



# MEDIA LAW LETTER

Reporting Developments Through November 25, 2002

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## WHAT A GREAT PARTY WE HAD!!!

### *Thanks to all of you for coming!*

The 2002 LDRC Annual Dinner was a tremendous success. Thank you all. Each year, attendance at the Dinner grows. While the Board of Directors endeavors to give you all a solid program each year, the fact is that the success of the Annual Dinner is the result of your being there!!

Thank you to Media/Professional Insurance which sponsored the cocktail party that precedes the Dinner. That party is easily one of the best given for the First Amendment community anywhere or at any time.

And thank you to the panel this year. Moderated by Ted Koppel of ABC News, this panel gave a serious and often times disturbing perspective of current access to information from the government. Sy Hersh, reporting for The New Yorker; John Kifner, The New York Times; and Bob Simon, CBS News – all of them experienced correspondents and war reporters (each has been in the business of reporting for forty years), and each of them of the view that this Administration has honed the fine art of secrecy and limited access beyond that of any U.S. administration under which they have previously reported. We hope to have a transcript we can publish of the discussion for next month. But it will not be easy reading for those who care about open government.

Prior to the Dinner, we held the LDRC Annual Meeting for our media membership. Minutes of that meeting are published below. And before that, we hosted a Roundtable on Access, with a panel of seven noted litigators and think-

ers, moderated by Nathan Siegel, counsel for ABC and Chair of the LDRC New Legal Developments Committee, and David Schulz, Clifford Chance partner and President of the Defense Counsel Section. The transcript for that will be published in an upcoming **LDRC BULLETIN**.

It was a very successful discussion of not only doctrinal issues related to public and press access to government proceedings and, to a lesser extent, documents and information more generally, but on the strategies and tactics that First Amendment counsel should consider in litigating what is turning out to be great challenges to public access and possibly the greatest exercise in judicial thinking on the basis of access since the days of *Richmond Newspapers* and its progeny. LDRC will have a great deal more to report and to say on access issues in the near future.

LDRC convened a meeting of the LDRC Committee Chairs to discuss projects for 2003 and beyond. We held a meeting of those interested in the planning of the London Forum, scheduled for September 22-23, 2003. A number of LDRC Committees met. And we held an Annual Meeting of the Defense Counsel Section, minutes from which are published here at page 4. A great week.

And good to see so many of you. Come again. The Dinner is likely to be Wednesday, November 12<sup>th</sup> of 2003. We hope to have a fabulous program for you. Again, thank you all so much for attending these events and participating in these LDRC programs and meetings.

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## Minutes of Media Members Annual Meeting

The meeting was called to order by Robin Bierstedt, Chair of the LDRC Board of Directors. Ms. Bierstedt welcomed all attendees and thanked the members for their support and participation over the course of the previous year.

### **ELECTION OF DIRECTORS**

Ralph Huber, Advance Publications, Inc., Elisa Rivlin, Simon & Schuster, and Susan Weiner, NBC, were nominated as new members of the LDRC Board of Directors. Each candidate's nomination was seconded and unanimously approved by voice vote. Outgoing Board member

Susanna Lowy will continue as Chair as of the LDRC Institute, LDRC's 501(c)(3) sister company, and outgoing Board member Ken Vittor will also remain on the Institute Board.

Ms. Bierstedt then called for the election of Hal Fuson, Copley Press, and Ken Richieri, The New York Times Company, to the LDRC Board, each to a two-year term. The motion for re-nomination was seconded and approved unanimously by voice vote.

Mr. Fuson has been nominated by the Board as its new Chair. His term will begin on January 1, 2003.

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## Minutes of Media Members Annual Meeting

(Continued from page 3)

### DEFENSE COUNSEL SECTION REPORT

David Schulz, President of the Defense Counsel Section, reported on the activities of the DCS during the past year. The DCS, through a committee headed by Tom Kelley, did a study of LDRC membership to assist the LDRC staff in formulating the specifications for the organization's proposed new website. The new site, which will not be in service until 2003, will provide numerous benefits for the membership and possibly become an income-generator for the LDRC. The Expert Witness Committee of the DCS was the initial proponent of a new site after experiencing difficulty in keeping the expert witness roster fresh, and expressing a desire to create a more interactive instrument for the members.

Next, Mr. Schulz described the effort by Nathan Siegel, Chairman of the DCS New Legal Developments Committee, to bring together academics and practitioners to discuss media law issues. The first outgrowth of this project was a roundtable discussion, which included both academics and practitioners, held earlier in the afternoon focusing on access issues in the post-September 11 world. The event was very successful and was attended by over 50 individuals. A transcript from the session will be incorporated into an **LDRC BULLETIN** intended for distribution at the end of December 2002.

Finally, Mr. Schulz detailed changes to the DCS Committee structure. The Agricultural Disparagement Committee has become a Working Group under the auspices of the Legislative Affairs Committee, while the Expert Witness Committee will be merged into the Trial Techniques Committee. Two new committees were also created: Ethics (chaired by Bob Bernius), and News-gathering (chaired by Dean Ringel and Kelli Sager).

Ms. Baron urged Media Members to look into participating in DCS Committees. She congratulated the Defense Counsel Section for its many accomplishments during the past year and noted its overall growth in number of member firms.

### EXECUTIVE DIRECTOR'S REPORT

Sandra Baron, LDRC Executive Director, was asked for a report. Ms. Baron first thanked all of the members for their participation over the past year; the entire LDRC Board of Directors; then Ken Vittor and Susanna Lowy for their contribution as Board members; and new Board members Ralph Huber, Elisa Rivlin and Susan Weiner. Ms. Baron also thanked Robin Bierstedt who will remain on the Board after her term as Chair of the Board of Directors expires.

### CONFERENCES

Next, Ms. Baron discussed the NAA/NAB/LDRC Libel Conference held this past September in Virginia. Despite the postponement from last year, the conference was a tremendous success with over 300 attendees. Specific thanks were given to the sponsors who stepped in to ensure the financial stability of the conference. Comments from those who attended are being analyzed and the membership was and is encouraged to provide any further suggestions on the conference to the LDRC staff, Dan Waggoner and Peter Canfield (chairs of the DCS Conference Committee).

The Libel Conference also saw the awarding of the first LDRC First Amendment Leadership Awards. The Awards were created to recognize lawyers for their past and current contributions to the field of media law. The initial recipients were Cam DeVore, Dick Schmidt, and Dick Winfield.

Progress is also being made on next year's conference in London. The conference will be held in Stationer's Hall, long associated with the Stationers Guild. Sponsors for the event are coming forward in order to keep costs down. Organizers are also attempting to invite lawyers to the conference from countries and areas not typically represented at prior conferences, such as Asia, Africa, South America and the European continent. The conference will be interactive with panel discussions, speakers, roundtables and possibly a Mock Appellate Argument.

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***The Libel Conference also saw the awarding of the first LDRC First Amendment Leadership Awards.***

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## Minutes of Media Members Annual Meeting

(Continued from page 4)

### LDRC WEBSITE PROPOSAL

Ms. Baron then introduced the LDRC staff and reminded attendees that the LDRC had moved its offices to 80 8th Avenue in New York. Attendees were also reminded that the LDRC will officially change to its new name (Media Law Resource Center) January 1, 2003.

The new website for MLRC will be completed during 2003. The URL will be [www.medialaw.org](http://www.medialaw.org). ([www.ldrc.com](http://www.ldrc.com) will still be operational after the new site is completed and courtesy of Jim Brelsford, MLRC will also own [www.medialaw.com](http://www.medialaw.com)). The website will contain many resources to be made available to all members on a password protected basis, including word searchable Brief Bank, Membership Directory, Expert Witness Bank, MediaLawLetter, LDRC Bulletins, Jury Instructions, and Committee Reports, such as the Model Trial Brief and the Jury Instruction Manual. In addition, each of the Committees will have an area on which to post their meeting notices, reports and other noteworthy matters.

Special thanks for their contributions to development of the new site were given to

- Tom Kelley, John Borger and Pete Kelley (IT Director) of Faegre & Benson for conducting a needs analysis;
- Jonathan Hart and Elisa Rosen of Dow, Lohnes & Albertson for their help on the web site contract;
- David Schulz and his colleagues at Clifford Chance for assisting LDRC with the needed trademark expertise with respect to obtaining and registering MLRC in the U.S., Europe and Canada, and for obtaining the needed URLs; and
- Eric Robinson (LDRC Staff Attorney) for doing much of the groundwork.

### PUBLICATIONS PAST & FUTURE

Next, Ms. Baron reported on the status of LDRC publications. The MediaLawLetter is now delivered electronically saving time, money and energy. No problems were reported by the membership with the electronic delivery. Any ideas for or comments on the news-

letter would be welcome by the LDRC staff, or by David Bralow, Chair, and Bruce Rosen, Vice-Chair of the MediaLawLetter Committee. DCS Committee reports are also being delivered electronically to the membership.

Publications being prepared for distribution in the near future include:

- a “discovery roadmap” from the Pre-Trial Committee and a “Pre-publication Checklist” from the Pre-pub/Prebroadcast Committee;
- **LDRC BULLETIN** reports on criminal libel laws and prosecutions; on how allegations are handled under the fair report privilege, neutral report privilege and substantial truth privilege, and on post-9/11 access issues;
- an article on ALI’s proposed “restatement” with respect to “International Jurisdiction and Judgments Project” (members were encouraged to contact ALI in opposition to any change).
- “Ethics Corner” articles in the MediaLawLetter (members were encouraged to provide feedback on the feature and any topics they would like to see discussed).

Finally, Ms. Baron discussed the “roundtable” which took place earlier in the day on the rights of access to government proceedings of the public and press, matters that have taken on significance and urgency in the post-September 11 environment. A transcript of the “roundtable” will be published in the **LDRC BULLETIN** within a few months. Special thanks were given to David Schulz and Nathan Siegel for moderating the discussion.

Ms. Baron thanked the membership again for their participation and support.

### NEW BUSINESS

Ms. Bierstedt thanked Ms. Baron and the LDRC staff for their work, and commented on the benefits of the imminent name change to MLRC.

There being no other business, the meeting was adjourned.

## Minutes of DCS Breakfast

**November 15, 2002.**

The meeting was called to order by David Schulz, President of the Defense Counsel Section.

### ELECTION OF TREASURER

The first order of business was to elect a new treasurer for the upcoming year. Joyce Meyers of Montgomery McCracken Walker & Rhoads was nominated by the DCS Executive Committee to fill the post. There being no other nominations, a motion was made on Ms. Meyer's nomination. The motion was seconded and unanimously approved by voice vote.

### DCS BY-LAW AMENDMENT

Next on the agenda was a proposed amendment to the DCS by-laws. The amendment would permit the LDRC (soon to be MLRC) Executive Director and LDRC staff to distribute DCS meeting notices through electronic communication. A motion was made and seconded, and the amendment was adopted unanimously through voice vote.

### PRESIDENT'S REPORT

Mr. Schulz first commented on the status of the development of the new website. Thanks were given to the Expert Witness Committee and its chairs Michelle Tilton and John Borger, for being the initial force behind updating the site; Tom Kelley, John Borger and Faegre & Benson's IT staff for conducting a needs analysis; and the LDRC staff for its role in implementing the ideas. Ms. Baron will have more information available on the new site after the first of the year.

Next, Mr. Schulz discussed the roundtable discussion on post-September 11 access issues held on November 13<sup>th</sup>. The panel, moderated by Mr. Schulz and Nathan Siegel (chair of the New Legal Developments Committee), and sponsored by the New Legal Developments Committee, brought together practitioners and academics. The Committee wants to hold this type of panel-event in future years, in an effort to bring some understanding and relationship between First Amendment scholars and practitioners.

Changes were made to the DCS Committee structure over the past year. The Expert Witness Committee will

become a sub-committee of the Trial Committee. Two new committees were also created: Newsgathering (chaired by Dean Ringel and Kelli Sager, and Ethics (chaired by Robert Bernius).

The Libel Conference held in September of this year was a big success. Dan Waggoner and Peter Canfield did a great job in planning the Conference. Plans are underway for next year's London conference to be held September 22-23. There will be an effort to expand participation in the conference to attorneys from the Continent, Asia, Africa and other areas not typically represented.

### COMMITTEE REPORTS

Mr. Schulz reported that certain committees will be getting new chairs or co-chairs, the result of the ordinary rotation of leadership. However, many of the committees would welcome new members and new ideas of projects. Members are encouraged to contact Ms. Baron and/or committee chairs with any ideas or suggestions they have.

•**Advertising & Commercial Speech Committee**, Richard Goehler, co-chair, reported that the Committee held an informal conference call in the spring, initially to discuss follow-up issues to the LDRC Bulletin on misappropriation and right of publicity. The call, however, coincided with the release of the California Supreme Court decision in *Kasky v. Nike*, which dominated the discussion. The ultimate outcome of the *Kasky* case will affect the Committee's future work as it will help develop the definition of commercial speech. The Committee is always looking for new members.

•**Conference & Education Committee**, Dan Waggoner, co-chair, described the great success of this year's Libel Conference. New aspects of the Conference included a Mock Trial and ethics break-out sessions, both of which will be done again in the future. There has already been considerable input on the Conference, and additional input on the Conference is encouraged.

•**Cyberspace Committee**, Patrick Carome, co-chair, reported that most of the Committee's work was done for the Conference during which updated articles on

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### Minutes of DCS Breakfast

*(Continued from page 6)*

cyberspace issues were presented, and cyberspace break-out sessions were conducted. Projects relating to cyber-law and international jurisdictional are also being looked into.

•**Employment Law Committee** report was given by Susan Grogan Faller in the absence of Committee Chair Sanford Bohrer. The annual outline of employment law has been completed as well as a horizontal review of employment law chapters. The Committee has been contacting the ALI to coordinate their respective employment law outlines. The Committee is also going to attempt to have at least one article in each month's *MediaLawLetter*.

•**Ethics Committee** report was given by Bruce Johnson, in lieu of chair, Bob Bernius. Ethics break-out sessions were conducted during the past Libel Conference. The "Ethics Corner" feature has been added to the *MediaLawLetter* and has received positive feedback. The Committee, however, is soliciting comments and ideas for future columns from the membership. In August 2002, the ABA proposed changes to rules governing multi-jurisdictional practice which will now go to the states. Members are encouraged to contact the Committee when their state begins to examine the proposed changes.

•**International Committee**, Kurt Wimmer, co-chair, presented the report. Planning for the London Conference continues. Lee Levine has done considerable work formulating an agenda, and speakers are being lined up. The conference will be at Stationers Hall, a location where licensing of book publishing originally occurred in England. An outreach program is also being established to contact media defense attorneys throughout the Continent, Asia, Africa, and other areas not typically represented at the conference. Members are encouraged to contact any international attorneys they know and whom might be interested in attending. The Committee is also contributing more articles to the *MediaLawLetter*. Comments were written for the EU in connection with its consideration of international jurisdictional issues.

•**Jury Debriefing Project**, Jim Stewart conveyed the difficulty in trying to ascertain when trials occur, and the

logistics of managing juror debriefing, however two juries were interviewed thus far. Members are encouraged to contact the Project or the LDRC staff of any upcoming trials.

•**Jury Committee's** report was presented by Chair David Klaber. The Committee is looking for new members. Committee projects include an update to the Jury Instruction Manual last updated two years ago, a jury questionnaire, analyzing the impact of written jury instructions to the jury, and a jury questionnaire to ascertain jurors' notions on the media.

•**Legislative Committee**, Jim Grossberg, Chair, gave the report. On both federal and state levels pressure has mounted to sacrifice the free flow of information to national security concerns. The increasing profits squeeze in the media sector has made it more difficult to lobby against this pressure. One good piece of news was the postponement of legislation which would have instituted criminal liability on federal workers for divulging national security secrets to the public. The Homeland Security Act was passed by the House, which included two exceptions to FOIA (for information relating to critical infrastructure and related information provided to the federal government by a non-federal government source) and criminal sanctions for government employees who disclose such information. Additional aspects of the bill include: the new FOIA exception would apply to the information itself as well as the report, federal employees divulging information would be subject to fines and jail time, and there is no provision for separating non-exempt data in documents from exempted data.

•**MediaLawLetter Committee**, David Bralow, Chair, gave the report. The Letter is now distributed over e-mail, making it more accessible for members. Ideas for articles for the newsletter generally are always welcome.

•**Membership Committee's** report was delivered by Susan Grogan Faller, liaison to the Committee. 14 new firms joined the DCS this past year. Current members are encouraged to speak with other lawyers and firms back home about joining DCS. Karen Fredrickson and

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### Minutes of DCS Breakfast

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Kimberly Walker (co-chairs of the Committee) over the past year contacted attorneys and firms who have attended media law conferences and were not DCS members.

•**Newsgathering Committee**, Kelli Sager and Dean Ringel (co-chairs) gave the report. Committee projects include a model brief on access issues related to juries, a model brief on certain privacy issues (including electronic reporting and undercover reporting), a report on HIPPA, a report on post-September 11 government actions limiting newsgathering, planning for a potential symposium with media leaders to discuss post-September 11 access matters and corporate response to government limitations on access, and formulating a list of criminal defense attorneys and bond bailsmen for members to use when their clients are in emergency situations.

•**Pre-Publication/Pre-Broadcast Committee**, the report was presented by Chair John Greiner. The Committee published several reports, columns on the lessons to be learned for prepub/prebroadcast purposes from various litigated publications, and is putting together a checklist for prepublication/pre-broadcast review. The Committee is also collecting information and review materials to be used for member newsroom seminars.

•**Pre-Trial Committee**, Joyce Meyers, co-chair, gave the report. The Committee is working on a “discovery roadmap” as a follow up to their successful Summary Judgment Roadmap, and is looking for new members.

•**Trial Techniques Committee**, David Sanders and Guylyn Cummings, co-chairs, reported that their committee’s projects include creating a repository of closing arguments for members, continuing the composing of a list of expert witnesses, and creating a list of jury consultants used by members.

•**New Legal Developments Committee**, Nathan Siegel, chair, presented the report. Committee projects include the recently completed access roundtable (hopefully similar events on other issues will be done in the future), and contributing an article to the *MediaLawLetter* every other

month. Additionally, the access roundtable will be the start of forming a resource bank for access issues.

Next, Mr. Schulz announced the creation of the Ad Hoc Committee on the Enforcement of Judgments. The primary responsibility of the new committee would be to respond to the proposed “International Jurisdiction and Judgments Project” of the American Law Institute – a “restatement” composed by ALI which would attempt to undermine such decisions as that in *Telnikoff v. Matusovich*, which made it more difficult for plaintiffs to enforce foreign libel judgments in the United States. Laura Handman, Mark Sableman and Tom Leatherbury are already at work on this issue

### A THANK YOU TO OUTGOING PRESIDENT, DAVID SCHULZ...

Ms. Baron first introduced the incoming President of the DCS Executive Committee, Lee Levine. Mr. Levine congratulated Mr. Schulz on an outstanding term as President of the DCS. Mr. Schulz has provided the DCS with a tremendous amount of energy and has given birth to many of the ideas discussed today, including the redevelopment of the website, and the reinvigoration of the New Legal Developments Committee. He cares deeply about the issues and constantly looks ahead to determine what problems are on the horizon. Please give show him our gratitude for a wonderful year.

### EXECUTIVE DIRECTOR’S REPORT

Ms. Baron thanked the DCS Executive Committee – David Schulz, Lee Levine, Bruce Johnson, Jim Stewart and Susan Grogan Faller – for all of their hard work over the course of the past year. The LDRC Board of Directors was also thanked, specifically outgoing Chair Robin Bierstedt and incoming Chair Hal Fuson. Ms. Baron then introduced the LDRC staff and encouraged members to contact them with any issues, questions or problems.

Ms. Baron thanked all of the membership for their support for the organization and their participation in LDRC committees, projects and services. For more on her report, see the Minutes above at p. 3.



## ALI Proposal Would Make Foreign Libel Judgments Easier to Enforce Threatens to Overrule First Amendment Sensitive US Decisions

By Tom Leatherbury

The current draft of the American Law Institute's proposed Act on International Jurisdiction and the Recognition and Enforcement of Foreign Country Judgments would work great mischief on the First Amendment. The text of the pertinent portion of the proposed statute is unremarkable and unobjectionable. Section 5(a)(vi) states:

A foreign judgment shall not be recognized or enforced in a court in the United States if the judgment debtor or other person resisting recognition or enforcement establishes: . . . the judgment or the claim on which the judgment is based is repugnant to the public policy of the United States.

In the comments to this section, however, NYU Law professors Andreas Lowenfeld and Linda Silberman, who serve as the Reporters for this particular ALI project, favor a cramped view of the public policy defense and take square aim at several cases in which U.S. courts refused to recognize foreign libel judgments because they were obtained in violation of First Amendment principles. They write:

In two recent decisions, libel judgments obtained in England were denied enforcement in the courts in the United States on the ground that the libel law of England is incompatible with the values reflected in the First Amendment to the U.S. Constitution, and hence that enforcement would be contrary to public policy. *Bachchan v. India Abroad Publications, Inc.*, 154 Misc. 2d 228, 585 N.Y.S. 2d 661 (Sup. Ct. N.Y. Cty. 1992); *Telnikoff v. Matusевич*, 347 Md. 561, 702 A.2d 230 (1997), *aff'd (table)*, 159 F. 3d 636 (D.C. Cir. 1998). To the extent those decisions applied American standards to conduct and injury wholly outside of the United States, as *Telnikoff* did (the libel was contained in a letter from one resident of England published in an English newspaper alleged to defame another resident of England), it would not seem that American interests were sufficiently engaged to overcome the narrow limits of the public policy defense.

The *Bachchan* case was similar to *Telnikoff* in that the plaintiff who alleged that he had been defamed did not reside in the United States and had not been accused of misconduct in the United States. However, the publication that printed the offending article was distributed in the United States, and the judge considered that English libel law, which did not distinguish between private and public figures and placed the burden of proving truth upon media defendants, would have a chilling effect on the exercise of First Amendment rights in the United States.

The *Bachchan* case (which was not appealed) might well come out the same way under §5(a)(vi) as the actual case, if the effect on speech or publication in the United States could be established. However, **the thrust of §5(a)(vi) . . . is that a court presented with a libel judgment from a state with a fundamentally fair legal system (i.e., not a dictatorship that punishes all critique of the government) should balance the public policy in favor of free speech against the public policy in favor of recognition and enforcement of foreign judgments, and not appraise the foreign judgment by the specialized constitutional standards of U.S. libel law as it has developed in recent years.**

An illustration of the approach called for by §5(a)(vi) may be seen in *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001). A French court had issued an order pursuant to French law purporting to restrain an Internet Service Provider based in the United States from making accessible to users in France offers to purchase Nazi texts and memorabilia. Prior to an action by the French plaintiffs to enforce the order in the United States, the U.S.-based Internet Service Provider applied to the U.S. District Court for a declaratory judgment stating that the order of the French court would impermissibly infringe on its rights under the First Amendment to the U.S.

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**ALI Proposal**

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Constitution. In granting a judgment to this effect, the court wrote:

The Court has stated that it must and will decide this case in accordance with the Constitution and laws of the United States. It recognizes that in so doing, it necessarily adopts certain value judgments embedded in those enactments, including the fundamental judgment expressed in the First Amendment that it is preferable to permit the non-violent expression of offensive viewpoints rather than to impose viewpoint-based governmental regulation upon speech. The government and people of France have made a different judgment based upon their own experience. In undertaking its inquiry as to the proper application of the laws of the United States, the Court intends no disrespect for that judgment or for the experience that has informed it.

ALI, International Jurisdiction and Judgments Project, Council Draft No. 2 (Sept. 30, 2002) (Emphasis added).

Thus far, several of us have contacted the Reporters and expressed our concern and our disagreement with their gloss on the public policy defense. We have argued, for example, that, especially given the increasingly global nature of communications, this unnecessary commentary creates unwarranted controversy and encourages forum shopping, that any point about the scope of the public policy exception can be made without reference to libel cases, and that, where constitutional values are at stake, U.S. courts should require that a “fundamentally fair legal system” be more than “not a dictatorship that punishes all critique of government” as the Reporters would have it.

Thus far, the Reporters have not appreciated just how low they have set the bar. They apparently remain unpersuaded and have declined to change the commentary. In fact, the Reporters stated in a memorandum dated June 6, 2002:

The “First Amendment” public policy cases (see §5(a)(vi) and Reporters’ Note 5 . . . ) have generated extensive commentary. There have been several letters insisting that the commentary does not go far enough in support of the First Amendment and other letters stating that the commentary gives too much weight to U.S. values when there is an outstanding foreign judgment. *This debate may prove that we have got it just about right.* (Emphasis added.)

The ALI Council has had several meetings to consider this draft statute and has another scheduled in December. It is anticipated that the final proposal will be discussed and voted on at ALI’s Annual Meeting in May 2003. If you and your clients are concerned about this legislative proposal, what can you do?

- Determine who in your firm is a member of the American Law Institute;
- Educate them about the potential impact of this proposal;
- Put them in touch with me for more information if they wish; and
- Initiate appropriate contacts with the Reporters, with members of the ALI Working Group, and with members of the ALI Council (whose names I would be pleased to give you).

*Tom Leatherbury is a partner at the Dallas office of Vinson & Elkins, LLP.*

***Especially given the increasingly global nature of communications, this unnecessary commentary creates unwarranted controversy and encourages forum shopping.***

***LDRC would like to thank Fall interns — Connie Chen, Cardozo Law School, Class of 2004 and Rachel Mazer, Cardozo Law School, Class of 2004 — for their contributions to this month’s MediaLawLetter.***

## We Need to Stop the ALI Draft: Help is Needed

If you are interested in working directly with Tom Leatherbury and others in their efforts to back down the ALI reporters in their efforts to make foreign libel judgments easier to enforce in the United States – and by fiat, to overrule the decision in *Telnikoff v. Matusевич* – please get in touch with Tom Leatherbury at Vinson & Elkins (tleatherbury@velaw.com).

But it would also be useful for each of you to ascertain if you have any ALI members in your firm and enlist them, particularly if they are involved in the Members Consultative Group for the International Jurisdiction and Judgments Project.

Below is a list of the ALI Council, the men and women who are to vote on the adoption or not of the Reporters' current proposal.

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\*Director Emeritus

## Justice Stevens Expresses Doubt Whether Brandenburg Protects “Instructional Speech”

Justice Stevens, in a “Statement respecting the denial of the petition for writ of certiorari” he filed with the Supreme Court’s denial of cert in *Stewart v. McCoy*, No. 02-20 (October 21, 2002), laid out his doubt as to whether “instructional speech” – in this case providing general advice and information on how to better run a criminal gang – is protected by the First Amendment and *Brandenburg v. Ohio*, 395 U.S. 444 (1969)(*per curiam*). The Supreme Court’s denial of cert allowed to stand a grant of habeus corpus by the Ninth Circuit to respondent Jerry Dean McCoy. McCoy had been convicted by a state jury and sentenced to 15 years imprisonment for violating an Arizona statute forbidding individuals from giving advice with the intent of furthering a “criminal syndicate”.

The Ninth Circuit found McCoy’s actions protected by the First Amendment, *Brandenburg* and *Hess v. Indiana*, 414 U.S. 105 (1973) (*per curiam*). Justice Stevens, commenting for himself, stated that the “harsh sentence for a relatively minor offense” warranted the granting of habeus corpus. However, Justice Stevens also explained that the denial should not be interpreted as support for the Ninth Circuit’s reasoning, and expressed doubt as to whether the speech at issue was constitutionally protected.

### **Facts and Procedural History**

McCoy, a former gang member, provided information to his girlfriend’s son and members of his gang at two separate parties. He furnished them with suggestions on how better to manage the gang’s affairs, including gang hierarchy, establishing their territory, and maintaining gang discipline through violence. McCoy was charged and convicted by a jury of participating in a criminal street gang. The relevant statute prohibited “Furnishing advice or direction in the conduct...with the intent to promote or further criminal objectives of a criminal syndicate.” *A.R.S. §13-2308(A)(3)*

On appeal, the Arizona Court of Appeals affirmed McCoy’s conviction and the Arizona Supreme Court denied his petition for review. The U.S. District Court then granted McCoy’s writ of habeus corpus. The district court held that the evidence at trial was “insufficient to convict McCoy consistent with the requirements of the First Amendment”.

*282 F. 3d. 626, 629*

The Ninth Circuit upheld the grant of habeus corpus finding that the state courts engaged in an “unreasonable application” of the First Amendment, as well as improperly applying *Brandenburg* and *Hess*. *Id. at 626*. Examining McCoy’s statements at issue, the court, in an opinion by Judge O’Scannlain, found them to be “mere abstract advocacy of lawlessness” and protected by the First Amendment. *Id. at 631*. According to the court, McCoy’s comments were made intermittently during a party, directed to no one in particular, did not encourage immediate future action, and did not incite any illegal behavior.

### **May Not Require “Imminent Danger”**

The Supreme Court denied certiorari on a petition by Arizona Department of Corrections (per its director). In his comments, Justice Stevens contended that “long range planning of criminal enterprises” may not be protected under *Brandenburg*. Even though both lower federal courts saw McCoy’s speech as nothing more than abstract advocacy, Justice Stevens suggested that McCoy may have crossed a boundary separating abstract advocacy with “instructional speech” which “may create significant public danger”. Justice Stevens saw something more than pure advocacy in McCoy’s advice.

Justice Stevens also disagreed with the lower courts’ application of the “imminent” danger standard. Instructional speech, to be outside the safe confines of the First Amendment, may not have to cause “imminent” danger. According to Justice Stevens,

“While the requirement that the consequence be “imminent” is justified with respect to mere advocacy, the same justification does not necessarily adhere to some speech that performs a teaching function.”

Appellant was represented in the Circuit Court by Ginger Jarvis, Assistant Attorney General, Criminal Appeals Section, Phoenix

Appellee was represented in the Circuit Court by T.S. Hartzell, Tucson, Arizona

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***Instructional speech, to be outside the safe confines of the First Amendment, may not have to cause “imminent” danger.***

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## Talk Show Exonerated

### *Jenny Jones Show Not Liable For Guest's Murder*

By Laurie Michelson

According to a 2-1 decision of the Michigan Court of Appeals, a television talk show cannot be held responsible when one guest murders another guest three days after taping a segment together and returning home to continue with their lives. In *Graves v. Warner Bros, et al*, 2002 Mich. App. LEXIS 1461 (2002), the Court in an Opinion written by Judge Griffin, reversed the \$29 million wrongful death judgment against the *Jenny Jones Show*, its owner Warner Bros. and producer Telepictures, after finding that under the circumstances of the case, the Defendants owed no legally cognizable duty to protect Plaintiffs' son from the homicidal acts of a third party.

#### **Background**

This was a wrongful death action that arose out of the March 1995 taping of a *Jenny Jones Show* that pertained to "same-sex secret crushes."

Two Michigan residents, Scott Amedure and Jonathan Schmitz, were participants. Three days after the taping, during which Amedure revealed his secret crush on Schmitz, Schmitz murdered Amedure. Schmitz was ultimately convicted of second-degree murder. The Michigan Court of Appeals reiterated the facts underlying the highly publicized criminal case:

This case arises from [Schmitz's] killing of Scott Amedure with a shotgun on March 9, 1995. Three days before the shooting, [Schmitz] appeared with Amedure and Donna Riley in Chicago for a taping of an episode of the *Jenny Jones* talk show, during which [Schmitz] was surprised by Amedure's revelation that he had a secret crush on him. After the taping, [Schmitz] told many friends and acquaintances that he was quite embarrassed and humiliated by the experience and began a drinking binge.

On the morning of the shooting, [Schmitz] found a sexually suggestive note from Amedure on his front door. [Schmitz] then drove to a local bank, with-

drew money from his savings account, and purchased a 12-gauge pump-action shotgun and some ammunition. [Schmitz] then drove to Amedure's trailer, where he confronted Amedure about the note. When Amedure just smiled at him, [Schmitz] walked out of the trailer, stating that he had to shut off his car. Instead, [Schmitz] retrieved the shotgun and returned to the trailer. Standing at the front door, [Schmitz] fired two shots into Amedure's chest, leaving him with no chance for survival. [Schmitz] left the scene and telephoned 911 to confess to the shooting.

#### ***Trial Court Proceedings***

Following the murder, Amedure's parents brought a wrongful death action against the Defendants in Circuit Court in Oakland County, Michigan. Plaintiffs alleged that the show "ambushed" Schmitz by fail-

ing to disclose the subject matter of the show and also failed to determine the impact this ambush might have on Schmitz. Plaintiffs maintained that Defendants breached their duty, as business inviters, to prevent or refrain from placing Amedure in a position which would expose him to the risk of harm, albeit the criminal conduct of a third person – and that this breach ultimately resulted in Amedure's death.

The Defendants' filed an initial motion to dismiss on the pleadings contending that, as a matter of well-established First Amendment and premises liability law, they owed no duty to Amedure three days after he left their premises and was hundreds of miles away. This motion was denied. Following extensive discovery, Defendants filed another motion for summary disposition on the ground that, even if they owed a duty to Amedure, the intentional, criminal action of Schmitz precluded a finding of negligence. This motion was denied. Following an extensive trial – and denial of directed verdict motions – the jury returned a substantial verdict in Plaintiffs' favor.

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***At least for now, though, if the public wants to punish these types of talk shows, it is going to have to do so by turning off its television sets.***

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## Talk Show Exonerated

(Continued from page 13)

### **The Appeal**

On appeal, the Michigan Court of Appeals first addressed the “cornerstone of the case” – whether Defendants owed a duty to Scott Amedure to protect him from harm caused by the criminal acts of third-party Jonathan Schmitz. The Court reiterated that whether a duty exists is a question of law. *Id.* at \*5. This analysis requires a determination of whether the relationship of the parties is the sort that a legal obligation should be imposed on one for the benefit of another. *Id.* According to the Court, examples of the requisite “special relationship” recognized under Michigan law include a common carrier that may be obligated to protect its passengers, an innkeeper his guests, an employer his employees, owners and occupiers of land their invitees, a doctor his patient and business inviters their business invitees. *Id.* at \*9.

In determining whether such a relationship existed between the show and Amedure, the Court focused extensively on a recently decided Michigan Supreme Court case, *MacDonald v. Pine Knob Theatres, Inc.*, 464 Mich. 322; 628 N.W.2d 33 (2001). In *MacDonald*, plaintiff was injured while attending a concert at defendants’ theatre after other concertgoers began throwing sod. Plaintiff in that case alleged the theatre was negligent in failing to provide adequate security and eliminating intoxicated patrons.

The Michigan Supreme Court held that merchants have a duty to respond reasonably to situations occurring on their premises that pose a risk of imminent and foreseeable harm to identifiable invitees; however, the duty is limited to reasonably expediting police involvement and there is no duty to otherwise anticipate and prevent the criminal acts of third parties. *Id.* at 338.

Relying on *MacDonald*, the Court of Appeals held that:

Logic compels the conclusion that defendants in this case had no duty to anticipate and prevent the act of murder committed by Schmitz three days after leaving defendants’ studio and hundreds of miles away.

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**Logic compels the conclusion that defendants in this case had no duty to anticipate and prevent the act of murder committed by Schmitz three days after leaving defendants’ studio and hundreds of miles away.**

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Here, the only special relationship, if any, that ever existed between defendants and [Amedure], was that of business invitor to invitee. However, any duty ends when the relationship ends, and in this instance the invitor/invitee relationship ended on March 6, 1995, three days before the murder, when Schmitz and Amedure peacefully left the Chicago studio following the taping of the episode.

*Graves, supra* at \*16. The Court thus found that Defendants owed no duty to protect Amedure from Schmitz’ violent attack on March 9, 1995. *Id.*

The Court also rejected Plaintiffs’ attempt to impose a duty under a “misfeasance theory” – *i.e.*, defendants’ conduct in creating and taping a show on same-sex crushes actively created a volatile situation that made Schmitz’s criminal conduct foreseeable. The Court found nothing in the trial record to justify departing from the general rule that criminal activity is normally unforeseeable. To the

contrary, the record indicated that Schmitz appeared to be a well-adjusted individual who consented to being surprised by a secret admirer of unknown sex and identity; and nothing in his dealings with the show put them on notice that he posed a risk of violence to others. *Id.* at \*19. Accordingly, “the trial court should have ruled that the murder was not foreseeable as a matter of law and entered judgment in favor of defendants.” *Id.*

In summary, the Court remarked that while Defendants’ actions in producing this particular *Jenny Jones Show* may be regarded by many “as the epitome of bad taste and sensationalism,” they did not give rise to a legally cognizable duty to protect Amedure from Schmitz’s intentional criminal acts that occurred three days after the taping.

### **A Vitriolic Dissent**

The dissenting Judge Murphy — who was clearly troubled by the Show’s conduct — would have left the issue of foreseeability to the jury. He believed the evidence indi-

(Continued on page 15)

## Talk Show Exonerated

*(Continued from page 14)*

cated that Schmitz was humiliated and devastated by Amedure's revelation of a homosexual crush and lurid sexual fantasy and that Defendants produced the show "using deceit, sensationalism and outrageous behavior." *Id.* at \*23. As a result of Schmitz's personal history — which included mental illness and substance abuse — he believed reasonable minds could differ on whether Schmitz's violent act foreseeably resulted from Defendants' actions. *Id.* Ultimately, the dissent "would hold that as a matter of public policy, if defendants, for their own benefit, wish to produce 'ambush' shows that can conceivably create a volatile situation, they should bear the risk if a guest is psychologically unstable or criminally dangerous by being charged with that knowledge in the context of any foreseeability analysis." *Id.* at \*40.

Plaintiffs' counsel, Geoffrey Feiger, has indicated he will seek leave to appeal to the Michigan Supreme Court.

### ***The Right Result***

Fortunately, justice delayed here was not justice denied. Even if the Michigan courts chose not to protect the Defendants' actions under the First Amendment, the

Court of Appeals was correct to find no liability as a matter of pure negligence law. This was not a case where Schmitz attacked Amedure either on stage or even back-stage. The two guests, after voluntarily appearing on the Show and thanking members when it was over, left Chicago and traveled back to Michigan together — where they stayed in contact. Three days later — after Amedure left Schmitz a sexually provocative note that the Defendants knew nothing about — Schmitz killed Amedure. Schmitz went to prison and Amedure's parents went after the "deep pockets." At least for now, though, if the public wants to punish these types of talk shows, it is going to have to do so by turning off its television sets.

The case was tried and appealed for Defendants by Feeney Kellett Wiener and Bush, Bloomfield Hills, Michigan; George, Donaldson and Ford, Austin, Texas; and Zazi Pope, Senior Litigation Counsel, Warner Bros. Butzel Long, Detroit, Michigan, was involved in the pre-trial defense.

*Laurie J. Michelson is a member at the Detroit office of Butzel Long.*

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## Ninth Circuit Revives Some of Gennifer Flowers' Claims Against Sen. Clinton, Carville, and Stephanopoulos

By **Laura R. Handman** and **Matthew A. Leish**

Introducing its decision with the truism, "Long after the public spotlight has moved on in search of fresh intrigue, the lawyers remain," the Ninth Circuit has partially revived Gennifer Flowers' lawsuit against James Carville, George Stephanopoulos, Stephanopoulos' book publisher, and Senator Hillary Clinton, allowing Flowers to proceed with some of her defamation and false light claims against Carville and Stephanopoulos and with her conspiracy claim against all three individual defendants. *Flowers v. Carville*, \_\_ F.3d \_\_, 2002 WL 31500990 at \*1 (9<sup>th</sup> Cir. Nov. 12, 1992). However, the court affirmed the dismissal of Flowers' remaining claims, and warned that Flowers "no doubt faces an uphill battle on remand" to the District of Nevada.

And despite the mixed outcome, the Ninth Circuit's decision contains some useful language regarding reliance on reputable news sources, the pleading standard for a defamation claim, the inapplicability of the continuing tort doctrine to defamation claims, and the question of where a defamation claim arises for statute of limitations purposes when the statements in issue are broadcast nationally.

### ***The Affair Alleged***

Flowers' claims arise out of events surrounding the 1992 presidential campaign of then-Governor Bill Clinton, when the supermarket tabloid *The Star* published a

*(Continued on page 16)*

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## 9th Circuit Revives Gennifer Flowers' Claims Against Sen. Clinton, Carville, and Stephanopoulos

(Continued from page 15)

story alleging an affair between Flowers and Governor Clinton. After initially denying the allegations, Flowers sold her story to *The Star*, claiming to have had a twelve-year affair with the Governor. Following a *60 Minutes* appearance in which Governor Clinton denied the charges, Flowers then held a press conference in which she played tapes of alleged phone conversations with the Governor.

Flowers brought suit in November 1999 in Nevada—where she had moved in 1998 to pursue a career as a singer—asserting claims for defamation and false light against Carville arising out of a 1998 appearance on *Larry King Live*; against Stephanopoulos arising out of a separate 1998 *Larry King* appearance; and against Stephanopoulos and his publisher, Little, Brown and Company, arising out of Stephanopoulos' political memoir *All Too Human: A Political Education*.

Flowers subsequently amended her complaint to add Hillary Clinton as a defendant, alleging that Senator Clinton had orchestrated a conspiracy to defame Flowers and place her in a false light, released private information about her, and organized break-ins at her residence. Flowers also added conspiracy claims against Stephanopoulos and Carville, and added new allegations against Carville arising out of his memoir *All's Fair: Love, War and Running for President*.

As Judge Kozinski, in full botanical metaphor, explained, “Flowers claims that, as a result of all this schemery, her reputation has wilted and her blossoming career as a Las Vegas lounge singer has been nipped in the bud.” 2002 WL 31500990 at \*1.

### ***District Court Dismisses Suit***

All of the defendants moved to dismiss on various grounds. On August 24, 2000, Judge Philip Pro of the District of Nevada granted the motions and dismissed the complaint in its entirety. *Flowers v. Carville*, 112 F.Supp.2d 1202 (D.Nev. 2000). Stephanopoulos and Carville had argued—and the district court had found—that Flowers' claims were governed by Nevada's “borrowing statute,” which provides that “[w]hen a cause of action has arisen in another state” and would be

time-barred under the laws of that state, the cause of action cannot be maintained in Nevada “except in favor of a citizen [of Nevada] who has held the cause of action from the time it accrued.” Nev. Rev. Stat. Ann. 11.020.

Since Flowers had not been a Nevada citizen at the time of Stephanopoulos' statements on “Larry King,” the district court ruled—in the first reported decision on this issue—that her defamation and false light claims based on those statements were governed not by Nevada's two-year statute of limitations, but by the one-year statute of limitations of New York, and were thus time barred.

### ***9th Circuit: Timeliness Nevada Style***

However, the Ninth Circuit concluded that the borrowing statute's exception in favor of “a citizen [of Nevada] who has held the cause of action from the time it accrued” applies to any plaintiff who is a citizen of Nevada at the time the claim is brought, and not just to a plaintiff who is a citizen at the time the cause of action accrues. This result puts Nevada's law at odds with virtually every other states' borrowing statute. The other statutes, albeit based on slightly different wording, are all with the same purpose—to prevent the kind of forum shopping here where Ms. Flowers moved from Dallas to Las Vegas, brought her claim, and has now moved on to the French Quarter. Nonetheless, the court found that the claims as to the “Larry King” appearances were governed by Nevada's two-year statute and were not time-barred. 2002 WL 31500990 at \*2-3.

Flowers had also argued, both below and on appeal, that the borrowing statute did not apply at all, because the defamation claim supposedly arose everywhere the statements were broadcast, including Nevada, and the claims therefore had not “arisen in another state.” Fortunately, the Ninth Circuit did not address this argument and left undisturbed the district court's rejection of the notion that a defamation claim arises everywhere it is published.

The Ninth Circuit next held that, even applying Nevada's two-year statute of limitations, the defamation

(Continued on page 17)



## 9th Circuit Revives Gennifer Flowers' Claims Against Sen. Clinton, Carville, and Stephanopoulos

(Continued from page 16)

claim arising out of Carville's book was time-barred. The court rejected the contention that the continuing tort doctrine applied, holding that a cause of action for defamation accrues immediately upon publication. As the court noted, "[t]he only thing 'continuing' about this tort was Flowers' protracted failure to bring a lawsuit when she had the chance." 2002 WL 31500990 at \*4. The court similarly held that the vaguely-pleaded claims against Senator Clinton for allegedly disclosing private information and organizing break-ins were not subject to the continuing tort doctrine and were time-barred. 2002 WL 31500990 at \*5.

### ***Defamation: Mixed Results***

Turning to the merits of the defamation claims, the court first agreed with the district court that "the trio of colorful waste metaphors" in Stephanopoulos' book – in which he recounted his contemporaneous description of the *Star* stories as "trash," "crap," and "garbage" – were non-actionable rhetorical hyperbole under Nevada law. 2002 WL 31500990 at \*6.

However, the court reached a different conclusion regarding statements made by Carville and Stephanopoulos about Flowers' taped conversations with Governor Clinton. In his book, Stephanopoulos recounted his contemporaneous speculation as he first listed to the tapes: "*The conversation did sound stilted; her questions were leading – maybe the tapes were doctored? It's a setup.*" Stephanopoulos also reported that "later investigations by CNN and KCBS would show that the tapes were 'selectively edited' . . ."

Similarly, on the "Larry King" broadcasts, Carville and Stephanopoulos had each commented that news reports in 1992 had found that the tapes were "doctored." Flowers also had sought, unsuccessfully, to amend her complaint to add a later statement by Stephanopoulos on Tim Russert's program in which Stephanopoulos again referred to the tapes as "selectively edited." 2002 WL 31500990 at \*5.

The Ninth Circuit held that, generally speaking, "one who repeats what he hears from a reputable news source, with no individualized reason external to the news report to doubt its accuracy, has not acted" with actual malice. 2002 WL 31500990 at \*8. *Id.* The court accordingly endorsed defendants' contention that "reliance on reports of reputable news organizations cannot constitute actual malice as a matter of law." *Id.* However, the court concluded that Carville and Stephanopoulos "were not uninvolved third parties" and would not be entitled to rely on these news reports if they in fact knew that the reports were inaccurate.

Thus, while reiterating that the potential chilling effect of a defamation claim requires a plaintiff to make "more specific allegations than would otherwise be required" to avoid dismissal, the court held that it was inappropriate to dismiss Flowers' claims pre-discovery with-

out giving her a chance to attempt the "difficult[] task" of "marshal[ing] clear and convincing evidence" that Carville and Stephanopoulos "knew the news reports were probably false or disregarded obvious warning signs from other sources." 2002 WL 31500990 at \*9.

Saying it was "improbable" but not necessarily "impossible" that Flowers could do so, the court cited as examples that Flowers might be able to show actual malice if she could prove that either of the experts on the news broadcasts was merely a "shill for the Clintons" or that there were intentional "material discrepancies" between the broadcasts and what Carville and Stephanopoulos said. 2002 WL 31500990 at \*9 and n.11. Accordingly, the court reversed the dismissal of the defamation claims based on the statements about the tapes.

### ***False Light and Conspiracy Survive***

The court next found that the false light claims were not impermissibly duplicative of the defamation claims

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***The court concluded that Carville and Stephanopoulos "were not uninvolved third parties" and would not be entitled to rely on these news reports if they in fact knew that the reports were inaccurate.***

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(Continued on page 18)

**9th Circuit Revives Gennifer Flowers' Claims Against Sen. Clinton, Carville, and Stephanopoulos**

*(Continued from page 17)*

because a plaintiff need not show injury to reputation to recover for false light under Nevada law. 2002 WL 31500990 at \*10. Finally, the court vacated the district court's dismissal of the conspiracy claim, which was based on the dismissal of the underlying claims, but "[left] it to the district court to dispose of the claim" on any other appropriate ground. 2002 WL 31500990 at n.12.

*Laura R. Handman, a partner in the Washington, D.C. office of Davis Wright Tremaine LLP, and Matthew A. Leish, an associate in the New York office of Davis Wright Tremaine, represent George Stephanopoulos and Little, Brown and Company. Hillary Rodham Clinton is represented by David E. Kendall, Nicole Seligman, and Gabriel Gore of Williams & Connolly, LLP in Washington, D.C. James Carville is represented by William Alden McDaniel, Jr. and Jo C. Bennett of McDaniel Bennett & Griffin in Baltimore, MD. Plaintiff is represented by Larry Klayman of Judicial Watch, Inc. in Washington D.C.*

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## Evel Knievel Runs into First Amendment Barrier

By Nathan Siegel

It wasn't the Snake River Canyon, but daredevil Evel Knievel suffered a less painful setback when Montana U.S. District Judge Donald Molloy dismissed a libel suit brought by Knievel and his ex-wife against ESPN. *Knievel v. ESPN, Inc.*, No. CV-01-69-BU-DWM (D. Mt., October 8, 2002).

This suit arose out of the ESPN Action Sports and Music Awards, an annual event highlighting extreme sports and music celebrities. At the 2001 inaugural event, celebrities were videotaped and photographed as they mingled with the media on their way into the auditorium. Photos of celebrities accompanied by humorous captions were later placed on EXPN.com, a website dedicated to extreme sports and its young fans. A photo of Knievel surrounded by two younger, blond women (one his then wife) appeared in the middle of a gallery of 17 pictures and captions. The caption on the Knievel read, "Evel Knievel proves that you're never too old to be a pimp."

The Knievels sued ESPN for defamation. They alleged that the caption accused Knievel of criminal activity and his wife, by implication, of being a prostitute.

In a 20-page opinion, Judge Molloy granted ESPN's motion to dismiss. He found that no reasonable person would understand the caption to be making a factual assertion about criminal activity. As a result, the First Amendment required dismissal.

### Site as Context for Photo

Applying analysis that may be useful in seeking early dismissal of future cases involving websites, Judge Molloy first concluded that it was appropriate for the Court to consider a CD-ROM exhibit attached to ESPN's motion, without converting it to one for summary judgment. The plaintiffs had only attached a copy of the single Knievel photo to their Complaint. ESPN's exhibit included the 16 other pictures and captions included in the same photo gallery as the Knievel photo, and several web pages that a reader would have seen in the course of accessing the photo gallery. This material was essential to viewing the photo in its full, original context.

Applying the "incorporation by reference" doctrine recently approved by the Ninth Circuit in *Van Buskirk v. CNN*,

284 F.3d 977, 980 (9<sup>th</sup> Cir. 2002), the Court found that because the website was referenced in the Complaint and the authenticity of its contents was not disputed, it could be considered without converting the motion to one for summary judgment.

### Not a Statement of Fact

Turning to the merits, Molloy noted that the U.S. Supreme Court's *Bressler-Letter Carriers-Hustler-Milkovich* line of cases preclude defamation liability for statements that do not state or imply assertions of fact. He then applied the Ninth Circuit's variation of the three-part test to separate fact and opinion to analyze whether the Knievel photo/caption could be understood to imply a defamatory statement of fact. This test analyzes the broad context of the publication at issue, its specific context, and whether it

is susceptible of being proved true or false. *Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9<sup>th</sup> Cir. 1995);

First, Molloy noted that the broad context of the website was filled with tongue-in-cheek humor and youth slang that was not meant to be taken seriously.

Turning to the specific context of the Knievel photo, the Court found that it appeared in a series of photo captions replete with loose, figurative teenage slang like "share the love", "hardcore", "hottie" and "go ahead and choke on these." Thus, in this context no one could reasonably believe "pimp" was intended to accuse the Knievels of literally being a pimp and prostitute in the criminal sense. Judge Molloy also noted that the word "pimp" is a compliment in contemporary youth slang, meaning "cool" or a "ladies man."

Finally, the Court concluded that in this context calling Knievel a "pimp" was not capable of being proved true or false. While the caption could be understood as carrying both positive and derogatory meanings, it could only reasonably be understood as a tongue-in-cheek, hyperbolic statement.

The Knievels have filed a motion to reconsider the decision, which is pending.

Wade J. Dahood and Bernard Everell of Knight, Dahood, McLean & Everett, Anaconda, MT. represented Knievel.

*Nathan Siegel of ABC, Inc., with Peter Michael Meloy and Jennifer S. Hendricks of the Meloy Law Firm in Helena, MT., represented ESPN in this lawsuit.*

***The Court found that because the website was referenced in the Complaint and the authenticity of its contents was not disputed, it could be considered without converting the motion to one for summary judgment.***

## Attaching Articles to Libel Complaint is Insufficient, Says NY Court

By Anne Carroll

Section 3016(a) of New York's Civil Practice Law and Rules specifies that "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint." The question in *Hausch v. Clarke*, \_\_\_ A.D.2d \_\_\_, \_\_\_ N.Y.S.2d \_\_\_, 2002 WL 31320358 (2d Dep't Oct. 15, 2002) was whether plaintiff's attachment to her complaint of two allegedly defamatory newspaper articles published in a Westchester weekly, the Gannett-owned Review Press, was enough, by itself, to meet the particularization requirement. (The complaint alleged only that "each of the . . . articles individually, and taken together" libeled plaintiff.) The Appellate Division, in an opinion written by Judge Altman, ruled that it was not and affirmed an unreported trial court decision dismissing the complaint.

### Controversy Over Blue Building

The articles described a controversy that arose in the Village of Tuckahoe when plaintiff painted her brick building in the historic village's commercial district royal blue, reporting that she had done so after being cited by local authorities for occupying the building without a certificate of occupancy. The articles included such state-

ments as "[i]t wasn't exactly a blueprint for neighborliness" and "[s]he was finally issued four citations last month to appear in Village Court."

The newspaper defendants argued that mere attachment of the articles did not give them, or the court, sufficient notice of what statements were at issue in the litigation and prejudiced them by, among other things, depriving them of the opportunity to make a motion to dismiss on the face of the pleadings all claims directed to statements protected from liability under constitutional principles or state privilege law. Plaintiff argued, among other

things, that defendants could learn which statements were at issue through discovery devices.

The appellate court found a violation of CPLR § 3016(a) in that "perusal of the newspaper articles . . . annexed to [the] complaint does not reveal the al-

legedly defamatory material," distinguishing *Pappalardo v. Westchester Rockland Newspapers, Inc.*, 101 A.D.2d 830, 830, 475 N.Y.S.2d 487, 488-89 (2d Dep't 1984), *aff'd*, 64 N.Y.2d 862, 487 N.Y.S.2d 325 (1985).

*Anne Carroll is with Satterlee Stephens Burke & Burke LLP, New York City, which represented the defendants in this matter.*

***"Perusal of the newspaper articles . . . annexed to [the] complaint does not reveal the allegedly defamatory material."***

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## Connecticut Court Issues Media-Friendly Decisions on Fair Report Privilege and Retraction Statute

By Victor A. Bolden

Within the span of one month, the *New Haven Register* (the "Register") prevailed in two libel cases. The two decisions, *Mackowski and Alfano v. New Haven Register*, Superior Court, judicial district of New Haven, Docket No. CV 99-0430252 S, (September 27, 2002) (Arnold, J.), and *Fred Dellacamera v. New Haven Register*, Superior Court, judicial district of New Haven, Docket No. CV 00-0436560, (October 28, 2002) (Arnold, J.), written by the same judge, granted summary judgment to the newspaper under Connecticut's common-law and its retraction statute.

Both decisions add to Connecticut law on libel in two critical ways. First, both cases clarify the reach of Connecticut's retraction statute and define it as limiting significantly any monetary recovery when no written retraction is requested by the plaintiff. Second, both rulings extend the common-law privilege of fair reporting in Connecticut to include articles based on the contents of arrest reports, as other jurisdictions have done.

### *Mackowski v. The Register: Recanted Charges*

The *Mackowski* case arose out of an article published in the *Register* reporting on the arrest of Jeffrey C. Mackowski and David Alfano for the alleged kidnapping, assault and drug-related crimes. Mackowski and Alfano were arrested on the basis of a statement that, the alleged victim, Felicity Fries gave to the Connecticut State Police, in which she claimed, *inter alia*, that she had been "forced" into a car, "held" her against her will, and "hit" several times. She also stated that she feared for her life.

The day after the arrest, the *Register* published an article detailing Fries' allegations to the State Police. However, after the arrest, Ms. Fries, who knew both of the purported assailants, recanted her story. As a consequence, the charges that had been based on her allegations were dismissed though the drug-related charges were not dismissed.

The *Register* ran a follow-up story covering the dismissal of these charges. Mackowski and Alfano nevertheless sued the *Register*, alleging that "[a]ny statement made in the paper regarding any violent acts or any acts carried out against Felicity Fries were false."

Plaintiffs claimed that, if the *Register* had exercised rea-

sonable care prior to publishing its article, then it would have known that the victim's statements were untrue and defamatory per se. They also argued that the defendant "should know that the statement would cause the plaintiffs emotional distress which could lead to physical injury." Plaintiffs argued that the paper had an obligation to contact the plaintiffs or take additional steps to verify the accuracy of Fries' statements before publishing them. The *Register* moved for summary judgment on two grounds: (1) Connecticut's retraction statute, Conn. Gen. Stat. § 52-237; and (2) the "fair report privilege." The trial court ruled in favor of the *Register* on both grounds.

### *Retraction Statute*

Connecticut's retraction statute, Conn. Gen. Stat. § 52-237 provides in pertinent part that:

"[U]nless plaintiff proves either malice in fact or that the defendant, after having been requested by him in writing to retract the libelous charge, in as public a manner as that in which it was made, failed to do so within a reasonable time, he shall recover nothing but such actual damages as he may have specially alleged and proved."

The plaintiffs conceded that they had not sought a retraction in writing and thus, were not entitled to recover from the *New Haven Register* unless they pled and proved special damages or that defendants published the article with "malice in fact." The Court held that plaintiffs failed to satisfy either requirement.

Plaintiffs had no special damages, according to the Court, because special damages under Connecticut's statute requires "actual pecuniary losses", "legally caused" by the defendant's actions, and not simply "general harm to reputation, injured feelings or mental anguish." "Actual pecuniary losses" are economic losses. The Court rejected plaintiffs argument that the fee paid to a bail bondsman after the plaintiffs' arrest satisfied the statute's requirements. The publication of the article *after* the plaintiff was arrested could not and did not "legally cause" him to hire a bail bondsman.

The Court also held that plaintiffs could not prove

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## Connecticut Court Issues Media-Friendly Decisions

(Continued from page 21)

“malice-in-fact” under the statute, which the Court equated with “actual malice,” under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny. In fact, however, plaintiffs conceded that the article was based on law enforcement sources and that the references in the article relating to “violent acts” against the victim were contained in a State Police report. Moreover, the *New Haven Register* published its article prior to the dismissal of criminal charges against either plaintiff. As a result, the Court concluded that the

“plaintiffs have not submitted any evidence that would establish the defendant’s subjective knowledge or awareness that the victim’s statements to the police authorities were false at the time [the *New Haven Register*] published its newspaper article.”

Alternatively, the Court recognized that the *Register* was entitled to protection under Connecticut’s “fair report privilege.” As an article on the arrest and “contents” of an arrest report, the

Court held that the *Register’s* article on the plaintiffs fell within the scope of the fair report privilege.

Plaintiffs, however, argued that Connecticut had not adopted the fair report privilege as a part of its common law. The Court rightly disagreed, noting that there was ample precedent for applying the privilege in this case, relying on a Second Circuit decision, *Miller v. News Syndicate Co.*, 445 F.2d 356 (2d Cir. 1971), which had affirmed a district court decision recognizing the fair report privilege as part of Connecticut’s common-law.

Accordingly, the Court dismissed in its entirety plaintiffs’ action against the *New Haven Register*.

## *Dellacamera v. New Haven Register*

The second case, *Dellacamera*, arose out of a brief two-sentence article published in the *Register’s* police blotter section. The article reported on the arrest of plaintiff Fred Dellacamera for breach of peace and public indecency, who was described in the article as having been arrested for “masturbating” in his car. Plaintiff did not deny that he was arrested on a warrant charging breach of peace and public indecency and that the basis for the arrest was his exposing himself in public. However, plaintiff sued the *Register* for

libel, as well as false light invasion of privacy and negligent infliction of emotional distress, because the arrest warrant affidavit did not describe him as “masturbating” when arrested. The Court summarily dismissed all of plaintiff’s claims.

Applying the fair reporting privilege, the Court held that the *Register* article fairly and accurately reported on the circumstances surrounding the plaintiff’s arrest. As plaintiff conceded, the affidavit in support of the arrest warrant stated that plaintiff was seen “sitting in the driver’s seat [of his car] with his penis exposed . . . [and] fully erect as he was holding it in one hand.” The Court therefore held that “a verbatim recitation of the relevant language of the arrest warrant affidavit would not have had a different effect on the reader than the language actually used in the article.” Moreover,

**“A verbatim recitation of the relevant language of the arrest warrant affidavit would not have had a different effect on the reader than the language actually used in the article.”**

plaintiff never sought a written retraction from the *Register* and under Connecticut’s retraction statute the plaintiff neither had special damages nor any evidence of malice-in-fact. As in *Mackowski*, the Court rejected the plaintiff’s argument that the attorneys fees he expended in defending against

the criminal charges constituted special damages under the statute since the *Register* article was not the “legal cause” of the plaintiff’s criminal arrest. Moreover, the use of the term “masturbation” instead of the precise language of the affidavit from the arrest warrant could not create a factual dispute as to whether the *Register* acted with malice. Indeed, the Court found no distinction between the language in the affidavit and the definition of masturbation provided in the most recent edition of Webster’s Dictionary, much less any evidence that the *Register* knew that its article was false or acted with reckless disregard as to its truth.

The Court also summarily dismissed the false light invasion of privacy and negligent infliction of emotional distress claims. Since these claims merely incorporated by reference the allegations of the libel claim, these claims were entirely derivative of the libel claim. Under Connecticut law, these derivative claims had to suffer the same fate as the libel claim: summary dismissal.

John Williams, New Haven, represented plaintiffs in both cases

*Daniel J. Klau and Victor A. Bolden of Wiggin & Dana LLP, of New Haven, Connecticut represented the New Haven Register in both the Mackowski and Dellacamera cases.*

## Commercial Disparagement Plaintiffs Have One Year to Sue in Pennsylvania

By David Strassburger

In a case of first impression, the Supreme Court of Pennsylvania determined that the one-year statute of limitations applicable to libel and slander actions, 42 Pa.C.S.A. § 5523(1), also applies to actions for commercial disparagement. The Court, through a terse Opinion written by Chief Justice Zappala in *Pro Golf Manufacturing, Inc. v. Tribune-Review Newspaper Co.*, \_\_\_ A.2d \_\_\_, 2002 Pa. LEXIS 2194 (Oct. 22, 2002), reversed the judgment of the Superior Court, which had concluded the two-year statute of limitations found in 42 Pa.C.S.A. § 5524(7) was more appropriate.

### Lost Business Leads to Suit

Pro Golf alleged in its Complaint that the newspaper ("The Herald") had published articles concerning the demolition of certain buildings in Indianola, Pennsylvania. Pro Golf's business

allegedly was located in one of the buildings mentioned, but that particular building was never scheduled for demolition, and never demolished. Pro Golf brought suit more than one year after the publication, but less than two years after the publication, alleging that the publication was false, reckless, and caused Pro Golf to lose customers who believed that Pro Golf was out of business.

The trial court granted judgment on the pleadings to The Herald based on the one-year statute of limitations. On appeal, the Superior Court reversed. 761 A.2d 553 (Pa. Super. 2000). Although it noted that other jurisdictions had reached different conclusions, *id.* at 56-57, the Superior Court asserted that the one-year statute of limitations could not apply because commercial disparagement is neither libel nor slander, and, unlike those torts, is not designed to protect reputation. The Superior Court also believe that the two-year residuary statute of limitations for "[a]ny other action" to recover damages to property, or sounding in trespass, was more appropriate because a commercial disparagement plaintiff must prove special damages, which may not be calculable within one year of the publication.

### Supreme Court Reverses

The Supreme Court granted discretionary review and reversed. Preliminarily, the Court confirmed the prediction of the U.S. Court of Appeals for the Third Circuit in *Neurotron, Inc. v. Medical Service Association of Pennsylvania, Inc.*, 254 F.3d 444 (3d Cir. 2001), and adopted the definition of the tort set forth in the *Restatement (Second) of Torts* § 623A. It then proceeded to shred the Superior Court's analysis.

First, the Court determined that the plain language of section 5523(1) supported its application because courts had historically referred to the commercial disparagement

***The Supreme Court's decision in Pro Golf closes a potential loophole, and makes clear that, labels aside, a plaintiff who complains of a false publication must sue within one year of the date of the publication.***

cause of action as trade libel, slander of property, slander of title, and the like. Second, the Court rejected the Superior Court's conclusion that section 5523(1) applied only to torts that redress injuries to reputation by noting that section 5523(1) also refers to invasion of privacy, and that tort is primarily designed

to remedy emotional distress, not reputation. Finally, the Court explained that the additional time allegedly needed by a disparagement plaintiff to prove special damages was not a reason to reject section 5523(1). That section, said the Court, applies to all classes of slander, and in Pennsylvania, the only slander plaintiffs exempted from proving special damages are those who alleged slander "per se."

*Pro Golf* marked a major victory for the media. Existing case law had already established that plaintiffs complaining of libel could not creatively plead other causes of action, such as intentional interference with a contract, in order to avoid the one-year statute of limitations. *Evans v. Philadelphia Newspapers, Inc.*, 601 A.2d 330 (Pa. Super. 1991). The Supreme Court's decision in *Pro Golf* closes a potential loophole, and makes clear that, labels aside, a plaintiff who complains of a false publication must sue within one year of the date of the publication.

Pro Golf was represented by Chrystal Ciampoli of Damian & Amato.

*David Strassburger of Strassburger McKenna Gutnick & Potter, P.C. represented The Herald in this matter.*

## Press Conference Qualified Privilege in Nova Scotia

By Roger D. McConchie

On October 24, 2002, in *Campbell v Jones* 2002 NSCA 128, the Nova Scotia Court of Appeal (2-1) set aside a jury's \$240,000 defamation verdict against two lawyers over statements they made at a press conference which allegedly conveyed the innuendo that the plaintiff police officer was racist, motivated by racism or discriminates in the conduct of her duties on the basis of race, economic status and social status. The lawyers represented three 12 year old black school girls from a poor neighborhood.

The Court of Appeal held there was no liability because the lawyers' statements had been made on an occasion of qualified privilege.

The news media defendant had settled with the plaintiff before trial for \$14,500 and were therefore not parties to the appeal. The judgment does not directly deal with the existence of a privilege for the media to report the lawyer's statements.

Applying the Supreme Court of Canada's decision in *R v Golden*, [2001] S.C.J. 81 (decided after the trial), the Court of Appeal held that the three girls had in fact been subjected to an unlawful "strip search" contrary to the *Charter*, as alleged by the lawyers in the complaint and at the press conference. [Paragraphs 23, 65, 72]. The trial judge had found that the search was "not technically a strip search."

The appeal decision did not address a defence of justification (truth) with respect to the imputations of racism.

Roscoe J.A. (Glube C.J.N.S. concurring) held that the two lawyers, who in advance of the press conference had filed complaints to the Police Commission on behalf of three school girls, had an ethical duty to speak out against injustice. Roscoe J.A. held that the press conference was held to be an occasion of qualified privilege, stating inter alia:

*59 ...[L]awyers, who are officers of the court with duties to improve the administration of justice and upheld the law, have a special relationship with and responsibility to the public to speak out when elements of the justice system itself have breached*

*the fundamental rights of citizens and they have reason to believe that complaints pursuant to the Police Act will not provide an adequate remedy.*

....

*68 ...In determining whether the press conference was an occasion of qualified privilege, the trial judge had to consider all of the circumstances. Here, there was an intertwining of Charter rights; the right to counsel and the right not to be subjected to an unreasonable search, with Charter values; freedom of speech and equality rights. Freedom of speech was being exercised to promote equality rights and to draw attention to violations of Charter rights.*

...

*70...In a case such as this where freedom of expression is exercised not merely for its own sake, or to advance one's own self-interest, but to bring attention to and seek redress for multiple breaches of such important Charter rights as the right to counsel, the right to security of the person, including the right not to be subject to unreasonable search, and the right to equal protection and benefit of the law, one would expect it to be even more difficult to justify its curtailment. In any event, in my view, it was incumbent upon the trial judge to at least turn his mind to the myriad of Charter rights and values at issue in the case before him. If constitutional rights are to have any meaning, they must surely include the freedom of persons whose Charter guarantees have been deliberately violated by officials of state agencies to cry out loud and long against their transgressors in the public forum, and in the case of children and others less capable of articulation of the issues, to have their advocates cry out on their behalf.*

Roscoe J.A. noted the trial judge had found that the defendant lawyers were not actuated by express malice, either in the sense of personal animosity or in the sense of reckless indifference to the truth.

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## Press Conference Qualified Privilege in Nova Scotia

*(Continued from page 24)*

Perhaps the most far-reaching implications of this decision are found in the observations of Roscoe J.A. that the Supreme Court of Canada's decision in *Jones v Bennett*, [1969] S.C.R. 277, often cited as authority for the proposition that "publication to the world" via the news media is too broad to be an occasion of qualified privilege, "pre-dated the *Charter* by over 12 years" [paragraph 67] and that the common law should be modified incrementally to ensure that it conforms with *Charter* values. [paragraph 69]

The dissent of Saunders J.A., which is even longer than the majority decision, also warrants careful analysis. Among other things, Saunders J.A. held that even if the occasion of the press conference was privileged (which he rejected), the conduct of the lawyers exceeded the occasion and the privilege was therefore lost.

It will not be surprising, having regard to the uncertainties surrounding the scope of qualified privilege in light of the *Charter* and the Reynolds decision of the House of Lords, if the plaintiff seeks leave to appeal to the Supreme Court of Canada.

Counsel for Plaintiff: George W. MacDonald, Q.C. and Hugh H. Wright. Counsel for the defendant Jones: William L. Ryan, Q.C. and Nancy G. Rubin. Counsel for the defendant Derrick: S. Bruce Outhouse, Q.C. and Lester Jesudason.

*Roger D. McConchie is a civil litigation partner at the Vancouver office of Borden Ladner Gervais.*

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## New York Federal Court Refuses to Enjoin Harrods From Filing U.K. Libel Suit Against Dow Jones

By Amy L. Neuhardt

On October 11, 2002, Judge Victor Marrero of the U.S. District Court for the Southern District of New York issued a 115-page opinion declining to exercise subject matter jurisdiction over a lawsuit filed by Dow Jones & Co., Inc. against Harrods Limited and Harrods' owner and chairman, Mohamed al Fayed. (2002 WL 31307163) In the suit, Dow Jones sought declaratory judgment that a *Wall Street Journal* column commenting on a premature April Fools' joke played by Harrods' and al Fayed was not actionable as a matter of law, and also sought an injunction prohibiting Harrods and al Fayed from pursuing a libel claim filed against Dow Jones in the United Kingdom based on the same article.

### ***Background***

#### **APRIL FOOLS! – A DAY EARLY**

On March 31, 2002, Harrods issued a press release declaring that the next day (April 1, 2002), Harrods would announce a plan to "float shares," *i.e.*, sell shares of its stock to the public. In reliance on a wire service report of the press release, the *Journal* reported on April 1, 2002 in its U.S. print and online editions that Harrods would go public that day. Shortly thereafter, Harrods announced that the March 31 press release had been an April Fools' joke designed to draw attention to the re-designed personal website of Harrods' chairman and owner, al Fayed. The following day, the *Journal* published a correction in its U.S. print editions and on *WSJ.com*, informing readers that Harrods' March 31 press release had been a joke.

#### **DOW JONES FOLLOWS UP**

On April 5, 2002, in its U.S. print edition, the *Journal* published in its "Bids and Offers" column (a collection of light-hearted musings and anecdotes about the business world published each Friday) a five-paragraph, ironic commentary on the Harrods hoax entitled "The

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## New York Federal Court Refuses to Enjoin Harrods From Filing U.K. Libel Suit Against Dow Jones

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Enron of Britain?” (“the April 5 Article”). The April 5 Article was also available online to paid subscribers of *WSJ.com*. The April 5 Article opened with the comment, “[i]f Harrods, the British luxury retailer, ever goes public, investors would be wise to question its every disclosure.” The column then explained the remark by reporting on the false press release and the announcement that the press release had been no more than an April Fool’s joke intended to promote Mr. Fayed’s personal website. The article went on to observe that the prank was “[n]ot exactly Monty Python-level stuff,” but explained that, Harrods had not violated any British laws, and that the U.K. government had not received any complaints about the prank.

### HARRODS IS NOT AMUSED

Despite the humorous tone of the April 5 Article, and the truth of the facts contained therein, Harrods promptly began to threaten legal action against Dow Jones for publishing the article. Harrods’ Director of Legal Affairs wrote to Dow Jones asserting that the April 5 Article had “caused serious damage to Harrods’ reputation worldwide” by “linking Harrods (a law abiding and historic British institution) with Enron” and by “insinuat[ing] that Harrods . . . can and will act unlawfully.” Although Harrods failed to identify a single false statement of fact in the April 5 Article, it demanded that the *Journal* publish an apology in its domestic and international editions (where the April 5 Article had not even been published) and pay Harrods “substantial damages” and legal costs.

Dow Jones’ counsel responded with an explanation that the April 5 Article was no more than a humorous commentary on the false March 31 press release, and that, because there was no false statement of fact contained in the article, a “correction” was neither necessary nor appropriate. Dow Jones suggested, however, that Harrods submit a responsive letter to the editor for consideration for publication.

Harrods declined, and the legal back-and-forth continued. On May 13, Harrods’ London solicitors asked Dow Jones to consent to “pre-action disclosure” by May 27, 2002, and threatened that, if Dow Jones did not comply, they would “bring the matter before” the High Court of Justice in London.

### THE INITIAL COMPLAINT

On May 24, 2002, Dow Jones filed a complaint in federal court in New York seeking a declaratory judgment that the April 5 Article was non-actionable as a matter of U.S.

and New York law. The theory of the complaint was that 1) the April 5 Article (which was written and edited in the United States and directed primarily to the *Journal*’s print readers in this country) unquestionably was not actionable as a matter of U.S. and New York law;

2) recent U.S. decisions in

*Telnikoff v. Matusevitch*, 702 A.2d 230 (Md. 1997), and *Bachchan v. India Abroad Publ’ns Inc.*, 154 Misc. 2d 228, 585 N.Y.S.2d 661 (N.Y. County, NY, 1992), had recognized that British libel law was offensive to U.S. public policy as embodied in the First Amendment;

- 3) the expense and diversion of editorial resources caused by defending the article—admittedly not actionable in the U.S.—in the U.K. constituted a cognizable First Amendment harm from which the Court had the power to protect Dow Jones; and
- 4) a declaratory judgment by the U.S. court would, through application of the single publication rule, resolve the dispute between Dow Jones and Harrods worldwide.

### THE AMENDED COMPLAINT

Shortly after Dow Jones filed its initial complaint, Harrods instituted the threatened libel action against Dow Jones in the U.K. based on the April 5 Article. In a later-

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**“Even if Dow Jones’ theory that a judgment against it in the London Action would be unenforceable in most or all American jurisdictions were conceded, it does not follow that the mere prospect that such a ruling may be rendered at some indefinite point in the future raises a sufficient actual controversy.”**

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## New York Federal Court Refuses to Enjoin Harrods From Filing U.K. Libel Suit Against Dow Jones

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filed “Particulars of Claim,” Harrods clarified that it was basing its claim on the theory that the entire April 5 Article was “meant and [was] understood to mean that the Claimant’s every corporate disclosure should be distrusted.” Harrods further asserted that

“the words complained of meant, and were understood to mean that it is reasonably suspected that if the Claimant were to become a public company, it would prove itself to be Britain’s Enron by deceiving and defrauding its investors on a huge scale.”

Harrods did not identify any false statements of fact to support its allegations.

Dow Jones thereafter amended its complaint to add a request for an anti-suit injunction prohibiting Harrods and al Fayed from pursuing their litigation against Dow Jones in the United Kingdom (or anywhere else in the world).

Harrods and al Fayed subsequently moved to dismiss the litigation for lack of subject matter jurisdiction under the Declaratory Judgment Act and, as to Harrods only, lack of personal jurisdiction. After oral argument, Judge Marrero issued a lengthy opinion granting the motion to dismiss on grounds of subject matter jurisdiction, and declining to rule on the issue of personal jurisdiction.

### *The Opinion*

#### STANDARD OF REVIEW

Although neither Dow Jones nor Harrods had submitted factual evidence in support of the motion to dismiss (both sides did submit affidavits of their British counsel expressing differing views on British libel law), and no discovery had been taken, Judge Marrero first determined that Harrods’ motion did not challenge the sufficiency of Dow Jones’ pleadings, but instead was directed to the “fact” of subject matter jurisdiction. The court then proceeded to determine issues of fact relating to the subject matter challenge.

#### NO CASE OR CONTROVERSY

Having determined that it was not bound by the allegations of Dow Jones’ complaint, the court first turned to the issue of whether Dow Jones had presented a case or controversy.

Judge Marrero found that no case or controversy existed. According to Judge Marrero, “even if Dow Jones’ theory that a judgment against it in the London Action would be unenforceable in most or all American jurisdictions were conceded, it does not follow that the mere prospect that such a ruling may be rendered at some indefinite point in the future raises a sufficient actual controversy.” Judge Marrero reasoned that Dow

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***The court further rejected Dow Jones’ argument that the burden of defending the U.K. action was itself a recognizable First Amendment harm.***

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Jones relied on “a string of apprehensions and conjectures about future possibilities,” in particular that 1) the UK court would find it had jurisdiction over the claim; 2) the U.K. court would render an adverse ruling against Dow Jones; 3) the U.K. court would

award monetary damages to Harrods and/or an injunction against Dow Jones; 4) Harrods would seek to enforce the judgment in the U.S. or elsewhere; and 5) the judgment would be enforced.

Judge Marrero further found that Dow Jones “express confidence” that no U.S. court would enforce any judgment rendered against Dow Jones by the U.K. court, “worked against [Dow Jones’] strenuous assertions that it faces a real, sufficiently direct and immediate threat of injury.”

The court further rejected Dow Jones’ argument that the burden of defending the U.K. action was itself a recognizable First Amendment harm. Without mentioning *Sullivan*, the court relied instead on *Younger v. Harris* and other abstention case law to support its contention that “not every chilling effect on freedom of expression presents a justiciable controversy warranting extraordinary equitable relief.” The court reasoned that, if the prospect of criminal prosecution were not sufficient to

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## New York Federal Court Refuses to Enjoin Harrods From Filing U.K. Libel Suit Against Dow Jones

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confer standing in *Younger*, the threat of an adverse civil judgment did not create standing here, notwithstanding Dow Jones' allegations that it was directly harmed by having to defend the London action.

### **Concerned about Comity**

Judge Marrero further expressed concern that any declaratory judgment he issued would offend notions of international comity, and would be ignored by the U.K. court. He also rejected Dow Jones' suggestion that the extraordinary reach of the Internet compelled the court to protect American publishers from foreign legal regimes that seek to punish speech protected by the First Amendment:

...[U]nder Dow Jones' hypothesis, the DJA would confer upon an American court a preemptive style of global jurisdiction branching worldwide and able to strike down offending litigation anywhere on earth. Intriguing as such universal power might appear to any judge, this Court must take a more modest view of the limits of its jurisdiction, and offers a more humble response to the invitation and temptation to overreach.

Dow Jones' argument further was weakened, the court reasoned, by Dow Jones' own admission that declaratory judgment would have a direct impact on the U.K. action only if the British court were to recognize the U.S. judgment. The court observed that the parties, through the submissions of their U.K. counsel, disputed whether a U.K. court would in fact recognize a U.S. declaratory judgment, but found it "highly improbable" that the U.K. court would do so.

### **Precedent for Injunction Read Narrowly**

Reading narrowly the leading case of *Farrell Lines, Inc. v. Columbus Cello-Poly Corp.*, 32 F. Supp. 2d 118 (S.D.N.Y. 1997) (Mukasey, J.), *aff'd*, 161 F.3d 115 (2d Cir. 1998), the court concluded that Dow Jones' request

for injunctive relief did not alter its case or controversy analysis.

*Farrell*, Judge Marrero reasoned, approved injunctive relief only because there was a forum selection clause in a bill of lading by which the parties agreed to litigate in the Southern District of New York. As Judge Marrero interpreted the case, *Farrell* involved a breach of contract, not a tort, and "the governing law there was predetermined by the parties and its application readily adjudicated by the parties." In contrast, here "there is no touchstone by which this Court can dispositively rule that American law should be applied in the case at hand to resolve a conflict pending in a British court involving a claim allegedly arising in the United Kingdom under English law."

Summarizing its conclusion that Dow Jones had not presented a concrete, justiciable controversy, the Court depicted Dow Jones' arguments as

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***Alleged injuries such as the cost, anxiety and inconveniences an individual may suffer by being compelled to defend litigation are not sufficient" to justify declaratory relief.***

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[A]n abstract tower of hypotheticals stacked like a house of cards on suppositions piled on top of speculations all founded on conjectures and conjuring "ifs" "mays" and "to the extents."

"If" the London Action is not enjoined, the argument goes, Dow Jones may be sued not only in the United Kingdom but in any other country where the offending publication appeared; if so, Dow Jones necessarily will be held liable; if so, Dow Jones may be ordered to pay damages and/or it may be directed to cease future publication of the article "to the extent that the U.K. court were to issue an injunction" so ordering; Harrods may seek to enforce any judgment not just in the United States but conceivably in other countries. And, as already mentioned, as the antidote to these hypotheticals, if this Court were to grant the relief Dow Jones seeks, the conflict may be fully resolved, closing the loop of surmises, but only

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## New York Federal Court Refuses to Enjoin Harrods From Filing U.K. Libel Suit Against Dow Jones

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“if” the courts in the United Kingdom (and presumably elsewhere) were to recognize and enforce this Court’s judgment.

### DOW JONES’ CASE WAS NOT APPROPRIATE FOR DECLARATORY JUDGMENT

Although Judge Marrero’s court’s ruling on the “case or controversy” issue was dispositive of the case, he went on to address the alternate ground of whether the dispute was appropriate for consideration under the DJA.

Again, Judge Marrero was not persuaded by Dow Jones’ arguments. The court began by rejecting Dow Jones’ argument that its First Amendment interests were implicated by the mere pendency of the U.K. litigation. The court stated that “there is no merit to such a far reaching proposition.” The court again relied on *Younger v. Harris* to reason that “the Supreme Court has declared that even in the much more profoundly harmful context of a criminal prosecution instituted under

a tenuous statute regulating speech, alleged injuries such as the cost, anxiety and inconveniences an individual may suffer by being compelled to defend litigation are not sufficient” to justify declaratory relief.

Judge Marrero further dismissed the idea that the circumstances presented by Dow Jones were sufficiently extraordinary to warrant federal intervention. The court noted that Dow Jones had produced no evidence that, in filing the UK action, Harrods had acted in bad faith or to harass Dow Jones.

### NOT APPROPRIATE FOR INJUNCTIVE RELIEF

The court also found that the case was not appropriate for injunctive relief. Although the court acknowledged that *Farrell* and other applicable law allowed it to enter such an injunction if, among other things, 1) the parties in both matters are the same; and 2) resolution of the case before the enjoining court would be dispositive of the dispute between the parties, the court found Dow Jones had not met even this threshold standard.

The court accepted that al Fayed and Harrods could be considered “effectively the same parties” for the purposes of Harrods’ motion, and that the first prong of the *Farrell* test likely would be met. But the court found Dow Jones wanting on the second prong; it found that issuing injunctive relief would not be “dispositive” of the U.K. litigation.

The court reiterated its concern that the English courts would not “honor the court’s judgment.” The court did not address Dow Jones’ argument that the injunctive relief sought by Dow Jones would have been directed to Harrods and Al Fayed and presumably enforceable through U.S. contempt proceedings without the necessity for any recognition or further action by the U.K. court.

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***The court was unpersuaded that issuing the declaratory and injunctive relief sought by Dow Jones would in fact terminate the controversy between the parties.***

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The court also refused to accept Dow Jones’ argument that whether the U.S. case would be “dispositive” of the foreign action does not require the party seeking an anti-suit injunction to prove as a matter of fact that the foreign forum necessarily would abide by the U.S. court’s judgment in the absence of an anti-suit injunction.

Dow Jones noted that cases granting anti-suit injunctions had undertaken no inquiry into the foreign forum’s likely deference to the U.S. court’s judgment. As Dow Jones read those cases, the “dispositive” requirement for issuing a foreign anti-suit injunction requires only that plaintiff show that the subject matter of the competing actions be substantially the same—a test which Dow Jones argued was easily met here.

The court, however, did not agree with Dow Jones’ interpretation of the “dispositive” standard and read it to require a showing that the foreign court would indeed accept the U.S. court’s judgment in the underlying action. Alternatively, Judge Marrero decided that the subject matter of the two cases was not substantially the same. Although both arose from identical events, one case addressed U.S. law, the other U.K. law.

### DISCRETION TO DECLINE JURISDICTION

Finally, the court set forth a third basis for granting Harrods’ motion to dismiss – that even if Dow Jones had presented a case or controversy appropriate for resolution under

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## New York Federal Court Refuses to Enjoin Harrods From Filing U.K. Libel Suit Against Dow Jones

*(Continued from page 29)*

the Declaratory Judgment Act, the court nonetheless had discretion to decline jurisdiction over the case.

After providing a lengthy history of the DJA and the purposes behind it, the court again relied on notions of comity and international relations to decline jurisdiction. The court was unpersuaded that issuing the declaratory and injunctive relief sought by Dow Jones would in fact terminate the controversy between the parties. The U.K. action was grounded on British law and by the court's "reckoning of realities and probabilities" it was highly improbable that a U.S. judgment in fact would end the litigation. Rather, the court concluded, the court's "exercise of jurisdiction would spur more litigation," both by the parties through exercise of appellate options and because the U.K. court might "exercise judicial power to protect their own jurisdiction over this matter."

Similarly, the court found that the relief sought by Dow Jones would "serve no useful purpose." The court expressed skepticism at Dow Jones' claim that the action would resolve its dispute with Harrods everywhere in the world. Although the court acknowledged that a judgment would be useful in removing uncertainties regarding later enforcement of any U.K. award "it is unlikely to do much to dispose of Harrods' claims in London, or anywhere else beyond this country."

On November 8, 2002, Dow Jones filed a notice of appeal to the U.S. Court of Appeals for the Second Circuit. In administrative papers filed with the Second Circuit, Dow Jones summarized the issues presented by the appeal as follows:

Whether the District Court erred in dismissing plaintiff's action for lack of subject matter jurisdiction, including whether plaintiff's action presented a justiciable case or controversy; whether various policy grounds precluded the exercise of the District Court's jurisdiction under the Declaratory Judgment Act or otherwise; whether the District Court abused its discretion under the Declaratory Judgment Act in dismissing plaintiff's action; whether the District Court improperly determined disputed issues of fact and disputed issues of foreign law on a motion to dismiss without affording proper significance to the

allegations of plaintiff's complaint or affording plaintiff adequate notice or opportunity to develop those issues through discovery or otherwise; and whether the District Court properly dismissed plaintiff's claim for an anti-suit injunction.

Zachary Carter, Lile Deinard and Bruce Ewing of Dorsey and Whitney represented Harrods.

*Amy L. Neuhardt is an associate of the New York office of Gibson, Dunn & Crutcher LLP. Amy, Jack Weiss, and Alia Smith of Gibson Dunn and Stuart D. Karle of Dow Jones represent Dow Jones in this matter.*

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## **PREPUBLICATION REVIEW:**

### **News Desk Should Control Promotions**

**By Alice Neff Lucan**

Being a libel defendant before the Virginia Supreme Court must be a little like being a Christian before a bench of Roman lions. You know you're going to be eaten alive, but you can't always see what approach they'll take.

And so it was with WJLA-TV, Channel 7 in Washington, D.C., when the news room broadcast a very serious story about an orthopedic doctor and ended up with a two million dollar defamation verdict against the station. On appeal, the Virginia Supreme Court held that the news report was "a newsworthy event and a matter of public interest," and dismissed an appropriation claim while affirming the jury's verdict of actual malice. With the benefit of hindsight and second-guessing, there are at least a couple of pre-publication lessons to be gleaned from this decision.

**First, here's the background.** According to the summary in the Virginia court's decision, the Virginia Board of Medicine had called a doctor practicing orthopedic medicine in Fairfax County, Virginia, for hearings on whether he had applied medically inappropriate treatment for several female patients when he was treating them for piriformis syndrome. The problem can cause severe back pain from pressure on the sciatic nerve. This doctor said he performed intravaginal massage on the piriformis muscle. The Board dismissed the complaints, but one patient took this story to Channel 7. Later, one of the patients filed a lawsuit against the doctor and her filed complaint also was an attributed source in the Channel 7 story. The story quoted testimony from the Board hearing with attribution. The story also used sound bites from two patients, one of whom had not complained to the Board. The broadcast story also included an interview with a doctor who is an expert on piriformis syndrome, saying he had not heard of this treatment. WJLA reporters worked on the investigation for five months.

**Where did all of this good work go wrong, you ask?** According to the Court, the piriformis expert withdrew permission to use his interview before the broadcast and the news people knew that. More precisely, the expert called the switchboard just before the news broadcast and left a message with the receptionist. That, the Court took to be evi-

dence of actual malice. In hindsight, we can now see that it would have been useful to expand on the comments of other doctors, who also said they had not heard of this treatment. And from a purely strategic point of view, it could have been useful to present the orthopedist's point of view, even without his cooperation. Nonetheless, it is also clear that the attributions in the news report to the legal proceedings were given short shrift and should have been more helpful in establishing an absence of actual malice.

**The promos.** But the really huge problem appeared to be in the promotions for the story. The doctor was called the "Dirty Doc" and the copy included phrases like "you'll be outraged," and "when does a doctor's treatment become a sexual assault?" The doctor had not been charged with criminal sexual assault, and the Court drew the inference that Channel 7 accused him of a crime, knowing that he was not charged — more actual malice.

Over WJLA's objections, the promotions were considered together with the news copy as a complete package, thus neither the jury or the trial judge had to do the hard work of going through the news copy to find whether or not there was anything capable of supporting a libel suit in the news report alone. The Court said, "the thrust of [the plaintiff's] claim of defamation was that WJLA's publications collectively accused him of sexually assaulting some of his female patients under the guise of treating them..."

Ironically, the Court found the promotional copy to be announcements to promote a report of a newsworthy event — and thus dismissed the doctor's statutory appropriations claim against WJLA. The promos were legitimate exceptions to the appropriations law, but were the most likely culprit behind the two million dollar defamation verdict.

From this end, it appears that losing the motion on the consolidated copy is the principal cause of the outcome in this case. In fact, in retrospect, trial lawyer David J. Branson says the doctor would not have had a successful case without the promo's.

The decision can be found at 264 Va. 140; 564 S.E.2d 383; 2002 Va. LEXIS 87; 30 Media L. Rep. 2249.

*Alice Neff Lucan is a lawyer in Washington D.C. and a member of LDRC's Prepublication/Prebroadcast Committee.*

## Washington Reaffirms No Reasonable Expectation of Privacy in Public Place

By Andrew M. Mar

In *State v. Glas*, 54 P.3d 147 (Sept. 19, 2002), the Washington Supreme Court recently reaffirmed there is no reasonable expectation of privacy in a public place in a decision overruling two convictions under Washington's voyeurism statute for taking photographs and video up women's skirts.

### Background

Sean Glas and Richard Sorrells were found guilty in separate cases of violating Washington's voyeurism statute, RCW 9A.44.115. The statute prohibits, among other things, knowingly viewing, photographing, or filming of another person, without that person's consent or knowledge, while the person being viewed, photographed or filmed "is in a place where he or she would have a reasonable expectation of privacy." RCW 9A.44.115(2).

Glas took at least two pictures up the skirts of two separate women at a shopping mall near Yakima, Washington. Both times Glas was in plain view, once in a department store, and once in the main hallway of the shopping mall. (Interestingly, the court does not question if a shopping mall is a public place). The women both saw Glas and police arrested him and confiscated his camera.

Sorrells brought a video camera to an outdoor food festival in Seattle, where he videotaped up the dress of at least one woman. Witnesses reported him to police and he was arrested.

Both men argued the voyeurism statute did not apply to pictures taken in a public place. On appeal, the Washington Supreme Court found the conduct by Glas and Sorrells, while "reprehensible", was legal because upskirt photography in a public location did not violate the voyeurism statute.

### No Expectation of Privacy in a Public Place

The voyeurism statute defines a place where a person "would have a reasonable expectation of privacy" as either (1) a "place where a reasonable person would be-

lieve that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed or filmed by another," or (2) a "place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance."

The Washington high court recognized the first type of place would be the "traditional venue of the peeping tom," such as bathrooms, bedrooms, changing rooms, and tanning booths. The second type of place, the court found, includes rooms in a person's domicile other than bedroom or bathroom, locker rooms (where persons undress but do not expect to have their pictures taken), or an enclosed office where someone closes the door to breast feed or change for a bike ride commute home.

There is also a reasonable expectation of privacy in places one might not normally disrobe but still expect privacy, such as a private suite or office. "A person would reasonably expect that another individual would not place a camera under his or her desk to view or film his or her genital region."

The court notes this second group of places, while expanding on the traditional locations where one has a reasonable expectation of privacy, does not include public locations. The second group of places only include locales where a person "reasonably expect[s] to be safe from casual or hostile intrusion or surveillance," but the court notes casual intrusions and surveillance occur frequently when a person ventures out in public, so it would be "not logical[]" to include public places in the definition.

Thus, because the women photographed and filmed were in public places – working in the public areas of a shopping mall or standing in a concession line at a food festival – neither had a reasonable expectation of privacy, and the voyeurism statute did not apply.

*Andrew M. Mar is an associate in the Communications, Media and Information Technologies Department at Davis Wright Tremaine LLP's Seattle office.*

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**Casual intrusions and surveillance occur frequently when a person ventures out in public.**

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## Louisiana Appellate Court Upholds Anti-SLAPP Statute Against Constitutional Challenge

By Mary Ellen Roy

In a case of first impression, a Louisiana appellate court has upheld the Louisiana anti-SLAPP statute against a constitutional challenge. *Lee v. Pennington*, 2002 WL 31375541 (La. App. 4<sup>th</sup> Cir. Oct. 16, 2002). The Court of Appeal also for the first time held that the prevailing party media defendants were entitled to an award of attorneys' fees under the statute. In addition, the Court rejected the plaintiff's attempt to create new avenues for liability under novel "racial profiling" and "abuse of rights" legal theories. State Fourth Circuit Court of Appeal Judge Terri Love wrote the opinion, which judges David Gorbaty and Michael Kirby joined.

### **Reports of Rape Charge**

Plaintiff George Lee was a New Orleans police officer who was arrested on charges of aggravated rape and kidnapping. The New Orleans Police Department issued a press release detailing the arrest and held a press conference to discuss the charges and Lee's suspension from the police force. Four New Orleans television stations (WDSU, WGNO, WVUE, and WWL) broadcast accurate news stories about Lee's arrest and the charges against him, as did The Times-Picayune newspaper. Lee brought an action for defamation against these news media defendants as well as against the City of New Orleans, the police chief, and the district attorney, alleging claims of defamation, invasion of privacy, abuse of rights, and "racial profiling," among others. Lee ultimately was convicted of forcible rape and second degree kidnapping and sentenced to thirty years in prison.

The Louisiana anti-SLAPP statute, La. Code of Civil Procedure art. 971, was enacted in 1999 and has been applied by an appellate court to affirm the dismissal of a defamation/invasion of privacy case against a media defendant in only one previous case (*see Stern v. Doe*, 806 So.2d 98 (La. App. 4<sup>th</sup> Cir. 2001); *LDRC LibelLetter*, March 2002). *Lee* is the first appellate decision addressing the constitutionality of the statute.

### ***Anti-SLAPP Statute Held Constitutional***

The plaintiff filed a motion to declare the anti-SLAPP statute unconstitutional on a number of grounds. Because the statute provides a new procedural device, a "special motion to strike," which requires that the court dismiss a complaint affecting the free speech rights of a defendant on a public issue unless the plaintiff can demonstrate a "likelihood of success" on the merits, the plaintiff argued that the statute violated his right to due process, his right to a jury trial, and the "open courts" provision of the Louisiana Constitution.

The Court of Appeal upheld the constitutionality of the statute based on the express legislative intent of the state

legislature to enact a procedural device to screen meritless claims pursued to chill one's constitutional rights under the First Amendment of the United States Constitution. The Court pointed out that the anti-SLAPP statute "does not bar anyone with a valid claim from pursuing his

case through the judicial process."

The Court also upheld the anti-SLAPP statute against an equal protection challenge. The plaintiff argued that the statute violated equal protection because enforcement actions brought by the State of Louisiana or other government attorneys are exempt from the statute. The Court of Appeal held that a defendant retains the right to defend himself in such actions, and thus, there is "no reason to declare this article unconstitutional."

### ***Abuse of Rights Claim Rejected***

On the merits, the Court of Appeal affirmed the dismissal of the plaintiff's defamation and privacy claims on the straightforward grounds that the news stories of plaintiff's arrest were true and were matters of public record.

More interestingly, the Court of Appeal also rejected the plaintiff's claim of "abuse of rights." Abuse of rights is a civilian doctrine available under Louisiana's unique Civil Code (also known by common law lawyers as the "Napoleonic Code"). The abuse of rights doctrine has been

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### **Louisiana Appellate Court Upholds Anti-SLAPP Statute Against Constitutional Challenge**

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invoked sparingly in Louisiana, but provides that in limited instances, a defendant's otherwise judicially-protected rights may be unenforceable. Thus, the plaintiff argued that the news media defendants "abused" their First Amendment rights allegedly by mischaracterizing him as a serial rapist.

The Court rejected the plaintiff's abuse of rights claim because, among other things, the news media's motivation was not for the predominate purpose of causing harm to the plaintiff, but was a "valid exercise of their right to freedom of the press." The Court rejected the plaintiff's argument that the news media exploited the situation for their own financial gain because "there is no basis in law or duty that these services (to provide information to the public about events of public concern) be provided for free."

### **Racial Profiling Claim Rejected**

Finally, the Court of Appeal refused to entertain plaintiff's claim of "racial profiling." The plaintiff had argued that the news media defendants sensationalized the stories of his arrest because he was African-American. The Court held that Louisiana law does not recognize a cause of action for racial profiling in the media, and the issue of whether such a tort should be recognized was a determination to be made by the legislature, not the court.

### **Attorneys' Fees Awarded**

*Lee* also is the first appellate decision in Louisiana in which the Court held that the "language of the statute is clear that attorney fees must be awarded to a prevailing defendant," and that the trial court had thus erred in not awarding attorneys' fees to the news media defendants. The Court remanded the case to the lower court for a determination of reasonable attorneys' fees.

*Mary Ellen Roy is a partner at Phelps Dunbar LLP in New Orleans, Louisiana. She and former Phelps Dunbar associate Sheryl Odems represented New Orleans television stations WDSU, WGNO, WVUE and WWL in the litigation. James Swanson and Loretta Mince of Correrro Fishman represented The Times-Picayune. Kenneth Plaisance represented the plaintiff, George Lee.*

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## D.C. Circuit Hears FOIA Appeal On Release of Detainees' Names

By Charles D. Tobin

The judiciary must to defer to the executive branch's judgment in post-9/11 access matters "if the price of being wrong is airplanes flying into buildings again," the Justice Department told a federal appeals court this month during oral argument in a landmark FOIA case.

But a coalition of access groups, which seeks disclosure of the names of people detained in the government's search for domestic links to terrorism, urged the panel not to use "deference as a substitute for [the government's] burden" to show the information is exempt under the statute.

The United States Circuit Court of Appeals for the District of Columbia Circuit November 18 heard argument in the appeal of *Center for National Security Studies, et al. v. U.S. Department of Justice*, 215 F. Supp. 2d 94 (D.D.C 2002). More than 25 civil rights and public interest groups – including the Reporters Committee for Freedom of the Press – brought the lawsuit in late 2001 seeking the names and other information about the more than 1,000 people detained after the 9/11 attacks.

In her ruling last summer, District Court Judge Gladys Kessler held that most of the detainees' names must be released, but that the government may keep secret the locations of the arrests, detentions and, for those detainees let go, their release. The government appealed the ruling, and the coalition of plaintiffs cross-appealed.

At argument in the D.C. Circuit, Deputy Assistant Attorney General Gregory Katsas told the judges that in ordering the names released, the district court "undervalued" the "grave and obvious dangers with providing a roadmap" to al Qaeda of the government's efforts to root out terrorist cells in the U.S. For this reason, he argued, the detainees' names should be withheld under FOIA exemption 7.

But Judge David S. Tatel, a Clinton appointee to the court, aggressively challenged the logic of the argument. Tatel noted that on the Friday before the hearing, Justice

had trumpeted to the press the arrests of a Detroit group of alleged conspirators, providing the public with their names and extensive information about their suspected contacts and activities. Katsas responded that the government must be free to choose the instances in which it believes releasing information will further, rather than impede, an investigation. "There are times when disclosure of information is helpful."

Judge Tatel also extensively questioned the government's lawyer about whether the breadth of the government's position. Didn't the government affidavits urging secrecy, Judge Tatel asked, argue for deference whenever identifying the subject would impede a complex probe, such as a narcotics or organized crime investigation? Or was Justice seeking a narrow ruling that

in the war on terrorism the judiciary must defer to the investigators? Citing Supreme Court precedent regarding the executive branch's authority over national security issues, Katsas responded, "The courts owe the affidavits a greater degree of deference . . . if the price

of being wrong is airplanes flying into buildings again."

Additionally, Judge Tatel questioned whether a key government affidavit – which said release of the information "could" hamper the investigation -- met its burden under FOIA to show disclosure "could reasonably be expected" either "to interfere with enforcement proceedings" or "to constitute an unwarranted invasion of personal privacy." Finally, Judge Tatel noted on the privacy issue that case law under exemption 7 holds in favor of disclosure when the record contains "compelling evidence" of government misconduct, and disclosure is necessary to confirm or rebut the claim. Weren't detainees' claims that they were deprived of outside contact and legal counsel enough evidence of misconduct to warrant disclosure, he asked?

DOJ's Katsas responded that the merits of the detainees' complaints should be decided in litigation in which they are the parties, not in this FOIA case. In any event, he argued, complaining detainees only were briefly prohibited from seeing counsel. "There are not allegations

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***"The courts owe the affidavits a greater degree of deference . . . if the price of being wrong is airplanes flying into buildings again."***

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## D.C. Circuit Hears FOIA Appeal On Release of Detainees' Names

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that people are locked up in dungeons and held incommunicado,” Katsas argued.

Arguing the pro-access side, Kate Martin with the Center for National Security Studies volunteered at the outset of her argument that preventing another terrorist attack is a government interest “of the highest importance.” She noted, however, that the government’s affidavits “carefully never allege” that a single arrestee is a suspected terrorist. FOIA, she argued, does not “license a scheme of secret arrests,” and that the First Amendment does not permit it either. Martin underscored that the government already released much information about the geographic areas in which the government has focused its search for al Qaeda cells.

Judge David B. Sentelle, an appointee of former President Bush, aggressively questioned Martin throughout her pro-access argument. When Martin pointed to myriad newspaper stories detailing information released by the government about the geographic areas on which investigators are concentrating, Judge Sentelle warned her not to cite to them. He said that based on his years of experience with the press, “Trust me, newspaper articles are not evidence.”

Judge Sentelle also questioned that, if the geographic data has been released as Martin asserted, “then why are we here?” Martin responded that despite the release of some information, the names of 750 of these detainees, and where they were arrested, have always remained cabined. The judge then asked Martin if she knew whether al Qaeda had the names already, and Martin was forced to concede that she did not. He followed up rhetorically: “So there are at least 750 pieces of information relevant to the government investigation that you would put into the hands of al Qaeda?” Martin responded, “That’s right your honor.”

Judge Sentelle also alluded to case law under the Classified Information Procedures Act, where potentially exculpatory, classified information may be withheld from a criminal defendant where the disclosure would reveal the “pattern” of the government’s investi-

gation. Martin responded that the government has never even shown that revealing to al Qaeda the “pattern” of the investigation “would be valuable to them,” and that they do not already have the information.

Finally, Martin also briefly argued – in a point made extensively in an *amicus* brief filed on behalf of more than a dozen media entities – that the due process rights of the detainees give rise to a constitutional right of public access to their identities. “If the Constitution prohibits secret arrests, then the First Amendment gives the public the right to know who’s arrested,” Martin told the panel. Judge Sentelle replied that he does not “understand what the First Amendment has to do with it.” “I missed that part of the First Amendment.”

The third member of the panel, Judge Karen LeCraft Henderson, also appointed by former President Bush, said very little during the argument. She interrupted once to ask the government about its progress under the portion of Judge Kessler’s order requiring Justice to more diligently search for documents sought in plaintiff’s FOIA request that contain policies regarding the detentions. The government’s lawyer responded that the search for documents is “ongoing.”

*Chuck Tobin is with the Washington D.C. office of Holland & Knight LLP.*

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***She noted, however, that the government’s affidavits “carefully never allege” that a single arrestee is a suspected terrorist.***

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## Ninth Circuit Softens Decision On Limits of Common Law Access Rights

By Kelli Sager and Rochelle Wilcox

The Ninth Circuit Court of Appeals recently amended its published decision in *Phillips v. General Motors Corporation*, (the amended opinion is at 307 F.3d 1206 (9th Cir. 2002). The original opinion is at 289 F.3d 1117 (9th Cir. 2002)) limiting the reach of its earlier decision. See LDRC *MediaLawLetter*, May 2002 at 29. The Court originally had held that the common law presumption of access that typically applies to court records does not apply to discovery documents that are filed under seal with the court pursuant to a stipulated protective order.

In response to the Petition For Rehearing Or Rehearing *En Banc* filed by The Los Angeles Times (“The Times”), however, which was joined by media groups across the country as *amici*, the Court amended its decision, in an opinion written by Judge Brewster, finding only that the common law presumption of access does not apply to sealed discovery documents submitted with a *nondispositive* motion. By narrowing the reach of its decision, the Ninth Circuit minimized the conflict between its prior decision and other decisions from the Ninth Circuit and from other Circuit courts.

### Defective Gas Tank Lawsuit

In the underlying case, the plaintiffs had alleged that the gas tank of a General Motors (“GM”) C/K pickup truck was defective, and that this defect had resulted in a fire that seriously injured some of the plaintiffs and resulted in the deaths of some of their family members. During discovery, the plaintiffs and GM entered into a Protective Order which “allowed the parties to share all information covered under the order with litigants in similar cases, but not the public.”

The document at issue – which reflected settlement information for other GM post-collision fuel-fed fires – was produced by GM as a result of an order by the Magistrate Judge, and was designated as confidential

“subject to further review and determination by Judge Molloy as to whether the information produced should be subject to [the Protective] Order.” The document became part of the court file when it was submitted by the plaintiffs as an exhibit to a motion seeking discovery sanctions, including terminating sanctions, based on plaintiffs’ allegations that GM deliberately had failed to provide the information in the form and manner that the court had ordered. However, the parties settled and the case was dismissed before the sanctions motion could be decided.

### District Court Unseals Document

After the case had been dismissed, The Times intervened to request that the exhibit be unsealed. The Times argued that no good cause existed for the document to be sealed in the first instance, but that even if the document had been properly sealed pursuant to the Protective Order, The Times’ common law and First Amendment rights of access entitled it to obtain a copy of the exhibit.

The district court agreed, holding that

- 1) the exhibit was not covered by the terms of the parties’ Protective Order;
- 2) there was no justification in any event for the exhibit to be subject to the Protective Order; and
- 3) The Times independently had a common law right of access to the exhibit. The district court did not address The Times’ argument that it was entitled to access under the First Amendment.

### Ninth Circuit Reverses

The Ninth Circuit reversed. In its amended opinion, filed on October 15, 2002, the Court first reiterated the showing GM had to make to establish “good cause” to seal the exhibit. Under Ninth Circuit authority, “the fruits of pre-trial discovery are, in the absence of a court order to the contrary, presumptively public.” This presumption may be overridden for “good cause,” by showing that “specific prejudice or harm will result if no protective order is granted.” The party seeking protection bears the

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**“The fruits of pre-trial discovery are, in the absence of a court order to the contrary, presumptively public.”**

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### **Ninth Circuit Softens Decision On Common Law Access Rights**

*(Continued from page 37)*

burden of showing “good cause” as to the particular document sought to be sealed.

The Ninth Circuit found that the district court erred, however, in supposedly limiting its evaluation of “good cause” to the information specifically enumerated in Rule 26(c), *i.e.*, “trade secrets, proprietary matters, research, development or other commercial information that should be protected under Rule 26(c).” The Court held that Rule 26(c) provides broader protection and allows the district court to issue “any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden.” Accordingly, the Court reversed with instructions to the district court to conduct another “good cause” analysis, without limiting its determination to the specifically enumerated rationales for a protective order.

#### ***Balancing Common Law Access***

The Court then addressed The Times’ common law right of access argument. The Court noted that if the district court on remand were to find that no good cause existed to apply the Protective Order to the exhibit, it would become public and no further analysis would be necessary. However, if the district court found “good cause” existed to apply the Protective Order, it would then be required to determine whether The Times’ common law right of access applied.

Under these circumstances, the Court held that there would not be a *presumption* of access under the common law; rather, the burden would be on The Times to demonstrate a compelling reason to unseal the document. The Court reasoned that, since the district court already would have conducted a “good cause” analysis before this point would be reached, it would “make little sense to render the district court’s protective order useless simply because the plaintiffs attached a sealed discovery document to a nondispositive sanctions motion filed with the court.”

The Court concluded that

when a party attaches a sealed discovery document to a *nondispositive motion*, the usual pre-

sumption of the public right of access is rebutted, so that the party seeking disclosure must present sufficiently compelling reasons why the sealed discovery document should be released.

Thus, in its amended decision, the Court specifically limited its holding to the filing of discovery materials with nondispositive motions, eliminating the broader language that had appeared in its previous order.

Although the Petition had requested the Court to consider The Times’ argument that the document should be presumptively public under the First Amendment, the Court refused on the grounds that the district court had not reached that issue. Consequently, the application of the First Amendment as a justification for unsealing the document remains a potential independent grounds for the district court to order the release of the sealed exhibit.

William E. Jones & Lucy T. France, Garlington Lohn & Robinson, PLLP, Missoula, MO; Richard A. Cordray, Andrew B. Clubok and Eric R. Claeys, Kirkland & Ellis, Washington, DC, for the defendant-appellant.

James H. Goetz, Goetz, Gallik, Baldwin & Dolan, P.C., Bozeman, MO; James E. Butler, Jr. & Peter J. Daughtery, Butler, Wooten, Overby, Pearson, Fryhofer & Daughtery, Columbus, GA, for the plaintiffs-appellees

*Counsel for The Times were Kelli Sager and Rochelle Wilcox of Davis Wright Tremaine LLP, Peter M. Meloy and Jennifer S. Hendricks of Meloy Law Firm, and Karlene Goller of Los Angeles Times Communications LLC.*

#### ***Any developments you think other LDRC members should know about?***

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## DC Circuit Rules that US Fish and Wildlife Service Must Disclose Data Indicating the Presence of Endangered Species

By Rafe Petersen and Ethan Arenson

The United States Court of Appeals for the District of Columbia Circuit has issued a ruling that could have wide-ranging significance for the Freedom of Information Act community. See *National Association of Homebuilders v. Norton*, No. 01-5283 (D.C. Cir. November 6, 2002). In a 17-page opinion authored by Judge Judith W. Rodgers, the court ruled that the U.S. Fish and Wildlife Service (USFWS), a branch of the Department of the Interior, had improperly asserted four FOIA exemptions in withholding records pertaining to the presence of endangered species on private property. The court reversed the district court's earlier findings that FOIA exemption 6's protection of personal privacy allowed the USFWS to withhold the data because the documents included addresses that could be traced to private residences.

The court found a strong public interest in the disclosure of scientific data, which the court held essential for keeping tabs on how a federal agency

performs its duties. The court also ruled for the first time that the Endangered Species Act does not require an agency to withhold data, and it reaffirmed that the data an agency utilizes cannot be protected as "deliberative."

Most of the court's analysis concentrated on Exemption 6. But the panel also ruled that nothing in the Endangered Species Act exempts the information from disclosure, and that Exemption 3 therefore did not apply. Moreover, the court held that the data was not "commercial" under Exemption 4 and did not qualify as an "inter-agency or intra-agency deliberation" under Exemption 5.

### Background

In 1998, the National Association of Home Builders sent a FOIA request to USFWS seeking information regarding the location of populations of the Cactus Ferruginous Pygmy-owls, an endangered species resident in the American Southwest. NAHB sought the information, in part, because the USFWS was using it in an ongoing rulemaking proceeding on a proposal to designate over 700,000 acres of land in Arizona as "critical habitat" for the owl. The desig-

nation under the Endangered Species Act of private land as critical habitat has significant consequences for landowners and has become a hot button political issue in the Southwest.

Although USFWS agreed to provide printouts of the Arizona Game and Fish Department's records of the owl, the government redacted "section information, site directions, and site names . . . ." In other words, the USFWS would not divulge the specific locations where owls have been spotted. USFWS initially based its decision on FOIA Exemption 3, claiming the Endangered Species Act exempted this information from disclosure. Later in a supplemental FOIA response, the government asserted three additional FOIA exemptions: 4 (commercial data) 5 (privileged government deliberation), and 6 (privacy).

NAHB administratively appealed the redaction – without success – and eventually filed suit in U.S. District Court for the District of Columbia. In an opinion dated September 27, 2000, the district court rejected USFWS's arguments under FOIA Exemptions 3, 4, and 5, but ruled in favor of the

agency on Exemption 6. *National Association of Homebuilders v. Babbitt* (Civ. No. 99-1923 (CKK)). The court was particularly concerned with potential uses of the information, fearing that "public access to the [owl] data would likely mobilize a surge of birdwatchers willing to trespass on private lands to get a glimpse of the owls." On this basis, the court held the information was exempt under FOIA.

### The D.C. Circuit Opinion Exemption 6

FOIA Exemption 6 provides that documents may be withheld only if they are "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." In order to prevail on an Exemption 6 claim, an agency must demonstrate two elements. First, the agency must show that the withheld data qualifies as a personnel, medical or similar file. Second, if the agency can meet that threshold burden, it must show that the privacy interests protected by withholding the requested data outweigh the public interest in obtain-

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**The court found a strong public interest in the disclosure of scientific data, which the court held essential for keeping tabs on how a federal agency performs its duties.**

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## US Fish and Wildlife Service Must Disclose Data

(Continued from page 39)

ing the withheld information.

The court did not resolve NAHB's threshold challenge that the owl data did not constitute a "personnel, medical or similar file." Fundamentally, NAHB asserted that the information was merely scientific data that does not apply to an individual. While the court agreed such data is not the type that would "normally" be described as pertaining to an individual, it was troubled by the fact that it would allow for identification of individual property owners. Ultimately, however, instead of squarely resolving this question, the court chose instead to proceed to the question of the balance of the private against the public interest.

Under the balancing test, USFWS had to demonstrate a "substantial probability" that disclosure will cause an interference with personal privacy. The lower court had permitted the agency to rely on the affidavit citing a prior incident where knowledge of the location of Pygmy Owls led birdwatchers to seek out the bird. The D.C. Circuit, however, found this evidence unconvincing. It noted that "one incident in which there is no claim that unlawful trespass occurred hardly demonstrates a general problem, and there is nothing to suggest that property owners cannot be protected against unlawful trespassers."

In addition, the Circuit found it significant that property owners who allowed the government to survey their property for owls signed agreements stating that the data may be subject to public disclosure laws and court orders. The court also noted that NAHB indicated that it did not need the names of the property owners, only the locations of the property.

On the other side of the balance – the public interest – the court considered the extent to which disclosure would shed light on an agency's performance of its statutory duties. NAHB asserted a broad interest in the public's effective participation in the upcoming critical habitat process, as well as understanding the myriad of other land use decisions made by USFWS based on the Owl Data. The court found a significant public interest in the public's use of the information in exploring how the Service uses the information. Such a use is related to "citizens' right to be informed about 'what their government is up to.'" This has some significance in that the court found that the raw data alone would allow the public to ascertain how the agency is performing its duties.

## Exemption 3, 4 and 5

The D.C. Circuit also affirmed the district court and rejected USFWS's argument that Exemptions 3, 4 and 5 protect the owl data from disclosure. FOIA Exemption 3 provides that federal agencies may withhold information that is "specifically exempted from disclosure by statute." The court held that the Endangered Species Act does not qualify under Exemption 3 because the statute contains no explicit language that refers to withholding information. The court also rejected the government's request that it consider the legislative history of the Endangered Species Act, holding that "legislative history will not avail if the language of the statute itself does not explicitly deal with public disclosure."

FOIA Exemption 4 permits a federal agency to withhold information which qualifies as "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The USFWS argued that owl data qualifies as commercial information because the federal government provides funding to the state of Arizona in exchange for access to the owl data. In

***"Legislative history will not avail if the language of the statute itself does not explicitly deal with public disclosure."***

rejecting this rationale the court held that the agreement between Arizona and the federal government was merely a "quid-pro-quo exchange" which "does not constitute a commercial transaction in the ordinary sense." Thus, the court reasoned, because owl data is created by a non-commercial entity (the state of Arizona) which has no commercial stake in the data's disclosure, the data cannot qualify as commercial information under Exemption 4.

FOIA Exemption 5 protects information which qualifies as "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The court held that the owl data is merely factual information that does not reveal that Service's "mode of formulating or exercising policy-implicating judgment."

*Rafe Petersen and Ethan Arenson are with the Washington D.C. office of Holland & Knight LLP. Along with Lawrence R. Liebesman, also with the firm, they represented the National Association of Home Builders in this matter. Roscoe J. Howard, Jr., R. Craig Lawrence and David J. Ball, all with the United States Department of Justice, represented the Department of the Interior.*



## Update: Media Gears For War, Access Cases Continue

### *Reporters Go To Boot Camp*

More than 350 reporters signed up for Pentagon training and some individual news organizations such as CNN made their own training arrangements as the military and the media geared up for expected war in Iraq. At the same time, concerns were expressed regarding media access to military operations.

The Pentagon announced the one-week training program for journalists in late October, and by mid-November 58 reporters from 31 news organizations were aboard the U.S.S. Iwo Jima off the coast of North Carolina as the crew of the amphibious assault ship went through drills simulating combat situations. The journalists were also slated to be trained in skills such as avoiding enemy fire, identifying

mines, and protection against nuclear, biological and chemical attack at Marine Corps headquarters in Quantico, Va. Pentagon spokeswoman Victoria Clarke said that the goal of the training was to "raise the comfort level" between the media and the military. Pentagon officials stated that journalists receiving the training would not get any preference in access.

Access has been an issue of concern for the media, especially after they were generally excluded from covering operations in Afghanistan earlier this year. In comments before the Associated Press Managing Editors annual meeting, AP President Louis Boccardi said that his organization was "doing all we can to get access," and to avoid covering the war from briefing rooms.

In Washington, D.C., a new group called Military Reporters and Editors held an inaugural conference focusing on war access issues. More than 100 journalists attended the event, where the general consensus was that the Pentagon had imposed unprecedented controls on media access to information. "We're committed to access," the *Boston Globe* quoted Air Force Colonel Jay DeFrank telling the group. "But it's probably not going to be the access you want."

The *Virginian-Pilot* quoted Clarke saying that the

Pentagon was committed to embedding journalists with combat troops in the field. She was due to meet with media bureau chiefs in late November.

Fox News, meanwhile, asked the United Nations for permission to accompany weapons inspectors in Iraq. Fox executives said that they would share the footage with other news organizations willing to share in the cost.

### *No Leak Law Needed*

After studying the issue for more than almost a year, a task force headed by Attorney General John Ashcroft has concluded that there is no need for new legislation criminalizing leaks by government officials. But the

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***"We're committed to access," the Boston Globe quoted Air Force Colonel Jay DeFrank telling the group. "But it's probably not going to be the access you want."***

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task force did recommend new regulations, and aggressive investigation and vigorous enforcement of existing laws. The report is available at <http://www.fas.org/sgp/othergov/dojleaks.html>.

The task force was created under the provisions of the intelligence spending bill passed last December, which required a "comprehensive review" of existing statutes and an assessment of "whether or not modifications of such laws or regulations, or additional laws or regulations, are advisable..." Intelligence Authorization Act for Fiscal Year 2002, Pub. L. 107-108, § 310 (Dec. 28, 2001); *see also LDRC LibelLetter*, Jan. 2002, at 35.

The measure calling for the study came after President Clinton vetoed another version of the spending bill that included a provision which would have imposed criminal penalties for disclosure of "properly classified" information by current or former government employees. *See LDRC LibelLetter*, Nov. 2000, at 26. A similar criminal provision was briefly considered in Congress last year. *See LDRC LibelLetter*, Aug. 2001, at 19; and Sept. 2001, at 16.

Ashcroft wrote in his report:

"[T]he Nation must combat unauthorized disclosures of classified information effectively,

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## Media Gears For War, Access Cases Continue

(Continued from page 41)

through aggressive administrative enforcement of current requirements, rigorous investigation of unauthorized disclosures, and vigorous enforcement of the criminal laws that make such disclosures a Federal crime” ...

“Although there may be some benefit from a new comprehensive criminal statute, such a statute standing alone would be insufficient in my view to meet the problem of unauthorized disclosures of classified information in its entirety... Should Congress choose to pursue a criminal statute that covers in one place all unauthorized disclosures of classified information, however, the Administration would, of course, be prepared to work with Congress.”

### *Developments in Access Cases*

In the past few weeks there have been developments in several cases regarding public access to court hearings and information involving the government’s investigation into the Sept. 11 terrorist attacks and their aftermath.

- \* The Court of Appeals for the District of Columbia Circuit heard oral argument in the government’s appeal of a ruling by District Judge Gladys Kessler ordering the government to release the names of those detained since Sept. 11, as well as the identities of their attorneys. *See Center for Nat’l Security Studies v. Dept. of Justice*, No. 02-5254 (D.C. Cir. argued Nov. 18, 2002); *see also LDRC MediaLawLetter*, Aug. 2002, at 55. A summary of the argument is at page 29 of this *MediaLawLetter*.
- \* In October, the government asked the 6th Circuit to reconsider its Aug. 26 ruling that upheld a federal district court judge’s ruling that immigration hearings involving Muslim activist Rabih Haddad could not be closed under a blanket order issued after the Sept. 11, 2001 terrorist attacks. *See Detroit Free Press v. Ashcroft*, 303 F.3d 681, 30 Media L. Rep. 2313 (6th Cir. 2002); *see also LDRC MediaLawLetter*, Sept. 2002, at 3.
- \* In Oregon, three men suspected of being members of an alleged terrorist cell based in Portland opted to remain in jail after a federal judge ruled that their pretrial release hearings would be open to the public. Defense attorneys had requested the closure to avoid coverage of potentially incriminating tape recordings, and cited extensive pre-trial publicity as endangering their clients’ rights to a fair trial. The Associated Press, the Oregon Association of Broadcasters, the Oregon Newspaper Publishers Association, the *Oregonian*, and the *Portland Tribune* opposed the closure motion. *U.S. v. Battle*, Crim. No. 02-399 (D.Ore. order issued Nov. 12, 2002) (refusing to close hearings).
- \* In New York, several news organizations sought access to a secret FBI report on how the agency interrogated Abdallah Higazy, who falsely confessed to owning a radio capable of ground-to-air communication that was found in a hotel near the World Trade Center. The request was filed by the *New York Times*, CNN, the *Daily News* and *Newsday*. *U.S. v. Higazy* (S.D.N.Y. motions filed Nov. 14, 2002). And, in another case, lawyers for a man accused of plotting with terrorists to detonate a “dirty bomb” asked a federal judge to refuse to review a classified report regarding their client, since government prosecutors will not provide the document to defense counsel. *U.S. v. Padilla* (S.D.N.Y. motion filed Oct. 28, 2002).
- \* The Air Line Pilots Association filed a brief in early October seeking to block Gannett’s attempt to have released to the public and media any cockpit voice recordings and transcripts used by the prosecution in the trial of alleged terrorist conspirator Zacarias Moussaoui. *U.S. v. Moussaoui*, Crim. No. 01-455-A (filed Oct. 10, 2002); *see LDRC MediaLawLetter*, Sept. 2002, at 41. The Association of Flight Attendants later joined the pilot group’s effort. The pilot association’s brief is available at [notable-cases.vaed.uscourts.gov/1:01-cr-00455/docs/67744/0.pdf](http://notable-cases.vaed.uscourts.gov/1:01-cr-00455/docs/67744/0.pdf). U.S. District Judge Leonie

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### Media Gears For War, Access Cases Continue

(Continued from page 42)

Brinkema has not yet decided whether to allow government prosecutors to use the tapes.

- \* The ACLU launched a public relations campaign to publicize what it sees as abuses of governmental authority under the Patriot Act.
- \* Meanwhile, the ACLU joined with the Electronic Information Privacy Center, the American Booksellers Foundation for Free Expression, and the Freedom to Read Foundation in filing a lawsuit seeking information on the standards for and numbers of records searches at libraries, bookstores and Internet service providers. See *ACLU v. Department of Justice* (D.D.C. filed Oct 24, 2002). Such searches are authorized under the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). (For an outline of the Patriot Act provisions, see *LDRC LibelLetter*, Dec. 2001, at 47.) The suit was filed after the government did not respond to a Freedom of Information Act request for the information.

### Secret Appeals Court Releases Decision

The court established in 1978 to hear appeals from a lower court which evaluates requests for government surveillance in intelligence investigations publicly released a redacted version of its first ever decision, holding that a new policy allowing use of evidence gathered in intelligence investigations in non-intelligence cases, such as criminal prosecutions, was permissible under the Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1811, 1821-1829, 1861-1862). See *In re: Sealed Case No. 02-001*, 2002 WL 31546991 (F.I.S. Ct. Rev. Nov. 18, 2002), available at [www.cadc.uscourts.gov/common/newsroom/02-001.pdf](http://www.cadc.uscourts.gov/common/newsroom/02-001.pdf)

While the ruling itself has implications for privacy and due process rights, from a First Amendment perspective it was noteworthy for the fact that it was made public at all, even in redacted form.

Argument before the appellate court, the Foreign Intelligence Surveillance Court of Review, was held without prior notice on Sept. 9, in a closed session in a secret room within the Justice Department. The Department prevented various Congressional staffers from at-

### Presidential Records Bill Dies

The Presidential Records Act Amendments of 2002 (H.R. 4187), which would have altered an executive order allowing sitting and former presidents 90 days to review documents from past administrations, and then allows them to block disclosure of indefinitely, was passed by the House Committee on Government Reform but did not make it to a vote on the House floor before Congress adjourned.

The bill, sponsored by Rep. Stephen Horn (R-Cal.), would have given the current and former president up to 40 days to review materials. Within that time, either could invoke a constitutionally-based privilege, which would have to be approved by a court. Otherwise, the material would be released. See H.R. 4187, 107th Cong. (2002); see also LDRC Media Law Letter, July 2002, at 34.

A lawsuit challenging the executive order is pending. See *American Historical Ass'n v. Nat'l Archives and Record Admin.*, Civil No. 01-2447 (D.D.C. filed Nov. 28, 2001).

tending the session, citing the small size of the room and the sensitive nature of the issues discussed at the oral argument.

In addition to the court's release of its ruling, the government released its briefs in the case. And while the statute creating the Court of Review authorizes oral argument by the government only, the appeals court accepted amicus briefs from a coalition of civil rights groups and from National Association of Criminal Defense Lawyers. All of these briefs are available on a number of Internet sites.

The Court of Review did not comment on public release of its decision.

The lower court, the Federal Intelligence Surveillance Court, released its decision in August – three months after it was filed – in response to a request from the Senate Judiciary Committee. The lower court's new presiding judge, Colleen Kollar-Kotelly, also announced in a letter to the Committee that “should the FISA Court issue any unclassified opinions or orders in the future, it would be our intention, as a Court, to release them and publish them.”

## D.C. District Court Quashes Defense Subpoena to Reporter in Criminal Case

By Tom Curley

On October 31, 2002, the Honorable Richard J. Leon, of the U.S. District Court for the District of Columbia, quashed a subpoena issued to a reporter for the *Washington City Paper* by a defendant in a criminal case who sought the reporter's testimony in a bid to impeach the credibility of a police officer. *United States v. Whitmore*, No. CR 02-269 (RJL) (D.D.C)

Expressing its support for the application of a First Amendment-based reporter's privilege in criminal cases, the court held that the reporter's testimony would be inadmissible under the Federal Rules of Evidence, even assuming the privilege could be overcome. The ruling illustrates that, in addition to the reporter's privilege, a trial court judge may also be sympathetic to arguments that a subpoena to a reporter should be quashed in the absence of a strong evidentiary foundation.

### Reported on Prosecution Witness

Unlike many reporter's privilege cases, *City Paper* reporter Jason Cherkis had not reported about the specific events in the underlying criminal prosecution. Instead, the defendant, arrested on a drug and a weapons charge, sought Cherkis' testimony because the reporter had previously written an article about a police officer who was the principal witness for the prosecution. In that article, entitled "Rough Justice," some community members and one judge were quoted as having criticized the officer as untrustworthy, although others were quoted as praising his police work.

The defendant subpoenaed Cherkis to testify pursuant to Federal Rule of Evidence 608(a), which permits the introduction of impeachment evidence pertaining to a witness' reputation for truthfulness in the community. At bottom, the defendant hoped that Cherkis would testify that the officer had a poor reputation for truthfulness, based on the interviews and other research that Cherkis conducted for his article.

Cherkis moved to quash the subpoena arguing that his testimony was privileged from compelled disclosure under the First Amendment. Specifically, Cherkis argued that his testimony was not crucial to the defense, nor did it go to the

heart of the case, because the testimony would not even be admissible under Fed. R. Evid. 608(a). The defendant argued that there is no reporter's privilege in criminal cases.

### Foundation for Testimony Lacking

Ruling from the bench, Judge Leon held that Cherkis lacked the necessary foundation to testify as to the officer's reputation in the community under Fed. R. Evid. 608(a) because the reporter's testimony would be predicated solely upon a single newspaper article and his newsgathering efforts related to it.

While the court therefore concluded that it need not address the contours of the reporter's privilege in a criminal case, Judge Leon indicated that he would be inclined to apply the privilege in these circumstances.

[T]here are very strong arguments in favor of that [privilege] being applicable in this particular situation because ... Mr. Cherkis would undoubtedly have to testify

with respect to confidential sources that he was relying upon in order to present to the court his belief as to the reputation of [the officer]. ... [H]is overall impression of this officer's reputation is one that has mixed within it the opinions of confidential sources which in order for him to be fairly cross-examined would have to be revealed.

Tr. at 28.

Although the D.C. Circuit has not squarely confronted the application of the privilege in the criminal context, at least one district court in the jurisdiction had previously applied the privilege. *See United States v. Hubbard*, 493 F. Supp. 202, 204 (D.D.C. 1979).

Mr. Whitmore was subsequently convicted, is scheduled to be sentenced in mid-January, and is expected to appeal.

*Washington City Paper reporter Jason Cherkis was represented by David Andich of Andich & Andich of Rock Island, Illinois and Seth D. Berlin, Cameron Stracher and Tom Curley of Levine Sullivan & Koch, L.L.P. of Washington, D.C. Defendant Gerald F. Whitmore was represented by Erica Hashimoto of the Federal Public Defender's Office.*

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***In addition to the reporter's privilege, a trial court judge may also be sympathetic to arguments that a subpoena to a reporter should be quashed in the absence of a strong evidentiary foundation.***

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## Update: Utah Criminal Libel Law Struck Down; Kansas Case Continues

### *Utah Statute Unconstitutional*

The Utah Supreme Court declared one of Utah's two criminal libel statutes unconstitutionally overbroad in a Nov. 18 ruling, and dismissed prosecution of high school student Ian Lake, charged under the statute in May 2000 after he disparaged his school principal and teachers on a web site. *In Re: I. M. L.*, No. 20010159, 2002 UT 110 (Utah Nov. 15, 2002), available at [courtlink.utcourts.gov/opinions/supopin/iml.htm](http://courtlink.utcourts.gov/opinions/supopin/iml.htm); see also *LDRC LibelLetter*, July 2000, at 7.

The decision ended the prosecution of Lake under Utah Code § 76-9-501, et. seq, a statute dating from 1874 which requires only intent and malice. But the prosecutor also indicted Lake under a newer statute, Utah Code § 76-9-404, which requires that a defendant know that a defamatory statement is untrue.

The Utah high court's action came in an appeal of a decision by the juvenile court hearing the case to deny Lake's motion to dismiss. That court held the statute to be constitu-

tional by finding that the term "malicious" in Utah Code § 76-9-501, which defines libel that is criminal under § 76-9-502, included "actual malice." See *LDRC LibelLetter*, Dec. 2000, at 11. The Utah Court of Appeals certified the case to the state Supreme Court.

The Supreme Court reversed, holding that the failure of the statute to require actual malice and to provide immunity for truthful statements rendered it unconstitutionally overbroad.

The 1965, the U.S. Supreme Court struck down Louisiana's criminal libel law as unconstitutional when applied to statements regarding public officials because it did not contain a requirement that the defendant be found to have acted with actual malice. See *Garrison v. Louisiana*, 379 U.S. 64 (1964).

The Utah high court's majority opinion, authored by Chief Justice Christine Durham, rejected the state's argument that the statute should be read in combination with Utah's criminal defamation statute, Utah Code § 76-9-404, to include an actual malice requirement.

Based on the plain language of the statute, ... we hold that the criminal libel statute prohibits defamatory statements without regard for the truth of the statements whether they were made knowingly or recklessly. Thus, the statute is overbroad.

*In Re: I. M. L.*, No. 20010159, 2002 UT 110 (Utah Nov. 15, 2002), slip op., ¶ 29.

In a concurring opinion, Justice Michael J. Wilkins wrote that since both laws were passed after *Garrison*, they should be read together to both include an actual malice requirement. But he still concluded that §§ 76-9-501, et. seq. was unconstitutional, because creates a presumption of malice "if no justifiable motive for making [the statement] is shown."

Since this requirement does not comport with the concept of actual malice, he wrote, the statute at issue is unconstitutional.

Justice Leonard H. Russon's separate concurrence argued that the statute was unconstitutional on its face,

and that the majority's further analysis was unnecessary.

In April, Beaver County Attorney Leo Kanell added an additional indictment under Utah Code § 76-9-404, which was not affected by the Utah Supreme Court's ruling. (In a footnote, the court explicitly stated that it was not ruling on the constitutionality of § 76-9-404. *In Re: I. M. L.*, *supra*, n. 12.) But the prosecution may not proceed, since Kanell was defeated in a re-election bid earlier this month.

Lake was represented by Richard Van Wagoner and Robert J. Shelby of Snow, Christensen & Martineau, P.C. in Salt Lake City, and Janelle P. Eurick and Stephen C. Clark of the ACLU. Utah Assistant Attorneys General Kent M. Barry and Laura B. Dupaix, along with Leo G. Kanell of the Beaver County Attorney's Office, represented the state.

David C. Reymann and Jeffrey J. Hunt of Parr, Wadoups, Brown, Gee & Loveless in Salt Lake City sub-

(Continued on page 46)

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**Based on the plain language of the statute, ... we hold that the criminal libel statute prohibits defamatory statements without regard for the truth of the statements whether they were made knowingly or recklessly. Thus, the statute is overbroad.**

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## Utah Criminal Libel Law Struck Down; Kansas Case Continues

(Continued from page 45)

mitted an amicus brief on behalf of the Society of Professional Journalists, the Reporters Committee for Freedom of the Press, and the Student Press Law Center.

Lakes' father, David, and former Milford High School Principal Walter Schofield reached a confidential settlement in September 2001 in mutual civil libel suits stemming from the case.

### ***Kansas Court Rejects Jury Misconduct Claim***

Meanwhile, a Kansas trial court has denied an effort by the editor and publisher of a monthly political newspaper, who were convicted in July of seven misdemeanor counts of criminal defamation, to show juror misconduct in their case. *Kansas v. Carson*, No. 01-CR-301 (Kansas Dist. Ct., Wyandotte County ruling Nov. 14, 2002); see also *LDRC MediaLawLetter*, Aug. 2002, at 5.

In a motion for judgment notwithstanding the verdict or a new trial, the defendants alleged that the jury foreman's failed to disclose that he was dating an intern for the local prosecutor's office, and sought to present witnesses on this issue. The defendants sought to subpoena 20 witnesses who they said could testify regarding the alleged juror misconduct. In response, prosecutors alleged that at least one of the defense attorneys was aware of the relationship at the time of trial.

While the charges were originally brought by Wyandotte County District Attorney Nick Tomasic, J. David Farris of Atchison, Kan. was named as a special prosecutor after District Judge Tracy Klingensmith ruled that Tomasic and his staff could not prosecute the case and the Kansas attorney general's office declined to prosecute the case. See *LDRC LibelLetter*, Dec. 2001, at 27.

District Judge Tracy Klingensmith rejected the effort to present the evidence, ruling that the relationship could have been discovered during voir dire. A ruling on the motion itself was expected before a scheduled sentencing hearing in late November.

The convictions stemmed from articles in *The New Observer* ([www.thenewobserver.com](http://www.thenewobserver.com)), that questioned whether Kansas City Mayor Carol Marinovich and her husband, Wyandotte County District Judge Ernest John-

son, actually lived in the county as required by law. Although the paper ran a correction in January 2001 apologizing to the actual owner of a home that it alleged was where the couple lived, the newspaper reiterated the charge that they lived outside of Wyandotte County.

Carson and Powers apparently have a long history of criticizing local government in Kansas City, Kansas, and their newspaper has frequently criticized both Marinovich and Tomasic.

While criminal libel proceedings against media defendants have been rare in the past two decades, there have been several prosecutions of non-media defendants. For a more information and a compilation of recent criminal defamation cases, see Jeffrey Hunt and David Reymann, *Criminal Libel Law in the U.S.*, in 2002 LDRC Bulletin 2 (March 2002), at 79, and Russell Hickey, *A Compendium of U.S. Criminal Libel Prosecutions: 1990 - 2002*, 2002 LDRC Bulletin 2 (March 2002), at 95. Prior to the *Observer* case, the most recent criminal libel conviction against a media defendant of which LDRC is aware occurred in 1969.

*Observer* publisher David Carson is represented by Mark Birmingham of Kansas City. Douglas J. Patterson of Leawood – who is a Kansas state representative – represents editor Edward H. Powers, Jr. and the newspaper's corporate owner, Observer Publications.

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## Virginia High Court Allows Subpoena for Anonymous Speaker

By Samir C. Jain and Edward Siskel

In *America Online Inc. v. Nam Tai Electronics, Inc.*, 2002 Va. LEXIS 157 (Nov. 1, 2002), the Virginia Supreme Court refused to quash a subpoena duces tecum issued by a Virginia trial court in response to a California court's commission for out-of-state discovery that compels AOL to disclose the identity of one of its subscribers who posted an anonymous message on an Internet bulletin board. In a unanimous opinion written by Justice Lawrence L. Koontz, Jr., the Court held, *inter alia*, that a Virginia trial court properly applied principles of comity in denying the motion to quash because enforcing the subpoena was not contrary to Virginia public policy.

AOL has subsequently filed a notice of intent to apply for rehearing. As it stands, however, the Court's ruling establishes that, in Virginia, the United States Supreme Court's decision in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), does not preclude a plaintiff from seeking relief for reputational injuries under a state law business tort claim, even though the same allegations do not support a claim for libel. The decision potentially represents a substantial incursion on the right to speak anonymously on the Internet and creates an opening for plaintiffs to circumvent constitutional restrictions on defamation claims through creative pleading.

### Chat Room Claims

Nam Tai Electronics, Inc. ("Nam Tai") filed a complaint in California state court against fifty-one John Doe defendants for libel, trade libel and unfair business practices under California Business and Professions Code § 17200 *et seq.*, alleging that an anonymous individual had posted "false, defamatory, and otherwise unlawful messages" concerning the performance of Nam Tai's stock on an Internet bulletin board. While the claims were styled as three separate causes of action, the gravamen of each count was the same—that the publication of an allegedly false statement caused Nam Tai reputational harm.

Underlying all three claims was a single message posted by someone using the screen name "scovey2"

which Nam Tai asserted "defamed and damaged [its] reputation, injured [its] good will and interfered with [its] relationship with its shareholders and the general public." Based on the language of the complaint, the injury underlying the libel and unfair business practices claims was the same.

### Sought Speaker ID

After Nam Tai determined that "scovey2" had an account with AOL, it obtained a commission for out-of-state discovery from the California court to depose AOL's custodian of records in Virginia. A Virginia trial court then issued a subpoena to AOL pursuant to the Virginia equivalent of the Uniform Foreign Depositions Act.

AOL responded by filing a motion to quash in Virginia state court, asserting, *inter alia*, that the subpoena would "infringe on the well-established First Amendment right to speak anonymously," and that First Amendment protections governing defamation claims apply

equally to Nam Tai's unfair business practices claim.

Based on *America Online, Inc. v. Anonymous Publicly Traded Co.*, 261 Va. 350, 542 S.E.2d 377 (2001) (holding that principles of comity guide the decision whether to enforce a foreign court's order permitting third-party discovery and, therefore, require a determination that the order does not violate Virginia public policy), the Virginia trial court explained that it was required to determine "whether comity should be granted to the California court's Order and, if not, whether the subpoena should nevertheless be enforced in light of the merits of Nam Tai's underlying California law-based claims." Because the Court could not make that determination on the existing record, it entered a protective order barring discovery until the California court clarified the procedural and substantive basis for its order.

### Libel Out, Business Tort Ok'd

In response, the California court made the following finding:

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***The decision creates an opening for plaintiffs to circumvent constitutional restrictions on defamation claims through creative pleading.***

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(Continued on page 48)

## Va. Court Allows Subpoena for Anonymous Speaker

(Continued from page 47)

That Nam Tai has alleged sufficient facts in its complaint, under California law, for libel, trade libel and for injunctive relief under [California's unfair business practices statute], such that Nam Tai is entitled under California law to conduct discovery to identify the anonymous defendant in this matter notwithstanding the First Amendment privacy concerns raised in AOL's motion to quash.

The Virginia trial court reviewed this clarifying order and concluded that "neither of the defamation claims would withstand demurrer if filed in Virginia." Thus, comity did not require enforcing the subpoena for those claims. Still, the court directed AOL to comply with the subpoena because it found that the unfair business practices claim was not offensive to Virginia public policy.

In reaching that conclusion, the trial court relied on *Chaves v. Johnson*, 230 Va. 112, 335 S.E.2d 97 (1985), for the proposition that the First Amendment protections asserted by AOL are not applicable to Nam Tai's unfair business practices claim. *Chaves* involved a tortious interference with contract claim that was brought in conjunction with a defamation claim based on the same conduct. The Court rejected the plaintiff's defamation claim because it involved statements of opinion, but refused to apply the same restrictions to the tortious interference claim because such a rule "by logical extension, [ ] would apply to any verbal conduct, however, tortious, and would completely destroy the right of action universally recognized." *Id.* at 121.

### **Argued Hustler to Virginia High Court**

On appeal to the Virginia Supreme Court, AOL argued, *inter alia*, that the trial court erred in relying on *Chaves*, because that decision has been called into question by the United States Supreme Court's subsequent decision in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).<sup>1</sup>

*Hustler Magazine* held that the same First Amendment protections which precluded Falwell's defamation claim foreclosed his claim for intentional infliction of emotional distress. The Court reached this conclusion in part because it was necessary to "give adequate 'breathing space' to the freedoms protected by the First Amendment," *id.* at 56, but also because of a practical concern that the contrary rule would allow plaintiffs to circumvent free speech protections by refashioning libel claims as suits for other torts. *Id.* at 53 ("Were we to hold otherwise, there can be little doubt that political cartoonists and satirists would be subjected to damages awards without any showing that their work falsely defamed its subject").

For the same reasons, AOL argued Nam Tai cannot use its unfair business practices claim to attack otherwise protected speech, and to the extent *Chaves* holds to the contrary, AOL asserted that it has been overruled by *Hustler Magazine*.

The Virginia Supreme Court recognized that since *Hustler Magazine* was decided, other courts "have sustained challenges to tort litigation on the ground that the plaintiff was seeking to 'avoid the protection afforded by the Constitution ... merely by the use of creative pleading.'" 2002 Va. LEXIS at \* 21 (quoting *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union*, 39 F.3d 191, 196 (8th Cir. 1994)).

Nevertheless, the Court concluded that "*Chaves* is sound precedent," based solely on its decision in *Maximus, Inc. v. Lockheed Information Management Systems Co.*, 254 Va. 408, 493 S.E.2d 375 (1997), which "acknowledged 'the similarity ... [of] the defamation law construct to business torts' noted in *Chaves*, but declined to extend First Amendment protections to a tortious interference with a contract expectancy cause of action." Therefore, the Court could not say "the trial court erred in determining that Nam Tai's statutory cause of action for unfair business practices under California law is reasonably comparable to the law of Vir-

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***The Virginia Supreme Court reading of Hustler Magazine is inconsistent with the interpretation of Hustler Magazine in subsequent Supreme Court precedent and by the vast majority of other courts.***

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## Va. Court Allows Subpoena for Anonymous Speaker

(Continued from page 48)

ginia and is not repugnant to the public policy of Virginia.” 2002 Va. LEXIS at \*21-22.

### ***Unreasonably Narrow View of Hustler***

The Virginia Supreme Court has thus adopted an extremely narrow reading of *Hustler Magazine*. But this reading is inconsistent with the interpretation of *Hustler Magazine* in subsequent Supreme Court precedent, see *Cohen v. Cowles*, 501 U.S. 663, 671 (1991) (recognizing that *Hustler Magazine* applies broadly to non-defamation tort claims seeking recovery for reputational injury), and by the vast majority of other courts.

Lower courts have applied *Hustler Magazine*'s reasoning to foreclose a broad range of other tort claims that sounded in defamation where the constitutional requirements for defamation could not be met, including publication damages for loss of good will and lost sales resulting from breach of a duty of loyalty, *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 522 (4th Cir. 1999); false light, *Brown v. Hearst Corp.*, 54 F.3d 21 (1st Cir. 1995); tortious interference, *Beverly Hills Foodland, Inc. v. United Food and Commercial Workers Union*, 39 F.3d 191, 196 (8th Cir. 1994); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990); negligence, *EEE ZZZ Lay Drain Co., Inc. v. Lakeland Ledger Publishing Corp.*, 2000 U.S. Dist. LEXIS 21266, \*13 (W.D. N.C. 2000); misappropriation of name and right

of publicity, *Doe v. TCI Cabletelevision*, 2002 Mo. App. LEXIS 1577, \*44; fraud, *Hornberger v. ABC, Inc.*, 351 N.J. Super. 577, 627-30, 799 A.2d 566 (2002); and even unfair business practices under California Bus. & Prof. Code § 17200, *Isuzu Motors Ltd. v. Consumers Union of United States, Inc.*, 12 F. Supp. 2d 1035, 1048-49 (C.D. Cal. 1998).

### ***Misapplied Prior Virginia Law***

Moreover, the Virginia Supreme Court's interpretation of *Maximus* is questionable when one looks at the posture of that case. *Maximus* involved a free-standing claim for tortious interference with a contract expectancy. 254 Va. at 410. The plaintiff lost a government contract after the defendant, a competing bidder, filed a formal protest stating that two members of the panel awarding the contract had undisclosed conflicts of interest. *Id.*

The complaint did not include a defamation claim against the defendant, nor could it have because the plaintiff was not the subject of any allegedly injurious statement; the two members of the panel were the only ones arguably defamed. Moreover, the plaintiff did not allege any reputational harm; the only injury was the loss of the government contract.

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## Va. Court Allows Subpoena for Anonymous Speaker

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The trial court nevertheless analogized to the law of defamation, holding that the defendant was entitled to a qualified privilege and that the plaintiff would have to satisfy a heightened burden similar to a defamation action. In rejecting the trial court's analogy, the *Maximus* Court explained that any similarity between defamation and business torts in terms of balancing interests "neither suggests nor demands that the specific requirement for imposition of liability in one cause of action must be applied to the other cause of action." *Id.*

As a statement of Virginia law in the context of a free-standing tortious interference claim like the one alleged in *Maximus*, this is clearly true. There is no reason to think that, under the facts of *Maximus*, simply because there is balancing of interests in both contexts, the same defenses must apply.

The *Maximus* Court's analysis, however, did not speak to the concern at issue in *Hustler Magazine* and the case at hand where the issue is whether a tort claim for reputational injuries is being used to circumvent First Amendment protections that would otherwise apply to a libel claim based on the same conduct. Nor did it consider the continuing viability of *Chaves* after *Hustler Magazine*. There simply was no occasion to address these questions in *Maximus* because the plaintiff could not have styled its interference with contract expectancy claim as a defamation claim, and there was no reason to think they were using the non-defamation tort as a means to plead around the First Amendment.

The Virginia Supreme Court's decision in this case represents a potentially serious incursion on the right to speak anonymously on the Internet. Given the strong precedent in most other jurisdictions, including California, for applying First Amendment protections to non-defamation tort claims under these circumstances, it is likely that the defendant in this case and other similar anonymous speakers will eventually prevail on the merits of the underlying claim. And yet, unless the Court grants rehearing or the decision is appropriately cabined to the particular facts, as long as the Court is willing to enforce a subpoena, speakers may be forced to forfeit their anonymity when a clever plaintiff can come up with an alternative tort claim to cover the same alleged injury.

*Samir C. Jain is a partner, and Edward Siskel is a law clerk, at the law firm of Wilmer, Cutler & Pickering. They represent America Online, Inc. in the petition for rehearing of the Nam Tai case. The views expressed here are their own and do not necessarily reflect those of their clients.*

<sup>1</sup> AOL also argued that the California court did not properly apply its own First Amendment precedent in finding that Nam Tai had stated a claim for a violation of the unfair business practices statute because in a series of cases beginning with *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 728 P.2d 1177 (1986), California courts had rejected attempts to circumvent First Amendment protections by bringing non-defamation tort actions where the "gravamen [of the underlying claim] is the alleged injurious falsehood of a statement." 728 P.2d at 1180. The Court rejected this argument, however, explaining that in affording comity "[w]e presume that the foreign court is in a better position than the Virginia courts to determine the substantive law of its jurisdiction and, thus, afford a high degree of deference to its judgment in such matters." 2002 Va. LEXIS at \*18-19.

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## ETHICS CORNER

### Hidden Justice: The Ethics of Secret Settlements

By Jane E. Kirtley

During the summer of 2002, Joseph F. Anderson, Jr., Chief Judge of the Federal District Court for the District of South Carolina, promulgated a modest proposal. He suggested that Local Civil Rule 5.03 be amended to read: "No settlement agreement filed with the court shall be sealed pursuant to the terms of this Rule."

In a series of eloquent letters to his colleagues, Judge Anderson recognized the strong opposition from the defense bar to any attempt to prohibit secret settlements. Candidly acknowledging that he might be "tilting at windmills," Anderson wrote that, nevertheless, his experience presiding over a variety of bitterly-contested cases had convinced him that court-ordered secret settlements in cases "implicating public safety" should not be allowed. Citing the Firestone/Arthur Andersen/Enron/Catholic priest scandals, he wrote, "Here is a rare opportunity for our court to do the right thing and take the lead nationally."

The proposed rule was made available for public comment in mid-August. A total of 34 separate comments, totaling 173 pages, were received before the closing date of September 30. On November 1, at their regular meeting, the district judges considered the comments and decided to adopt the rule as proposed. The rule took effect on that date, and by its own terms applies to any settlement agreement filed with the court.

#### *The Ethics in Settlements*

In addition to presenting compelling arguments about the salutary effects of openness in promoting public safety and preventing future injuries and death, Judge Anderson's letters also addressed the ethical implications of secret settlements, a topic that has been thrashed out in academic journals, but has received relatively little attention from the bar.

The reason for this is simple: ethics rules require attorneys to zealously represent their clients' interests. As Richard A. Zitrin has observed, "lawyers are bound to settle cases in ways which serve the needs of the specific clients even if they potentially harm the interests of society as a whole."

Zitrin argues that unless an attorney practices in a state, such as Florida, Texas, or Washington, which has a statute or court rule prohibiting secret settlements, "there is little that can be done when the defendant demands, and the plaintiff accepts, secrecy as a condition of resolving a case." Zitrin, Richard A., "The Case Against Secret Settlements (or, What You Don't Know Can Hurt You)," 2 J. Inst. Stud. Leg. Eth. 115 (1999).

In 1998, in an attempt to rectify the situation (and arguably by tilting at windmills himself), Zitrin proposed that the American Bar Association adopt a new section (b) to Rule 3.2, which would read:

A lawyer shall not participate in offering or making an agreement, whether in connection with a lawsuit or otherwise, to prevent or restrict the availability to the public of information that the lawyer reasonably believes directly concerns a substantial danger to the public health or safety, or to the health or safety of any particular individual(s).

Perhaps not surprisingly, the Ethics 2000 Commission declined to do so, concluding that the problem was one best solved by the courts or the legislatures. As Prof. Nancy J. Moore, Chief Reporter for the ABA Commission explained,

"[f]or the Commission . . . the issue was not whether disciplinary rules can go beyond other law; rather, the question is whether the disciplinary rules should impose prohibitions on lawyers that unfairly impinge on a client's ability to obtain the lawyer's advice on conduct that is per-

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***Citing the Firestone/Arthur Andersen/Enron/Catholic priest scandals, he wrote, "Here is a rare opportunity for our court to do the right thing and take the lead nationally."***

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## Hidden Justice: The Ethics of Secret Settlements

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fectly lawful on the part of the client. If these agreements are bad for society . . . then no one should be entitled to make them.”

Moore, Nancy J., “Lawyer Ethics Code Drafting in the Twenty-First Century,” 30 Hofstra L. Rev. 923 (Spring 2002).

### *Legality of Secret Settlements*

Whether secret settlements concealing information that would result in harm to the public are themselves illegal is a concept that has been floated by several academics. Prof. Susan Koniak argues, for example, that “trading secrecy in settlement agreements may amount to the misdemeanor of compounding,” rendering the secrecy agreement unenforceable. Koniak, Susan, “Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?”, 30 Hofstra L. Rev 783 (Spring 2002). *See also* Freeman, John P., “Court-Ordered Secrecy Agreements,” Comments addressed to the Honorable Joseph F. Anderson, Jr., at 4, July 11, 2002 (arguing that a secret settlement agreement that threatens to jeopardize public safety ought to be considered “offensive to public policy”).

Koniak further argues that a reasonable interpretation of the Ethics 2000 Commission amendment to Rule 1.6 (b)(1), which now permits attorneys to reveal information relating to client representation if the lawyer reasonably believes it necessary to do so to “prevent reasonably certain death or substantial bodily harm,” means that

“it would be unethical for a lawyer to participate in drafting or being a party to any agreement that binds the lawyer to conceal information that might protect third parties from serious physical harm or death if revealed.”

Similarly, citing ABA ethics opinion No. 00-417, Judge Anderson speculated that

“[f]or a judge to sign an order requiring an attorney not to disclose information he or she has learned in representing a client may be condoning unethical conduct by the attorney.”

### *ABA or Legislators Should Act*

But as Alan Morrison pointed out in an op-ed in the *Boston Globe*, the narrow exception to maintaining client confidentiality is permissive, not mandatory, and probably would not apply to, for example, the secret settlement agreements negotiated in the priest sex abuse cases.

“[A]t what point can a lawyer no longer justify his conduct by saying that it does not violate the bar’s ethics rules? No lawyer should be forced to choose between his obligations to his client and assuring that information about pedophilic priests and others who prey on the public is delivered to the proper authorities.”

Calling for the ABA to amend the rules to make it an ethics violation to ask for or agree to a secrecy provision that would prevent a lawyer from informing the government about conduct or products that could cause death or serious physical or psychological harm, Morrison concluded that “if the organized bar does not do what’s right, state legislatures should step in . . . and enable lawyers to do what is morally right without jeopardizing their licenses.” Morrison, Alan B., “The secrecy scandal,” *Boston Globe Online*, April 14, 2002.

In the District of South Carolina, the court has stepped in to do so. The new Local Rule 5.03 is breathtaking in its simplicity and scope. It includes no exceptions for “sensitive” information, nor is it limited by its terms to cases involving public health or safety.

Other courts may soon follow suit. Federal judges in South Florida and the chief justice of South Carolina’s Supreme Court are also examining the issue, and the U.S. Judicial Conference’s Rules Committee has begun a study of the issue which is expected to be acted upon in 2003.

Judge Anderson seems to have gotten his wish: his court has taken the lead in doing the right thing.

*Jane E. Kirtley is the Silha Professor of Media Ethics and Law and the Director of the Silha Center for the Study of Media Ethics and Law, University of Minnesota. She is an honorary member of the DCS Ethics Committee.*