

MULRC Media Law Resource Center

MEDIA LAW LETTER

Reporting Developments Through May 27, 2009

SUPREME COURT

- U.S.** **Supreme Court Rejects Appeal Over Fleeting Expletives** **3**
Expletives Must Be Deleted – At Least for Now
FCC v. Fox Television

CONGRESS

- Senators, Publishers, and Aggregators “Link Up” for Hearing on the “Future of Journalism”** **7**

INTERNET

- 9th Cir.** **Claim Based On Broken Promise To Remove Website Content Is Not Barred By Section 230** **9**
Recovery Under Promissory Estoppel Would Not Treat Yahoo As a Publisher
Barnes v. Yahoo!

LIBEL & PRIVACY

- N.Y.** **Burden of Proof of Constitutional Malice is Clearly with the Plaintiff** **13**
No Evidence That Mistake Was Made With Actual Malice
Kipper v. NYP Holdings Inc.
- S.D. Tex.** **Crusader Against Corruption Scores Jurisdictional Victory In Internet Libel Case** **16**
No Jurisdiction in Texas Over Article Focusing on Nigerian Corruption
Orhii v. Sowore
- Tex. App.** **Texas Court of Appeal Finds San Antonio Express-News Articles Substantially True** **18**
Hearst Wins Summary Judgment
Hearst v. Macias
- Cal. App.** **Court Affirms Anti-SLAPP Ruling for Fox News** **20**
Court Cites Media’s Right to “Present Information in the Manner It Chooses”
Balzaga v. Fox News Network
- Cal. Sup. Ct.** **San Francisco Chronicle Wins Anti-SLAPP Motion in Public Official Defamation Case** **22**
Column Not “Provably False”; Protected as Fair Report
Brooks v. San Francisco Chronicle
- Mass. Sup. Ct.** **Massachusetts Newspaper Wins Dismissal of Defamation SLAPP Suit** **24**
Statute Protects Commercial Media Entities
Joyce v. The Wareham Observer
- N.J.** **New Jersey Supreme Court Addresses Common Law Remedy for SLAPP Suits** **27**
Attorneys Can Be Liable Under Abuse of Process Theory for Filing SLAPP Suit
LoBiondo v. Schwartz

Ga. App.	Georgia Court of Appeals Reinstates Libel Claim Against Trade Publication <i>Jury Should Decide Issues of Falsity and Negligence</i> Gettner v. VNU	28
Fla.	Florida Legislature Passes Bill On Non-Recognition of Foreign Defamation Judgments <i>After Passing Both Houses Unanimously, Bill Awaits Signature by Governor</i>	29
N.J.	Libel Tourism Bill Introduced in New Jersey <i>Judiciary Committee Reports Out Bill to Limit Enforcement of Foreign Libel Judgments</i>	30
Cal.	California Anti-Libel Tourism Bill Getting Broad Support <i>Bill Will Likely Reach Governor's Desk</i>	31
NEWSGATHERING & ACCESS		
Tenn. Cr. Ct.	Court Rejects Effort to Limit Anonymous Internet Speech Relating to Criminal Proceeding <i>Murder Defendant Sought to Bar Comments on Media Websites</i> Tennessee v. Cobbins	33
N.D.N.Y.	Court Adopts "Sunshine Provision" in Sealing Order <i>Court Gives Date When Sealing Order Automatically Expires</i> United States v. Strevell	35
REPORTERS PRIVILEGE		
Texas	Texas Becomes Number 37 in States that have a Reporter's Privilege	37
N.D. Ga.	Court Denies Effort by Journalism School Dean to Compel Disclosure of Confidential Source <i>Plaintiff Failed to Exhaust Alternatives and Show Information Necessary</i> Soloski v. Board of Regents of Univ. System of Ga.	39
COPYRIGHT		
4th Cir.	Fourth Circuit Affirms Summary Judgment for Plagiarism Detection Service <i>Digital Database a Fair Use; Important Implications For New Media</i> Vanderhye v. iParadigms	41
E.D.N.Y.	Court Dismisses Claim that Swing Vote Infringed Plaintiff's Movie Treatment <i>No Substantial Similarity Between Movie and Treatment</i> Blakeman v. The Walt Disney Company, et al.	43
ETHICS		
	Whose Life Is It, Anyway? Media Rights And The Model Rules	45

Supreme Court Rejects Appeal Over Fleeting Expletives

Expletives Must Be Deleted – At Least for Now

By Jerianne Timmerman

On April 28, the Supreme Court, in a 5-4 ruling, upheld a Federal Communications Commission decision that the airing of even an isolated or fleeting expletive during live programming on broadcast television violated the agency's indecency rules and could subject stations to substantial fines. *FCC v. Fox Television Stations, Inc.*, No. 07-582 (April 28, 2009).

The Court's decision, however, was based on administrative law and avoided deciding whether the FCC's recent, stricter indecency policies violate the First Amendment. What is most clear from the Court's narrow and splintered decision is that the fundamental First Amendment issues implicated by the FCC's regulation of allegedly indecent programming on broadcast radio and television will be receiving substantial judicial attention in the very near future.

The FCC's Reversal on Indecency Enforcement

Federal law prohibits the broadcast of "obscene, indecent, or profane language by means of radio communication." 18 U.S.C. § 1464. Over thirty years ago, the Supreme Court, by a slim 5-4 majority and stressing the narrowness of its decision, upheld the differential treatment of indecency in the broadcast media in comparison to all other electronic and print media. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). The Court based its decision on the supposed unique pervasiveness and accessibility, particularly to children, of the broadcast media.

Following *Pacifica*, the FCC for decades adhered to the position that fleeting expletives were not actionable under its indecency rules. In 2004, however, the FCC reversed course, concluding that even the fleeting use of certain expletives was actionably indecent and profane. In two cases applying this stricter indecency standard, the FCC found that the fleeting use of "fuck" and "shit" in live broadcast

programming (two *Billboard Music Awards* shows on the Fox network) was indecent and profane. Fox appealed this order to the Second Circuit Court of Appeals.

Appeals Court Reverses FCC's Reversal

The Second Circuit overturned the FCC's new indecency policy on the airing of fleeting expletives. *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007). In a 2-1 decision, the appeals court found that the FCC had failed to provide a reasoned analysis for its about-face on the treatment of fleeting expletives, and, thus, the agency's new policy was arbitrary and capricious under federal administrative law.

The court refrained from deciding the constitutional challenges raised by

... the fundamental First Amendment issues implicated by the FCC's regulation of allegedly indecent programming ... will be receiving substantial judicial attention in the very near future.

broadcasters. However, the court engaged in a lengthy discussion of the constitutional questions raised by the FCC's indecency regulations, which had been fully briefed. The court strongly indicated its skepticism about the constitutionality of the fleeting expletive policy and, more broadly, about the FCC's indecency regulatory regime.

Supreme Court Reverses Second Circuit

In a ruling narrowly focused on administrative law issues, five Justices (Scalia, Roberts, Kennedy, Thomas and Alito) reversed the Second Circuit, finding that the FCC's altered indecency policy was not arbitrary and capricious under the Administrative Procedure Act (APA) and *Motor Vehicle Mfrs. Ass'n. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29 (1983). In particular, the majority concluded that there was no basis in the APA or in *State Farm* for requiring agencies to provide a more substantial explanation for their actions that change prior policy, or for subjecting agency changes to more searching judicial review. The Court found that the Second Circuit

(Continued on page 4)

Supreme Court Rejects Appeal Over Fleeting Expletives

(Continued from page 3)

had erred in relying in part on its precedent interpreting the APA and *State Farm* in this manner.

The majority noted that an agency must “display awareness that it *is* changing position,” and may in some cases need to account for prior factfinding or certain reliance interests created by a prior policy. Opinion of the Court at 11. However, an agency need not demonstrate to a court that the reasons for a new policy “are *better* than the reasons for the old one.” *Id.* It “suffices that the new policy is permissible” under the relevant statute, that there are “good reasons for it,” and that the “agency believes it to be better.” *Id.* Under these standards, five Justices found that the FCC’s new indecency policy passed muster.

Finally, the majority declined to apply a more stringent arbitrary-and-capricious review to agency actions that implicate constitutional liberties. The Court found that the lawfulness of an agency action “under the Constitution is a separate question” from the APA’s arbitrary and capricious standard, and should be “addressed in a constitutional challenge.” *Id.* at 12.

Concurrences and Dissents -- The “Long Shadow” of the First Amendment

Because the Second Circuit did not definitively rule on the constitutionality of the FCC’s order, the majority declined to address the constitutional questions raised by broadcasters. Notably, however, the majority opinion appears untroubled by the constitutional ramifications of the FCC’s policy. *See, e.g.*, Opinion of Court at 25-26 (indicating that it was “conceivable” that the FCC’s “orders may cause some broadcasters to avoid certain language that is beyond the Commission’s reach under the Constitution,” but that would be determined “soon enough,” and, in the meantime, “any chilled references to excretory and sexual material” was at the periphery of First Amendment concern; also stating that the FCC “could reasonably conclude that the pervasiveness of foul language,” and the “coarsening” of entertainment in other media such as cable, “justify more stringent regulation of broadcast programs;” *etc.*). In contrast, First Amendment concerns were front and center in several of the concurring and dissenting opinions.

Contrasting Concurrences

Most interestingly, Justice Thomas, while concurring in the Court’s opinion on the administrative law issues, strongly expressed his doubt about the continuing validity of *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) and *Pacifica* – the two cases that support the FCC’s assertion of constitutional authority to regulate broadcast programming. According to Justice Thomas, the justifications relied on by the Court in these two cases (spectrum scarcity, unique pervasiveness and accessibility to children) to justify intruding into the First Amendment rights of broadcasters lack any basis in the Constitution.

Moreover, even if the Court’s disfavored treatment of broadcasters under the First Amendment could have been justified at the time of *Red Lion* and *Pacifica*, “dramatic technological advances have eviscerated the factual assumptions underlying these decisions.” Thomas Concurring Opinion at 4. Justice Thomas argued that broadcast spectrum is significantly less scarce than it was decades ago, and traditional television and radio are no longer the “uniquely pervasive” media forms they once were. *Id.* at 5. For these reasons, the Justice stated that he was “open to reconsideration of *Red Lion* and *Pacifica* in the proper case.” *Id.* at 6.

Also interestingly, Justice Kennedy – the Court’s most consistent First Amendment advocate – authored a concurring opinion that focused solely on administrative law issues. Specifically, his concurrence addressed the “question whether a change in policy requires an agency to provide a more-reasoned explanation than when the original policy was first announced,” and concluded that the answer depended on the circumstances (*e.g.*, whether the agency has substantial data and experience to inform the new rule or whether it must rely on predictive judgments; whether the agency’s prior policy was based on factual findings; whether there are reliance interests in the prior policy). Kennedy Concurring Opinion at 1-3. He declined to join the portion of the majority opinion that addressed the dissenting arguments of Justices Stevens and Breyer.

Justice Kennedy had also said very little during the oral argument in the *Fox* case. With regard to the constitutional

(Continued on page 5)

Supreme Court Rejects Appeal Over Fleeting Expletives

(Continued from page 4)

questions, his opinion merely states that “as this case comes to us from the Court of Appeals, we must reserve judgment on the question whether the [FCC’s] action is consistent with the guarantees of the Constitution.” *Id.* at 5.

Differing Dissents

In a separate dissent, Justice Stevens – the only current Justice who also heard the *Pacifica* case – found two flaws in the Court’s reasoning. First, he faulted the majority for concluding “that the Commission need not explain its decision to discard a longstanding rule in favor of a dramatically different approach to regulation.” Stevens Dissenting Opinion at 1. Because the “FCC’s shifting and impermissibly vague indecency policy” imperils “broadcasters and muddles the regulatory landscape,” it made “eminent sense to require the Commission to justify why its prior policy is no longer sound before allowing it to change course.” *Id.* at 3-4.

Second, according to Justice Stevens, the majority incorrectly assumed that *Pacifica* decided that the term “indecent,” as used in 18 U.S.C. § 1464, permitted the FCC “to punish the broadcast of *any* expletive that has a sexual or excretory origin.” *Id.* at 1. He noted that *Pacifica* was narrow in two critical respects – it “did not decide whether an *isolated* expletive could qualify as indecent” and “certainly did not hold that any word with a sexual or scatological origin, however used, was indecent.” *Id.* at 5. Justice Stevens explained that “customs of speech” refute the FCC’s claim that use of the words “fuck” and “shit,” in any context and in any form, “*necessarily* describes sex or excrement.” *Id.* He found a “critical distinction” between using an expletive to describe a sexual or excretory function and using such a word for an entirely different purpose, such as to express emotion. “One rests at the core of indecency; the other stands miles apart.” *Id.* at 6.

Because the FCC “failed to demonstrate an awareness that it has ventured far beyond *Pacifica*,” Justice Stevens found the agency’s policy to be arbitrary and unlawful. *Id.* at 7. Significantly, Justice Stevens specifically noted his disagreement with Justice Thomas “about the continued wisdom of *Pacifica*,” but acknowledged that “changes in technology and the availability of broadcast spectrum . . .

certainly counsel a restrained approach to indecency regulation, not the wildly expansive path the FCC has chosen.” *Id.* at n. 5.

In another separate dissent, Justice Ginsburg wrote that the FCC’s “bold stride beyond the bounds” of *Pacifica* exemplified arbitrary and capricious decision-making, noting the impossibility of hiding the “long shadow the First Amendment casts over what the Commission has done.” Ginsburg Dissenting Opinion at 1. She also observed that the *Pacifica* decision, “however it might fare on reassessment,” was “tightly cabined . . . for good reason.” *Id.* at 2-3. She further cautioned that if “the reserved constitutional question reaches this Court,” it “should be mindful that words unpalatable to some may be ‘commonplace’ for others, ‘the stuff of everyday conversations.’” *Id.* at 3, quoting *Pacifica*, 438 U.S. at 776 (Brennan, J., dissenting).

A third dissenting opinion was written by Justice Breyer, and he was joined by Justices Stevens, Souter and Ginsburg. This lengthy dissent found that the FCC had failed to explain adequately why it changed its fleeting expletive policy; specifically, the agency’s explanation did not discuss two critical factors.

First, the FCC “said next to nothing” about the relation between its changed policy and the “First-Amendment-related need to avoid ‘censorship.’” Breyer Dissenting Opinion at 7-8. Justice Breyer found this particularly important because the “FCC had *explicitly* rested its prior policy in large part upon the need to avoid treading too close to the constitutional line.” *Id.* at 8. Second, the FCC failed to consider the potential impact of its new policy on local broadcasting coverage, and especially on smaller non-network affiliated and public service broadcasters and their coverage of live, local events. *See id.* at 11-14. This dissent further stressed that explaining a change requires more than setting forth reasons why the new policy is a good one, but additionally requires the agency to answer the question, “Why did you change?” *Id.* at 3.

Given the FCC’s failure to justify its change, Justice Breyer found the agency’s altered fleeting expletive policy was arbitrary and capricious. He also noted that the doctrine of constitutional avoidance would have similarly led him to remand the case to the FCC, stating that the Court had “often applied that doctrine where any agency’s regulation

Supreme Court Rejects Appeal Over Fleeting Expletives

(Continued from page 5)

relies on a plausible but constitutionally suspect interpretation of a statute.” *Id.* at 21.

Implications of the Court’s Decision

As a matter of administrative law, the Court’s decision will tend to make it easier for agencies to reverse course on policies and change regulations. This could conceivably lead to a less stable and less predictable regulatory environment for regulated entities.

Some commentators have expressed reservations about the decision. In particular, commentators noting that congressional delegations of authority to agencies should be construed narrowly have argued that it is appropriate to require agencies to provide more complete or thorough explanations when they alter course, including an explanation for the policy change in addition to an explanation for the new policy itself.

With regard to the constitutional questions, the *Fox* decision only postpones the time that a court will consider whether the FCC’s indecency enforcement policies comport with the First Amendment. The *Fox* case now returns to the Second Circuit, which will address the First Amendment issues directly and which has already indicated in dicta its skepticism about the constitutionality of the fleeting expletive policy.

Likely Return of Indecency to the Supreme Court

There are several cases before the appeals courts that could reach the Supreme Court. First, of course, the *Fox* case – however decided by the Second Circuit on remand – will very likely be appealed to the Supreme Court by one or more parties.

Another indecency case is awaiting a decision in the Second Circuit. On February 5, the court heard oral argument in ABC’s appeal of the FCC’s decision finding indecent an episode of *NYPD Blue* briefly showing a woman’s buttocks.

On May 4, the Supreme Court ordered the Third Circuit to reexamine, in light of the *Fox* case, its 2008 ruling in favor of CBS, which had vacated the FCC’s imposition of fines over Janet Jackson’s “wardrobe malfunction.” This case is complicated by additional questions as to whether CBS could be held liable for the actions of performers at the Super Bowl halftime show under various theories of respondeat superior and vicarious liability.

One or more of these cases is likely to reach the Supreme Court in a posture requiring the Court to address the First Amendment issues raised by the FCC’s indecency regulatory regime. As discussed above, the *Fox* decision

shows that the Court is obviously splintered on these issues.

At least one of

the five Justices that voted to uphold the FCC’s policy on administrative law grounds appears highly skeptical of the constitutional basis for the FCC’s action.

To complicate any prognostication about the Court’s future actions, Justice Souter is unlikely to be on the Court when it next considers the FCC’s indecency policies. And Justice Kennedy – the most consistent First Amendment supporter on the Court – was noticeably reticent about expressing his views on the constitutionality of the FCC’s indecency policies or the continuing validity of *Pacifica*.

As Justice Ginsburg aptly observed, the Supreme Court’s decision in *Fox* “does nothing to diminish” the First Amendment shadow over the FCC’s altered indecency policy. Ginsburg Dissenting Opinion at 1. It will take further decisions by one or more appeals courts and the Supreme Court before the situation is in any way clarified. As they say on TV, please stay tuned for the next episode.

Jerianne Timmerman is Senior Vice President and Deputy General Counsel of the National Association of Broadcasters. Carter G. Phillips, Sidley Austin LLP in Washington, D.C. argued the case for Fox Television. Solicitor General Gregory Garre argued for the FCC. A transcript of the oral argument is available [here](#).

the Fox decision only postpones the time that a court will consider whether the FCC’s indecency enforcement policies comport with the First Amendment.

Senators, Publishers, and Aggregators “Link Up” for Hearing on the “Future of Journalism”

By **Bruce D. Brown** and **Clarissa K. Pintado**

On May 6, 2009, the Senate Committee on Commerce, Science and Transportation held a Subcommittee Hearing on “The Future of Journalism” which, for the first time, allowed for thoughtful, moderated debate among key players in the news and search engine industries over what role, if any, the government should have in addressing challenges posed to print media by the digital information age.

Panelists present included James Maroney, Publisher and Chief Executive Officer of the Dallas Morning News; David Simon, author, television producer, and former Baltimore Sun reporter; Marissa Mayer, Vice President of Google Inc.’s Search Products and User Experience; and Arianna Huffington, Co-Founder and Editor in Chief of The Huffington Post. Other witnesses were Steve Coll, former Managing Editor of the Washington Post; and Alberto Iburgüen, President and Chief Executive Officer of the John S. and James L. Knight Foundation.

Senator John Kerry (D-Mass.) began by welcoming the panelists and audience to the “brave new world” of journalism, a reference that underscored a common theme of the hearing: that it is not just the newspaper industry but the very fabric of American democracy that is at stake as old economic models for the press wither. The consequences of newspapers being swept away to make room for blogs, aggregators, and iPhones have become ever more tangible over the past year as local newspapers across the nation—The Rocky Mountain News, The Seattle Post-Intelligencer, The San Francisco Chronicle, The Boston Globe—have closed or are on the brink of extinction. Regional newspapers are beginning to look like an “endangered species,” Sen. Kerry said. Quoting the legendary newspaper publisher Joseph Pulitzer, he went on to say that “our Republic and its press will rise or fall together.” For many of the panelists, the meeting was a long-overdue opportunity to present evidence of injustices in the online environment. For others, such as Arianna Huffington and Marissa Mayer, however, it provided a platform for journalistic Darwinism: “endangered species” must either evolve or die off.

There was consensus among the panelists that for journalism to survive, a government bailout is not the answer as it would jeopardize the independence of journalism. Several

panelists argued that the traditional newspaper business model, based on circulation and advertising revenue, is antiquated and cannot save the industry online. Huffington proposed a hybrid model, much like the Huffington Post’s, based on a “new link economy”—one that would be partially for-profit and partially non-profit, and pointed to successful examples such as the Voice of San Diego and the Center for Investigative Reporting. Huffington and Mayer were resolute that it is the newspapers’ responsibility to adapt to the 21st century by making their web-pages more engaging.

Senator Ben Cardin (D-Md.), the first witness to testify, has recently proposed another business model in his Newspaper Revitalization Act (S. 673). This bill would allow newspapers to be treated as non-profits under section 501(c)(3) of the Internal Revenue Code of 1986, and therefore exempt from taxes. Newspapers that agreed to the terms would not be allowed to make political endorsements, but would be allowed to freely report on all issues, including political campaigns. The measure is designed to help local newspapers as opposed to large newspaper conglomerates.

Questioning from Sen. Kay Bailey Hutchison (R-Texas) brought out some of the flaws in these models when she asked Maroney how newspapers could continue to do in-depth reporting without sufficient revenue coming from the Internet. He argued that it was unrealistic that a non-profit or hybrid model could support the newsgathering operations of many of the newspaper’s bureaus. (The Dallas Morning News, Maroney asserted, requires an annual investment of about \$30 million for newsgathering.) The clear implication of Maroney’s testimony is that the hybrid model may work for companies that don’t need to pay directly for investigative journalism. Coincidentally (or not), it is the companies that do not pay for newsrooms that rely on the ones that do for their content, but neither Huffington nor Mayer was pressed on this point.

Fair use was obviously a point of contention. In support of aggregators, Google’s Mayer argued that they are increasing business for newspapers by directing traffic to news websites. But both Kerry and Maroney noted that when Americans do read news, it is in “snippets”—no longer in full article form—and it is often from blogs which republish content without linking to the original article. Maroney stated that the atomization

(Continued on page 8)

Senators, Publishers, and Aggregators “Link Up” for Hearing on the “Future of Journalism”

(Continued from page 7)

of news consumption is not just “down to the article level,” as Mayer contended, but is now “down to the first four lines of the article.” “They’re making plenty of money off of those first four lines,” he said. Maroney pointed to the reaffirmation of the “hot news” doctrine in a recent Associated Press case in New York as an example of a legal stick that could give publishers a fair return for their labors.

In addition to forms of temporary tax-relief and reasonable compensation for content, Simon and Maroney’s path forward relied on a relaxation of the antitrust laws that were created at a time when the public feared the power of media monopolies, a stark contrast from today’s fear of losing the industry altogether. Simon maintained that newspapers “butchered” themselves when they flung themselves recklessly into the Internet, and Maroney agreed that the “horse has been out of the barn for 10 years. To try to bring it back one newspaper website at a time will not work. If the Dallas Morning News today put up a paid wall over its content, people would just go to the Fort Worth Star Telegram.” In both of their views, industry-wide collaboration on pricing is essential to survival.

Mayer argued that Google generates approximately \$5 billion annually for publishers through Google AdSense. She stressed the option of “opt-outs” for copyright holders by using a robot.txt file that enables websites to be bypassed before being consumed in the cache of Google, Yahoo and other search giants. The amount of advertising dollars moving from news sites to aggregators was not discussed nor was the possibility of future agreements between aggregators and newspapers.

A May 21 Financial Times interview with Eric Schmidt, Chairman and Chief Executive Officer of Google, did not exactly open any doors to this possibility. Schmidt was asked about the prospect of Google News sharing revenue, generated specifically from newspaper stories, with the newspapers who produced them. Echoing Mayer’s statement at the hearing, he replied that the value that Google “provides to the partners is the traffic.” Later in the interview he admitted, however, that Google News is dependent on the production of newspaper website content: “If the people who are producing that [content] are getting laid off, it’s really a tragedy for both,” he said.

Alberto Ibarguen and Steve Coll proposed other models for the future of journalism. Ibarguen suggested congressional actions that would support the transition to online news in several ways, mainly by creating affordable digital access for every

American. He stressed the importance of the public interest. “If the future of democracy is online then we must ensure that everyone is online.” To do so, he said that role of publicly-subsidized media must be strengthened.

Similarly, Coll recommended that the federal government use “arms-length” initiatives and reinforce the already existing bridges with the media. Some of these bridging policies would involve making technology accessible to the public, for example through the stimulus legislation that, if implemented properly, he believes could lead to greater access to broadband technology thereby providing a more level broadcast and publishing playing field for disadvantaged and rural communities. Greater reform and investments in the Corporation for Public Broadcasting and the National Endowment of the Humanities were other bridge-strengthening actions suggested by Coll. He also argued that the FCC’s current “public service” requirements could be altered to allow stations to satisfy those requirements through contributions to a fund that would be used to support reporting on public institutions and public issues. In addition, Coll supported Sen. Cardin’s News Revitalization Act.

After more intense questioning from Sens. John Thune (R-SD.), Maria Cantwell (D-Wash.), Bill Nelson (D-Fla.), Senator Claire McCaskill (D-Mo.), and Mark Pryor (D-Ark.), among others, Sen. Kerry ended the meeting with a promise for future discussion:

Life changes, the marketplace changes, business models change...But I want to guarantee that it doesn’t leave behind that precious difference that we have in our country from almost every other place on the planet—that unbelievable ability of a couple of beat reporters on the police beat in Washington to hold the President of the United States accountable for a crime.

The hearing clarified many of the positions of the represented entities and provided a stepping stone towards future dialogue and the preservation of journalism.

Bruce D. Brown is a partner and Clarissa K. Pintado is a case assistant at Baker & Hostetler LLP in Washington, D.C. To see the written testimony of the witnesses and a webcast of the hearing visit: <http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.ByMonth>

Ninth Circuit Holds That Claim Based On Broken Promise To Remove Website Content Is Not Barred By Section 230

By Tom Curley and Steven Zansberg

In a finely-parsed opinion, the Ninth Circuit recently held that Section 230 immunity does not preclude a promissory estoppel claim in which it was alleged that Yahoo explicitly promised to remove offensive website content but failed to do so. *Barnes v. Yahoo!, Inc.*, No. 05-36189, 2009 WL 1232367 (9th Cir. May 7, 2009) (O’Scannlain, Graber, Callahan, JJ.).

The decision, the most recent by the Ninth Circuit to interpret Section 230 of the Communications Decency Act, 47 U.S.C. § 230, was a partial victory for Yahoo. The court held that the plaintiff’s “negligent undertaking” claim arising out the same facts was precluded by Section 230. However, the panel held that Section 230 did not bar a promissory estoppel claim because liability was not predicated upon Yahoo’s conduct as a “publisher” but instead upon Yahoo’s alleged failure to keep a promise voluntarily entered into.

Background

Barnes v. Yahoo arose out of circumstances that are not atypical of Section 230 claims: the plaintiff alleged that someone vindictively appropriated her identity by posting a fake profile of the plaintiff that subjected her to harassment and reputational injury. Specifically, plaintiff Cecilia Barnes alleged that her ex-boyfriend posted profiles of her on Yahoo which “contained nude photographs of Barnes and her boyfriend, taken without her knowledge, and some kind of open solicitation, whether express or implied is unclear, to engage in sexual intercourse.”

According to the Ninth Circuit’s decision, Barnes further alleged that the ex-boyfriend “conducted discussions in Yahoo’s online ‘chat rooms,’ posing as Barnes and directing male correspondents to the fraudulent profiles he had created. The profiles also included the addresses, real and electronic, and telephone number at Barnes’ place of employment. Before long, men whom Barnes did not know were peppering her office with emails, phone calls, and personal visits, all in the expectation of sex.”

Barnes claimed she attempted to get Yahoo to remove the profiles, including by “mail[ing] Yahoo a copy of her

photo ID and a signed statement denying her involvement with the profiles and requesting their removal.” Nevertheless, Barnes alleged she was unable to get Yahoo to remove the fake postings.

Specific Promise Alleged

Ultimately, a day before a local television news program was to air a report on Barnes’ predicament, “Yahoo broke its silence; its Director of Communications ... called Barnes and asked her to fax directly the previous statements she had mailed. [The Director] told Barnes that she would “personally walk the statements over to the division responsible for stopping unauthorized profiles and they would take care of it.”

Barnes alleged she “relied on this statement and took no further action regarding the profiles and the trouble they had caused,” according to the Ninth Circuit’s decision. “Approximately two months passed without word from Yahoo, at which point Barnes filed” suit. The profiles have since been removed.

While Barnes’ complaint was “somewhat unclear” as to the specific legal theories she pursued, the Ninth Circuit construed the complaint to allege two distinct causes of action under Oregon law: (1) negligent undertaking and (2) promissory estoppel.

As to the negligent undertaking claim, its elements were defined by the Ninth Circuit (quoting section 323 of the *Restatement (Second) of Torts*) as follows: “One who undertakes, gratuitously or for consideration, to render services to another ... is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care ... if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other’s reliance upon the undertaking.”

As to the promissory estoppel claim, its elements were defined under Oregon law as (1) a promise; (2) which the promisor could reasonably foresee would induce conduct of the kind which occurred; (3) actual reliance on the promise; (4) resulting in a substantial change in position by the plaintiff.

(Continued on page 10)

Ninth Circuit Holds That Claim Based On Broken Promise To Remove Website Content Is Not Barred By Section 230*(Continued from page 9)*

Under either theory, the predicate for liability was that Yahoo allegedly broke a promise made by its Director of Communications to remove the offending profiles, a promise Barnes relied upon to her detriment in otherwise taking no further action on her own behalf. As the complaint put it, while Yahoo “may have had no initial responsibility to act, once [Yahoo,] through its agent, undertook to act, [it] must do so reasonably.”

Parsing Section 230

Yahoo moved to dismiss the complaint on the basis that Section 230 was an affirmative defense to Barnes’ claims. The trial court granted the motion, dismissing the complaint in its entirety on the basis of the immunity conferred by Section 230. *See Barnes v. Yahoo!, Inc.*, No. Civ. 05-00926-AA, 2005 WL 3005602 (D. Or. Nov. 8, 2005).

On appeal, the Ninth Circuit’s analysis focused closely on the language of Section 230. In relevant part, Section 230 states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”

The statute defines “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet.”

Here, there was no dispute that allegedly Barnes’ ex-boyfriend – as distinct from Yahoo was the “provider” of the objectionable content. Similarly, there was no dispute that Yahoo is an “interactive computer service” within the meaning of Section 230.

Removing (or Not Removing) Content is What a Publisher Does

The focus of the Ninth Circuit’s inquiry was whether the two legal theories asserted by Barnes sought “to treat Yahoo as a ‘publisher or speaker’ of the indecent profiles in

order to hold Yahoo liable.” The court appeared to have little trouble concluding that Barnes’ negligent undertaking claim was barred by Section 230.

The court held: “[T]he duty that Barnes claims Yahoo violated derives from Yahoo’s conduct as a publisher—the steps it allegedly took, but later supposedly abandoned, to de-publish the offensive profiles. It is because *such conduct is publishing conduct* that we have insisted that section 230 protects from liability ‘any activity that can be boiled down to deciding whether to exclude material that third parties seek to post online.’” (emphasis added).

But, while the factual predicate for liability was essentially the same under either legal theory, and the elements of the theories overlapped, the court reached a different result with respect to Barnes’ promissory estoppel claim. It concluded that Barnes’ theory of recovery under promissory estoppel would *not* “treat Yahoo as a ‘publisher or speaker’

under” Section 230 and therefore the claim was not barred.

Barnes’ theory of recovery under promissory estoppel would not “treat Yahoo as a ‘publisher or speaker’ under” Section 230 and therefore the claim was not barred.

Noting the apparent incongruity of this result, the court posed the rhetorical question -- “How does this analysis differ from our discussion of liability for the tort of negligent undertaking?” -- and then proceeded to answer it. The court reasoned:

Promising is different because it is not synonymous with the performance of the action promised. That is, whereas one cannot undertake to do something without simultaneously doing it, one can, and often does, promise to do something without actually doing it at the same time. Contract liability here would come not from Yahoo’s publishing conduct, but from Yahoo’s manifest intention to be legally obligated to do something, which happens to be removal of material from publication. Contract law treats the outwardly manifested intention to create an expectation on the part of another as a legally significant event. That event generates a legal duty distinct from the

(Continued on page 11)

Ninth Circuit Holds That Claim Based On Broken Promise To Remove Website Content Is Not Barred By Section 230*(Continued from page 10)*

conduct at hand, be it the conduct of a publisher, of a doctor, or of an overzealous uncle.

The court acknowledged that the broken promise specifically at issue was “to take down third-party content from its website, which is quintessential publisher conduct.” But, according to the court, Section 230 “creates a baseline rule: no liability for publishing or speaking the content of other information service providers. *Insofar as Yahoo made a promise with the constructive intent that it be enforceable*, it has implicitly agreed to an alteration in such baseline.” (emphasis added).

In this regard, the Ninth Circuit’s reasoning was somewhat reminiscent of the Supreme Court’s approach in *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), in which the Court held that the First Amendment did not preclude a promissory estoppel claim predicated upon a newspaper’s broken promise to a confidential source that his name would not be published.

As the Supreme Court put it, while the First Amendment generally precludes the punishment for the publication of truthful information lawfully obtained, the tort of promissory estoppel (a law of “general applicability”) “requires those making promises to keep them. The parties themselves ... determine the scope of their legal obligations, and any restrictions which may be placed on the publication of truthful information are self imposed.”

Seventh Circuit Influence

In any event, the Ninth Circuit in *Barnes v. Yahoo* did not cite to nor rely on *Cohen v. Cowles Media*, but instead it relied, *inter alia*, on decisions of the Seventh Circuit in which that Circuit expressed some doubt about the expansiveness of the protection that Section 230 provides, a view not widely followed by other courts.

For example, in its decision, the Ninth Circuit stated: “Looking at the text [of Section 230(c)], it appears clear that neither this subsection nor any other declares a general immunity from liability deriving from third-party content ... ‘Subsection (c)(1) does not mention ‘immunity’ or any synonym.’” (quoting *Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 669 (7th Cir. 2008)).

More troubling is the court’s gratuitous (not argued) finding that Section 230 is an “affirmative defense” that cannot properly be raised in the context of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a view that is squarely at odds with numerous cases both within the Ninth Circuit and elsewhere.

Conflict with *Zeran v. AOL*?

Most significantly, in its result, the Ninth Circuit’s decision arguably conflicts with several decisions in which courts have held that an unfulfilled promise to retract a publication (or a third-party’s posting) could not be the basis of liability because of the language of Section 230.

For example, in *Zeran v. AOL, Inc.*, 129 F.3d 327 (4th Cir. 1997), the plaintiff alleged that he was the victim of a hoax and that, when he contacted America Online to demand that highly offensive internet postings falsely attributed to him be removed, he was allegedly “assured” by a “company representative ... that the posting would be removed from AOL’s bulletin board.” *Id.* at 329.

The plaintiff in *Zeran* brought suit alleging that AOL was negligent in failing to act quickly enough to remove the postings and in preventing any further similar postings. The Fourth Circuit affirmed dismissal of the complaint, holding that it was clear that the plaintiff sought “to impose liability on AOL for assuming the role for which § 230 specifically proscribes liability – the publisher’s role.” *Id.* at 332-33.

In *Barnes v. Yahoo*, the district court relied upon *Zeran* in dismissing Barnes’ complaint. The district court concluded that “regardless of the particular label attached to the claim” – *i.e.*, promissory estoppel or negligent undertaking – Barnes “was seeking to hold the service provider liable based on injuries allegedly resulting from the dissemination of third-party content.” Thus, Barnes’ claim, just as in *Zeran*, “necessarily and impermissibly sought to treat the service provider as ‘publisher’ of that content.”

Other courts have also rejected claims predicated upon a broken promise or false representation of some kind, claims sounding both in tort and contract law. *See, e.g.*, *Green v. AOL*, 318 F.3d 465 (3d Cir. 2003) (Section 230 bars claims arising out of America Online’s alleged failure to enforce membership agreement in not protecting plaintiff

(Continued on page 12)

Ninth Circuit Holds That Claim Based On Broken Promise To Remove Website Content Is Not Barred By Section 230

(Continued from page 11)

from offensive speech); *Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 41 (Wash. App. 2001) (Section 230 bars claims premised on allegation that Amazon “promised to remove” content challenged by plaintiff but website “failed to do so”); *Doe v. SexSearch.com*, 502 F. Supp. 2d 719 (N.D. Ohio 2007) (Section 230 bars claims arising out website’s failure to verify ages of participants in dating service, despite website’s representation that it screened for minors), *aff’d on other grounds*, 551 F.3d 412 (6th Cir. 2008); *Prickett v. InfoUSA, Inc.*, 561 F. Supp. 2d 646 (E.D. Texas 2006) (rejecting under Section 230 claims arising out website’s failure to adhere to promise that it verified business listings prior to publication).

Indeed, the very impetus for Congress’ passage of the Communications Decency Act, and of Section 230 in particular, was its declared intention to overturn the result in *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. IAS Part 34, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). (The *Barnes* panel’s decision acknowledged this legislative history.) Notably, in *Stratton Oakmont*, the trial court had treated Prodigy as “publisher” in large part because of a “stated policy,” as set forth in its “content guidelines,” that “notes that harass other members or are deemed to be in bad taste or grossly repugnant to community standards . . . will be removed when brought to Prodigy’s attention.” (emphasis added).

Ironically, under the *Barnes* holding, this policy would appear to give rise to a claim for promissory estoppel by a Prodigy member, a claim that would be excluded from Section 230’s protection, precisely because the *Stratton Oakmont* court had also found the Prodigy policy “was in part influenced by its desire to attract a market it perceived to exist consisting of users of a ‘family-oriented’ computer service.” Thus, in the words of the Ninth Circuit, the policy of mandatory removal of an offending posting upon notice to Prodigy may represent an “outwardly manifested intention to create an expectation on the part of another.”

Conclusion

Of course, it is far from clear at this early juncture (assuming no subsequent appellate proceedings alter the court’s ruling) what impact the decision in *Barnes v. Yahoo* will have on judicial interpretation of Section 230, let alone its impact on attempts by would-be plaintiffs to surmount Section 230’s still-

considerable protections for publishers of third-party content on the Internet.

For its part, the Ninth Circuit indicated that the potential for liability on a promissory estoppel claim could be readily avoided: “a general monitoring policy, or even an attempt to help a particular person, on the part of an interactive computer service such as Yahoo does not suffice for contract liability. This makes it easy for Yahoo to avoid liability: it need only disclaim any intention to be bound.” In other words, if you promise to do anything, either in writing or orally, be sure to disclaim any intention to be bound by that promise.

The practical effect of that advice, however, may be to make websites reluctant to interact with individuals complaining about offensive content because of the fear that a potential promissory estoppel claim, regardless of the merit of such a claim, will survive a preliminary motion.

Another, more generalized message emerges from the panel’s decision in *Barnes v. Yahoo!, Inc.*, issued a little more than a year after the *en banc* ruling in *Fair Housing Council of San Fernando Valley v. Roommates.com LLC*, 521 F.3d 1157 (9th Cir. 2008): as Professor Eric Goldman aptly put it on his blog, “it’s . . . overwhelmingly clear that a number of Ninth Circuit judges are hankering for the opportunity to take their whack at 47 U.S.C. [§] 230.”

Yahoo has filed a [petition for rehearing](#) asking the panel to delete from its opinion the dicta describing Section 230 as an “affirmative defense” that cannot be raised in the context of a motion to dismiss. Public Citizen, the Center for Democracy and Technology, the Citizen Media Law Project, and the Electronic Frontier Foundation have asked for permission to submit a [brief](#) in support of Yahoo.

Tom Curley is partner in the Washington, D.C. office of Levine Sullivan Koch & Schulz, LLP and Steven Zansberg is a partner in the firm’s Denver office. Patrick J. Carome, Wilmer, Cutler, Pickering, Hale and Dorr LLP, Washington, DC, argued the cause for the defendant-appellee and filed the brief; Samir Jain and C. Colin Rushing, Wilmer, Cutler, Pickering, Hale and Dorr LLP, Washington, DC, and Reginald Davis and Eulonda Skyles, of Counsel for Yahoo!, Inc., Sunnyvale, CA, were also on the brief. Thomas R. Rask, III, Kell, Alterman & Runstein LLP, Portland, OR, argued the cause for the plaintiff-appellant in the Ninth Circuit and filed briefs. Denise N. Gorrell, Kell, Alterman & Runstein LLP, Portland, OR, was also on the briefs.

Burden of Proof of Constitutional Malice is Clearly with the Plaintiff

By Katherine M. Bolger and Rachel F. Strom

On April 30, the New York Court of Appeals affirmed the rule that, when a plaintiff is a public figure, a libel defendant has a limited burden on summary judgment: it is simply to “point to deficiencies in the record that will prevent plaintiff from proving [constitutional malice] by clear and convincing evidence.” [*Kipper v. NYP Holdings Co., Inc.*](#), 2009 WL 1148653 (N.Y. Apr. 30, 2009).

New York’s highest court affirmed the dismissal by an intermediate appellate court of a libel lawsuit brought by Dr. David A. Kipper against NYP Holdings, Inc. (“NYP”), the publisher of the *New York Post* (the “*Post*”). The court held that, even though NYP could not present evidence as to exactly how an admitted falsity made its way into an article in the *Post*, Dr. Kipper, as a public figure, failed to meet his burden of “demonstrate[ing] that a reasonable jury assessing [the] evidence could find actual malice by clear and convincing evidence.”

Background

Plaintiff David A. Kipper is a well-known “celebrity doctor” who made his reputation not only by treating famous patients but through his own long-standing television and movie career. As Dr. Kipper himself noted, he has appeared on television as a medical commentator over one hundred times. Further, he is a member of the Screen Actors Guild and the American Federation of Television and Radio Artists. He even has a film career, appearing as a doctor in several feature films including *As Good As It Gets*, *Primary Colors*, *Shallow Hal*, and even appearing as himself in *Jackass: The Movie*.

But, in 1998, it was not his television and movie career that gained the attention of the *Los Angeles Times*. Instead, as part of an exposé about the treatment of stars in Hollywood, the *LA Times* published a series of three articles about Dr. Kipper’s alleged practice of detoxifying his famous, drug-addicted patients in luxury hotels with limited medical supervision and with an allegedly illegal opiate-based medicine called buprenorphine. After these Pulitzer Prize-winning articles were published, the Medical Board of California, a state agency responsible for licensing and disciplining medical doctors, began to investigate Dr. Kipper.

The Board’s investigation into Dr. Kipper’s detoxification practices culminated with the Board filing a formal Accusation against Dr. Kipper in November 2003, charging him with eleven causes for discipline. On December 4, 2003, as part of its continuing coverage of Dr. Kipper’s controversial detoxification practices, the *LA Times* reported on the Accusation.

LA Times and Post Articles

On the evening of Saturday, December 6, 2003, the *LA Times* carried on its newswire service a lengthy 98-paragraph article entitled, “Harsh Reality of ‘Osbornes’ No Laughing Matter: The hit show’s star says that he was ‘wiped out’ on drugs ordered by a physician investigated for overprescribing for others,” which reported that John “Ozzy” Osbourne had claimed to the newspaper that Dr. Kipper had overprescribed medicine to Osbourne and that Osbourne’s distracted, bumbling appearance on the reality show, *The Osbornes*, was due to this overmedication. It also reported that “The state medical board last week *moved to revoke* Kipper’s license, accusing him of gross negligence in his treatment of other patients.” (emphasis added.)

On the same evening, the *Post* received the *LA Times* newswire article and decided to publish for its Sunday editions its own, much condensed, 8-paragraph article on Osbourne’s accusations against Dr. Kipper. The *Post* article, however, contained an error, which stated: “Last week, the state medical board *revoked* Kipper’s license, accusing him of gross negligence in his treatment of other patients, according to the Los Angeles Times.” (emphasis added). Nearly eight weeks later, Dr. Kipper’s attorney contacted the *Post* to request a retraction, which the *Post* promptly published.

Discovery and The Lower Court’s Decision

Nearly a year after the *Post* article was published, Dr. Kipper brought suit against NYP in New York State court. NYP conducted extensive discovery in New York and California. Plaintiff, however, only sought the depositions of two *Post* employees. First, plaintiff deposed the *Post* reporter who wrote the article. The reporter stated in his

(Continued on page 14)

Burden of Proof of Constitutional Malice is Clearly with the Plaintiff

(Continued from page 13)

deposition that he did not recall making the error in the article and speculated that the error might have occurred somewhere in the editing process. The reporter also testified that in rewriting wire service articles, the *Post* tends to shorten the wire service articles and change the lead paragraph to make it more *Post*-like, meaning to make it “less boring” or a “better read.” Second, plaintiff deposed the editor of the article, but the editor similarly did not recollect the precise editorial steps as to the article at issue.

Following discovery, Dr. Kipper and NYP both moved for summary judgment. NYP argued that Dr. Kipper was a public figure, who bore the burden of showing that a jury could find by clear and convincing evidence that the error was published with constitutional malice, and that Dr. Kipper had failed to point to any such evidence. Dr. Kipper argued that the article was false, and claimed that mere falsity was sufficient to meet

his burden on a summary judgment motion, particularly because the *Post* could not recall, some years after the article was published, exactly how the error made its way into the article.

On May 11, 2007, the New York State Supreme Court for the County of New York issued a Decision and Order granting in part and denying in part NYP’s motion for summary judgment. Specifically, the court held that Dr. Kipper was “unquestionably a public figure,” because, “[h]e is quintessentially ‘the publicized person [who] has taken an affirmative step to attract public attention.’” *Kipper v. NYP Holdings, Inc.*, 15 Misc.3d 1136(A), 841 N.Y.S.2d 820 (Table) (Sup. Ct. N.Y. Co. May 11, 2007) (quoting *James v. Gannett Co.*, 40 N.Y.2d 415, 422 (1976)).

The court, however, stated that it could not grant summary judgment in NYP’s favor because there was a “factual issue presented of how the misstatement found its way into the Article,” and because “*Defendant* has not met its burden of proof that, as a matter of law, the Article’s misstatements were published without knowledge of falsity and without a reckless disregard for the truth.” (emphasis added.) (The court did grant defendant’s motion as to the claim brought by Dr. Kipper’s professional corporation and

dismissed that company’s causes of action. The court also denied plaintiff’s motion for summary judgment.)

Appellate Division Decision

NYP appealed the Decision and Order arguing that the lower court improperly placed the burden of proving the absence of actual malice on the defendant, when the law is clear that, on a summary judgment motion, a public-figure plaintiff bears the burden to bring forth clear and convincing evidence from which a jury could find that the defendant acted with constitutional malice in publishing an allegedly defamatory statement. NYP also argued that because Dr. Kipper had failed to bring forth any evidence that it acted with the requisite constitutional malice, summary

judgment should be entered in its favor. Dr. Kipper did not cross-move either as to the denial of his summary judgment

A writer can make an article a ‘better read’ and engage in ‘more interesting word selection’ without sacrificing factual integrity.’

motion or on the issue of being found to be a public figure.

In a Decision and Order dated January 31, 2008, the Appellate Division, First Department *unanimously* reversed the lower court’s Decision and Order and held that there was no evidence of actual malice in the record and NYP was entitled to summary judgment as a matter of law. *Kipper v. NYP Holdings Co., Inc.*, 47 A.D.3d 597, 852 N.Y.S.2d 56 (1st Dep’t 2008).

New York Court of Appeals

After the New York Court of Appeals granted Dr. Kipper’s motion for leave to appeal to the Court, Dr. Kipper again argued that there was an issue of fact as to whether NYP acted with actual malice because NYP had not proved that the error in the article was merely a mistake. NYP argued, as it did in the courts below, that Dr. Kipper fundamentally misunderstood NYP’s burden on summary judgment and that it was *Dr. Kipper* who had the burden of proving that NYP acted with constitutional malice and not NYP’s burden to prove that it had not.

(Continued on page 15)

Burden of Proof of Constitutional Malice is Clearly with the Plaintiff

(Continued from page 14)

On April 30, 2009, in a 6 to 1 decision, the New York Court of Appeals affirmed the First Department's dismissal of Dr. Kipper's complaint. The Court first rejected all of Plaintiff's arguments that he had established an issue of fact as to whether NYP acted with constitutional malice. Specifically, the Court stated that "plaintiff's reliance upon the *Post's* failure to employ fact-checkers, to attempt to verify the status of his license prior to publication, or to identify those individuals responsible for the false headline and statement is misplaced" because this would only establish negligence on the *Post's* part. "Put simply" the Court went on "mere negligence does not suffice" to establish actual malice by clear and convincing evidence.

The Court then rejected Plaintiff's argument that a jury could conclude that NYP acted with constitutional malice because the *Post* reporter testified that, in the *Post*, "the lead paragraph of a wire service article was usually edited to make it more 'Post-like.'" The Court recognized that "this short-hand phrase referred to stylistic alterations and not to the fabrication of facts. A writer can make an article a 'better read' and engage in 'more interesting word selection' without sacrificing factual integrity."

After rejecting Plaintiff's arguments, the Court of Appeals concluded that although the "circumstances surrounding the *Post's* erroneous statement are not entirely clear" and even "recognize[ing] the danger of awarding summary judgment solely upon the defendant's professions of good

faith in publishing libelous material" summary judgment in NYP's favor was still warranted. The Court stated that "a libel defendant's burden in support of summary judgment is not, as Supreme Court reasoned, to prove as a matter of law that it did not publish with actual malice, but to point to deficiencies in the record that will prevent plaintiff from proving that fact by clear and convincing evidence." And here, Dr. Kipper had not presented "evidence necessary for a jury to conclude that defendant's inaccurate statements were published with actual [i.e. constitutional] malice." To the contrary, "the record bespeaks non-actionable mistake or negligence." In so holding, the New York Court of Appeals placed the burden of proof on that issue on Dr. Kipper's shoulders.

Judge Piggot, as the sole dissenting judge, disagreed and stated that "A defendant should not be allowed to point to alleged deficiencies in the record that are the product of its employees' claimed inability to recall the circumstances surrounding the editing of the article and be awarded summary judgment." He wrote that "[e]ssentially, the majority's opinion ... places the disposition of defamation cases into the unilateral control of defendant."

Slade R. Metcalf, Katherine M. Bolger and Rachel F. Strom of Hogan & Hartson LLP, New York City represented NYP Holdings, Inc. Dr. Kipper was represented by David Jaroslawicz, Elizabeth Eilender and Robert J. Tolchin of Jaroslawicz & Jaros, Esqs., New York City.

ANY DEVELOPMENTS YOU THINK OTHER MLRC MEMBERS SHOULD KNOW ABOUT?

CALL US, OR SEND US A NOTE.

MEDIA LAW RESOURCE CENTER, INC.
520 EIGHTH AVE., NORTH TOWER 20TH FLOOR
NEW YORK, NY 10018

PH: 212.337.0200,
MEDIALAW@MEDIALAW.ORG

Crusader Against Corruption Scores Jurisdictional Victory In Internet Libel Case

No Jurisdiction in Texas Over Article Focusing on Nigerian Corruption

By Julie Ford

When Omoyele Sowore was a child in Nigeria, the military police ransacked his village and arrested his half-brothers and their mother. He watched as the police raped his 17-year-old cousin.

When he started college in 1989, Sowore actively and openly criticized the Nigerian government through various student demonstrations. As a result, he was expelled from school and his family intimidated by the police. Sowore continued to participate in anti-military rallies and was repeatedly arrested and beaten for speaking out. His punishment for leading one protest was torture and solitary confinement for two weeks. Another time he was held for six days shackled to the ground in a tiny cell. When Sowore began to speak out against government corruption in the oil industry, not only was he arrested twice, he was told if he did not stay away from oil issues he would be killed.

In 1999, Sowore came to the United States for medical care for ongoing problems caused by past torture in Nigeria. Sowore ultimately settled in the United States, earning a masters degree from Columbia University. But to this day, he continues his work of exposing corrupt Nigerian officials from his home in New Jersey. Together with the help of other volunteers, Sowore operates an Internet publication called *SaharaReporters*, which focuses on alleged corrupt activities of Nigerian government officials.

Sued in Texas

It was because of his whistleblowing activities that Sowore found himself named a defendant in a lawsuit filed in Houston, Texas, styled CA No. 4:08-CV-03557, *Paul B. Orhii vs Sowore Omoyele, dba SaharaReporters.com*, in the United States District Court, Southern District of Texas, Houston Division.

The plaintiff, Paul Orhii, alleged that an article published by Sowore on the SaharaReporters website had libeled him. A Nigerian citizen, Orhii was living in Houston in May 2008 when Sowore's article was published on the internet. The focus of the article, entitled [*Pfizer Case Settlement: Aondoakaa Plans Big Pay Day Through Cousin,*](#)

was Nigerian's Minister of Justice, Michael Aondoakaa. As described by the Court,

"The Article reported on a large out-of-court settlement of a civil and criminal case in Nigerian courts against the pharmaceutical company Pfizer and claimed that Nigeria's Attorney General, Michael Aondoakaa, would personally benefit from the settlement. It accused Aondoakaa of pursuing a "double agenda," publicly declaring his determination to make Pfizer pay for certain illegal drug trials, but secretly negotiating with Pfizer officials to "work[] out a deal favorable to Pfizer in return for a hefty fee 'in the millions of dollars,' one reliable source said." *Orhii v. Omoyele*, slip copy, 2009 WL 926993 (S.D. Tex. 2009), p.*1.

The article alleged that Plaintiff Orhii was involved with this scheme, stating:

"Aondoakaa was pushing for a \$1 billion settlement amount so that he can pay himself \$10 million through his first cousin, Dr. Paul Botwev Orhii. The AG [Aondoakaa] earlier engineered Orhii's appointment as an expert witness and 'pharmacological litigation support specialist' in the cases pending at the high courts in Abuja and Kano." *Id.* at p. *2 (quoting the article posted on SaharaReporters.com).

The article went on to describe Orhii's connections to Texas, including the fact that he graduated from law school in Houston, had worked as a researcher in San Antonio and was currently living in Houston.

Orhii's Complaint, filed in December 2008, alleged that the article implied that Orhii, "an accomplished scientist, medical doctor and attorney," was engaged in a criminal conspiracy with the Attorney General of Nigeria. Orhii pleaded that the article's statements and inferences were false, and sought damages in excess of \$15 million.

(Continued on page 17)

Crusader Against Corruption Scores Jurisdictional Victory In Internet Libel Case

(Continued from page 16)

Not surprisingly, Sowore, who essentially works on a volunteer basis, was without resources to defend himself in a lawsuit in Texas. And he was convinced that the lawsuit had been engineered by government officials in Nigeria who wanted to shut down his website and intimidate others from investigating and criticizing the Nigerian government.

Fortunately, a non-profit organization based in London, Media Legal Defense Initiative, agreed to fund the cost of his defense. Once Sowore retained Texas counsel, he filed a motion to dismiss for lack of personal jurisdiction.

Complaint Dismissed for Lack of Jurisdiction

Sowore's successful motion to dismiss was based on the Fifth Circuit's two-factor jurisdiction test applied in libel cases. The motion to dismiss involved the application of the "minimum contacts" jurisdiction test in the context of an Internet publication. Plaintiff Orhii argued that under *Calder v. Jones*, the fact that the article described plaintiff's ties to Texas, and that the defendant knew plaintiff lived and worked in Texas, was sufficient to meet the minimum contacts test. See *Calder v. Jones*, 465 U.S. 783, 789-90, 104 S.Ct. 1482 (1984) (holding that specific jurisdiction for libel exists when a publisher "aims" a story at the forum state knowing the "effects" of the story will be felt there).

Sowore argued that the Fifth Circuit had clarified the ruling in *Calder* in *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005). As explained in *Fielding*, the "aim" of the plaintiff under the *Calder* test must be demonstrated by showing two factors; that (1) the subject matter and (2) the sources relied upon for the article, were in the forum state. Sowore's motion demonstrated that neither factor was met in his case. The subject matter of the article was focused on Nigeria, and Sowore relied on no sources in Texas.

The federal district court applied the two-factor test in *Fielding* and granted Sowore's motion to dismiss, stating:

"In this case, the subject matter of the Article was clearly focused on Nigeria and the actions of its public officials. The references to Orhii's residence in Houston and work in Texas were "merely collateral" to the Article's focus, supplying 'background, biological information' about Orhii. Moreover, as for Defendant Sowore's source for the Article, Plaintiff has not refuted Defendant's evidence that he relied upon no Texas sources." *Orhii v. Omoyele*, slip copy, 2009 WL 926993 (S.D. Tex. 2009), p.*4.

Plaintiff Orhii has not appealed this order dismissing the case. In fact, shortly after filing his lawsuit in Houston, Paul Orhii moved to Nigeria where he now serves as the Director General of the National Agency for Food and Drug Administration and Control for Nigeria.

As for Sowore, he dare not return to Nigeria. As one Internet writer put it, "if he shows up defiantly I think President Yar'Adua ... will definitely love to have him for a dinner or breakfast." SOC Okenwa, www.NigeriansinAmerica.com, Dec. 31, 2008. As Okenwa states in that posting, "For the Nigerian ruling cabal Sowore and his team of 'masked' reporters are IT guerilla rebels, undesirable elements using the power of the internet to spread subversive materials against those 'elected' to provide leadership."

Okenwa adds, "But for those millions of Nigerians at home and abroad Omoyele Sowore is a patriotic hero who is waging an uncompromising Saharan 'rebellion' against the corrupt establishment." *Id.*

Julie Ford, George & Brothers, L.L.P., Austin, Texas represented Omoyele Sowore dba SaharaReporters.com. Plaintiff was represented by Grant Cook, The Cook Law Firm, Houston, Texas.



Texas Court of Appeal Finds San Antonio Express-News Articles Substantially True

Hearst Wins Summary Judgment

By Jonathan Donnellan and Kristina E. Findikyan

The Texas Fourth Court of Appeals reversed that portion of the trial court's judgment denying the motion for summary judgment of the San Antonio Express-News and its reporter Ron Wilson, holding that a number of articles on a public power struggle between two San Antonio public officials were substantially true and rendering a take-nothing summary judgment in favor of the newspaper defendants with respect to the public official's libel claim. [*Hearst Newspapers Partnership, L.P. d/b/a San Antonio Express-News and Ron Wilson v. Manuel Macias, Jr.*](#), No. 04-08-00725-CV, 2009 WL 400368 (Feb. 18, 2009).

The Articles and Lawsuit

In the fall of 2006, the San Antonio Express-News published a series of articles covering a clash between two San Antonio housing officials. The plaintiff, Manuel Macias, was the Executive Director of the San Antonio Development Agency ("SADA") and the sister non-profit organization it created, San Antonio Affordable Housing, Inc. ("SAAH"). Diane Gonzalez-Cibrian was SADA's chairwoman and a member of the SAAH board of commissioners. After a dispute arose between the two officials over Macias's management of the two entities, Macias was according to the complaint "constructively terminated" from his position as Executive Director of SADA.

Macias maintained his post at SAAH, but when a SADA auditor requested SAAH's financial records, SAAH refused, claiming it was an independent agency. The SADA board headed by Cibrian reacted, declaring itself the official SAAH Board and commencing litigation against Macias and other former SAAH officers to obtain SAAH's records. The court issued numerous temporary restraining orders enjoining Macias and others from withholding the financial documents, which culminated in a permanent injunction requiring Macias to turn over SAAH's records to SADA.

The Express-News covered the public power struggle as it happened. The series of articles reported, among other things, that Macias "resigned" from SADA in the wake of

an independent audit of his credit card use, another audit of whether SADA used federal housing funds appropriately, and the City of San Antonio's plan to defund SADA, whose housing contracts were being investigated by the FBI. The Express-News also reported the content of city records showing that Macias charged \$400 for airfare for his family and failed to document \$1000 in lunches, as well as the conflict between SADA and SAAH and the SAAH officers' refusal to turn over records.

In January 2007, Macias filed an Original Petition alleging multiple claims against Cibrian and other public officials arising out of his tenure and departure from SADA and SAAH. Macias also named the Express-News and its reporter for the publication of ten articles reporting the controversy, alleging claims for libel, negligence and intentional infliction of emotional distress. Macias's libel claim did not specify which statements allegedly defamed him, relying instead on the ten articles as a whole.

Threshold Motions Narrow Complaint

The Express-News filed special exceptions to the Original Petition, which were granted in July 2007. The court dismissed the claims for intentional infliction of emotional distress and negligence with prejudice and held that Macias's libel claim was not actionable to the extent it challenged Cibrian's statements, which were subject to the fair report privilege. The court required Macias to replead his libel cause of action with specificity.

Macias filed a First Amended Petition, repeating the same libel cause of action and adding a new claim for tortious interference with contract. The Express-News again filed special exceptions, which again were granted. The court found that Macias still failed to plead his libel claim with required specificity, and dismissed the tortious interference claim, given the failure to allege facts that could support the element of inducement. The court offered Macias yet another opportunity to cure the defects in his petition.

(Continued on page 19)

Texas Court of Appeal Finds San Antonio Express-News Articles Substantially True

(Continued from page 18)

Macias filed a Second Amended Petition, attempting to revive his dismissed claims and failing to cure the pleading defects in the libel cause of action. The Express-News filed a motion to dismiss the action in its entirety. On the day of the hearing, Macias filed a Third Amended Petition, which for the first time identified eight specific statements as the basis for his defamation claim. The court permitted the defamation claim to go forward based on those statements, and reiterated its dismissal of the other claims.

Mixed Summary Judgment Ruling

The eight remaining challenged statements fell into six categories: (1) Macias “resigned” his position at SADA; (2) the FBI investigated SADA’s housing contracts under his watch; (3) Macias charged \$400 for airfare for his family and failed to document approximately \$1,000 in lunches; (4) under his leadership, SAAH refused to turn its records over to SADA; (5) Cibrian raised questions about whether a certain financial transaction violated banking laws; and (6) Cibrian opined on whether SAAH was “attempting to hijack” an apartment project to obtain the fees.

The Express-News filed a motion for summary judgment on substantial truth grounds. In support, the paper submitted a host of evidence, including an affidavit from an FBI officer stating that there was an FBI investigation of SADA’s housing contracts, a city audit report reflecting that Macias failed to account for approximately \$1000 in lunches, and court orders requiring SAAH to turn over its financial records to SADA. The Express-News also argued for the application of the fair report and comment privileges, the opinion doctrine, and that certain statements were not defamatory and not “of and concerning” Macias.

On September 5, 2008, the trial court issued a summary order granting in part and denying in part the motion. The court granted the motion regarding one of the references to Macias “resigning,” the statement that Macias refused to turn over SAAH records to SADA, Cibrian’s statement raising questions about whether a financial transaction violated banking laws, and Cibrian’s opinion on whether SAAH was “attempting to hijack” an apartment project to obtain fees. The trial court denied the motion with respect to the remaining statements.

The Court of Appeal

The Express-News filed an interlocutory appeal. On February 18, 2009, the Fourth Court of Appeals found that the trial court erred in not granting the Express-News and Wilson summary judgment in full because the newspaper established that the articles were substantially true.

The appellate court first found that the Express-News’ statement that Macias “resigned” was substantially true because there was no dispute that Macias wrote what he himself characterized as a letter of resignation. Since the article “accuse[d] him of absolutely nothing except what he had a right to do” (quoting *Musser v. Smith Protective Serv., Inc.*, 723 S.W.2d 653, 655 (Tex. 1987)), the court found that, in the mind of the average reader, the newspaper’s statement was no more damaging to Macias than a statement that he was constructively terminated.

The court next analyzed the “gist” of the articles and, pointing to the newspaper’s summary judgment evidence, concluded that the statements that Macias had resigned in the wake of audits and an FBI investigation and that city records reflected Plaintiff’s \$400 airfare charge for his family and \$1000 in undocumented lunch charges were substantially true.

Finally, the court rejected Plaintiff’s argument before the trial court that he was defamed by the omission of a separate audit report that allegedly exonerated him of any wrongdoing. The court noted that summary judgment record contained neither a copy of the report nor any indication that the report was available to the newspaper. Even if the separate audit report was available to the newspaper and had actually been quoted in the articles, the court reasoned that Plaintiff had no claim for libel since the “gist” of the challenged articles would remain unchanged.

The San Antonio Express-News and Ron Wilson were represented by Hearst in-house counsel Jonathan Donnellan, Kristina E. Findikyan and former Hearst counsel, Trina R. Hunn, with Joseph R. Larsen of Sedgwick, Detert, Moran & Arnold LLP contributing to the briefs. Plaintiff was represented by Mark E. Braswell.

California Appeals Court Affirms Anti-SLAPP Ruling for Fox News Court Cites Media's Right to "Present Information in the Manner It Chooses"

By Guylyn Cummins

A California Court of Appeal ruled that a defamation claim brought by seven migrant workers against Fox News Network failed as a matter of law where there was an insufficient basis for a factfinder to conclude that the "MANHUNT AT THE BORDER" caption, when viewed in context with the entire news story, was reasonably susceptible of the false and defamatory meaning plaintiffs' attributed to it. *Balzaga et. al. v. Fox News Network LLC*, No. D052743, 2009 WL 1332746 (Cal. App. 4th App. Dist. May 14, 2009) (Haller, McConnell, Aaron, JJ.).

The lawsuit was predicated on the plaintiffs' claim that the caption falsely suggested that *law enforcement* was conducting a search for plaintiffs, rather than the victim, John Monti, an anti-illegal immigration activist.

Background

The news story arose from these facts. On November 18, 2006, Monti was taking photographs of the plaintiffs who work as day laborers, when he became involved in a fight with them. Monti filed a police report for battery and robbery, saying he had been attacked by the plaintiffs and his camera damaged. Police arrested one of the plaintiffs the next day, but released him after questioning.

Ten days after the fight, Monti told his story on Fox News's Hannity & Colmes television show. At the time, police would confirm only that they were still investigating the incident. The telecast showed Monti's wounds to his hands and face, with the caption "Manhunt at the Border." It confirmed the police "are investigating an attack on an anti-illegal immigration advocate near a migrants' encampment," and reported that Monti had taken pictures of the attackers and "now needs your help."

The telecast showed Monti's poster with photographs of plaintiffs, entitled "Wanted Robbery, Assault and Battery." Monti was questioned about his characterization of the fight as a "hate crime" versus law enforcement saying it was Monti's photographing of the plaintiffs that "sparked their behavior." The telecast also relayed Monti's view of the tremendous problems and crimes caused by migrant camps

or "shanty towns." Fox News concluded that they would continue to follow the story.

Months later, plaintiffs demanded a retraction of virtually the entire telecast. Fox News declined, but invited plaintiffs' counsel to tell their version of the attack in a March 2007 Hannity & Colmes show.

In the heat of a political battle between anti-immigration and immigration groups over the incident, the San Diego City attorney brought misdemeanor charges against Monti for the fight in what was termed by some as a "Nyfong" attack brought for political reasons. (The word "Nyfonged" has been coined to refer to prosecutions of individuals who have been "framed" or prosecuted based on false evidence. The word is derived from the bogus prosecutions based on false evidence by a North Carolina District Attorney Michael Nyfong of several Duke lacrosse players for allegedly raping a "stripper" at a party.)

At the September 2007 trial, the jury returned not guilty verdicts on all charges, which included battery, assault, and filing a false police report.

Plaintiffs' lawsuit was filed the next month. Plaintiffs alleged the telecast was false for myriad reasons, but ultimately argued only that the caption "Manhunt at the Border" was false because police were merely *investigating* the crime and were not conducting an organized search for plaintiffs at the time of the telecast. Plaintiffs asserted, without support, that the police were only investigating Monti at the time of the telecast. Fox News filed an anti-SLAPP motion.

Motion to Strike

California's anti-SLAPP statute (Code Civ. Proc. § 425.16) was enacted to check "a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional right[] of freedom of speech," and to provide "a fast inexpensive unmasking and dismissal" of such claims. *See Ludwig v. Superior Court*, 37 Cal. App. 4th 8, 16 (1995). The statute provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connec-

(Continued on page 21)

California Appeals Court Affirms Anti-SLAPP Ruling for Fox News

(Continued from page 20)

tion with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” Code Civ. Proc., § 425.16, subd. (b) (1).

The statute includes, but is not limited to, activities set forth in subdivision (e)(1) (i.e., “any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or in any other official proceeding authorized by law”); subdivision (e)(2) (i.e., “any written or oral statement or writing made in connection with an issue under consideration or review by a . . . judicial body . . .”); subdivision (e)(3) (i.e., “any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest”); and subdivision (e)(4) (i.e., “any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.”)

The trial court granted the anti-SLAPP motion, finding the telecast did not attribute the caption “Manhunt at the Border” to law enforcement, but rather made it “pretty clear if there is a manhunt, it’s by this guy [Monti], it’s not a police manhunt...” Accordingly, the court found the telecast was privileged as a “fair and true” report to a public journal concerning the “arrest of Plaintiff Balzaga and the police investigation” of the incident, as well as “fair comment, opinion and hyperbole.”

Court of Appeal Decision

The Court of Appeal affirmed. Applying the “totality of the circumstances” test to review the meaning of the caption in context, the court ruled that a person who viewed the Fox News telecast would not have reasonably concluded that law enforcement officers were conducting a “manhunt” for plaintiffs, but rather that it was a “colorful” way of referring to Monti’s own attempts to bring to justice the plaintiffs. The telecast plainly said police were only “investigating” the attack and aired only “Monti’s story” (and, subsequently, plaintiffs’ story as well). Regarding whether the attack was a hate crime, Monti also made it clear the San Diego police department was not doing enough given that

he, a white male, had been attacked by seven migrant workers who had not been arrested or charged. As the court further ruled, the use of “hyperbole or language in a loose figurative sense” is constitutionally protected and not actionable.

The court concluded:

In reaching this conclusion, we emphasize that an owner of a cable television news program has broad First Amendment rights to present information in the manner it chooses. The use of captions and graphics has become a popular method for television stations to enhance their news programs and thus to increase viewer audiences. In this case, plaintiffs seek to isolate a four-word caption from the rest of the story to create a legal basis for their defamation claim. If we were to uphold this approach, it is likely the courts would be faced with a plethora of new claims from viewers dissatisfied with how a particular television caption or graphic has accurately summarized or represented the essence of the news story. This outcome would have a severe chilling effect on free speech rights and would be contrary to First Amendment jurisprudence, as well as common sense. As in this case, the best way to challenge a claimed false statement is to allow the dissatisfied viewer to exercise his or her own First Amendment rights to counter the false statement. Although the Fox News telecast may not have been “fair and balanced,” it did not have the defamatory meaning alleged by plaintiffs and thus is not actionable.

Judge Cynthia Aaron dissented, finding that “a reasonable viewer could have understood the words “MANHUNT AT THE BORDER” in Fox News’s telecast to refer to a law enforcement manhunt.”

Guylyn Cummins, a partner at Sheppard, Mullin, Richter & Hampton LLP in San Diego, represented Fox News in this matter. Plaintiffs were represented by James C. Mitchell and Daniel M. Gilleon, Mitchell & Gilleon, San Diego.

San Francisco Chronicle Wins Anti-SLAPP Motion in Public Official Defamation Case

Column Not “Provably False”; Protected as Fair Report

By Jonathan Donnellan and Kristina E. Findikyan

The California Superior Court in Alameda County granted the anti-SLAPP motion of the San Francisco Chronicle and its columnist Chip Johnson, striking the defamation complaint of an Oakland City Councilwoman on the grounds that the challenged column was not provably false and was absolutely privileged under California’s fair report doctrine. *Desley Brooks v. The San Francisco Chronicle, et al.*, No. RG08-400868 (Cal. Super. April 1, 2009) (Tigar, J.).

The Column

In June 2008, the San Francisco Chronicle published an opinion column by Chip Johnson entitled “Time to probe corruption in Oakland City Hall,” severely criticizing Oakland’s City Administrator. In an effort to illustrate his view that it was “time for a higher authority to take a look at operations inside Oakland City Hall,” Johnson recounted a number of incidents involving the City Administrator’s loyalists. One involved Oakland City Councilwoman, Desley Brooks.

For almost three years, the Chronicle had reported on investigations by the Alameda County District Attorney’s Office and the Oakland Public Ethics Commission into allegations that Brooks had employed the daughter of Brooks’ boyfriend as a full-time aide while that daughter was simultaneously enrolled as a full-time student 3,000 miles away at Syracuse University in New York, and that Brooks had received kickbacks in the hiring. In a single sentence in his column, Johnson lamented that:

Two years ago, nothing was done when allegations of illegal kickbacks were raised against District Six City Councilwoman Desley Brooks, another of [the City Administrator’s] allies, after police investigators linked bank deposits made by the mother of one of Brooks’ employees to several personal checks for \$1,200 written to Brooks (exactly half the employee’s paycheck).

After noting that Brooks, like others, had come to the City Administrator’s defense, Johnson concluded, “[t]hrough all the smoke and mirrors surrounding the latest debacle, it’s obvious to the average Oakland resident – like me – that there is something terribly

wrong with the way business is conducted in Oakland City Hall.” *Id.*

The Lawsuit

Brooks filed for defamation, claiming it was false to say that the city employee’s mother had given her a kickback amounting to half of the employee’s wages.

The Chronicle and Johnson moved to strike the complaint under California’s anti-SLAPP statute, Code of Civil Procedure § 425.16. They argued that Brooks could not establish a probability of prevailing on her claim because the column was privileged as a fair and true report of the District Attorney and Public Ethics Commission investigations, was substantially true, was protected opinion, and that Brooks, who is a public official, could not show that the newspaper and columnist acted with actual malice.

Brooks did not dispute that the kickback allegations had been investigated. Rather, she contended that the column was defamatory because it went further, stating that the police linked bank deposits from the aide’s mother to Brooks. That reference, she argued, was false because, among other things, the aide’s mother was deceased at the time of the alleged transactions.

While the motion to strike was pending but prior to the filing of Brooks’ opposition, Brooks filed motions to lift the statutory stay of discovery and to amend the complaint. Brooks sought to take columnist Chip Johnson’s deposition to ascertain his confidential source or sources, and moved to amend the complaint to correct what she called a drafting mistake. Citing *Paterno v. Superior Court* (2008) 163 Cal. App. 4th 1342 and *Garment Workers Center v. Superior Court* (2004) 117 Cal. App. 4th 1156, the court on March 5, 2009 denied the motion for leave to take discovery, holding that before any discovery could go forward the plaintiff first had to demonstrate that the column contained provably false statements, which was an issue to be decided in connection with the anti-SLAPP motion.

In a separate opinion issued the same date, the court allowed the amended complaint, finding that because the defendants were aware of the proposed language and addressed it in their anti-SLAPP motion, there was no prejudice and the amendment would not thwart the anti-SLAPP procedure.

(Continued on page 23)

San Francisco Chronicle Wins Anti-SLAPP Motion in Public Official Defamation Case*(Continued from page 22)****The Anti-SLAPP Opinion***

On April 1, 2009, Judge Jon S. Tigar of the Alameda County Superior Court issued an opinion granting the defendants' anti-SLAPP motion to strike. As an initial matter, the Court found that the Chronicle and Johnson easily met their burden of establishing that the column was, under the anti-SLAPP statute, an "act ... in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue."

However, Brooks had not met her burden of establishing a probability of success on her defamation claim. First, the court held that Brooks did not demonstrate that the column was "provably false." Citing details from the Public Ethics Commission records submitted by defendants, the court noted that Brooks did not dispute that allegations of illegal kickbacks had been raised against her. Against that backdrop, the court held that the column's reference to the bank deposits allegedly made by the aide's mother did not alter the "sting" of the concededly truthful parts of the column. "An ordinary reader, learning that Councilwoman Brooks was being officially investigated for kickbacks in connection with the employment of a staff member, would have the same opinion of Councilwoman Brooks whether or not the challenged phrases were part of Mr. Johnson's column."

The court also held that the column was privileged as a true and fair report under Civil Code 47(d)(1). "Here, Mr. Johnson's column concerned an official investigation, by both the Public Ethics Commission and the District Attorney's office, into allegations that Councilwoman Brooks had received kickbacks in connection with the hiring of an employee. This is the kind of report concerning a 'public official proceeding' that is protected by section 47." Because the court had already concluded that the column was substantially true, it held it was also privileged under section 47.

Brooks has appealed the anti-SLAPP ruling to the California Court of Appeals.

The San Francisco Chronicle and Chip Johnson are represented by Hearst in-house counsel Jonathan Donnellan and Kristina E. Findikyan, with Tom Burke of Davis, Wright Tremaine LLP and Karl Olson of Levy, Ram & Olson LLP contributing to the briefs. Before the trial court, Plaintiff was represented by Wayne Johnson of Oakland, California. Howard Moore, Jr. of Berkeley, California filed the Notice of Appeal on behalf of the Plaintiff, and has associated Wayne Johnson on the appeal.

©2009

MEDIA LAW RESOURCE CENTER, INC.
520 Eighth Ave., North Tower, 20 Fl.
New York, NY 10018

BOARD OF DIRECTORS

Kenneth A. Richieri (Chair)

Kelli Sager

Dale Cohen

Stephen Fuzesi, Jr.

Ralph P. Huber

Henry S. Hoberman

Marc Lawrence-Apfelbaum

Karole Morgan-Prager

Elisa Rivlin

Susan E. Weiner

Kurt Wimmer

STAFF

Executive Director: Sandra Baron

Staff Attorney: David Heller

Staff Attorney: Eric Robinson

Staff Attorney: Maherin Gangat

MLRC Fellow: Stephanie Shaffer

MLRC Administrator: Debra Danis Seiden

MLRC Publications Assistant: Philip J. Heijmans

Massachusetts Newspaper Wins Dismissal of Defamation SLAPP Suit

Statute Protects Commercial Media Entities

By Michael A. Pezza Jr.

In an all too often rare piece of good news for the media in Massachusetts, a state trial court judge – acting on a motion under the state’s anti-SLAPP statute – recently dismissed a defamation case brought by a police chief against a local newspaper and its publisher. *Thomas A. Joyce v. Robert Slager and The Wareham Observer*, No. 08-01240-B (Mass. Sup. Ct. 2009).

This appears to be the first known decision in Massachusetts where a defamation case against a commercial media defendant has been dismissed under the anti-SLAPP statute. Associate Justice Robert Rufo, of the Superior Court Department of the Massachusetts Trial Court, allowed the special motion to dismiss brought by the two media defendants. Despite vigorous opposition by the plaintiff, the court determined that the statements at issue were protected petitioning activity, rejected plaintiff’s contention that prior case law barred commercial entities or commercial media entities from the statute’s protection, and concluded that the special motion to dismiss must be allowed because the plaintiff failed to meet his burdens under the statute.

Background

Plaintiff Thomas Joyce has been chief of police in Wareham, Massachusetts, for many years. *The Wareham Observer* is a small, weekly newspaper, which seeks to encourage citizen participation in town government. Defendant Robert Slager is the publisher of the paper, and, at the time of the subject publications, its sole full-time employee.

Joyce’s job performance was a matter of ongoing interest in Wareham. He was, for example, sued by a police officer in a case where the court allowed the officer’s petition for review, and found that the revocation or refusal to issue a firearms license to the officer upon his reinstatement to the police force was arbitrary, capricious, or an abuse of discretion, and his job performance was a subject of review by members of the board of selectmen.

The *Observer* had covered a number of matters concerning Joyce, and Slager had offered opinions about Joyce’s job performance in his commentary column. Slager viewed the *Observer*’s reporting and commentary as a call to action, as he sought to encourage review of issues by town officials and citizen demand for such review.

Plaintiff’s Claims

In his complaint, Joyce cited as false and defamatory three specific items published in the *Observer* in 2007 and 2008: a headline (“Joyce defies court order”), a paragraph in an opinion column (concerning reports of missing police log entries

This appears to be the first known decision in Massachusetts where a defamation case against a commercial media defendant has been dismissed under the anti-SLAPP statute.

and alleged police favoritism towards town officials and their families), and a

sentence in a short blurb (stating that Joyce was told by selectmen to let a volunteer group resume issuing parking tickets in a certain section of town). Joyce asserted that each of the statements was published “with actual malice and actual knowledge of its falsity or a high degree of awareness of its probable falsity.”

Anti-SLAPP Statute

The Massachusetts anti-SLAPP (anti-Strategic Lawsuit Against Public Participation) statute, [General Laws c. 231, § 59H](#), applies to civil claims against a party that are based solely upon the party’s exercise of its right of petition under the United States or Massachusetts constitutions. The statute provides broad protection from harassing, retaliatory lawsuits. When it first addressed the statute in 1998, the Massachusetts Supreme Judicial Court recognized that its protection extends to situations beyond what had been viewed in other states as a typical SLAPP lawsuit.

The statute provides the mechanism of a special motion to dismiss, which follows a well-established procedure. The party seeking dismissal must demonstrate, through pleadings and affidavits, that the claims against it are based on petition-

(Continued on page 25)

Massachusetts Newspaper Wins Dismissal of Defamation SLAPP Suit

(Continued from page 24)

ing activities alone, and have no substantial basis other than the petitioning activities. Once that threshold showing is made, the burden shifts to the opposing party to demonstrate, also by pleadings and affidavits, first, that the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law, and second, that the petitioning activity caused actual injury to the opposing party.

The statute broadly defines a party's exercise of its right of petition as including, in short, any written or oral statement made before or submitted to a governmental body or proceeding, or made in connection with an issue under consideration or review by a governmental body, or reasonably likely to encourage such consideration or review, or reasonably likely to enlist public participation in an effort to effect such consideration or review, or any other statement falling within constitutional protection of the right to petition the government.

No appellate court in Massachusetts has addressed the issue of whether a commercial media entity is entitled to protection under the anti-SLAPP statute, although there are many cases where the statute was applied to other commercial entities. In a 1998 Superior Court case, the court applied the statute to the defendant newspaper, but denied the paper's special motion to dismiss because the plaintiff established that the subject statement was devoid of reasonable factual support and that he had suffered actual injury as a result of the statement. A 2008 Superior Court decision denied a blogger's special motion to dismiss, although it appears that while the court did cite the blogger's commercial status, the court's decision was primarily driven by the apparent lack of intent to engage in petitioning activity reflected in the blogger's own deposition testimony.

Special Motion To Dismiss

Defendants argued that the statute applied to newspapers and other media entities, that each of the three subject statements fell within the statute's definition of petitioning activity, and that plaintiff's defamation claims were based solely on that petitioning activity. They also argued that the facts in the affidavits they submitted (which in addition to Slager's affidavit included affidavits from a police officer, a selectman, and another local official) demonstrated that it would be logically impossible for Joyce to meet his heavy burden under the stat-

ute to prove that the petitioning activity was devoid of any reasonable factual support or arguable basis in law.

Joyce opposed the special motion on the grounds, essentially, that "commercial media enterprises" are not entitled to protection under the statute, and that even if they are, the subject statements were devoid of reasonable factual support. He argued that the statute only protected petitioning activity of a "private citizen," that the statute did not apply to a commercial media entity (and that *MacDonald v. Paton*, a 2003 decision of the Massachusetts Appeals Court, acknowledged the statute's protection only as to a non-commercial, individual Web site operator), and that petitioning activity must involve issues under active governmental consideration.

In responding to the opposition, the *Observer* defendants emphasized that commercial media were not excluded from the statute's protection either by the terms of the statute itself or by Massachusetts common law (and that nothing in the *Paton* decision limited the application of the statute to non-commercial media entities), and that the statute's protection was not restricted to petitioning activity concerning matters under active consideration.

In its memorandum of decision, the court undertook a detailed review of the facts, arguments, and applicable law. The court then rejected Joyce's arguments that the subject statements do not qualify as petitioning activity because they were made in support of a commercial enterprise, that commercial entities are barred from enjoying the protection of the statute, that petitioning activity must be by someone acting as a private citizen in order to be protected, and that no media defendant can enjoy the protection of the statute. The court also stated that petitioning activity need not be motivated by a matter of public concern or be undertaken simultaneously with active governmental review in order to be subject to the statute's protection.

The court then stated how each of the subject statements qualified as protected petitioning activity. In doing so, the court cited instances where one or another of the three subject statements had caused people to contact selectmen, or caused selectmen to investigate Joyce's activities. The court concluded that the defendants had met the burden of showing that Joyce's claims were based solely on defendants' petitioning activity, and that they were entitled to invoke the statute's protection.

In discussing why Joyce then failed to meet his burden of showing that the petitioning activity was devoid of any reason-

Massachusetts Newspaper Wins Dismissal of Defamation SLAPP Suit

(Continued from page 25)

able factual support, the court cited the factual bases advanced by the defendants, and also noted that any minor inaccuracies found in hindsight are protected under law if a statement was reasonably supported by fact at the time it was made. Implicitly acknowledging that the standard under a special motion to dismiss is not the same as that used in assessing a rule 12(b)(6) motion to dismiss for failure to state a claim, the court further noted that Joyce could not meet his burden simply by stating conflicting facts without any support because he is not here entitled to any inferences in his favor.

Noting that Joyce did not address whether the subject statements had any arguable basis in law (one of the standards stated in the statute), the court agreed with the defendants, and concluded that the statements had at least an arguable basis in law under *New York Times v. Sullivan*, and, further, that in Massachusetts commentary is a legally protected expression of opinion.

Finally, after noting that because Joyce did not meet his first burden under the statute the court did not need to examine whether the petitioning activity caused Joyce actual injury, the court nonetheless went on to conclude that Joyce also did not

meet his burden in that regard, as he did not submit any evidence in support of his claims of injury. The court stated that to prove damage to his reputation, Joyce should have submitted evidence of his reputation before the subject publications, and that with regard to mental suffering, Joyce had not presented any medical records or competent doctor's affidavit.

From the newspaper defendants' perspective, allowing the special motion to dismiss accomplished exactly what the anti-SLAPP statute intended: the early termination of a legal action seeking to intimidate, chill, or harass the other party, where that action is based only upon a party's constitutionally-protected petitioning activity. In this case, the court apparently recognized that the media defendants were not seeking special treatment, but were arguing that they are entitled to the same protection as other parties, whether individuals or commercial entities.

Michael Pezza, of Law Office of Michael A. Pezza Jr., Boston, represented the defendants Robert Slager and The Wareham Observer. Plaintiff was represented by Richard J. Sinnott, of Sinnott Law Office, Boston.

UPCOMING EVENTS

1	2	3	4	5	6
7	8	9	10	11	12
13	14	15	16	17	18
19	20	21	22	23	24
25	26	27	28	29	30
31	1	2	3	4	5

MLRC London Conference
*International Developments in Libel, Privacy
 Newsgathering and New Media Law*
 October 1-2, 2009

MLRC Annual Dinner
 November 11, 2009

First Amendment Speakers Bureau
 Upcoming MLRC Institute Events

*Feel free to e-mail us with any questions regarding
 MLRC's upcoming events @ MediaLaw@MediaLaw.org*

New Jersey Supreme Court Addresses Common Law Remedy for SLAPP Suits

Attorneys Can Be Liable Under Abuse of Process Theory for Filing SLAPP Suit

In a lengthy non-media decision, the New Jersey Supreme Court held that in limited circumstances attorneys can be liable to non-clients under a common law theory of malicious use of process for filing so-called SLAPP lawsuits. *LoBiondo v. Schwartz*, 2009 WL 1362989 (N.J. May 14, 2009).

New Jersey does not have an anti-SLAPP statute and the Supreme Court and the appellate court below both rejected a request to create a new cause of action as a remedy against SLAPP suits. Instead, the Court agreed that the “ancient, well-established, albeit disfavored, tort of malicious use of process” is available as a remedy to combat SLAPP suits if the plaintiff or the lawyers who represented the plaintiff acted to chill the defendants free speech or petition rights. The Supreme Court acknowledged that allowing a SLAPP-suit victim to sue an adversary’s lawyer could raise attorney client conflict issues, but found the remedy appropriate for the rare occasion where the lawyer’s *primary motive* was an improper one.

The decision ended a tortuous dispute that began in 1986 between the owners of a New Jersey beach club and a neighbor and her family who objected to the club’s expansion plans. After five years of hearings and objections to the expansion, the owner sued the neighbor for defamation, tortious interference and emotional distress. Plaintiffs obtained a trial court judgment of approximately \$169,000, but that award was reversed on appeal. *See LoBiondo v. Schwartz*, 323 N.J. Super. 391 (App. Div. 1999) (*LoBiondo I*). The appeals court found that the club owner’s lawsuit was essentially a SLAPP suit (strategic lawsuit against public participation) and went on to reinstate the neighbor’s counterclaim for malicious use of process.

On remand, the neighbor added a new twist to the case by adding a malicious use of process claim against the law firm that had represented the beach club owners. These claims again reached the intermediate appeals court which granted summary judgment to the law firm, but denied summary judgment to the beach club owners. *See LoBiondo v.*

Schwartz, No. A-4325-04 (App. Div. Aug. 1, 2007) (*LoBiondo II*).

The New Jersey Supreme Court dismissed the remaining claims in the case and in doing so considered in detail the parameters of the malicious use of process tort in the context of a SLAPP suit. The traditional elements of the tort are: the filing of a complaint, without probable cause, actuated by malice, that terminated in favor of the party now seeking relief, and that caused the party now seeking relief to suffer a special grievance. The Court agreed that a claim of malicious use of process should be available as a SLAPP suit remedy and that filing suit to chill free speech or petition rights satisfies the “special grievance” element of the claim.

The Court affirmed that “advice of counsel” is an absolute defense to the client provided he or she gave their lawyer all the necessary facts before filing suit. But where the client raises the “advice of counsel” defense, and puts the advice of counsel at issue, the SLAPP suit victim may bring a malicious use of process claim against the client’s lawyer. The non-client has the steep burden of showing that the lawyer’s primary motive in filing suit was improper. As for the lawyer’s liability, the Court explained:

“If an attorney, knowing the litigation is baseless and that the client intends to pursue it only for the improper purpose of harassing, silencing or intimidating the non-client, proceeds for that reason primarily, so as to make that improper purpose the attorney’s own, he or she should not escape the consequences of that choice. In that circumstance, the client and the attorney will both share in liability to the non-client for the consequence of their joint endeavor.”

The plaintiffs (beach club owners) were represented by Thomas J. Hirsch. Defendants were represented by Ira Karasick and Joan Pransky.

Georgia Court of Appeals Reinstates Libel Claim Against Trade Publication

Jury Should Decide Issues of Falsity and Negligence

The Georgia Court of Appeals reinstated a libel claim against VNU Media, publisher of *AdWeek* magazine, over a statement that plaintiff was “demoted for poor performance.” The court rejected the publisher’s argument that “poor performance” was a statement of opinion, finding instead that it referred to a verifiable – and disputed – issue of fact. *Gettner v. Fitzgerald*, No. A09A0155, 2009 WL 839932 (Ga. App. April 1, 2009) (Ellington, Johnson, Mikell, JJ.).

In addition, the court held that an issue of fact existed as to whether *AdWeek* negligently published the story. The source for the statement was plaintiff’s then boss and the reporter conducted no further investigation of the statement. The court held that under the circumstances a jury could find that the reporter should have conducted her own investigation of the statement and questioned the reliability of the boss’s account.

Background.

The plaintiff Mark Gettner was an advertising executive with Fitzgerald & Co. in Atlanta. According to his complaint, plaintiff was promoted to creative director at the agency in 2001, but a year later asked to return to his former position. The seeds of a lawsuit were planted when Fitzgerald emailed Alicia Griswold, a reporter for *AdWeek*, to ask if she knew of any good creative directors on the market because Gettner had “stepped down.” When pressed for the real story Fitzgerald said that plaintiff was demoted for poor performance, but he asked the reporter not to publish that information.

In March 2003, plaintiff was terminated. The next month *AdWeek* published its annual “Agency Report Cards” and noted under the entry for Fitzgerald & Co. that “CEO Dave Fitzgerald demoted [Executive Creative Director] Mark Gettner [in 2002] after poor performance ...” Gettner sued VNU for libel and his former employer for disclosure of private facts and misappropriation for displaying his photography on the company website after he left. The trial court granted summary judgment to the defendants on all claims.

Libel Claim Against VNU Reinstated

The Court of Appeal affirmed summary judgment for the employer. The court held that plaintiff released his employer

for the private facts claim and failed to show that his employer obtained any benefit by continuing to have plaintiff’s photograph on the company’s website for some time after his termination. But the court reinstated the libel claim against the magazine, holding that the statement that plaintiff was demoted for poor performance could be defamatory and that issues of fact existed as to both falsity and fault.

As to defamatory meaning, the court reasoned that “if, as Gettner contends, he can prove that Fitzgerald demoted him for reasons other than unsatisfactory performance, then the defamatory statement is capable of being proved false. VNU cannot avoid liability solely by labeling the report an ‘opinion.’”

As to falsity, the court found that a disputed issue of fact existed as to whether plaintiff was demoted for “poor performance.” The plaintiff introduced evidence that he had requested a voluntary demotion. Thus even if his employer was dissatisfied with his work, the magazine article could be found false if the demotion was based on plaintiff’s request for a change in position at the agency.

As to fault the court held that plaintiff was a private figure, finding that while the magazine report “may have appealed to its readers’ ‘morbid or prurient curiosity,’” it did not involve a public controversy. Finally, as to negligence, the court found that a jury could find that the reporter breached the applicable standard of care by failing to independently verify the employer’s statement about plaintiff’s demotion. This was particularly so, the court found, given the length of time (roughly nine months) between the reporter’s discussion with the employer-source and publication of the article. This was ample time for the reporter to “conduct a more thorough investigation of the circumstances of Gettner’s demotion.” Moreover, a jury could find that the reporter should have questioned the source’s truthfulness where his characterization of plaintiff’s demotion conflicted with his original account and where he asked the reporter not to publish the information.

Plaintiff is represented by Amanda Farahany, Atlanta. VNU Business Media is represented by Kenneth Menendez, Epstein, Becker Green, Atlanta.

Florida Legislature Passes Bill On Non-Recognition of Foreign Defamation Judgments

After Passing Both Houses Unanimously, Bill Awaits Signature by Governor

By Jennifer A. Mansfield

Although Florida is internationally known for its tourism industry, there is one form of tourism that its legislature seeks to quash: libel tourism. To that end, on April 30, 2009, the Florida Senate passed by a vote of 40-0 a bill providing for the non-recognition of a foreign defamation judgment unless a Florida court first determines that the defamation law applied in the foreign country provided at least as much free speech and press protections as would be provided by the United States and Florida constitutions.

The Florida House of Representatives had previously passed the bill, HB 949, on April 16, 2009, by a vote of 115 to 0. Identical bills were filed in the Florida Senate and House on January 29, 2009 and February 17, 2009, respectively. The Senate bill, [SB1066](#), was tabled in favor of the House version. It is currently awaiting transmittal to the Florida Governor, Charlie Crist, who is expected to sign the bill into law.

Like legislation pending in other states, the Florida legislation is a reaction to “libel tourism,” where plaintiffs go to foreign countries with plaintiff-friendly defamation laws because similar suits in the United States would not withstand First Amendment scrutiny. The Florida Senate Judiciary Committee’s bill analysis refers to English defamation law specifically, but notes that while England is the primary destination for libel tourism, Singapore, New Zealand, Kyrgyzstan, and Australia are also considered plaintiff-friendly. The legislation addresses the libel tourism problem by ensuring that free speech and press protections cannot be evaded by plaintiffs obtaining defamation judgments in foreign courts, only to return to Florida in order to enforce the judgments obtained.

The legislation also provides for personal jurisdiction over both plaintiffs and defendants in the Florida courts for the purpose of determining whether a foreign defamation judgment should be deemed non-recognizable. If approved by the Florida Governor, the bill will take effect July 1, 2009. However, the legislation specifically states that it is to be retroactive, “appl[ying] to judgments rendered in defamation proceedings outside the United States before, on, or

after July 1, 2009.” The Florida Senate Judiciary Committee’s bill analysis notes that the constitutionality of the retroactivity provision will hinge on whether the courts interpret the legislation as affecting substantive rights, noting that statutes that relate only to remedies or procedure can be applied retroactively.

Last year, New York became the first state to pass libel tourism legislation, titled the “Libel Terrorism Protection Act,” 2008 N.Y. Sess. Laws ch. 66 (S. 6687-C), which provided for the non-recognition of foreign defamation judgments. That legislation, also referred to as “Rachel’s Law,” was passed in reaction to the situation of Rachel Ehrenfeld (“Ehrenfeld”), who wrote a book in 2003 alleging that a prominent Saudi businessman, Khalid bin Mahfouz, financed terrorism. The book was only published in the United States, but a few copies were sold over the Internet and made their way to England, which the British courts found sufficient for jurisdiction over the Saudi’s libel suit. The British court then allowed a default judgment against Ehrenfeld of \$250,000 plus other penalties. She attempted to have a federal court in New York declare the foreign judgment non-enforceable but the court dismissed the suit for lack of personal jurisdiction over Khalid bin Mahfouz, thus prompting the New York legislation. In a written statement to Congress on February 12, 2009, Ehrenfeld stated that instances such as hers cause self-censorship, chilling free speech and the press.

Illinois was the next state to pass libel tourism protection legislation, effective August 19, 2008. Illinois Public Act 95-0865 (2008), codified at 735 Ill. Comp. Stat. §2-209, §12-621 (9/2009). A California bill was also unanimously passed by the state senate on April 28, 2009, and the New Jersey Senate Judiciary Committee this month recommended passage of a bill, S-1643, also aimed to prevent libel tourism. Like the Florida legislation, the foregoing states’ legislation is substantially similar to the New York law.

On the federal level, in 2008, two bills were introduced in the United States House of Representatives in an effort to combat libel tourism. The first, H.R. 5814, 110th Congress

(Continued on page 30)

Florida Legislature Passes Bill On Non-Recognition of Foreign Defamation Judgments

(Continued from page 29)

(2008) died in committee. The second, H.R. 6146, 110th Congress (2008), passed the House, but was not taken up by the Senate. The Senate also failed to move ahead on its own libel tourism bill, S.2977, in 2008. This year, however Congress is considering the Free Speech Protection Act of 2009, (S. 449 and H.R. 1304), which is considered a stronger bill than last year's, as it would, among other things, allow writers subjected to libel tourism suits in foreign countries to countersue in the United States for treble damages.

Upon the unanimous passage of the Florida bill by the House of Representatives, the bill's sponsor, Representative Charles E. Van Zant (R-Keystone Heights), was quoted by the American Center for Democracy as saying: "This bill protects all Floridians' fundamental right to the freedom of

speech and press without fear of reprisal from foreign courts. Political speech is a right we as Americans and Floridians hold dear. This law will ensure that no Floridian will ever have to answer to terrorists as a result of their criticism of terrorism, or its enablers."

The American Center for Democracy also quoted Florida House Majority Leader, Adam Hasner (R-Boca Raton) as stating, "This bill protects Floridians from having their right to free speech suppressed by those with radical ideologies. Foreign courts that do not place the same value on our constitutionally guaranteed freedom of speech will no longer be used to intimidate Florida citizens."

Jennifer A. Mansfield is a partner with Holland & Knight LLP in its Jacksonville, Florida office.

Libel Tourism Bill Introduced in New Jersey Judiciary Committee Reports Out Bill to Limit Enforcement of Foreign Libel Judgments

The New Jersey Senate Judiciary Committee this month reported out a libel tourism bill designed to restrict the enforcement of foreign libel judgments. The bill, [SB 1643](#), was introduced this month by State Senators Loretta Weinberg and Robert Singer.

The current version of the bill provides in relevant part that "A foreign country money-judgment need not be recognized if ...

the cause of action resulted in a defamation judgment obtained in a foreign country, unless, prior to the collection of the judgment, a court in this State first determines that the defamation law applied in the foreign country provides at least as much protection for freedom of speech and press as is provided by the Constitutions of the United States and New Jersey.

If enacted the bill would take effect immediately.

California Anti-Label Tourism Bill Getting Broad Support

Bill Will Likely Reach Governor's Desk

By Thomas W. Newton

Legislation introduced in the California State Legislature early this year to combat libel tourism is picking up speed and will likely reach Gov. Arnold Schwarzenegger's desk soon. Sponsored by the California Newspaper Publishers Association and authored by Senate Judiciary Committee Chairwoman Ellen Corbett (D-San Leandro), [SB 320](#) would prohibit state courts from recognizing a defamation judgment obtained in a foreign jurisdiction, unless the court determines the defamation law applied in the case provided at least as much protection for freedom of expression as offered by the First Amendment and California Constitution.

The bill has received bipartisan support, passing the Senate Judiciary Committee on a 5-0 vote and the full Senate 38-0. SB 320 would amend the state's Uniform Foreign-Country Money Judgments Act, which requires, with certain exceptions, California courts to recognize a foreign-country money judgment and allows a judgment creditor to invoke enforcement procedures against a California resident or asset. SB 320 would add an exemption to the law. Senators Arlen Specter and Joseph Lieberman have introduced similar federal legislation. S. 449 would prohibit federal courts from recognizing libel judgments deemed inconsistent with the First Amendment.

Corbett's bill is intended to stop the increasingly popular practice of suing U.S. journalists and authors in libel-friendly foreign courts, and then attempting to enforce the judgment (usually obtained by default) in a California court. British libel law, for example, presumes a statement is false and places the burden of truth on the defendant. It has become a jurisdictional Mecca for the rich and famous. On the other hand, U.S. law, and especially California, places difficult burdens on plaintiffs to prove falsity and defamatory content, and requires them to clear many other tall hurdles intended to protect free expression under the First Amendment.

The New York legislature enacted protective legislation last year after Rachel Ehrenfeld – an Israeli-born writer living in the United States – was sued by billionaire Saudi entrepreneur Khalid Salim bin Mahfouz in London for her book, *Funding Evil*, which accused Bin Mahfouz of financing Islamic terrorist groups. Ehrenfeld's book was not published in London, but Bin Mahfouz was able to establish jurisdiction because 23 copies of the book were purchased there online. Ehrenfeld determined not to submit to the court's jurisdiction and Bin Mahfouz was awarded a \$225,000 default judgment.

While Bin Mahfouz has not attempted to enforce the judgment in the U.S., Ehrenfeld contends it has had an intense chilling impact on writing about terrorism. "It has not only affected me," Ehrenfeld said in an interview. "Publishers are also afraid to mention any Saudi financier of terrorism, even if the evidence is there. The intimidation factor has worked very well to silence the media."

CNPA and Corbett hope her bill will limit the exposure to California writers, diminish the chilling impact of libel tourism on aggressive reporting about important international issues, and ultimately, pressure foreign jurisdictions like Britain to change its laws to place greater protections on free speech.

While no individuals or groups have formally opposed SB 320, the California Judicial Council – the administrative arm of the courts – has met with the author and sponsor and suggested technical amendments to the bill to clarify the procedures judges will use to determine whether a foreign-court defamation judgment will be recognized. These amendments will likely be taken in the Assembly Judiciary Committee. While Gov. Schwarzenegger has not said whether he will sign the bill, staff from his Office of Policy Research has contacted CNPA and said it will recommend a support position.

Thomas W. Newton is General Counsel of the California Newspaper Publishers Association.

Save the Date!

MLRC London Conference 2009

October 1-2, 2009

Stationers' Hall, London

International Developments in Libel, Privacy Newsgathering and New Media IP Law



Keynote Address: Lord Hoffmann, House of Lords
Speech by Justice Ruth McColl, Supreme Court New South Wales Australia
In-House Counsel Breakfast on practice and management issues
Delegates receptions on September 30th and October 1st

Discussion topics include:

- Liability for third-party content posted online in the UK and Europe
- Libel Terrorism Protection Acts and enforcement of judgments
- The right to be left alone in public – the continuing evolution of the Princess Caroline privacy decision
- Reporting on terrorism: How has the fight against terrorism impacted reporting?
- Fair use and fair dealing in the digital media environment

For information contact Dave
Heller at dheller@medialaw.org



Tennessee Court Rejects Effort to Limit Anonymous Internet Speech Relating to Criminal Proceeding

By Elizabeth Spainhour

In April 2009, the Criminal Court for Knox County, Tennessee, denied motions to prohibit or limit anonymous Internet commentary about a capital murder proceeding. *Tennessee v. Cobbins*, Capital Case Nos. 86216 A, 86216 B, 86216 C, 86216 D.

The case, involves a confluence of constitutional issues. The court’s order denying the motions to restrict media coverage illustrates the conflict between the First Amendment right of the media to cover criminal proceedings and the Sixth Amendment right of criminal defendants to receive a fair trial. It also involves threatened prior restraints on media coverage and the First Amendment right to engage in anonymous speech on the Internet.

Background

Tennessee v. Cobbins is a capital case that involves four defendants who have been charged in the deaths of two people. The charges against the defendants include allegations of carjacking, rape, and murder—the *Cobbins* case has generated significant attention and bears the classic signs of a “sensational” case.

In February 2009, defendants’ counsel filed motions seeking to prohibit or otherwise restrict anonymous online comments about the criminal proceeding that are posted on websites published by local newspapers and broadcasters. The defendants argued, among other issues, that anonymous posters would be less likely to make inflammatory, potentially prejudicial comments if those comments were publicly attributed to the posters by name.

The *Knoxville News Sentinel* and WBIR-TV, Knoxville, Tennessee, moved to intervene in the *Cobbins* case and oppose the motions to

prohibit or limit the anonymous speech. Both

defendants’ counsel filed motions seeking to prohibit or otherwise restrict anonymous online comments about the criminal proceeding

media companies operate websites that allow interested parties to post anonymous comments on their respective websites.

The Knox County Criminal Court used the familiar three-part test from *Nebraska Press Association v. Stuart*, 427 U.S.

539 (1976), to determine whether, in this case, a prior restraint on protected speech would be justified. *Nebraska Press Association* requires the court to determine (1) the nature and extent of pretrial publicity, (2) whether alternative measures would be likely to mitigate the effects of unrestrained pretrial publicity, and (3) how effectively a restraining order would operate to prevent the threatened danger. The court in the *Cobbins* case found that the balance weighed against entry of a prior restraint:

In this case, the publicity has been extensive, detailed, and arguably misleading at times from a legal perspective. The relief sought currently is not the complete bar of media coverage of the proceedings, but rather a bar to the sharing of ideas between citizens who read or listen to the local media reports concerning this case, who wish to make anonymous public comment on the same in the media internet forums. This Court has already granted alternative measures to mitigate the effects of unrestrained pretrial publicity by granting a change of venire to those defendants who have made the request; therefore, the juries who will hear and decide the charges will not be from the local media coverage area. The relief sought also would not necessarily effectively operate to prevent the threatened danger. Counsel asserts that the restraint is necessary to ensure the effective representation of the defendants. Only two media outlets intervened in these proceedings. The internet is not restricted to use by the media alone. Private citizens have access to and utilize the internet everyday to freely discuss and exchange ideas whether on the internet forums of the two media outlets or otherwise.

Considering all the factors, this Court cannot find that disabling the internet

forums of the media internet sites would be an appropriate restraint.

(Continued on page 34)

Tennessee Court Rejects Effort to Limit Anonymous Internet Speech Relating to Criminal Proceeding*(Continued from page 33)*

Tennessee v. Cobbins, Capital Case Nos. 86216 A, 86216 B, 86216 C, 86216 D, Order Denying Motions to Restrict Media Coverage at 5 (Apr. 14, 2009).

In striking the balance between the First Amendment rights of the media intervenors and Internet posters and the Sixth Amendment rights of the accused, the court considered the well established First Amendment interests in anonymous speech. The court recognized that “[t]he right to speak anonymously was of fundamental importance to the establishment of our Constitution.” *Id.* at 6 (quoting *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092-93 (W.D. Wash. 2001)). Moreover, the right to speak anonymously applies with equal force to speech on the Internet. Indeed, “the ‘ability to speak one’s mind’ on the Internet ‘without the burden of the other party knowing all the facts about one’s identity can foster open communication and robust debate.’” *Id.* (quoting *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999)). The court held that as long as anonymous commenters posting comments about the *Cobbins* proceeding do not engage in unlawful conduct, “they should be free to anonymously participate in online forums.”

In addition to the fair trial argument, the attorneys for at least one of the four *Cobbins* defendants also argued that the online commentary posed a threat to the attorneys’ safety and, therefore, jeopardized their client’s right to effective assistance of counsel. Counsel for this defendant asked the court to allow each attorney who so requested to withdraw from the case if the court declined to limit the online commentary. Ultimately, the court determined that the speech “did not rise to a level which would require allowing counsel to withdraw at this time.”

The Knox County Criminal Court’s Order Denying Motions to Restrict Media Coverage is available online from the *Knoxville News Sentinel* at <http://web.knoxnews.com/pdf/041509carjack-baumgartner-comments.pdf> and WBIR-TV at http://www.wbir.com/pdf/04142009_thomas_ruling.pdf.

Elizabeth Spainhour is a Communications and Media attorney at Brooks Pierce in Raleigh, North Carolina. WBIR-TV was represented by Thomas McAdams and C. Scott Taylor of Bernstein, Stair & McAdams LLP in Knoxville, TN. The Knoxville News Sentinel was represented by Richard L. Hollow, Hollow & Hollow LLC, Knoxville, TN.

MLRC MediaLawLetter Committee

Thomas M. Clyde (Chair)

David Tomlin (Chair)

Dave Heller (Editor)

Robert D. Balin

Michael Berry

Katherine M. Bolger

Jay Ward Brown

Robert J. Dreps

Jon Epstein

Rachel E. Fugate

Michael A. Giudicessi

Charles J. Glasser

Richard M. Goehler

Karlene Goller

Shelley M. Hall

Russell T. Hickey

David Hooper

Leslie Machado

John Paterson

Deborah H. Patterson

Bruce S. Rosen

Indira Satyendra

Court Adopts “Sunshine Provision” in Sealing Order

By Jonathan Donnellan and Ravi V. Sitwala

In a recent decision from the Northern District of New York, *United States v. Strevell*, No. 05-CR-477, 2009 WL 577910, 37 Media L. Rep. 1545 (N.D.N.Y. Mar. 4, 2009), Judge Gary Sharpe adopted the *Albany Times Union*'s argument and included a “sunshine provision” in its sealing order, providing a date certain when the sealing order would automatically expire. The purpose of the sunshine provision, the court recognized, was to help narrowly tailor an already limited sealing order while properly maintaining the burden of justifying continued sealing on the party seeking to deny the public's rights of access to court records.

Access to Sentencing Materials Sought

In early 2007, after J. Felix Strevell pled guilty to honest-services fraud, both Strevell and the government filed sentencing memoranda and letters under seal. The public plea agreement contained promises of cooperation by Strevell in the Government's investigation of other individuals, and the sealed materials presumably concerned that cooperation.

The *Times Union* sought access to those records and moved to intervene and unseal them. The Court heard argument on the motion and, after detailing some limited redaction the Court believed was warranted, ordered Strevell and the government to submit proposed redacted copies of the memoranda and support for the proposed redactions. The Court also ordered the *Times Union* to provide support for its request at the hearing that any sealing contain a sunshine date – a date certain upon which any sealing would expire absent a later motion to continue sealing.

Court Recognizes Right of Access to Sentencing Materials

The *Times Union* submitted briefing both on the general sealing issues as well as in support of the inclusion of a sunshine provision in any sealing order entered. As a general matter, the paper argued that the common law and the First Amendment both provide a right of access to the sentencing memoranda, and the Court found these rights to be “firmly established.” However, the Court recognized that these rights are not absolute, and may be restricted based on com-

elling interests, so long as the restriction is narrowly tailored to serve those interests. Among the compelling interests that could justify sealing, the Court identified law-enforcement interests and individuals' privacy interests, both asserted in support of sealing the sentencing records. But the Court was careful to point out that mere recitation of such interests is insufficient; there must be specific, on-the-record findings to justify any sealing. As to narrow tailoring, the Court explained that redaction often serves to achieve the right balance, but that the Court cannot rely on the party requesting sealing to properly redact and that redaction cannot be used to “render[] information unintelligible.”

Most Document Unsealed

Addressing the documents at issue (which grew to include in addition to the sentencing memoranda nearly all of the papers filed by Strevell and the Government in connection with the sealing issue), the Court noted that the fact of Strevell's cooperation was already disclosed through the plea and that most personal information ought not be shielded by nebulous privacy concerns, particularly where the information “serves as a basis for sentencing advocacy.” The Court found the parties' proposed redactions to the sentencing memorandum overbroad and ordered that its own redacted version be publicly filed. And the Court ordered the Government's sentencing letter to be disclosed in its entirety. However, the Court ordered that the Government's later-filed sentencing memorandum remain sealed. It found that the remaining documents did not reveal anything that was not already public, and ordered them unsealed. The Court filed a document under seal containing its specific reasons for the continued sealing.

“Sunshine Provision” Incorporated to Limited Sealing Order

The Court then considered the *Times Union*'s request for a sunshine provision in its sealing order, making the documents public after a defined period, absent a later motion to continue sealing (with the burden of justifying continued sealing falling on the party seeking it). The paper con-

(Continued on page 36)

Court Adopts “Sunshine Provision” in Sealing Order

tended the narrow tailoring required by the First Amendment and common law rights of access affected the duration of sealing as well as its scope, and that a fixed limitation on duration properly balanced the government’s interest in safeguarding an ongoing investigation with the rights of access. This would maintain the burden on the Government or other party seeking continued sealing, as only it would possess information regarding whether such sealing was still justified.

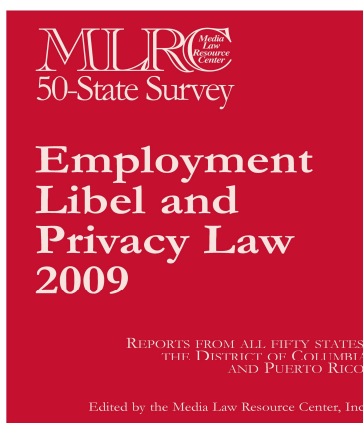
In the absence of direct precedent, the *Times Union* cited analogous cases supporting the concept of a sunshine provision. In particular, the Second Circuit’s decision in *United States v. Moten* explained that the “government’s interest in its ongoing investigation does not go on forever” and the “the government bears a continuing burden of justifying the need for secrecy.” The paper also cited in a supplemental filing a federal magistrate’s decision from the Southern District of Texas that was issued after its motion was submitted. In *In re Sealing and Non-Disclosure of Pen/Trap/2703 (D) Orders*, the court held that “sealing and non-disclosure of electronic surveillance orders must be neither permanent nor, what amounts to the same thing, indefinite” and that “such restrictions on speech and public access are presumptively justified while the investigation is ongoing, but that justification has an expiration date.” The court further held that the sealing of the surveillance orders would extend for 180 days and the Government would be given 30 days notice prior to unsealing to request continued sealing, “but a

correspondingly greater specificity in the certification will be required for each such extension.”

After considering the *Times Union*’s arguments, the Court found a sunshine provision warranted. It recognized that any sealing was “disfavored” and that the sunshine provision “helps to ensure that the sealing . . . is narrowly tailored” and “properly places the non-disclosure burden on the party seeking an exemption to the presumption of access rule.” The Court ordered a one-year sunshine date. No party appealed (although the Government did submit a cryptic letter to the Court purporting to reserve its rights to argue that the burden to justify unsealing must be carried by the party seeking unsealing at the end of the one-year sealing period notwithstanding the fact that the sealing order by its own terms would expire at that time).

The *Strevell* decision provides a useful precedent to ensure that court records are not made secret forever in cases where a party initially meets its burden to justify sealing. While it is of course true that delayed disclosure is no substitute for immediate access, the combination of scrutinizing the alleged compelling interests offered by those seeking secrecy and the use of limited redaction and sunshine provisions can ensure that the public’s access to court records is maximized in each instance.

The Times Union was represented by Hearst in-house counsel Jonathan Donnellan and Ravi V. Sitwala.



MLRC 50-STATE SURVEY: EMPLOYMENT LIBEL AND PRIVACY LAW 2009

TOPICS INCLUDE: Publication • Compelled Self-Publication • Fault Standards • Damages • Recurring Fact Patterns • Privileges and Defenses • Procedural Issues • Employer Testing of Employees • Searches • Monitoring of Employees • Activities Outside the Workplace • Records • Negligent Hiring • Intentional Infliction of Emotional Distress • Interference with Economic Advantage • Prima Facie Tort

For access to an order form please click this ad.

Texas Becomes Number 37 in States that have a Reporter's Privilege

By Laura Lee Prather

On May 13, 2009, Texas became the thirty-seventh state to enact a reporter's privilege. The law was signed by Governor Rick Perry that day and became effectively immediately. Texans have tried for decades to get a law like this on the books. In recent history, legislation was proposed during the last three sessions.

In 2005, the major accomplishment was getting the broadcast and the print media to speak with one voice on the issue and to both support the measure. In 2007, the bill would have passed but for a last minute point of order killing the bill on a technicality. The 2009 session, however, proved that the third time was indeed a charm.

The bill that was proposed the last three sessions is a qualified privilege patterned in large part after the Department of Justice Guidelines. In 2007, there were two chief opponents to the legislation – law enforcement and the business community. During the last session, we were able to negotiate with the business community to alleviate their concerns about disclosure of trade secrets and other information they deemed to be “private” or “proprietary” in nature.

Ultimately the business community groups signed a letter to the Legislature indicating they no longer opposed the bill. Unfortunately, despite repeated efforts, there were no fruitful negotiations with the prosecutors last session. Indeed, it was the former District Attorney from Houston (who was since been indicted) who actually supplied the point of order that killed the bill in 2007.

The 2009 legislative session proved to be different. During the interim, we suffered some setbacks, with our House sponsor being defeated in a primary election and the uncertainty of who would carry the legislation in the House this time. Luckily, our long-time sponsors in the Senate – Senator Rodney Ellis (D-Houston) and Senator Robert Duncan (R-Lubbock) remained steadfast supporters of the legislation and agreed to sponsor the bill again in 2009.

The newspapers and the broadcasters also continued to work hard to better educate people through grass roots efforts and the establishment of a very informative website – www.freeflowact.com. The website gives examples of demonstrated need for the law, shows what laws have been adopted in other states and when their laws were enacted,

provides editorials on the issue, and has a section on subpoena abuse and prosecutorial misconduct.

Ultimately we were able to find a new sponsor in the House Representative, Trey Martinez-Fischer from San Antonio. Still, for other reasons, the start of the 2009 session was a rocky one. There was a change in the leadership in the House of Representatives, and Texas' long-time Speaker of the House (Rep. Tom Craddick) was ousted at the beginning of this session. This meant that the make up of all of the committees and committee chairmanships changed – including the committee our bill would be heard before.

HB 670 was heard by the House Judiciary and Civil Jurisprudence committee this time around, and there were only three returning members of the committee who had heard the issue in previous sessions. We were concerned that the learning curve would be detrimental to our cause. What we did not anticipate was the strength of the new chairman of the committee – Chairman Todd Hunter (R-Corpus Christi).

From the beginning, Chairman Hunter worked to have the bill heard early – which is key in Texas because our Legislature only meets five months out of every two years. Chairman Hunter also put tremendous pressure on the prosecutorial community to sit down and have a meaningful discussion and negotiate with the media on the bill. He made it clear that the train was leaving the station, and they could either get on board or not. As a result of Chairman Hunter's tenacity and dedication, we had four different negotiation sessions with the prosecutors – the final one lasting more than thirteen hours. In the end, we had a bill that everyone could agree upon, and the bill sailed through the House and the Senate with unanimous votes on third reading.

The bill is a qualified privilege, and during the negotiations with the prosecutors, we separated it into two different sections. The civil section has a three prong test one must overcome in order to require a reporter to testify or produce materials. The party who issues the subpoena must establish by clear and convincing evidence that: (1) they exhausted all reasonable efforts to get the information elsewhere, (2) the information is relevant and material to the proper administration of justice, and (3) the information sought is essential to the maintenance of the claim or de-

(Continued on page 38)

Texas Becomes Number 37 in States that have a Reporter's Privilege

fense of the person asking for it. In the civil arena, the same test applies whether one is seeking confidential or nonconfidential information or published or unpublished information.

The criminal section, on the other hand, is separated into three parts with different tests applying to different matters. The first part deals with confidential sources, the next with work product and nonconfidential sources, and the third with published information. When a confidential source is involved, there is an absolute privilege except to the extent that (1) the journalist was an eye witness to a felony, (2) the journalist received a confession of the commission of a felony, or (3) probable cause exists that the source committed a felony. In those three scenarios, the only hurdle one must overcome before calling the journalist to testify is establishing by clear and specific evidence that they have exhausted all reasonable efforts to get the information elsewhere.

Further, a journalist can be compelled to give up his confidential source if disclosure is reasonably necessary to stop or prevent reasonably certain death or substantial bodily harm. With regard to unpublished materials in the criminal setting, the same three part test as the civil arena applies. Published materials are not covered by the statute

so one would look to common law with regard to those materials.

In addition to the foregoing, there are three unique and interesting twists to the Texas law. First, with regard to criminal subpoenas, the elected district attorney is required to sign all subpoenas issued to journalists. Second, again with regard to criminal subpoenas, the subpoenaing party is required to pay the journalist a reasonable fee for the journalist's time and costs incurred in responding to the subpoena. Last, the law added a provision to make broadcasts self-authenticating, like newspaper articles, so that a reporter will not have to be put on the stand solely for the purpose of authenticating a broadcast tape.

It has been a monumental undertaking to get this law passed in Texas, and there are many people who have helped make this quest a reality. We thank all of those who have assisted in the effort and each of the lawmakers who voted in favor of passing a law that will benefit all Texas citizens – the Texas Free Flow of Information Act.

Laura Lee Prather is a partner in the Austin, Texas office of Sedgwick, Detert, Moran & Arnold LLP.

WHITE PAPER ON THE REPORTER'S PRIVILEGE

In 2004, the MLRC Institute published the Media Law Resource Center White Paper on the Reporter's Privilege, a series of articles that assess the history of the reporter's privilege and the arguments and empirical rationales that support it.

[To view click here](#)

Georgia District Court Denies Effort by Journalism School Dean to Compel Disclosure of Confidential Source

Plaintiff Failed to Exhaust Alternatives and Show Information Necessary

By Tom Clyde

On April 30, 2009, the district court for the Northern District of Georgia overturned a troubling order issued by a Magistrate Judge that had required a former *Atlanta Journal-Constitution* journalist to disclose the identity of a confidential source. *Soloski v. Board of Regents of Univ. System of Ga.*, Case No. 06-cv-3043 (N.D. Ga.).

The controversy over the confidential source arose in an unusual context. The party moving to compel disclosure was none other than a former journalism school dean. Professor John Soloski previously ran the University of Georgia's Grady College of Journalism and Mass Communication and is currently a tenured faculty member there.

Nevertheless, in connection with a lawsuit claiming that the University violated his constitutional rights when it found that he had breached the University's sexual harassment policy, Soloski noticed the deposition of former *Journal-Constitution* reporter Kelly Simmons. Soloski made clear that he intended to compel her to reveal the confidential source or sources who alerted her that an investigation was underway, which allowed her to break the first news story on the University's inquiry into Soloski's conduct.

In response to the subpoena, Simmons invoked Georgia's statutory reporter's privilege, O.C.G.A. § 24-9-30 – a privilege that has never been overcome in connection with a confidential source since its passage in 1992. However, on January 30, 2009, U.S. Magistrate Judge Christopher Hagy issued an order denying the *Journal-Constitution's* motion to quash Simmons' deposition.

On April 30, 2009, however, U.S. Senior District Judge Marvin Shoob vacated the Magistrate's Order and granted the motion to quash, finding that Simmons was protected by Georgia's statutory privilege. Pursuant to Fed. R. Civ. P. 72 (a), Judge Shoob was authorized to set aside the Magistrate Judge's Order if it was "clearly erroneous or contrary to law." Judge Shoob found clear error in at least two respects: (1) the Magistrate Judge's finding on exhaustion of alternative sources, and (2) the Magistrate Judge's finding

on the "necessity" of the identity of the confidential source to the case.

Plaintiff Failed to Exhaust Alternative Means

In reversing the Magistrate Court's order, Judge Shoob concluded that it was error to find that Soloski had made reasonable efforts to use alternative means to determine who spoke with Simmons about the then-ongoing investigation. Judge Shoob determined that Soloski had failed to depose the vast majority of the individuals interviewed as part of the investigation, including Soloski's accuser.

The court noted that by failing to depose Soloski's accuser, "who arguably had the greatest interest in publicizing the investigation, plaintiff clearly failed to 'beat the bushes' to identify Ms. Simmons' source." *Slip op.* at 7, n.1 (quoting *Price v. Time Inc.*, 417 F.3d 1327, 1348 (11th Cir. 2005)).

The court was particularly critical of Soloski's reliance on a stipulation entered into with the defendants. The stipulation stated that the depositions of several University administrators had established that the identity of the source "could not be reasonably obtained other than by asking Ms. Simmons directly." The court explained:

[T]he duty to exhaust reasonable alternative sources of information is not one that the parties can simply "stipulate" away. Nor is the Court required to accept a self-interested stipulation that is patently false.

Slip op. at 8.

The court then denied Soloski's request that he be allowed to conduct the necessary depositions, finding that to grant the request would require reopening discovery at a very late stage in the case.

(Continued on page 40)

Georgia District Court Denies Effort by Journalism School Dean to Compel Disclosure of Confidential Source

Identity of Source Not Necessary to Case

Judge Shoob also rejected the Magistrate Judge's conclusion that the identity of the source was "necessary to the proper preparation of . . . [his] case." *Id.*

Although Simmons had been alerted to the ongoing investigation by a confidential source, the existence of the investigation was thereafter confirmed in an on-the-record statement by a University Provost. Moreover, Soloski himself then also spoke to Simmons about the lack of merit in the allegations that prompted the investigation.

Plaintiff's contention in issuing the subpoena to Simmons was that he needed to know the identity of her initial source to support an invasion of privacy claim. He claimed he had an actionable expectation of privacy under University rules that the investigation would be kept confidential by University officials until it reached a conclusion.

Judge Shoob, however, concluded that the identity of the initial source was *not* necessary to his privacy claim because the on-the-record confirmation of the investigation by a University official gave him an independent basis to allege a privacy violation if such a cause of action existed under Georgia law (an issue the Court did not reach). The court explained:

[R]egardless of whether Ms. Simmons' original source was a University official, [the Provost's] confirmation of the existence of the investigation would have constituted a separate and independent violation of the non-disclosure policy. Thus, the source of the original tip is, at best, redundant and unnecessary evidence.

Slip op. at 9.

The court emphasized that the article in which Soloski's privacy was allegedly invaded only reported that the investigation was ongoing based on the University's confirmation. All other details about the investigation were provided by and attributed to Soloski himself. Given the narrow scope of the story, the court concluded that the Provost's admitted confirmation of the existence of the investigation "already provides all the evidence plaintiff needs to prove his claim." *Slip op.* at 10.

Is The Case Over?

Dean Soloski's lawsuit has been marked, so far, with both successes and failures. In a prior order, Judge Shoob found that Soloski was entitled to the issuance of a writ of mandamus to the University requiring it to clear his employment record. The court found that the University's conclusion that he had committed sexual harassment was a gross abuse of discretion. Nonetheless, the court has otherwise dismissed all his claims for money damages. The invasion of privacy claim is the only claim left in Soloski's case that remains unresolved. At this juncture, the parties are participating in a mediation to determine if the case can be resolved.

Peter Canfield, Tom Clyde and Lesli Gaither of Dow Lohnes PLLC in Atlanta represent The Atlanta Journal-Constitution and reporter Kelly Simmons. Plaintiff John Soloski is represented by Brandon Hornsby and Austin Perry of Atlanta, Georgia. The University of Georgia is represented by Bryan K. Webb of Athens, Georgia, and Annette Marie Cowart of the Office of the State Attorney General.

ANY DEVELOPMENTS YOU THINK OTHER MLRC MEMBERS SHOULD KNOW ABOUT?

CALL US, OR SEND US A NOTE.

MEDIA LAW RESOURCE CENTER, INC.
520 EIGHTH AVE., NORTH TOWER 20TH FLOOR
NEW YORK, NY 10018

PH: 212.337.0200,
MEDIALAW@MEDIALAW.ORG

Fourth Circuit Affirms Summary Judgment for Plagiarism Detection Service

Digital Database a Fair Use; Important Implications For New Media

By Justin E. Klein

In a recent published decision, the United States Court of Appeals for the Fourth Circuit unanimously affirmed a district court decision granting summary judgment in favor of iParadigms, LLC, operator of the Turnitin® Plagiarism Detection Service, and dismissing a complaint for copyright infringement brought by four high school students based upon the archiving of their class assignments in the Turnitin system. *Vanderhuy v. iParadigms*, Nos. 08-1424, 08-1480 (4th Cir. April 16, 2009) (Wilkinson, Motz, Traxler, JJ.).

The Fourth Circuit decision has important implications for new media because, in finding that the classroom paper archiving at issue fell under the fair use exception to copyright infringement, the Fourth Circuit, like the Ninth Circuit decision in *Perfect 10 v. Google* (involving “highly transformative” thumbnail images in a search engine), recognized that the use of a copyrighted work could be transformative “in function or purpose without altering or actually adding to the original work.”

Background

Turnitin is a proprietary technology system, which evaluates the originality of written works in order to prevent plagiarism. The Turnitin system allows educators at schools and universities to check – via an online system, rather than manually – whether written works submitted by students are original. Schools and academic institutions make the choice about whether to use the Turnitin system.

Once a student work is submitted to Turnitin, the Turnitin system makes a “fingerprint” of the work by applying mathematical algorithms to its content. Using the digital fingerprint made of the student’s work, the Turnitin system compares the student’s work electronically to content available on the Internet (both currently and archived instances), student papers previously submitted to Turnitin, and commercial databases of journal articles and periodicals. The Turnitin system then produces an Originality Report for each submitted student work, which identifies the percentage of a student’s paper which is not original. It is then up to the student’s teacher or instructor to evaluate the Originality Report and address any issues with the student.

The Turnitin system then digitally archives the student’s submitted work – if requested by the participating school – so that the

work becomes part of the database used by Turnitin to evaluate the originality of other student’s works in the future. If a participating school determines that it does not want Turnitin to archive Student papers, then no archiving occurs.

It was the decision by plaintiffs’ respective school systems to elect to archive in the Turnitin system that caused plaintiffs, among others, to campaign against their respective school system’s policies implementing Turnitin and the archiving of student submissions. After failing to convince the school systems to change their policies, in the spring of 2007, plaintiffs filed suit in the United States District Court for the Eastern District of Virginia claiming that the archiving of their papers was a copyright infringement.

In the lower court, iParadigms defended the lawsuit and moved for summary judgment on two separate grounds, arguing: (1) that plaintiffs’ claims were precluded because they entered into a “valid contractual agreement,” containing an applicable limitation of liability clause, when they clicked “I agree,” accepting the terms and conditions of the use of the Turnitin web site; and (2) that the only act of copyright infringement alleged by plaintiff – the digital archiving of their student papers – constituted fair use under 17 U.S.C. § 107. As to the infringement claim, the lower court granted iParadigms’ motion for summary judgment and dismissed plaintiffs’ claims on both grounds.

iParadigms also asserted counterclaims against plaintiffs including, *inter alia*, claims against one plaintiff for violating the Computer Fraud and Abuse Act (“CFAA”), 18 U.S.C. § 1030, and the Virginia Computer Crimes Act (“VCCA”), Va. Code Ann. § 18.2-152.3, based upon plaintiff A.V.’s unauthorized use of an enrollment identification and password provided by plaintiffs’ counsel in order to access iParadigms’ computer services to submit his paper to a college where he was not enrolled. The archiving of the paper at issue in the counterclaims served as the basis for plaintiff A.V.’s claim for copyright infringement.

The lower court granted plaintiffs’ motion for summary judgment on iParadigms’ two computer fraud counterclaims. In dismissing the CFAA and VCCA claims, the lower court held that iParadigms’ alleged consequential damages responding to the improper use of the college password, did not come within the “economic damages” and “any damages” required under the CFAA and the VCCA respectively.

(Continued on page 42)

Fourth Circuit Affirms Summary Judgment for Plagiarism Detection Service

(Continued from page 41)

The Appeal

On appeal, the Fourth Circuit affirmed the lower court's findings on each of the fair use factors. On the first factor, the purpose and character of the use, the Fourth Circuit held that the "archiving of plaintiffs' papers was transformative and favored a finding of 'fair use'" because "iParadigms' use of these works was completely unrelated to expressive content and was instead aimed at detecting and discouraging plagiarism."

In resolving the first factor, the Fourth Circuit: (1) recognized that commercial use can still be a fair use; and (2) rejected plaintiffs' argument that iParadigms' use of their works was not transformative because the archiving process did not add anything to the work. Specifically, the Fourth Circuit, citing to the Ninth Circuit decision in *Perfect 10 v. Google*, stated that "[t]he use of a copyrighted work need not alter or augment the work to be transformative in nature" and held that "iParadigms' use of plaintiffs' works had an entirely different function and purpose than the original works; the fact that there was no substantive alteration to the works does not preclude the use from being transformative in nature."

With respect to the second fair use factor, the nature of the works, the Fourth Circuit affirmed the lower court's finding that the factor was neutral because even though the papers at issue were fictional and poetry and thus came "within the core of creative expression," "iParadigms' use of the works in the case—as part of a digitized database from which to compare the similarity of type-written characters used in other student works" was unrelated to any creative component in the works. In reaching its determination on this factor, the Fourth Circuit rejected plaintiffs' argument that iParadigms' use of plaintiffs' papers undermined plaintiffs' right to first publication.

In addressing the third fair use factor, the amount and substantiality of the portion used in relation to the work as a whole, the Fourth Circuit affirmed the lower court's determination that although iParadigms used the entirety of plaintiffs' works to perform the plagiarism detection service, the fact that iParadigms' use was transformative rendered the third factor neutral. The Fourth Circuit rejected plaintiffs' argument that the lower court improperly considered the transformative nature of the use in the third factor analysis and recognized that an overlap exists between the first and the third factor in the fair use analysis.

Finally, in resolving the fourth fair use factor, "the effect of the use upon the potential market for or value of the copyrighted work," the Fourth Circuit held that its focus was not on "whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but [upon] whether the secondary use usurps the market of the original work." The Fourth Circuit also recognized that "the analysis of whether the disputed use offers a market substitute for the original work overlaps to some extent with the question of whether the use was transformative."

In its analysis, the Fourth Circuit rejected most of plaintiffs' arguments as implausible in light of how the Turnitin system functions. However, the Fourth Circuit did address plaintiffs' only plausible argument, *i.e.*, did iParadigms' archiving, which arguably prevents plaintiffs from selling their papers to so-called "paper mills" such as www.ibuytermpapers.com, affect the marketability of plaintiffs' papers. The Fourth Circuit rejected this argument because (1) plaintiffs testified that they would not sell to cheat sites; and (2) no "market substitute was created by iParadigms, whose archived student works do not supplant the plaintiffs' works in the "paper mill" market so much as merely suppress demand for them, by keeping record of the fact that such works had been previously submitted." Thus, the Fourth Circuit affirmed the lower court's determination that the fourth factor favored iParadigms.

In analyzing all four factors together, the Fourth Circuit held that iParadigms' archiving of the papers was a fair use and affirmed the dismissal of plaintiffs' copyright infringement claim on that basis. Because the Fourth Circuit affirmed on fair use, the Fourth Circuit declined to address the question of whether the terms of the Clickwrap Agreement created an enforceable contract between plaintiffs and iParadigms.

The Fourth Circuit also reversed and remanded the dismissal of iParadigms' counterclaims for violations of the CFAA and the VCCA holding that the district court had construed "economic damages" under the CFAA and "any damages" under the VCCA too narrowly when it determined that iParadigms' alleged consequential damages were not cognizable under the statutes.

On May 12, 2009, the Fourth Circuit denied plaintiffs' petition for rehearing and petition for rehearing en banc.

James F. Rittinger, Joshua M. Rubins, and Justin E. Klein, of Satterlee Stephens Burke and Burke LLP in New York City represented iParadigms, LLC. Robert A. Vanderhye in McLean, Virginia represented plaintiffs.

Court Dismisses Claim that *Swing Vote* Infringed Plaintiff's Movie Treatment

No Substantial Similarity Between Movie and Treatment

By John Lynch

In a recent decision by the Eastern District of New York, Judge Joseph Bianco dismissed a copyright infringement claim against the creators, producers and distributors of last summer's movie *Swing Vote*. The plaintiff Bradley Blakeman, a political commentator and former Deputy Assistant to President George W. Bush, claimed that *Swing Vote*, the story of a lone voter who must break the tie in a deadlocked presidential election, infringed his copyrighted treatment for a movie that would feature the behind-the-scenes machinations of a presidential campaign. *Blakeman v. The Walt Disney Company, et al.*, 2009 WL 1285106 (E.D.N.Y. May 11, 2009).

The court found that any alleged similarities in the works are non-protectible *scenes a faire* that would be expected in any work concerning a fictional U.S. presidential election, and that the average observer would not consider plaintiff's treatment and *Swing Vote* to be substantially similar. In these circumstances, the court found that dismissal is warranted regardless of the lack of discovery on issues such as access, since no amount of discovery would change the fact that the works at issue are not substantially similar.

Background

As alleged in the complaint, in the Spring of 2006, Blakeman sent a treatment and an "amplification" titled "Go November" to defendant Kelsey Grammer and Grammer's production company, defendant Gramnet Productions. Subsequently, Blakeman met with Grammer and defendant Steven Stark, a Gramnet employee, in Hollywood to discuss Go November and a potential role therein for Grammer as a Republican President running for re-election.

The Go November amplification described the story as the "ANIMAL HOUSE of politics" where "[t]he likeable, moral President is running against a slick charismatic challenger. But the real battle is between the President's tough 'do anything to

win' campaign team and the challenger's idealistic young team that is ready to fight back with every trick they can muster." As the court described it, the movie *Swing Vote* "follows the journey of Bud Johnson, a recently laid-off single father, convicted felon, recreational drinker and resident of the fictional county

of Texico in New Mexico, struggling to raise his precocious, civic-minded

... no amount of discovery would change the fact that the works at issue are not substantially similar.

daughter Molly. Bud unwittingly becomes the focus of two presidential campaigns when a voting machine malfunction on Election Day casts him as the deciding vote in the race."

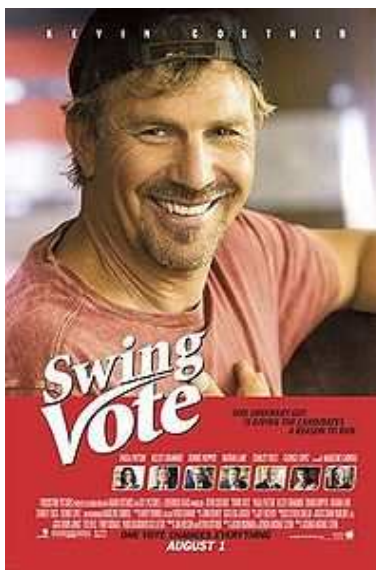
Swing Vote stars defendant Kevin Costner in the lead role of Bud Johnson. The film was produced by Costner's production companies, defendants *Swing Vote – The Movie Productions LLC* and *Treehouse Films, LLC*, and defendant Robin Jonas. The *Swing Vote* screenplay was co-written by defendants Jason Richman and Joshua Michael Stern, who also directed. Grammer played the role of the Republican President running for re-election. *Swing Vote* was distributed by Disney-related entities.

All of the defendants moved to dismiss the copyright infringement claim for failure to state a claim under FRCP 12(b)(6) on the ground that the works did not share probative similarities sufficient to establish that defendants had actually copied plaintiff's treatment, or, alternatively, that the works were not substantially similar with respect to protectible elements, thus precluding as a matter of law a claim of unlawful appropriation.

Defendant urged that such a conclusion can be reached on a motion to dismiss because the required analysis can be undertaken through a review of the respective works referred to in the complaint without need for discovery.

At oral argument, plaintiff's counsel conceded that nothing beyond a review of the respective works was required to determine substantial similarity. And, while the court acknowledged that copyright claims can be dismissed on a 12(b)(6) motion

(Continued on page 44)



Court Dismisses Claim that *Swing Vote* Infringed Plaintiff's Movie Treatment

(Continued from page 43)

where a comparison of the works reveals no substantial similarity, “in an abundance of caution,” the court converted the motion into one for summary judgment.

The Decision

The court declined to address whether the works lacked probative similarity so as to preclude a finding of actual copying, and moved directly to the question of substantial similarity of protectable elements, the lack of which would thwart the claim for copyright infringement even if probative similarities existed in the works as a whole. With respect to substantial similarity, the court concluded that “the main themes and plot of the respective works are entirely different.”

The court contrasted Go November's self-styled “Animal House” sensibility and its plot's emphasis on “dirty tricks” involving vandalism, trespass, voter fraud, bribery, file snooping and sexual liaisons with opposing campaign staffers with *Swing Vote*'s focus on the relationship between Bud Johnson and his daughter and his “personal journey ... from irresponsible oaf to concerned citizen.”

The court reasoned that “[t]o say that these movies are substantially similar because of the common theme of a Presidential election would be as irrational as saying the movie “Animal House” is substantially similar to “Rudy” or “Good Will Hunting” because the movies all focus on college life.”

The court noted that aside from similarity in the works' respective final scenes, none of the dozens of scenes described in plaintiff's treatment appear in *Swing Vote*, none of Go November's characters remotely resemble the three main characters in *Swing Vote*, and there is no similarity in the works' structure, sequence or pace.

The court took pains to address, and in turn reject, each of the similarities in the works asserted by plaintiff. Regarding alleged similarities in the works' characters – specifically the shared “Reagan-type” republican President and his liberal democratic challenger and their scheming political strategists – the court “note[d] that these characters . . . are hardly protected expressions of an idea, but rather ‘stock characters,’ and thus, not protected elements of a copyrighted work as *scenes a faire*.” The court also characterized depictions of “acts of questionable morality undertaken by political campaigns in an effort to prevail in an election” non-protectible *scenes a faire*, and found

that, in any event, the respective immoral acts in each work that plaintiff pointed out would be recognized by an “ordinary observer” as fundamentally different from each other.

The court rejected plaintiff's allegation that the works shared similar structure, sequence and pace, noting that the few scenes that plaintiff asserts are similar (primarily those involving the machinations of the candidates' campaigns) are broken up by and interspersed among lengthier scenes devoted to the relationships between Bud, his daughter, a local television reporter and their respective friends and co-workers, with 90 of the film's 120 minutes devoted to these relationships and only 30 minutes devoted to the candidates' campaigns.

In additions, the court found that the scenes depicting the main characters' interrelationships are qualitatively more influential on *Swing Vote*'s structure, pace and sequence than the secondary themes driven by the political characters.

Regarding the works' closing scenes – in *Swing Vote*, Bud enters the voting booth but his decision is not revealed, and in Go November a random, unidentified voter enters the booth, and his choice is likewise not identified – the court found that there were marked differences between the two, given Bud's unique role as the singular decision-maker in the election, and that the closing scenes were not particularly material to either works' overall plot.

Finally, the court rejected plaintiff's suggestion that it apply Ninth Circuit law, which plaintiff contended dictates a lower standard of proof for substantial similarity where a high degree of access is shown. (Defendants had conceded access only for purposes of their motion to dismiss.) The court found that it was bound to apply Second Circuit law to a copyright infringement claim, regardless of plaintiff's assertion that a “choice of law” analysis might dictate application of California law because most of the alleged acts underlying the claim occurred there. The court additionally concluded that “plaintiff would still lose under the Ninth Circuit standard because the works at issue here lack any concrete or articulable similarities of protectable elements.”

John Lynch is a partner at Pryor Cashman LLP as of June 1, 2009. Mr. Lynch and John Burleigh of Jacobs deBrauwere LLP represented the defendants. Bradley Blakeman was represented by Todd Rubenstein of Abrams, Fensterman, Eisman, Greenberg & Formato.

ETHICS CORNER

Whose Life Is It, Anyway? Media Rights And The Model Rules

By Kip Purcell

Trial lawyers are riveting storytellers – and outside the courtroom, at least, their tales tend to revolve around the lawyers themselves. As überlawyer Bernie Nussbaum recently remarked during an *ABA Journal* interview, “We’re discussing my favorite subject – me.”¹ But the story of a lawyer’s professional life is oftentimes inextricably intertwined with the stories of his clients. When a lawyer decides to capitalize on his life experiences by selling his story, what part of that story does he really own? And what can he ethically do to secure rights to the rest?

The Model Rules of Professional Conduct explicitly address a piece of this problem, but only a small piece. Rule 1.8(d) provides that “[p]rior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.”² According to commentators, “[t]he policy served by the Rule is obvious”:

A lawyer holding media rights to the story of the very case in which he is involved has an interest in seeing the case sensationalized. The lawyer also has the means of sensationalizing it, by his choice of tactics and by the recommendations he makes to the client (not to plead guilty to a lesser charge, for example). Thus, the risk that the lawyer will succumb to these temptations and actually provide less than vigorous representation is not trivial.³

Historically, the need for a categorical ban on a lawyer’s negotiation of media rights contracts during the pendency of a representation has not been “obvious” to everyone. In *Maxwell v. Superior Court*,⁴ for example, the California Supreme Court suggested that lawyers’ egos – and their solicitude for their own professional reputations – are the best insurance against the risk that an advocate holding an interest in the media rights to his own client’s case will undermine the quality of the representation by taking steps to maximize publicity values. “A quiet strategy that succeeds,” the court mused, “may well make a better story than a flamboyant failure.”⁵ In other words, the lawyer’s natural desire to win – or at least to achieve the best possible compromise – would ordinarily

trump the temptation to play for the cameras. At the same time, as the *Maxwell* court and other Rule 1.8(d) critics have pointed out, conflicts of interest are inherent in many fee arrangements; a lawyer paid by the hour may be motivated to prolong his client’s dispute, while a lawyer paid a flat fee may have an incentive to dispose of the matter too hastily.⁶ The Rules of Professional Conduct, far from forbidding these compensation schemes, merely enjoin lawyers to be sensitive to the ensuing conflicts and to resolve them in the clients’ favor.⁷

But beyond the borders of California, the dissenters from Rule 1.8(d) have been few and far between. It is no exaggeration to state that “courts, scholars and organizations of the bar ... have uniformly denounced the execution of literary and media rights fee arrangements between attorneys and their clients during the pendency of a representation.”⁸ The issue appears to be completely settled. (On the other hand, “hardly any” courts have held that the mere existence of such a contract requires reversal of the client’s criminal conviction.)⁹

If the concern underlying Rule 1.8(d) is that attorneys trafficking in literary rights will throw their clients under the media bus, it is by no means clear why “media rights fee arrangements between attorneys and their clients”¹⁰ should be the rule’s only subject. What about media rights arrangements between the attorney and others? Might these arrangements not create equally powerful inducements to enhance a representation’s publicity value at the possible expense of the client?

Perhaps because the precursor to Rule 1.8(d) focused exclusively on “arrangement[s] or understanding[s] with a client by which [the attorney] acquire[d] an interest in publication rights,”¹¹ attorneys accused of violating the rule have sometimes raised an “it’s all about me” defense. Thus, in *Harrison v. Mississippi Bar*,¹² the attorney explained: “The contract was for my life story, not that of my client. The title of the story was ‘The Garnett Harrison Story’ and it was my understanding that the events surrounding [my client’s] case were to constitute only a small portion of the story.”¹³ But the attorney’s defense foundered on the facts – because, in conjunction with contracting to sell her own life story, she had obtained a release from her client – and the Mississippi Supreme Court proceeded to disbar her, on that and other grounds.¹⁴ The court’s conclusion that the attorney had run afoul of Rule 1.8 (d) seems correct, though the court’s stated rationale for disbarring

(Continued on page 46)

Ethics Corner: Whose Life Is It, Anyway? Media Rights And The Model Rules

(Continued from page 45)

her – that “[r]ealization of personal profit from representation of a client creates an appearance of impropriety that the profession can ill afford”¹⁵ – will send a chill down the spine of any lawyer who has ever worked for a living.

More recently, and on more sympathetic facts, the District of Columbia Bar Association has reexamined the question whether a lawyer can market the rights to his own life story during the pendency of a high-profile representation without contravening Rule 1.8(d). The lawyer in question (who wisely sought an advisory opinion from his local ethics committee before inking any deals) represented a pro bono client in litigation that had drawn extensive media attention – and as far as the lawyer was concerned, the media’s “primary interest” was “in the lawyers who are conducting the litigation rather than the client.”

The media representatives would like to discuss an arrangement under which the [lawyer] would receive compensation from them for the [lawyer’s] cooperation and the rights to the [lawyer’s] story; the client, while not the primary focus of the media’s interest, would also receive compensation “for his life rights.” The [lawyer] would not divulge any confidential information protected by Rule 1.6 ...¹⁶

In the ethics committee’s view, such arrangements would not implicate Rule 1.8(d):

That provision prohibits a lawyer from “mak[ing] or negotiate[ing] an agreement giving the lawyer literary or media rights to a portrayal or account” based on the representation (emphasis added). We believe the rule prohibits a lawyer from acquiring media rights from the client or otherwise; it does not, however, prohibit the lawyer from making an agreement with media representatives with respect to his own media rights.¹⁷

By contrast, when F. Lee Bailey struck a book deal with G.P. Putnam during his defense of Patricia Hearst, the Ninth Circuit had little difficulty concluding that Rule 1.8(d) – which was then in draft form – would have “explicitly ... prohibited” the contract had the rule been in force, even though “the contract itself was not an acquisition from the client of an interest in publication rights.”¹⁸ And while the District of Columbia Bar’s ethics committee found

Rule 1.8(d) inapplicable to such situations, the committee emphasized that the scenario did raise a “serious issue” with respect to personal-interest conflicts under Rule 1.7 – because “any agreement made by a lawyer with media representatives presents a conflict of interest if, as a practical matter, its value to the lawyer might fluctuate depending on later events in a related matter in which the lawyer is representing a client.”¹⁹ The lesson is that any lawyer contemplating an agreement to sell “his” story with respect to an ongoing representation would be well advised either to await the representation’s termination or else to seek the bar’s blessing in advance.

By its terms, Rule 1.8(d) ceases to constrain a lawyer’s conduct after “the conclusion of [the] representation” to which the media seek rights. Rule 1.7 also becomes inapplicable then. But the lawyer must at that point pay close attention to Rule 1.9, concerning duties to former clients. In particular, the lawyer may not

- (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit ... with respect to a client, or when the information has become generally known; or
- (2) reveal information relating to the representation except as these Rules would permit ... with respect to a client.²⁰

“[W]ith respect to a client,” of course, the rules would permit the disclosure of such information, or its use to the client’s disadvantage, only with the client’s “informed consent.”²¹

It is Rule 1.9 that should impress upon a lawyer how little of the story of his professional life he truly owns. Anyone with a modicum of literary talent can do the research necessary to write engagingly about the lawyer’s cases. The incremental value that the lawyer himself might hope to bring to the process would stem from his inside knowledge and insight. Yet those are precisely the commodities that Rule 1.9 prohibits him from cashing in on, except with the ex-client’s informed consent.

Lawyers understand the point well enough with respect to privileged communications. We all recognize that the privilege belongs to the client and that it lasts forever, even beyond the grave.²² We realize that we enjoy no right of self-actualization through the unilateral disclosure of privileged information.²³

But what about our “mental impressions, conclusions, opinions, [and] legal theories”²⁴ concerning the representation? Do we

(Continued on page 47)

Ethics Corner: Whose Life Is It, Anyway? Media Rights And The Model Rules

(Continued from page 46)

not exercise exclusive dominion over them? It may well be true that core work product belongs to the lawyer and that no court can compel him to divulge it – not even to the client himself, in some jurisdictions. But the lawyer’s property right in his own mental processes is limited. Absent his former client’s informed consent, he is never free to disclose his thoughts about the case to the public, because they constitute “information relating to the representation” within the meaning of Rule 1.9.

Suppose, however, that the lawyer plans to betray no privileged communications and no private thoughts, but only to make use of publicly available information in telling the story of his own representation. What could be wrong with that? Yet even information in the public domain appears to be protected by Rule 1.9:

Unlike the evidentiary attorney-client privilege ..., a lawyer’s ethical duty of confidentiality ... applies to all information relating to representation of a client, protecting more than just “confidences” or “secrets” of a client. The ethical duty of confidentiality is not nullified by the fact that information is part of a public record or by the fact that someone else is privy to it.²⁵

Indeed, the involved lawyer is arguably the one person in the world who may not be completely at liberty to disseminate the public information that came to his attention, or that he himself generated, while he was representing a client.

To be sure, a lawyer is free to use information about a concluded representation that has become “generally known.”²⁶ But “Rule 1.9(c)(2) prohibits any disclosure (as opposed to use) of former-client information that would not be permitted in connection with a current client, regardless of whether the information has become public knowledge.”²⁷ While commentators have complained that the model rules are “overprotective” of such information,²⁸ and while Rule 1.9(c)(2) itself may be subject to the common-sense gloss that it proscribes only disclosures “to the disadvantage of the client,”²⁹ there is no surefire escape from the duty of confidentiality other than the client’s informed consent. A lawyer’s unflattering observation about his former client, or even an entirely laudatory account that elevates the client’s legal problems out of the practical obscurity of a court file, may violate that duty. Thus, unless he plans to withhold or fictionalize so many of the details that “there is no reasonable likelihood that [his audience] will be able to ascertain the identity of the client or the situation

involved,”³⁰ the prudent lawyer preparing to tell “his” story always seeks his ex-client’s permission first.

What does “informed” consent entail in this context? Generally speaking, because a lawyer may not reveal confidential information to the former client’s disadvantage, a lawyer soliciting the client’s consent to such disclosures must anticipate – and explain as clearly as possible – the risks to which the disclosures expose the client. Thus, for example, if the lawyer seeks consent to the revelation of privileged communications, he must warn the client that waivers of attorney-client privilege may have unpredictable and unfortunate consequences in pending or future litigation – and that, while some courts have reasoned that “the extrajudicial disclosure of an attorney-client communication ... does not waive the privilege as to the undisclosed portions of the communication,”³¹ other courts may disagree.

Finally, what – if anything – must the lawyer say or do about compensating the former client for relinquishment of the client’s right to insist on the lawyer’s continued silence? Drawing on principles of agency, the *Restatement (Third) of the Law Governing Lawyers* takes the position that “a lawyer who uses confidential information of a client for the lawyer’s pecuniary gain other than in the practice of law must account to the client for any profits made.”³² Although this rule apparently concerns the problem of secret profit-taking – and although the *Restatement* adds that “[t]he duty is removed by client consent” under § 62³³ – it is difficult to imagine how such consent could be “informed” without some discussion of the background doctrine. What is more, while the average former client would probably understand from the very fact of the request for his consent that he possesses some market power in the matter, the *Restatement* goes a step further by suggesting that “the terms and circumstances of the transaction [must be] fair and reasonable” to him and that he must be “encouraged, and given a reasonable opportunity, to seek independent legal advice concerning the transaction.”³⁴ (The model rules are less clear on the existence of any such duties to former clients.)³⁵

To be honest with ourselves is to admit that the public’s interest in what we do derives in large measure from the clients we are privileged to serve. It is no easier to divide the lawyer’s story from the client’s than to separate the dancer from the dance. The Rules of Professional Conduct force us to confront that truth and to act accordingly.

Kip Purcell is with Rodey, Dickason, Sloan, Akin & Robb, P.A., in Albuquerque, New Mexico.

(Continued on page 48)

Ethics Corner: Whose Life Is It, Anyway? Media Rights And The Model Rules*(Continued from page 47)*

[1] Mark Curriden, *Lions of the Trial Bar*, ABA J., Mar. 2009, at 20, 26.

[2] Model Rules of Prof'l Conduct R. 1.8(d) (2007); accord *Restatement (Third) of the Law Governing Lawyers* § 36(3) (2000). Likewise, the forerunner to Rule 1.8(d) – Disciplinary Rule 5-104(B) of the Model Code of Professional Responsibility – provided that “[p]rior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.” Disciplinary Rule 5-104(B) was promulgated in response to the news that Melvin Belli’s fee for defending Jack Ruby against a murder charge in the shooting death of presidential assassin Lee Harvey Oswald had included the media rights to Ruby’s story. “The bar thought that was awful,” recalls ethics expert Geoffrey Hazard. “And there was great antipathy toward Jack Ruby.” John Gibeaut, *Defend and Tell: Lawyers Who Cash in on Media Deals for Their Clients’ Stories May Wish They’d Kept Their Mouths Shut*, ABA J., Dec. 1996, at 64, 66.

[3] 1 Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, *The Law of Lawyering* § 12.10, at 12-28 to -29 (3d ed. 2008). *But cf. Beets v. Scott*, 65 F.3d 1258, 1273 (5th Cir. 1995) (en banc) (“Succinctly, a media rights contract is offensive because it may encourage counsel to misuse the judicial process for the sake of his enrichment and publicity-seeking, and it necessarily trades on the misery of the victim and his family.”).

[4] 639 P.2d 248 (Cal. 1982).

[5] *Id.* at 255 n.8.

[6] *See id.* The *Maxwell* court appeared to be impressed by the attorneys’ “extensive disclosure of possible conflicts and prejudice” created by the media-rights contract in that case, including the possibility that the attorneys might wish to “see him convicted and even sentenced to death for publicity value.” *Id.* at 250; *see id.* at 257 (“Yet [the defendant knowingly] insisted on proceeding with [these] counsel.”).

[7] *See, e.g.*, Model Rules of Prof'l Conduct R. 1.1, 1.3, 1.5, 1.7 (2007).

[8] *Beets v. Scott*, 65 F.3d at 1273.

[9] *Id.*

[10] *Id.*

[11] Model Code of Prof'l Responsibility DR 5-104(B) (1980).

[12] 637 So. 2d 204 (Miss. 1994).

[13] *Id.* at 224.

[14] *See id.*

[15] *Id.* at 227.

[16] D.C. Bar Ethics Op. 334 (2006) (available at http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion334.cfm).

[17] *Id.*; accord Am. Bar Ass’n, *Annotated Model Rules of Professional Conduct* 144 (6th ed. 2007).

[18] *United States v. Hearst*, 638 F.2d 1190, 1191-92, 1197 & n.6 (9th Cir. 1980).

[19] D.C. Bar Ethics Op. 334.

[20] Model Rules of Prof'l Conduct R. 1.9(c) (2007).

[21] Model Rules of Prof'l Conduct R. 1.6(a), 1.8(b) (2007).

[22] *See Swidler & Berlin v. United States*, 524 U.S. 399 (1998).

[23] *See, e.g., Am. Motors Corp. v. Huffstutler*, 575 N.E.2d 116, 118, 120 (Ohio 1991) (rejecting argument that in-house counsel who assisted in the defense of his employer’s products liability cases had a First Amendment right to “create a market for his unique talents” by consulting with plaintiffs’ attorneys after his employment ended).

[24] Fed. R. Civ. P. 26(b)(3)(B).

[25] *Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850, 861-62 (W. Va. 1995); *see also, e.g., In re Anonymous*, 654 N.E.2d 1128, 1129 (Ind. 1995) (judgment contained in publicly available court file was “confidential” information because attorney learned of it while consulting with potential client).

[26] Model Rules of Prof'l Conduct R. 1.9(c)(1) (2007); *see* *Restatement (Third) of the Law Governing Lawyers* § 59 cmt. d (2000) (“generally known in the relevant sector of the public”).

[27] Am. Bar Ass’n, *supra* note 17, at 169. *Contra Restatement (Third) of the Law Governing Lawyers* §§ 59-60 (2000).

[28] 1 Geoffrey C. Hazard, Jr., W. William Hodes & Peter R. Jarvis, *supra* note 3, § 13.12, at 13-32; accord *id.* § 9.15, at 9-60 (“probably a drafting oversight”).

[29] Model Rules of Prof'l Conduct R. 1.9 cmt. 8 (2007).

[30] Model Rules of Prof'l Conduct R. 1.6 cmt. 4 (2007).

[31] *In re von Bulow*, 828 F.2d 94, 102 (2d Cir. 1987) (concerning impact of Alan Dershowitz’s *Reversal of Fortune* on his consenting client’s privilege).

[32] *Restatement (Third) of the Law Governing Lawyers* § 60(2) (2000).

[33] *Id.* cmt. j. Section 62 provides that “[a] lawyer may use or disclose confidential client information when the client consents after being adequately informed concerning the use or disclosure.”

[34] *Id.* § 126; *see id.* § 36 cmt. d (“[A]n informed client ... [may] sign[] a publication contract after the lawyer’s services have been performed As a transaction between a former client and a lawyer arising out of the representation, such a contract is subject to § 126.”).

[35] *See, e.g., Am. Bar Ass’n, supra* note 17, at 140-41 (“[I]t is the pendency of the [representation] ... that triggers application of ... Rule [1.8 concerning business transactions between lawyer and client].”).