404 Park Avenue South, 16th Floor, New York, NY 10016 • (212) 889-2306

LDRC Libel Defense Resource Center

LIBELLETTER

November 1996

THE NEUTRAL REPORTAGE DOCTRINE IN OHIO: TO BE OR NOT TO BE?

Richard M. Goehler, Esq.
Jill P. Meyer, Esq.

In early October, the Ohio Supreme Court passed on a clear opportunity to strengthen the First Amendment right of reporters to keep the public informed. The brief opinion in *Young v. The Morning Journal*,76 Ohio St. 3d 627, 669 N.E.2d 1136 (1996). surprised many by declining, without discussion, to recognize the "neutral reportage" doctrine "at this time." Prior to this decision, many courts -- including a number of appellate courts in Ohio -- relied on this doctrine to protect "the accurate and disinterested" reporting of newsworthy events.

Young involved a report published in *The Morning Journal* that "Amherst attorney James Young" was facing contempt charges. The reporter who wrote the article failed to realize the

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The Pentagon Papers 25 Years Later: LDRC Honors Katharine Graham and Arthur Ochs Sulzberger

David Halberstam, Keynote Speaker
Victor Kovner, Introduction

In commemoration of the 25th anniversary of the Pentagon Papers decision, LDRC honored Arthur Ochs Sulzberger of The New York Times Company and Katharine Graham of The Washington Post Company with the LDRC *William J. Brennan, Jr. Defense of Freedom Award* at the Fourteenth Annual LDRC Dinner held on November 6, 1996.

Over 430 attorneys, writers, reporters and media representatives crowded New York's Sky Club to honor the pair for their courageous decisions to publish the Pentagon Papers in the face of government opposition.

Robert Hawley, Chair of the LDRC Executive Committee, began the evening by acknowledging the debt of gratitude owed to Chad Milton of Media Professional, Inc. and Margaret Blair Soyster of Rogers & Wells, who are stepping down as LDRC Executive Committee members. In their place, Mr. Hawley welcomed Kenneth Vittor of The McGraw-Hill Companies and Susanna Lowy of CBS, who were elected to the Executive Committee at the LDRC annual meeting earlier that afternoon. Mr. Hawley also thanked Media/Professional Insurance, Inc. and Scottsdale Insurance Company for presenting the cocktail party that preceded the Dinner.

Mr. Hawley then introduced LDRC Executive Director Sandra Baron who thanked all the members of LDRC for the energy and ideas that they have brought to LDRC. Calling LDRC "truly a membership organization," Ms. Baron noted that LDRC is the collective

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Eighth Circuit Reverses District Court and Enters $1 Million Jury Verdict for Plaintiff

In what is believed the first post-*Hepps* appellate opinion to explicitly consider the question and so hold, a panel of the Eighth Circuit declined to apply independent appellate review to the issue of falsity. *See Lundell Manufacturing Company, Inc. v. American Broadcasting Companies, Inc.*, 1996 U.S. App. LEXIS 26790 (8th Cir. Oct. 15, 1996). Although other courts have reviewed jury findings of falsity under a "clearly erroneous" standard, they have done so without considering whether independent appellate review of falsity is constitutionally required. *See* infra p. 18 ("Standard of Review in Other Jurisdictions")

In reversing the trial court, which had entered judgment as a matter of law for the defendant following a jury verdict for the plaintiff, the appellate court held that there was sufficient evidence to support the jury finding of falsity. The Eighth Circuit also rejected ABC's alternative argument that the trial court ruling should be upheld because the plaintiff was a public figure and had failed to prove actual malice.

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***Minutes of LDRC's Annual Meeting on page 25.**

***Minutes of LDRC's Annual Defense Counsel Section Breakfast Meeting on page 27.**

In This Issue . . .

Please Note . . .

Also attached to this month's LDRC LibelLetter are the following reports, which were prepared in conjunction with the LDRC Annual Meeting:

•Summary of Alternative Dispute Resolution Project
Prepared by the Pre-Publication/Pre-Broadcast/Pretrial Committee

•Model Trial Brief Outline
Prepared by the Committee on Trial Techniques

•Report on 1996 Legislative Developments
Prepared by the Tort Reform Committee

U P D A T E S

1. Settled: WACO Suit by Federal Agents against local Television and Newspaper Media over Branch Davidian Raid

The extraordinary lawsuit brought by Federal Bureau of Alcohol, Tobacco and Firearms agents and their families against a Waco, Texas newspaper and television station, and a local ambulance company, for alleged responsibility for the deaths and injuries of agents during the ill-fated raid in 1993 by federal authorities of the Branch Davidian compound has settled for an undisclosed amount. The case was pending in federal district court for the Western District of Texas.

Summary Judgment Lost Last April

Last April, defendants lost a motion for summary judgment on the claim of negligence, although summary judgment was granted to the newspaper on claims of breach of contract, intentional infliction of emotional distress, conspiracy and interference with a law enforcement officer's duties. *Risenhoover v. England*, Civil No. W-93-CA-138 W.D. Tex. April 2, 1996) (*See LDRC LibelLetter*, April 1996 at 1.)

Plaintiffs -- consisting of approximately 102 individuals and/or estates -- contended that media newsgathering missteps tipped off the Branch Davidians, thus resulting in the tragedy at the compound, in which the Branch Davidians exchanged gunfire when agents sought to search the compound and arrest the group's leader, David Koresh. Four ATF agents died and more than 20 were wounded. Several months later, Koresh and more than 80 of his followers died in a fire that destroyed the compound.

While the facts of what happened on and before the day of the raid are extensive -- and were the subject of extensive discovery in the lawsuit, as well as investigations by the Texas Rangers and the U.S. Treasury Department -- the principal behavior of the media defendants that underlay the negligence issue included such activities as driving to the area of the Davidian Compound, using unsecured cellular telephones, and seeking to cover the impending raid from a house across the street from the Compound. A member of the television station crew was alleged to have inadvertently alerted a sect member to the impending raid when assistance on directions to the Compound was offered by a mailman who turned out to be Koresh's brother-in-law.

Defendants argued in their summary judgment motions that the activities of the media defendants were neither the proximate cause nor the cause in fact of the injuries, and that the newsgathering activities of the defendants were protected by the First Amendment. According to Cox's counsel, pending at the time of settlement was a subsequent summary judgment motion by the newspaper asserting that despite years of discovery there was no evidence that the newspaper reporters were even near the compound when the Davidians learned of the impending ATF raid.

The ATF commanders had, in fact, been criticized for, among other things, not anticipating media activity in the area and for going forward with the raid even after having learned that the Davidians knew of the impending law enforcement action. The Treasury Department Report stated: "Media activity in the vicinity of the Compound was not the immediate cause of the casualties suffered by ATF agents on Febru-

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THANK YOU FOR THE GREAT SUCCESS!
The LDRC Annual Dinner
The DCS Annual Meeting and Breakfast
The LDRC Annual Meeting

To The LDRC Membership:

No one who attended the LDRC Annual Dinner on Wednesday, November 6, will be surprised to learn that a record number of LDRC members and their guests were at the event. The response was overwhelming, and the post-Dinner comments very positive. On behalf of LDRC -- the staff and the membership -- ***thank you*** to all of you who attended.

A record number of members also attended the DCS Annual Meeting and Breakfast on the following Thursday morning and the LDRC Annual Media Membership Meeting on Wednesday afternoon.

The attendance at these events is truly vivid evidence of the vitality, energy and commitment of the membership of LDRC. The membership is currently manning 15 different committees, each with projects that are intended to provide material useful in your practices. The membership is working with LDRC on two volumes of the **50-State Survey**, assisting LDRC staff with the **LDRC Bulletin**, writing articles and sending in decisions and other material for the ***LDRC LibelLetter***, sending in briefs, jury instructions, experts -- the stuff that allows LDRC to serve as a powerful clearinghouse for our collective wisdom and experience.

Thank you all for your support. We look forward to working with you in the next year, and to seeing all of you, first, at the NAA/NAB/LDRC Conference on September 10-12 in Reston, Virginia, and second, at the Annual Dinner and Annual Meetings in November 1997.

Sandra Baron
Executive Director

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ary 28. These were inflicted by Koresh and his followers, and could have been avoided had ATF's raid commanders called off the operation once they recognized that they had lost the advantage of surprise." Their actions were in direct contravention of prior instructions from ATF superiors who had told the commanders to cancel the operation if they learned that the secrecy of the raid had been compromised.

Settlement Has No Admission of Wrongdoing

Cox At Odds with Insurance Carrier

Counsel for both the newspaper and the station were reported to have stated that the settlement of the litigation included no admission of wrongdoing.

Cox Newspapers Inc., which owns the Waco newspaper, issued a statement asserting that the settlement was a business decision by the insurance company made over the objections of Cox officials.

The decision to accept a settlement was clearly a difficult one for the television station, a CBS affiliate with local ownership, which found itself engaged in extensive litigation regarding basic newsgathering activities, and which disagreed strongly with the court's opinion and disposition of the summary judgment motions on negligence. While a business decision was made with its carriers on the matter, the station counsel indicated that no one involved was satisfied with that outcome.

According to a newspaper account, the local ambulance firm that was a co-defendant in the suit also settled the claims against it. The company had been hired by ATF to provide emergency services during the raid, and it was alleged that one of its employees tipped off the local television station to the impending raid.

2. Turner v. Dolcefino: $4.5 Million Punitive Damage Award Against TV Station Reduced to $2.2 Million by Trial Judge

The trial judge, without opinion but by letter to counsel, has granted a portion of defendants' motion for judgment notwithstanding the verdict in the highly publicized Texas libel trial brought by mayoral candidate Sylvester Turner against the local ABC owned and operated station, KTRK-TV, and its reporter, Wayne Dolcefino.

The result last month was a jury verdict in favor of the plaintiff totaling $5.55 million in damages, with $275,000 for reputational harm, $275,000 for mental anguish, $500,000 in punitive damages against the reporter, and $4.5 million in punitive damages against the station. *(See LDRC LibelLetter* September 1996 at 1).

The reduction was based upon the Texas statute (Chapter 41 of the Texas Civil Practice and Remedies Code) limiting punitive damage awards in tort actions to a ratio of 4 to 1, i.e., punitive damages are limited to four times the actual damages, which counsel for KTRK successfully argued should apply to libel cases. The ratio did not serve to reduce the punitive damage award against the reporter.

Counsel for the defendants intend to move for a new trial.

3. California Supreme Court Declines To Review Narrow Application of SLAPP Statute

The California Supreme Court has declined to review *Zhao v. Wong*, a decision by the California Court of Appeal reading California's anti-SLAPP statute to only apply to cases where there is a dispute over a "public issue." *Zhao v. Wong*, 48 Cal. App. 4th 1144 (1996).

The California Supreme Court also rejected requests to depublish the decision.

As was reported in the September 1996 issue of the *LDRC LibelLetter*, the California Court of Appeal in *Zhao* reversed the trial court's dismissal under the anti-SLAPP statute, construing the law to apply only to "a narrow sphere of activity" essentially involving exercise of the right to petition with regard to matters of public concern. *See LDRC LibelLetter*, September 1996 at 9.

At issue in the case were the claims of Xi Zhao, who alleged that she had been falsely accused of murdering her lover in an article that appeared in the *San Jose Mercury News*. Although the appellate court found the story "intriguing" and "newsworthy," it went on to hold that the case did not involve a "'public issue' in the sense that we interpret the term."

The denial of review leaves in place the split within the California circuits over the appropriate scope of the anti-SLAPP statute. In *Averill v. Superior Court*, 42 Cal. App. 4th 1170 (1996), the California Court of Appeal, Fourth District, Division 3, read the statute to have a broad application – a determination which the appellate court in *Zhao*, California Court of Appeal, First District, Division 1, rejected outright.

Illinois Supreme Court Limits Innocent Construction Rule

By Samuel Fifer and Michael R. Lufrano

On October 24, 1996, the Illinois Supreme Court highlighted its antipathy for the Illinois "innocent construction" rule and may have limited the number of Illinois cases in which the rule can be applied. The case, *Bryson v. News America Publications, Inc.*, 1996 WL 616225 (Oct. 24, 1996), involved a story in *Seventeen* magazine about a dispute between high school classmates in Southern Illinois.

The Illinois rule of "innocent construction" has been a unique feature of Illinois libel law since first adopted by the Illinois Supreme Court in *John v. Tribune Company*, 24 Ill. 2d 437 (1962), *cert. denied*, 371 U.S. 877 (1962). Drawing on a similar rule of construction found in English law, the *John* Court wrote (in language many believed, and still believe, was merely *dicta*) that where a statement could be construed in an innocent, non-defamatory way, courts should find it non-actionable as a matter of law. Many defamation claims foundered in such an environment, as trial and appellate courts freely applied the rule. In 1982, the Illinois Supreme Court limited the approach mandated under the rule to those circumstances where the innocent construction was deemed "reasonable," implicitly and explicitly criticizing the way courts had applied the rule since *John*. *Chapski v. Copley Press, Inc.*, 92 Ill.2d 344 (1982). It was the *Chapski* application of the rule that was at issue in analyzing the allegedly defamatory publication in the *Bryson* case.

Plaintiff Kimberly Bryson claimed she was defamed by a story entitled "Bryson" which appeared in the March 1991 issue of *Seventeen*. The story, written in the style of a first-person narrative, recounted the long-running conflict between an unidentified speaker and her high school classmate named "Bryson." In the story, the narrator referred to the Bryson character as a "slut" during an explanation of why the author felt no sympathy for her high school rival. *Bryson*, 1996 WL 616225 at *1-2.

Innocent Construction Not Redefined But Narrowly Construed

The Illinois Supreme Court, in an opinion authored by Chief Justice Bilandic, rejected defendants' argument that the story's use of the term "slut" was subject to an innocent construction. The majority wrote, "it is obvious that the word `slut' was intended to describe Bryson's sexual proclivities." *Bryson*, 1996 WL 616225 at *7. This was enough to defeat defendants' motion to dismiss. The Supreme Court reversed the appellate court and remanded the case to the trial court for further proceedings on plaintiff's libel claims.

Justice Bilandic wrote, "the innocent construction rule does not apply ... simply because allegedly defamatory words are `capable' of an innocent construction," *Bryson*, 1996 WL 616225 at *6, *citing*, *Chapski v. Copley Press, Inc.*, 92 Ill.2d at 351. "When a defamatory meaning was clearly intended and conveyed, this court will not strain to interpret allegedly defamatory words in their mildest and most inoffensive sense in order to hold them nonlibellous under the innocent construction rule." *Bryson*, 1996 WL 616225 at *6.

Bryson's application of the rule could be troubling to defendants in defamation claims. In cases where an allegedly defamatory statement may have more than one potential construction, lower courts may feel they have more discretion to allow defamation claims to proceed.

A Small Town Story In A National Magazine

Justice Mary Ann McMorrow, in dissent, provides the most complete picture of the story as written:

> In the story, the Bryson character is introduced as a "platinum-blond, blue-eye-shadowed, faded-blue-jeaned, black-polyester-topped shriek" who is once again "after" the unnamed narrator. Both characters are in high school, although their mutual dislike has spanned several years. ***
>
> [T]he narrator relates that during one particular week Bryson had been slamming lockers, cutting classes and dropping water balloons. The narrator, bemoaning the fact that "[i]t was only a matter of time before her attention swung my way," proceeds to describe the following scene, which takes place in the high school restroom in the presence of another girl, Sue Barton:
>
> > "I heard a voice behind me like I've heard a million times, in a high-pitched, brassy voice, `Well look who's here.' Bryson had just walked in. Without turning around I knew she was talking straight to me. `You usually got cigarettes.' ***
> >
> > `Not today.'
> >
> > `Not today?' Bryson looked at Sue ... and didn't say anything. Good. If she wasn't saying anything, she wasn't looking for a scene. I put my comb in my bag and edged for the door.
> >
> > `Hey, I *was talking* to you.' She placed one arm on the wall's peeling green paint. *** Then, instead of doing what I'd always done -- what I've learned was the only thing to do -- stand there, quiet, looking at my feet until her attention went somewhere else, I walked straight up to her arm, put my hands together in a sort of hammer, and knocked it down. *** Then she smiled and said, `So meet me by the baseball field after school today then.'
>
> Later that morning, the narrator telephones her friend Anita, who was sick at home. Anita cautioned, "You can't fight her. She broke Beth Harper's two front teeth." Then, the narrator states:

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> About two months ago Bryson was at a bonfire with these two guys that nobody knew. One had a tatoo, and they were all drinking. Lots. Who knows what guys like that made Bryson do. The next day she came into school with a black eye. Beth Harper looked at her too long, and Bryson slammed her up against a glass door and cracked her one clean in the mouth.
>
> Later that afternoon, as Bryson shouted down the hallways like always, I remembered what a slut she was and forgot about the sorriness I'd been holding onto for her. *Bryson*, 1996 WL 616225 at *19-20.

It is this last paragraph which formed the basis of plaintiff's claims. Plaintiff argued that the character named Bryson in the story referred to her, and that the reference to Bryson as a "slut" implied plaintiff was unchaste. Both plaintiff and the author of the story, defendant Lucy Logsdon, were residents of Gallatin County in Southern Illinois, and a footnote at the end of the story identified Logsdon as a "native of southern Illinois." *Bryson*, 1996 WL 616225 at *1-2. The complaint alleged two counts of defamation per se, two counts of defamation per quod and two counts of invasion of privacy by portraying the plaintiff in a false light.

Innocent Construction Applied

In applying the innocent construction rule to these facts, the *Bryson* Court rejected defendants' argument that the rule precluded liability because "slut" may be defined in the dictionary as a "bully" or "bold, brazen girl." *Bryson*, 1996 WL 616225 at *6-7.[1]

The majority opinion emphasized that the word "slut" appeared in the story following a paragraph in which the narrator asks "who knows what guys like that made Bryson do." *Bryson*, 1996 WL 616225 at *6. This, it said, made the "natural and obvious" meaning of the word a reference to Bryson's sexual proclivity. *Bryson*, 1996 WL 616225 at *4.

But the Court did not address the possibility that the story's use of the word "slut" in this context could easily have referred to Bryson's proclivity for violence, not sex. Indeed, immediately following the sentence "who knows what guys like that made Bryson do," is the sentence, "The next day she came to school with a black eye." *Bryson*, 1996 WL 616225 at *2. *See*, McMorrow, J., dissenting, *Bryson, 1996 WL 616225 at *19-20.*

The *Bryson* court also did not address (and there is no mention in the opinion that defendants argued) the fact that the story's use of the word "slut" could be an example of non-actionable name calling. *See Delis v. Sepsis*, 9 Ill. App. 3d 217, 222, 292 N.E.2d 138, 142 (1st Dist. 1972) (mere name-calling is not libelous). For example, the majority opinion did not address the possibility that in teenage slang, the word "slut" can be an insulting, derogatory term, akin to "jerk" or "creep," not intended to imply fornication. Nor did the Court address the possibility that in teenage slang, the word "slut" may refer to one who has many boyfriends, even if those relationships do not involve sex. The Court also did not address the possibility that, used in the context of describing why the narrator felt no sympathy toward Bryson, the word "slut" was merely one of the many names high school girls call each other.

Interestingly, the one woman judge on the panel dissented from the majority view, finding that in the total context of the article the term "slut" was clearly intended to connote brazeness; that the term meant nothing lacivious or licentious in the context of describing Bryson's "less than decorous or mannerly behavior." It was, in the dissenter's view, name-calling, shouted down a hallway, by one adolescent fictional character to another.

Chapski to Bryson

The *Bryson* Court's understanding that "the innocent construction rule does not apply ... simply because allegedly defamatory words are `capable' of an innocent construction," *Bryson*, 1996 WL 616225 at *6, could be seen to conflict with the interpretation of *Chapski* adopted by other Illinois courts. Courts applying *Chapski* often looked for a reasonable, non-defamatory reading of an allegedly defamatory statement; where a statement "***may*** be reasonably innocently interpreted," the action would be dismissed. *Cf.*, *Harte v. Chicago Council of Lawyers*, 220 Ill. App. 3d 255, 262-63, 581 N.E.2d 275, 279 (1st Dist. 1991) (statements are reasonably capable of being construed in a non-defamatory manner, therefore no cause of action for defamation; court need not decide whether plaintiff's or defendant's interpretation is correct).

Bryson seems to say that a statement which "***may*** be innocently interpreted" might still be actionable if its most natural and obvious meaning, as ascribed by the reviewing court, is defamatory. *Bryson's* instruction to lower courts is to "interpret the allegedly defamatory words as they appeared to have been used and according to the idea they intended to convey to the reasonable reader." *Bryson*, 1996 WL 616225 at *6.

This is, at most, a subtle difference. The *Bryson* decision can be read as very fact specific -- a result of the majority's belief that the word "slut" as used in the story was meant to suggest Bryson's sexual promiscuity. The *Bryson* opinion did not specifically overrule or explicitly limit any previous Supreme Court precedent or any other Illinois case on innocent construction. *Bryson*, like *Chapski*, held that if a statement, when read in context, may reasonably be innocently interpreted, "it cannot be actionable per se." *Bryson*, 1996 WL 616225 at *4; *Chapski*, 92 Ill.2d at 352. As such, *Bryson* may be interpreted as reflecting the majority's narrow view of the definition of "slut,"

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No Proof of Injury to Reputation Fatal to Kansas Libel Claim

Actual Malice Required in Private False Light

Finding no genuine issue of material fact as to the reputational damage allegedly suffered by the plaintiff, and finding that such a showing was required for maintenance of a libel claim, United States District Court Judge Frank G. Theis for the District of Kansas, granted a motion for summary judgment for the Osborne County Farmer newspaper.

Stating that he would not permit the plaintiff to "sidestep the safeguards which restrain the defamation action" through the use of a false light claim, and that Kansas courts would require a private figure plaintiff to prove actual malice, the judge granted summary judgment on that claim as well. *Pfannenstiel v. Osborne Publishing Co.*, 1996 WL 590687 (D. Kan. Sept. 19, 1996).

The plaintiff, Jim Pfannensteil, was misidentified by the newspaper as a car thief when in fact it was his car that was stolen. The September 10, 1992 edition of the Osborne County Farmer included an article written by editor Sandra Trial detailing the theft of an automobile and other items from a local garage. In the article, Ms. Trail mistakenly reported that Jim Pfannenstiel, a garage employee, was arrested for the theft.

On the day of publication, however, Ms. Trail discovered that Pfannenstiel was the owner of the car while Michael Cantrell had been arrested for its theft. Ms. Trail then placed a correction on the newspaper's Telenews telephone line and wrote a correction apologizing for the error which appeared in the following week's edition of the Farmer. In a related article, Ms. Trail blamed the confusion on the Osborne Police Department's apparent policy of denying media requests for copies of its reports. Pfannenstiel subsequently sued the newspaper for defamation, false light and intentional infliction of emotional distress.

In ruling on the motion for summary judgment, Judge Theis's opinion reflected the Kansas courts' reluctance to create causes of action for negligently caused hurt feelings. Kansas law, the court stated, requires proof of damage to the plaintiff's reputation; it is the "essence and gravamen of an action for defamation." (Quoting *Gobin v. Globe Publishing Co.*, 232 Kan.1, 6, 649 P.2d 1239 (1982)).

Consistent with the view, the court rejected the defamation claim because Pfannenstiel failed to present the necessary proof of any actual damage to his reputation caused by the article.

The plaintiff's alternative reliance on false light was rejected for lack of showing of actual malice. The court noted that Kansas state courts had not resolved whether a private figure would be required to prove actual malice in a false light claim. Two Kansas federal district courts had stated that *Gertz* would apply to such claims, indicating that only public plaintiffs had to prove actual malice.

Citing the Supreme Court opinion in *Time v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967), and Kansas courts' "great caution" in recognizing torts based only on injury to emotional well-being, the court concluded that a private individual is required to prove actual malice "to state a claim for invasion of privacy based on false light publicity where the publication deals with a matter of public concern." 1996 WL at *5. To allow otherwise would, in effect, allow a defamation claim without the requirement of proof of damage to reputation.

Nor, the court continued, was there any evidence proving that Mr. Pfanninstiel has undergone any treatment for medical or mental problems related to this incident, which would be sufficient to satisfy the standard for intentional infliction of emotional distress cause of action.

Damage to Reputation: An Element of The Claim

Of the ten jurisdictions that have decided the issue of whether the plaintiff is required to show damage to reputation as a prerequisite to recovery, in the post-*Sullivan/Gertz* era, five have found that such proof is required while five have found that no such showing is necessary.

Minnesota, Iowa, Arkansas, Kansas, and the Fifth Circuit Court of Appeals (applying Mississippi law) have all ruled that evidence of damage to reputation is a prerequisite to the recovery of damages in a defamation action. Minnesota, in *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 24 Media L. Rep. 1897 (Minn. 1996), and Iowa, in *Johnson v. Nickerson*, 542 N.W.2d 506 (Iowa 1996), are the most recent jurisdictions to decide the issue. Arkansas decided the issue in *Little Rock Newspapers, Inc. v. Dodrill*, 281 Ark. 25, 660 S.W.2d 933, 10 Media L. Rep. 1063 (Ark. 1983); Kansas in *Gobin v. Globe Publishing Co.*, 232 Kan. 1, 649 P.2d 1239 (Kan. 1982); and the Fifth Circuit in *Garziano v. E.I. DuPont de Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987) (applying Mississippi law).

In addition, New York's Appellate Division, First Department, has twice held that proof of loss of reputation is required. *See France v. St. Clare's Hosp. & Health Center*, 441 N.Y.S.2d 79 (1981); *Salomone v. MacMillan Publishing Co.*, 429 N.Y.S.2d 441 (1980). Both cases cited the 1858 New York Court of Appeals decision in *Terwilliger v. Wands*, 17 N.Y. 54 (1858), which held that recovery for emotional harm is foreclosed in the absence of proof of reputational harm, but the New York Court of Appeals has not revisited the issue since *Gertz*.

On the other hand, Colorado, Florida, Louisiana, Maryland, and the Virgin Islands have all held that plaintiffs may recover damages without first establishing a loss of reputation. Colorado reached its conclusion in *Keohane v. Stewart*, 882 P.2d 1293 (Colo. 1994); Florida in *Time Inc. v. Firestone*, 305 So.2d 172 (Fla. 1974), *vacated and remanded*, 424 U.S. 448 (1976); Louisiana in *Freeman v. Cooper*, 414 So.2d 355 (La. 1982); Maryland in *Hearst Corporation v. Hughes*, 466 A.2d 486, 9 Media L. Rep. 2504 (Md. Ct. App. 1983); and the Virgin Islands in *Ross v. Bricker*, 770 F.Supp. 1038 (D.V.I. 1991).

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rather than a desire to shift application of the innocent construction rule.

Nevertheless, *Bryson* could be troubling to defendants in defamation claims. In cases where an allegedly defamatory statement may have more than one potential construction, lower courts may feel they have more discretion to allow defamation claims to proceed. The *Bryson* court clearly favored a narrow application of the rule and may signal to others its unwillingness to allow the rule to be used to protect the media in defamation cases.

Defendants' Other Arguments Also Rejected

The Supreme Court also rejected defendants' argument that because the story was published under the heading "New Voices in Fiction," the allegedly defamatory statements were protected as statements of opinion. The Court, relying on *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), found that the allegedly defamatory statement (that Bryson was a "slut") was a factual statement capable of being proven true or false. *Bryson*, 1996 WL 616225 at *10-11.

The Court found that although the story was labeled as fiction, it "portray[ed] realistic characters responding in a realistic manner to realistic events. A reasonable reader could logically conclude that the author of the story had drawn upon her own experiences as a teenager when writing the story." (*Bryson*, 1996 WL 616225 at *11.) The Court distinguished *Flip Side, Inc. v. Chicago Tribune Co.*, 206 Ill. App. 3d 641 (1991) by saying that the persons and events described in that case were "so fantastic that no reasonable person would believe that they stated actual facts or described actual events." *Bryson*, 1996 WL 616225 at *11. [2]

In the final analysis, the opinion in *Bryson* could be viewed as an attempt to limit Illinois' special rule of innocent construction by encouraging courts to allow all but the thinnest defamation claims to survive the pleading stage. To be sure, where the "natural and obvious" meaning of an allegedly defamatory statement is innocent, even the *Bryson* court would seem to support dismissal. But where the innocent construction of an allegedly defamatory statement is but one of many possible interpretations, the Illinois Supreme Court now seems more inclined to let the litigation move forward.

Endnotes

1 The Court rejected defendants' argument that use of the word "slut" was not actionable per se, by holding that the word "slut" implied fornication in violation of Section 1 of the Slander and Libel Act. 740 ILCS 145/1. *Bryson*, 1996 WL 616225 at *4.

2 The Court also rejected defendants' argument that the plaintiff failed to adequately plead actual malice, nothing that while plaintiff's allegation of malice was "less than ideal," the facts necessary to determine whether the story was written or published with malice were in the possession of the defendants. The Court seemed to say that since defendants could determine whether there was malice in the writing or publication of the story, the Complaint did not need to spell out the allegations of malice in detail. *Bryson*, 1996 WL 616225 at *16. This seems to reduce the standard for pleading malice to one that requires little more than the raising of the allegation. Finally, the Court specifically declined to address whether punitive damages may be awarded in Illinois without actual malice in cases involving private figures and matters of private concern.

Mr. Fifer is a partner, and Mr. Lufrano an associate, the Chicago office of Sonnenschein Nath & Rosenthal.

State of Ohio v. Kenneth E. Asher: Procter & Gamble Gives Up Bid to Keep Cincinnati Media From Criminal Trial

Procter & Gamble, concerned that a local Ohio criminal trial would result in the public exposure of various confidential information regarding its computer system, sought to obtain the right to bar media and public access to any portion of the trial that it deemed sensitive and to have sealed any documents and/or portions of the transcript containing information which it deemed confidential, secret or would irreparably harm the company.

The criminal trial involved a former P&G employee who had allegedly used a computer to access P&G's computer network. P&G anticipated that testimony in the trial from the defense side would involve introduction of the ways of gaining access to the P&G computer system in both authorized and unauthorized manner.

On the eve of hearing on the motion of its Motion to Close Part of the Trial to the Public, and with opposition filed by local media, P&G withdrew its motion.

Ohio Court: World Wide Web Operator Is Public Figure

By Charles D. Tobin

An Ohio trial judge has ruled that the operator of a World Wide Web homepage is a public figure and dismissed the operator's libel lawsuit for failure to adequately plead actual malice.

The decision, *WorldNet Software Co., et al. v. Gannett Co., Inc., et al.*, No. A-9601960 (Ohio Ct. Comm. Pls. September 30, 1996), arose out of a lawsuit challenging a business column published in *The Cincinnati Enquirer*, an investigative report broadcast on WKRC-TV, and a Better Business Bureau ("BBB") bulletin.

WorldNet, a Miami, Florida outfit, and its owner sued the newspaper for a signed column on home computing that expressed skepticism over plaintiffs' Web advertisement seeking people to work as WorldNet's "agents." The columnist wrote that WorldNet appeared to be an "work-at-home scheme" and he warned consumers to call the National Fraud Information Center before joining any venture that is "probably a scam." The television station broadcast a similar report that not all Internet postings "are legitimate" and that WorldNet "appeared to be a pyramid scam." The BBB bulletin warned the agency it had received a number of complaints against WorldNet.

WorldNet originally filed a complaint sounding in negligence. On the morning of the defendants' motion to dismiss hearing, however, WorldNet filed an amended complaint adding allegations that the statements were made with "actual malice" because the defendants had "failed to investigate" them before publication.

Opinion Under Ohio's Vail Test

In an 11-page decision, Ohio Court of Common Pleas Judge Ann Marie Tracey ruled that all of the statements published by the newspaper were protected opinion under the Ohio Supreme Court's test in *Vail v. Plain Dealer Pub. Co.*, 72 Ohio St. 3rd 279 (1992), that is, whether the statement is verifiable, the general context of the statement and broader context in which the statement appeared.

The columnist's use of the imprecise term "scam" and the non-factual qualifier "probably" signaled to the reader statements of non-verifiable opinion, she wrote. Additionally, his admonition that readers contact authorities suggested they, and not the author, should be the judge of WorldNet's conduct. Finally, the judge noted the newspaper's publication of the columnist's photograph and by-line, the column's appearance in a portion of the newspaper devoted to consumer interest, the columnist's use of a first-person writing style and his invitation that readers e-mail him with comments all signal an opinionative article.

Judge Tracey ruled that most of the television station's broadcast was protected as well, although some of its statements "appear objective and factual rather than a subjective opinion."

WorldNet is Public Figure

The judge ruled that, in any event, WorldNet was a public figure.

> Even should the complaint allege a sufficient basis for claims, an entity presenting and promoting itself publicly is subject to certain permissible public comment. WorldNet represents itself as a public, on-line computer service "accessible from anywhere in the world." As a provider of services to the public, WorldNet must establish that the defamatory statement was published

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RADIO PROGRAM DIRECTOR IS LIMITED-PURPOSE PUBLIC FIGURE, FEDERAL COURT RULES

By Michael Kovaka

Finding that a program director was a limited-purpose public figure with respect to comments criticizing his on-the-job performance, a federal court in Florida has granted summary judgment in a slander suit against South Florida radio station WIOD and a local newspaper. Proof of pronounced audience interest in station programming decisions was key to the media victory in late October. *Bruce v. WIOD, Inc., et al.*, No. 94-6986-CIV-GONZALES (S.D. Fla., Oct. 24, 1996).

Media Comments on Firing Fuel Defamation Suit

The case began in early 1994, when WIOD terminated its former program director, Gary Bruce. Soon after the firing, the *Fort Lauderdale Sun-Sentinel* published an article about Bruce's departure. The article, which cited to a "ratings hemorrhage" at the station during the latter portion of Bruce's tenure, was critical of Bruce's performance and quoted several former employees' comments on the firing, including one source's remark that hearing of the program director's termination was "better than hitting the Pick Six."

Legal problems began for WIOD when top-rated talk show host Neil Rogers gleefully read the entire *Sun-Sentinel* article over the air. That Rogers was less than shattered by Bruce's departure would have come as no surprise to WIOD listeners. Rogers had saddled Bruce with the moniker "Boy Gary," and criticism of the program director was a daily staple of Rogers' radio program.

Bruce retaliated with a suit against both the newspaper and the radio station, claiming defamation in connection with the *Sun-Sentinel*'s publication of the article and its republication

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with "actual malice," that is, "with knowledge that it is false or with reckless disregard of whether it was false or not." (citations omitted).

The amended complaint's allegations of fault merely "parrot[ed] the definition of actual malice," and under U.S. Supreme Court law the bare allegation that defendants "failed to investigate" also was insufficient as a matter of pleading, the judge wrote. She dismissed the claims against the media defendants with prejudice.

The court let stand, however, the claim against the BBB. At this juncture, the court ruled, insufficient facts appeared in the record to determine whether the BBB's communication was subject to a qualified privilege it asserted for statements made in good faith on a matter in which BBB had an interest, right or duty, to people having a corresponding interest or duty.

Plaintiffs have filed a notice of appeal of the newspaper's and television's stations dismissal.

Still pending in the Ohio Common Pleas Court are several other libel lawsuits WorldNet has filed against former WorldNet agents, who have posted notices on the Internet critical of the outfit.

Charles D. Tobin of Gannett Co., Inc. and John C. Greiner of Graydon, Head & Ritchey represent The Cincinnati Enquirer.

LDRC would like to acknowledge fall interns Natasha Gourari and Anna Pokhvishcheva, both of Benjamin N. Cardozo School of Law, for their contributions to this month's LDRC LibelLetter.

RADIO PROGRAM DIRECTOR IS LIMITED-PURPOSE PUBLIC FIGURE, FEDERAL COURT RULES

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on WIOD. After discovery, both defendants moved for summary judgment, arguing that Bruce was a public figure and that there was no evidence of actual malice.

Waldbaum Test Reveals Ongoing "Controversy" Over Programming

Applying the three-part limited-public figure test first set forth in *Waldbaum v. Fairchild Publications*, 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 989 (1980), and later adopted by the Eleventh Circuit in *Silvester v. American Broadcasting Cos.*, 839 F.2d 1419 (11th Cir. 1988), the court agreed that Bruce was a public figure. Under that test, the court must (1) isolate the public controversy, (2) examine the plaintiff's involvement in the controversy, and (3) determine whether the alleged defamation was germane to the plaintiff's participation in the controversy.

Recognizing that the "public controversy" concept encompasses any "matter which is openly debated, and which affects more than simply the direct participants," the court found that a public controversy over programming decisions at WIOD existed prior to Bruce's firing.

Evidence showed that Bruce's programming decisions were a pervasive subject of on-air debate and commentary by Rogers and other WIOD talk show hosts. Listeners also called in often to voice their opinions on the subject. Bruce testified at his deposition that it is "the obligation of the radio station to respond to the public," and that he had appeared on the air on more than one occasion for the specific purpose of discussing programming.

Peaked audience interest in programing also was shown by evidence that Bruce, himself, received approximately 300 listener letters each year, mostly regarding his programming decisions. Bruce testified to receiving so many listener calls that if he took them all he "couldn't function and do [his] job."

According to the court, all this added up to a public controversy: "It is apparent that the ongoing debate about WIOD's programming and Bruce's decisions affected not only Bruce and other members of the WIOD staff, but also the numerous WIOD listeners who chose to write and call with their opinions. The debate about WIOD programming and Bruce's decisions was therefore a public controversy which satisfies the first prong of the *Waldbaum* test."

The court had little trouble finding the second and third parts of the *Waldbaum* test satisfied. As program director, Bruce was situated at the vortex of the controversy and the allegedly defamatory statements all related to Bruce's performance as programming chief.

No Triable Question of Actual Malice

Having been ruled a public figure, Bruce failed to meet his burden of demonstrating the existence of a triable issue of actual malice. In fact, Bruce admitted at his deposition that he had no evidence that Rogers knew or had reason to know that any portion of the article he read on the air was false.

Absent any showing of actual malice by Bruce, the court granted summary judgment to the media defendants.

The court's opinion falls short of suggesting that program directors as a class will normally be treated as public figures with regard to comments on their job performance. Nonetheless, the case should be helpful to the media because of its relatively expansive treatment of the "public controversy" concept.

Michael Kovaka is with the firm Dow, Lohnes & Albertson in Washington, D.C.

New York Trial Court Allows Potential Witness to Represent Libel Plaintiff Michael Armstrong in Discovery

A New York trial court denied Simon & Schuster's motion to disqualify one of Michael Armstrong's attorneys in Armstrong's defamation suit against S&S based upon the book *Den of Thieves*. *See Armstrong v. Simon & Schuster*, N.Y.L.J. Oct. 18, at 30, cols. 3–4. The ruling allows the attorney, who is expected to be a witness at trial in the case, to supervise discovery and to conduct depositions, using a pseudonym on the record.

This vigorously contested libel suit has already been to the New York Court of Appeals, which affirmed the denial of Simon & Schuster's motion to dismiss. *See LDRC LibelLetter*, April 1995 at 2. On its appeal, Simon & Schuster had argued that the allegedly defamatory statements were substantially true and further urged the New York Court of Appeals to establish a test for "libel by implication" under which "the defamatory implication must be clear and inescapable" for liability to attach. 82 N.Y.2d 373, 381, 625 N.Y.S.2d 477, 481, 23 Media L. Rep. 1532, 1536 (1995). In affirming the denial of the motion to dismiss, the Court of Appeals identified a disputed issue of fact regarding the falsity of a statement in the book and thus found it unnecessary to reach the implication issue. *Id.*

In denying Simon & Schuster's motion to disqualify one of Armstrong's attorneys, Eugene R. Licker, the court was called upon to interpret New York Disciplinary Rule DR 5-101[B], which provides that "[a] lawyer shall not act, or accept employment that contemplates the lawyer's acting, as an advocate before any tribunal if the lawyer knows or it is obvious that the ought to be called as a witness on behalf of the client. . ." 22 NYCRR § 1200.20[b].

Justice Friedman noted that several rationales have been advanced for disqualification in such instances: "that counsel should not be in a position to argue his or her own credibility to the factfinder, that opposing counsel may be limited in challenging the credibility of the attorney-witness, and that it has the appearance of impropriety."

Although neither the attorney of record in the defamation suit nor designated as lead counsel at trial, Mr. Licker is supervising the discovery phrase of the suit. Mr. Licker had been an associate and later a partner at the same firm as Mr. Armstrong and was involved in the underlying events reported upon in *Den of Thieves*. Because undoubtedly Mr. Licker will be called as a witness at the trial, the court was called upon to determine whether DR 5-101[B] precludes him from any involvement

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Tying News Report To Movie Narrows the Fair and True Report Privilege

Charles J. Glasser, Jr.

The popular practice among local television stations of tying news reports to movies was found by a state trial court in Portland, Maine to create a triable issue of fact which may defeat the "fair and true report" privilege.

In *Elshafei v. Elshafei, et al.*, (Cumberland Dkt. CV-95-371, 10-3-96, Maine) WCSH, an NBC affiliate, broadcast a story about the divorce and custody battle between the Elshafei spouses. Mrs. Elshafei, a co-defendant in the libel case with WCSH, had unsuccessfully applied for a Temporary Restraining Order to prevent her husband from taking their daughter to Egypt. Reporting about her travails in court, WCSH did not quote the language of the pleadings, but instead interviewed Mrs. Elshafei, who expressed her fears of the child's abduction. The station also interviewed an expert on child abduction hired by the wife, who reiterated those fears.

The report introduced the expert, Arnold Dunchock, as the man who "represented the woman whose similar story became a movie called 'Not Without My Daughter." Dunchock was also the author of the book upon which that movie was based. In that movie, the Arab-born husband was a physically abusive parent who spirited his American daughter away to the Middle East. Mr. Elshafei's complaint is based on two theories: that it was libel per se to be accused of planning to abduct a child; and that it was defamatory to be compared to the evil character in the movie.

The defense pleaded in motion for summary judgment that "because the report was a fair summary of an official proceeding, the statements in the news story are privileged and not actionable."

State Court Judge Bradford disagreed with the attempt to assert an absolute privilege, and instead relied upon Restatement (Second) of Torts Sec. 611 to ask aloud whether any conditional privilege was lost because the report may not have been "fair and accurate." Because the news report went beyond the story of Mrs. Elshafei's attempt to get a TRO and instead made reference to the movie, the court held that a fact issue remained for purposes of the motion, because "there is a genuine factual issue as to whether the story carries with it a materially greater sting than the precise story itself, especially the background (footage of Egypt), the reference to 'Not Without My Daughter' and the interview with the author. Therefore, summary judgment is not appropriate."

Former LDRC Intern Charles Glasser is an associate at DCS member firm Preti, Flaherty, Beliveau & Pachios in Portland, Maine.

Trial Court Allows Potential Witness to Represent Plaintiff in Discovery

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with the case.

Justice Friedman noted that DR 5-101[B] had been amended in 1990, when it was adopted by the Appellate Divisions. As originally adopted by the New York State Bar Association in 1970, the Rule had disqualified not only the potential attorney-witness but his or her firm as well. As amended, DR 5-101[B] bars only the potential attorney-witness.

While noting that the principal purpose of the Amendment was to permit attorneys other than the potential attorney-witness to work on the case, Justice Friedman observed that the amended Rule added the phrase "as an advocate before any tribunal." He concluded that the insertion of this language suggested that an attorney might be permitted to work on pre-trial aspects of a case regardless of whether he or she would later be called as a witness.

Justice Friedman then observed that the fact that the amended Rule does not bar an attorney-witness from all aspects of a case did not end the inquiry, as it was necessary to consider whether appearances other than at trial might constitute appearance "as an advocate before any tribunal."

After reviewing, and rejecting, the plaintiff's claims that the defendant's motion was being made at too late a stage in the case, and that depriving him of Mr. Licker would work a substantial hardship, Justice Friedman concluded that Mr. Licker could participate in several aspects of the pre-trial discovery.

First, he concluded that Mr. Licker's participation as counsel supervising discovery would not be inappropriate. Second, he allowed that Mr. Licker could conduct or defend depositions so long as a pseudonym was used in the transcripts, so that his name would not be disclosed to the jury. This latter ruling was based, in part, on the plaintiff's allegation, which was not denied, that the parties had previously agreed to the use of a pseudonym in any deposition conducted or defended by Mr. Licker.

Justice Friedman noted that participation in these pre-trial activities would not raise any of the problems normally advanced as reasons for disqualification of counsel under DR 5-101[B]. That is, Mr. Licker would not be required to argue his own credibility to the court or jury, the defense would not be inhibited from challenging his credibility as a trial witness, and there would not be an appearance of impropriety.

Justice Friedman did disqualify Mr. Licker from acting as counsel during his own deposition or participating in any motion for summary judgment, as well as from any participation in the trial.

Newsgathering Privilege Waived by Soliciting Confirmation

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omitted]; and (2) the "controlling effect" should be given to "the law of the jurisdiction which, beacuse of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation" [citation omitted]. Judge Gammerman ultimately decided that New York should be applied to the case at hand. *Slip op.* at 3-4.

First, as between New York and D.C., Judge Gammerman reasoned that because New York "is a world center for journalism," "New York's concern with the specific issues raised in the litigation is therefore great." *Slip op.* at 4. In addition, Judge Gammerman noted that the fact that the alleged slander occurred in D.C. "appears serendipitous [as] the Christian Coalition convention probably could have been held in a number of locations." *Slip op.* at 4. Further, "no participant in either this or the underlying action resides [in D.C.]." *Slip op.* at 4. And finally, "the waiver provision in the D.C. law conflicts directly with the New York public policy as expressed in § 79-h(g)." *Slip op.* at 4.

The choice of law between New York and North Carolina was , for Judge Gammerman, a much closer issue. In deciding the issue, Judge Gammerman stated that "the New York preference for applying the law of the jurisdiction trying the underlying case must be weighed against New York's great interest in the issue as a world media capital." *Slip op.* at 4-5. In the end, it was the fact that "New York has clearly enunciated a strong public policy, not only in favor of creating a privilege but in favor of sharply controlling it in cases of disclosure," while "North Carolina's policy, being constitutionally rooted, is not as strongly enunciated, nor does it so specifically control the manner in which a waiver may occur," that convinced Judge Gammerman that New York law should be applied. *Slip op.* at 5.

Waiver Found

The choice of law issue settled, Judge Gammerman turned to address Reiner's contention that even if New York law applies, "soliciting confirmation or comment about newsworthy information from the parties directly affected is a common and desirable journalistic practice [which] conforms with the policy underlying the privilege, and should therefore not constitute a waiver." *Slip op.* at 6. While acknowledging the force of this argument, Judge Gammerman felt compelled to reject it, stating that the statute is explicit, "a waiver ensues when the information is disclosed to any person not covered by the statute, therefore to any person not a newsgatherer." *Slip op.* at 6. Judge Gammerman did rule, however, that "the scope of [Reiner's] deposition should be limited to matters actually disclosed to Peterson." *Slip op.* at 6.

Reiner's attorneys have indicated that they will be seeking reargument, however, because the court did not address the issue of whether the privilege would be waived under either the U.S. or New York Constitutions.

Laura R. Handman and Gregory A. Welch of Lankenau Kovner and Kurtz are representing Mr. Reiner on the motion to quash.

New York Judge Rules Newsgathering Privilege Waived by Soliciting Confirmation

Holding that the newsgathering privilege under the New York Shield Law was waived when ABC *PrimeTime Live* reporter Steven Reiner related accusations of criminal activity to the subject of those accusations, New York County Supreme Court Judge Ira Gammerman denied Reiner's motion to quash the subpoena that sought to compel his testimony in the defamation suit which subsequently arose out of the statements. *In the Matter of the Application of Mark A. Peterson and Andrea Peterson, for an Order to Examine Steven Reiner, as Ordered by a Foreign Subpoena Pursuant to CPLR § 3103 (e)*, No. 96/110197 (N.Y. Sup. Ct. Oct. 7, 1996).

In September 1994, Reiner was based in New York and working on a story for *PrimeTime Live*, about the business activities of Pat Robertson, when he attended a Christian Coalition convention in Washington, D.C. At the convention, Reiner spoke to Ralph Reed, executive director of the Coalition, who in the course of the conversation allegedly accused Mark Peterson, a former president of a Robertson company, of criminal activity.

Following the conversation Reiner telephoned Peterson in order to inform him of Reed's accusations and solicit his response. Peterson subsequently filed a defamation suit against Reed, Robertson, and others, in North Carolina based on the accusations allegedly made to Reiner, and after Reed denied making the accusations obtained a subpoena for the reporter's testimony.

Choice of Law: Which Privilege?

Faced with a New York reporter, a North Carolina lawsuit, and the events of a Washington, D.C. convention, Judge Gammerman's first task was to decide which jurisidiction's law should be applied. Under Washington, D.C. Code §§ 16-4701 to 4704, the journalist privilege, as Judge Gammerman noted, is "virtually impenetrable" since it "does not consider the privilege waived if the journalist disseminates the information sought." *Slip op.* at 3.

New York's Shield Law, § 79-h, on the other hand, provides that the newsgathering privilege is waived if the journalist "voluntarily discloses . . . the specific information sought to be disclosed to any person not otherwise entitled to claim the exemptions provided by this section." N.Y. Civ. Rights § 79-h (g).

Finally, Judge Gammerman stated that North Carolina has not yet codified the privilege but rather "relies on Amendments One and Fourteen of the U.S. Constitution and their equivalents in the North Carolina Constitution." *Slip op.* at 2. Thus, it was not clear how North Carolina courts would rule on the issue of waiver.

Reiner, not surprisingly, argued that D.C. law should apply as the alleged defamation occurred there, while Peterson argued for the application of either North Carolina or New York law. Stating that New York's choice of law policy offers two applicable principles: (1) "that, in general, the law of the place where the testimony is to be heard governs its admissibility, although a state may refuse to apply the law of a trial state when the deposition state has contacts with the cause of action and has a fundamental public policy not in accord with the law of the trial state" [citations

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Whitewater Court Denies ABC's Motion to Quash

Background

On November 6, 1996, Judge Susan Wright of the Eastern District of Arkansas denied ABC's motion to quash a grand jury subpoena issued by Independent Counsel Kenneth Starr seeking the full transcript and videotape of an ABC interview with Susan McDougal, who had been indicted and convicted in connection with the Whitewater investigation. *See In re Grand Jury Subpoena of American Broadcasting Companies, Inc.*, No. GJ-96-3 (E.D. Ark. Nov. 6, 1996).

In doing so she found that *Branzburg* did not support more than narrow First Amendment protection, that state law privileges did not apply, and that the independent prosecutor was not required to follow DOJ guidelines on the issuance of subpoenas to media.

Ms. McDougal was found guilty of four felony counts arising from a $300,000 loan obtained from the Small Business Administration on May 28, 1996. She was subsequently sentenced to two years' imprisonment, followed by three years' probation, a $5000 fine, repayment of the loan with interest, and 312 hours of community service. The conviction and sentence are currently on appeal before the Eighth Circuit. *Slip op.* at 3.

On August 20, 1996, the date of her sentencing, Mr. Starr served Ms. McDougal with a subpoena directing her to testify before the grand jury investigating Whitewater on September 4 and 5, 1996. Ms. McDougald moved to quash the subpoena or for a protective order, and Judge Wright denied the motion, issuing an immunity order under 28 U.S.C. § 6002 and directing Ms. McDougald to testify. *Slip op.* at 3–4.

When Ms. McDougald refused to testify, Judge Wright held her in civil contempt and ordered her to be jailed for 18 months or until she agrees to testify, the term of the grand jury expires, or her testimony is no longer necessary. *Slip op.* at 4. The civil contempt was subsequently upheld on appeal. *Id. See In re Grand Jury Subpoena*, No. 96-3345, 1996 WL 577476 at *1 (8th Cir. Oct. 9, 1996).

On September 4, 1996, ABC aired portions of an interview of Ms. McDougal by Diane Sawyer on *PrimeTime Live*. The interview had been taped in New York City on August 30. Following the broadcast, Mr. Starr issued a

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Hidden Camera Case Won By NBC in California

By Anne H. Egerton

On November 6, a state court in Los Angeles granted summary judgment to NBC in a "hidden camera" case involving allegations of illegal recording and fraud.

The case arose from a 1994 *Dateline NBC* report about the "pay-per-call" industry. The first broadcast in *Dateline*'s three-part series reported on companies that were using "toll-free" 800-number lines to sell 900-line-type services, including sex lines and other chat lines.

Legislation passed by Congress to regulate 900 services had created a loophole, allowing pay-per-call providers to operate 800 lines without complying with legal requirements and regulations for 900-line services. At the time, members of Congress, regulators, state attorneys general, and parents were complaining about the 800-line loophole, because consumers -- including many teens -- were running up huge telephone bills, believing the 800 lines to be free.

Two *Dateline NBC* producers responded to an advertisement placed in the "business opportunities" section of *USA Today* by pay-per-call provider SimTel Communications, soliciting investors in its 800 lines. The producers gave their true names but did not tell SimTel that they were journalists, allowing the SimTel salesman who answered the phone to believe that they were potential investors.

After a number of telephone conversations, the producers agreed to meet SimTel salesman Tom Scott for lunch. Scott brought with him to the lunch meeting, which took place on the outdoor patio of a Los Angeles-area restaurant, SimTel sales manager Steve Wilkins. The producers brought two other people with them. At the lunch, Wilkins described SimTel's pay-per-call business; NBC videotaped and audiotaped the lunch meeting with hidden cameras. *Dateline* then aired portions of the tape in its report on the 800-line business.

Wilkins and Scott sued NBC and its Los Angeles station, as well as the producers, correspondent, and anchor on the piece. The plaintiffs' lawyer was Neville Johnson, the Los Angeles attorney who represented two "telephone psychics" in a 1994 "hidden camera" case against ABC.

Wilkins and Scott alleged a variety of claims, including illegal recording in violation of the California Penal Code, common law intrusion, fraud, public disclosure of private facts, and infliction of emotional distress. (The plaintiffs also sued for defamation and false light, but they dismissed those claims during discovery.)

At the conclusion of discovery, NBC moved for summary judgment. Wilkins and Scott filed a cross-motion for summary adjudication on their fraud claim, alleging that the NBC producers had used false names, had pretended to be married, and had said that they were in California on vacation and business (rather than just on business).

NBC argued that the plaintiffs could not prove that the lunch meeting was a "confidential communication" within the meaning of California's recording statute, because Wilkins and Scott freely talked about SimTel's business with two virtual strangers and two total strangers on the patio of a public restaurant. NBC also contended that the plaintiffs could not recover for fraud because they could not prove reliance, causation, or damages.

Wilkins had admitted at his deposition that he would have provided the same information to the *Dateline NBC* producers even if he had known that they were journalists, but that he would have chosen his words more carefully. Scott had testified at his deposition that he would not have done anything differently had he known the producers' real names or that they were not married.

With respect to the plaintiffs' common law privacy claims, NBC argued that Wilkins and Scott could not sue for intrusion based on the photographing of them -- whether surreptitious or not -- in a public place, talking about business rather than personal matters. The disclosure of private facts claim failed, NBC said, because the fact of Wilkins' and Scott's employment was not private and, in any event, the broadcast was newsworthy.

Los Angeles Superior Court Judge David Yaffe granted NBC's motion and dismissed the case. Judge Yaffe stated that, when he watched the tape of the lunch meeting (which NBC had filed with its papers), he became convinced that Wilkins and Scott had no reasonable expectation of privacy or confidentiality in their remarks.

The court seemed to draw a distinction between the videotaping (implicitly holding that the photographing of Wilkins and Scott in public could not be actionable) and the audiotaping of their conversation.

With respect to the audiotaping, Judge Yaffe noted that Wilkins and Scott never even asked who the two strangers accompanying the producers were or what they did, and that Wilkins continued with his business pitch even when waiters were standing at the table, without stopping or lowering his voice.

The court's conclusion that Wilkins and Scott could not reasonably have expected their conversation to be confidential, Judge Yaffe said, was fatal to all of their claims, including fraud. Johnson has said that his clients will appeal.

NBC was represented by Anne H. Egerton and Patricia Duncan of the NBC Law Department and Henry Shields, Jr., a partner with Irell & Manella.

Whitewater Court Denies ABC's Motion to Quash Third Party Subpoena

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grand jury subpoena seeking the full transcript and videotape of the interview, including portions that were not broadcast. *Slip op.* at 4. ABC provided the Independent Counsel with a transcript of the broadcast interview as well as a copy of a document containing additional excerpts from the interview, which ABC had previously given to *The Washington Post*. *Slip op.* at 6 n.3.

ABC moved to quash the subpoena, arguing that the editorial matter was protected from disclosure by a journalist's qualified privilege under the First Amendment, the Arkansas Constitution, and the shield laws of both Arkansas and New York. ABC also argued that the subpoena should be quashed because the Independent Counsel had failed to follow Department of Justice guidelines regarding the issuance of subpoenas to the media. *Slip op.* at 5.

Court Holds First Amendment Reporters' Privilege Foreclosed Under Branzburg

The court began by stating that ABC's assertion of a qualified reporter's privilege under the First Amendment was essentially foreclosed by the Supreme Court decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972). *Slip op.* at 6.

Judge Wright rejected ABC's argument that Justice Powell's concurring opinion, which gave the fifth vote to the majority in *Branzburg*, could be read as requiring a "case-by-case" balancing to ensure that First Amendment interests were not violated by the subpoena. Citing decisions in the Fourth, Sixth, and Ninth Circuits, Judge Wright concluded that Justice Powell's concurrence was "entirely consistent" with the majority's view that a subpoena issued to the media, at least in the criminal grand jury context, is subject to a First Amendment challenge only in the most limited of circumstances: "'where a grand jury inquiry is not conducted in good faith, or where the inquiry does not involve a legitimate need for law enforcement, or has only a remote and tenuous relationship to the subject of the investigation, then the balance of interests struck by the Branzburg majority may not be controlling.' *In re Grand Jury Proceedings*, 5 F.3d 397, 401 (9th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994)." Slip op. at 9. Judge Wright went on to note that Justice Powell had specifically rejected the three-part test proposed by three of the dissenters in *Branzburg*. *Id.* at 9–10.

Judge Wright conceded that some circuits had read Justice Powell's concurrence as having created a qualified privilege to be determined under a three-part test. *Slip op.* at 10–11. Because the majority of those cases were decided in the civil as opposed to criminal context, however, Judge Wright concluded that they "have no bearing on cases involving federal grand jury proceedings." *Slip op.* at 11.

For the same reason, the court held as distinguishable an Eighth Circuit decision that had granted the media defendants' motion for summary judgment while denying the plaintiff's motion to compel disclosure of the sources for the article in question. *See Cervantes v. Time Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). Judge Wright noted that in applying a journalist's privilege in *Cervantes*, the Eighth Circuit had distinguished the civil context from the grand jury case at issue in *Branzburg*.

Moreover, in a more recent decision, the Eighth Circuit had cited *Branzburg* for the proposition that "absent 'unusual circumstances,' the First Amendment rarely offers protection from a duty to testify before a grand jury." *Slip op.* at 13 (*quoting In re Grand Jury Subpoenas Duces Tecum*, 78 F.3d 1307, 1313 n.13 (8th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3181 (Sep. 4 1996) (No. 96-360).

Because ABC had not alleged that the subpoena was issued in bad faith or in order to harass the press, that the information sought was only remotely connected to the investigation, or that the Independent Counsel did not have a legitimate need for the information, Judge Wright held that the limited qualified privilege under *Branzburg* was not applicable.

Even Allowing a Qualified Privilege under Branzburg, Court Would Deny Motion to Quash

Judge Wright went on to note that she would deny ABC's motion to quash even if she were to adopt the three-part test she had held was rejected by the *Branzburg* majority. She began by noting that the inquiry must take place in the context of grand jury proceedings, where there is a "lack of knowledge as to just what records exist and what they will reveal." *Id.* at 14–15 (*quoting Universal Manufacturing Co. v. United States*, 508 F.2d 684, 686 (8th Cir. 1975).

In the context of the grand jury investigation, Judge Wright held that the material was both highly relevant and that Mr. Starr had an overriding need for the information, observing that Ms. McDougald played an important role in the Independent Counsel's investigation. Moreover, because Ms. McDougald had discussed matters under the Independent Counsel's jurisdiction in the aired portion of the broadcast there was reason to believe that the outtakes would also contain statements on these matters. *Slip op.* at 15.

Judge Wright also concluded that the information was not reasonably available from other sources, despite the fact that Ms. McDougald had given other media interviews. Those interviews, concluded the court, shed no light on what Ms. McDougald might have said on the outtakes of the *Prime-Time Live* interview. *Id.*

State Law Privileges Unavailable, Holds Judge Wright

Judge Wright then dismissed all state law privileges asserted by ABC, in-

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Whitewater Court Denies ABC's Motion to Quash Third Party Subpoena

(Continued from page 15)

cluding a qualified journalist's privilege under the Arkansas State Constitution and statutory privileges under both Arkansas and New York law with the observation that state law privileges do not apply to a federal grand jury subpoena.

Independent Counsel Not Required to Follow DOJ Guidelines

Finally, Judge Wright rejected ABC's argument that Mr. Starr had failed to follow the Department of Justice Guidelines regarding the issuance of subpoenas to the media, which require that "[n]o subpoena may be issued to a member of the news media . . . without the express authorization of the Attorney General." 26 C.F.R. § 50.10(e).

Although Mr. Starr had not obtained such consent prior to issuance of the subpoena, Judge Wright pointed to an exception under the Independent Counsel charter. That is, the Independent Counsel "shall, *except to the extent that to do so would be inconsistent with the purposes of this chapter*, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws." *Slip op.* at 17 (*quoting* 28 U.S.C. § 594(f) (emphasis supplied by the court). The court found that requiring the Independent Counsel to obtain the Attorney General's consent for issuance of a subpoena would be contrary to his authorization. Moreover she concluded that these regulatioins do not confer an enforceable right on the subpoenaed person.

CBS Journalists Subpoenaed in Espy Investigation

In a related case, in connection with an investigation into alleged misconduct by former Agriculture Secretary Mike Espy, Independent Counsel Donald C. Smaltz has subpoenaed journalists from CBS concerning a "60 Minutes" broadcast on Tyson Foods. Mr. Smaltz is seeking to compel testimony from the journalists before a grand jury as well as outtakes, reporter's notes, and research papers extending back over four years.

CBS has moved to quash the subpoena and Judge Penn, of the District Court of the District of Columbia, has granted a stay of the subpoena pending his decision, which is expected shortly.

Eighth Circuit Reverses District Court and Enters $1 Million Jury Verdict for Plaintiff

(Continued from page 1)

Background

The suit arose from an ABC broadcast on "World News Tonight with Peter Jennings" about the plaintiff's garbage recycling machine. Part of an ongoing series on "Anger in America," the story opened with ABC correspondent Rebecca Chase reporting that "taxpayers are angry that they are stuck with a three million dollar debt for this garbage recycling machine that they never approved and does not work." Chase went on to relate how the county commission of the south Georgia county had decided to purchase the plaintiff's machine after its landfill had become full. *Id.* at *1–*2.

Later in the story, viewers were shown another recycling machine as Chase reported that "[plaintiff's] machine was supposed to work like this one in Tennessee, sorting and recycling up to ninety percent of the county's garbage and paying for itself by selling the recycled materials and charging user fees. That is how then-commissioner Joe Stallings promised it would work here. It did not." *Id.* at *3.

Chase then interviewed Stallings, who stated "There's nothing physically wrong with the machine. It's the people." Chase went on to report that Stallings "blames the people for not giving the machine a chance" but that "most people here blame him for misleading them about how much it cost to operate the plant." She also reported that although the machine "turned the garbage into fuel pellets," no buyers were found for the pellets. *Id.*

Lundell sued ABC, claiming that the statement that the machine "does not work" implied that it was mechanically defective. ABC countered by claiming that the statement "accurately implied that the Lundell machine and Berrien County's recycling plan did not work as intended or promised because the system did not work in a financially viable manner." *Id.* at *4.

The trial court denied ABC's motion for summary judgment, holding that it was a jury question as to whether the "gist" or "sting" of the report was substantially true. The court also held that Lundell was a private figure and thus required only to demonstrate negligence by a preponderance of the evidence in order to recover at trial. *Id.* at *5.

Following a jury verdict for Lundell totaling $900,000 for injury to reputation and $158,000 for lost profits, the district court entered judgment as a matter of law for ABC, ruling that the report was substantially true as a matter of law. The court also ruled that in any case it would have set aside the $158,000 award because of insufficient evidence of lost profits. *Id.* at *6.

Standard of Review

The court began its analysis by noting that the parties disagreed as to the standard of review. Lundell argued that the jury verdict should be upheld so long as there was "sufficient evidence" to support it, and that all evidence should be evaluated in the light most favorable to the party against whom judgment as a matter of law has been entered. *Id.* at *6–*7. By contrast, ABC maintained that appellate courts were required to "'make an independent examination of the whole record' in order to ensure that no 'forbidden intrusion on the field of free expression' has occurred." *Id.* at *7

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Eighth Circuit Reverses District Court and Enters $1 Million Jury Verdict for Plaintiff

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(*citing New York Times v. Sullivan*, 376 U.S. 254, 285 (1964)).

The Eighth Circuit conceded that appellate review of the issue of actual malice is not limited by the clearly erroneous standard and that, under *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 (1984), appellate courts have a constitutional duty "to independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of actual malice." However, it rejected ABC's argument that the issue of falsity was also subject to independent appellate review, agreeing with Lundell that the heightened level of appellate scrutiny is limited solely to the issue of actual malice. *Id.* at *8–*18.

ABC argued that independent appellate review was required because the issue of falsity had been constitutionalized by the holding in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), that the plaintiff bears the burden of proof in defamation actions against the media. The Eighth Circuit rejected this reading of *Hepps*, contending that "[t]he Court identified the burden of proof, not the element of falsity, as the constitutional requirement." *Id.* at *14.

Reviewing the Evidence

ABC argued that the phrase "does not work" was substantially true because "the machine failed to function on a financially self-sufficient basis, failed to solve the county's waste disposal crisis, and had not operated since its permit had been suspended." *Id.* at *22. Because it was subject to reasonable dispute "whether the statement goes to the operability of the machine, or its economic shortcoming," the Eighth Circuit held that it was a matter for the jury to determine which meaning was conveyed. *Id.* at *23.

The court went on to observe that there was "substantial evidence from which a reasonable jury could conclude that the statement was false, and from which a reasonable jury could conclude that the sting of the story was that the Lundell machine was mechanically inoperable." *Id.* at *24. "Even according ABC the independent review it requests," the court concluded, "we are confident that there has been no forbidden intrusion on First Amendment principles." *Id.* at *25.

"[In Hepps, the] Court identified the burden of proof, not the element of falsity, as the constitutional requirement."

First, the court pointed to evidence in the record that the story had been motivated by a mistaken belief that the machine was broken. For example, the initial proposal for the story had included a statement that the plaintiff's machine "has never worked." *Id.* The reporter, Rebecca Chase, had also admitted "that at the time of the broadcast she believed that the machine had a broken main shredder, and this was one reason why she reported that the machine did not work." *Id.* at *26.

Moreover, when the camera crew came to film the machine, one of the crew members stated to the former plant manager that he understood that the plant was broken down. Finally, in response to Lundell's post-broadcast request for a retraction, ABC responded with the following statement:

> Contrary to your letter, the report does not state that the "system" does not work. What the report does say is that the garbage recycling machine purchased by Berrien County does not work. This is in fact completely true. At the time of our broadcast the Berrien County machine was not functioning. As I am sure you are aware, the main shredder broke down and has not been repaired.
>
> *Id.* at *27.

The court then considered ABC's contention that any false impression generated by the statement that the machine was mechanically inoperable was negated by other parts of the story. For example, argued ABC, (1) there was footage showing the machine to be operating, (2) the report noted that the machine turned garbage into fuel pellets and showed the fuel pellets made by the machine, (3) the report had included the statement "there's nothing physically wrong with the machine," and (4) the report showed footage of another of plaintiff's machines that was operated by Tennessee officials. *Id.* at *28.

The Eighth Circuit observed, however, that the report had not included footage showing the machine to be operating, but only footage showing a worker sorting garbage and fuel pellets made by the machine. Moreover, the footage showing the Tennessee machine made it appear that "the Tennessee machine worked, and the Berrien County machine did not." Finally, the report had painted the commissioner who had stated "there's nothing physically wrong with the machine" as someone who had misrepresented the machine to the county taxpayers, thus increasing the likelihood that a reasonable juror would discredit his statement. *Id.* at *28–*29.

Lundell Held to Be a Private Figure

ABC then argued that the district court ruling should be upheld on the alternative ground that Lundell was a public figure and had been unable to demonstrate actual malice.

The Eighth Circuit began its public figure analysis by observing that the particular controversy giving

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Eighth Circuit Reverses District Court and Enters $1 Million Jury Verdict for Plaintiff

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rise to the ABC broadcast — the garbage disposal problem in Berrien County — was "clearly a public controversy involving questions of 'public concern.'" *Id.* at *32. However, the court held that there was no evidence that Lundell had voluntarily injected itself into the controversy in an attempt to influence its resolution. *Id.* at *35-36 ("Indeed, [ABC reporter] Chase admitted that she 'did not uncover any evidence from any source that [Lundell] had attempted to inject [itself] into [the] political debate of Berrien County."); *id.* at *36 ("ABC does not direct us to any evidence that Lundell placed itself into the controversy to influence the issues involved.")

Throughout this portion of the decision, the court made clear that it believed Lundell had been unwillingly dragged into a public controversy that was created by the defendant, analogizing Lundell to the plaintiffs in *Hutchinson v. Proxmire*, 443 U.S. 111 (1979), and *Wolston v. Reader's Digest Association*, 443 U.S. 157 (1979). Quoting *Hutchinson*, the court noted that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." 1996 U.S. App. LEXIS 26790 at *33 (*quoting Hutchinson*, 443 U.S. at 135).

Again invoking *Hutchinson* and *Wolston*, the Eighth Circuit held that it was irrelevant to the determination of Lundell's status that the company had contracted with the county for the sale of its machine. *Id.* at *36 ("the Supreme Court makes clear in *Hutchinson* and *Wolston* that it is the plaintiff's role in the controversy, not the controversy itself, that is determinative of public figure status").

All Damages Upheld

In upholding the damages awarded by the jury, the Eighth Circuit rejected ABC's argument that a corporate plaintiff should not be permitted to recover damages for loss of reputation as well as lost profits, observing that Iowa courts "uniformly allow business entities to recover damages for injury to their reputation as well as lost profits." *Id.* at *38.

The court also rejected ABC's contention that there was insufficient evidence of actual damages, pointing to testimony that Lundell had been an industry leader before the ABC broadcast but had sold no machines after the broadcast. The court observed that the size of the award was supported by testimony regarding historical sales data as well as development costs. *Id.* at *38-*39.

The Eighth Circuit also reversed the district court's alternative ruling that the lost profits award should be set aside because there had been "tremendous problems" with the machines and inconsistent testimony as to lost sales. With respect to the conflicting evidence regarding the cause for the complete absence of sales following the broadcast, with Lundell presenting evidence that the report had killed interest in the machine and ABC presenting evidence that the loss of sales resulted from problems with the machines, the Eighth Circuit concluded that the issue was one for the jury to resolve. *Id.* at *42-*43.

Similarly, the court held that it was for the jury to resolve any conflict between the testimony of Lundell and the vice president of his company regarding estimated sales for the two years following the broadcast. Moreover, there was testimony that there was "substantial interest" in the machine prior to the broadcast, and historical sales figures provided a reasonable basis for estimating the amount of lost profits. *Id.* at *41.

Standard of Review in Other Jurisdictions

According to LDRC's most recent study of independent appellate review, in 18 of the 27 appeals in which falsity was at issue, appellate courts reviewed the evidence on a "clearly erroneous" standard. *See* LDRC BULLETIN 1996(3), Table 17, at A14. Only in two of these 27 decisions did the court explicitly address the issue of the appropriate standard of review, however. *Compare Levine v. CMP*, 738 F.2d 660 (5th Cir. 1984) (independent appellate review required only for actual malice) *with Locricchio v. Evening News Association*, 438 Mich. 84, 113, 476 N.W.2d 112 (Mich. 1991) (independent appellate review of falsity required).

In *Levine*, the Fifth Circuit held it unnecessary to apply the more rigorous standard of review mandated by *Bose* to the issues of falsity and negligence, reasoning that *Gertz* had given greater latitude to the states in cases involving private figures. 738 F.2d at 673 n.19 ("this court must abide by *Gertz* by applying principles of state, not federal law, to defamation suits brought by private persons").

Obviously, this rationale does not survive *Hepps*. Moreover, an inescapable corollary to the requirement that the plaintiff prove falsity would seem to be that appellate courts must independently review the evidence of falsity in order to ensure that no "forbidden intrusion on the field of free expression" has occurred." *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964). Indeed, as the Michigan Supreme Court recognized in the only other post-*Hepps* decision to explicitly address the issue, the protection afforded by shifting the burden of proof "would indeed ring hollow if . . . no effective review existed to ensure compliance with the burden of proof." *See Locricchio v. Evening News Association*, 438 Mich. 84, 113, 476 N.W.2d 112, 124 (Mich. 1991).

Texas Court Declares Criminal Stalking Law Unconstitutional

Striking down Texas's anti-stalking law as unconstitutionally vague, the state's Court of Criminal Appeals pointed to the "real likelihood that the statute could chill the exercise of protected First Amendment expression." *Long v. Texas*, 1996 WL 512396 at *8 (Tex. Cr. App. Sept. 11, 1996).

The decision marks the second instance that a Texas criminal statute directed at harassment has been held to be void for vagueness. In 1983, the Fifth Circuit Court of Appeals struck down Texas Penal Code § 42.07 (a)(1) (pre-1983 version), then the state's harassment statute, as facially unconstitutional due to the vagueness of the terms "annoy" and "alarm." *Kramer v. Price*, 712 F.2d 174 (5th Cir. 1983), *rehearing en banc granted*, 716 F.2d 284 (5th Cir. 1983), *grant of relief affirmed*, 723 F.2d 1164 (5th Cir. 1984).

The current statute, while curing certain defects in the old statute, continued not only the use of the terms "annoy" and "alarm," but created other phrases and provisions that were found unconstitutionally vague.

Media do not think of themselves as "stalkers." But a number of media counsel have indicated that they pay attention to the criminal and civil stalking statutes when advising crews that plan to follow or stake out individuals. In this era of new claims against the media, primarily based in newsgathering activities, that may be a worthwhile practice in a number of jurisdictions.

Anti-Stalking Statutes

Following the 1989 murder of television actress Rebecca Schaeffer by an obsessive fan, the anti-stalking statute movement began. California enacted the first anti-stalking law in 1990, with the remaining 49 states, the District of Columbia, and the Virgin Islands following suit (see below for a list of the statutes). Realizing the potential for challenge on the grounds of vagueness, as in the Long case, the legislators have often attempted to narrow the scope of the anti-stalking statutes by either heightening the "cause" requirements or the "effect" requirements, or both. In other words, some of the statutes require an intent to harm on the part of the alleged stalker, while other statutes require that actual harm be visited upon the victim. Many of the statutes, like the one involved in Long, provide an exception for "constitutionally protected activities" which would seemingly include newsgathering.

Ala. Code §§ 13A- 6 - 90 to - 94 (1994)
Alaska Stat. §§ 11.41.260 to .270 (Supp. 1994)
Ariz. Rev. Stat. Ann. § 13 -2921 (Supp. 1994)
Ark. Code Ann. § 5 -71-229 (Michie 1994)
Cal. Penal Code § 646.9 (West Supp. 1995)
Colo. Rev. Stat. § 18 - 9 -111 (Supp. 1994)
Conn. Gen. Stat. Ann. §§ 53a-181c to -181d (West Supp. 1994)
Del. Code Ann. tit. 11, § 1312A (Supp. 1994)
Fla. Stat. Ann. § 784.048 (West Supp. 1995)
Ga. Code Ann. §§ 16 -5 - 90 to - 93 (Supp. 1994)
Haw. Rev. Stat. § 711-1106.5 (Supp. 1992)
Idaho Code § 18 -7905 (Supp. 1994)
Ill. Ann. Stat. ch. 720, para. 5/12-7.3 to .4 (Smith- Hurd 1995)
Ind. Code Ann. §§ 35 - 45 -10 -1 to -5 (West Supp. 1994)
Iowa Code Ann. § 708.11 (West Supp. 1994)
Kan. Stat. Ann. § 21-3438 (Supp. 1993)
Ky. Rev. Stat. Ann. §§ 508.130 to .150 (Michie/Bobbs-Merrill Supp. 1994)
La. Rev. Stat. Ann. § 14:40.2 (West Supp. 1994)
Me. Rev. Stat. Ann. tit. 19, § 762 (West Supp. 1994) (including stalking as part of abuse)
Md. Ann. Code art. 27, § 121B (Supp. 1994)
Mass. Gen. Laws Ann. ch. 265, § 43 (West Supp. 1994)
Mich. Comp. Laws §§ 750.411h to .411i (Supp. 1994)
Minn. Stat. § 609.749 (Supp. 1995)
Miss. Code Ann. § 97-3 -107 (1994)
Mo. Ann. Stat. § 565.225 (Vernon Supp. 1994)
Mont. Code Ann. § 45 -5 -220 (1993)
Neb. Rev. Stat. §§ 28 -311.02 to .05 (Supp. 1994)
Nev. Rev. Stat. § 200.575 (Supp. 1993)
N.H. Rev. Stat. Ann. § 633:3 -a (Supp. 1994)
N.J. Rev. Stat. § 2C:12-10 (Supp. 1994)
N.M. Stat. Ann. § 30 -3A-1 to - 4 (Michie Supp. 1993)
N.Y. Penal Law §§ 120.13 -.14, 240.25 -.26 (McKinney Supp. 1995) (calling crime menacing or harassment rather than stalking)
N.C. Gen. Stat. § 14 -277.3 (Supp. 1993)
N.D. Cent. Code § 12.1-17- 07.1 (Supp. 1993)
Ohio Rev. Code Ann. §§ 2903.211 to .215 (Anderson Supp. 1994)
Okla. Stat. Ann. tit. 21, § 1173 (West Supp. 1995)
Or. Rev. Stat. § 163.730 -32 (Supp. 1994)
18 Pa. Cons. Stat. Ann. § 2709(b) (Supp. 1994)
R.I. Gen. Laws §§ 11-59 -1 to -3 (1994)
S.C. Code Ann. § 16 -3 -1070 (Law. Co-op. Supp. 1993)
S.D. Codified Laws Ann. §§ 22-19A-1 to - 7 (Supp. 1994)
Tenn. Code Ann. § 39 -17-315 (Supp. 1994)
Tex. Penal Code Ann. § 42.07(a)(7) (West 1994) (describing stalking in section entitled harassment)
Utah Code Ann. § 76 -5 -106.5 (Supp. 1994)
Vt. Stat. Ann. tit. 13, §§ 1061- 63 (Supp. 1994)
Va. Code Ann. § 18.2- 60.3 (Michie Supp. 1994)
Wash. Rev. Code Ann. § 9A.46.110 (West Supp. 1995)
W. Va. Code § 61-2- 9a (Supp. 1994)
Wis. Stat. Ann. § 947.013 (West Supp. 1994) (addressing stalking under section entitled harassment)
Wyo. Stat. § 6 -2-506 (Supp. 1994)
D.C. Code Ann. s 22-504 (1993)
V.Is. 14 V.I.C. § 2072 (1995)

THE NEUTRAL REPORTAGE DOCTRINE IN OHIO

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attorney facing the charges was James C. Young of Cleveland and not James H. Young of Amherst. Two days after the report, the *Journal* published a correction that the attorney was from Cleveland, not Amherst. James H. Young, however, had offices in both Cleveland and Amherst.

The trial court granted summary judgment for the newspaper based on the statutory privilege for fair and impartial reports of judicial records. Ohio Rev. Code Ann. § 2317.05 provides:

> The publication of a fair and impartial report of the return of any indictment, the issuing of any warrant, the arrest of any person accused of crime, or the filing of any affidavit, pleading, or other document in any criminal or civil cause in any court of competent jurisdiction, or of a fair and impartial report of the contents thereof, is privileged, unless it is proved that the same was published maliciously, or that defendant has refused or neglected to publish in the same manner in which the publication complained of appeared, a reasonable written explanation or contradiction thereof by the plaintiff . . .

The court of appeals reversed the judgment, holding that the report was not a "substantially accurate" report of the official record *Young v. The Morning Journal*, 1995 Ohio App. LEXIS 1875 (May 3, 1995). The reversal was based on the statutory privilege and on a discussion of the "neutral reportage" doctrine, recognized by many Ohio appellate courts as "essentially an expansion of the privileges in R.C. 2317.04 and R.C. 2317.05." *Id.* at *8-9. The Ohio Supreme Court affirmed this decision based on the statutory privilege, but in addressing the "neutral reportage" argument simply stated: "This court has never recognized the 'neutral reportage' doctrine and we decline to do so at this time." 76 Ohio St. 3d 627, 629.

Where does this decision leave the "neutral reportage" doctrine in Ohio?

The future of a doctrine that has been recognized and relied upon by many courts in this state now is uncertain. The fact that the Supreme Court did not discuss the doctrine or review the many decisions which recognized it before summarily refusing to adopt it is of significance when evaluating its future. This important First Amendment protection, which has been instrumental in promoting the right of reporters to keep the public informed of newsworthy events, cannot be glazed over by the Court as an unpopular, unrecognized privilege. Indeed, Ohio appellate courts routinely have recognized the "neutral reportage" doctrine.

This fact was noted by Justice Douglas in a strong dissent to the *Young* opinion in which he chastised the court for failing to formally adopt the "neutral reportage" doctrine. As Douglas aptly stated:

> The treatment of this issue (or lack thereof) by the majority leaves one with the impression that this doctrine is simply a common-law aberration worthy of little attention. However, what the majority does not reveal is that the neutral reportage privilege has been widely recognized by numerous courts in this state and other jurisidiction.

Id. at 631.

Only a few months before the *Young* decision, an Ohio appellate court joined the ranks of many others when it upheld a grant of summary judgment based on the "neutral reportage" doctrine. *See Watson v. Leach*, 1996 Ohio App. LEXIS 2474 (Gallia County June 7, 1996). In that decision, the appellate court noted that "several Ohio appellate courts have recognized the privilege" since 1980 and discussed in detail the elements required in Ohio for the doctrine to apply. *Id.* at *6. Those elements, taken from an often cited Ohio case for applying the doctrine, *April v. Reflector-Herald, Inc.*, 546 N.E.2d 466 (Ohio Ct. App. 1986), include: (1) an allegedly defamatory accusation was made by a responsible, prominent organization or individual; (2) the accusation concerned a matter a public interest; and (3) a media defendant accurately and disinterestedly republished the defamatory accusation, *Watson*, at *7. The Ohio Supreme Court, however, did not find it necessary to address this recent decision in *Young*.

This decision has left a question in the minds of many dealing with Ohio courts in this area. Did the Ohio Supreme Court's failure to "formally adopt and apply" the privilege, *Young*, 76 Ohio St. 3d 627, 631, extinguish the neutral reportage doctrine or merely keep the common law doctrine within the discretion of lower courts to either adopt or reject, as it has existed to this point? The lack of discussion by the majority provides no guidance to discover what the court meant by stating that the court "declines" to adopt the doctrine "at this time." As Douglas stated in his dissent:

> It is time that Ohio be included among those enlightened jurisdictions which have adopted the doctrine of neutral reportage. This court could . . . take this next logical step in support and protection of the right of a free press to gather and report the news. I regret that the majority has missed the golden opportunity to do so.

Id. at 632.

So do we. Though, let us be certain that our next "golden opportunity" to seek clarification and the court's formal recognition of the "neutral reportage" doctrine will not be missed.

Richard M. Goehler and Jill P. Meyer are with the firm Frost & Jacobs in Cincinnati, OH.

Judge Cote Enjoins City from Airing Fox News and Bloomberg on a PEG Channel

In an ever-escalating battle over cable access between Rupert Murdoch's News Corporation and the newly-merged Time Warner and Turner Broadcasting Systems, Inc., Time Warner scored a victory, effectively keeping Murdoch's Fox News out of New York's cable stations, both PEG and commercial.

In *Time Warner Cable of New York, et. al. v. City of New York and Intervenor-Defendant Bloomberg. L.P.*, 96 Civ. 7736, (S.D.N.Y. 11/6/96), Judge Denise Cote preliminarily enjoined New York City from placing Murdoch's Fox News and Bloomberg, another news provider, on *Crosswalks*, one of the five PEG (public, educational and government)-designated channels operated by the City on Time Warner's system.

Presented with conflicting evidence regarding the City's motives, Judge Cote found as a fact that

> "Time Warner has established...that the City abused its power...and has acted both to coerce Time Warner and to retaliate against it for its decision not to enter into a contract with Fox News..."

On the basis of this factual conclusion, she then went on to hold that the City had violated two different provisions of the Cable Act, as well as its franchising agreements with Time Warner and Time Warners's First Amendment rights and, finding both irreparable harm and likelihood of success on the merits, granted the preliminary injunction.

Background

The players in the dispute over access to New York City's cable systems are the defendant, New York City, and plaintiff Time Warner Cable of New York City ("Time Warner"), a division of Time Warner Entertainment Company L.P., and other Time Warner-affiliated cable operators who, pursuant to franchising agreements with New York City, provide cable service throughout the five boroughs of New York City.

Fox News, though not a party to the lawsuit before Judge Cote, lies at the core of the controversy, is a 24-hour news service owned by News Corporation, of which Rupert Murdoch is the CEO. Intervenor-defendant Bloomberg L.P. ("Bloomberg"), produces a number of news services including a 24-hour cable news service.

Below is a brief summary of the factual background. It is not complete. Judge Cote's recitation of the factual material, the legislative history of the Cable Act and the historic use of PEG stations runs over ninety pages.

Time Warner's Decision Not to Carry Fox News

The dispute over access to New York City cable systems began when, following protracted FTC proceedings, Time Warner, Inc. (the parent company of the plaintiffs) and Turner Broadcasting Systems, Inc. announced the completion of their merger, scheduled for October 10, 1996. In order to obtain FTC approval, Time Warner was required to sign a consent decree in which it agreed that the cable systems operated by the merged company would carry a 24-hour news service *unaffiliated* with either of the principals.

Prior to the merger, Time Warner held discussions with two competing news providers: Fox News and MSNBC, a joint venture between Microsoft and NBC, each of which had announced plans to launch a 24-hour news programming service. (Defendant-intervenor Bloomberg had also approached Time Warner, but, for a variety of reasons, had never been a serious candidate.)

Ultimately, Time Warner selected MSNBC. According to Time Warner, its choice was based on NBC's proven track record in delivering news and the fact that MSNBC was the successor service to *America's Talking*, a program service with an audience of 20 million subscribers that was already being carried on Time Warner's New York City system.

In addition to obtaining FTC approval, under the terms of Time Warner's two franchise agreements with New York City, any "change of control" within Time Warner was subject to approval by New York City's Department of Information Technology and Telecommunication ("DoITT"). Accordingly, well before the date set for the merger--and prior to Time Warner's formal rejection of Fox News--Time Warner began its communications with DoITT, taking the position that because Time Warner was acquiring Turner, the transaction involved no change in control and, therefore, required no approval by the City.

While not agreeing with Time Warner's position regarding "change of control", DoITT's Assistant Commissioner informed Time Warner that, based upon the agency's review thus far, "it may be possible for DoITT to recommend approval of the merger...." In August, 1996, the agency prepared a draft memorandum to the City's Franchise and Concession Review Committee ("FCRC") requesting approval of the merger along with a request for public hearings and a proposed resolution approving the merger.

No discussions were held about the *content* of Time Warner's channels, nor, the Court found, did the City voice any objection to the merger until Time Warner rejected the bid of Fox News and *instead selected MSNBC* as the unaffiliated 24-hour news provider to fulfill Time Warner's obligation under the FTC consent decree.

The City's Reaction

Just three days after the Time Warner's September 17th announcement that it had selected MSNBC, the Mayor intervened, asking his subordinates to investigate the matter and referring to the situation as "very serious." Rupert Murdoch, Time Warner alleged, is a supporter of the Mayor and, as the Court found, has massive holdings which include *The New York Post*, WNYW Channel 5, and Fox Broadcast Network. Also in evidence, however, was the fact that the City had been engaged in longstanding negotiations with Fox, including tax and other

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concessions, to maintain its operations in New York.

On October 1, 1996, a meeting of principals and lawyers of Time Warner and Fox as well as various New York City officials, was held at the office of Fran Reiter, Deputy Mayor for Economic Development and Planning. The purpose of the meeting was to convey the City's request that Time Warner agree to carry Fox News on Time Warner's commercial channels, an issue the City wanted resolved before it approved the merger. At this meeting, Deputy Mayor Reiter reminded Time Warner, that the franchise was up for renewal in 1998 and that "Time Warner would not want the Fox News Channel issue to cloud the renewal decision."

Time Warner raised legal objections to the City's involvement with the content of commercial cable programming, as well as practical issues about limited capacity on its commercial channels. Addressing the capacity problem, the City proposed to allow Time Warner to move certain educational services, such as the Discovery and History Channels, onto the *Crosswalks* channel, but conditioning its offer on Time Warner's agreement to place Fox on a Time Warner commercial channel.

Time Warner rejected this proposal, arguing that lack of capacity was not the only reason for its rejection of Fox News. Time Warner noted that it was improper under the First Amendment for the City to attempt to dictate programming choices to a media entity and that the City's proposed use of a PEG channel was improper under the Cable Act.

The City then proposed to place Fox News on its *Crosswalks* channel, and during the next week pressured Time Warner to waive its objection to this plan. The City argued that there was precedent for carrying programs with commercials on PEG channels. In past instances, Time Warner had granted a waiver permitting certain programs with commercials to be transmitted on PEG channels, most notably in the case of certain foreign language programs.

On October 9, the City submitted a written request that Time Warner consent to the City placing Fox News, along with Bloomberg's news services, on its *Crosswalks* channel. The City also advised Time Warner that, absent consent, it would run the programs without commercials on its *Crosswalks* channel.

On October 10, Time Warner rejected this proposal, and pointed out that the removal of commercials would not sufficiently change the nature of the programming to make it suitable for carriage on a PEG channel. That evening, at 10:48 PM, and without further notice to Time Warner, the City began transmitting Bloomberg's 24-hour news program over *Crosswalks* and announced its intention to transmit Fox News the next evening.

Time Warner Files Suit Against the City

On October 10th, just one day prior to the proposed airing of Fox News, Time Warner brought suit in the United States District Court for the Southern District of New York to preliminarily enjoin the City from using Bloomberg and Fox on its PEG channel, alleging violation of the Cable Act, violation of Time Warner's First Amendment rights, violation of Time Warner's franchising agreements with the City, along with a variety of state and city violations. On October 11, 1996, after a hearing, Judge Cote granted a temporary restraining order, and a hearing on the preliminary injunction took place from October 28 to October 30, 1996.

The Factual Allegations

Although numerous facts and motives were in controversy at the hearing, simply put, Time Warner alleged that because of Rupert Murdoch's political connections with the Mayor, the City was engaged in coercive tactics designed to force Time Warner to carry Fox News on its commercial stations and, further, that the City's tactics, including its stated intention to carry Fox News on a PEG channel, were improper under the Cable Act as well as a violation of Time Warner's First Amendment rights.

The City, in turn, argued that as a governmental authority, the City had a right to use PEG stations for what *it* deemed to be in the public interest. Factually, it disputed Time Warner's contention that the Mayor's actions were politically motivated. According to voluminous affidavits by City officials, the City's motive in both encouraging Time Warner to carry Fox and ultimately to itself carry Fox on *Crosswalks* was part of long-standing negotiations between Fox and the City to create new jobs in New York City and to promote other legitimate interests, including diversity of programming and competition among cable programmers.

Among the affidavits submitted by the City was that of Fran Reiter, Deputy Mayor for Economic Development and Planning. In her affidavit, Ms. Reiter contends that "media and entertainment jobs represent an important and growing sector in New York City's job market; and that the Giuliani Administration had, on previous occasions, "personally intervened in efforts to keep media jobs in New York City." (Affidavit of Fran Reiter, paragraph 4.) The City's relationship with Fox News, the Deputy Mayor averred, was merely part of a long standing series of negotiations between the City and the New York City-based News America Publishing Inc, the parent of Fox News, which would have resulted in the retention and creation of thousands of jobs in New York and yielded millions of dollars worth of tax revenues to the City.

In response, among other things, Time Warner pointed out that there were numerous other New York City-based programmers which Time Warner was unwilling to carry and that the City never once before had pressured Time Warner to carry any other New York-based service. Time Warner also pointed out that Fox itself claimed its launch of a news service was one of the most successful in cable history, with 17 million viewers and that there was no threat to any jobs in New York City.

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Judge Cote Enjoins City from Airing Fox News and Bloomberg on a PEG Channel

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Judge Cote: NYC Coercing Time Warner

During the three-day hearing on the preliminary injunction, the Court found as a fact that after Time Warner accepted MSNBC as its 24-hour news station, New York City attempted to "coerce" Time Warner to reverse its decision and select Murdoch's Fox News According to the Court,

> "the City acted to punish Time Warner for exercising its editorial discretion to refuse Fox News. This punishment included placing BIT [Bloomberg] and preparing to place Fox News on *Crosswalks*, and linking Time Warner's decision...to Time Warner's franchise renewal in 1998."

Having found as a factual matter that "Time Warner has established...that the City abused its power...and has acted both to coerce Time Warner and to retaliate against it for its decision not to enter a contract with Fox News...", Judge Cote went on to determine that Time Warner had satisfied the rigorous standards for the granting of a preliminary injunction: *i.e.* (1) that it would be "irreparably harmed" were the injunction not granted; and (2) there was a likelihood of success on the merits.

A central issue in the case was the propriety of issuing a preliminary injunction against the airing of Fox News and Bloomberg on *Crosswalks*. Both the City and Bloomberg argued that the City's decision to air Fox News and Bloomberg on a PEG station did not *actually impact* Time Warner because Time Warner remained free to make its own editorial decisions on its commercial channels. Issuance of a preliminary injunction, defendants contended, was therefore unwarranted.

Acknowledging that "[t]his argument raises the closest issue in the case," Judge Cote disagreed, holding that the City had violated Time Warner's First Amendment rights by improperly interfering with its ability to determine the editorial mix of programming carried on its cable system.

Although she specifically rejected Time Warner's claim that it had a First Amendment right to the PEG channels, she found that

> "[t]he City's decision to place the two news programs on *Crosswalks* is best seen and can only properly be understood as part of its continuing effort, through means fair and foul, to prevail upon Time Warner to carry Fox News on one of it commercial channels"

and that "Fox News and BIT [Bloomberg] ... expect that placement on *Crosswalks* will significantly increase their ability to win places on Time Warner's commercial channels."

Judge Cote found that the "irreparable harm" requirement had been satisfied by Time Warner's showing that the City's action "have had a direct, immediate and chilling effect on Time Warner's exercise of its constitutionally-protected editorial discretion."

The second requirement for the granting of a preliminary injunction--likelihood of success on the merits-- was found after an exhaustive review of the provisions and legislative history of the Cable Act, 47 U.S.C. section 531 (a) *et. seq.*, the historic use of PEG channels throughout the United States as well as in New York City, and an interpretation of certain provisions in the parties' 1983 and 1990 franchising agreements.

Not Proper PEG Use

First, the judge found that the City's actions were contrary to the PEG provisions of the Cable Act, whose purpose, she had earlier noted, was to furnish cable TV access to "[l]ocal governments, school systems and community groups"; in the words of the House report, to provide "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet." Noting that the Cable Act does not specifically delineate what constitutes a proper use of a PEG channel, the judge noted that the actual language of section 531-- "public, educational or governmental use"-- was "not without meaning" and that the City's attempted use of its PEG channel to accommodate Fox was unlawful.

Judge Cote rejected the City's argument that, content notwithstanding, the "governmental use" requirement was satisfied by the fact that the city operated the PEG channel in question. "[I]f I were to follow the City's interpretation of the PEG provision," she noted, "the entire statutory provision would be nonsensical."

Franchise Agreement and Cable Act Violated

Next, the judge found that the City's actions violated the franchise agreements between Time Warner and the City. At issue in the hearing was a difference in wording between the 1983 and 1990 agreements' definition of a PEG station.

The City maintained that the omission of the word "noncommercial" in the 1990 Agreement authorized the placement of commercial programs on PEG channels. Time Warner, using parol evidence, maintained just the opposite: *i.e.* that PEG channels could *not* be used by the City for commercial purposes and that the change in wording had not been intended to alter the essential usage of a PEG channel.

Judge Cote, agreeing with Time Warner's contractual interpretation, held that the proposed use of the City's PEG channel was clearly "commercial" and thus violative of the agreements.

Judge Cote also found that the City had violated section 544(f)(1) of the Cable Act which provides that any governmental or franchising authority "may not impose requirements regarding the provision or content of cable services..."

First Amendment: Strict Scrutiny Required

Finally, while acknowledging a dearth of precedent and noting that "[t]he Supreme Court's First Amendment jurisprudence in the area of cable regulation is not settled," Judge Cote went on to hold

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Time Warner v. NYC Judge Cote Enjoins City from Airing Fox News and Bloomberg on a PEG Channel

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that the City had violated Time Warner's First Amendment rights. Although she rejected Time Warner's claim to First Amendment rights in the City's PEG channels themselves, she did agree that the City had violated Time Warner's First Amendment rights through its attempted coercion of Time Warner's editorial decisions.

Finding that the City's actions were intended "to reward a friend and further a particular viewpoint," the Judge held that such content-based decision making warranted application of strict scrutiny.

Time Warner's Action Failed to Meet That Standard

In ruling in favor of Time Warner, Judge Cote rejected the City's *own* First Amendment argument that a federal court cannot issue a preliminary injunction against the airing of a program on a City PEG channel. While not addressing the issue of whether cities have First Amendment rights, Judge Cote held that "[t]he City cannot wield its own First Amendment right as a sword to force Time Warner to capitulate to the City's demands, and then claim that same First Amendment right as a shield preventing this Court from granting relief."

Fox Anti-Trust Suit Against Time Warner

Both the City and Bloomberg are appealing the decision.

Pending in the United States District Court for the Eastern District of New York before United States District Court Jack B. Weinstein is *Fox News v. Time Warner*, Civ. No. 96-4963, in which Fox News, alleging anti-trust violations, seeks treble damages from Time Warner as well permanent divestiture by Time Warner of its shares of Turner Broadcasting. That case is scheduled to go to trial on April 1, 1997. Time Warner has filed a motion to dismiss all of Fox's claims.

LDRC Honors Katharine Graham and Arthur Ochs Sulzberger

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expertise, "the value-added that comes from bringing together more than anyone of us could know individually."

She thanked the William J. Brennan, Jr. Award/Dinner Comittee for their efforts, and Diana M. Daniels and Solomon B. Watson IV, co-chairs, for all of their efforts.

Following dinner, Victor Kovner took the podium to introduce the keynote speaker, David Halberstam, Pulitzer Prize-winning journalist and author. Mr. Kovner remarked that the evening's honorees "acted in the defense of freedom, not only freedom of the press, but truly, all of our freedoms." Mr. Kovner also highlighted the roles that the attorneys and journalists for *The Times* and *The Post* had played in the publication and litigation of the Pentagon Papers, many of whom were in attendance. Mr. Kovner then asked them all to stand for acknowledgement from the assembled guests. Further, Mr. Kovner continued to note this past year's struggle in the *Business Week* case is an example of why the Pentagon Papers decision was so important.

David Halberstam, former New York Times reporter and noted author, then spoke of the how appropriate it was to honor Ms. Graham and Mr. Sulzberger with an award named for the Honorable William J. Brennan, Jr., whom Mr. Halberstam characterized as, "quite possibly the most influential American citizen of the second half of he twentieth century." Turning to the evening's honorees, Mr. Halberstam spoke with great admiration and warmth of the two publishers. "They gave us and those who follow them a shining example of the uses of these great freedoms, " Mr. Halberstam stated.

Mr. Halberstam's comments were followed by the presentation of the LDRC William J. Brennan, Jr. Defense of Freedom Awards by Robert Hawley.

Mr. Sulzberger reminisced about the "excitement, anxiety and confusion" of the events surrounding the publications. He quoted from a *Times* editorial published June 16, 1971, reiterating the reasoning behind the publication of the Pentagon Papers: "As a newspaper that takes seriously its obligations and its responsibilities to the public, we believe that once this material fell into our hands, it was not only in the interests of the American people to publish it, but even more importantly it would have been an abrogation of our responsibility and a renunciation of our obligations under the First Amendment not to publish it."

Ms. Graham recalled that the publication of the Pentagon Papers "was truly a defining moment, for *The Post*, for journalism, and for the country itself." She continued to note that the publication of the Papers prepared her newspaper for the upcoming ordeals of Watergate. In fact, Ms. Graham stated, "it is not an exaggeration to say that if the Pentagon Papers had not occurred, Watergate might not have occurred either."

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LDRC wants to thank those who made the evening such a special event, with particular thanks to Solomon B. Watson IV and Diana M. Daniels who chaired the LDRC Annual Award/Dinner Committee. LDRC also wishes to thank Floyd Abrams, Jonathan Albano, Harold W. Fuson, Jr., Laura R. Handman, Randy Lebedoff, Chad Milton, Bruce R. Sanford, and Richard Winfield, all of whom served on the Dinner Committee and without whose assistance the evening would not have been possible.

Minutes of LDRC Annual Meeting, November 6, 1996

New Executive Committee Members

Bob Hawley, chair of the Executive Committee, brought the meeting to order. He noted that this was the first year that the members of the original Executive Committee were scheduled to rotate off the board. Bob extended a warm thank you to the first two members whose terms had expired, Blair Soyster and Chad Milton, who have been members of the LDRC Executive Committee since its inception, Blair as Treasurer and Chad as a one-man membership committee and later in charge of special projects. Bob then welcomed Ken Vittor of McGraw-Hill and Susanna Lowy of CBS, who were nominated to run for the vacant seats on the Executive Committee.

Report of the Chair

Bob went on to observe that serving on the LDRC board means never having to say goodbye. Although Blair and Chad have stepped down, Blair will be working on the development of an outline for a possible 50-STATE Survey of libel and privacy issues in the employment context and Chad is heading a special projects committee that will be seeking ideas/suggestions for what LDRC can do to better serve its membership.

Bob then welcomed the newest addition to the LDRC in-house staff, Pamela R. Winnick. Bob noted that Pam is not a media lawyer, but rather what LDRC needs, a nonprofit lawyer, having had more than ten years experience as general counsel of leading nonprofit organizations.

Other highlights of the past year have included the formation of an international law committee, headed by Dick Winfield and Kevin Goering. The initial impetus for the committee was the request from Russian lawyers for an international libel conference in Moscow, which is currently scheduled for Thanksgiving. Bob pointed out the importance of having an international committee, given the growing internationalization of the media.

Another highlight of the past year was the publication of the LDRC complaint study, which, using data provided by Media Professionals and Employers Reinsurance, reported on the frequency of complaints, types of claims, and plaintiff and defendant status. Bob characterized the study as a very solid piece of work and thanked both insurers for making it possible.

Looking ahead, Bob noted that our biggest challenge next year will be the identification of new media members, by which he went on to explain that he meant not only new members from media organizations but members from the "new" media, such as Internet companies and online services. He underlined the importance of reaching out to these new companies, both in terms of expanding our membership and because this is where so much information is being published.

Executive Director's Report

Sandra Baron then covered additional highlights of the previous year. As in 1995, the 50-STATE SURVEY OF PRIVACY AND RELATED LAW was published in June and the 50-STATE SURVEY OF LIBEL LAW was published in October. Sandy noted that this year, each book contained a survey of the law in the federal circuits, unlike last year, when federal privacy as well as libel law was placed in the 50-STATE LIBEL SURVEY.

Looking forward, there are plans to publish an international 50-STATE SURVEY, in conjunction with the ABA Forum Committee. The Forum Committee would like LDRC to publish the volume, in a format similar to the 50-STATE SURVEY. Currently they have received chapters from seven countries.

Next year, the first issue of the LDRC BULLETIN, scheduled for January, will be devoted to the LDRC Damages Study. Topics for subsequent BULLETINS include updates of the independent appellate review study as well as the summary judgment study.

Sandy forecasted that the LDRC Complaint Study will grow with maturity and will be increasingly valuable as we gather more years of data. LDRC Fellow John Maltbie, who prepared the initial study, will be putting together a protocol to enable greater consistency in the gathering of data. It is also hoped that additional insurers will take part.

The LDRC Committees

Sandy noted that there are now 14 Defense Counsel Section committees, all of which were extremely active during the past year. Tom Kelley's Trial Techniques Committee has completed the Model Trial Brief, which will be distributed on disk on request to members. It will also be available in hard copy. A copy of the table of contents was available at the annual meeting.

The Cyberspace Committee expects to have its next set of articles ready to be published by the end of the year, including a bibliography of cases and articles in the area. Sandy mentioned that the articles will be distributed on three-hole punch paper, which will allow LDRC members to assemble a cyberspace looseleaf.

The Expert Witness Committee is in process of canvassing journalism schools for potential experts. Sandy noted that requests for experts are among the most frequently received requests by LDRC.

The Jury Instruction Committee is considering updating its jury instruction manual, which Sandy characterized as an extremely important and useful publication. Sandy invited all those with comments or suggestions regarding the manual to send them to her or to Bob Raskopf, chair of the committee.

Susan Grogan Faller's Pre-Publication/Pre-Broadcast Committee has completed a report on Alternative Dispute Resolution, which includes the Arizona and Texas mediation project. A copy of the report is available.

Sandy also reported that the

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Minutes of LDRC Annual Meeting, November 6, 1996

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Tort Reform Committee, under Dick Rassel, has completed its writeup of 1996 Legislative Developments.

Among the two newest committees, Chad Milton reported that his Special Projects Committee is currently in the brainstorming phase, and invited all with suggestions to pass them along. Blair Soyster reported that her committee for developing an outline for a possible 50-STATE SURVEY OF EMPLOYMENT LAW was not yet even in the brainstorming stage. She is currently in the process of developing the committee.

During the past year LDRC formed an Advertising and Commercial Speech Committee, with Cam DeVore as chair. Cam reported that the committee is working on a series of articles on libel and privacy issues, among others, in advertising and commercial speech.

Finally, Sandy noted that the Conference and Education Committee was meeting the following day to begin planning for the next biennial conference. The dates are September 10–12, 1997, and the conference will be held at the Hyatt Regency in Reston, Virginia. The new hotel will have more space and be less expensive than the Ritz-Carlton. As a result, the Conference can make better use of break-out sessions while also avoiding an increase in the cost to attendees.

Sandy also noted that members had had frequent occasion to take advantage of LDRC's various litigation support services, from the Brief Bank to the expert witness database to the jury instructions bank. LDRC also lent support to the introduction of the Uniform Correction or Clarification of Defamation Act in New York this past year and will do so again next year when it is reintroduced to the legislature.

In closing, Sandy reiterated that the LDRC is the sum total of the cumulative expertise and knowledge of its members.

LDRC LibelLetter

Peter Canfield reported that the *LDRC LibelLetter* fulfills one of LDRC's principal missions, namely getting information out to the membership. Peter thanked the *LibelLetter* Committee and the New Developments Committee for their efforts in keeping the *LibelLetter* current but noted that the success of the *LibelLetter* was largely the result of Sandy Baron's efforts as editor.

Membership

Robin Bierstedt reported some concern in the leveling off of media members, although she noted that fortunately the DSC membership has continued to grow. Part of the difficulty with continued expansion of the media membership derives from the fact we have already tapped most companies that are logical members of LDRC. Compounding that, the increasing number of mergers has in some instances reduced membership.

Current efforts are underway to target obvious members from newspaper and book publishing who still have not joined as well as increase membership efforts with respect to non-traditional members. She noted that the latter efforts would be aided if the organization had a broader name. That issue will be taken up by the LDRC Executive Committee.

The Executive Committee elections were then held, with Ken Vittor and Susanna Lowy unanimously elected by voice vote, with their terms to begin on January 1, 1997.

Bob Hawley closed the meeting by again noting that the whole point of LDRC is to serve its constituency and thanked all of the members for their support.

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404 Park Avenue South, 16th Floor
New York, New York 10016

LDRC encourages members to share copies of the *LibelLetter* with others in their organization.

ATTENTION DCS MEMBERS: Please submit Directory changes and e-mail addresses for 1997

The new DCS Directory for 1997 will be undergoing production shortly. We need your help in correcting any errors in your firm's listing and updating any changes that occurred with regard to your firm's name, address, phone number, branch offices, etc. since the Directory was published last February. LDRC would like to also include e-mail addresses for each firm in the Directory so please submit yours if you wish it to be listed. Send all information to:

Melinda Tesser, LDRC, 404 Park Ave., South, New York, NY 10016 or fax (212) 689-3315. Thank you.

Minutes of Defense Counsel Section Annual Meeting November 7, 1996

The meeting was called to order at approximately 7:30 A.M. by P. Cameron DeVore, President of the Defense Counsel Section (DCS) of the Libel Defense Resource Center. Mr. DeVore welcomed the members, and particularly the new members.

President's Report

Cam reported that LDRC was engaged in activities and new projects, including the *50-State Surveys* and the *LDRC LibelLetter*. But of great importance is the work of the LDRC committees. Under Sandy Baron's leadership, the committees have produced much of value for the benefit of the membership and are to be commended.

He reported that the Executive Committee of the DCS had determined to raise the DCS membership fees to $750 for 1997 in light of, and to generate appropriate support for, the many new projects and services offered by LDRC. LDRC publications, for example, have become increasingly important tools for media lawyers to remain current of the law.

Mr. DeVore reported that, under LDRC's rotation system, he will be succeeded as President of the DCS Executive Committee by Jim Grossberg, currently Vice President of the DCS, and that a new treasurer was to be elected. The Executive Committee, according to the by-laws, was to act as a nominating committee, and had nominated Tom Kelly to succeed Tom Leatherbury as Treasurer. No other nominations had been received. A motion was made to elect Tom Kelley and seconded and the vote was unanimous.

In the succession, Laura Handman will be Vice President and Tom Leatherbury will be secretary.

Mr. DeVore introduced Robert Hawley, Chair of the LDRC Executive Committee. Mr. Hawley expressed appreciation for the energy and commitment of DCS members as well as for the work of Executive Director, Sandra Baron.

Thank you Cam!

Mr. DeVore called upon Ms. Baron, who in turn, called upon Jim Grossberg. Jim thanked Cam deeply for his two years of service as DCS President and for his leadership of this organization. He noted how extraordinarily effective Cam was in managing this organization and stated that he looked forward to Cam's continued involvement as *ex officio* member of the Committee. The members joined Jim Grossberg in a round of applause for Mr. DeVore.

Ms. Baron also thanked Cam, remarking on his organization, efficiency, and effective leadership. She noted that he had taken on the role of Chair of the new LDRC Advertising and Commercial Speech Committee.

Executive Director's Report Ms.

Ms.Baron went on to report that five new committees had been added over the past year; that new committees, while generally run under the auspices of the DCS had, in recent years, also included lawyers from the Media Membership. She reported on the work of LDRC during the last year, including publication of the ***LDRC 50-State Survey: Media Libel Law*** and the ***LDRC 50-State Survey: Media Privacy and Related Law***, and that each volume now contains the appropriate federal circuit surveys. She reported that LDRC is under discussion with the ABA Forum Committee on a joint publication, anticipated for next year, of an international survey. While expected to look like the current volumes, this survey would probably not be updated annually, and would add new countries over time.

LDRC also published the quarterly **LDRC Bulletin** (the fourth quarter bulletin was available to DCS members at the meeting). A subsciption to the **LDRC Bulletin** would be provided as a benefit of membership to those DCS members who paid $1000 or more in annual dues, a form of parity with LDRC Media Members who currently receive the publication at that minimum level of media support and to encourage circulation of the **LDRC Bulletin** to as many members as possible.

Binders for the **LDRC Bulletin**, allowing subscribers to retain the publication and a new service in 1997, would, Ms. Baron reported, be sent out to all subscribers. The next edition of the Damages Survey, probably one of LDRC's most important and valuable studies, would be published in the **LDRC Bulletin** at the end of January, 1997.

Ms. Baron went on to thank members for their work on all of the LDRC publications and on committee projects over the past year and encouraged them to continue to send in new decisions, briefs and other relevant information and litigation support materials. LDRC, she emphasized, is a clearinghouse, where, by bringing together the sum of our expertiese and experience, we can create a powerful information bank.

The DCS Committees

Mr. DeVore reported on the **Advertising and Commercial Speech Committee.** A new committee this year, the group proposes to publish a number of articles on practical aspects of libel and privacy and related issues in the advertising and commercial speech area. Drafts are due in December, with publication to the membership anticipated for early in 1997.

Cam then introduced the Chairs of the other DCS Committees.

Lee Levine then gave a report of the **Advisory Committee on New Developments.** The Committee has been assigned to keep track of new issues and decisions across the country and has been trying to bring those to LDRC.

Terry Adamson of the **Conference & Education Committee** indicated that his committee would be meeting at noon that day to begin the process

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Minutes of Defense Counsel Section Annual Meeting November 7, 1996

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of planning for the next LDRC/NAA/NAB Conference. That Conference will be held next year from September 10 through September 12, 1997 in Reston, Virginia.

In the absence of Michael Kovaka and Steve Lieberman, Ms. Baron delivered the report the **Cyberspace Committee.** She reported that a new round of articles had been commissioned that, along with updates on the series from last Fall, are intended for distribution to the membership by the end of the year. The articles will be distributed on three-hold punch paper in order to allow the membership to retain them in a loose-leaf book. The Committee mounted a survey of Internet use and interest by the membership, which is being compiled. The Committee may look into the possibility of LDRC maintaining a web site.

Ms. Blair Soyster then spoke on behalf of the **Employment Law Committee,** which is just in the idea stage. The purpose of the committee is to explore issues of libel and privacy in the employment context. Blair indicated that, since the 1980's, one-third of defamation cases had been brought in the employment context. The Committee, she said, would be looking at the possibility of producing an outline akin to the *50-State Survey* outlines. Those members who would be interested in serving on this committee and working on these issues were encouraged to get in touch with Blair.

Guylyn Cummins then gave a report of the **Expert Witness Committee,** indicating that the Committee would be contacting journalism schools in an effort to expand the existing pool of experts.

Richard Winfield gave the report of the new **International Law Committee,** remarking on the growing internationalism of media law and the entrepreneurial opportunities outside the United States. Two LDRC representatives will be going to Moscow on November 26th to participate in a roundtable conference on issues of libel and to explore the feasibility of a larger conference during the summer of 1997 that may involve many more LDRC volunteers. He also encouraged members to look to their branch offices overseas for additional involvement.

Robert Raskopf gave the report of the **Jury Instructions Committee.** Last year the Committee produced a Jury Instruction Manual, and a topic index for the jury instruction files at LDRC. This year they propose to update those materials. Bob asked the membership to let him know of any suggestions that they might have for improving the Manual.

Peter Canfield gave the report of the *LDRC LibelLetter* Committee, indicating that the publication appears to be successful with the membership in keeping them up-to-date on new developments. He said that LDRC would be looking to do some graphic and layout changes with the publication over the next year.

Tom Leatherbury gave the report of the **Membership Committee,** welcoming new members, indicating that there were 180 DCS members, and that the DCS accounted for $110,000 in annual contributions to LDRC during 1996. He urged all DCS members to assist in recruiting new members and suggested that they look to lawyers used as local counsel in media-related cases.

Susan Grogan Faller gave the report of the **Pre-Publication/Pre-Trial Committee.** One of the Committee's projects was to explore Alternative Dispute Resolution (ADR), an idea which the media has seemed reluctant to embrace. She suggested that LDRC maintain a list of experts available to serve as mediators in non-binding mediation because success was more likely when the mediator was an expert in media law. The Committee's Report, *Results of the Alternative Dispute Reolution Project*, was distributed to members.

Richard Rassel then gave the report of the **Tort Reform Committee,** indicating that resistance to tort reform was breaking down and that some states were progressing with tort reform. Mr. Rassel distributed to DCS members the *Report of the Tort Reform Committee on 1996 Legislative Developments.*

Dave Bodney gave the report of the **Trial Techniques Committee,** indicating that the Committee was completing a model brief for member use.

Mr. DeVore then introduced speaker Bruce Sanford, who spoke about his forthcoming book about the public's hostility towards the media and the dangers that posed to litigating media issues before judges and juries.

Mr. DeVore then closed the meeting and again thanked the members for all of their support of and participation in LDRC.

Please Note . . .

Attached to this month's LDRC LibelLetter are the following reports which were prepared in conjunction with the LDRC Annual Meeting:

- ***Summary of Alternative Dispute Resolution Project***
  Prepared by the Pre-Publication/Pre-Broadcast/Pretrial Committee
- ***Model Trial Brief Outline***
  Prepared by the Committee on Trial Techniques
- ***Report on 1996 Legislative Developments***
  Prepared by the Tort Reform Committee