it applied only to certain "disfavored" subjects.

The Ninth Circuit found that § 148.6, like the ordinance at issue in *R.A.V.*, "regulates an unprotected category of speech, but singles out certain speech within that category for special opprobrium based on the speaker's viewpoint."

The question presented in defendant's petition was: Does California Penal Code Section 148.6, which makes it misdemeanor to file knowingly false complaint of misconduct against peace officer, impermissibly discriminate based on content of speech in violation of free speech clause of First Amendment?

Petition For Pretrial Discovery Dismissed

Petitioner Sought to Bring False Light Claim Against Newspaper

By Damon Dunn

A petition for pretrial discovery against the *Chicago Sun-Times* for a potential false light claim was dismissed with prejudice in *Maureen Jagmin v. Chicago Sun Times, Inc.*, 06 L 002129 (Cir. Ct. Cook Ct. IL, April 25, 2006).

Background

Illinois Supreme Court Rule 224, "Pretrial Discovery to Identify Responsible Persons and Entities," provides a tool by which a potential plaintiff can compel limited discovery prior to filing a lawsuit. As its name suggests, Rule 224 discovery is limited to determining the identity of a person or entity who may be liable to the potential plaintiff.

Last year, Maureen Jagmin, a former Chicago suburban school board member, or someone at her home, dialed a reporter's cell phone in response to inquiries made to her on the eve of a vote to withdraw her high school district from a suburban high school athletic conference.

The call was answered by voicemail but, instead of hanging up, the caller continued a racially charged conversation with a third person concerning the other high schools in the conference while the reporter's voicemail was recording.

The *Sun-Times* published several articles revealing the contents of the voicemail recording. Jagmin denied that she had made the statements, but after the stories were published, Jagmin resigned from the school board and the Illinois Attorney General opened an investigation into the circumstances surrounding the break up of the athletic conference.

While the story was ongoing, the *Sun-Times* agreed to play the recording to Jagmin for comment but declined several requests to play the recording to her lawyer or turn over a copy of the audio recording. Recently, a civil rights suit was filed challenging the dissolution of the conference.

False Light Claim

In her Rule 224 Complaint, Jagmin alleged that the *Sun-Times* articles placed her in a false light, and that due to the articles, she suffered repeated threats and was pressured to resign. Jagmin sought to gain access to the audio recording of the voicemail message as well as the identities of persons involved in making and safekeeping the recording.

Jagmin claimed that the Sun-Times had not responded to her lawyer's correspondence and without the requested information, she could not ascertain the responsible persons and seek redress for injuries to herself and her reputation.

The *Sun-Times* filed an opposition to Jagmin's petition, arguing that Jagmin was not entitled to a copy of the audio recording pursuant to Rule 224 because the articles provided Jagmin with the necessary information. Jagmin knew both the identity of the reporter and the publisher once the articles had been published under the reporter's byline by the *Sun-Times*. The *Sun-Times* also argued that Jagmin's proposed discovery order was overbroad and unrelated to the purported cause of action.

Petition Dismissed

On April 25, 2006, Circuit Court Judge Kathy M. Flanagan issued a memorandum order and opinion that denied Jagmin's petition and dismissed the case. After an extensive review of Illinois law regarding Rule 224, the court agreed that Rule 224 discovery is limited to identifying a person or entity that may be liable to the potential plaintiff and, since the published articles provided Jagmin with the identity of the potentially responsible parties, a copy of the audio recording was unnecessary.

The court further stated that if a copy of the audio recording was so crucial to Jagmin, she should have filed a lawsuit whereby a court could have entered orders preserving the original voicemail message and requiring the custodian to produce a copy. The court concluded "[t]here is no court ability to enforce requests by letter."

Finally, the court agreed that Jagmin's proposed discovery order sought additional discovery outside the scope of Rule 224 because "the identification of persons who prepared or provided the recording or transcripts, those who had any input or authority or control over the taping, recording, safekeeping, collecting, etc., or those who had input, authority or control over the printing of the news articles goes well beyond the parameters of the Petition and goes to the obtaining of ultimate proof or evidence which would support any potential cause of action."

Damon Dunn and Orley Moskovits of Funkhouser Vegosen Liebman & Dunn Ltd. in Chicago represented Sun-Times, Inc. Petitioner was represented by Lonny Ben Ogus of Law Offices of Lonny Ben Ogus.

Long Island Weekly Newspaper Wins Motion to Dismiss

Substantially True Based on "Documentary Evidence"

By Henry Kaufman and Michael Cantwell

On May 16, 2006, a New York State Supreme Court Justice in Suffolk County granted a local newspaper's motion to dismiss a defamation complaint based on "documentary evidence" consisting of the plaintiff's own sworn pleadings and exhibits in a separate legal proceeding arising out of the same facts that were the subject of the allegedly libelous publications. *Gerard Matovcik v. Times Beacon Record Newspapers et al.*, Index No. 12283/04.

Background

Plaintiff is a high school English teacher and defendants are a weekly newspaper on the North Shore of Long Island and its reporter/editor. The publications at issue are a news article (titled "Scandal in the English Department") and an accompanying editorial ("The Shame of a Miller Place Teacher") reporting and commenting on a previously undisclosed investigation by plaintiff's school district into his involvement in the collection of cash from students for workbooks that had already been budgeted and paid for, and the use by plaintiff of the workbook fees for purchases of various non-workbook items for the English Department.

The news article reported that plaintiff had already been placed on paid leave pending resolution of the investigation. The editorial questioned whether the teacher's actions may have violated penal laws and suggested that the school district refer the matter to the District Attorney.

After the articles were published, but before the defamation action was commenced, the school board formally suspended plaintiff and filed disciplinary charges against him under N.Y. Education Law §3020-a, alleging, *inter alia*, misappropriation and violations of the N.Y. Penal Law. Plaintiff then commenced two actions – the first against the newspaper for defamation; the second against the school board seeking to enjoin the disciplinary proceeding and to require the board to reinstate plaintiff to his position (the "Article 78 proceeding").

The newspaper defendants answered the original complaint, assuming that the seemingly fact-intensive case would have to follow a typical pattern of discovery leading to a motion for summary judgment. The case was then largely dormant as plaintiff and the school district litigated the Article 78 proceeding.

Several months later it was announced that Mr. Matovcik and the school district had entered into a confidential settlement terminating the disciplinary action and the Article 78 proceeding. Reports at that time suggested that the matter had been satisfactorily resolved from Matovcik's point of view.

The newspaper was ultimately able to obtain a copy of the settlement agreement in response to a freedom of information request. This turned out to be a very useful stratagem, in lieu of formal discovery. It became apparent that, under the settlement agreement, plaintiff had in fact accepted a strong reprimand "for collecting money from students and/or directing or permitting teachers under your supervision to collect money from students … for vocabulary books which had already been paid for by the District."

The reprimand "extend[ed] to the fact that [plaintiff] kept custody of the funds [he] collected, failed to apprise the Business Office of [his] collection and custody of the funds, and then unilaterally expended these funds on books and other supplies for [his] department."

The reprimand concluded that "[t]his conduct is unacceptable." As part of the settlement, plaintiff also agreed to be transferred to another school and to resign from his tenured position after two years.

He also paid an "administrative penalty" of $2,000. Notwithstanding the multiple sanctions plaintiff accepted, the settlement purported to provide that it should "not be construed as an admission of culpability or guilt by the teacher of the allegations" and expressly envisioned that plaintiff would continue to pursue his defamation claims against the newspaper.

Thereafter, when plaintiff moved to make certain technical amendments to his complaint in the defamation action, defendants demanded that the action be withdrawn on the ground that it was now clearly frivolous, factually and legally, based on the resolution of the Article 78 proceeding. When the action was not withdrawn defendants moved to dismiss the amended complaint.

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Long Island Weekly Newspaper Wins Motion to Dismiss

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Motion to Dismiss

Under New York State procedure, a party may move to dismiss a complaint when "the documentary evidence definitively contradicts the plaintiff's factual allegations and conclusively disposes of the plaintiff's claim." *Berardino v. Ochlan*, 770 N.Y.S.2d 75, 76 (2d Dep't 2003). Documentary evidence has been construed to include "letters, demands, receipts, releases, contracts, leases as well as public record such as court judgments." See *Weinstein Korn & Miller*, N.Y. Practice, § 3211.06, at 32-40-41.

In addition to the settlement agreement itself, defendants argued that plaintiff's own affidavits and exhibits in the Article 78 proceeding made undeniably clear that he had, notwithstanding the purported reservation of rights, essentially admitted all of the key facts reported as to his involvement in the collection and use for other purposes of the student's workbook funds.

Plaintiff's contention in the Article 78 proceeding that he was merely following longstanding practice of which, he claimed, other school officials were aware, was itself an implicit admission of the central facts that had been reported by defendants.

The newspaper's motion papers appended as exhibits substantial portions of the Article 78 court file. Based on that "documentary evidence" defendants argued that the factual statements in their news article were true or substantially true and that the balance of the article and editorial – including negative characterizations made or quoted in the article such as "scandal," "misappropriation," "slush fund," "scheme," "shame" and "got away with," and questions as to whether the admitted actions amounted to criminal violations – were merely non-actionable statements of opinion based on those undeniably true facts.

Bench Ruling

In its decision from the bench granting defendants' motion to dismiss the court agreed and found, based on the documentary evidence, that the publications were substantially true and "non-libelous." The court observed that the words of negative characterization were either "substantially true" or were not allegations of actual criminality but were commentary and criticism which were not solely directed at plaintiff but also at the school district and the board. The court also concluded that the questions and suggestions raised in the editorial about possible criminal wrongdoing did not rise to the level of libel.

In many defamation cases early dismissal based on the pleadings is assumed to be unavailable where the motion raises issues that cannot be determined based solely on the law as applied to the four corners of the complaint.

This recent decision suggests that, when possible under local procedure, a strategy to seek early dismissal based on "documentary evidence" from a parallel proceeding may be a means by which uncontested material beyond the immediate pleading can be brought to bear at the motion to dismiss stage – even on an issue as seemingly fact-sensitive as "substantial truth."

Obviously, such an early motion is an attractive alternative, where appropriate, to the lengthier – and inherently more costly and burdensome – process of discovery and summary judgment.

Henry Kaufman and Michael Cantwell, of Henry R. Kaufman, P.C., in New York represented the defendants in this case. Plaintiff was represented by John Ray of John Ray and Associates, Miller Place, NY.

Supreme Court Denies Cert. In Obscenity Case

The Supreme Court this month declined to address the question of whether obscenity laws violate a constitutional right of personal privacy. *U.S. v. Extreme Associates, Inc.*, 431 F.3d 150 (3d Cir. 2005), *cert. denied*, 2006 WL 993487 (U.S. May 15, 2006) (No. 05-1306). *See MediaLawLetter* Dec. 2005 at 49.

Last year in a controversial decision a Pennsylvania federal district court ruled that federal obscenity laws were unconstitutional in light of the Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding anti-sodomy laws unconstitutional). *See* 352 F.Supp.2d 578 (W.D.Pa. 2005).

The Third Circuit reversed, holding that the district court overstepped its authority. It noted that the Supreme Court has "explicitly admonished lower courts that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls leaving to this Court the prerogative of overruling its own decisions." *Quoting Rodriquez de Quijas v. Shearson/ American Express*, 490 U.S. 477, 484 (1989).

Moreover the Third Circuit found that several Supreme Court decisions on obscenity had, in fact, considered to some extent privacy interests, albeit without expressly using the phrase "substantive due process." Thus the district court erred in dismissing the indictment "based on speculation" that pivotal obscenity cases "appear to rest on reasons rejected in *Lawrence.*"

The questions presented in defendant's petition were:

1) Do federal obscenity statutes, as applied to distribution of obscenity in private areas of Internet, violate an individual's right to privately access and view obscene materials?
2) Are U.S. Supreme Court's previous determinations that a right to privately possess obscenity generates no corollary right to distribute obscenity valid in light of court's emerging understanding of privacy and the advent of the Internet?
3) Does Lawrence v. Texas eliminate Congress's ability to criminalize distribution of obscenity in private areas of Internet based solely upon concerns for public morality?

Cert. Denied in *Yahoo! v. LICRA* Case

The Supreme Court this month denied defendants' petition for certiorari in *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006), *cert. denied*, 74 USLW 3599 (May 30, 2006) (No. 05-1302).

In January a fractured eleven judge en banc panel of the Ninth Circuit dismissed Yahoo!'s declaratory judgment action seeking a ruling that French court orders against the global internet company are not recognizable or enforceable in the United States.

By a vote of eight to three, the panel held that there was personal jurisdiction in California over the French defendants to hear the case. But three of these eight concluded that the case was not ripe for adjudication. Their votes, together with the three judges who rejected personal jurisdiction formed a six judge majority to dismiss the case.

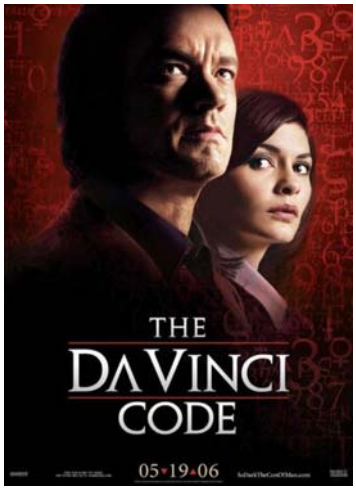
At issue are lawsuits filed in France against Yahoo! by two French civil rights groups complaining that Nazi-era items were available on Yahoo!'s auction websites accessible to French residents.

Although the California action was dismissed, the French defendants last month filed a petition for certiorari on the issue of personal jurisdiction. The questions presented were:

1) By litigating a bona fide claim in a foreign court and receiving a favorable judgment, does a foreign party automatically assent to being haled into a court in the other litigant's home forum?
2) Under the "effects" test set for in *Calder v. Jones*, must the underlying action in a non-contract case be tortious or otherwise wrongful to justify exercise of personal jurisdiction, or is "express aiming" of any action, regardless of culpability, sufficient?

The petition was filed by E. Randol Schoenberg of Donald S. Burris, Burris & Schoenberg LLP in Los Angeles. Yahoo! did not file a responsible petition.

Pro Se Complaint Against Da Vinci Code Movie Dismissed



A New York federal district court this month dismissed a pro se complaint against the producers of the movie The Da Vinci Code. *Baldeo v. Sony Corp. Pictures, et al.*, No. 06-CV-2107 (E.D.N.Y. May 17, 2006) (Feurstein, J.).

The pro se complaint, filed *in forma pauperis*, sought to enjoin release of the film under a variety of claims, including violation of constitutional rights, defamation and intentional infliction of emotional distress. Based on the movie trailer, plaintiff alleged that the movie promoted false ideas about Jesus, harmed his right to free exercise and defamed his religion and lifestyle.

Noting that pro se complaints are subject to less stringent pleading standards, the court worked through plaintiff's complaint to see whether any causes of action existed. Unsurprisingly, it found none. Plaintiff had no standing to pursue vague allegations of public harm. There was no state action to state a claim for deprivation of constitutional rights. Plaintiff's libel claim failed to meet the "of and concerning" requirement or properly plead harm. And, finally, notwithstanding the movie's bad reviews, its content could not support a claim for intentional infliction of emotional distress.

Sony was represented by Charles Sims, Proskauer Rose LLP in New York.

Copyright Claim Against *The Da Vinci Code* Rejected

A Tortuous Tale of Copyright

By Mark Stephens

After 11 days of trial, an English Chancery Court last month rejected a copyright infringement claim by two authors who alleged that the international bestseller *The Da Vinci Code* copied the "architecture" of their earlier nonfiction work *Holy Blood Holy Grail*. *Baigent and Leigh v Random House*, [2006] EWHC 719 (Ch) (Judgment April 7, 2006).

Although, Mr. Justice Peter Smith, a former Chair of the Chancery Bar Association, threw out the allegation of copyright infringement, he agreed that some of the themes and language of *Holy Blood Holy Grail* were used in *The Da Vinci Code* – but this use did not amount to infringement.

Background

The central themes of *Holy Blood Holy Grail* were conceived in a 5 year period between 1976 and1981, by Henry Lincoln: the marriage of Jesus Christ to Mary Magdalene, a blood line from Christ, and the role of the Merovingian's to protect that blood-line. Michael Baigent researched and, together with Leigh and Lincoln, wrote *Holy Blood Holy Grail* which was published in 1982.

Holy Blood Holy Grail was described as a work of "historical conjecture for ordinary people" by the Claimants, Baigent and Leigh. Henry Lincoln, on advice, didn't sue.

The *Da Vinci Code* is a fictional romp based on this historical conjecture. The research for the *Da Vinci Code* began in about 2000 with Dan Brown's wife, Blythe, shouldering the major burden of the investigations. Indeed, Mr Justice Peter Smith, was moved to say: "Blythe Brown was the true researcher... Mr Brown in my view simply accepted Blythe Brown's research material... I do not believe for one minute he was analytical of it or critical of it; he simply accepted it."

Brown pokes fun at the Claimants by introducing a character into his book, a religious historian called Leigh Teabing. It will not have escaped the astute reader that this name is derived from authors Leigh and Baigent (the latter being an anagram.)

Copyright Law

It is trite law that there is no copyright protection in ideas, but only protection for the skill and labour in the rendering of words and the selection of the compilation: the story. There have been no literary copyright infringement cases decided by the UK courts in recent years, and there has been much need of clarification of the law in the light of other developments as to what constitutes the test of "substantial copying."

Particularly in the light of "so-called" non-textual copying cases, the House of Lords in 2000 effectively "*put the cat amongst the pigeons*" in *Designers Guild v. Russell Williams Textiles*, [2000] 1 WLR 2416 (23rd November, 2000). That decision effectively says, if you couldn't have got to design "B" without having taken features from design "A" then there is an infringement of "A".

This was a new and much looser test than had been previously applied, giving greater weight to themes of selection and compilation. The *Designers Guild* test only crystallized in 2001 but its genesis can be traced as far back as 1967 to a case about the film of a book on the Charge of the Light Brigade.

This non-textual-test invariably does justice in cases involving visual works but it has been less than clear how those principles translate into the copyright schemes for other media, in particular between literary works. This is undoubtedly why Baigent and Leigh focused their case with such vigor on the "architecture of the book."

In essence Baigent and Leigh identified themes from *Holy Blood Holy Grail* which had been copied by Dan Brown. The judge accepted that even if its themes had been copied that was insufficient to meet the "substantial copying" test laid down in the Copyright Designs & Patents Act 1988.

Baigent and Leigh lose. They will have to pay their own lawyers and also those of the defendants – some millions. The only practical way of recovering those sums is from royalties so no doubt all parties will be hoping that the publicity of this case and the film will enhance the sales of *Holy Blood Holy Grail* sufficiently to give everyone, not just the lawyers, a handsome payday.

Mark Stephens and Nicola Solomon, of Finers Stephens Innocent LLP in London advised Henry Lincoln in this matter. Plaintiffs Michael Baigent & Richard Leigh were represented by Jonathan Rayner-James QC and Orchard Brayton Graham LLP. The Random House Group Ltd was represented by John Baldwin QC and Arnold & Porter (UK) LLP.

Indiana Supreme Court Authorizes Camera Coverage of Trial Courts

18 Month Pilot Project will Assess the Impact of Cameras in the Courtroom

By Jonna L. McGinley and Briana L. Kovac

The public will get a real-life glimpse into the day-to-day operations of eight selected trial courts across the State of Indiana beginning July 1, 2006. On May 9th, the Indiana Supreme Court approved the implementation of an 18-month pilot project to evaluate the effects of allowing audio, video, radio, and photographic news coverage of all public civil and criminal proceedings.

Presently, cameras are not allowed inside criminal and civil courtrooms in Indiana. Cameras are allowed in hearings of the State Supreme Court and Indiana Court of Appeals, but the roughly 275 trial courts have maintained the camera ban, with rare exceptions such as to allow the shooting of a documentary.

Under the trial court pilot project, the consent of the trial judge and all parties involved in a case are required prior to permitting cameras in the proceeding. Once consent is obtained, as many as one video camera, one still camera, and three audio tape recorders may be allowed into the participating trial courts. The media will be responsible for assembling and removing the recording equipment as well as designating an individual to coordinate the pooling of the coverage between news, radio, and other media outlets.

At the conclusion of each proceeding, participants, including the judge, jurors and attorneys will be asked to evaluate the process.

The pilot project will have stringent media requirements to ensure that potential disturbances are minimized or eliminated entirely. All media personnel and equipment must be in place prior to the commencement of proceedings and may only enter and leave during recesses or after adjournment.

Further, all cameras must be on tri-pods and no equipment that uses a flash, motorized advancement, or produces distracting noises will be permitted in the courtroom.

Finally, confidentiality will be maintained in certain necessary circumstances through a ban on the filming or recording of police informants, undercover agents, minors, jurors, victims of sex-related offenses, witnesses at sentencing hearings, bench conferences, and attorney-client or co-counsel communications.

In the event of a disturbance, failure to comply with the project's requirements, or any other circumstance affecting the proceeding, the participating judges will retain full discretion to suspend or terminate media coverage as deemed necessary.

At the conclusion of each proceeding, participants, including the judge, jurors and attorneys will be asked to evaluate the process. Following the termination of the pilot project in December of 2007, officials will review the program and determine whether it should continue.

The Indiana Broadcasters Association (IBA) and the Hoosier State Press Association (HSPA) will engage in an in-depth analysis of the effectiveness of the pilot project. This evaluation will involve a compilation of surveys issued to all individuals who participated in the cases subject to news coverage, assessing the project's impact on judge and attorney preparation and witness testimony and exploring possible disruptions or other effects of the cameras.

The IBA and HSPA will prepare a detailed report, including a summary of the survey results, explanation of the benefits and detriments of the project, and possible recommendations concerning future media coverage of trial court proceedings and deliver the report to the Indiana Supreme Court within 90 days of the completion of the pilot project.

The IBA and HSPA will also be responsible for hiring a professional research company to evaluate the program's effect on the public impression of the judicial system. This will be accomplished through the establishment of focus groups both within the Indianapolis area and in more distant regions of Indiana.

The IBA and HSPA will also engage in an internal analysis to determine if the in-court news recording enhanced the media's ability to provide in-depth coverage of related issues and submit a report summarizing their findings on each issue within 90 days of the conclusion of each broadcasted trial. Additional evaluation methods may be enacted as deemed necessary to ensure that the project is thoroughly evaluated.

This pilot project is part of an ongoing attempt to engage the public in governmental proceedings. The project has the potential to bring Indiana in line with the majority of U.S. states which already allow cameras in the courtroom.

Jonna L. McGinley and Briana L. Kovac are with Bingham McHale LLP in Indianapolis, Indiana.

NJ Appeals Court Opens Long-Sealed Commercial Case

Strong Endorsement of Right of Access

By Bruce S. Rosen

A New Jersey appellate panel ended a three-year-long seal on a highly publicized civil case involving alleged commercial bribery and collusion between a class action law firm and Prudential Insurance Co. *Lederman v. Prudential Life Ins. Co.*, 2006 WL 1236089 (NJ App. May 9, 2006).

In doing so, the Appellate Division ruled that confidentiality agreements between parties cannot trump First Amendment and common law presumptions of access without a showing of specific harm. And a loss of contractual rights to confidentiality and potential embarrassment – do not automatically constitute such harm.

"The presumption of openness to court proceedings requires more than a passing nod," wrote Judge Michael Winkelstein for the three-member panel. "Open access is the lens through which the public views our government institutions. It is essential to foster public confidence in the judiciary."

Confidentiality agreements between parties cannot trump First Amendment and common law presumptions of access without a showing of specific harm.

The decision reversed three sealing orders by two different trial court judges that closed all filings and proceedings to the public. (In a further twist, when counsel for the parties appeared in court to make minor redactions of non-parties in line with the appeal's court decision, it was discovered that the court file, aside from orders, was missing. At press time, the court was attempting to reconstitute it from counsel's files.)

Background

The case began when several plaintiffs once represented by Leeds Morelli & Brown ("LMB") as part of a class action involving racial discrimination and whistleblowing claims by 358 former Prudential agents, filed suit in Superior Court in Newark, alleging that LMB colluded with Prudential to throw the cases into mandatory arbitration, allowing only limited potential damages, while LMB would receive guaranteed compensation for their representation during the ADR process.

Plaintiffs' counsel, Roper and Twardowsky of Totowa, N.J., had attached the confidential arbitration agreement to the complaint it filed on behalf of the lead plaintiff, and the allegations received extensive publicity on ABC-TV, Bloomberg News and in North Jersey Media Group Inc., publisher of *The Record* and *Herald News*.

Shortly after, Prudential obtained an *ex-parte* sealing order from Judge Edward Schwartz based upon their right to confidentiality in the arbitration agreement.

When another plaintiff moved to lift the seal, the three media entities moved to intervene. The judge would not allow the media to join that argument, ostensibly because they might learn something that had been sealed, and so the media was scheduled for a hearing two weeks after the plaintiff – but the media would not be permitted to learn the decision or read a transcript. The media was also required to file its motion under seal, even though everything in it was public.

At the hearing on the media's motion to intervene, the trial judge, Theodore Winard, declined to make any order public except one simply stating that the media motion was granted and the relief sought was denied. The judge also referred some of the plaintiffs' attorneys and individual plaintiffs for a criminal contempt prosecution, which was also kept under seal.

When media intervenors threatened to bring an action for access to the proceeding under *Richmond Newspapers v. Virginia*, the judge assigned to hear the contempt case stayed it, pending the Appellate Division decision. The status of this proceeding is unclear.

A few months later, Judge Winard sealed a malpractice action filed against LMB by a different plaintiff and attorney and fined that attorney for breaking the confidentiality agreement, although he consolidated that case as well.

New Jersey appellate courts declined to grant the media's leave to appeal, and the appeal languished until the trial judge ordered the underlying case dismissed and the matter referred to arbitration several months later. In a companion decision, the Appellate Court reversed that order

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NJ Appeals Court Opens Long-Sealed Commercial Case

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as well and ordered discovery to proceed on the underlying claims against Prudential and LMB, ruling that the arbitration clause was not meant to encompass the types of claims brought by the plaintiff.

Appeals Court Unseals

The Appellate Division panel, which issued its opinion just one month after hearing oral argument, reaffirmed the First Amendment and common law right of access to court proceedings and the presumption of access to all filed documents under a number of New Jersey Supreme Court and Third Circuit cases.

It ruled that the issues in the underlying suit were matters of legitimate public interest that were interpreted far too narrowly by the judges below and that any sealing application should have been subject to enhanced scrutiny because of the allegations of racial discrimination, fraud and bribery charges involved.

The Court rejected the trial court's reasoning that the defendants' contractual rights could override the presumption of access without a showing of specific harm. Defendants had seized on *dicta* in *Publicker Indus. Inc, v. Cohen*, 733 F.2d 1059, 1066 (3d Cir. 1984), which indicated that a binding contractual obligation could override the presumption when disclosure might deprive them of their right to enforce that obligation.

The Court rejected that view of Publicker and adopted the reasoning of *Universal City Studios, Inc. v. Superior Court*, 110 Cal.App.4th 1273 (Cal. App. 2003) which ruled that more than an agreement of the parties is required, such as a specific showing of injury.

The Court also rejected the trial judge's reliance on perceived embarrassment and harm to the defendants' reputation. "We agree that plaintiff's allegations may embarrass defendants," the panel said. "If embarrassment were the yardstick, sealing court records would be the rule, not the exception."

Finally the Court said that while the prior publicity – which occurred because the plaintiff violated the confidentiality agreement – was not the sole reason to lift the seal, it was a consideration in its decision that no current justification for privacy existed.

Bruce S. Rosen of McCusker, Anselmi, Rosen, Carvelli & Walsh in Chatham, N.J. argued the appeal for intervenors-appellants American Broadcasting Companies, Inc., North Jersey Media Group, Inc., and Bloomberg News L.P. Henry S. Hoberman, Jennifer Borg, and Charles Glasser, were of counsel on the briefs. Nathan Siegel, then of ABC, argued the media motion to intervene at the trial court in 2003. Gregory B. Reilly of Lowenstein Sandler, Roseland N.J. and Theodore Wells of Paul, Weiss, Rifkind, Wharton & Garrison, represented Prudential and its general counsel, Mark Faber. Janice J. DiGennaro, Harris J. Zakarin, and Andrew S. Turkish of Rivkin Radler in Uniondale Long Island, represented LMB and several individual defendants. Angela M Roper of Roper & Twardowsky represented plaintiffs.

Judge Allows Media to Accompany Jury's View of Crime Scene

By Herschel P. Fink

Access to courtroom proceedings is rarely a problem these days. But what happens when the judge takes jurors on a "field trip" to the alleged crime scene, and the crime scene is on private property? That was the issue recently decided in a high profile murder trial being covered by numerous news organizations, including Court TV, as well as one network television news magazine.

Background

The first degree murder trial has all the elements of a made-for-television movie. Mark Unger, 45, lived in an upscale Detroit suburb with his wife, Florence, 37. The couple had two children and, to their neighbors, seemed to live a storybook life. But it wasn't. Mark Unger had substance abuse and gambling problems. Florence began a love affair with a neighbor. She filed for divorce.

On a late October weekend in 2003, Mark Unger convinced his wife to go with him to a rural west Michigan resort. He told police he wanted a reconciliation. What happened late on the night of October 24, 2003 is the subject of Mark Unger's murder trial.

Florence's body was found the next morning with her face in shallow lake water abutting a concrete deck under an elevated lookout porch. The railing on the porch was broken. A medical examiner testified she had been incapacitated by a head injury from a fall from the porch, and her body then dragged and placed in the water to drown. Mark Unger claims she went out alone for a walk. The defense theory is that Florence stood on the elevated porch near the lake. The railing gave way, and she fell to the concrete patio below, striking her head, but then crawled to the edge of the lake.

The prosecution claims the couple quarreled, as they were seen doing earlier in the day; that Unger struggled with his wife and pushed her or she fell. He then dragged her body and placed it in the water, where it was discovered the next morning.

Benzie County (Michigan) Circuit Judge James M. Batzer had been cooperative with the news media that flocked to his usually quiet rural Michigan courthouse to cover the trial. He granted requests to televise and photograph the trial – discretionary under Michigan rules.

But, when it came time to take the jury on a "view" of the crime scene, the judge balked. He ruled that, since the alleged crime scene was on private property, he had no authority to bring along the public, including the media.

Press Can Go With Jury to Crime Scene

Less than an hour after the ruling, on May 3, the *Detroit Free Press*, through its counsel, faxed the judge a letter arguing that "the jury view is an integral part of a criminal trial," citing *Press Enterprise I and II*, two Michigan Supreme Court decisions, a state statute and a prior Detroit Free Press case also involving a jury view, *Michigan v King*, 20 Med. L. Rptr. 2208 (Mich Cir Ct 1993).

Shortly after receiving the letter from the Free Press, Judge Batzer relented, issuing the following order:

> The Court has determined that a jury view is an integral part of a criminal trial. *See Press-Enterprise Co v Superior Court*, 464 US 501 (1984); *Press-Enterprise v Superior Court*, 478 US 1 (1986); *Detroit Free Press v Macomb County Judge*, 405 Michigan 544 (1970); *Detroit Free Press v Recorders Court Judge*, 409 Mich 364 (1980); MCL 600.14200. NOW THEREFORE,
>
> IT IS ORDERED that all members of the camera and press media may follow the Court Party, which consists of the jury, the Judge, counsel, and Court staff, but must remain at least 150 feet behind the Court Party.
>
> IT IS FURTHER ORDERED that, since the jury view will occur on private property, the camera and press media shall take care not to alter or harm any private property and shall exit said private property within 5 minutes of the Court Party leaving the scene.
>
> IT IS FURTHER ORDERED that there is no time limitation for the media to remain on public property that affords a view of the scene.
>
> The view then proceeded with media gallery in tow.

Herschel P. Fink of Honigman Miller Schwartz and Cohn LLP, Detroit, Michigan, represented Detroit Free Press.

Available to MLRC members at www.medialaw.org

MLRC Panic Book
The Fastest Possible Answers in an Emergency

An Anxiety Reducing Project of the MLRC Newsgathering Committee

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Edited by Steven Zansberg, Faegre & Benson

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Legislative Update

By Kevin M. Goldberg

With the recent introduction of a third version of a federal shield law in the 109th Congress, one would assume the focus of this month's update would be on efforts to pass that bill. However, I am reasonably certain that the legislation will be discussed in other parts of this month's newsletter, and various media outlets across the country, so a short summary of the new "Free Flow of Information Act" would be rather superfluous.

Instead, there is presented below a short description of three important, but largely ignored, FOIA exemptions that have been proposed in recent months.

Biodefense Pandemic Vaccine and Drug Development Act (S 2564)

- On October 17, 2005 Sen. Richard Burr (D-NC) introduced a bill that would create a new office within the Department of Health and Human Services.
- This office, to be named the Biomedical Advanced Research and Development Agency ("BARDA"), would be dedicated to countering bioterrorism. However, all of its activities and information would be exempt from the Freedom of Information Act and Federal Advisory Committee Act, unless the Secretary of Health and Human Services or Director of BARDA determined that release of the information would not harm the national security – a determination that was not subject to judicial review.
- The bill moved quickly through the Senate Committee on Health, Education, Labor and Pensions, passing on October 18. It took another 10 days before anyone outside of that committee took notice of the bill's existence and began to mount opposition.
- In the face of serious criticism of the broad exception to FOIA and other concerns with the bill, a new version of this legislation – S 2564 – was introduced by Sen. Burr on April 6, 2006 with a new FOIA exemption that is narrower in scope.
    - The exemption applies to any information that is "created or obtained during the countermeasure and product advanced research and development funded by the Secretary that reveal vulnerabilities of existing medical or public health defenses against biological, chemical, nuclear, or radiological threats."
    - Any information that is withheld shall be reviewed every 5 years to determine whether it can then be released to the public.
    - There is also an exemption from the Federal Advisory Committee Act for the working groups that convene under this bill.
    - No action has been taken on S 2564 by the Committee on Health, Education, Labor and Pensions.

SAFE Port Act (HR 4954 and S 2459)

- The efforts to secure our nations ports may lead to restrictions on access to information about those ports if Senator Susan Collins (R-ME) and Rep. Daniel Lungren (R-CA) have their way.
    - Rep. Lungren introduced HR 4954 on March 14, 2006. It passed the House of Representatives May 4, 2006.
    - Senator Collins introduced S 2459 on March 27, 2006. It received a hearing in the Committee on Governmental Affairs and Homeland Security on April 5, 2006 and passed that Committee on May 2, 2006. It has not received a vote from the full Senate.
    - Though the text of each bill differs slightly, both contain a FOIA exemption that would apply to a new "Automated Targeting System", which is a new system "established by the United States Customs and Border Protection to target those imports which pose a high risk of containing contraband or otherwise pose a security risk." The exemption would work in practice in much the same way as the Critical Infrastructure Information Act of 2002 – by restricting access to information provided by private companies to the government.

National Defense Authorization Act (S 2507 and HR 5122)

- The Fiscal Year 2007 National Defense Authorization Acts were introduced with FOIA exemptions that would have applied to information related to weapons of mass destruction – although the reach of the particular exemptions would certainly go far beyond that narrow class of information.

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Legislative Update

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- The House version of this legislation was introduced by Reps. Duncan Hunter (R-CA.) and Ike Skelton (D-MO) on April 4, 2006 as HR 5122.
- The Senate version was introduced the same day as S 2507 by Sens. John Warner (R-Va.) and Carl Levin (D-MI).

- Section 923 of each bill could be interpreted so broadly that it may actually weaken our national security by preventing the public from participating in its own defense.
  - It does not appear to be limited to information that is generated by the government or even to information that would instantly be related to weapons of mass destruction.
  - Similar to FOIA exemptions which we have opposed in recent years, Section 923 would provide legislative authority for the government to hide a wide swath of documents from public view for reasons completely unrelated to national security; our view is that information which actually does impact the national security could be protected from disclosure through the existing FOIA exemption dealing with that subject.
  - The most likely result of adding this exemption to FOIA would be to restrict access to information that citizens could use to protect themselves and others by participating as the first line in the national defense.
    - The bill pays lip service to this ideal when it states "[t]his exemption shall be implemented in a manner so as to not unduly restrict the public's current level of access to environmental impact statements, records concerning healthcare activities, or other information essential to inform official decision-making concerning the health and safety of the public."
    - However, this general nod toward active community participation is contradicted by other, more specific, provisions in the bill. For instance, the definition of "information concerning weapons of mass destruction" found in subsection (d)(2) contains a list of documents which might be considered "current and sensitive." Much of that information may be very useful to the public, including:
      - Security/emergency response plans
      - Vulnerability assessments for facilities containing weapons of mass destruction materials
      - United States Government evaluations of response plans of state and local governments
  - The exemption was eventually dropped from the version of HR 5122 that was passed by the House of Representatives on May 11, 2006.
  - S 2507 is still pending before the Senate Armed Services Committee.

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

The Ethics Nerd's Guide to the Media Lawyer's Ethics Library

By Lucian T. Pera

The ethics nerd. Every law office has, or should have, at least one. You know, the guy or gal the other lawyers in the office frantically descend on when they need to sue a company they represented last year, or when they really want to contact that former CFO of an opposing party. Yes, I know, the politically correct term these days is "firm counsel" or "ethics counsel," or, in larger firms, even "general counsel." But we're still ethics nerds.

But what do you do when they're on vacation, or actually practicing law themselves? Well, when prayer fails, you can try to find the answer yourself. But that does require that you have some minimum level of resources at hand on legal ethics and related issues. Do you? Today, we're going to find out.

This article will attempt to sketch for you the most effective basic ethics tools you can and should have available to you, even if they are only beautifully arranged behind the glass door in the "Break-in-Case-of-Ethics-Emergency" box in your office.

The Rules in Your Jurisdiction(s)

First and foremost, you need to have handy a current copy of the ethics rules in the jurisdictions in which you regularly practice. Usually, this is easy, but here are a few suggestions for those in doubt.

The high courts and state bars of many jurisdictions publish handy paperbound compilations of their rules, and many jurisdictions' rules are already hidden away in the pamphlets many trial lawyers have of their supreme court's rules. These are often cheap or free in hard copy, and sometimes downloadable free.

Almost every jurisdiction's current ethics rules are also readily available on the web, sometimes in multiple locations, and you should bookmark them right now. Among the sources that will get you to these sites are the American Bar Association's Center for Professional Responsibility website listing of state other web resources (http://www.abanet.org/cpr/links.html), and Cornell Law School's pioneering online American Legal Ethics Library, with its links to various state resources (http://www.law.cornell.edu/ethics/).

Which jurisdictions matter to you? For some, who never practice outside one state, it's easy, but, remember, you would be well advised to have the rules handy from *every jurisdiction in which you practice regularly*. This includes federal and state agencies, a number of which (*e.g.*, the U.S. Patent and Trademark Office) have adopted their own ethics rules, and federal district courts, where the rules are usually borrowed from the state in which they sit. And these other agency and federal jurisdictions sometimes vary or add just one or two rules of their own to the ethics rules they borrow from another jurisdiction, so some care is appropriate.

A Secondary Source on Your Jurisdiction(s)

Many jurisdictions have available one or more secondary sources that act essentially as treatises on ethics and lawyering.

These range from a simple version of your jurisdiction's statutory code that includes a copy of your ethics rules annotated with cases and ethics opinions, to handbook of forms, to guidelines for trust accounting, to full-blown books on the law of ethics in your state. Some states even have multiple sources like this.

One particularly useful source of this kind is maintained as part of Cornell's American Legal Ethics Library (http://www.law.cornell.edu/ethics/). On this site, local lawyers have prepared extensive narrative treatments of the law of ethics in nineteen jurisdictions, all on a common outline and citing local case law and other authority, with links to the rule text.

Because these secondary sources can be easy or hard to find, the best advice is to ask around. Ask your ethics nerd, check your state bar's website for publications, or maybe even email the chair of your state bar's ethics committee. Spending the money to buy such a local treatise could be the best money you ever spend on ethics resources.

Ethics Opinions

Most jurisdictions have some source of written ethics guidance in the form of ethics opinions, often from a state or local bar ethics committee. The authority these carry varies widely, but their value often far outweighs any prece-

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The Ethics Nerd's Guide to the Media Lawyer's Ethics Library

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dential authority established for them by rule or case law. As a practical matter, when the only available guidance on an issue comes from a state bar ethics committee, and where the opinion is at least moderately well-reasoned, an ethics opinion can have the weight of a supreme court opinion for many judges.

Where do you find them? Well, that can be a challenge. Before the internet ("Yes, Virginia, the phrase 'carbon copy' used to refer to something lawyers and their secretaries actually used"), it was almost impossible to find some states' ethics opinions. Today, your odds are very good of being able to find, available for free on the internet, the ethics opinions of almost all jurisdictions. Also, some jurisdictions collect and publish their ethics opinions.

Odds are, the organizations that publish ethics opinions in your jurisdiction will host on their websites – and, if you're lucky, index or allow searches of – their opinions. For pointers to these sites, see the ABA Center for Professional Responsibility listing of state ethics resources (http://www.abanet.org/cpr/links.html), and Cornell's American Legal Ethics Library's state links (http://www.law.cornell.edu/ethics/). Also, LEXIS and WestLaw make most existing ethics opinions available as part of their ethics offerings.

Got Enough Ethics?

OK, so now your emergency ethics kit includes your jurisdiction's rules, along with access to any available secondary source for your jurisdiction and access to available ethics opinions. With luck, you've been able to accomplish this at little or no expense, especially if your jurisdiction offers these resources on the web for free. Can you stop there?

Quite possibly so. For example, if you practice mainly in New York, resources available on the internet and Professor Roy Simon's *Simon's New York Code of Professional Responsibility Annotated* (Thomson West; $131; http://www.thomsonwest.com/store/product.asp?product_id=14691598) should give you as complete a state ethics library as any normal, non-ethics-nerd lawyer would need.

In some smaller states, by way of counter-example, having a copy of the state's ethics rules and access to a set of ethics opinions on the web is a complete state library in itself. In Mississippi, for example, the Mississippi Rules of Professional Conduct are fully available on the Mississippi Supreme Court's website (http://www.mssc.state.ms.us/rules/default.asp), Mississippi State Bar ethics opinions are available in full text and searchable on the bar's website (http://www.msbar.org/ethic_opinions.php), and the bar also publishes several ethics-related pamphlets that it fully republishes on its website (http://www.msbar.org/professional_responsibility.php). Access to these is likewise probably all that an ordinary practicing Mississippi lawyer would need for most day-to-day ethics questions.

My advice, however, is to go just two steps further.

Ethics Specifically for the Media Lawyer

Ask most ethics nerds about resources for media lawyers on ethics, and you will get a blank stare, *unless* they know about the work of the MLRC Defense Counsel Section's ethics committee.

Although there are a few stray (and very good) articles elsewhere, the only place this writer knows of anywhere that has a collection of ethics guidance directed at media lawyers is the website of this MLRC ethics committee, which lives at http://www.medialaw.org//Template.cfm?Section=Ethics_Committee&Template=/MembersOnly.cfm&NavMenuID=383&ContentID=2426&DirectListComboInd=D. Posted there are a series of more than two dozen practical and helpful articles prepared by committee members, almost all of which appeared in these pages first. Visit today and bookmark it.

Practical National Resources

One further step to vacation-proof your ethics resources.

A lawyer's ethics library does not really get a workout unless the question is a tricky one, or matters quite a lot to the lawyer or her client. With the abundance of new national resources on ethics that have emerged over the last decade, and with more jurisdictions moving their rules closer to the ABA Model Rules of Professional Conduct, there are a number of national treatises that can neatly supplement a lawyer's own state's resources and get her to answers that lie outside her own jurisdiction. Two come to mind most quickly.

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The Ethics Nerd's Guide to the Media Lawyer's Ethics Library

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My personal favorite is a handy, nearly 2000-page paperback by Professors Rotunda and Dzienkowski, called, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (Thomson West; $73; http://west.thomson.com/product/17503733/product.asp). Published in conjunction with the ABA, the 2005-2006 edition includes a pretty complete treatment of almost every ethics issue you will ever see, with short, but thorough, narrative sections about each, and appropriate and complete cites to all the relevant ABA opinions and many of the leading cases from across the country.

Another contender for a single-volume, reasonably-priced national resource is the ABA's *Annotated Model Rules of Professional Conduct* (5th ed.; ABA; $98 list price, with discounts down to $73.50 for certain ABA members; http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5610171). The *Annotated Model Rules* provides narrative summaries of many rules-related issues, organized by ABA Model Rule, with citations to and discussions of all relevant ABA opinions and much case law. Its coverage is not quite as broad as the Rotunda and Dzienkowski *Deskbook*, but it's a well-written alternative that gets you quickly to the most important opinions and other sources nationally.

One other viable substitute for such a national treatise is the set of loss prevention materials that some legal malpractice insurers make available to their insureds. For example, if your law firm is a member of Attorneys Liability Assurance Society (ALAS), be absolutely sure to have your loss prevention partner give you access, whether in hard copy or online, to their *Loss Prevention Manual* and related materials. Aon, which brokers legal malpractice insurance for many large law firms, also periodically provides some similarly excellent materials to its client law firms through its loss prevention counsel.

One More Freebie

There are lots of free things on the web, many of them very useful, but there's one more absolutely indispensable site you need to bookmark: www.FreivogelOnConflicts.com. The site contains everything you need to know about conflicts of interest, period. It is authored entirely by William Freivogel of Chicago, now Senior Vice President - Loss Prevention for Aon Risk Services, Inc., and also an ALAS loss prevention veteran, who scrupulously keeps it up to date on a weekly, if not daily basis. Bookmark it now.

Nerd Paradise

But what if you want to go a little deeper, or if money is no object – what other valuable ethics resources could you buy? Well, here's an idiosyncratic list your office ethics nerd would almost certainly bless, even if he might have additions:

- *ABA/BNA Lawyers' Manual on Professional Conduct* (BNA; effective July 2006 (so act now!), prices rise to $1,358 for an annual subscription to the print version, $1,542 for an annual subscription to the electronic version; http://www.bna.com/products/lit/mopc.htm). Still the "bible" of ethics and professional responsibility, this publication is a combination loose-leaf treatise and current awareness service, with solid coverage of pretty much any ethics topic out there. There is an electronic version available online, with excellent search capability and a nifty interface that makes it much easier to use than the print version. The bi-weekly *Current Reports* awareness service (available by email) is the gold standard for those who try to really keep up in this field.
- *Restatement (Third) of the Law Governing Lawyers* (ALI; $195 for the 2-volume hardbound edition, $75 for the 1-volume paperback; https://www.ali.org/ali/LGL.htm). Approved by the American Law Institute in 1998 after many years of work, this Restatement was published in 2000 and has rapidly become a standard reference on almost all the issues it touches. Its coverage is broader than just ethics, including numerous malpractice, attorney-client privilege, and other topics, with the usual authoritative treatment and numerous, usually well-chosen citations. The paperback version is a little-known bargain, but you might need to buy the hardback's pocket part to supplement it.
- *The Law of Lawyering* (3rd ed.; Aspen Law & Business; $345; http://www.aspenpublishers.com/Product.asp?catalog%5Fname=Aspen&category%5Fname=&product%5Fid=0735516081&Mode=SEARCH&ProductType=M). Professors Hazard and Hodes author this two-volume loose-leaf treatise, which remains the standard work in

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the field. Hazard and Hodes is probably the ethics treatise most frequently cited by courts, and it provides really authoritative treatment on all ethics issues

- *Lawyer Law* (ABA; $195 list price, $170 for ABA members; http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=2150009). This recent ABA publication, masterminded by Professor Tom Morgan, is a very detailed, full-text comparison of the current ABA Model Rules of Professional Conduct and the Restatement of the Law Governing Lawyers, along with some other editorial enhancements pointing to other sources and summarizing the law. A very useful tool, and maybe a complete substitute for the Restatement.
- *Lawyer Disqualification* (Banks & Jordan; $179; http://www.banksandjordan.com/catalog.html). This recent (2003 with a 2005 supplement) addition to the literature of conflicts of interest and other bases for lawyer disqualification covers substantive and procedural issue comprehensively, with cases from coast to coast. Combined with Bill Freivogel's site, www.FreivogelOnConflicts.com, a reader would have virtually complete and comprehensive coverage. Put another way, if you have a conflict of interest problem and you can't find an answer in Flamm or Freivogel, there isn't one.

Very Useful Odds and Ends

Touching the borders of matters ethical are a number of other fields, but the one in which research resources are most frequently needed is the area of attorney-client privilege and work product. While there are always the old stalwarts, like *Wigmore on Evidence* and *Weinstein's Federal Evidence*, two relatively recent, very well-organized publications often provide quick and solid answers to these issues:

- *Attorney-Client Privilege in the United States* (2nd ed.; Thomson West; $260; http://west.thomson.com/product/13507262/product.asp). Professor Paul R. Rice's two-volume loose-leaf treatise is, in this writer's experience, the single most accurate, authoritative, and helpful publication on privilege issues. It also comes with a handy CD-ROM containing excellent individual chapters on the law of privilege in every American jurisdictions.
- *The Attorney-Client Privilege and the Work Product Doctrine* (4th ed. and supplement; ABA; $165, and $135 for ABA Litigation Section members; http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=5310292). This ABA Section of Litigation handbook, authored by Chicago lawyer Edna Selan Epstein, is mostly in outline form, and contains quick, effective treatments of what seem to be all the essential cases on all the important privilege and work product issues faced by trial lawyers.

Your To-Do List

Now that you've had the guided tour of essential ethics resources, be sure to check off these items from your to-do list:

1. Get the ethics rules of your jurisdiction (or jurisdictions) readily available to you.
2. Buy or bookmark any available secondary source on your jurisdiction's ethics law.
3. Get access to one decent national resource on ethics.
4. Tell your office ethics nerd to add an extra day on to her vacation.

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Any developments you think other MLRC members should know about?

Call us, or send us a note.

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