

MILRC Media Law Resource Center

MEDIA LAW LETTER

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New York State Enacts Libel Terrorism Protection Act

Foreign Libel Judgments Must Meet First Amendment Standards to be Enforced in New York

By Jason P. Criss

On May 1, New York Governor David Patterson signed into law the “Libel Terrorism Protection Act,” a set of amendments to New York’s long-arm statute and the New York Civil Practice Law and Rules (“CPLR”) provision governing the enforcement of foreign judgments. *See N.Y. C.P.L.R. § 5304* (Apr. 28, 2008).

New York is now the first state to have a law expressly addressing “libel tourism,” the practice of plaintiffs suing authors or publishers for defamation in foreign jurisdictions that have no legitimate connection to the challenged publication and that provide weaker free speech protections.

The Act passed both houses of the State Legislature unanimously, and its sponsors credited the legal, journalism and publishing communities’ broad support for the Act for its rapid (for Albany) passage through the Legislature in less than four months. The New York City Bar, New York State Bar, Authors Guild, Association of American Publishers, New York Newspaper Publishers Association, and PEN all issued statements in support of the bill, and supporting editorials and op-eds were published in the *Albany Times-Union*, *Newsday*, *New York Post*, and *Wall Street Journal*.

The Act was prompted by the decision in *Ehrenfeld v. Bin Mahfouz*, 881 N.E.2d 830 (N.Y. Dec 20, 2007) (J. Ciparick) in which the New York Court of Appeals held that the long-arm statute then in effect did not support the exercise of jurisdiction over a Saudi plaintiff who had sued a New York author for libel in the United Kingdom, but who had not taken any actions to enforce the judgment in New York. *See Id.*

The Act overruled the *Ehrenfeld* decision by amending two separate provisions of the CPLR. These amendments took effect immediately. First, the Act added to CPLR § 5304’s list of grounds pursuant to which a court has the discretion to not recognize a foreign judgment that “the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court’s adjudication provided at least as much protection

for freedom of speech and press in that case as would be provided by both the United States and New York constitutions.” Libel Terrorism Protection Act § 2; N.Y. C.P.L.R. § 5304(b)(8).

Second, the bill amended New York’s long arm statute to provide for jurisdiction over a plaintiff who secures a foreign defamation judgment with a sufficient nexus to New York State, by adding this new paragraph to CPLR § 302:

The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York who has assets in New York or may have to take actions in New York to comply with the judgment, for the purposes of rendering declaratory relief with respect to that person's liability for the judgment, and/or for the purpose of determining whether said judgment should be deemed non-recognizable pursuant to section fifty-three hundred four of this chapter, to the fullest extent permitted by the United States constitution, provided:

1. the publication at issue was published in New York, and
2. that resident or person amenable to jurisdiction in New York (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign defamation judgment. The provisions of this subdivision shall apply to persons who obtained judgments in defamation proceedings outside the United States prior to and/or after the effective date of this subdivision.

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New York State Enacts Libel Terrorism Protection Act

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Libel Terrorism Protection Act § 3; N.Y. C.P.L.R. § 302 (d).

These CPLR amendments filled significant gaps in the protections for libel defendants under prior New York law. Previously, if a foreign defamation plaintiff tried to enforce a foreign defamation judgment, a New York court likely would have refused to enforce it. *See, e.g., Bachanan v. India Abroad Publications Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992) (J. Fingerhood) (declining to enforce an English defamation judgment because it would be repugnant to public policy to enforce a judgment imposed without First Amendment protections). But the author or publisher sued for defamation abroad had to wait for the foreign libel plaintiff to take action. Now, the author or pub-

lisher can take the initiative by filing a declaratory action and obtaining an order stating that that foreign judgment is unenforceable. These New York declaratory judgment actions could prove to be a powerful check against libel tourists' attempts to chill criticism by United States authors and publishers.

Time will tell how many authors and publishers avail themselves of the Act's protections, and whether other states will follow New York's lead and enact similar legislation.

Jason P. Criss, Special Counsel to Covington & Burling LLP in New York, represented a group of press freedom organizations and media companies as amici in Ehrenfeld. He also was one of the authors of the New York City Bar's position paper in support of the Act.

Another Bill Introduced to Limit Enforcement of Foreign Defamation Judgments

At press time, Congressman Steve Cohen (R-TN) introduced [H.R. 6146](#) to prohibit recognition and enforcement of foreign defamation judgments that do not comport with First Amendment protections.

The bill is co-sponsored by Representatives Darrell Issa, Jerrold Nadler, John Conyers, Howard Berman, Howard Coble, Zoe Lofgren, Sheila Jackson-Lee, Robert Wexler, Hank Johnson, Luis Gutierrez, Mark Udall, and John Yarmuth. Illinois Senator Dick Durban may introduce a similar bill in the Senate.

The bill provides that: "Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment concerning defamation unless the domestic court determines that the foreign judgment is consistent with the first amendment to the Constitution of the United States."

The bill defines defamation as " libel, slander, or any other cause of action primarily based on a published communication."

According to Congressman Cohen's office the Congressional Research Service ("CRS") has concluded that Congress has two or three different sources of power under the Constitution to regulate the enforcement of foreign judgments even though historically this has been a matter of state law. This includes Congress's power over foreign affairs, and its 14th Amendment Section 5 power to uphold the First Amendment . The CRS concluded that there was sufficient state action when a domestic court enforces a foreign judgment.

Legislative Update: Libel Tourism Visits Capitol Hill, While Media Ownership Gets Its Day in the Senate

By Kathleen Kirby & Shawn A. Bone

The issue of libel tourism – one that has flummoxed courts for years – has finally reached Capitol Hill with the introduction of the “Free Speech Protection Act of 2008” (S. 2977, H.R. 5814) by Senator Arlen Specter (R-PA) and Representative Peter King (R-NY). Both Members introduced identical legislation in the last two months to address the enforceability of foreign defamation judgments in the U.S. Specifically, the legislation would authorize the following:

A United States “person” (namely a U.S. citizen, a resident alien, and a business incorporated in or with its primary location in the U.S.) who is the subject of foreign defamation litigation precipitated by writings, utterances, or other speech published, uttered, or disseminated in the U.S. could bring a federal suit against the person who has sued the U.S. person in foreign court, if the writings, utterances, or other speech that are the subject of the suit would not constitute defamation under United States law. S. 2977/H.R. 5814 § 3(a).

The federal court where this suit is filed would be entitled to enter a judgment in favor of the U.S. person barring enforcement of any foreign defamation judgment concerning the writings, utterances, or other speech that is found to be not defamatory under U.S.

law. The court may also order the foreign litigant to pay in damages the amount of any foreign judgment obtained by the litigant, as well as the costs incurred by the U.S. person in the foreign litigation and the value of any harm caused to their opportunity to publish, conduct research, or generate funding. *Id.* § 3 (c).

A jury may also award the U.S. person treble damages if it determines that the foreign litigant “intentionally engaged in a scheme to suppress rights under the [First Amendment].” *Id.* § 3(d).

A federal court may exert jurisdiction over a foreign litigant in a suit under the Act by virtue of the fact that the foreign litigant filed a defamation suit in a foreign jurisdiction concerning the U.S. person. *Id.* § 3(b).

The Act’s provisions apply retroactively to suits filed before its passage. *Id.* § 4. The Act also provides that a foreign litigant may maintain a foreign defamation action provided that the suit is brought in good faith and the U.S. person being sued “failed to adhere to standards of professionalism by publishing false information maliciously or recklessly.” *Id.* § 5.

As the nickname suggests, libel tourism refers to litigants shopping for the best place to sue for, and recover damages for, defamation (including both libel and slander). Libel tourism is not the only problem with defamation in an age where speech is disseminated worldwide, whether through print publications or online. See Shawn A. Bone, *Private Harms in the Cyber-World: The Conundrum of Choice of Law for Defamation Posed by Gutnick v. Dow Jones & Co.*, 62 Wash. & Lee L. Rev. 279 (2004) for a discussion of choice of law questions in foreign defamation actions premised on statements made online by U.S. defendants.

In recent years, many litigants have chosen to sue for defamation in foreign courts, ostensibly based on the reputational

A jury may also award the U.S. person treble damages if it determines that the foreign litigant “intentionally engaged in a scheme to suppress rights under the [First Amendment].”

harm suffered by the litigant in that foreign country. According to Senator Specter, in his statement introducing the Free Speech Protection Act of 2008, English courts have become the courts of choice for defamation action because English law does not require a litigant to prove falsity or actual malice. See [Statement of Senator Specter on Introduction of S. 2977](#) (May 7, 2008).

An added advantage of suing in a foreign court, however, is the ability of the litigant to avoid the strictures the First Amendment places on defamation actions in the United States. Once a

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Legislative Update: Libel Tourism Visits Capitol Hill, While Media Ownership Gets Its Day in the Senate

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judgment has been obtained in that foreign tribunal, litigants then come to the United States to enforce the foreign judgment against the U.S. property of the alleged defamer. See, e.g., *Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997).

The instant legislation was prompted by a federal court action in New York. In *Ehrenfeld v. Mahfouz*, a litigant from Saudi Arabia had sued a U.S. citizen in English court, claiming that a book written by the U.S. citizen indicated that Mr. Mahfouz financially supported terrorism. English jurisdiction was premised on the fact that the book was distributed in the country and 23 copies of this book had been purchased there. See www.binmahfouz.info/news_20050503_full.html for a copy of the English judgment in the case. The English court notes that 23 copies had been sold in England at the time judgment was rendered. The court also states that portions of the book were had been made available online, and could be accessed by English citizens.

Ms. Ehrenfeld refused to make an appearance in or reply to the suit, and the English court entered a default judgment against her that included money damages as well as an injunction to bar Ms. Ehrenfeld from publishing, or causing or authorizing the further publication, of the allegedly defamatory statements in England. Ms. Ehrenfeld then filed a declaratory judgment action in New York federal court to render the English judgment unenforceable, and Mr. Mahfouz filed a dismissal for lack of personal jurisdiction.

The U.S. Court of Appeals for the Second Circuit held that such actions, at least under New York law, are impermissible for lack of personal jurisdiction over the foreign litigant, where jurisdiction is asserted based solely on the fact that the foreign litigant has obtained a foreign defamation judgment against the federal court plaintiff. See *Ehrenfeld v. Mahfouz*, No. 06-2228CV (Mar. 3, 2008), affirming *Ehrenfeld v. Mahfouz*, 2006 WL 1096816 (S.D.N.Y. Apr. 16, 2006).

This decision was informed by an answer to a certified question, issued by New York Court of Appeals, which stated that New York state law would not permit personal jurisdiction in a case such as this. See *Herzfeld v. Mahfouz*, 2007 WL 4438940 (N.Y. Dec. 20, 2007). (The New York legislature has now amended New York law to establish personal jurisdiction in such lawsuits. See *N.Y. Senate Bill No. 6687* (signed by the Governor of New York on Apr. 28, 2008).

Senator Specter has called for swift action on the "Free Speech Protection Act of 2008" as a means of protecting the

ability of U.S. citizens to address important matters like terrorism funding. Both he and Representative King have argued that the Act is essential to the protection of the First Amendment in foreign courts, though neither the House nor the Senate Judiciary Committees have scheduled a hearing on this issue. It is unclear whether the legislation will be debated by either Chamber before the end of the current session.

Media Ownership Update

Both the House and the Senate have explored legislative options in the wake of the FCC's media ownership decision last December, with Members of both Houses deciding to introduce Resolutions of Disapproval concerning the new rules. The Resolution of Disapproval is a relatively underutilized Congressional tool that allows Congress to adopt a resolution which renders null and void a particular agency rulemaking. See 5 U.S.C. § 801 et seq. for the rules concerning the form of a Resolution of Disapproval and procedural rules for passage of the same. Such resolutions require the signature of the President to be valid, per the Presentment clause of the Constitution. U.S. Const. Art. I, § 7.

The Senate has been more active on the question of the validity of the media ownership rules under the direction of Senator Byron Dorgan (D-ND). His Resolution of Disapproval, Senate Joint Resolution 28, was introduced on March 5, 2008, and adopted by the Senate's Committee on Commerce, Science, and Transportation in early May with the support of the Chairman and Vice-Chairman of that Committee, Senator Daniel Inouye (D-HI) and Senator Ted Stevens (R-AK). On May 15, the full Senate approved the Resolution by voice vote, although several Senators came to the floor to note their support for the new rules and opposition to the Resolution.

The House has been less keen to address its pending Resolution of Disapproval, House Joint Resolution 79, introduced by Representative Jay Inslee (D-WA). In fact, it is currently unclear whether either the Senate or the House Resolution will receive a vote in the House. Should passage of the Resolution occur, however, President Bush has indicated that he will veto the measure. The House and the Senate will have an opportunity to override this veto.

Kathleen Kirby and Shawn A. Bone are with Wiley Rein LLP in Washington, D.C.

MLRC – Stanford Conference Explores Digital Publishing and Distribution Issues

Legal Frontiers in Digital Media

Over 120 participants convened at Stanford University this month for a conference organized by MLRC, Stanford Publishing Courses and Stanford Law School's Center for Internet & Society.

The two-day event held on May 15-16 explored emerging legal issues surrounding digital content in today's multi-platform world. Conference sessions explored:

- liability of site owners for third-party content
- digital content licensing, copyright and fair use
- behavioral targeting, geo-targeting and related privacy issues
- legal issues surrounding online advertising and keyword buying
- ethics of geo-filtering, data-scraping and user-profiling
- emerging issues in mobile content distribution

The conference was presented with the additional support of MLRC members Davis Wright Tremaine LLP, Dow Lohnes PLLC, Hiscox and Microsoft.



(From left to Right) Judge Anthony Kline, Nicole Wong, and Patrick Carome



Matt Cohen, OneSpot.com

JUST PUBLISHED BULLETIN 2008:2

DIGITAL MEDIA: ARTICLES & COMMENTS ON NEW FRONTIERS IN INTERNET LAW

The Murky Wake of Roommates.com:

When Does the Exercise of "Traditional Editorial Functions" Render a Website Operator Responsible for Third Party Postings?

By Steven D. Zansberg and Adam M. Platt

Targeting With Others' Trademarks:

The Uncertain Law of Keyword Based Online Advertisements

By Mark Sableman and Brian Reinhold

FTC Behavioral Advertising Privacy Principles Extend Far Beyond Current Requirements

By James Chadwick and Brian Anderson

Online Syndication of User Generated Content Under the Communications Decency Act

By Jeffrey P. Hermes, Elizabeth A. Ritvo, Samantha L. Gerlovin, and Benjamin M. Welch

Mobile Content: Going the Distance

By Daniel M. Waggoner and Ambika K. Doran

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State Right of Publicity Claims Are Not Barred by Section 230

Court Holds All Intellectual Property Claims Outside the Scope of Statute

In an interesting ruling the New Hampshire federal district court recently held that a website was not protected by Section 230 of the Communications Decency Act for a third party posting that allegedly violated plaintiff's right of publicity. *Doe v. Friendfinder Network, Inc., et al.*, 540 F.Supp.2d 288 (D.N.H. 2008) (Laplante, J.).

The plaintiff sued over a false profile on an adult website. While the court dismissed the bulk of plaintiff's claims under Section 230, it found that a state right of publicity claim was not barred by Section 230. The court relied on what it deemed the "plain language" of § 230(e)(2) which provides that the statute "shall [not] be construed to limit or expand any law pertaining to intellectual property."

Background

The "Jane Doe" plaintiff sued over a false profile posted to AdultFriendFinder.com, an online sex personals website operated by defendants Friendfinder Network, Inc. and Various, Inc.

In June 2005, an unknown person created a profile for a woman with the screen name "petra03755." The profile stated that "petra03755 was a recently separated 40-year old woman in the Upper Valley region of New Hampshire seeking "Men or Women for Erotic Chat/E-mail/Phone Fantasies and Discreet Relationship." The profile was created by using an online form which queried users about their biographical data and sexual interests. The person who posted the profile also uploaded a nude photo of a woman.

Plaintiff complained about the profile and the defendants removed it from the website, but a "teaser profile" still appeared as advertising on third party websites. Although the plaintiff was not identified by name and claimed the photo was not of her, she alleged that several friends believed the profile was hers. Plaintiff filed an eight count complaint against the defendants alleging "Invasion of Property/Intellectual Property Rights" (Count I); Defamation (Count II); "Intentional/Negligent/Reckless Con-

duct" (Count III); "Dangerous Instrumentality/Product" (Count IV); Intentional infliction of emotional distress (Count V); Violation of the New Hampshire Consumer Protection Act, N.H.Rev.Stat. Ann. § 358-A (Count VI); False designations in violation of the Lanham Act, (Count VII); and "Willful and Wanton Conduct" (Count VIII).

The district court granted a defense motion to dismiss all the claims under Section 230, except plaintiff's state right of publicity and federal Lanham Act claims.

Defamation & Related Claims

The court first held that plaintiff's defamation, emotional distress and related claims were all clearly barred by Section 230. The court relied primarily on the reasoning of the First Circuit's decision in *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413 (1st Cir. 2007).

In *Universal*, the First Circuit interpreted Section 230 for the first time, affirming dismissal of claims against Lycos for third party postings on an investors message board. The First Circuit specifically rejected plaintiff's argument that the website provided "culpable assistance" in creating the postings "through the construct and operation of its website."

The New Hampshire district court relied on this rationale to rule that "Section 230 bars the plaintiff's claims that the defendants acted wrongfully by encouraging the anonymous submission of profiles or by failing to verify that a profile corresponded to the submitter's true identity." This was so even where the false profile was created by using defendant's online questionnaire. To lose immunity the website would have to engage in "clear expression or other affirmative steps taken to foster unlawful activity" and here plaintiff

"has not alleged anything even approaching it."

The district court's decision was issued one week before the Ninth Circuit's en banc decision in *Fair Housing Council v. Roommates.com*, Nos. 04-56916, 04-57173; 2008 WL 879293 (9th Cir. Apr. 3, 2008), which analyzed this issue in detail. In addressing the issue of liability for user content created through online prompts and questionnaires, Judge Kozinski affirmed the

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State Right of Publicity Claims Are Not Barred by Section 230

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broad scope of protection afforded by Section 230, but carved out a narrow exception for online questionnaires that compel users to submit information that is itself illegal. The New Hampshire district court decision appears consistent with this approach.

The New Hampshire district court also held that that the “teaser profiles” used as online advertising for the website were protected by Section 230.

Section 230 depends on the source of the information in the allegedly tortious statement, not on the source of the statement itself. Because “petra03755” was the source of the allegedly injurious matter in the profile, then, the defendants cannot be held liable for “reposting” the profile elsewhere *Friendfinder* at 296.

Right of Publicity & Section 230

The court next considered whether plaintiff’s state right of publicity claim was barred by Section 230.

The Ninth Circuit Court of Appeals had considered this issue last year and held that Section 230 immunizes interactive computer service providers from state law right of publicity claims relating to third-party created content. *Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102 (9th Cir.), *cert. denied*, 2007 WL 2455134 (U.S. 2007).

The plaintiff in *Perfect 10*, the publisher of print and online adult magazines, sued a credit card processing company and web, hosting company for, among other things, violating plaintiff’s right of publicity under California law. On that issue, the Ninth Circuit held that § 230 provided the defendants with immunity. Only federal intellectual property claims are outside the scope of § 230 immunity. The Ninth Circuit noted that while federal intellectual property law is relatively well-established, state laws are not uniform, bear various names, provide for varying causes of action and remedies, and have varying purposes and policy goals. Thus “[b]ecause material on a website may be viewed across the Internet, and thus in more than one state at a time, permitting the reach of any particular state’s definition of intellectual property to dictate the contours of this federal immunity would be contrary to Congress’s expressed goal of insulating the development of the Internet from the various state-law regimes.” *Perfect 10* at 1118-1119.

The New Hampshire district court disagreed, arguing that the relevant portion of Section 230 makes no distinction between

state and federal intellectual property. And the court criticized the Ninth Circuit for relying on the “intent” rather than the express language of the statute

Here, the language of § 230(e) (2) itself does not suggest a limitation to federal intellectual property law, but states simply that “[n]othing in this section shall be construed to limit or expand *any* law relating to intellectual property.” *Friendfinder* at 300.

Moreover, the court also noted that other portions of Section 230 specifically identify federal and state law. *See* § 230(e)(1) (“Nothing in this section shall be construed to impair the enforcement of [named federal criminal statutes] or any other *Federal* criminal statute”), § 230(e)(3) (“Nothing in this section shall be construed to prevent any State from enforcing any *State* law that is consistent with this section”). Thus “where Congress wished to distinguish between state and federal law in § 230 it knew how to do so.”

The court disagreed with the Ninth Circuit’s assessment that the state intellectual property laws differ significantly from each other or from federal law so as to unduly burden interactive computer service providers and users.

This court has no reason to believe that reading § 230(e) (2) to exempt state intellectual property law would place any materially greater burden on service providers than they face by having to comply with federal intellectual property law—an obligation that persists under even *Perfect 10*’s construction of the CDA. That court’s view that “inclusion of rights protected by state law within the ‘intellectual property’ exemption would fatally undermine the broad grant of immunity provided by the CDA,” 488 F.3d at 1119 n. 7, is simply unsupported.

In conclusion the court ruled that plaintiff had sufficiently pled the elements of a right of publicity claim by alleging she had an enforceable right in her persona and that the defendants used an aspect of her persona without permission and causing her damage.

The plaintiff is represented by W.E. Whittington, Whittington Law Associates PLLC, Hanover, NH. Defendants are represented by Ira Rothken and Jared Smith, Rothken Law Firm LLP, Novato, CA; and James Bassett and Jeffrey Spear, Orr & Reno PA, Concord, NH.

National Guard Photo Leads to New Decision on Privacy, Publicity

By Ian C. Ballon and Wendy M. Mantell

A West Virginia federal district court dismissed a plaintiff's right of publicity claim (without prejudice to re-allege that he is a public figure) and dismissed with prejudice his right of publicity claim based on intrusion, but not the claim based on false light. *Curran v. Amazon.com, Inc. et al.*, Case. No. 2:07-0354 (S.D. W. Va. Mar. 2008) (Copenhaver, J.).

The court further denied CafePress.com's ("CafePress") motion to dismiss these claims pursuant to section 230 of the Communications Decency Act ("CDA"), but did so based solely on the court's unwillingness at the pleadings stage to take judicial notice of CafePress' status as a host of user-generated sales offers, concluding that ultimately "plaintiff faces an uphill battle given the broad grant of immunity conferred by § 230, as interpreted in the seminal case of *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998)."

Background

The plaintiff Erik Curran ("Curran"), a West Virginia National Guardsman, filed suit because his image allegedly was licensed by defendant Getty Images and subsequently appeared on the cover of a book published by defendant St. Martin's Press, which was sold by defendant Amazon.com, Inc.

The image also allegedly inspired an action figure manufactured and sold by defendant Hot Toys, Inc. and allegedly was reproduced on a t-shirt sold by a Shopkeeper on CafePress.com, the leading user-generated commerce web site that allows individuals and businesses to set up virtual online shops. Curran alleged that the defendants violated his rights of privacy and publicity by using his likeness without his consent. There was no dispute that the image or likeness in question was taken while Curran was deployed in active combat in Iraq.

The defendants moved to dismiss, arguing among other things that Curran could not maintain his publicity claim because he had not alleged he was a public figure, and, that Curran's claim for invasion of the right of privacy for intrusion upon seclusion failed because the allegedly infringing photo was taken without any physical intrusion into

Curran's private space, though denied the motion to dismiss with respect to the false light claim finding that the images could be found to have placed him in a false light.

Because Curran had not alleged that he was a public figure, nor that he was a soldier, the Court dismissed Curran's publicity claim without prejudice.

Some of the defendants also argued that Curran's right of publicity claim failed because Curran had not established that his likeness had commercial value. Because the court dismissed with prejudice Curran's right of publicity claim on other grounds as described above, the court declined to rule on that portion of defendants' motion.

Judge Copenhaver likewise dismissed Curran's claim for invasion of privacy based on intrusion because there was no allegation of any physical intrusion.

The Court denied defendants' Getty and St. Martin's motions with respect to false light invasion of privacy finding that the plaintiff had pled the necessary elements of (1) the false (2) publication (3) of private facts (4) portraying the plaintiff in a false light (5) which would be highly offensive to a reasonable person, and at this stage of the case the Court found that a reasonable person could conclude that the allegedly infringing book, entitled "Killer Elite" had placed plaintiff in an offensive false light.

The court also declined to dismiss the complaint on First Amendment grounds finding that a dismissal based on either the "newsworthiness" or "incidental use" exceptions to the rights of privacy and publicity would be premature at this stage in the case.

With respect to CafePress' CDA defense, Judge Copenhaver declined to dismiss the case on a Rule 12 motion, agreeing with the Seventh Circuit that CDA issues are best resolved at the summary judgment stage. *See Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003); *see also Novak v. Overture, Svcs., Inc.*, 309 F. Supp. 2d 446, 452 (E.D.N.Y. 2004) (citing *GTE Corp.*, 347 F.3d at 657). *But see Beyond Systems, Inc. v. Keynetics, Inc.*, 422 F. Supp. 2d 523, 536-37 (D. Md. 2006) (granting one ISP's motion to dismiss because it was "clear that all the requisites for the application of the immunity provisions of the CDA are in place."); *Universal Communication Systems, Inc. v. Lycos*, 478 F. 3d 413, 419 (1st Cir. 2007) (affirming the district court's dismissal of claims against defendant for failure to state a claim because

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National Guard Photo Leads to New Decision on Privacy, Publicity and the CDA*(Continued from page 11)*

its activities fell squarely within those that Congress intended to immunize); *Doe v. Bates*, 35 Media L. Rep. 1435, 2006 WL 3813758 at *8-10 (E.D. Tex. 2006) (finding that a Rule 12(b)(6) motion is a procedurally proper method for determining the applicability of an affirmative defense provided by Section 230 and dismissing plaintiff's complaint); *PatentWizard, Inc. v. Kinko's Inc.*, 163 F. Supp. 2d 1069 (D.S.D. 2001) (granting motion to dismiss pursuant to Rule 12(b)(6) based on the CDA); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 833-35 (2002) (dismissing claim on demurrer against eBay for, among others, negligence based on federal immunity granted by Section 230 of the CDA).

Judge Copenhaver made it clear, however, that the CDA presented a major obstacle to plaintiff's privacy and publicity claims. CafePress, the leading user generated retail site on the Internet, allows shopkeepers to create customized products and feature and offer for sale their products in a virtual online marketplace, hosted by CafePress. CafePress does not itself create the content displayed on the products created by its users; it provides automated interactive Internet-based tools to allow users to create, buy and sell their customized products through online stores and in an online marketplace. The t-shirts at issue in *Curran* were created and sold by a shopkeeper through the CafePress marketplace.

The CDA expressly preempts claims against interactive computer services for material posted by their users or other third parties. Other courts have ruled that the CDA expressly preempts claims based on state law right of publicity and privacy claims. *See Perfect 10, Inc. v. CCBill, LLC*, 488 F.3d 1102 (9th Cir. 2007) (ruling that CDA preempts claims for invasion of the right of publicity); *Carafano v. Metrosplash.com*, 339 F.3d 1119, 1122-25 (9th Cir. 2003) (holding that interactive computer service was entitled to statutory immunity from liability in tort, including for alleged invasion of privacy); *Parker v. Google, Inc.*, 422 F. Supp. 2d 492, 500 (E.D. Pa. 2006) (same). While the Court denied CafePress' motion with respect to the CDA defense because "CDA immunity is a question awaiting discovery and exploration," it specifically cautioned that "plaintiff faces an uphill battle given the broad grant of immunity conferred by § 230, as interpreted in the seminal case of *Zeran v. America Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997), *cert. denied*, 524 U.S. 937 (1998)."

Ian C. Ballon and Wendy M. Mantell of Greenberg Traurig, LLP represent CafePress.com, Inc. in this matter. The views expressed in this article are solely their own. Defendant Hot Toys, Ltd. is represented by Mychal S. Schulz and Ashley C. Pack, Dinsmore & Shohl LLP, Charleston, WV. Defendants St. Martin's Press, LLC and Amazon.com are represented by David A. Barnette and W. Scott Evans, Jackson Kelly PLLC, Charleston, WV. Defendant Getty Images, Inc. is represented by Stephen Rummage, Davis Wright Tremaine, Seattle, WA. Plaintiff is represented by Marvin W. Masters and Charles M. Love, IV, The Master Law Firm in Charleston, WV.

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Women Indicted in MySpace Suicide Case

Criminal Charges Hinge on Violating Website's Terms of Use

A Missouri woman who allegedly created a fake MySpace profile to cyberbully a 13 year old neighbor was indicted in mid-May by a federal grand jury in California for violating the Computer Fraud and Abuse Act, 18 U.S.C. Section 1030 et seq. *United States v. Drew*, Crim. No. 08-00582 (C.D. Cal. indictment filed May 15, 2008).

The controversial criminal charges are based on allegedly accessing the MySpace computer network in violation of its terms of service. These terms prohibit false profiles and abusive conduct online. The charges have been described as a dangerous use of the federal statute. As one newspaper editorial pointed out, "Under this theory, millions of Americans who post inaccurate yet flattering profiles of themselves online or post angry responses in cyber-spats with friends are committing fraud on an hourly basis and could be prosecuted." *Falsehoods on MySpace*, *Washington Post*, May 26, 2008, at A16.

Background

In a highly publicized incident, the defendant Lori Drew of Dardenne Prairie, Missouri, is accused of acting together with several co-conspirators to create a false profile on MySpace, and pretending to be a 16-year-old boy named "Josh Evans." In 2006, "Josh" contacted Megan through MySpace and engaged in an e-mail correspondence over the following weeks. According to the indictment, after five weeks of flirtatious e-mails back and forth, on October 7, 2006 "Josh" sent an e-mail to Megan telling her that he was moving away. She responded by writing "I love you so much."

On October 15, 2006, "Josh" and Megan exchanged a flurry of e-mails, including messages from "Josh" saying that "I don't know if I want to be friends with you anymore because I've heard you are not very nice to your friends" and "The world would be a better place without you." After the exchange of these messages, Megan hung herself in her bedroom closet.

According to the indictment, Drew and her co-conspirators deleted the "Josh" account when they found out about Megan's suicide.

The federal indictment in California came after state prosecutors in Missouri concluded that there was insufficient evidence to file harassment, stalking or child endangerment charges against Drew, and federal prosecutors in Missouri concluded that there was no basis for prosecution.

Although the defendant, and all other individuals involved in the case reside in Missouri, the California court's jurisdiction is based on the alleged illegal use of the MySpace computer system. MySpace's corporate offices and servers are located in Los Angeles County, California.

Computer Fraud and Abuse Act

The [Computer Fraud and Abuse Act](#) was originally enacted in 1984 and Congress has followed with a series of amendments, most recently in 2002. Among other things, the statute makes it a federal crime to access government and private computers without authorization. Lori Drew was charged with violating 18 U.S.C. Section 1030 (a)(2)(C) which makes it a crime if a person:

intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains information from any protected computer if the conduct involved an interstate or foreign communication.

The term "exceeds authorized access" means to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter.

No reported cases consider whether using a website in violation of its terms of service agreement constitutes unauthorized access within the meaning of the statute.

Internet Harassment Bills

Legislators in Missouri and Illinois, and in Congress, moved to pass laws making Internet harassment a specific crime. The Missouri legislature passed its measure on May 19, and Missouri Gov. [Matt Blunt](#) was expected to sign it. See Mo. S.B. 818 (2008). The Illinois legislature passed a similar measure on May 22 and sent it to Illinois Gov. Rod Blagojevich. See Ill. S.B. 2426 (2008).

In Congress, Rep. Linda Sánchez of California and Rep. Kenny Hulshof – who is running for governor of Missouri – announced plans to introduce a bill to make "cyber-bullying" a federal offense. The bill is to be called the "Megan Meier Cyberbullying Prevention Act."

Lori Drew is represented by H. Dean Steward of San Clemente, California.

California Court Strikes Down Prior Restraint in Online Defamation and Privacy Case

Pretrial Injunction Constitutionally Invalid

A California appellate court reversed a preliminary injunction in a non-media online defamation and privacy lawsuit, holding that a pretrial injunction was “constitutionally invalid.” *Evans v. Evans*, No. D051144, 2008 WL 2009669 (Cal. App. 4th Dist. May 12, 2008) (Haller, Huffman, McIntyre, JJ.).

The decision is a notable departure from some recent cases in which courts applied prior restraints to online speech with little regard for traditional First Amendment analysis. See “Bloggers and Prior Restraints: Cases Put Pressure on Traditional First Amendment Protections,” *MLRC MediaLawLetter*, Feb. 2008 at 34. Here the court notably pointed out that “speech on the Internet is accorded the same First Amendment protection as speech on other forums.”

Background

The *Evans* case involved a divorced spouse’s internet posts about her former husband. Thomas Evans, an officer in the San Diego Sheriff’s Office, sued his former wife Linda Evans for defamation and harassment stemming from internet postings Linda made concerning their family court case and allegations of domestic abuse. The trial court granted a preliminary injunction, barring Linda from publishing confidential personal information about Thomas on the Internet or any “false and defamatory statements” about Thomas on the Internet.

Linda urged the trial court to reconsider the injunction. She argued that her discussions of the family court case were an attempt to obtain legal advice and her postings concerning domestic abuse were true. The trial court granted the reconsideration motion, but ultimately upheld the preliminary injunction.

Appeals Court Decision

The appellate court reversed the preliminary injunction. The court began by citing leading First Amendment case law, including *Near v. Minnesota*, 283 U.S. 697, 713 (1931) and *Nebraska Press Assn. v. Stuart*, 427 U.S. 539,

562-68 (1976), holding that prior restraints on speech are repugnant to the First Amendment.

Turning to the trial court order, the court first addressed the pretrial prohibition on publishing “false and defamatory statements” on the Internet. Recently the California Supreme Court held that a narrow post-trial injunction preventing further defamatory speech about the plaintiff was constitutional. *Balboa Island Village Inn, Inc. v. Lemen*, 40 Cal. 4th 1141 (Cal. 2007). In *Balboa Village*, the injunction in question had been issued after a trial on the merits and the California Supreme Court noted the constitutionally troubling aspects of issuing an injunction prior to trial.

Here the appellate court seized upon the important distinction highlighted in *Balboa* between an injunction issued before and one issued after trial. The crux of the issue for the court was that an individual cannot be prohibited from making a statement before a judicial determination on the merits of the defamation claim:

Because there has been no trial and no determination on the merits that any statement made by Linda was defamatory, the court cannot prohibit her from making statements characterized only as “false and defamatory.” The fact that the [trial] court’s prohibition on publishing false materials applied only to speech on the Internet does not affect our analysis. The courts have made clear that speech on the Internet is accorded the same First Amendment protection as speech on other forums.

Evans, 2008 WL 2009669 at *6.

The court, however, noted that this was not a ruling on the merits and that ultimately an injunction could be granted after trial.

“Confidential Personal Information”

Next the court addressed the order’s prohibition against Linda publishing “confidential personal information” on

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California Court Strikes Down Prior Restraint in Online Defamation and Privacy Case

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the Internet – which the court also described as a prior restraint. The alleged violation of plaintiff’s privacy involved a right of privacy protected under the California Constitution (Cal. Const. art. I, § 1), and thus a prior restraint “may be proper under certain compelling or ‘extraordinary’ circumstances.” *Id.*

However, the court was unable to balance the competing interests. Thomas had simply complained about Linda posting information from the parties’ divorce file. And the injunction failed to specify what, if anything, constituted

“confidential personal information.” Thus the court order was vague and overbroad and not narrowly tailored. As to what information might be restrained from publication, the appellate court noted that “a compelling reason includes, but is not limited to, facts showing the disclosure of information would jeopardize the personal safety of Thomas or his family and/or would lead him to fear for his or his family’s personal safety.” *Id.* at *8.

Plaintiff was represented by Harry W. Harrison, Harrison Patterson & O’Connor. Defendant represented herself.

Louisiana Appeals Court Strikes Prior Restraint Against Author and Publisher

Plaintiff Claimed Short Stories Revealed Confidential Patient Information

A Louisiana appellate court lifted a preliminary injunction against an author and publisher, and dismissed with prejudice claims that they violated state and federal patient privacy laws. [*Association for Retarded Citizens / Ouachita v. Wilson and Aventine Press, LLC*](#), No. 43, 193-CA (Apr. 30, 2008) (Brown, Stewart, Moore, JJ.).

The court held that plaintiff had no right of action under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 42 U.S.C. Sec. 1320 et seq. or under Louisiana’s patient confidentiality laws.

Background

The Association for Retarded Citizens / Ouachita (“ARCO”) provides individual and family services for people with developmental disabilities. The defendant Katherine Wilson had worked for ARCO as a direct care provider. Wilson, under the pen name Katherine Able, published two books of short stories with Aventine Press, a self-publishing company.

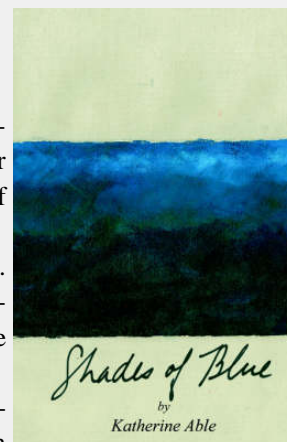
ARCO sued Wilson and Aventine for violating HIPAA and Louisiana’s patient privacy law, La. R.S. 46:56, claiming that the stories revealed “conversations, physical descriptions and other descriptive indicia” of several clients. ARCO also claimed the disclosures jeopardized its licenses and state service contracts.

The trial court ruled that ARCO had a duty to act on behalf of its clients to protect their confidentiality and that patients could be identified by the fictional stories. The court granted a broad injunction enjoining further publication of the stories unless they were revised and submitted to ARCO for approval. And the trial court retained authority to resolve any disputes about the adequacy of the changes.

No Private Right of Action

The appellate court reversed and dismissed the case with prejudice. The court held that the HIPAA by its terms created no private right of action. *See, e.g., Johnson v. Quander*, 370 F. Supp. 2d 79 (D.D.C. 2005), *aff’d*, 440 F. 3d 489 (D.C. Cir. 2006); *University of Colorado Hospital Authority v. Denver Publishing Company*, 340 F. Supp. 2d 1142 (D. Colo. 2004). Similarly, the state patient privacy statute only provides for state imposed punishment.

Finally, the court expressed “serious concerns” as to whether the fictional stories disclosed any information covered by HIPAA or R.S. 46:56, but noted that it did not need to consider the issue after holding that plaintiff had no cause of action.



First Circuit Affirms Dismissal of Soldier's Fahrenheit 9/11 Libel Claim

By Jonathan Albano

The First Circuit Court of Appeals has affirmed the dismissal of a libel claim brought by an Iraq War veteran arising out of Michael Moore's film "Fahrenheit 9/11," holding that neither a reasonable viewer nor a reasonable member of the military could construe the plaintiff's nonconsensual appearance in the film as an endorsement of the filmmaker's anti-war message. *Damon v. Moore*, 520 F.3d 98 (1st Cir. 2008) (Torruella, Howard, Delgado-Colón, JJ.).

The plaintiff Peter J. Damon ("Damon") was an Army Reserve Sergeant. While on active duty in Balad, Iraq, a tire on a Black Hawk helicopter exploded while Damon and another reservist were servicing the aircraft. As a result of the explosion, Damon lost his right arm near the shoulder and his left arm above the wrist; the Army reservist who was assisting Damon was killed.

Days after his injuries, while awaiting surgery at Walter Reed Army Medical Center in Washington, D.C., Damon was asked to do an interview with Brian Williams of NBC News. Although heavily sedated, he agreed to the interview, speaking on screen from his hospital bed for approximately thirty seconds about his injuries and the positive effects of the treatment he was receiving. The news segment concluded with Brian Williams commenting that "to a man" the soldiers in Damon's hospital ward "were completely behind" the war effort.

Moore licensed the NBC News clip for use in his anti-war documentary "Fahrenheit 9/11." Damon had no prior notice of, nor did he consent to, the use of his interview in the film. A sixteen-second excerpt of Damon's interview was included in the film shortly after commentary by Moore critical of President Bush's failure to adequately support the troops. Damon alleged that the film was an attack upon the integrity of the Commander-in-Chief and the war effort and that his unwitting appearance in the documentary falsely portrayed him -- and was interpreted by members of the military and veteran communities -- as sharing, adopting and endorsing Moore's attack on the credibility of the President about the justification for the war, its cost and consequences.

The First Circuit began its analysis by observing that whether the film reasonably was susceptible to a defamatory meaning in the eyes either of the community as a whole or

that of the military or veteran community to which Damon belonged presented a threshold issue of law for the court to decide. The court ruled that if the communication was susceptible of both a defamatory and non-defamatory meaning, a question of fact existed for the jury. Noting that "[f]orced or strained construction of the statement will not suffice to state a claim for defamation," the court viewed the film in its totality in the context in which it was published, considering all the words used, not merely a particular phrase or sentence. 520 F.3d at 105.

The court acknowledged that, under the *Restatement (Second) of Torts*, two distinct threshold issues of law are presented in defamation cases: (1) whether a communication is capable of bearing the particular meaning ascribed to it by plaintiff; and (2) whether that meaning is defamatory. See *Restatement (Second) of Torts* § 614 (1977); see also *Phelan v. May Dep't Stores Co.*, 443 Mass. 52, 56-57, 819 N.E.2d 550, 554 (2004). According to the court, however, because Damon could not show that his appearance in the documentary was reasonably susceptible to a defamatory meaning in the eyes of either the community as a whole or that of the military or veteran community to which he belonged, his complaint failed to state a claim.

The court first addressed the standard of reasonable members of the community as a whole. At a "micro-level," the court observed, because Damon spoke exclusively about the pain he was suffering due to his injuries, and the effectiveness of his pain treatment, nothing in his appearance reasonably could be construed as promoting disloyalty or denouncing either the Commander-in-Chief or the medical treatment received by veterans. 520 F.3d at 105. Viewing the film as a whole, the court found that Moore did not manipulate the actual questions asked, or Damon's responses, in such a way to convey a different meaning than when originally broadcast by NBC. *Id.* at 105, 106 n.4. Although "understandably upsetting to Damon," the court concluded that his appearance as one of numerous persons in the film -- some of whom supported the war effort and other who expressed no opinion at all -- did not "propel his otherwise benign interview into one reasonably susceptible of defamatory meaning." 520 F.3d at 105-06.

The court also analyzed the film from the perspective of reasonable members of the military and veteran community.

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First Circuit Affirms Dismissal of Soldier's Fahrenheit 9/11 Libel Claim

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The court noted that military personnel, “like other professional groups, such as doctors, lawyers or judges have a standard of judgment of their colleagues which is peculiar to their profession which differs sharply from the appraisal of the uninitiated.” *Id.* at 107 (*quoting Kelly v. Loew's Inc.*, 76 F. Supp. 473, 486 (D. Mass. 1948)). The court also recognized that “during its long history the military has, by necessity, developed laws and traditions of its own,” as evidenced by the Uniform Code of Military Justice, which prohibits the making of a disloyal statement, including “attacking the war aims of the United States.” *Id.*

The court nevertheless held that

[w]hile it is clear that military and civilian communities may very well view certain situations, *e.g.* a soldier's refusal to return to battle, differently, this is not one of those situations. Taking the documentary as a whole, no reasonable member of the military or veteran community could possibly view Damon's appearance in the documentary as being disloyal to the United States. . . . Damon makes no statements in opposition to the war effort, nor was his interview manipulated in such a way to imply that he was ‘attacking the war aims of the United States.’

Id. at 108. The court quoted with approval the ruling of the district court, which in dismissing Damon's case stated that the film's portrayal of Damon

shows an individual who is discussing with great dignity and obvious pain what his participation in

the conflict in Iraq has meant and not in any way suggesting that he thinks that his service was demeaned, but rather expressing his opinion that the medical treatment that he received has been something that helps to make his pain more livable. [Damon's appearance] transcends the alternative views that others present there with ... considerable dignity and no suggestion of disloyalty.

Id. at 108.

The court concluded by saying that while it “appreciate [d] Damon's anger and frustration over appearing without his consent in a documentary that stands in direct contrast to his own personal and political beliefs, . . . his appearance in the documentary is not reasonably susceptible of a defamatory meaning.” *Id.* at 109. Because of the grounds for its ruling, the court stated that it need not reach the separate question of whether being falsely labeled either pro- or anti-war, as a matter of law, holds a member of the military up to the type of scorn and ridicule required for a defamation claim or any of the other First Amendment implications of the case.

Jonathan M. Albano, Esq. and Carol E. Head, Esq. of Bingham McCutchen LLP in Boston, MA represented the defendants/appellees Michael Moore; Harvey Weinstein; Robert Weinstein; Miramax Film Corp.; The Fellowship Adventure Group, LLC; Lions Gate Films, Inc.; IFC Films, LLC; Showtime Networks, Inc.; Cinemanow, Inc.; Westside Productions LLC; and NBC Universal, Inc. Donald J. Feerick, Jr., Esq., of Feerick Lynch MacCartney PLLC, in South Nyack, N.Y. and Philip D. Moran, Esq. of Salem, MA represented the plaintiff/appellant Peter J. Damon

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California Court of Appeal Affirms Dismissal of Trade Libel Complaint Supports Broad Opinion Protection; Rejects Survey Evidence on Defamatory Meaning

By Thomas R. Burke, Rochelle L. Wilcox and Jeff Glasser

The California Court of Appeal issued a ruling on April 30 rejecting a plaintiff's attempt to prove the existence of a defamatory implication in a publication through use of a public opinion survey. *Simpson Strong-Tie Co. v. Gore et al.* (No. H030444) (Cal. Ct. App. April 30, 2008).

The decision, brought in the context of a trade libel dispute against a plaintiffs' class action lawyer, includes helpful language for media defamation defendants regarding the broad protection afforded by the Constitution for opinion and the limited applicability of the so-called "commercial speech" exemption to California's anti-SLAPP statute, which was adopted a few years ago. The decision not only contains a thorough discussion of this particular exemption, the decision also discusses defamation by implication and provides broad support to defend such claims against the media.

Background

Galvanized screw manufacturer Simpson sued California attorney Ben Pierce Gore, a plaintiffs' class action attorney, over a legal advertisement Gore published in a local newspaper to locate potential representatives for a class action lawsuit he intended to file. The ad stated that if a consumer's deck was built with galvanized screws manufactured by Simpson (or two other manufacturers), the consumer "may have certain legal rights and be entitled to monetary compensation, and repair or replacement of your deck. Please call if you would like an attorney to investigate whether you have a potential claim."

Simpson promptly sued Gore for libel, trade libel, false advertising and unfair business practices. Gore filed a motion to strike the action as a SLAPP (strategic lawsuit against public participation), using California's anti-SLAPP statute. The trial court agreed, granting Gore's motion in full. On appeal, as it had claimed in the lower court, Simpson argued that its lawsuit was exempt under Code of Civil Procedure Section 425.17(c), an exemption generically described by other courts as the "commercial speech" exemp-

tion to the anti-SLAPP statute.

Court of Appeal Decision

The Court of Appeal initially examined whether a party claiming exemption from the anti-SLAPP statute has the burden of establishing the applicability of the exemption. The court pointed to a "well-recognized principle" that those claiming an exemption from a general statute have the burden of proving that they come within the exemption. "For the purposes of this rule," the court stated, the anti-SLAPP law is a "general statute." Therefore, the plaintiff bears the burden of showing that the act is exempt from the protections of the anti-SLAPP statute.

In making this determination, the court disapproved a decision from another Court of Appeal—*Brill Media Co., LLC v. TCW Group, Inc.*, 132 Cal. App. 4th 324 (2005)—that had placed the burden on the defendant seeking the protection of the anti-SLAPP statute to demonstrate that the exemption should not apply.

The *Brill* Court of Appeal had reasoned that because in the first stage of the anti-SLAPP procedure the burden rests on the defendant to show that the acts about which the plaintiff complains were taken in furtherance of defendant's right to free speech, the defendant also bears the burden of showing that no exemptions to the statute apply. The court in *Simpson Strong-Tie* rejected that reasoning, determining that it contradicted the long-standing rule that parties seeking an exemption have the burden of proving that they are entitled to the protection of the exemption.

Section 425.17(c) Exemption Doesn't Apply

The court next criticized the characterization of Section 425.17(c) by other courts as the "commercial speech" exemption, describing it as "substantially overbroad." The court, in some detail, explained that the exemption applied only to statements that either (1) concern the speaker's or a competitor's products or services or (2) are made in the course of delivering the speaker's products or services.

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California Court of Appeal Affirms Dismissal of Trade Libel Complaint

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Regarding the first point, the statement in Gore's ad plainly did not concern the products or services of Gore or one of his competitors; it involved Simpson's products—the galvanized screws. Accordingly, Simpson could not invoke the exemption on that basis. Regarding the second point, the court stated that the exemption applies only to statements made while the speaker is delivering a product or service that the speaker is in the business of providing.

Because Gore, an attorney, is not in the business of selling advertising, he was not, through his advertisement, delivering a “product or service” within the meaning of the statute. Rather, he was only attempting to deliver his professional services. Such attempts to deliver services do not fall within the purview of the statute, the court concluded.

“Commercial Speech” Exemption No Anti-SLAPP Safe Harbor

On a broader level, the court stated that it would distort the purpose of the exemption in Section 425.17(c) for Simpson to be able to use it to gain safe harbor from the anti-SLAPP statute. Tracing the legislative history of that statute, the court stated that the exemption was enacted to protect public interest or consumer class plaintiffs from the growing misuse of anti-SLAPP motions by commercial enterprises seeking to impede or obstruct litigation brought against them.

Simpson sought to achieve the same results with the Section 425.17(c) exemption that commercial enterprises had earlier tried with the anti-SLAPP motion, a result the court could not countenance. “Here a seemingly large commercial enterprise has attempted to use the new exemptions to perpetuate a lawsuit that may fairly be described as a paradigmatic SLAPP in that it plainly arises from conduct protected by the anti-SLAPP statute and, as will appear momentarily, lacks substantial merit,” the court stated. “To permit this effort to succeed would be a perversion of legislative purpose at least as striking as the one that motivated the Legislature to enact the exemptions that Simpson invokes.” The court's thorough analysis of Section 425.17(c) is one of the first published decisions to narrowly construe this recent exemption to California's anti-SLAPP statute.

Court Rejects Survey Evidence

Immediately after Gore's advertisement began running, Simpson commissioned a professional public opinion survey regarding the purported effect of Gore's advertisement. Simpson sued Gore within a week after that survey was completed, claiming that Gore's ad implied that Simpson's galvanized screws were defective. Simpson relied heavily on the results of the survey to support its claim that the advertisement was defamatory, and also to establish that it had incurred special damages (required to allege a trade libel claim in California).

On appeal, the court found Simpson's use of the survey to be nebulous, especially because Simpson had phrased the survey responses to include the ambiguous answer that after reading the ad the consumer found it “somewhat likely” that Simpson galvanized screws were defective. The court explained:

The requirement of a provably false assertion of defamatory fact is ground in the constitutional entitlement to speak truthfully. That entitlement is not subject to defeasance by plebiscite, let alone by private opinion survey. It is for the courts, as guardians of our constitutional liberties, to say whether a statement is the type that will permit a judgment for libel. That function cannot be delegated to anonymous citizens questioned by anonymous interrogators in public parking lots.

Gore's Ad Protected Opinion

In concluding that Gore's advertisement was not actionable, the court affirmed the principle that a “false opinion” is not actionable under defamation laws and that a claim for defamation may only succeed if a plaintiff shows a “provably false assertion of fact.” Simpson's main claim of provable falsity, the court stated, rested on the faulty premises that Gore's advertisement stated that Simpson's galvanized screws are “defective,” a term never used in the ad, and that screws are only “defective” if Simpson would be held liable in a products liability suit. “To the average reader of a general circulation newspaper,” the court stated, “the meaning of ‘defective’ is not determined by the laws of

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California Court of Appeal Affirms Dismissal of Trade Libel Complaint

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products liability but by common usage.”

Under this common usage standard, this advertisement did not brand Simpson screws as “defective,” the court stated, but at most suggested that some of Simpson's galvanized screws “were *unsuitable* for use in specified applications and that persons who used them might have a remedy *against someone*.” Gore's ad therefore was not a provably false assertion of fact because it was “explicitly couched in terms not of fact but of *possibility*,” and the “law of defamation is concerned with perceived derogatory *facts*, not vaguely disquieting possibilities.”

Moreover, regarding the claims in the ad of a possible right to legal relief, “it is explicitly *predictive* and thus cannot be understood to assert a proposition of fact because it is almost universally understood that no one knows the future.”

Conclusion

Many aspects of the court's decision will be helpful to media defamation defendants. In particular, the court's strong rejection of survey evidence—frequently offered by plaintiffs to attempt to establish defamatory meaning—should be persuasive in other situations. In addition, the broad language used by the court in rejecting the false implications Simpson attempted to draw from the advertisement should help defend against claims resting on predictions and possibilities, which, as the court correctly found, are not the provable assertions of fact needed to make out a claim for defamation. As of this writing, Simpson plans to file a petition for review in the California Supreme Court.

Thomas R. Burke is a partner in the San Francisco office of Davis Wright Tremaine LLP, Rochelle L. Wilcox is a partner and Jeff Glasser is an associate in the firm's Los Angeles office. Mr. Burke and Ms. Wilcox successfully represented defendant Pierce Gore in the trial and appellate courts.

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North Dakota Supreme Court Applies Actual Malice Rule in Case Brought by Promoter of Family Law Initiatives

By Christopher J. Harayda

A limited purpose public figure plaintiff may not recover damages for defamatory criticism unless there is clear and convincing evidence that the statements were made with actual malice, even in the absence of state statutory restrictions on defamation actions involving public figures, according to a recent decision of the North Dakota Supreme Court.

In *Riemers v. Mahar*, 2008 ND 95 (May 15, 2008), the North Dakota Supreme Court upheld summary judgment in favor of defendant Rick Mahar. The court held that plaintiff Roland Riemers was, at the very least, a limited purpose public figure and that he failed to present clear and convincing evidence of actual malice and thus failed to raise a genuine issue of material fact.

Background

The case arose out of a September 2006 article by Mr. Mahar in the *Walsh County Record* that criticized two family law initiatives that Mr. Riemers helped draft and promote. The article also criticized Mr. Riemers personally, claiming he had no interest in families or children and that the initiatives were little more than an attempted power grab by a “self-absorbed zealot.” Mr. Riemers, a former political candidate, sued for defamation, but the lower court granted Mr. Mahar’s motion for summary judgment and dismissed the suit.

On appeal, the court first dispensed with the plaintiff’s argument that Mr. Mahar’s motion failed to comply with specificity requirements. The required level of specificity for a motion is recited in N.D. R. Civ. P. 7(b)(1), and requires that a motion shall state with particularity the grounds therefore. The court found Mr. Mahar’s motion failed to meet the particularity requirement on its face. However, relying on *Schaan v. Magic City Beverage Co.*, 609 N.W.2d 82, 86 (N.D. 2000) and *Eisenbarth v. Eisen-*

barth, 91 N.W.2d 186, 188 (N.D. 1958), the court found that Mr. Mahar’s accompanying brief detailed the grounds for the motion with sufficient specificity. Thus, the trial court did not err in accepting the motion for summary judgment.

State Supreme Court Decision

The court then reached the merits of the appeal. It first held that federal constitutional limits on defamation actions brought by public figures applied even though North Dakota statutory law did not impose such limits. It then went on to hold that, as a limited purpose public figure, Mr. Riemers was required to show actual malice.

The court found Mr. Riemers to be a limited purpose public figure because of the role of special prominence he voluntarily assumed regarding the two initiatives. The court also noted Mr. Riemers’s access to channels of effective communication: Mr. Riemers had published various articles, including a rebuttal to Mr. Mahar’s, and he had given interviews about the initiatives both before and after the accused statements were published. Having classified Mr. Riemers as a limited purpose public figure, the court found that he had failed to present any evidence of actual malice. Thus, the court affirmed the summary judgment dismissing the suit.

Christopher J. Harayda is a summer associate at DCS member firm Faegre & Benson LLP. Mr. Riemers represented himself. Nicholas B. Hall, Hodny Currie Lawyers, represented Mr. Mahar.

The briefs in this case are available online on the North Dakota Supreme Court’s website. Defendants’ brief is online at

www.court.state.nd.us/court/briefs/20070232.aeb.htm

Plaintiff’s brief is online at

www.court.state.nd.us/court/briefs/20070232.atb.htm

Georgia's Anti-SLAPP Statute Applied in Media Case

First Published Decision Applying Statute to Media Defendant

By Cynthia Counts

A Georgia Superior Court applied Georgia's anti-SLAPP statute to a media defendant, granting the television station's request for an expedited hearing and dismissing plaintiffs' five-count complaint with prejudice for failure to comply with the prerequisites of O.C.G.A. § 9-11-11.1(b) after Plaintiff did not cure the defect with proper verifications within the statutory ten-day cure period. *Boxcar Development Corp., et al. v. New World Communications of Atlanta, Inc., et al.*, No. 08CV2248-10 (Ga. Super. Ct. May 1, 2008) (Wood, J.).

Anti-SLAPP Statute and the Media

Significantly, this is the first published decision in Georgia explicitly finding Georgia's anti-SLAPP statute and its procedural protections should apply to a media defendant. Though the Georgia Court of Appeals in *Davis v. Emmis Publ'g Corp.*, 244 Ga. App. 795, 798 (2000), previously discussed the anti-SLAPP statute in relation to a media defendant, the court in that case made clear that it was not reaching the question of whether the statute applied to a media defendant as the issue was never raised by either party on appeal.

Moreover, in a concurring opinion in *Davis*, a retired appellate judge went so far as to suggest the statute should not have been applied to claims arising from a newspaper's publication of an article regarding a murder investigation because the statute was not intended to protect "freedom of the press in general." *Id.* at 800. As discussed more fully below, the Court in this case found the anti-SLAPP statute applied to the defendant television station because the investigative news reports inherently were aimed toward influencing both the public and government to take action.

Background

On February 8, 2008, plaintiffs filed a complaint alleging defamation, invasion of privacy, fraudulent misrepresentation, and intentional infliction of emotional distress arising from FOX 5's investigative reports about plaintiff Hoffman and his principal business, plaintiff Boxcar Development Corp. In the final news report, the lead investigative reporter commented that the Georgia Secretary of State's securities division had begun investigating Hoffman based on FOX 5's earlier news reports.

FOX 5 argued that plaintiffs had filed their complaint seeking to punish FOX 5 for reporting true facts to the public and the government about plaintiffs; namely that Hoffman was engaging in questionable business practices in Georgia, and was the focus of a government investigation.

The complaint contained a verification signed by plaintiff Hoffman stating "the allegations in the above-captioned complaint are true and accurate to the best of my knowledge." Hoffman's verification, however, did not include the

the Superior Court found that the anti-SLAPP statute applied to a media defendant and emphasized the importance of having an early disposition mechanism for First Amendment cases.

statements required by O.C.G.A. 9-11-11.1(b). Moreover, plaintiffs' counsel filed no verification at all. Under the Georgia anti-

SLAPP statute both the party and attorney must attest that (i) the action is well-grounded in fact and existing law and or a good faith extension of existing law, (ii) the claim is not interposed for any improper purpose and (iii) the action is not premised on statements made in good faith in furtherance of the right of free speech or the right to petition the government for redress in connection with an issue of public interest or concern.

In its verified answer, defendant FOX 5 gave notice that plaintiffs had failed to comply with the prerequisites of O.C.G.A. § 9-11-11.1(b). Despite proper notice, however, plaintiffs never filed the proper verifications. After the ten days that plaintiffs were statutorily permitted to cure, defen-

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Georgia's Anti-SLAPP Statute Applied in Media Case

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dants filed and served upon plaintiffs' counsel their Motion to Dismiss SLAPP Suit and requested an expedited hearing pursuant to O.C.G.A. 9-11-11.1(d). Accordingly, the court scheduled the hearing within 30 days as required by statute.

The Court's Decision

First and foremost, the Superior Court found that the anti-SLAPP statute applied to a media defendant and emphasized the importance of having an early disposition mechanism for First Amendment cases. According to the court, a defendant who comments upon and reports about potential illegal or wrongful conduct or activity that is made in connection with an issue under consideration or review by a government entity has engaged in an "act" covered by Georgia's anti-SLAPP statute. See O.C.G.A. § 9-11-11.1.

The court further emphasized Georgia law holding that even statements made prior to the initiation of a government investigation can qualify as an "act" entitled to protection as Georgia's anti-SLAPP statute has been construed to apply to statements made to a local television station that sparked an official investigation. The Georgia Supreme Court in *Berryhill v. Ga. Cmty. Support & Solutions, Inc.*, 281 Ga. 439, 442 (2006), restricted the scope of the anti-SLAPP statute to those "acts" that seek to influence or comment upon government proceedings and, in dicta, said that a statement calling for the initiation of official proceedings might fall within the statute.

Here, the court stated that an investigative news report is a medium that, by its nature, seeks to influence the public or State government and specifically found that, because FOX 5 reported that plaintiff Hoffman was engaged in questionable business practices and raised the issue of a governmental investigation of Hoffman and his companies, the news

reports were acts that "could reasonably be construed to be" within the scope of O.C.G.A. § 9-11-11.1(b).

Significantly, the court applied the Georgia anti-SLAPP statute to all of the counts alleged by plaintiffs, including the non-defamation claims for invasion of privacy, fraudulent misrepresentation, and intentional infliction of emotional distress. The court found that applicability of the Georgia anti-SLAPP statute does not depend on the label of the claims, but on whether the claims arise from an act which falls within the purview of the statute.

In making this determination, the court looked to the "gravamen" of plaintiffs' cause of action. Because all damages alleged by plaintiffs arose from FOX 5's acts of communication – the broadcasts of the news reports – the court held that all of plaintiffs' claims were covered by the anti-SLAPP statute. Although the Georgia Supreme Court in *Denton v. Browns Mill Dev. Co.*, 275 Ga. 2, 10 (2002), held that the anti-SLAPP statute is not applicable to claims of trespass, the Superior Court found the facts in this case were distinguishable. First, there was no specific claim of trespass alleged. Moreover, all of the damages alleged by plaintiffs arose not from interference with a property right, but rather from the broadcast of the news reports.

After finding that the anti-SLAPP statute applied, the court held that a dismissal with prejudice for failure to comply with the detailed verification requirements of O.C.G.A. 9-11-11.1(b) is essential to promoting the entire purpose of Georgia's anti-SLAPP statute. Accordingly, the court found it was mandated by O.C.G.A. 9-11-11.1(b) – and the case law construing it – to dismiss plaintiffs' complaint with prejudice.

Cynthia Counts, Counts & Associates in Atlanta, Georgia, represented the media defendants in this matter.

Hawai'i Enacts Reporters' Shield Law

New Law Protects Confidential Sources and Unpublished Information

By Jeffrey Portnoy and Gerald Kato

Hawai'i, the 50th state admitted to the Union is poised to become the 36th with a shield law for journalists—and the first to endorse a measure specifically extending protections to non-traditional news disseminators such as bloggers.

On April 29, 2008, the Hawai'i Legislature unanimously passed a bill that will allow journalists to protect confidential sources and unpublished information. Governor Linda Lingle, who earlier in her career was editor of a newspaper on the island of Molokai, is expected to sign [House Bill 2557](#), "Relating to Evidence," into law and it will take effect upon approval.

The landmark legislation enhances the public's right to know, and it provides a balance between information which reporters may have to disclose for the greater good, and the information which needs to remain protected to have a free and independent media.

Hawai'i journalists have long faced a worst-case scenario for protecting confidential sources: No statutory protection exists, and the only relevant case to reach the Hawai'i Supreme Court (In Re Goodfader's Appeal) held in 1961 that journalists had no constitutional right to conceal a source's identity. Reporters have faced the threat of going to jail for refusing to name sources, and the legal terrain in Hawai'i remained uncertain.

The impetus to provide certainty came after high-profile national stories emerged about journalists being jailed or facing the threat of jail because they declined to identify sources, such as in the Valerie Plame case. State Rep. Blake Oshiro, a Democrat, and state Rep. Gene Ward, a Republican, initiated discussions late last year on a shield law bill with news media representatives, asking them to review drafts for introduction in 2008 legislative session. The Honolulu Community-Media Council sponsored a panel discussion on journalist-source privilege in November 2007, highlighting the importance of the issue.

Oshiro, vice chair of the House Judiciary Committee, introduced a shield bill (HB 2557) as part of legislative package backed by the Democratic majority in the House. The proposal became the vehicle for discussion of a number of critical issues, including protection for non-traditional journalists, the scope of the privilege in criminal and civil

cases, and whether there should be exceptions to the privilege.

The state Attorney General's office and Honolulu Prosecutor's office stated their objections at a February committee hearing, insisting the bill was too broad and did not adequately address law enforcement concerns about serious crimes and public safety. For their part, supporters backed the bill's intent but were wary about a provision that extended the privilege to anyone who met "applicable standards of journalism ethics." That language was a red flag to the Society of Professional Journalists, which said its ethics code is voluntary and not intended to acquire the force of law.

By this time, a coalition of news media organizations was formed and a smaller task force took on the job of trying to get a bill passed. The task force included the authors of this article Jeffrey Portnoy (a media attorney with the firm of Cades Schutte), and Gerald Kato (a journalism professor at the University of Hawai'i), and Chris Conybeare (president of the Honolulu Community-Media Council) and Mark Platte (editor of The Honolulu Advertiser).

It became apparent serious differences remained during a Senate Judiciary Committee hearing March 20 where law-enforcement officials, including the Honolulu Police Department, were either opposed to the bill or demanded changes that effectively made the privilege useless. The coalition, meanwhile, supported a broad privilege for traditional and nontraditional reporters. An interesting departure came from the Big Island Press Club, composed of journalists on the island of Hawaii, which said a shield law was not needed since the First Amendment already provided adequate protections.

Senators urged the various sides to work out a compromise, and a week later Portnoy, representing the news media, met with Attorney General Mark Bennett and representatives of Honolulu Prosecutor Peter Carlisle. Bennett drafted a new bill which included law-enforcement provisions the news media found unacceptable, prompting us to submit our own draft on behalf of the coalition. The Senate committee eventually moved the news coalition's version, with the understanding negotiations would go on.

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Hawai'i Enacts Reporters' Shield Law

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Talks, in fact continued until the last possible day for consideration by a House and Senate conference committee. On April 22, we—Portnoy and Kato—met with Bennett, and with the help of Rep. Oshiro, finally worked out a compromise. But just before the compromise bill was sent out of the conference committee, legislators opted to add three-year sunset provision in the law for reasons that were not clearly explained. We think it is to give prosecutors time to see how the law impacts actual criminal cases in Hawai'i and it proved to be a necessary concession to gain unanimous bi-partisan support from the House and Senate, which unanimously passed HB2557 on April 29 and sent it to the governor to sign into law. Despite the sunset provision, we believe this is a strong and durable piece of legislation.

This shield law bill is “journalist friendly” in several significant ways. It protects news gatherers from being forced to reveal confidential sources, or information that could lead to identifying sources. It protects unpublished information such as notes, outtakes, photographs and videos, even if it is not confidential. It provides an absolute privilege for all civil cases, except defamation, as well as a complete privilege for all non-felony criminal cases.

Hawai'i is one of the first states to take into account changing times and technologies by being the nation's first to

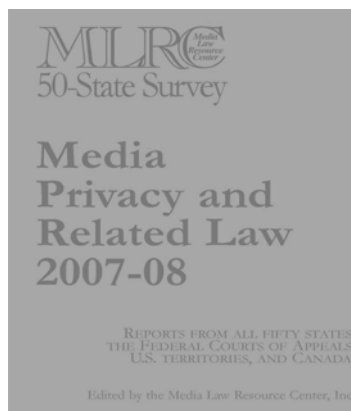
explicitly include bloggers and others not part of the mainstream media, through application of a function test. Non-traditional journalists will be protected if they regularly disseminate news of significant public interest and engage in activities similar to their traditional counterparts.

We're satisfied that the exceptions involving eyewitness testimony and information sought for criminal investigation and prosecution are few and narrow and that the burden of proof for overcoming the privilege are sufficiently high so as not to be easily breached.

Hawaii is expected to be the third state to enact a shield this year. The Utah Supreme Court adopted a shield law rule in January and Maine enacted a shield law in April. The states' protection of reporters clearly adds support for recognition of a federal common-law privilege and adds momentum to enactment of a federal shield law now pending in the Congress.

The Hawai'i shield law, we believe, recognizes the important role journalists play in gathering and reporting information critical to a well-functioning democracy and advances the cause of a free press across the country.

Jeff Portnoy is a partner at Cades Schutte LLP in Hawai'i. Gerald Kato is a journalism professor at the University of Hawai'i.



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Maine Enacts Shield Law to Protect Journalists' Confidential Sources

By Daniel W. Walker, Sigmund D. Schutz, and Jonathan S. Piper

This past spring, Maine joined the ranks of 33 other states and enacted a journalist shield law. LD 2047, An Act to Shield Journalists' Confidential Sources, will go into effect 90 days from the adjournment of the legislative session—on July 18, 2008.

Maine's version of the shield law provides a qualified privilege against compelled disclosure of confidential sources of information, information that identifies confidential sources, and confidential information obtained from a source. Unfortunately, the final version of the bill did not include any protection to the journalist for non-confidential information.

A number of interested parties supported and effectively lobbied for LD 2047. Testifying in support of the bill were the Maine Press Association, the Maine Society of Professional Journalists, the Maine Association of Broadcasters, and the Maine Civil Liberties Union. No one testified against the bill. However, the Maine Attorney General's Office participated in the work sessions on the bill and succeeded in limiting the bill to only confidential information.

The lobbying and committee work proved to be so effective that the bill received a unanimous vote from the Judiciary Committee and sailed through both chambers of the Maine Legislature without debate. On April 18, 2008, Governor Baldacci signed the bill, which is now codified as Public Law 2007, Chapter 654.

The Legislative Process

Representative Jon Hinck, a first-term Democrat from Portland, sponsored LD 2047. The original draft of the bill was based almost entirely on the Media Law Resource Center model bill. In developing his original draft, Hinck also reviewed the shield laws of many states but turned back to the MLRC version of the bill, as he felt that the versions from other states had been adversely affected by the various political processes.

Rep. Hinck sought to fill a void in Maine law, as there has never been a journalist shield statute. Rep. Hinck sought much needed protection for confidential sources and whistle blowers. The original draft provided for a qualified privilege, not only for confidential sources, but for non-confidential information gathered by journalists in a journalistic capacity.

The Maine press community supported Hinck's effort, as a codification of a journalist shield law in statute would finally bring clarity and stability to an area of the law that has been unstable and unpredictable.

Before the public hearing on LD 2047, members of the journalist community in Maine came to a consensus regarding the language of the bill. The only sticky issue was the definition of "journalist." However, the various groups finally agreed on the following definition and proposed it to the Judiciary Committee during the public hearing:

Any person or entity professionally or regularly engaged, in any news medium now known or hereafter devised, in gathering, preparing, collecting, writing, editing, filming, taping, photographing or disseminating written, oral, pictorial, photographic or electronically recorded information or data concerning events or matters of public concern or interest or affecting the public welfare or a person supervising or assisting that person or entity.

The Judiciary Committee held the public hearing for LD 2047 on January 24, 2008. Testifying in support of the bill were Irwin Gratz, Maine Public Broadcasting and former national President of the Society of Professional Journalists; Tony Ronzio, Editorial Director of the *Sun Journal*, representing the Maine Press Association; Daniel Walker; an attorney with Preti Flaherty, serving as legal counsel to the Maine Press Association; Jeff Inglis, Editor of the Portland Phoenix and President of the Maine Society of Professional Journalists; and Suzanne Goucher, Executive Director of the Maine Association of Broadcasters. Also, providing support but not testifying was the Maine Civil Liberties Union. No one testified in opposition.

During the public hearing, some legislators quickly demonstrated an uneasiness that this bill sought to protect non-confidential, as well as confidential, information obtained by a journalist. The supporters of the bill urged the Committee to retain the part of the bill providing a qualified privilege for non-confidential information obtained by a journalist, citing to several recent cases in Maine where subpoenas were issued to media entities to provide information as part of a civil lawsuit and an insurance investigation. The press argued that these "fishing expeditions" harm the free flow of information to the public that is constitutionally protected and that the media should not be forced to serve as a party's private investigator.

Other questions arose from the committee members as to who should be considered a journalist. Some committee members were uncomfortable that the definition of journalist in the bill went beyond what is a traditional journalist and would likely cover bloggers

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Maine Enacts Shield Law to Protect Journalists' Confidential Sources

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and other nontraditional journalists. Other committee members were quite comfortable including a broad definition of journalist in the bill. Interestingly, the committee decided to not include a definition of "journalist" in the bill and to leave the task to the courts on a case-by-case basis.

Several legislators on the committee also questioned whether existing case law in Maine was insufficient to protect journalists and thus, whether a shield bill was needed at all in Maine. Supporters replied that the "best" case protecting journalists' sources and information obtained as part of a journalistic investigation is *In re Letellier*, 578 A.2d 722 (Me. 1990), and this case provides insufficient protections for journalists.

Letellier applies a case-by-case balancing test, merely weighing the potential impairment of the protected news gathering and editorial processes on the facts of a particular case in litigation against the demonstrated need in that particular case for evidence possessed by the reporter. Supporters argued to the committee that a more stable, clear, and concise method of protecting the first amendment rights of the press codified in statute was critical in Maine.

Throughout the legislative session, the Judiciary Committee held a number of work sessions on LD 2047. On February 26, 2008, the committee invited the head of the Attorney General's criminal division, William Stokes, to share his concerns that the bill would improperly protect non-confidential information obtained by journalists. The committee was swayed by his arguments and limited the bill to protecting confidential sources, information identifying the confidential source, and information obtained from the confidential source.

The committee initially voted the bill 9-4 "ought to pass as amended." However, after a series of negotiations with dissenting members of the committee, the committee reconsidered its original vote and voted the bill "ought to pass as amended" unanimously. In order to achieve this unanimous vote, the legal standard of the balancing test set forth in the bill was lowered from "clear and convincing" to "preponderance of the evidence." Additionally, a provision of the bill declaring that the source of any information obtained in violation of this law would be inadmissible was struck from the bill. The committee felt that existing Maine law was sufficient to declare inadmissible information obtained in violation of the law.

As a result of the unanimous Committee vote, the bill was placed on the "consent calendar" of both chambers of the Maine Legislature, which allows bills to pass back and forth between the bodies without debate. No roll call was ever requested for LD 2047, and the bill was enacted in both the House and the Senate "under the hammer" on April 15, 2008. Three days later, the Gov-

ernor signed the shield bill into law.

The Legislation

As stated before, LD 2047 creates a qualified privilege against compelling a journalist to disclose the identity of a confidential source, any information used to identify a confidential source, or any information obtained from the confidential source by the journalist while acting in a journalistic capacity. The law does not define which journalists will be covered by this privilege, leaving it to the court to determine on a case-by-case basis.

The balancing test set forth in LD 2047 is much like the tests in other shield laws around the country. In order to compel a court to disclose the identity of a source or information, the party seeking the identity of the confidential source or the confidential information must establish by a "preponderance of the evidence" all of the following:

- 1) The identity of the source or the information is material and relevant;
- 2) The identity of the source or the information is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material to the claim or defense;
- 3) The identity of the source or the information is not obtainable from any alternative source or cannot be obtained by alternative means or remedies less destructive of First Amendment rights; and
- 4) There is an overriding public interest in the disclosure.

Additionally, the party must establish based on information obtained from a source other than the journalist that in a criminal case, there are reasonable grounds to believe that a crime has occurred, or in a civil case, there is a prima facie cause of action.

Maine's shield law also extends the privilege to third parties with respect to subpoenas issued to the third party that seek information relating to business records between the third party and the journalist for the purpose of discovering the identity of the confidential source or obtaining confidential information.

Finally, Maine's shield law provides a waiver of the privilege if the journalist voluntarily discloses or consents to disclosure of the identity of the confidential source and any information that could be used to identify the confidential source.

Daniel W. Walker, Sigmund D. Schutz, and Jonathan S. Piper are lawyers with Preti Flaherty in Portland, Maine.

Arizona Court Upholds Reporter's Privilege in Confidential Source Case

News Broadcast About Tire Safety Problems

By David J. Bodney and Peter S. Kozinets

Introduction

In a decision that both fortified the journalist's privilege and ended a tire manufacturer's three-year battle to restrain the further dissemination of a news broadcast about the safety risks of its tires, Arizona's intermediate appellate court recently affirmed the lifting of a prior restraint on the basis of a trial court's *in camera* review of a journalist's declaration regarding the source of internal documents featured in the broadcast.

In *Flores v. Cooper Tire & Rubber Co.*, 526 Ariz. Adv. Rep. 25, 178 P.3d 1176 (Ariz. Ct. App. Mar. 25, 2008), the Arizona Court of Appeals rejected the final efforts of Cooper Tire & Rubber Company ("Cooper") to challenge the procedure that the trial court had used to determine that the Cooper documents used in the broadcast had come from a source independent of the state court litigation. In a 2-1 decision, the Court reaffirmed the strong First Amendment foundations of the reporter's privilege, and recognized that alleged trade secret property interests in the documents must give way to the more fundamental protections for gathering and reporting the news.

Factual Background

In 2002, Juan Flores, on his own behalf and as a representative of his parents' estate, sued Cooper in state court, alleging that a Cooper tire's tread separation had caused his parents' car to roll over, leading to their deaths. In September 2005, Abbie Boudreau, then a reporter for KNXV-TV, a Scripps-Howard Broadcasting Co. television station in Phoenix, attended portions of the *Flores* trial. The trial court informed her about her about a confidentiality order, which mandated that all "[t]rial exhibits that contain confidential information will not become part of the public file and will not be accessible to the public." The trial court gave Ms. Boudreau the choice of being bound by the order or excluded from the courtroom. She agreed to comply with the order, though she was not shown a copy of it. When she

asked the trial court if she could report on things she learned in the courtroom, the trial court responded, in part, by saying "that the answer is probably no." The court instructed her to direct any questions to defense counsel:

There are things you can obviously report and talk about, but when it comes to the specific documents that are the subject of these confidentiality orders, you cannot disclose their content to the public. [¶] If you need to find out which specific ones there are, I invite you after the proceedings to talk to defense counsel . . . and they will be able to advise you.

Outside the courtroom, Ms. Boudreau spoke to Cooper's counsel, who told her to direct her questions to Pat Brown, Cooper's Vice President of Global Branding and Communications.

Weeks after the trial ended in settlement, a confidential source gave Ms. Boudreau documents related to the safety and durability of Cooper's tires. The documents appeared to be copies of internal memoranda prepared by Cooper employees six to ten years ago (the "Documents"). They had no confidentiality markings or Bates numbers.

KNXV used two of the documents in preparing a news broadcast concerning the safety of Cooper's tires. Before airing the broadcast, KNXV contacted Ms. Brown to request an interview for the story. As part of the request, Ms. Boudreau informed Ms. Brown that KNXV had documents to support the following statements:

Cooper knew it had tread separation problems dating back to 1996;

Cooper was aware of a significant increase of separation problems in the south and southwest region of the United States; and

Cooper's engineers made recommendations to make the tires more durable, but Cooper did not implement those changes due to cost considerations.

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Arizona Court Upholds Reporter's Privilege in Confidential Source Case

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Cooper declined the interview request and did not indicate that the Documents described in the email were confidential or possibly subject to the confidentiality order.

On November 3, 2005, KNXV aired the broadcast to tens of thousands of viewers. The Broadcast reported that litigants have filed hundreds of lawsuits against Cooper linking more than 200 deaths and 200 serious injuries to Cooper products. KNXV identified a pattern of increased tread separation claims in hot-weather states, including Arizona, and showed portions of two of the Documents. The broadcast was then made available for viewing and download on KNXV's website until November 9, 2005. In 2006, it won an Edward R. Murrow Award from the Radio and Television News Directors Association and a First Amendment Award from the Society of Professional Journalists.

Several days after the broadcast, Cooper's lawyer contacted counsel for KNXV and asserted that the Documents shown in the broadcast were confidential and subject to the trial court's confidentiality order. Cooper demanded that KNXV immediately (1) reveal its confidential source for the Documents, (2) return all copies of the documents, (3) agree not to disseminate the Documents and any of their contents further, including a prohibition on future dissemination of the broadcast, and (4) admit that KNXV had violated the confidentiality order.

To defend itself from Cooper's allegations and demands, KNXV filed an Application to Intervene in *Flores* and sought a judicial declaration that it had honored the confidentiality order and could continue to exercise its constitutional right to disseminate the broadcast and Documents. Cooper responded by filing a "Cross-Motion for Affirmative Relief as to [KNXV]," seeking, among other things, an order enjoining the broadcast and requiring KNXV to disclose the identity of its confidential source.

Cooper also filed a "Motion for Entry of an Order Directing All Counsel of Record and Others Subject to Protective Order to Answer Questions Regarding Disclosure of Confidential Documents." Forty-one trial participants responded, under oath, that they had not disclosed Cooper

documents to KNXV.

In March 2006, the trial court heard the cross-motions and denied Cooper's request to compel KNXV to reveal its confidential source. However, it granted Cooper's request to enjoin further broadcasts of the Documents.

KNXV promptly filed a petition for special action (an emergency interlocutory appeal) challenging the trial court's order as an unconstitutional prior restraint. In June 2006, the Arizona Court of Appeals held that the constitutionality of the trial court's order depended on whether "the documents came from a source outside [this state court] litigation." If KNXV and Ms. Boudreau "merely published information they received from others," the court wrote, "any prohibition on petitioners republishing the information would constitute an impermissible prior restraint." Accordingly, the appellate court directed the trial court to "conduct[] an *in camera* review of the underlying facts as to how the subject documents were obtained," and it ordered KNXV to provide "further factual information sufficient to allow the trial court to make an informed determination as to whether the source of the three documents in question was independent of this litigation."

Within days of the entry of the appellate court order, KNXV asked the trial court to conduct the required *in camera* review. Cooper responded by again arguing the KNXV had waived the reporter's privilege by seeking affirmative relief from the court.

KNXV asked for leave to submit a detailed declaration about the provenance of the Documents from Ms. Boudreau, *in camera* and for the trial court's eyes' only, and requested that the trial court review her declaration and the sworn statements of the 41 trial participants who denied providing the Documents to KNXV. Cooper argued that "*in camera*" did not mean *ex parte*, and insisted on having the right to cross-examine the reporter about how she came into possession of the Documents.

The trial court rejected Cooper's waiver argument, and adopted a two-stop procedure

for conducting the *in camera* review ordered by the Court of Appeals. First, the trial court would review the Boudreau Declaration *in camera*, outside the presence of counsel. The trial court invited Cooper to submit a checklist of ques-

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Cooper's lawyer asserted that the Documents shown in the broadcast were confidential and subject to the trial court's confidentiality order

Arizona Court Upholds Reporter's Privilege in Confidential Source Case

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tions, additional evidence or other information to inform the court's review. If the trial court were to conclude that additional information was necessary, it would then proceed to the second step – an *in camera* evidentiary hearing. Cooper declined to submit any further information, and objected to entire procedure being impermissible under the terms of the appellate court's order.

The trial court then reviewed the Boudreau Declaration and found, on August 22, 2006, that “the source of the documents was independent from and outside this litigation.” Accordingly, the trial court vacated the prior restraint.

Cooper then filed a series of unsuccessful emergency petitions to stay the trial court's order lifting the prior restraint. The trial court, the Arizona Court of Appeals and the Arizona Supreme Court rejected Cooper's requests. Cooper also filed a special action with the Arizona Supreme Court, which that Court construed as a Petition for Review – and which it denied. Cooper then filed an Application to the United States Supreme Court for Stay or Injunction Pending Disposition of Petition for Writ of Certiorari. Justice Kennedy, sitting as Circuit Justice for the Ninth Circuit, denied the Application, and the high court denied Cooper's certiorari petition.

Lastly, Cooper filed a state court appeal from the final order of the trial court lifting the prior restraint. In its appeal, Cooper challenged the trial court's denial of Cooper's request for a finding that KNXV had “waived” the journalist's privilege by seeking declaratory relief from the trial court. Cooper also challenged, on due process grounds, the procedure used to determine whether Ms. Boudreau's source was independent from the state court litigation.

The Decision

The Court of Appeals affirmed the trial court's finding of non-waiver of the reporter's privilege, and rejected Cooper's due process challenge to the trial court's determination that KNXV had obtained the Documents from a source outside of the state court litigation.

Addressing the waiver argument first, the Court rejected the notion that KNXV had waived the reporter's privilege by using it as both a “sword” and a “shield,” as Cooper had argued. Specifically, Cooper contended, *inter alia*, that KNXV had waived the privilege by intervening in the *Flo-*

res litigation, seeking a declaratory judgment that it had not violated the confidentiality order and by making selective disclosures about its confidential informant.

The Court found that KNXV's use of judicial process had been entirely defensive from the outset, and that it did not reflect an effort to obtain “affirmative” relief or to use the privilege as both a sword and a shield. The Court recognized that the reporter's privilege is codified in Arizona's “Press Shield Law,” which states:

A person engaged in . . . television or reportorial work, or connected with or employed by a . . . television station, shall not be compelled to testify or disclose in a legal proceeding or trial or any proceeding whatever, or before any jury, inquisitorial body or commission, or before a committee of the legislature, or elsewhere the source of information procured or obtained by him . . . for broadcasting over a . . . television station.

A.R.S. § 12-2237.

The Court ruled that the statutory privilege “belongs to the reporter” and is not easily waived. *Flores*, 178 P.3d at 1182. In support, the Court acknowledged the strong First Amendment foundations of the privilege and its importance in the reporting of news of acute public interest and concern:

Unlike the other evidentiary privileges, which are premised upon a prior, although tacit, agreement of confidentiality, the reporter-source privilege is rooted in the “public purpose to allow journalists to collect the news from sources who would not otherwise disclose information if they were identified.” *Ulrich v. Coast Dental Servs., Inc.*, 739 So.2d 142, 143-44 (Fla. Dist. Ct. App. 1999) (distinguishing between the journalist's privilege and other privileges that are based on confidential communications, such as the husband-wife, attorney-client, and patient-physician privileges). See generally Anthony L. Fargo, *The Year of Leaking Dangerously: Shadowy Sources, Jailed Journalists, and the Uncertain Future of the Federal Journalist's Privilege*, 14 Wm. & Mary Bill Rts. J. 1063, 1072 (2006) (explaining that while other

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privileges protect the right to safeguard a client's or patient's private statements from disclosure, a journalist's privilege protects the right to publish or broadcast information while keeping the source's identity secret; the primary aim "is to protect the journalist's First Amendment right to publish the news without government interference"). Accordingly, allowing disclosure of partial information to waive the privilege as to all information gathered on the same subject matter "would chill the free flow of information to the public." *In re Paul*, 270 Ga. 680, 513 S.E.2d 219, 224 (1999) (citations omitted).

Flores, 178 P.3d at 1183. Based on these authorities, the Court held that "we construe the scope of waiver narrowly." *Id.* Thus, a reporter's disclosures of some information about the source, such as information about who the source was not, is insufficient to waive the privilege. *Id.* In support, the Court cited *J.J.C. v. Fridell*, 165 F.R.D. 513, 516-17 (D.Minn.1995) (revealing that defendant was not the source of a story about plaintiff's claim did not waive the privilege), *In re Venezia*, 191 N.J. 259, 922 A.2d 1263, 1276 (2007) (refusing to hold that a waiver of privilege extended beyond the specific information actually imparted), and Carl C. Monk, *Evidentiary Privilege for Journalists' Sources: Theory and Statutory Protection*, 51 Mo. L.Rev. 1, 60 (1986) ("[W]hile revelation of confidential information may appropriately be said to constitute a waiver of some privileges, it should not be treated as a waiver of the reporter's privilege.>").

The Court then turned to the second basis of Cooper's appeal – the procedural due process challenge to the trial court's order lifting the prior restraint. While KNXV argued that this portion of the appeal was an untimely and improper attempt to appeal the Court of Appeals' earlier order regarding *in camera* review, the Court held that the implementation of its prior order was properly at issue.

Addressing the merits of Cooper's challenge, the Court applied the balancing test that the U.S. Supreme Court has developed for analyzing due process claims in civil cases,

and it approved of the trial court's process. The Court recognized that even in the criminal context, "[t]he right to confront witnesses is not absolute and may, in appropriate cases, give way to other legitimate interests in the criminal process."

the interest in protecting the informant's confidentiality is substantial.

Flores, 178 P.3d at 1184 (quoting *State v. Quinn*, 121 Ariz. 582, 585, 592 P.2d 778, 781 (Ct. App. 1978)). In civil cases, the "the United States Supreme Court has consistently recognized that procedural due process protections must vary depending on the situation, requiring courts to balance the nature of the private and governmental interests involved, the burdens of alternative processes, and the risk of erroneous deprivation." *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976)).

The Court then found that the trial court had struck the right balance between the private interests involved, recognizing that "the interest in protecting the informant's confidentiality is substantial." *Id.* In particular, the Court noted that A.R.S. § 12-2237 expressly "applies to all proceedings 'whatever' and thus precludes disclosure of the confidential source to Cooper and its counsel." *Id.* at 1184-85. The statute "fosters the news media's 'function as a vital source of information,'" *id.* at 1185 (quoting *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C.Cir.1981)), and it "furthers the public policy of enabling news organizations to meet their ethical and legal obligations." *Id.* (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991)).

The Court also found that the trial court's two-step procedure mirrored a nearly-identical two-stage *in camera* examination of a reporter – outside the presence of the parties and counsel – approved by the Fifth Circuit in *In re Selcraig*, 705 F.2d 789 (5th Cir.1983). *Flores*, 178 P.3d at 1185. In that case, the district court needed to determine if a reporter's confidential sources were independent of the defendant, a school district that had been sued for allegedly publicizing defamatory statements about the plaintiff. To protect the reporter's privilege "as far as possible," the district court proposed the following *in camera* "order of inquiry" about the reporters' sources:

The court would first ask Selcraig [the reporter]

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whether his confidential sources occupied such positions that their publication of the charges against [the plaintiff] could be attributed to [the school district]. If Selcraig answered that the sources were not connected with [the school district], the inquiry would stop there.

In re Selcraig, 705 F.2d at 795. If, however, the reporter answered that his sources were connected with the district, then the district court would follow up with additional questions. *Id.* The Fifth Circuit lauded “the district court’s carefully structured request for information,” stating that it “might well serve as a model” for other inquiries. *Id.* at 799.

The *Flores* Court also recognized that “similar procedures have been upheld in the criminal context, where the interest supporting disclosure of the information—the defendant’s liberty interest—is fundamental.” 178 P.3d at 1185. Specifically, it discussed *State ex rel. Green Bay Newspaper Co. v. Circuit Court*, 335 N.W.2d 367, 371 (1983), a case where a criminal defendant sought to compel two reporters to disclose their sources to obtain potentially exculpatory evidence. To protect “the societal interest ... [in] the free flow of information” protected by the journalist’s privilege, the court held that if the defendant could establish that

the reporters’ sources could lead to exculpatory evidence, then the trial judge would conduct an *ex parte*, *in camera* hearing to

confirm that the evidence was necessary to the defense. *Green Bay Newspaper*, 335 N.W.2d at 373-74. If the trial judge made such a finding, then – and only then – “would the source be disclosed to the defendant.” *Flores*, 178 P.3d at 1185.

Rejecting Cooper’s argument that the trial court’s procedure gave short shrift to its trade secret property interests, the Court cited *O’Grady v. Superior Court*, 139 Cal. App. 4th 1423, 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006), as “instructive.” *Flores*, 178 P.3d at 1185. In that case, a computer company sued website publishers for publishing allegedly confidential information, and sought to discover the source. In discussing the parties’ relative interests, the

decision stated that “where both 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.” *Id.* (quoting *O’Grady*, 44 Cal. Rptr. at 113). Moreover, if “the alleged trade secret is of great public interest, the balance also tips against private property interests.” *Id.*

The *Flores* Court also rejected Cooper’s argument that the Boudreau Declaration should have been shared with Cooper on an “attorneys’ eyes only” basis. The Court wrote that the Arizona Press Shield Law’s plain language, which extends the privilege to “any” proceeding whatsoever, “including civil, criminal, and grand jury proceedings, bars such a result.” *Flores*, 178 P.3d at 1186 (citing A.R.S. § 12-2237). If such information cannot be disclosure to a grand jury – especially where Arizona law provides that disclosing any “matter attending a grand jury” is a crime – “then it surely cannot be shared with opposing counsel in a civil suit under an attorney’s-eyes only order.” *Flores*, 178 P.3d at 1186 (quoting A.R.S. § 13-2812(A)). Moreover, “[c]reating the requested exception would seriously damage the public policies underpinning the shield law ‘because of the inevitable uncertainty to which the exception would lead. Parties could not be certain that their conversations and tips would be confidential and protected, and the stream

of information flowing to reporters and then to the public might be severely

where both 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.

diminished.” *Id.* (quoting *Coughlin v. Westinghouse Broadcasting & Cable, Inc.*, 780 F.2d 340, 352 (3d Cir.1985) (Becker, J., concurring)).

Judge Snow dissented from the *Flores* majority’s decision, writing separately that he would have reversed on due process grounds.

David J. Bodney and Peter S. Kozinets practice media and constitutional law in the Phoenix office of Steptoe & Johnson LLP. Along with Karen Hartman-Tellez, also of the Phoenix office of Steptoe & Johnson LLP, they represented Scripps-Howard Broadcasting Co. and Abbie Boudreau in the Flores litigation.

DA Required to Testify to Support Grand Jury Subpoena Seeking Identity of Internet Poster

By Mark Fowler

In a case involving a grand jury subpoena seeking information that might identify an anonymous poster of information on an online forum, a judge in Rockland County, New York, has held that “the grand jury’s broad investigatory powers . . . must be tempered with a citizen’s right to speak anonymously as protected by the First Amendment.”

The court required that an Assistant District Attorney provide sworn testimony concerning the need for, and the relevance of, the information sought from the host of the forum. Based on the government’s showing and a balancing the competing interests, the court allowed the District Attorney’s Office to proceed with the grand jury subpoena.

Background

In mid-April 2008, the Rockland County District Attorney’s Office issued a subpoena *duces tecum* directed to *The Journal News*, a daily newspaper published by Gannett Co., Inc that provides a feature on its lohud.com website allowing visitors to post commentary on news stories and to initiate blogs of their own concerning matters of public interest.

The subpoena sought to compel disclosure of specified subscriber account information that might potentially lead to the identification of an anonymous poster of information on the website. *The Journal News* filed a motion to quash, arguing that it should not be required to disclose the requested information unless the District Attorney was able to make “a heightened showing of need, demonstrating both a compelling interest in the subpoenaed documents and a sufficient nexus between those documents and the grand jury investigation;” citing *Full Gospel Tabernacle, Inc. v. Attorney-General*, 142 A.D.2d 489, 536 N.Y.S.2d 201 (3rd Dept. 1988), and other cases.

Sworn Testimony from the DA

Rockland County Court Judge Victor J. Alfieri, Jr., noted that it appeared to be a matter of first impression in New York whether the First Amendment imposed limitations upon the issuance of a grand jury subpoena seeking the identity of an anonymous Internet poster. He cited authorities holding that the courts have traditionally given grand juries “the widest possible latitude of its powers to inquire into possible criminal conduct.”

However, the judge agreed with *The Journal News* that, in this

case, the grand jury’s traditional authority potentially collided with the First Amendment right to speak anonymously, as recognized in cases such as *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 (1995), and therefore a balancing of interests was required. “The right to speak anonymously extends to the Internet,” he concluded, citing *Doe v. 2TheMark.com*, 140 F. Supp.2d 1088, 1092 (W.D. Wa. 2001).

In order to obtain a fuller record of the government’s need for the subscriber information, the court ordered an Assistant District Attorney to provide, under oath, “information regarding the nature of the grand jury proceeding and the relevance of the information requested to the investigation at issue.” As directed, an Assistant District Attorney then testified *in camera*. In keeping with grand jury secrecy requirements, the court’s opinion did not divulge the specifics of the showing that was made.

Showing Sufficed to Uphold the Subpoena

Ultimately, Judge Alfieri declined to articulate a precise “standard” to be applied in future cases because “courts should not decide constitutional issues when a case can be disposed of on a non-constitutional ground.” Instead, the judge ruled more narrowly that, by means of his sworn testimony, the Assistant District Attorney had made a heightened showing of need and demonstrated the nexus to the investigation, which the newspaper had said was required. Accordingly, the court declined to quash the subpoena.

The Journal News had also argued, by analogy to *Dendrite Int’l v. Doe No. 3*, 775 A.2d 756 (N.J. Super. App. Div. 2001), *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), and other cases involving civil subpoenas, that the court should require that the District Attorney make a good faith effort to notify the anonymous poster of the subpoena, unless there was a showing such notification would jeopardize the grand jury’s investigation. The purpose of the notification requirement in the *Dendrite* line of cases is to permit the party whose identifying information is sought to intervene anonymously by an attorney, if he so chooses, in order to defend his own First Amendment rights. Judge Alfieri noted the newspaper’s notification argument, but did not require such a notice and did not discuss his reasoning on that point.

Mark Fowler and Karen Bekker of Satterlee Stephens Burke & Burke LLP represented The Journal News. Executive Assistant District Attorney Gary Heavener represented the Rockland County District Attorney’s Office.

Georgia Federal Court Orders CNN to Disclose Unaired Footage Court Rejects *In Camera* Review on Request for Reconsideration

A Georgia federal court recently denied CNN's motion for reconsideration of its order that it produce unaired news footage to a defendant in a large multiparty personal injury action., No. 1:06-CV-1809-TWT, Case No. 1:07-MD-1804 (N.D. Ga. Mar. 24, 2008) (Thrash, J.).

Background

In October 2007, CNN's *Anderson Cooper 360°* show aired a segment about safety issues surrounding the product Tile Perfect Stand 'n Seal Spray-On Grout Sealer. An on air source, Dr. Walter Friedel, discussed how he was severely injured using the product. Friedel is one of hundreds of plaintiffs who have filed personal injury and liability lawsuits against the manufacturer, retailer and other parties.

One of the defendants, Aerofil, issued a subpoena to CNN for the unaired footage of the interview with Dr. Friedel and any other individual associated with the product safety segment. CNN moved to quash the subpoena.

The court acknowledged, and Aerofil did not contest, that CNN was protected by a qualified reporter's privilege under Georgia's shield statute O.C.G.A. 24-9-30. The statute provides in relevant part:

Any person, company, or other entity engaged in the gathering or dissemination of news for the public through a newspaper, book, magazine, or radio or television broadcast shall have a qualified privilege against disclosure of any information, document, or item obtained or prepared in the gathering or dissemination of news in any proceeding where the one asserting the privilege is not a party, unless it is shown that this privilege has been waived or that what is sought:

(1) Is material and relevant; (2) Cannot be reasonably obtained by alternative means; and (3) Is necessary to the proper preparation or presentation of the case of a party seeking the information, document, or item.

The shield statute does not distinguish between confidential and non-confidential information. However, the federal district

court stated that since the source was not confidential Aerofil could make a "lesser showing" to obtain the information.

Aerofil argued that the unaired footage of Dr. Friedel was relevant and necessary to "fill gaps in Dr. Friedel's deposition" and aid in a contributory negligence defense and provide probative evidence of Dr. Friedel's actual use of the product because the unaired footage shows Dr. Friedel using the spray.

Aerofil was also able to convince the court that it had no other way of obtaining the information and that it had a "compelling interest" in the footage. The court denied CNN's motion as to the unaired footage of Dr. Friedel, but granted the motion as to unaired footage not related to Dr. Friedel.

After the ruling CNN made an oral request for *in camera* review.

Motion for Reconsideration

CNN filed a [motion for reconsideration](#) of its oral request for *in camera* review. In arguing for reconsideration, CNN provided an affidavit that stated most of the footage was irrelevant. However, the court viewed this as an attempt to reargue the issue of relevancy.

According to the court, although motions for reconsideration are not specifically authorized by the Federal Rules of Civil Procedure, they are common. Cases have established though that motions for reconsideration should not be used merely to raise new issues that could have been addressed at the motion stage. Instead, a motion for reconsideration should only be granted in narrow circumstances. These include when the controlling law has changed, new evidence is available or there is clear error to be corrected.

Stressing that the argument should have been at the motion stage, the court declined to perform an *in camera* review, having already found that Aerofil made a showing of necessity. Furthermore, the court noted that the Georgia shield statute does not address *in camera* review and there is no precedent requiring a court to perform an *in camera* review.

CNN was represented by Eric Schroeder of Powell Goldstein LLP in Atlanta. Aerofil was represented on the motion by Patrick B. Moore, Weinberg, Wheeler, Hudgins, Gunn & Dial.

Guilty Plea in Minnesota Criminal Libel Case; Indictments in Wisconsin, Louisiana

A Rochester, Minnesota man pleaded guilty to one count of criminal libel stemming from a Craigslist posting that disparaged local elected officials. *Minnesota v. Klebel*, No. 55-CR-08-3574 (Minn. Dist. Ct., Olmstead County guilty plea entered May 15, 2008).

Mitchell Klabel, 21, was sentenced to perform 50 hours of community service and to pay \$500 in court costs, although the costs may be offset by additional service hours. He was also ordered to write letters of apology to the local officials who were disparaged in the posting, and was placed on probation for one year. Judge Debra Jacobson withheld adjudication in the case, meaning that the criminal record will be expunged after a successful probation period.

The posting, which appeared on December 27, 2007 in the “Rants and Raves” section of the Rochester, Minnesota Craigslist site, stated that “[Kasson, Minnesota] Police Chief Dave Johnson deals smack. Fact[.] Dodge County Court Judge Lawrence Agerter does cocaine. Fact. Try and stop these people.”

Minnesota’s criminal libel statute provides that:

Whoever with knowledge of its defamatory character orally, in writing or by any other means, communicates any defamatory matter to a third person without the consent of the person defamed is guilty of criminal defamation and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both.

Minn. Stat. § 609.765(2).

The statute exempts material that “is true and is communicated with good motives and for justifiable ends;” is absolutely privileged; “consists of fair comment made in good faith with respect to persons participating in matters of public concern;” “consists of a fair and true report or a fair summary of any judicial, legislative or other public or official proceedings;” or the communication is subject to the common interest privilege. Minn. Stat. § 609.765(3).

This is the third Minnesota criminal defamation case since 1964. A 2001 conviction was vacated in post-trial motions on public policy grounds, and the result of a 2004 case is unknown.

Wisconsin Charges Over Nude Photos

Meanwhile, three teenagers in Wisconsin faced criminal libel charges in two separate instances in which the teens allegedly distributed naked photos of ex-girlfriends. In Hudson, Wisconsin, Michael Meyer-Senty and Tyler J. Schultz, both 17, were charged with creating a montage of naked photographs of a girl that they had both dated and distributing it to fellow students. *Wisconsin v. Meyer*, No. 2008CM321 (Wis. Cir. Ct., St. Croix County); *Wisconsin v. Schultz*, No. 2008CM322 (Wis. Cir. Ct., St. Croix County). Meyer-Senty and Schultz both pled not guilty, and were released on \$1,000 bond on the condition that they have no contact with the girl; further court proceedings are pending.

In La Crosse, Wisconsin, 17-year-old Alex Phillips was charged with criminal defamation, possession of child pornography and sexual exploitation of a child after he posted naked pictures of his 16-year-old former girlfriend on his MySpace profile page. A not-guilty plea was entered on Phillips behalf, and a trial is pending. *Wisconsin v. Phillips*, No. 08CF309 (Wis. Cir. Ct., La Crosse County). At press time, Phillips was being held at the La Crosse County Jail on \$1,000 bond.

Louisiana Charges Over E-mails

And in a case similar to the one in Minnesota, Bobby F. Simmons of Franklin, Louisiana was arrested May 22 for criminal defamation over e-mails sent to local news organizations falsely alleging that Mamou, Louisiana Police Chief Greg Dupis had been arrested for drunk driving. *State v. Simmons*, No. 20070311025073135533 (La. Dist. Ct., Evangeline Parish 2008).

Louisiana, Minnesota and Wisconsin are among the 17 American jurisdictions – 16 states and 1 territory – with criminal defamation statutes on the books that have not been held unconstitutional. The U.S. Supreme Court held the Louisiana statute, La. Rev. Stat. § 14.47, unconstitutional as applied to defamation of public officials, see *Garrison v. Louisiana*, 379 U.S. 64 (1964), but has been upheld when applied to defamation of private figures. See *Snyder v. Ware*, 314 F. Supp. 335 (W.D. La. 1970), *aff’d without opinion*, 397 U.S. 589 (1970) (refusing to enjoin prosecution).

Journalist Wins Case Before Inter-American Court on Human Rights

Argentina Ordered to Amend its Criminal Defamation Laws

By Eduardo Bertoni

In 1989 Eduardo Kimel, an Argentinean journalist and writer published the book “The Massacre of San Patrick.” The book tells the story of the killing of five monks in 1976 during the last dictatorship in Argentina. In relation to the judicial investigation of the killings, Kimel expressed in one paragraph his opinion about the attitude of the judges during the dictatorship and criticized the judge who was in charge of the case.

Kimel wrote that, in general, the judges were accomplice with the repression during the dictatorship and that a lot of evidence related to the killings was not considered. He added that when it was clear that the order for the killings had been made by the core of the military power, the investigation was paralyzed.

In 1989, the judge in charge of the case initiated a criminal prosecution against the journalist alleging that the book had damaged his honor. The journalist was convicted, sentenced to one year in prison and ordered to pay 20,000 US dollars. After a very long domestic litigation process, Kimel brought his case to the Inter-American Commission on Human Rights, which sent the case to the Inter-American Court on Human Rights in 2007.

The American Convention on Human Rights and the American Declaration of the Rights and Duties of Man are the principal instruments through which the inter-American system provides for the protection of human rights. The organs responsible for enforcing these international obligations are the

Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. A brief description of these two organs is available at <http://www.cidh.org/Basicos/basic1.htm>

After almost two decades of an unjust conviction, Kimel found relief on May 2, 2008, when the Inter-American Court established that criminal defamation laws in Argentina are against the American Convention on Human Rights. *Kimel v. Argentina* (May 2, 2008). The complete decision of the Court is available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_177_esp.pdf (only in Spanish).

Criminal Defamation in Latin America

Libel, slander, and defamation laws continue to be used in Latin America. Criminal legislation to defend the honor of govern-

ment officials has been used as a tool to put psychological pressure on journalists. Just to cite few examples, in August 2006 the Supreme Court of Justice of Uruguay issued a five-month prison sentence for journalist Carlos Dogliani for the crime of defamation. Another example took place in May 2006 when the Fourth Chamber (Constitutional branch) of the Supreme Court of Justice of Costa Rica rejected a constitutional challenge against Article 7 of the 1902 Press Law, which punishes crimes of libel and slander committed by the press with up to 120 days in jail.

However, it is important to highlight that some countries have started to change. For instance, in April 2007 criminal defamation laws were repealed at the federal level in Mexico. Previously, in May 2006, the “Law of Civil Responsibility for the Defense of Honor, Private Life, and Self Image,” had eliminated “honor crimes” from the Federal District Penal Code.

Inter-American Court Decision

The Inter-American Court in the *Kimel* case analyzed the criminal defamation legislation in Argentina’s Penal Code and concluded that it is contrary to Articles 9 (principle of legality) and 13.1 (freedom of expression), in relation to Articles 1.1 (duty of the States to respect human rights) and 2 (duty of the States to adopt means to adapt internal legal system) of the American Convention.

the Court ordered Argentina to repeal or change its current criminal defamation laws.

Court ordered Argentina to adjust its domestic laws to be in accordance with the American Convention on Human Rights. In other words, the Court ordered Argentina to repeal or change its current criminal defamation laws. The Inter-American Court also ordered the State to annul the effects of Kimel’s criminal and civil sentences and to pay damages.

The Court expressed that “Criminal Law is the most restrictive and severe means for establishing responsibilities with respect to illicit conduct” and that, therefore, “the broad definition of crimes that protect the honor of people can run against the Criminal Law principles of minimum intervention and of last resort.”

Furthermore, the Court understood that the possibility of codifying the elements of these crimes “must be analyzed with special caution, weighing the extreme gravity of the conduct displayed by

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Journalist Wins Case Before Inter-American Court on Human Rights

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the alleged offender, his/her intention, the characteristics of the damage unjustly caused and other information tending to show the absolute necessity of resorting, in a truly exceptional way, to measures under criminal law.”

Moreover, the Court noted that an “opinion cannot be subject to legal penalties, especially when it involves a value judgment regarding an official act by a public official discharging his duties.” Unofficial translations of paragraphs of the decision in CELS, *A new Decision in Favor of Free Expression: the Inter-American Court of Human Rights Compels the Argentine State to Reform its Laws Against Slander and Libel*, press release issued on May 23rd, 2008.

Other Recent Cases

The *Kimel* case follows others in which the Inter-American Court decided against criminal defamation laws.

One previous case was the one about Mauricio Herrera Ulloa, a journalist in *La Nación* newspaper who published a series of articles in 1995 in which he partially reproduced information that appeared in the Belgian media on alleged wrongdoings by a Costa Rican honorary diplomat to the International Atomic Energy Organization in Austria. The official sued the journalist for the crime of defamation, libel and publication of offensive material. On July 2, 2004, the Inter-American Court issued a judgment finding that Costa Rica had violated the right to freedom of expression of Mauricio Herrera Ulloa, and ordered the nullification of the judgment that convicted the journalist. Case of *Herrera Ulloa v. Costa Rica* at

http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf

Another case was about statements by presidential candidate Ricardo Canese, made to the Paraguayan media, in which he criticized his rival, Juan Carlos Wasmosy, to whom he attributed alleged irregularities in connection with the construction of the Itaipu binational hydroelectric plant and his alleged links to the family of former dictator Alfredo Stroessner. Canese’s statements of August 1992 were done in the framework of the political campaign for the 1993 presidential elections. Part of the construction of the plant was entrusted to the company CONEMPA, whose board of directors Wasmosy had chaired. On October 23, 1992, the directors of CONEMPA filed suit against Canese for the crimes of defamation and slander. On August 31, 2004, the Inter-American Court of Human Rights issued a judgment in which it found that Paraguay had violated the right to freedom of thought and expression of Ricardo Canese, and ordered the payment of reparations to Mr.

Canese. Case of *Ricardo Canese Case v. Paraguay* at http://www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf

Conclusion

The difference between *Kimel* and its predecessors is that in *Kimel* the Inter-American Court ordered the state to modify its criminal defamation legislation. Since many of the criminal defamation laws in Latin America have a wording similar to the one in the Argentinean law, it is expected that the Inter-American Court’s decision will have an impact not only on Argentina, but also on the rest of the region.

The decision, though, reveals a split among the judges about the continued viability of criminal libel laws even under more protective standards. In obiter dictum found in paragraph 78, the Court noted that the use of criminal law against some expressions and opinions is not contrary to the American Convention on Human Rights. The Court mentioned some safeguards to limit the possibility of such use, such as the introduction of the “actual malice” doctrine related to who has the burden of the proof during the trial. However, this “obiter dictum” is unfortunate because it could be read as a contradiction with the rest of the decision.

We could interpret the obiter and put it under the best possible light saying that the Court wanted to leave open the possibility that criminal law could be used against certain expressions related to hate speech and the incitement of violence, for example.

The obiter also shows there has been tension between different judges. Judge Garcia Sayan, in a concurring opinion, emphasized that it is possible to use criminal law against certain expressions that could damage the honor of public officials. Judge Garcia Sayan’s opinion should not be read as Court’s opinion, but rather as his own, which contradicts that of other judges. The former president of the Court, Judge Garcia Ramirez clearly endorsed the opinion that the Court had started to develop in its previous decisions, which is that the state should not apply criminal law in those cases.

Eduardo Bertoni, the Executive Director of the Due Process of Law Foundation, a non-governmental organization based in Washington DC, was formerly the Special Rapporteur for Freedom of Expression at the Organization of American States (2002-2005). He represented Kimel in his Inter-American Commission on Human Rights petition together with the Center for Legal and Social Studies (CELS for its Spanish acronym), the Center for Justice and International Law (CEJIL), and Alberto Bovino and Santiago Felgueras.

Court of Appeal Rules in Favor of JK Rowling on Photo Privacy Claim *Photos Taken on Street an Invasion of Privacy*

By Nicola Solomon

Can the subject of a photo prevent its use? Is it ok to take photos in public places and use them without the subject's permission? The law used to be easy: the photographer owned the copyright and could use the image without regard to the subject's wishes.

The position has now radically reversed. A combination of new judgments culminating in this month's [Court of Appeal judgment](#) preventing pictures of JK Rowling's son being published means that stars and ordinary people are now able to control the way images of themselves are used.

Background

First, in 2002, UK radio station Talksport used a photograph of the racing driver Eddie Irvine in a promotional brochure for the station. Eddie Irvine successfully argued that anyone seeing the brochure would assume that he had endorsed Talksport's services. *Irvine & Ors v. TalkSport Ltd.* [2003] EWCA Civ 423. Since he was able to command money for advertising, Talksport had to pay him the fee he would have charged. If you use pictures of stars to endorse products, you now need to obtain their permission and usually pay a substantial fee.

What though if a photographer got a great snap of someone walking down the street carrying the latest handbag model; could the designer use it for its latest advertising campaign? Ordinary people do not have a business endorsing products and cannot succeed under the same principles as Eddie Irvine. However, developments in privacy law mean it is now far more difficult to use such photos.

Stars like Michael Douglas and Princess Caroline of Monaco have established in Court that everyone, however famous, has a reasonable expectation of privacy and that photos of them in their private life should not be published unless there is a legitimate public interest in doing so. This does not just mean that they are entitled to privacy when they are in private places such as their home. It also extends to behaviour they would not want others to know about.

In Naomi Campbell's case it was held that photographs of her taken in the street after attending a Narcotics Anonymous meeting should not have been published even though she had previously stated that she did not take drugs. (So there was a public interest in disclosure of the fact that she was a drug addict but not in publishing the photograph). Elizabeth Jagger was able to obtain an injunction when the sexual acts in which she was indulging in a nightclub with

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Court of Appeal Rules in Favor of JK Rowling on Photo Privacy Claim

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Callum Best were captured on CCTV even though those acts had been obvious to passers-by (and, tastefully, Callum himself had been recording them on his mobile phone).

JK Rowling Case

In the latest case, a photograph was taken by BPL, a celebrity photographic agency of David Murray, of the son of JK Rowling being pushed along in a buggy by his parents in an Edinburgh street. The photograph was taken secretly by a photographer using a long lens. The photos were published by the Express and JK Rowling sued on behalf of her son. The defendants argued that walking in the street is not a private activity and that a right to privacy under Article 8 of the European Convention of Human Rights could not be claimed in respect of it.

Last year the trial court dismissed the lawsuit, finding that “there remains an area of innocuous conduct in a public place which does not raise a reasonable expectation of privacy.” See [2007] [EWHC 1908 \(Ch\)](#).

The Court of Appeal, however, decided that, although such an activity might not always be private, it depends upon the circumstances and that the focus should not be on where the photos were taken but on the use to be made of them. *Murray v. Big Pictures (UK) Limited*, [2008] EWCA Civ 446 (May 7, 2008) (Clarke, Laws, Thomas, JJ.) The Court observed that this was:

the clandestine taking and subsequent publication of the Photograph in the context of a series of photographs which were taken for the purposes of their sale and publication, in circumstances in which BPL did not ask David’s parents for their consent to the taking and publication of his photograph. It is a reasonable inference on the alleged facts that BPL knew that if they had asked Dr and Mrs Murray for their consent to the taking and publication of such a photograph of their child, that consent would have been refused.

The Court referred to paragraph 6(v) of the Press Complaints Commission Code of Practice which provides that:

“Editors must not use the fame, notoriety or posi-

tion of the parent or guardian as a sole justification for publishing details of a child’s private life” and concluded that “subject to the facts of the particular case, the law should indeed protect children from intrusive media attention, at any rate to the extent of holding that a child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication which the person who took the photographs knew would be objected to on behalf of the child.”

Although the Court was careful to stress that each case must be decided on its facts, and particularly disapproved of the secret taking of the photograph, it is likely that it would hold that if such a protection of privacy goes for stars and their children how much more so for ordinary people. When you take a snap in the street you do not know if the person is involved in private activity. That lovely picture of a couple hand in hand may have been taken when they were on a sneaky adulterous weekend. The crowd picture at the football match may have shown someone who called into work on a sickie.

As was stressed in the Rowling case, the test of whether you have gone too far will focus on the use of the photos—i.e. what would a person expect would be done with photos of them—you could probably publish the football match picture when reporting the match but not for the front of a glossy brochure. Although individuals do not have value in their faces, it will usually be an invasion of privacy for their images to be used to endorse a product. The Courts will also be especially careful to protect the privacy of children, whether or not the photos are to be used commercially. Therefore if you want to use photos of people, obtain model releases which cover all the uses you may make of the photo to ensure that your snapshots don’t end up costing you an arm and a leg.

Nicola Solomon is a consultant with Finers Stephens Innocent, London. Plaintiffs were represented by Schillings and barristers Richard Spearman Q.C 4-5 Gray’s Inn Square and Godwin Busuttill 5RB. Defendants were represented by Solomon Taylor & Shaw and barristers Mark Warby Q.C and Jonathan Barnes 5RB.

News Groups Successfully Challenge South Dakota Restrictions on Exit Polling

State Will Allow Exit Polling Near Voting Sites

By Dave Tomlin

South Dakota Secretary of State Chris Nelson reversed himself and agreed to allow exit polling within 100 feet of voting sites just days after the five broadcast news networks and The Associated Press filed a federal lawsuit to overturn Nelson's order that there would be no exceptions to the state's restriction on activity near precinct locations.

The May 19 announcement was the fourth time the news organizations have successfully challenged such distance restrictions in the current election cycle. In the other three cases, courts in Ohio, Florida and Nevada ruled that such distance restrictions violate the First Amendment when applied to exit polling.

The rulings are important to the news organizations, because keeping exit pollsters at a distance seriously disrupts the process of randomly selecting interview subjects as they leave polling places. As distance from the poll exit rises above ap-

proximately 50 feet, comparisons of exit poll results with actual vote totals have shown that accuracy is increasingly compromised.

Secretary Nelson and other election officials have argued that exit polling near voting locations is similar to electioneering and other non-official activities that states have an interest in controlling because it can be annoying and distracting to voters, possibly deterring some from casting their ballots.

The news organizations argued that the states presented no credible evidence of any impact on voting by professional exit polling and that restricting the distance within which it can be conducted deprives the public of accurate information concerning how various segments of the electorate voted.

The agreement ending the South Dakota lawsuit applies to both the June 3 state primary and to the general election in November.

Dave Tomlin is Associate General Counsel at Associated Press.

MLRC Calendar

MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY	SUNDAY
31	1	2	3	4	5	6
PLEASE VISIT WWW.MEDIALAW.ORG FOR MORE INFORMATION						
14	15	16	17	18	19	20
September 17-19, 2008 NAA/NAB/MLRC Media Law Conference Chantilly, VA						
21	22	23	24	25	26	27
28	29	30	31	1	2	3
November 12, 2008 MLRC ANNUAL DINNER New York City						
notes:						

November 13, 2008

*MLRC Defense Counsel Section Annual Meeting and LUNCH

A Few Federal Courts Allow Cameras In

While efforts to pass a law allowing cameras into federal courtrooms continue, a company which webcasts court proceedings recently convinced two federal judges in New York to allow it to cover trial proceedings.

Courtroom View Network (“CVN”), webcasts court proceedings, for a fee, at www.courtroomlive.com. CVN was permitted to webcast a November 28, 2007 hearing in *GVA Market Neutral Master Limited v. Veras Capital Partners*, Civil No. 07-0519 (S.D.N.Y.) (securities litigation), as well as a status conference on March 20 and motion hearings on March 27 and 28 in *In re: Zyprexa Products Liability Litigation*, No. 04-MD-1596 (E.D.N.Y.). See 2008 WL 441896 (E.D.N.Y. Feb. 11, 2008) (allowing coverage of March 20 hearing).

The *GVA* and *American Equities* cases were both before Judge Robert W. Sweet of the Southern District of New York, while the *Zyprexa* case is before Senior Judge Jack B. Weinstein of the Eastern District of New York. Sweet and

Weinstein both previously allowed camera coverage of proceedings in separate cases in 1996.

In a short order granting CVN permission to cover the *Zyprexa* proceedings, Judge Weinstein wrote “In view of the fact that tens of thousands of individuals, organizations and governmental entities all over the United States are affected by the instant litigation, approval of the application may be in the public interest.”

CVN had also obtained court approval to webcast the January trial in *In Re: American Equities, et. al., v. American Equities, et. al.*, Civil No. 01-5207 (S.D.N.Y.), but the parties settled before trial. Since 2004, the site has webcast more than 100 proceedings; most of these were in state courts, but this also included oral argument in a civil appeal before the Second Circuit, *Vietnam Ass’n for Victims of Agent Orange v. Dow Chemical Co.*, Civil No. 05-1953 (argued: June 18, 2007).

Status of Cameras in the Courts: State and Federal

According to a [May 2007 compilation](#) by the RTNDA, most states allow for some form of cameras in courts. Five states (Delaware, Illinois, Louisiana, New York and South Dakota) prohibit all camera coverage of trials, and 10 other states have strong limitations on cameras in courts.

In the federal courts, camera coverage of federal criminal trials is generally prohibited, see Fed. R. Crim. Pro. 53; see also *United States v. Hastings*, 695 F.2d 1278, 1279, n. 5, 8 Media L. Rep. 2617 (11th Cir. 1983), *reh’g den.*, 704 F.2d 559, 9 Media L. Rep. 1582 (11th Cir. 1983), *cert. denied sub. nom. Post-Newsweek Stations, Florida, Inc. v. United States*, 461 U.S. 931 (1983), except to allow remote viewing by victims in criminal cases. See 42 U.S.C. § 10608.

The federal courts concluded a limited test of camera coverage of civil trials in 1994 with the conclusion that “the intimidating effects of cameras on some witnesses and jurors was a cause for serious concern.” (For an overview of cameras in federal courts, see *LDRC LibelLetter*, Oct. 2000 at 31.)

Despite this conclusion, in 1996 some judges of the Southern and Eastern districts of New York allowed camera coverage of particular cases under the courts’ local rule allowing such coverage at the court’s discretion. See *Marisol A. v. Giuliani*, 929 F. Supp. 660, 24 Media L. Rep. 2150 (S.D.N.Y. 1996) (Judge Robert J. Ward) (see *LDRC LibelLetter*, March 1996 at 23); *Katzman v. Victoria’s Secret Catalogue*, 923 F. Supp. 580 (S.D.N.Y. 1996)

(Judge Sweet); *Sigmon v. Parker Chapin Flanau & Kimpl*, 937 F. Supp. 335 (S.D.N.Y. 1996) (Judge Peter K. Leisure); *Hamilton v. Accu-Tek*, 942 F. Supp. 136, 137 (E.D.N.Y. 1996) (Judge Weinstein).

These courts share a common set of local rules, including one (formerly Local Civil Rule 7, now Local Civil Rule 1.8) allowing camera coverage of civil trials with the presiding judge’s written consent. (The rule is actually written in the negative, prohibiting coverage without such consent.)

In the New York cases, the judges held that the local rule was not superceded by a policy adopted in 1994 by the Judicial Conference of the United States opposing cameras in federal civil proceedings. The Judicial Conference policy rejected an unambiguous recommendation in favor of televised proceedings by its committee that had examined the issue after a three-year experiment in several federal district courts, including the Southern District of New York. In March 1996, the Conference passed a resolution allowing each circuit court to decide the issue for itself, while strongly urging the circuits to follow the Conference’s 1994 policy and to “abrogate any local rules of court that conflict with this decision.”

But the Second Circuit Judicial Council took no action to repeal the local rule. This was despite the Second Circuit ruling 12

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Status of Cameras in the Courts: State and Federal

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years earlier that “There is a long leap ... between a public right under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised. It is a leap that is not supported by history. It is a leap that we are not yet prepared to take.” *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16, 11 Media L. Rep. 1013 (2d Cir. 1984), *cert. denied sub. nom. Cable News Network, Inc. v. United States District Court for Southern District of New York*, 472 U.S. 1017 (1985).

The judges in the televised 1996 cases all concluded, as expressed by Judge Leisure in *Sigmon*, that “although the position of the Judicial Conference is persuasive, it is not controlling, and that the Court, pursuant to Rule 7, has full discretion regarding this issue.” *Sigmon* at 336. Despite these rulings, the U.S. Judicial Conference’s “Journalist’s Guide to the Federal Courts,” incorrectly states that no federal district court has allowed broadcasting of a trial. See http://www.uscourts.gov/journalistguide/district_source.html.

Other district courts within the Second Circuit have various policies: rules in the Connecticut district court (D. Conn. Local Civ. R. 83.11) and the Western District of New York (W.D.N.Y. Local Civ. R. 83.5) ban all cameras from court proceedings, while the Vermont district court prohibits cameras without “permission of the court.” D. Vt. Local Civ. Rule 83.5(a)(2). The Northern District of New York has no rule on the subject, although it has cited precedent disallowing such access with approval. See *Legi-Tech, Inc. v. Keiper*, 601 F. Supp. 371, 375 (N.D.N.Y. Dec. 4, 1984) (citing *Westmoreland, supra.*).

The Ninth Circuit has also refused to abrogate local rules allowing camera coverage of civil proceedings. But almost all the

district courts within the Ninth Circuit have adopted bans, with a few exceptions:

- the Oregon district court local rules prohibit such coverage except “as authorized by a judge in a particular proceeding,” D. Or. Local Civ. R. 83.14(a) (1);
- the Arizona district court rules, while generally banning cameras, allow for coverage of “historic proceedings,” D. Ariz. Local Civ. R. (2)(B); and
- the Nevada district court has no local rule on the issue.

In addition to allowing their district courts to adopt local rules permitting or prohibiting camera coverage of civil trials, the Second and Ninth Circuits have also allowed coverage of appellate arguments in their courts. From 1991 through 2005, Ninth Circuit panels received 205 requests for camera coverage of arguments, and allowed coverage of 133. See, e.g., *LDRC LibelLetter*, Oct. 2000 at 31.

According to counsel, CVN will continue to seek to cover trials in federal district courts where it is permitted, and advocate that other circuits adopt rules giving district court judges discretion to permit proceedings to be filmed.

Jonathan Sherman and Nick Jabbour of Boies, Schiller & Flexner in Washington, D.C., represented CVN in its motions to webcast the New York trial proceedings.

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ETHICS CORNER

Further Thoughts on the In-Firm Attorney-Client Privilege

By Marcy G. Glenn

Last month's column, by Brad Ellis, addressed the extent to which the attorney-client privilege does – or, as often, does not – apply to ethics and other loss prevention consultations within a law firm. Brad primarily discussed the 2007 decision in *Thelen Reid & Priest LLP v. Marland*, 2007 WL 578989 (N.D. Cal. Feb. 21, 2007) (J. Walker), and [Opinion No. 789](#) of the New York State Bar Association Committee on Professional Ethics, issued in October 2005.

Given the importance of the issue to firms and their clients alike, I take a further look at the issue, with several focal points. First, for those who in the future may need to challenge *Thelen* and similar decisions, I note some vulnerabilities of the analysis suggested by various commentators. Second, playing devil's advocate, I take the other side of the policy debate – arguing that *Thelen* does not necessarily reach the wrong result. Third, moving from policy to practice, I suggest some ways firms might limit the risk of compelled disclosure of in-firm communications.

Challenges to the Thelen line of cases.

Thelen and cases reaching similar results have been criticized on both policy and analytical grounds. The policy argument is straightforward: In-firm consultations are good for both firms and their clients and, therefore, should be encouraged through the preservation of the privilege. As Professor Elizabeth Chambliss states in one of the most in-depth law review articles to date:

As a policy matter, I argue for broad protection of communication with law firm in-house counsel, including communication about the representation of a current client of the firm. Such protection would encourage firm members to seek early advice about their duties to clients and to correct mistakes or lapses, if possible, to alleviate harm. Broad protection of in-firm privilege also would encourage law firms to pursue internal investigations where questions of misconduct arise. Finally, broad protection of communication

with in-house counsel would encourage law firms to invest in and formalize the role of firm counsel, which in turn would promote compliance with professional regulation.

Elizabeth Chambliss, *The Scope of In-Firm Privilege*, 80 Notre Dame L. Rev. 1721, 1724 (2005) (footnotes omitted).

Commentators also have challenged the analysis in *In re Sunrise Securities Litigation*, 130 F.R.D. 560, 595 (E.D. Pa. 1989) (J. O'Neill), the first reported decision to address the in-firm privilege question, which *Thelen* found instructive and followed. *Sunrise* rests on two distinguishable decisions: *Valente v. PepsiCo., Inc.*, 68 F.R.D. 361 (D. Del. 1975) (J. Wright); and *Garner v. Wolfenbarger*, 430 F.2d 1093 (5th Cir. 1970) (J. Godbold), neither of which involved in-house counsel to a law firm, and both of which involved issues analogous to joint representation of multiple clients, which is not the case when a lawyer simultaneously continues representing the firm's client and seeks internal advice concerning his or her conduct. See, e.g., Chambliss at 1734-36; William T. Barker, *Law Firm In-House Attorney-Client Privilege Vis-a-Vis Current Clients*, 70 Def. Couns. J. 467, 471 (2003).

Accordingly, *Sunrise* arguably imported to the in-firm privilege context an unwarranted concern about protection of multiple *related* clients. There are also arguments that *Sunrise* and later cases misapplied *Valente* and *Garner* in various respects. See generally Chambliss at 1740-43.

Also questionable is the courts' assumption that if a law firm has a conflict when it seeks in-firm advice about its representation of a current client, loss of the firm's privilege is a necessary consequence of that conflict. "That is not the rule in *separate* representation cases involving separate clients. If a lawyer represents Corporation A, and separately represents B, and overlooks a conflict, that waives neither the privilege of A or B." Brian J. Redding and Kenneth R. Landis, *The Erosion of the In-Firm Privilege: Can Anything Be Done?*, ALAS Loss Prevention J. 1517 (Fall 2005) (emphasis in original).

In addition, in the context of in-firm consultations, the confidentiality concerns underlying the conflict imputation doctrine are arguably inapplicable, since Model Rule 1.6 per-

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mits a lawyer to reveal client information when necessary to defend a client's claim against the lawyer or firm. As a result, Professor Chambliss has argued that the imputation doctrine should not apply where the law firm represents itself. Chambliss at 1746-48.

These challenges to the analysis in *Sunrise* and later cases have apparently not persuaded judges – generally trial courts ruling on discovery motions – to protect the in-firm privilege. It remains to be seen whether the current trend will continue or whether there will be some backlash in favor of lawyers' ability to consult in confidence with their colleagues.

Is Thelen defensible?

Notwithstanding the claimed analytical deficiencies summarized above, perhaps we should not be overly troubled by *Sunrise*, *Thelen*, and other similar cases. As Brad reviewed last month, *Thelen* decided “whether the attorney-client privilege applies where a law firm is attorney to both an outside client and to itself.” 2007 WL 578989 at *6. Thus, the issue was limited to communications generated while the firm represented a client that would later assert a claim against the firm and seek to discover the earlier communications. Similarly, the analysis *Thelen* quoted from *Sunrise* concerned only documents created during the continuing representation of the client that later sued.

The holding in *Thelen* was qualified, not absolute. As Brad explained, Chief Judge Walker confirmed the importance of in-firm consultations about lawyers' legal and ethical obligations, and he therefore declined to require disclosure of all communications related to a current firm client. Instead, he held that in-firm communications lose their confidential status only “once the law firm learns that a client may have a claim against the firm or that the firm needs client consent in order to commence or continue another client representation, . . .” 2007 WL 578989 at * 8. Stated differently, only a conclusion of a viable malpractice or conflict claim should lead to forfeiture of the privilege.¹

Moreover, although not clearly addressed in *Thelen*, other decisions have suggested that even where a *Thelen*-type conflict exists (because after in-firm consultation, the firm concludes that an existing client has a legitimate malpractice or conflict claim), the privilege is not necessarily lost. Rather, as recognized in *Koen Book Distributors v. Powell, Tracht-*

man, Logan, Carrle, Bowman & Lombardo, P.C., 212 F.R.D. 283, 286 (E.D. Pa. 2002) (J. Bartle), a conflicted firm could assert the privilege in eventual litigation by the client, so long as the firm had promptly disclosed the *Sunrise-Thelen*-type conflict and obtained the client's informed consent, assuming the firm “reasonably believed that representation of the clients would not be adversely affected by also representing itself,” *i.e.*, that the Rule 1.7 conflict was consentable. *But see Versuslaw, Inc. v. Stoel Rives, L.L.P.*, 127 Wash. App. 309, 111 P.3d 866, 879 n.31 (2005) (J. Schindler) (rejecting Stoel Rives' assertion of client consent where (a) it was disputed when the firm learned of the potential conflict and when and what it disclosed to its client, and (b) there was no evidence the client effectively waived the potential conflict).

Taking *Sunrise* and the later cases as a whole, then, the prevailing law appears to be as follows:

- Lawyers and firms have a right to consult internally about their legal and ethical obligations – indeed, they should be encouraged to do so. Like communications between members of any organization and its in-house counsel, those in-firm communications generally will be privileged if they meet the controlling jurisdiction's standards for privilege.
- However, where the in-firm consultations yield the conclusion that a client has a viable claim that firm lawyers have violated ethical duties or committed malpractice, a conflict exists between the firm's continuing representation of the client and of itself.
- If that conflict is consentable and the firm obtains the client's informed consent, the privileged nature of the in-firm communications should be protected despite the ongoing representation of the client.
- If the conflict is not consentable, or the firm does not obtain the client's informed consent, and if the client later sues the firm, the erstwhile privilege will succumb to the client's interests in access to intra-firm communi-

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tions that occurred while the firm continued to represent the client.

Aren't these results reasonable? They represent a compromise between competing interests: (a) the firm's and lawyer's interests in being able to give and obtain confidential legal advice on ethical and legal obligations; and (b) the client's interest in conflict-free representation by the firm, including where the conflict arises from the firm's own error or omission. The compromise seems appropriate because, if the firm faces potential exposure from some action it did or did not take, then the involved lawyers likely have a duty to share the fact of that mistake with the client – regardless of whether the firm is representing itself. That duty, where it exists, arises from Model Rules 1.4(a)(3), 1.4(b), 1.7(a)(2), and potentially 8.4(c).²

I say “where it exists” because no ethics rules or laws require a lawyer to disclose to the client *every* mistake – a lawyer must reveal only those that are likely to prejudice the client's right or claim. *See, e.g.,* Colo. Bar Ass'n Ethics Comm. Op. 113 (Nov. 19, 2005); N.J. Supreme Ct. Advisory Comm. on Prof. Ethics Op. 684 (March 9, 1998); N.Y. State Bar Ass'n Op. 734 (Nov. 1, 2000); *see generally* Nancy Moore, *Implications of Circle Chevrolet for Attorney Malpractice and Attorney Ethics*, 28 Rutgers L.J. 57, 73-76 (Aug. 1996).

Working around *Thelen* and similar decisions.

Even if *Thelen* and other cases reaching the same conclusions are defensible, firms have a legitimate interest in minimizing the risk of compelled disclosure of in-firm communications. The following steps could assist in preserving the privilege:

Firms should formalize the internal communications process so that the dialogue between lawyer and counselor resembles, as much as feasible, a true in-house counsel relationship. Ideally, firms will designate particular lawyers with responsibility for ethics compliance and advice and loss prevention. Those lawyers should bill their time to an administrative account – not to the underlying client's account. They should not have performed any work on the matter in question.

If the writing is on the wall – the client has made known its likely intention to assert a claim – the firm should take prompt steps to withdraw, so as to render the then-current client a former client and thereby hopefully obtain the privilege for subsequent internal communications.³

Alternatively, the firm can increase its reliance on outside counsel. If in-firm advisors are not involved, there can be no direct adversity between two clients of the firm, since the firm would not be representing itself. However, the potential for material limitations conflicts remains even if outside counsel provides all legal advice. Also, it obviously would be costly, inefficient, and ultimately not practical for a firm to depend entirely on outside counsel to advise on ethical and malpractice exposure, so this is an imperfect strategy.

Finally, consulted and consulting lawyers should avoid, as much as possible, reducing their communications to writing, so there will be less tangible documentation to produce if the privilege is later deemed lost. The reported cases are replete with damning quotes from internal memos, emails, and billing descriptions. (On the other hand, if a firm obtains a client's informed consent to a conflict created by in-firm communications, that waiver *must* be confirmed in writing. *See* ABA Model Rule 1.7(b)(4).)

Conclusion

The very first sentence to the comment to Model Rule 1.7 reads: “Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.” This principle is a bedrock for all the conflict rules. It also appears to be the essential underpinning of *Sunrise*, *Koen*, *Thelen*, and other similar cases – the glue that holds them together and continues to lead courts to place serious limitations on the in-firm privilege. For better or worse, under a growing body of law lawyers should tread carefully, if at all, when representing clients while concurrently obtaining in-house advice about the adequacy or inadequacy of that representation.

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Marcy G. Glenn is a partner in Holland & Hart, LLP, resident in the firm’s Denver office, and is the Chair of the Colorado Supreme Court Standing Committee on the Colorado Rules of Professional Conduct, and the immediate past Chair of the United States District Court (Colorado) Committee on Conduct.

Notes:

¹ Like *Thelen*, the *Sunrise* decision recognized the benefit of in-firm consultations, holding that the privilege would apply so long as the communications did not “implicate[] or create[] a conflict between the law firm’s fiduciary duties to itself and its duties to the client seeking to discover the communication.” 130 F.R.D. at 597. However, unlike *Thelen*, *Sunrise* does not clearly state that a debilitating conflict arises only if the in-firm consultation leads to the conclusion that the lawyer has probably breached a professional or ethical duty to the true client. Rather, *Sunrise* can be read as finding a Rule 1.7 conflict from the mere fact of in-firm consultation about a potential claim or grievance by a current

client, even if the lawyers involved conclude that the client’s challenge would be unsustainable.

² Model Rule 1.4(a)(3) requires a lawyer to “keep the client reasonably informed about the status of the matter.” Model Rule 1.4(b) requires a lawyer to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Model Rule 1.7(a)(2) prohibits material limitation conflicts. Model Rule 8.4(c) prohibits a lawyer from engaging in “conduct involving dishonesty, fraud, deceit or misrepresentation.”

³ *Koen Books* states in *dictum* that withdrawing will “avoid or minimize the predicament,” 212 F.R.D. at 286, but the conflict and, hence, privilege problems arguably would continue even after the representation had ended. Building on the conflict analysis that underpins *Sunrise* and *Thelen*, if the firm were to continue to represent itself after terminating representation of its original client, it would be adverse to a former client in a matter (the firm’s possible liability for malpractice or ethical violations) that would be substantially related to its prior representation of the former client. Why wouldn’t this potential violation of Model Rule 1.9(a) also lead to the firm’s forfeiture of the in-firm privilege?

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