

MULRC Media Law Resource Center
MEDIA LAW LETTER

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MLRC ANNUAL DINNER

November 12, 2003



The Award is presented to Howard H "Tim" Hays by Hal Fuson

The MLRC Annual Dinner was held at the Sheraton Hotel in New York on Wednesday night, November 12th...and it was quite a gala. The room was filled with well over 500 MLRC members and their guests, friends of MLRC, and invited guests.

Howard H "Tim" Hays, former owner and publisher of Press-Enterprise of Riverside, California, was presented with MLRC's William J. Brennan, Jr. Defense of Freedom Award. Under Mr. Hays, Press-Enterprise brought not one, but two, landmark cases to the Supreme Court of the United States on questions of access to court, and by extension other governmental, proceedings. He is a hero to all who recognize the profound value of the First Amendment rights of the press and public that he championed.

The Award was presented to Mr. Hays by Gary B. Pruitt, Chairman of the Board, President & Chief Ex-

ecutive Officer of The McClatchy Company. Gary's remarks, along with the other remarkable materials from this program, will be on the MLRC website in the near future, as will those of Harold W. Fuson, Jr., Vice-President and General Counsel of Copley Press, and Chair of the MLRC Board of Directors.

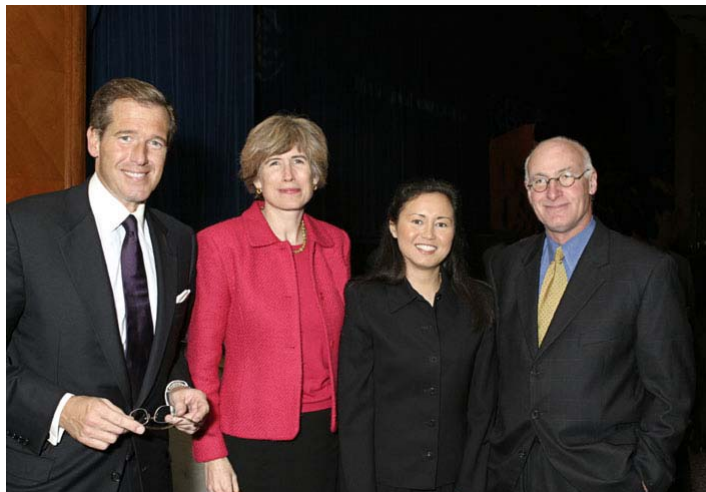
Also at the Dinner, was a panel led by Brian Williams of NBC News. The discussion – entitled "In the Trenches Revisited: War Reporting and the First Amendment - Part II" – was the second installment on the subject of covering war for America. This panel focused on covering

Iraq, what they experienced, what stories they found, and what stories require more attention. A transcript from that panel will also be posted on the MLRC website.

MLRC wants to thank all of the participants in the Annual Dinner program.



MLRC's William J. Brennan, Jr. Defense of Freedom Award



Panelists: Brian Williams (Moderator), Mary Beth Sheridan, Cheryl Diaz Meyer, Michael Weisskopf

In the Trenches Revisited: War Reporting and the First Amendment Part II



Gary B. Pruitt on Tim Hays, Press-Enterprise and the MLRC's William J. Brennan, Jr. Defense of Freedom Awards



Chairs of MLRC's Board of Directors, past and present: Robin Bierstedt, Hal Fuson, Bob Hawley

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The New Reality:
Current Legal Issues in Fact Based Programming
Los Angeles, CA • Thursday 29, 2004 • 4:00 -7:30 p.m.

- A Surreal Reality: Hot Issues in Reality Television
- Private Reality: The Continuing Development of Privacy Law
- The Ethical Reality: Ethics Issues in Advising Multiple Parties on Controversial or Unsettled Areas Of Law

Registration Materials at www.medialaw.org

*This event offers three hours of CLE credit, including one hour of legal ethics.
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2004 NAA/NAB/MLRC CONFERENCE

Alexandria, Virginia
September 29, 30 and October 1, 2004

**Sponsorships for the
2004 Conference are being solicited.**

Any firm interested in providing underwriting for the Conference
should contact Sandy Baron at MLRC.

Save the Date

MLRC Annual Dinner 2004

**Wednesday
November 17, 2004**

No “Actual Malice” in Airing Conflicting Reports about Fatal Shooting

Minnesota Judge Dismisses Police Officer’s Libel Claim against TV station

By Paul Klaas and Emily Fitzgerald

Judge Gary Larson of the Hennepin County (MN) District Court dismissed police officer Thomas Schlieman’s libel action against KARE-TV, holding that KARE did not have “actual malice” in broadcasting questions about whether Officer Schlieman was justified in killing a man who came toward him with a knife. *Schlieman v. Gannett Minnesota Broadcasting, Inc.*, Minn. Dist. Ct. (NC 00-2843) (Hennepin Cty). A jury had awarded Officer Schlieman \$110,000, but Judge Larson granted KARE’s motion for judgment notwithstanding the verdict and dismissed the case.

Fatal Shooting

On May 11, 1999, Kevin Hartwig, of St. Cloud, Minnesota, appeared at his neighbors’ house, covered in blood and carrying a Bible. He told his neighbors that he had just sacrificed his dog, Cocoa. The neighbors called 911.

Officer Schlieman, a St. Cloud Police Department veteran, and several other officers responded. According to Officer Schlieman, when he entered Hartwig’s house, he saw a knife protruding from Hartwig’s chest. Hartwig pulled the knife from his own chest and came toward Officer Schlieman yelling a “war whoop.” Officer Schlieman ran backwards out of the house, stumbled, fell onto the hood of a parked car, and knocked himself out for a few seconds. When he regained consciousness, Officer Schlieman saw Hartwig almost upon him. Officer Schlieman shot Hartwig five times, killing him. None of the other officers present fired.

KARE’S Investigation and Reports

KARE-TV is a Gannett-owned station in Minneapolis. It sent a reporter and a photojournalist to St. Cloud immediately after the shooting. That night, a police spokesperson told KARE that the shooting was justified. Eyewitnesses could not be located, however, so KARE sent Den-

nis Stauffer, a senior news reporter, and photojournalist John Drilling back to St. Cloud the following day.

Stauffer interviewed the neighbors who had called 911. The neighbors refused to appear on-camera, but they spoke with Stauffer at the scene for about five minutes. According to Stauffer and Drilling, the neighbors said that Hartwig was “not being aggressive” at the time Officer Schlieman shot him.

Stauffer went back to the police department to tell them he had conflicting reports. The police spokesperson repeated their view that the shooting was justified and told Stauffer that the witness statements taken by the police were supportive. For the rest of the day, Stauffer attempted but failed to obtain further substantive comment from the police, the state bureau of criminal apprehension, the county attorney, and eyewitnesses.

In his report on KARE’s May 12, 1999 6:00 p.m. news broadcast, Stauffer included extensive coverage of the police version of events, but he also reported that “...two people say

they witnessed the shooting and that Hartwig was not being aggressive.”

An official investigation was commenced. In August 1999, the official report found that Officer Schlieman was justified in killing Hartwig. KARE reported Officer Schlieman’s exoneration.

Jury Trials

Officer Schlieman did not complain to KARE about the report, and he did not ask for a retraction or clarification of KARE’s report. After the official investigation of the shooting was completed, Officer Schlieman filed suit.

The Hennepin County District Court determined that Officer Schlieman is a “public figure.” The Court also ruled that Officer Schlieman could not seek punitive damages. Summary judgment motions then narrowed his claim to compensatory damages caused by three statements in the KARE news report: that there was “conflicting information” about the shooting, that there was “some disagreement

Judge Larson held that he had erred in submitting the question of actual malice to the jury at all.

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No “Actual Malice” in Airing Conflicting Reports

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over exactly what happened,” and that Hartwig was “not being aggressive” when he was shot.

In 2001, the case was tried to a jury in the Hennepin County District Court. The neighbors denied telling KARE that Hartwig was “not being aggressive” at the time he was shot. The jury found that the three statements were not defamatory. Having found that the sentences were not defamatory, that jury was not asked whether the sentences were false, or broadcast with “actual malice,” or caused any injury.

Officer Schlieman appealed. The Minnesota Court of Appeals reversed and remanded the case for a new trial, holding that the jury instruction on defamatory meaning was a prejudicial misstatement of the law. The Court of Appeals also found that, as a matter of law, two of the three statements at issue were incapable of defamatory meaning and should have been dismissed on summary judgment. One member of the three-judge panel dissented on the grounds that none of the statements were capable of a defamatory meaning. For the full opinion, see *Schlieman v. Gannett Minnesota Broadcasting, Inc.*, 637 N.W.2d 297 (Minn. Ct. App. 2001).

On retrial, then, during July 2003, the jurors were asked to consider the sole remaining statement (“...two people say they witnessed the shooting and that Hartwig was not being aggressive”). The neighbors again denied telling KARE that Hartwig was “not being aggressive” at the time he was shot. The neighbors admitted that they told KARE that Hartwig was not aggressive, but they said they meant generally, not specifically at the time he was shot. The jury found that sentence was false, defamatory, broadcast with “actual malice,” and caused Officer Schlieman \$110,000 in compensatory damages.

KARE’s lead counsel and senior producer interviewed several of the jurors immediately after they returned their verdict. In explaining their decision that the broadcast was made with “actual malice,” the jurors pointed to the form jury instruction in Minnesota, which reads: “A statement is published with ‘actual malice’ if the person who published it knew it was false or had substantial doubts about its truth.” The jurors concluded that, because there were two plausible

but conflicting versions of what happened, both must be in “substantial doubt.”

Judgment Notwithstanding the Verdict

After the re-trial, Judge Larson ordered that judgment of dismissal with prejudice be entered, notwithstanding the verdict. Judge Larson held that he had erred in submitting the question of actual malice to the jury at all.

Judge Larson noted his duty to make an independent review of the record in a public figure libel case, giving less deference to the fact-finder’s determination than normal and taking into account the heightened burden of proof (clear and convincing evidence) required to show actual malice. *Bose Corp. v. Consumers Union of U.S.*, 466 U.S. at 510-11 (1984).

Judge Larson held that Officer Schlieman presented insufficient evidence to show that KARE, at the time of publication, either knew the statement was false or acted with reckless disregard for its truth. As the Court noted, journalists often have to report on events that are not clear and settled. KARE’s broadcast, appropriately under

the circumstances, reported that there were conflicting reports, but KARE did not report any conclusions as to which report was correct.

The Court’s opinion also pointed to the close similarity between what KARE reported the eyewitnesses said and what the eyewitnesses testified they said. One neighbor testified that she said: “We were so surprised by the event because Kevin had never been aggressive.” These words match almost exactly what KARE reported, “[T]wo people say they witnessed the shooting and that Hartwig was not being aggressive.”

While the eyewitness now claims she meant Hartwig was not generally an aggressive person, both Stauffer and Drilling testified she made the statement in relation to the shooting. In any event, the Court held, even if there had been a misunderstanding, as long as the reporter was not aware of a mistake at the time of publication, the First Amendment precludes liability. *Id.* at 512.

The jurors concluded that, because there were two plausible but conflicting versions of what happened, both must be in substantial doubt.

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The reporter’s vigorous attempts to gain additional corroboration and on-camera interviews were also deemed “significant evidence” that the statement was not broadcast with actual malice. *Accord Chafoulias v. Peterson*, 668 N.W.2d 642 (Minn. 2003) (granting summary judgment for defendant in defamation case where television station attempted to verify allegations, conducted interviews, and elicited plaintiff’s perspective for report).

Judge Larson also held that he committed error by giving only the form Minnesota jury instruction on “actual malice” (publication with “substantial doubts about its truth”). The Court held:

“Without further explanation of ‘actual malice,’ the jury in this case was instructed, in effect, that KARE –TV and Stauffer necessarily acted with ‘actual malice’ by presenting either account, because both were unsettled and in ‘doubt’ at the time.”

The Court held that it was also prejudicial error to deny the parties’ requests for more detailed instructions.

Officer Schlieman can appeal the decision again to the Minnesota Court of Appeals. No appeal is pending yet, but the deadline to file has not passed.

Paul Klaas and Emily Fitzgerald, Dorsey & Whitney, Counsel to KARE.

Virginia Court Reduces \$10 Million Defamation Verdict to \$1 Million

By Ashley Kissinger

With a firm nod to the First Amendment limitations placed on such awards, a Virginia state court has ordered remittitur of a \$10 million compensatory damage defamation verdict to \$1 million. The decision, announced on November 7 and authorized by Judge Edward L. Hogshire, relied heavily on the discussion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), concerning constitutional limitations on defamation damage awards.

The Broadcasts

The case, *Sheckler v. Virginia Broadcasting Corp.*, 2003 WL 22533657 (Nov. 7, 2003) (Va. Cir. Ct., Charlottesville), arose out of a news report first aired in April 2001 on local television station WVIR-TV concerning the recent arrest and indictment of the plaintiff on drug conspiracy charges. The report, which was broadcast several times during a 24-hour news cycle, accurately explained that five people, including the plaintiff, Jesse Sheckler, were arrested and charged in connection with a conspiracy to distribute cocaine. It was inaccurate, however, in reporting that the DEA and local drug enforcement agents “confiscated 50 grams of crack cocaine and 500 grams of powdered cocaine . . . at Sheckler’s home and business.” Sheckler owns and operates an automobile repair business next to his home in a small town north of Charlottesville. In fact, no cocaine was ever found

at Sheckler’s business or residence – indeed, the government never contended that he had possessed illegal drugs. WVIR rebroadcast the partially false report in October 2001 during Sheckler’s criminal trial, at which the jury acquitted him of all charges.

The Trial

Sheckler sued two of WVIR’s reporters and its owner, Virginia Broadcasting Corporation, contending that the broadcasts were false and defamatory. He contended the falsity was material because people in the community believed the televised report that he was found in possession of drugs and therefore thought that he was acquitted on a “legal technicality.” In that regard, he argued that the reports were factually specific and that they showed images of Sheckler’s home, and of a person being arrested, even though Sheckler was actually arrested at a gas station. He sought damages for emotional injuries including depression and post-traumatic stress disorder, as well as for injury to his reputation.

Under Virginia law, Sheckler, a private individual, was required to prove only negligence to recover defamation damages. He presented testimony that his criminal defense counsel called WVIR in April 2001 to complain that the reports were in error. He argued that, in light of that, WVIR should have retracted the story and that it was negli-

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Virginia Court Reduces \$10 M Defamation Verdict to \$1 M

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gent in rebroadcasting the inaccurate statements in October 2001. Sheckler also presented testimony from the assistant U.S. attorney who prosecuted him. He testified that the WVIR reporter who wrote the report had improperly attempted to obtain his private file on the case from his secretary. Sheckler's original defamation counsel was permitted to testify, over the station's objection, that he had asked WVIR's general manager for a retraction and that the manager refused the overture.

The court also admitted testimony, over the objection of WVIR, regarding the "journalistic standard of care." Although the judge ruled in advance of trial that the expert could not opine concerning whether WVIR *breached* the standard of care, his testimony included his detailed description of the "standard" and strongly implied, not surprisingly, that he believed WVIR breached it.

Damage Testimony

Sheckler and his family testified concerning the emotional injury that he (and they) allegedly suffered, including their contention that the broadcasts caused him much more mental anguish than his arrest, indictment and trial. One of Sheckler's friends of twenty years testified that he believed the inaccurate portion of the report "because it was so factual. It wasn't even larded [sic] with any of the usual alleged stuff that you see in the newscasts these days."

Another witness who had known plaintiff for thirty years testified that he, too, believed the inaccurate portion of the report because "you know, you believe so much from watching the TV . . . and at that point, as good as a friend I was with Jesse, I really believed that he was guilty when I seen [sic] it when they confiscated drugs."

Sheckler also presented expert testimony that, notwithstanding the fact that he received treatment and medication for depression long before the broadcasts, they nevertheless caused him to suffer severe depression and post-traumatic stress disorder. He presented no evidence, however, of any economic damages or medical expenses.

Defense Case

For its part, WVIR presented evidence that no requests for retraction were ever made and that WVIR was not negligent, either in airing the inaccurate statement or in rebroadcasting the report containing it in October 2001. It elicited testimony from Sheckler's criminal counsel that she did not call WVIR until after the final broadcast in the 24-hour news cycle in April 2001, and that she told WVIR she simply wanted the reports to cease. She conceded she never told WVIR what exactly was wrong with the broadcast, simply that it was "inaccurate" in some unidentified respect. WVIR's general manager testified that Sheckler's counsel never made a request for retraction – rather, he called only to indicate that a civil complaint was being filed and to ask for

the station's address for purposes of service.

The reporter who wrote the report testified that she reported the facts exactly as the assistant U.S. attorney had given them to her, including the statement that turned out to be false. In response to the prosecutor's earlier damaging testimony about

The trial court granted the motion in significant part and explained in detail why the \$10 million verdict was "so disproportionate to the plaintiff's defamation-related injuries as to 'shock the conscience of the court.'"

this reporter, WVIR presented testimony from a reporter for a local newspaper who convincingly testified that *she*, and not the WVIR reporter, had sought to obtain his file on the case. Yet another newspaper reporter testified that the same assistant U.S. attorney had provided him with inaccurate information concerning Sheckler's arrest.

In response to plaintiff's damages testimony, WVIR presented its own expert who disputed the post-traumatic stress disorder diagnosis and contended that plaintiff's preexisting mental health problems and depression caused by his arrest, indictment and trial far outweighed any anguish he may have suffered from the inaccurate portion of the broadcasts.

On May 23, after a three-day trial, the jury rendered a \$10 million verdict – the entire amount Sheckler requested – solely for actual compensatory damages. Before trial, the court had granted WVIR's motion to strike Sheckler's punitive damages claim, holding that he had not presented sufficient evidence of actual malice to support an award of presumed or punitive damages.

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Defendant's Post-Trial Motion

WVIR filed a post-trial motion to set aside the verdict and for a new trial (either *in toto* or on the issue of damages only) or, in the alternative, for remittitur. In an eleven-page order, the trial court granted the motion in significant part and explained in detail why the \$10 million verdict was “so disproportionate to the plaintiff’s defamation-related injuries as to ‘shock the conscience of the court.’” First, the court acknowledged that “the factual predicate for a finding of damage to reputation, loss of community standing, humiliation, etc. was presented from the testimony.” It noted that, “[a]dded to the quantum of harm was the geographical breadth” of the “broadcast range,” the “fact that the broadcasts were also carried on cable,” and the fact that “the news broadcasts were uploaded on the Internet.”

The problem, in the court’s view, lay in the sheer size of the verdict. The “most plausible explanation,” the court concluded, was that the jury “misperceived the law” and “set out to punish the Defendant in addition to compensating the Plaintiff.” In this regard, the court laid much of the blame at the feet of Plaintiff’s counsel, who “evok[ed] the cataclysmic image of the Defendant being allowed to run amuck if not hit with a huge verdict.” Quoting from plaintiff’s counsel’s closing argument at length, the court described how counsel had repeatedly analogized the defamation to “spreading poison in a pool,” to the “SARS epidemic,” and to blood forever “staining a shirt.” The court was equally concerned with counsel’s admonition to the jury that, if the verdict is “less than enormous,” the station’s news director and manager would “high five one another, and who knows what will happen next.”

Most significantly, the court stated that it was “mindful” that this “punishment” of WVIR through the vehicle of compensatory damages had “First Amendment implications.” Under *Gertz v. Robert Welch, Inc.*, the court explained, plaintiffs who do not prove actual malice are limited to compensation for actual injury. This limitation,

where coupled with “no evidence of actual economic loss,” the court reasoned, “must invite very close scrutiny.” The court then proceeded to discuss the plaintiff’s evidence of noneconomic injury in detail and concluded that, notwithstanding its instructions to the jury concerning causation and compensatory damages, the jury “misperceived its role and awarded a sum far in excess of an amount reasonably calculated to compensate for any proven losses.” In reaching this conclusion, the court reviewed Virginia defamation verdicts, noting that Sheckler’s was “five times larger than the largest verdict approved by the Virginia Supreme Court in *WJLA-TV v. Levin*, where presumed damages were allowed. Absent a showing of economic losses and given no

part of the award could be designated as presumed or punitive damages, the First Amendment . . . is clearly implicated: what appears is an award of punitive damages under the rubric of compensatory damages.”

As a result, the court set aside the verdict and ordered

that plaintiff either remit \$9 million of the \$10 million award or, in the alternative, submit to a new trial on damages only. In choosing this figure for remittitur, the court was no doubt influenced by the fact that, in *WJLA-TV v. Levin*, the plaintiff had presented un rebutted expert testimony of economic damage amounting to approximately \$1 million dollars, leaving the remaining \$1 million of the \$2 million defamation verdict to be accounted for by that plaintiff’s noneconomic injuries.

The court’s order requires that Sheckler elect, by November 21, whether to accept the remittitur or proceed to a new trial on damages.

At trial, Thomas E. Albro of Tremblay & Smith, L.L.P. and Matthew B. Murray of Richmond and Fishburne, L.L.P., both of Charlottesville, represented the defendants and the plaintiff respectively. Lee Levine, Ashley I. Kissinger and Alia L. Smith of Levine Sullivan Koch & Schulz, L.L.P. in Washington, D.C. assisted with WVIR’s post-trial motion.

The problem, in the court’s view, lay in the sheer size of the verdict. The “most plausible explanation,” the court concluded, was that the jury “misperceived the law” and “set out to punish the Defendant in addition to compensating the Plaintiff.”

Mississippi Paper Wins In Libel Case Brought By Judge *Suit Claimed Arrest Coverage Was Defamatory*

After a two-week trial, a jury determined that the *Vicksburg* [Miss.] *Post* had not libeled former County Court Judge H. Gerald Hosemann in its coverage of his 2001 arrest for allegedly assaulting his former court reporter. *Hosemann v. Loyacono*, No. 02-0127-CI (Miss. Cir. Ct., Warren County verdict Oct. 30, 2003).

The former court reporter, Juanita Johnston, was found semiconscious on the judge's ranch on Dec. 6, 2001. She ended up spending a month in hospitals in Vicksburg and Jackson.

Hosemann was arrested on Dec. 28 for allegedly assaulting Johnston, and was released on \$25,000 bond. After the arrest, the *Post* and other papers reported that Johnston had identified Hosemann as the attacker to a police investigator. There were also reports that Hosemann and Johnston had been romantically involved.

Preparing His Case

Two days after his April 22 arraignment, Hosemann, who had been on the bench since 1986, was suspended with pay by the Mississippi Supreme Court. The suspension lasted three months, during which he said he was using the time to prepare a case against the *Post*.

Hosemann pleaded no contest in May 2002 to a misdemeanor charge of disturbing the peace after Johnston stated that he had not harmed her. He received a suspended sentence of six months and was fined \$500.

In July, his attorney sent letters to the *Post*'s publisher and managing editor demanding a retraction. In reaction to the letters, *Post* editor and publisher Pat Cashman defended the paper's stories as being based on reliable and identified sources, although he conceded that some of the stories had falsely implied that Johnston had signed the statement naming Hosemann. The statement was actually signed by the police investigator, Pamela Turner, but purported to be based on Johnston's oral statement to Turner.

Hosemann's suit alleged that the *Post* defamed him by reporting that Johnston had been severely beaten, and that she had identified Hosemann as the attacker. Besides the newspaper, the suit also named the investiga-

tor, Pamela Turner, as a defendant, claiming that she had intimidated Johnston into making a statement naming Hosemann.

Other Defendants Dismissed

Other defendants that were named in the complaint were dropped by the plaintiff as the case progressed, while the claims against the newspaper's managing editor were dismissed on summary judgment. Two defendants – attorney Paul K. Loyacono, who had represented Johnston in civil actions against Hosemann that were all dismissed, and his wife Kathryn Loyacono – reportedly settled before trial.

Hosemann lost his bid for reelection in November 2002, and was suspended again for the last few days of his term after he dismissed 15 driving under the influence cases on a day when the county prosecutor – who was Hosemann's successor – had asked that no trials be scheduled so that he could attend a required judicial training program. *See Miss. Comm'n on Judicial Performance v. Hosemann*, No. 2002-JP-02072 (Miss. order Dec. 27, 2003).

The libel case was tried before retired Hinds County Circuit Judge William Coleman, who was appointed by the Mississippi Supreme Court to preside over Hosemann's case.

The newspaper was represented by Kenneth Rector of Wheelless, Shappley, Bailess & Rector, LLP in Vicksburg; Investigator Turner was represented by J. Lawson Hester of Craig Hester Luke & Dodson, PA in Ridgeland, Miss. The plaintiff was represented by Dennis L. Horn of Horn & Payne, PLLC in Madison, Miss.

**MLRC would like to thank fall intern
— Julia Clinton, Benjamin N. Cardozo
School of Law, Class of 2005 for her
contributions to this month's *MLRC
MediaLawLetter*.**

Libel Plaintiff Pays \$85,000 for Privilege of Dropping Suit

By George K. Rahdert

I have defended newspapers for 27 years — vigorously defended, actually — but this is a first. A libel plaintiff paid \$85,000 to drop his suit against the *St. Petersburg Times*.

The suit, *Green v. Times Publishing Co.*, No. 02009628CI (Fla. Cir. Ct., Pinellas County dismissed Sept. 29, 2003), stemmed from a series of articles about a real estate investor who set up solely-owned corporations to purchase older and often poorly repaired apartment complexes in Tampa, Florida. The apartment buildings would rack up code violations, bank mortgages would go unpaid, and litigation would ensue.

The libel complaint alleged dozens of libelous statements in a series of articles. About half related to the fact that the newspaper attributed difficulties to the investor himself, rather than to his wholly-owned corporations (a distinction later clarified as part of a settlement).

We followed a time-honored defense tactic: get aggressive. Third-party subpoenas yielded a potpourri of financial records, bank loan applications, etc. With these records in hand, we set the plaintiff for deposition and he failed to appear on several occasions.

The coup de grace occurred when Pinellas Circuit Judge Thomas Penick Jr. directed the plaintiff to explain his failure to appear by affidavit. Instead, the plaintiff provided an unnotarized note from his dentist, citing a lost filling which prohibited travel. He later testified that he had no business relationship with his dentist. However, records showed a deed from the dentist to one of the investor's corporations, and a loan application alluded to difficulties in obtaining full information about the business affairs of the apartment complex from the dentist.

Interestingly, the dentist's name was spelled two different ways, had two different signatures, and the deed was "notarized" by a person not registered as a notary.

Then, in litigation in another state, the plaintiff filed another statement from the same dentist quoting a slightly different time of treatment and a different emergency dental condition.

As the failures to abide by court orders and the discrepancies in the testimony and evidence began to mount, the trial judge issued an Order to Show Cause for Contempt of Court and appointed our firm as prosecutors. Settlement ensued soon after.

After the guidance provided us by Presidents Nixon and Clinton you would think the word would be out that the cover-up is often worse than the initiating cause. That lesson was evidently not learned by our plaintiff, but stands as a reminder for those of us who defend newspapers.

In addition, I continue to advocate the value of aggressive litigation and discovery in libel cases. Where plaintiffs have a record of unusual financial dealings, I have often asked the rhetorical question, why would this

person want to put the power of subpoena in the hands of a reporter?

In our case, this aggressive style of discovery yielded not only the discrepancies described above, but several other golden nuggets we did

not have time to put into our slingshot. But, two weeks after the settlement, we received his second retraction demand letter, so maybe next time.

George K. Rahdert is a partner at Rahdert, Steele, Bryan & Bole in St. Petersburg, Fla.

We followed a time-honored defense tactic: get aggressive.

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Any firm interested in providing underwriting for the Conference should contact Sandy Baron at MLRC.

Update: Ross v. Santa Barbara News-Press

Newspaper Seeking California Supreme Court Review of Jury Award

By Susan E. Seager

The 14-year legal battle between The New York Times Co. and a Beverly Hills businessman over two investigative articles published in the 1980s is not over yet.

As reported in the October 2003 MLRC *MediaLawLetter*, in a decision written by Judge Aldrich, the California Court of Appeal issued an unpublished decision on September 26, 2003 affirming the \$2.25 million jury verdict against the Santa Barbara-News Press, formerly owned by The New York Times Co., and a former reporter and editor. The Court of Appeal also refused to grant plaintiff Leonard M. Ross a new trial to seek hundreds of millions of dollars in punitive and special damages. *Ross v. Santa Barbara News Press*, 2003 WL 22220512 (Sept. 26, 2003, as modified on denial of rehearing, Oct. 24, 2003). Ross' petition for rehearing to the Court of Appeal was denied.

On October 24, 2003, the News-Press defendants filed a petition for review with the California Supreme Court, asking the court to consider four issues:

- the standard of review for substantial truth;
- the test for substantial truth;
- the application of the "law of the case" rule to newly discovered evidence; and
- whether a businessman who voluntarily enters a complex government regulatory process becomes a limited purpose public figure.

Standard of Review for Substantial Truth

The News-Press is asking the California Supreme Court to decide, as a matter of first impression, whether the federal and state constitutions require a reviewing court to conduct an independent review of the jury's finding that the articles were not substantially true. The Court of Appeal chose to apply the more deferential "substantial evidence" test.

Although the United States Supreme Court has held that other First Amendment issues require independent review (e.g., *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964) (reviewing courts must apply independent review to decide actual malice); *Bose v. Consumers Union*,

466 U.S. 485 (1984) (same)), the Court has not decided whether this applies to a "substantial truth" defense.

There is a split at the federal circuit level. The First Circuit applied independent review to the determination of truth and falsity in *Veilleux v. National Broadcasting Co.*, 206 F.3d 92, 108 (1st Cir. 2000), but the Second Circuit and Eighth Circuit declined to do so in *Meloff v. New York Life Ins.*, 240 F.3d 138, 146 (2nd Cir. 2001), and *Smith v. Des Moines*, 259 F.3d 942 (8th Cir. 2001).

Substantial Truth

The News-Press also urged review to correct the "unprecedented and unreasonably restrictive test" applied by the Court of Appeal to determine whether a statement is "substantially true." Relying solely on a passage in a libel law treatise authored by now-Second Circuit Judge Robert Sack, the Court of Appeal held that a statement cannot be "substantially true" unless "the proof of truth [goes] to the precise conduct or characteristic asserted."

The News-Press argued in its Petition that this holding appears to adopt a requirement of *literal* truth, which is wholly inconsistent with the decision of *Masson v. New Yorker Magazine*, 501 U.S. 496, 517 (1991), which held that the First Amendment protects statements that contain "minor inaccuracies" but "do not amount to falsity so long as the 'substance, the gist, the sting, of the libelous charge be justified.'" California courts have adopted this same "gist and sting" standard. See, e.g., *Jennings v. Telegram-Tribune*, 164 Cal. App. 3d 119, 122 (1985).

Private or Public Figure

Finally, the News-Press' Petition asked the California Supreme Court to review the Court of Appeal's refusal to reconsider its prior ruling that Ross was a private figure even though the News-Press obtained new evidence before the second trial that had been withheld by Ross for nearly a decade. The News-Press asserts that the new evidence – a detailed application that Ross

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Update: Ross v. Santa Barbara News-Press*(Continued from page 14)*

voluntarily submitted to government regulators to seek control of a troubled savings and loan during the nation's thrift crisis – demonstrated that Ross became a limited purpose public figure because the application invited scrutiny of his unusual past.

On November 3, 2003 Ross filed his own petition for review, asking the California Supreme Court to reverse the trial court's order directing a verdict on punitive damages. The trial court held that there was insufficient evidence of actual malice, and the Court of Appeal unanimously af-

firmed that ruling. Ross also has asked the Supreme Court to reverse the trial court's order that barred him from claiming hundreds of millions of dollars in alleged special damages that the court found were entirely speculative.

The Supreme Court's deadline for deciding whether to grant review is January 2, 2004.

Gary Bostwick, Kelli Sager, Jeffrey H. Blum and Susan Seager, Davis Wright Tremaine, represent defendants, News-Press.

Libel Case Against Eagle Scout Taken from Jury**Unanimous Georgia Supreme Court Continues Strong Stance Against Defamation Plaintiffs**

By Christopher L. Mezell

On November 10, 2003, in an unanimous decision authored by Chief Justice Norman S. Fletcher, the Georgia Supreme Court held that 17-year-old Eagle Scout Andrew Gast's assertions regarding adult Troop leader Doyle Brittain's "immorality" and departure from the "ideals of Scouting" are "plainly the sorts of opinions incapable of being proved false;" additionally, the Court ruled that Gast's letter containing these assertions could not reasonably be interpreted to imply or suggest that Brittain either engaged in or condoned certain criminal conduct that formed the basis for Gast's accusations against different Troop leaders contained within the same letter. *Gast v. Brittain*, No. S03G0716, 2003 WL 22533134 (Ga. Nov. 10, 2003), available at <http://www2.state.ga.us/Courts/Supreme/index.html>.

The Letter's Origin

In May of 1999, Andrew Gast became dissatisfied with what he believed were leadership problems in his Boy Scout Troop and proceeded to write a resignation letter addressed to the "Committee and Parents of Troop 1111"

which was also copied to a few other persons closely related to his Troop's activities. As part of his explanation of his reasons for distancing himself from the Troop, Gast cited what he felt were problems with the Troop's organization and leadership, making specific reference to, *inter alia*: (1) the distribution of alcohol, cigarettes and pornography by Troop leader Shawn McGee; and (2) his unwillingness to be involved in a Troop run by leaders Shawn McGee, Jim Patterson or (plaintiff/appellee) Doyle Brittain, because

The Court ruled that Gast's letter containing these assertions could not reasonably be interpreted to imply or suggest that Brittain either engaged in or condoned certain criminal conduct

"based on my experiences, I deem those individuals to be immoral and I do not believe that they live their lives by the ideals of Scouting."

Gast then recounted a prior Troop meeting at which he had debated these same issues with Troop leadership and parents and at which Brittain (among others) had expressed disagreement with Gast's assertions by stating that "nothing really wrong had happened."

The Ensuing Libel Suit

Following the circulation of the letter, Brittain sued Gast for libel. The trial court granted Gast's motion for summary judgment, holding that the any references to Brittain con-

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Libel Case Against Eagle Scout Taken from Jury

(Continued from page 15)

tained in the letter were non-actionable opinion. The Georgia Court of Appeals reversed, however, by positing a reading whereby accusations of criminal conduct made against other Troop leaders elsewhere in the letter could be nevertheless linked to Brittain due to Gast's reference to Brittain's "immorality," and, accordingly, might possibly be found by a jury to be libelous. *Brittain v. Gast*, 259 Ga. App. 124, 125, 575 S.E.2d 899 (2003). The Georgia Supreme Court granted Gast's Petition for Certiorari.

"Immorality" Held a Matter of Opinion

The Georgia Supreme Court unanimously rejected the Court of Appeals' reading and reinstated the trial court's grant of Gast's motion for summary judgment, holding that "assertions regarding 'immorality' and the 'ideals of Scouting' are plainly the sorts of opinions incapable of being proved false." Quoting, *Gertz v. Robert Welch*, 418 U.S. 323, 339-340, 94 S. Ct. 2997, 41 L.Ed.2d 780 (1974), the Court went on to say: "For such matters, 'we depend for [their] correction not on the conscience of judges and juries but on the competition of other ideas.'"

The Court made note of the *Milkovich* limits on opinion, but found that Gast's statements could not reasonably be interpreted to state or imply defamatory facts about Brittain that are capable of being proved false. As the letter's harshest accusations – those regarding child abuse and pornography – were specifically directed at leaders other than Brittain, the Court found that "Gast's letter clearly assigns responsibility for this conduct to a person other than Brittain."

In finding that there could be no inference or insinuation sufficient to support Brittain's libel action, the Court noted the presence of a clear delineation between the accusations of specific criminal conduct leveled at McGee and others and the more nebulous allegations of "immorality" directed at Brittain. Thus the Court soundly rejected a reading whereby a charge of "immorality"

could be effectively bootstrapped on to separate charges of criminal conduct, leveled at another person, to allow such a libel claim to progress.

In so doing, the Court followed another recent decision involving similar circumstances: last year, in *Nix v. Cox Enters.*, 274 Ga. 801, 803, 560 S.E.2d 650 (2002) the Court held that reference to an attorney in a report on lawyer discipline procedures did not imply that he was involved in criminal wrongdoing merely because criminal conduct of other attorneys was discussed within the same report.

The *Gast* decision makes plain that:

- (1) assertions regarding mutable concepts such as "morality" are simply not the type of statements that may form the basis of a defamation claim; and
- (2) that Georgia requires a clear connection between the actual words published and any alleged libel by implication or innuendo.

Moreover, the Court appropriately seized upon this opportunity to reinstruct the courts of Georgia regarding their duty to conduct the proper threshold inquiries in defamation cases – including liberal use of summary disposition mechanisms and holding would-be libel plaintiffs to rigorous constitutional burdens. Accordingly, through this decision, Georgia continues to maintain and reinforce its strong protections for the inherent value of free self-expression and the societal and political value of public debate.

Defendant/appellant Andrew Gast was represented by Karsten Bicknese and Daniel S. Wright of Seacrest, Karsh, Tate & Bicknese, LLP, Atlanta, Georgia and Stan Durden of Athens, Georgia; plaintiff/appellee Doyle Brittain was represented by David W. Griffeth of Athens, Georgia.

Christopher L. Meazell is an associate in the Atlanta office of MLRC member firm Dow, Lohnes & Albertson, PLLC.

**The Georgia Supreme Court
unanimously held that "assertions
regarding 'immorality' and the
'ideals of Scouting' are plainly the
sorts of opinions incapable of
being proved false."**

Appeal in Canadian Case Rules Against Summary Judgment Finding that Internet Website is a “Broadcast” under Libel Legislation

By **Brian MacLeod Rogers**

In a narrow procedural ruling on October 22, 2003, the Ontario Court of Appeal in *Bahleida v. Santa*, [2003] O.J. No. 4091 (C.A.), set aside a lower court ruling that an Internet Website posting constituted a broadcast for purposes of the province’s *Libel and Slander Act* (the “Act”).

The earlier ruling in Ontario Superior Court, made on March 31, 2003, ([2003] O.J. No. 1159) was the subject of a report in the June 2003 MediaLawLetter. That summary judgment ruling resulted in the dismissal of a libel claim over a Website posting; the dismissal was based on the judge’s finding that the posting was a “broadcast” and a libel notice was required. Under the *Act*, written notice of any complaint about libel in a newspaper or broadcast must be given within six weeks of the plaintiff having knowledge of it and prior to commencing litigation. In the case, notice was given four months after the plaintiff, Elaine Bahlieda, city clerk for Thunder Bay, Ontario, learned of the posting on a Website operated by the defendant, Orville Santa, a city councillor.

The Court of Appeal held that the original judge failed to make a crucial finding of fact: whether the Website “broadcasts” were from “a station in Ontario”, which is a requirement of the *Act* for the special notice and limitation provisions to apply. However, the Court’s main ground for reversing the original ruling was that there were conflicts in the experts’ testimony before the court on issues such as “whether the word dissemination [as used in the *Act*] can properly apply to information distributed by internet and whether internet publication is immediate and/or transient”. In keeping with general caselaw limiting the availability of summary judgment, the Court held that such proceedings were not a substitute for trial and were seldom suitable for “resolving conflicts in expert testimony particularly those involving difficult, complex policy issues with broad social ramifications”.

The case also squarely raised the conflict between English and U.S. caselaw on the “single publication” rule as applied to the Internet. On summary judgment, the motion judge rejected the English approach set out in *Loutchansky v. Times Newspapers Ltd.*, [2002] E.W.J. No. 5622; 1 All E.R. 652 (C.A.) while also refusing to adopt the “single pub-

lication” rule. The Court of Appeal avoided deciding the issue but signalled that it regarded it as very much an open question:

The conflicting expert opinions raise considerations that are germane not only to deciding whether internet publications are a broadcast within the meaning of the legislation, but also to determining whether subsequent viewing of the internet message by third parties amounts to a republication of the material.

The case will now proceed to trial after completion of examinations for discovery. Counsel for the plaintiff/appellant on appeal were Peter A. Downard and Berkley D. Sells, Fasken Martineau, DuMoulin LLP, and counsel for the defendant/respondent were Lorne Honickman and Carita Pereira, Goodman and Carr LLP.

Brian MacLeod Rogers, Barrister and Solicitor, practices media law in Toronto, Ontario and was founding president of Ad IDEM (Advocates In Defence of Expression in the Media) in Canada (www.adidem.org).

UPDATE:

Web Postings Are Libel, Not Slander, California Court Rules Appeals Court Ruling in Bitter Case

A California appellate court – ruling that Internet postings are libel, not slander, under California law, and therefore plaintiffs are not required to offer proof of special damages – has upheld a \$775,000 damage award for a slew of Internet postings by two former employees of a biotechnology company that disparaged their former employer, various company employees, and its attorneys. *Varian Medical Systems, Inc. v. Delfino*, No. H024214, 2003 WL 22679654, 2003 Cal. App. LEXIS 1692 (Cal. App., 6th Dist. Nov. 13, 2003).

The court’s finding that statements posted on the Internet may constitute libel, but not slander, was based on the language of Cal. Civ. Code § 45, which defines libel as “a false and unprivileged publication by writing, printing, picture,

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Web Postings Are Libel, Not Slander, Cal. Court Rules

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effigy, or other fixed representation to the eye.” Cal. Civ. Code § 46, meanwhile, defines slander as “false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means.” The clear intent of the Legislature when it last amended these statutes in 1945 was to include radio broadcasts under the slander statute, the court determined, and does not apply to a computer or another device that produces written communications.

The ruling came in a suit by Varian Medical Systems against former employees Michelangelo Delfino and Mary Day. Delfino was fired in October 1998 after manager Susan Felch accused him of sexual harassment, and his co-worker Mary Day quit two months later.

Within a few weeks, messages began appearing on various message boards, primarily Yahoo! Finance’s board devoted to Varian. Eventually, more than 13,000 postings regarding Varian showed up on 100 message boards, and on the defendants’ own web site. The messages charged that various Varian executives discriminated against homosexuals and pregnant women and that the executives were having affairs.

P.I. Reversed Before Trial

While the case was pending U.S. District Court Judge Ronald M. Whyte issued an preliminary injunction barring Delfino and Day from posting messages regarding Varian and its employees. They continued to post, and were held in contempt. But in September 2000 the 9th Circuit reversed the injunction in an unpublished opinion. *See Felch v. Day*, 238 F.3d 428 (table), 2000 U.S. App. LEXIS 23925 (decision) (9th Cir. Sept. 11, 2000).

The case finally came to trial before Judge Jack Komar of the Santa Clara County Superior Court in October 2001. Delfino and Day continued to post messages throughout the eight-week trial — and the plaintiffs often introduced them as evidence, sometimes on the same day that they were posted. Their postings argued that the lawsuit against them was a “SLAPP suit” — aimed at silencing their fair criticism of Varian — and that it should be dismissed under California’s anti-SLAPP provision, Calif. Civ. Proc. Code §425.16.

In court, their motion to dismiss the case on this basis was rejected, a decision which they have appealed.

The 12-member jury unanimously found on Dec. 13 that Delfino and Day had libeled two Varian executives, and awarded \$425,000 in compensatory damages. A few days later the jury awarded the plaintiffs an additional \$350,000 in punitive damages. *See LDRC LibelLetter*, Jan. 2002, at 13.

The Injunction

While the jury deliberated, Judge Komar enjoined Delfino and Day from making additional postings. Komar’s order barred the defendants from referring to Felch, Varian Vice President George Zdasiuk, and other trial witnesses as “homophobic” or “chronic liars,” posting personal and financial information about them, and from making various accusations against them. Komar specifically refused to bar the

defendants from describing Varian executives as “sick,” saying that “there may be some leeway to characterize decisions made by the CEO,” as long as the characterization is clearly an opinion that does not relate to a specific fact.

When Delfino and Day continued to post, the trial court

began contempt proceedings. But the appeals court issued a writ of supercedas suspending enforcement of the trial court judgment until the appeal was heard. *See LDRC MediaLawLetter*, April 2002, at 16.

In addition to their appeal of the damage award, Delfino and Day also appealed the trial court’s injunction against further postings.

The appellate court held that provisions of the injunction prohibiting the defendants from posting future defamatory statements were unconstitutional, saying that the prior restraints imposed were not reasonable time, place and manner restrictions.

But it upheld the injunction’s bar on defendants’ posting of plaintiffs’ financial information on the same website where they have or will post personal information about the plaintiffs, such as their address or family information. The court held that this restriction was constitutional, holding that it was content neutral.

The court’s finding that statements posted on the Internet may constitute libel, but not slander, was based on the language of Cal. Civ. Code § 45, which defines libel as “a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye.”

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Web Postings Are Libel, Not Slander, Cal. Court Rules

(Continued from page 18)

Paragraph 6 is content neutral. It may be justified without reference to the content of the statements. Content—whether the location of a person's home or the place where soccer practice will be held—is immaterial to the restriction. The trial court found that it was the juxtaposition of the information that presented a danger to the subjects of those postings. The court's purpose in issuing this part of the injunction was to prevent defendants from placing plaintiffs in danger and causing them fear in their daily lives.... Defendants may still post the information; they just cannot post it in the same place.

The court limited the injunction to cover only the actual named plaintiffs, ruling that the injunction could not cover non-parties to the suit.

Defendants May Act Against Book

The defendants wrote a book on the case, titled *Be Careful Who You SLAPP*, which they published in early 2003. The plaintiffs responded to the book by informing book sellers that they may be held liable for selling defamatory material, and asking publications carrying advertisements for the

book to reject the ads (*see MLRC MediaLawLetter*, May 2003, at 20).

In their appeal, the defendants argued that the plaintiffs' actions constituted an "end-run" around the appeals court's writ of supercedeas, and filed a motion seeking to have the defendants held in contempt. But the appeals court ruled that the plaintiffs' actions did not constitute contempt. The writ of supercedeas, the court said, served only to delay payment of the monetary judgment; it did not grant the defendants the right to continue to publish defamatory falsehoods, nor did it prohibit the plaintiffs from reacting to further defamatory statements by the defendants. Because the writ was not violated, the court held, it did not have jurisdiction to hold the plaintiffs in contempt.

Varian and the other defendants were represented by Lynne C. Hermle, Matthew H. Poppe and Robert Linton of Orrick, Herrington & Sutcliffe, LLP in Palo Alto; solo practitioner Gerald Z. Marer of Palo Alto; Douglas R. Young of Farella, Braun & Martel; and Renee A. Jansen of Pillsbury Winthrop in San Francisco. The defendants were represented by Jon B. Eisenberg and Jeremy B. Rosen of Horvitz & Levy in Encino, Cal., and Palo Alto attorney Randall Widmann.

The Pennsylvania Corner

MLRC members wince when they hear of litigation in Pennsylvania. And with good reason. Over the years, we have watched sorry state of libel lawsuits in that jurisdiction, with far too many brought by members of the judiciary itself. This litigious – and difficult to litigate in – state has served up enough this month to warrant its own section in the *MediaLawLetter*, some of it good news.

Pennsylvania Superior Court Affirms JNOV in *Merriweather v. Philadelphia Newspapers, Inc.*

By Michael E. Baughman and Amy Ginensky

Considering the case for the third time, the Pennsylvania Superior Court affirmed the grant of judgment notwithstanding the verdict to the Philadelphia Daily News in a libel suit brought by Philadelphia Municipal Court Judge Ronald Merriweather. *Merriweather v. Philadelphia Newspapers, Inc.*, docket number 2056 EDA 2002 (Pa. Super. Ct. September 10, 2003) (unpublished).

Two Theories on Meaning

The suit arose out of a Philadelphia Daily News article published on August 21, 1987, entitled "Feds: Court Reporter's Pot Trial Fixed." The article reported that Judge Kenneth Harris was indicted for fixing the criminal case of his court reporter by having her case reassigned from one judge to another. The article stated that the judge to whom the case was reassigned was Judge Merriweather and that he

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Merriweather v. Philadelphia Newspapers, Inc.*(Continued from page 19)*

acquitted the court reporter following a bench trial.

The article specifically stated that Judge Merriweather was not “accused of wrongdoing.” Nevertheless, Judge Merriweather claimed at trial that the article was false and defamatory because it implied that the federal indictment accused him of participating in the conspiracy to fix the court reporter’s trial.

This was the same claim that the Pennsylvania Superior Court dismissed in 1992. In 1991, defendants moved for summary judgment on the basis of the fair report privilege. At that time, Judge Merriweather was proceeding on two distinct theories of defamatory meaning:

- first, that the article falsely implied that the *federal indictment* accused him of participating in the conspiracy to fix the court reporter’s trial and,
- second, that the *article itself* implied that he had been involved in the conspiracy to fix the trial.

***The article specifically
stated that Judge
Merriweather was not
“accused of wrongdoing.”***

Litigates on Disallowed Theory

The trial court granted summary judgment as to both theories. The Superior Court reversed on the ground that the second theory presented a question for a jury. The Superior Court agreed, however, that plaintiff’s first theory – “that the article implies that federal authorities accused, but did not charge Judge Merriweather of fixing Massey’s trial” – was properly dismissed because the article “clearly states that Judge Merriweather was *not accused of any wrongdoing.*”

Thereafter, the case was litigated (including a second appeal after summary judgment was granted to defendants on actual malice) on the theory the Superior Court found viable in 1992: that the article could be read to imply an accusation by the *Daily News* that Judge Merriweather “had a role in fixing” the trial. However, at trial, plaintiff inexplicably reverted to the theory dismissed by the Superior Court in 1992, arguing that the article falsely implied that the *indictment* accused him of playing a role in fixing the case. The jury found in plaintiff’s favor and awarded \$500,000 in damages.

Defendants moved for post-trial relief on a number of grounds, including that plaintiff’s theory of the case was barred by the Superior Court’s 1992 opinion dismissing the very same claim. Plaintiff argued both that the Superior Court’s decision had been implicitly overruled by the Pennsylvania Supreme Court’s later decision in *MacElree v. Philadelphia Newspapers, Inc.* and that he had tried his other claim as well.

The trial judge appointed a three-judge *en banc* panel pursuant to Pa. R. Civ. P. 227.2 to consider only the question of whether the Superior Court had already rejected plaintiff’s theory of liability. The *en banc* panel unanimously held that plaintiff had, indeed, tried the claim “disallowed by the Superior Court” in 1992 and granted defendants’ motion.

In its unpublished memorandum opinion, the Superior Court affirmed the *en banc* panel’s decision. The court concluded that it had dismissed in 1992 precisely the same claim eventually tried by plaintiff in 2000. The court also disagreed with plaintiff’s interpretation of *MacElree*, stating that “*MacElree* addressed the case where a plaintiff takes issue with a small portion of an article and the rest of the article has nothing to do with, and does not explain, the language complained of. *That is not the case here.* In this case, the remainder of the article includes a passage which *expressly* refutes the defamatory implication that plaintiff attempts to ascribe to the limited portion of the article about which he is complaining. Unlike the article in *MacElree*, the article in suit here *expressly states* the contrary of what plaintiff claims the headline and second paragraph imply.”

Judge Merriweather filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court on October 10, 2003. Judge Merriweather is represented by Geoffrey R. Johnson of Sprague & Sprague in Philadelphia. The media defendants are represented by Robert C. Heim and Amy B. Ginensky of Dechert LLP.

Michael Baughman and Amy B. Ginensky are with Dechert LLP, Philadelphia, and with Robert C. Heim represented media defendants.

Pennsylvania Superior Court Upholds Dismissal of Judge's Libel Suit on Actual Malice Grounds

By Amy B. Ginensky and Michael E. Baughman

The Pennsylvania Superior Court has affirmed the grant of summary judgment to the Philadelphia Daily News in a libel suit brought by a Philadelphia Common Pleas Court Judge. *Lewis v. Philadelphia Newspapers, Inc.*, 31 Media L. Rep. 2249 (Pa. Super. Ct. 2003). The suit arose out of three Daily News opinion columns written by Dan Geringer, criticizing Judge Kathryn Streeter Lewis' decision to release a dangerous criminal under Pennsylvania's "Speedy Trial Rule." The Superior Court limited its decision to concluding that the record on actual malice was "substantially lacking." The decision, authored by Judge Johnson and joined by Judges Beck and Del Sole, reaffirms the difficult burden a public official libel plaintiff faces in surviving a motion for summary judgment based on lack of actual malice.

Criticized Judge

Columnist Dan Geringer learned about the Carlton Bryant case from the Philadelphia Police Detective responsible for the investigation. The detective told Geringer about Bryant's violent history, and told Geringer that he was very frustrated that, after so much hard police work had gone into capturing this dangerous criminal, he was released.

Geringer researched the case, including reviewing the court files, and spoke to confidential sources in the District

Attorney's Office who told him that there was enough time for Judge Lewis to have brought Bryant to trial in a timely manner. The source also told Geringer that Judge Lewis improperly charged the period between June 18th and July 2nd to the Commonwealth when the period should have been charged to the defendant. Although the source told Geringer that the District Attorney had made this argument to Judge Lewis at a December 1998 hearing, in fact the argument was made at a January 1999 hearing, where Judge Lewis rejected the argument.

Geringer wrote three opinion columns criticizing Judge Lewis' performance. The columns, written in strong terms, opined among other things that Judge Lewis should have done more to ensure that Bryant was brought to trial before the Speedy Trial Rule required his release.

"Judges are often and must get used to being criticized for the manner in which they adjudicate some cases."

"Why was a defendant who pleaded guilty to seven gun point robberies, changed his mind six months later, withdrew his guilty plea and was in jail awaiting trial, released and given the golden opportunity to disappear? Because hug-a-thug judges like Lewis have made Common Pleas Court a place where good police work goes to die."

He also wrote that Judge Lewis was not required to release Bryant because she had improperly disregarded the prosecutor's argument at a December 1998 hearing that the June 18th to July 2nd period should be charged to the defendant. He stated

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Penn. Sup. Ct. Upholds Dismissal of Judge's Libel Suit

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“what’s unclear is why Lewis ignored the Rule and freed a man charged with seven gun point robberies. The Commonwealth now has 365 days to try Bryant, beginning on the day they catch him. That is if they catch him. And if the next Judge he gets is more interested in bringing him to “prompt trial” than on relying on an electronic bracelet to do her job.”

The Libel Litigation

The trial court, Judge Isaac S. Garb, granted defendants’ motion for summary judgment on the grounds that (1) the columns were not false (2) the columns were constitutionally protected opinion and (3) there was no evidence in the record of actual malice. Judge Garb emphasized that elected officials like Judge Lewis are properly the subject of public criticism, noting

“Judges are often and must get used to being criticized for the manner in which they adjudicate some cases.”

Judge Lewis appealed, jettisoning most of the arguments raised below. On appeal, she relied on a single factual error in one of the columns at issue. She claimed that the column was false because it reported that the prosecutor had argued at the December 1998 hearing that the June 18th to July 2nd period was excludable. In fact, that argument was not made and rejected by Judge Lewis until a separate January 1999 hearing.

Although defendants made several arguments to the Superior Court in support of Judge Garb’s decision to dismiss the case (including that the supposed error was not materially false since it did not change the meaning of the columns or the basis of Geringer’s opinion), the Superior Court relied on the lack of actual malice.

Quotable Actual Malice Analysis

The Superior Court reaffirmed that the actual malice test requires the plaintiff to make a showing that the defendant *subjectively* entertained serious doubts about the truth of the published statements, and noted that on a motion for summary judgment

“[j]udges, as expositors of the Constitution, must

independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of ‘actual malice.’”

Moreover, the Superior Court emphasized that, in determining whether the record contains sufficient evidence of actual malice, the court must examine “what the defendant did, as opposed to what it refrained from doing or might have done but omitted to do,” and that “evidence of ill will or a defendant’s desire to harm the plaintiff’s reputation, although probative of the defendant’s state of mind, without more, does not establish ‘actual malice.’”

Applying these standards, the Superior Court found that “evidence of ‘actual malice’ [was] substantially lacking.” First, the Court found that

“[t]he fact that Geringer had, prior to publication, reviewed the trial court record does not, in our view, establish that he acted with any level of fault in reporting what transpired at the December 23 hearing. This evidence is equally consistent with simple negligence, which remains subject to First Amendment protection.”

The Court also rejected the plaintiff’s argument that Geringer acted with actual malice for allegedly failing to interview Bryant’s lawyer and because he supposedly harbored some sort of “ill will” toward Judge Lewis. The Court opined that Geringer had no obligation to interview Bryant’s lawyer because “a failure to investigate ‘will not alone support a finding of actual malice.’” The Court further concluded that

“claims of ill will, even if substantiated (which Lewis’s claim is not) offer only scant persuasive value of ‘actual malice.’”

Judge Lewis filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court on October 20, 2003. Judge Lewis is represented by Geoffrey R. Johnson, of Sprague & Sprague in Philadelphia.

Amy B. Ginensky and Michael E. Baughman of Dechert LLP, Philadelphia, represent the media defendants.

Jury Renders Verdict In Favor Of Better Business Bureaus In Defamation Case Brought By Business

By Paul D. Weller

On October 14, 2003, a jury rejected a defamation claim against the Better Business Bureau of Eastern Pennsylvania and the Better Business Bureau of Metropolitan Washington brought by a business that was the subject of a Better Business Bureau report (*American Future Systems d/b/a Progressive Business Publications v. Better Business Bureau of Eastern Pennsylvania and Better Business Bureau of Metropolitan Washington*, Philadelphia County Court of Common Pleas, Pennsylvania, No. 0520, November Term, 2001). The verdict was of particular significance to the Better Business Bureaus because the case threatened to call into question the manner in which the Better Business Bureaus provide information to the consuming public.

Factual Background

The plaintiff, American Future Systems, Inc., is a Malvern, Pennsylvania company that publishes newsletters throughout the United States, mostly through telemarketing, using the trade name, Progressive Business Publications.

The dispute arose after the Better Business Bureau of Eastern Pennsylvania issued a report that stated, among other things, the plaintiff had “an unsatisfactory business performance record due to a pattern of customer complaints alleging billing for unordered merchandise.” In response to this report, on November 7, 2001, the plaintiff initiated a suit against the Better Business Bureau of Eastern Pennsylvania in Pennsylvania state court for defamation, later adding the Better Business Bureau of Metropolitan Washington as a defendant.

Motions for summary judgement were denied, and the matter proceeded to trial on October 7, 2003.

The Trial

At trial, the plaintiff attempted to construe the language of the statement in the report in an effort to support its claim that the report was false, and that the Better Business Bureaus had acted with the requisite intent for defamation.

Among other things, the plaintiff claimed that the statement in the report was false because there was no “pattern” of consumer complaints alleging billing for unordered merchandise. The plaintiff argued that the complaints on file with the Better Business Bureau (more than 300) represented only a fraction of the plaintiff’s overall business.

To counter this argument, the Better Business Bureaus pointed to the language in the report, which described only those consumer complaints on file with the Better Business Bureau. The Bureaus also noted that the statement at issue was an opinion, did not say that the consumer complaints were true, and, in fact, merely reported on consumer complaints “alleging” billing for unordered merchandise.

In an effort to bolster its interpretation of the alleged defamatory statement, the plaintiff argued that all of the consumer complaints on file with the Better Business Bureaus were false. To that end, the plaintiff offered testimony from several witnesses that the plaintiff’s business operations were highly automated with a quality control system that made it virtually impossible to bill a customer for “unordered merchandise.”

Cross-examination, direct testimony and documentary evidence, however, undercut this position. Among other things, the Better Business Bureaus offered, as rebuttal witnesses, three unbiased consumers who had filed complaints regarding the plaintiff, all of whom testified that their complaints were true.

Although the plaintiff argued that the Better Business Bureaus had acted at least negligently in publishing the statement in question, evidence demonstrated to the contrary. In fact, testimony showed only that the Bureaus had acted properly following a review of the consumer complaints.

While the plaintiff argued for a specific monetary award during closing arguments, the plaintiff had failed to offer evidence of any specific lost business resulting from the publication of the statement. The Bureaus had reinforced this point during the cross examination of the plaintiff’s lead witness and from deposition testimony read to the jury.

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Jury Renders Verdict In Favor Of Better Business Bureaus In Defamation Case Brought By Business

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Prior to charging the jury, the court concluded that the plaintiff was not a public figure. The court went on to find, however, that, as consumer reporting agencies, the Better Business Bureaus are entitled to the protection of a conditional privilege. The court charged the jury with, among other things, Standard Pennsylvania Jury Instructions which, as written, required the plaintiff to show actual malice or recklessness in publishing the statement in question to overcome the conditional privilege.

The jury deliberated less than three hours before rendering its unanimous verdict. The matter remains pending on post-trial motions.

The Better Business Bureaus are represented by Paul D. Weller and Jennifer Jordan of Morgan, Lewis & Bockius LLP in Philadelphia, Pennsylvania. The plaintiff is represented by Wayne Mack and James H. Steigerwald of Duane Morris in Philadelphia, Pennsylvania.

Supreme Court Denies Cert: Suzuki Motor Corp. Suit Against Consumers Union to Continue

Following a bitterly divided Ninth Circuit ruling in May to deny a request for a rehearing en banc in Suzuki Motor Corp.'s product disparagement case against Consumers Union, the United States Supreme Court has refused, without comment, to hear the case. *Suzuki Motor Corp. v. Consumers Union of the United States*, 330 F.3d 1110 (9th Cir. 2003), cert. denied, 72 U.S.L.W. 3307 (U.S. Nov. 4, 2003) (No. 03-281).

The action stems from the republication of a key point from a 1988 magazine article in a subsequent anniversary edition – both published by Consumers Union (“CU”) in *Consumer Reports* – that alleged that the Japanese car manufacturer’s “Samurai” model unacceptably tended to roll over. Suzuki claims that the CU-conducted tests were rigged to produce negative results and that CU acted with actual malice to damage Suzuki’s reputation.

The district court originally granted summary judgment for CU, but the Ninth Circuit reversed in *Suzuki Motor Corp. v. Consumers Union*, 292 F.3d 1192 (9th Cir. 2002). The appellate court held that there was sufficient evidence of actual malice to defeat a summary judgment motion. In May 2003, in a closely contested decision, the en banc court voted 13-11 not to hear the case. 330 F.3d 1110. The initial panel opinion and dissenting opinion, filed June 25, 2002, were withdrawn and replaced by the amended majority, concurring, and dissenting opinions, written by Judges Tashima, Graber and Ferguson respectively, that were filed concurrently with the order to deny petition for rehearing en banc. *Id.*

Judge Alex Kozinski, writing a separate opinion for the dissent from the denial of rehearing en banc, predicted that the majority’s decision signals “the death of consumer ratings.” “If Suzuki can get to trial on evidence this flimsy,” he wrote, “no consumer group in the country will be safe from hordes of handsomely paid lawyers...” 330 F.3d at 1121.

Among the key issues at the Ninth Circuit was the standard of appellate review. Judge Tashima’s amended majority opinion rejected the notion that the “independent examination” standard required the appellate court to weigh the evidence of actual malice in reviewing summary judgment in a media libel case. Judge Tashima suggested that even in First Amendment cases, appellate judges are not permitted to scour the record as they would after a trial verdict.

In its petition for certiorari, CU had asked the Supreme Court to review: 1) Whether and to what extent the “independent examination” rule of *Bose Corp. v. Consumers Union* applies to a court’s disposition of a publisher’s motion for summary judgment? 2) Whether the First Amendment permits an inference of actual malice to be drawn from (i) the publisher’s substantive and well-articulated disagreement with the government; or (ii) the publisher’s financial status?

Michael Pollet of Pollet & Felleman represented CU. Robert Fiske, Michael Carroll, William Komaroff, Davis, Polk & Wardwell, New York, NY and Gene Schaerr, David Lewis, Paul Zidlicky, Michael Lee of Sidley & Austin, Washington, D.C., represented Suzuki.

Sprague Libel Suit Against ABA Settled on Eve of Trial

The trial was due to start on December 1, pitting libel plaintiff and libel plaintiff lawyer par excellent, Richard Sprague, against the American Bar Association. The suit was over a reference to Mr. Sprague in the ABA Journal in which he was characterized as “perhaps the most powerful lawyer-cum-fixer” in Pennsylvania.

The specific terms of the settlement are confidential, but some information about it was publicized.

The settlement contained some payment to Mr. Sprague, there was the suggestion that the half-page “apology” that the ABA promised to publish in its February ABA Journal was key. Sprague’s lawyer, James E. Beasley Sr., was quoted as saying that it was a critical element of the settlement. The Legal Intelligencer, *ABA, Sprague Agree to Settlement*, 11-21-2003. That “apology” reads strikingly like the clarification the ABA published in the November 2000 ABA Journal, except that it now includes somewhat gushier language in referring to Mr. Sprague, refers to the specific term “fixer,” and actually says “we apologize” for the distress caused Sprague.

The suit arose out of an article about a highly contentious situation in which a Philadelphia police officer shot an unarmed African-American teenager. When the DA chose not to prosecute the officer, community leaders got a court order requiring her to do so. The ABA Journal reported that the

“political stakes were raised ...when the DA accepted outside help in the case from her former boss, Richard Sprague, perhaps the most powerful lawyer-cum-fixer in the state. The appearance of the storied Dick Sprague set off alarms in the black precincts. Within a week, they brought in their own big guns.”

Mr. Sprague contended that the reference was defamatory, that it implied that he fixed cases and “used ‘power’ to influence and/or arrange their outcomes by improper and/or unlawful means.”

The ABA sought to have the case thrown out on summary judgment. The ABA argued that the reference simply was not defamatory; that the term “fixer” – and particularly when read in context – was intended to convey Mr. Sprague’s ability as a problem solver in a tough and

politically sensitive situation. The district court judge, William H. Yohn Jr., disagreed, holding that the term was capable of a defamatory meaning.

While Sprague fought long and hard to avoid being characterized as a public figure, he ultimately conceded that he was a “limited purpose public figure” after being confronted with a substantial set of papers on the subject filed by the ABA. The ABA could not, however, convince the district court to dismiss the case on lack of evidence of malice. The court thought a jury had to decide whether or not the ABA Journal, whose employees testified that they knew that term *could* have a defamatory meaning in some contexts (albeit not in this one), had behaved recklessly in using it in the article.

The trial promised to be a star-studded affair, with Sprague listing as potential witnesses Senator Arlen Specter, Jerry Shestack, a former U.S. Attorney and Federal Judge, a sitting justice of the Penn Supreme Court, the former President of Temple University, and the current DA.

Counsel for the ABA were Joyce S. Meyers, David Marion and Michael Twersky of Montgomery McCracken Walker & Rhoads, Philadelphia.

Update:

Pennsylvania Supreme Court Hears Arguments On Neutral Reportage Privilege

By Michael E. Baughman and Amy Ginensky

On October 20, 2003, the Pennsylvania Supreme Court heard arguments in the case of *Norton v. Glenn*, 18 & 19 MAP 2003 (Pa.), in which the Court is asked to decide whether Pennsylvania recognizes the constitutional privilege of neutral reportage. The case is probably one of the most significant cases involving freedom of speech and press that the Pennsylvania Supreme Court has decided in recent years, and one in which numerous media organizations filed an amicus brief in support of the media defendants.

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PA Sup. Ct. Hears Arguments On Neutral Reportage Privilege Supreme Court Allows “Spirit of Satan” Defamation Case to Go Forward

(Continued from page 25)

Although it is, of course, impossible to tell from an argument how the court will rule, several of the Justices peppered plaintiffs’ counsel with difficult questions. Justice Ronald Castille, in particular, suggested to plaintiff’s counsel that the privilege was what freedom of speech and press was “all about” and suggested that, even if the federal constitution provided no protection, the Pennsylvania Constitution has always afforded broader protection to freedom of speech and press.

Justice Michael Eakin suggested that the privilege was not unlike the protection accorded by the “hearsay” rule of evidence, and suggested that the public may well have the right to know even false charges if they are newsworthy. Justice Russell Nigro, by contrast, pushed the newspaper’s counsel on whether neutral reportage allowed for an adequate remedy by those harmed by defamatory falsehoods. It is not known when the Court will issue an opinion.

The case was argued by Amy B. Ginensky of Dechert LLP for the Media Defendants, Geoffrey Johnson of Sprague & Sprague for plaintiff Norton and William Wilson of MacElree Harvey for plaintiff Wolfe.

New York Appellate Division Restates Principle on Injunctions in Libel Suits

While affirming the jury damage award to the plaintiff, a New York appellate court reversed the trial court entry of a permanent injunction barring the defendants from publishing any statements about the plaintiffs and family found to have been libelous. In a recent decision in *Rombom v. Weberman*, 766 N.Y.S.2d 88, N.Y.A.D. 2 Dept. 2003 (Oct. 20, 2003), the court, citing New York precedents, stated: “Absent extraordinary circumstances, injunctive relief should not be issued in defamation cases.”

The suit involved websites operated by the Jewish Defense Organization (and members) and statements about an adversary, Steven Rombom. The injunction that was reversed also ordered the defendants to remove all of the statements found to be libelous that were found on their web sites.

Without comment, the U.S. Supreme Court denied the petition for certiorari seeking review of *Kliebenstein v. Iowa Conference of the United Methodist Church, et al.*, 663 N.W.2d 404 (Iowa 2003), *cert. denied*, 72 U.S.L.W. 3277 (U.S. Oct. 21, 2003)(No. 03-390), a case where the plaintiff took umbrage at a letter written by a former district superintendent of the church that called on members of the current congregation to acknowledge that “the spirit of Satan” had infiltrated the church and imperiled its members’ well-being.

Defendant, Reverend Jerrold Swinton, wrote the letter after speaking with plaintiff, Jane Kliebenstein, a church member. After the Reverend published his letter, Kliebenstein and her husband, Glen, filed a defamation suit.

In denying the petition, the Supreme Court let stand the Iowa Supreme Court’s decision reinstating the previously dismissed defamation case on the grounds that a secular meaning could be ascribed to the phrase “the spirit of Satan” because the letter had circulated outside the confines of the church community. Petitioner had argued that the Iowa Supreme Court lacked authority to become involved in a religious matter.

The case will now proceed to a local trial court for determination of the meaning of the phrase “spirit of Satan” as understood in its secular sense and whether plaintiff can prove the allegation is false.

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California Court Dismisses All But Contract Claim Over Re-Use of File Footage

Holds Spiritual Healer is a Limited Public Figure

In an unpublished decision filed September 30, 2003, the California Second District Court of Appeal reversed the Los Angeles Superior Court's denial of a television station's anti-SLAPP motion to strike a self-described spiritual healer's claims for defamation, false light and appropriation. *Decoud v. Univision Communications et al.*, 2003 WL 22245090 (Cal.App. 2 Dist., Sept. 30, 2003). The opinion was written by Presiding Justice Candace Cooper, joined by Justices Laurence D. Rubin and Paul Boland.

Court Left Standing a Contract Claim

The suit was brought after Univision Communications ("Univision") broadcast stock footage of Plaintiff Teodoro Decoud ("Decoud") during a 2002 report on how "superstitions could be dangerous to your health." (The "Broadcast.") The footage came from a 1994 story on spiritual healers, in which Decoud claimed he participated on the condition that the footage would not be used again for any other purpose. The 2002 Broadcast juxtaposed the 1994 footage of Decoud and his client while reporting that, "superstition – according to a study – could cause stress and even death."

After the Broadcast, Univision issued a clarification explaining that,

"the footage of Mr. Decoud was only an attempt to show a well-known psychic and the intention was never to imply that a session with him, or believing in the powers he claims to have, would cause anyone harm."

Decoud sued Univision for slander, false light invasion of privacy, common law invasion of privacy, and infringement of the right to publicity, as well as breach of contract, promissory estoppel, and breach of implied covenant of good faith and fair dealing.

California's Anti-SLAPP Statute

If a lawsuit arises from speech concerning a matter of public interest, California's Code of Civil Procedure § 425.16, commonly referred to as the "Anti-SLAPP statute,"

permits a defendant to file a Special Motion to Strike the complaint. Subsection (b)(1) of the provision requires the court to engage in a two-step analysis. First, the court determines whether the moving defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. If the court finds that such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.

Finding that the Broadcast was an exercise of Univision's right of free speech and that the subject of the Broadcast – the deleterious effects of being superstitious – was a public issue, the court held that Univision had easily satisfied the first requirement of the anti-SLAPP motion. The court then reviewed *de novo* the trial court's determi-

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California Court Dismisses All But Contract Claim Over Re-Use of File Footage

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nation of Decoud's probability of prevailing on each claim, beginning with the defamation, false light and appropriation causes of action.

The court found that a reasonable viewer could conclude that the Broadcast was "of and concerning" Decoud, and that the story implied Decoud could cause stress or death. Univision argued that the factual underpinnings of the story were true, but the court found that argument unpersuasive because the claim at issue was not that superstition could cause stress or death but rather that Decoud could cause stress or death, and Univision did not argue or present evidence of the truth of that claim.

Actual Malice Required for Limited Public Figures

The court then considered whether Decoud was a limited public figure or a private individual at the time of the Broadcast, because claims for defamation, false light invasion of privacy, appropriation and intrusion into a right of publicity all require that a plaintiff who is a public figure prove by clear and convincing evidence that the defendant acted with actual malice. Since Decoud had "voluntarily and repeatedly appeared before the public on a variety of television shows," and his own pleadings and declarations indicated that he had affirmatively placed himself at the center of the public issue of the effects of spiritual healing, the court held that he was a limited public figure at the time of the Broadcast.

As such, Decoud was required to prove that Univision acted with knowledge that the claim that Decoud could cause stress or death was false, or with reckless disregard of whether it was false or not. Decoud's proffered evidence of actual malice was that Univision had broadcast a positive story about Decoud in 1994, and thus knew that the claims in the 2002 Broadcast were false. The court rejected this argument, finding that it "conflict[ed] with the principles of free and uninhibited discussion embodied in the First Amendment," and that "[t]here is simply no basis for Decoud's statement that the publication of one favorable story on a topic renders all less favorable stories in reckless disregard for the truth."

Reversed on SLAPP Issues; Contract Claim Left Standing

Because Decoud did not demonstrate evidence of actual malice sufficient to withstand his burden in opposing the anti-SLAPP motion, the appellate court found that the trial court should have stricken Decoud's causes of action for slander, false light, common law appropriation, and infringement of the right to publicity. The appellate court also rejected Decoud's causes of action for promissory estoppel and breach of implied covenant of good faith and fair dealing, but declined the strike Decoud's breach of contract claim. Although Univision disputed the existence of an alleged oral contract regarding the 1994 footage, the appellate court found that Decoud had provided enough evidence to show a probability of prevailing on that claim.

Gary L. Bostwick and Rochelle L. Wilcox, Davis Wright Tremaine represented Univision.

Mark S. Gottlieb, Alan I. Cyrlin and Steve K. Wasserman, Wasserman, Wasserman, Comden, Casselman & Pearson represented Decoud.

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No a La Carte Justice in England for Roman Polanski

Appellate Court Nixes Testimony by Videolink

By David Hooper

On 11 November 2003 the British Court of Appeal struck what may prove to be a knock-out blow against Roman Polanski's libel action against *Vanity Fair* magazine. *Polanski v. Conde Nast Publications Ltd.*, [2003] EWCA Civ 1573 (Brown, LJ, Parker LJ, and Thomas LJ). The court held that Polanski could not testify by video link from Paris, but instead would have to appear at trial in London in order for his case to proceed – and thus face arrest and extradition to the U.S. on his 1970's California sex offense conviction.

Polanski ironically had done much to restore his reputation by winning an Oscar last year for his wonderful film, *The Pianist*. Astonishingly, however, he was foolish enough to sue *Vanity Fair* for an anecdote dating back to 1969, contained in a single paragraph on page 17 of a profile of Elaine's Restaurant in New York. The July 2002 restaurant profile included author Lewis Lapham's recollection that the only time he "ever saw people gasp in Elaine's was when Roman Polanski walked in just after his wife Sharon Tate had been murdered by the Manson clan" and he tried to pick up a "Swedish beauty"... "inundating her with his Polish charm" and a "honeyed spiel which ended with the promise "I will make another Sharon Tate of you." Id. at ¶ 3.

A Fugitive of the Law

The libel action has simply served to remind us that the film director is on the run from the Californian Courts after pleading guilty on a plea bargain to unlawful sexual intercourse with a 13 year old girl, when he was a mature 42. Fearful of another spell in a Californian jail, Polanski has not set foot in the USA, or for that matter the UK, since 1978. He lives happily in France as a French citizen safe from the attentions of the Californian DA.

In an act of astonishing recklessness which could see Polanski getting little change from legal bills of \$750,000, Polanski went forum shopping in - you've guessed it - the UK. Unhappily for Polanski the UK does extradite convicted sex offenders to the USA.

Shortly before the trial was scheduled to start on 3 November 2003, Polanski sought to give his evidence by video link in the safety of a luxury hotel off the Champs Elysees. He relied on the UK Civil Procedure Rules Part 32-3, the criteria for the application of which are set out in Annex 3 of the Practice Directions to CPR, Part 32. He relied on the ability to give hearsay evidence under UK law and a decision in *Rowland -v- Bock* [2002] 4 All ER 370

The Court of Appeal accepted Vanity Fair's argument that allowing Polanski to give evidence by video link was an affront to the administration of justice and an abuse of the process of the court.

that "full access to justice in a civil court should not, save in exceptional circumstances, be the price of a litigant losing his liberty and facing criminal proceedings."

Surprisingly the experienced libel judge, Mr Justice Eady, reluctantly allowed Polanski's application even though the fact that

Polanski's fugitive from justice was obviously an unattractive reason. Justice Eady felt that had Polanski not been allowed to give evidence by video (with the possibility of cross-examination), the alternative of allowing him to produce a written statement of evidence (without cross-examination) was the worse of the two evils.

Testimony Must Be in Person

The Court of Appeal disagreed. They accepted *Vanity Fair's* argument that allowing Polanski to give evidence by video link was an affront to the administration of justice and an abuse of the process of the court. Furthermore, Polanski could not get around this difficulty by giving his evidence by written statement. There was power under CPR 33.4(1) to permit the maker of the statement to be cross-examined and unless Polanski was willing to come to the UK to be cross-examined, his statement could not be admitted.

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No a La Carte Justice in England for Roman Polanski

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Polanski sought an indulgence from the court. He was not precluded from suing in the UK despite his conviction. He just had to hop on the Eurostar to London and show up at the Royal Courts of Justice. His snook-cocking at the Californian authorities and his forum-shopping raised issues of public policy which militated against Polanski's application to give his evidence from a Parisian hotel.

Rules on Video Link Evidence

The Court of Appeal laid down pointers as to when video link evidence would be allowed. The Court would look at the nature of the offence and the nature of the civil claim and the link between the two. Here both had a sexual content. The Court would consider the role of the witness, video evidence would be more likely to be permitted for a non-party witness as to fact (particularly if old and infirm as in *McPhilomeny -v- Times Newspapers Limited*) or for a Defendant, who after all had not chosen the jurisdiction. The Court would also look at the importance of the claim to the video link permission seeker and to that person's possibility of suing elsewhere.

Here, in a telling blow to forum shoppers, the Court of Appeal noted that this claim could have been brought in the USA (where the bulk of Vanity Fair's circulation is) or France (where Polanski lives and does have a reputation). Polanski had not after all set foot in the UK since February 1978. The Court would also look at the likely disadvantages of video link evidence against live evidence, notwithstanding the technical advances of video evidence. The facts of *Rowland -v- Bock* were distinguished, the one Plaintiff whose extradition was sought by a US court, had not even been convicted and the alleged offence bore no particular similarity to the facts of the claim.

Here Polanski wanted to litigate on special terms or as Vanity Fair elegantly put it "*a la carte justice*". No libel action has ever been fought in England in the Plaintiff's absence. On occasion the Plaintiff has not given evidence (*Bookbinder -v- Tebbit*) but the Plaintiff was then present at court to see his claim resoundingly fail.

Above all public policy should, the Court of Appeal observed, be to discourage litigants escaping the normal processes of law. It was inconceivable that if Polanski's sexual offending has been in the UK that he would have been allowed to sue from abroad. The same principle should be applied in relation to the Californian offence and if Polanski had mitigating reasons for his behaviour, his time would be better spent telling that to the Californian judge than seeking to massage his reputation from the comfort of his hotel by his ill-judged and costly choice of an English forum. Polanski is currently seeking permission to appeal to the House of Lords.

Vanity Fair was represented by Reynolds Porter Chamberlain and barristers Thomas Shields QC and Manuel Barca of One Brick Court. Polanski was represented by Schillings and barristers Ronald Thwaites QC, Ely Chambers, and Heather Rogers, Matrix Chambers.

David Hooper is a partner in the solicitors firm Reynolds Porter Chamberlain in London.

No libel action has ever been fought in England in the Plaintiff's absence.

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Diana Photographers on Trial in Paris for Invasion of Privacy

On October 24, 2003, a criminal trial began in Paris for three photographers who took photographs of the August 31, 1997 car crash that killed Princess Diana and her companion Dodi al Fayed. The photographers, Jacques Langevin of Sygma agency, Christian Martinez of the Angeli agency and freelancer Fabrice Chassery are accused of violating French privacy law by taking pictures of the interior of the wrecked car, although these pictures were never published.

Under the law the photographers face up to a year in jail and a fine of approximately \$50,000. According to one news report from the trial, the prosecutor asked for suspended prison sentences for the three on the grounds that they “sought to take pictures of misery and distress, not the kind of pictures which bear witness, such as war photography. They wanted pictures of people suffering.” See Philip Delves Broughton “Pictures of death crash ‘an invasion of privacy,’” *Daily Telegraph*, Oct. 25, 2003. (available online through <www.telegraph.co.uk>).

The trial is proceeding under the precedent of an earlier

French case brought by the pop singer Michel Sardou against paparazzi photographers. There the court held that the inside of a car – even when the car is in public – is to be considered as private as the inside of a house. This case will test the boundaries of that principle. According to the *Daily Telegraph*’s report, Jacques Langevin, who is a well-known war photographer and not a paparazzi, testified that he routinely takes photographs of people in their cars, including French presidents.

The three are being prosecuted upon the complaint of Fayed’s father, Mohamed Fayed. The privacy action was stayed during the lengthy criminal investigation of photographers, including these three defendants, for allegedly contributing to the deaths of the couple by chasing their car to obtain photographs. That investigation concluded that the couple’s chauffeur was solely responsible for the deadly crash.

A judgment in the privacy case is expected on November 28, 2003.

Update: Modest Damages Awarded to Michael Douglas & Catherine Zeta Jones

On November 7, 2003 High Court Justice Lindsay announced his damage awards in the high profile case brought by Michael Douglas, Catherine Zeta Jones and OK! magazine against Hello! magazine for its unauthorized publication of the couple’s wedding photographs. *Douglas & Zeta Jones v. Hello!* [2003] EWHC 2629 (Ch). See also *MediaLawLetter* April 2003 at 37.

While the couple had sought over \$1 million in damages for breach of commercial confidence and personal distress, the court awarded the couple only £14,600 (\$24,820), which included £3,750 each for distress, £7,000 for expenses incurred selecting and approving photographs for publication on an expedited basis, and £50 each for the data protection violation caused by the unauthorized publication.

Hello! was ordered to pay £1,033,756 (approximately \$1.7 million) in economic damages to rival magazine OK! which had obtained the exclusive right to publish the wedding photographs. Legal costs of the six-week-long high court trial and pretrial appeals, estimated at over 5 million pounds, will be decided at a later date.

Although Mr. Justice Lindsay issued a lengthy decision

on damages most of it covers the calculation of OK!’s economic damages for lost sales. Among other things, he rejected claimants suggestion that he award damages on a “notational license fee” theory, finding that such damages would be less than under his conventional damage calculation.

As to the award to Douglas and Zeta-Jones, Lindsay cited several media and non-media cases cited by the parties and noted, without discussing their relevance to their claims, that while “none provides a compelling guide as to the sum to be awarded ... they do provide a guiding matrix in which a place may be selected for the award here.” *Id.* at ¶ 56. Commenting on the damage award in aggregate, Lindsay noted that it was not so large as to “stifle free expression” yet likely to make “Hello! alive to the unwisdom of its acting as it did.” ¶ at 59.

Douglas and Zeta Jones were represented by the firm Addleshaw Goddard and barristers Alastair Wilson QC, 19 Old Buildings, and David Sherborne, 5 Raymond Buildings. Hello! was represented by the firms Charles Russell and M Law; and barristers James Price QC, 5 Raymond Buildings, and Giles Fernando.

Trial Court Grants Partial Summary Judgment for Philadelphia Magazine

Lawsuit stems from the publication of a nude photograph

Angela Izzo v. Philadelphia Magazine, a division of MetroCorp and Pascal Blancon

On November 5, 2003, Pennsylvania Common Pleas Judge Bernard Moore granted in part the defendants' motion for summary judgment in a case that stems from the publication of a nude photograph as part of a feature on spa services in the Philadelphia area. The plaintiff, Angela Izzo, filed her lawsuit in the Montgomery County Court of Common Pleas in February 2000. Naming the magazine and the photographer as defendants, Izzo alleged theft of her image by deception, fraud, negligent misrepresentation, invasion of privacy, intentional infliction of emotional distress, unjust enrichment and conspiracy. Izzo also sought injunctive relief. Judge Moore's order granted summary judgment against all of Izzo's claims except for her invasion of privacy claims for appropriation and publicity given to her private life. Most significantly, Judge Moore held that Izzo could not seek punitive damages. *Izzo v. Philadelphia Magazine, et. al.*, Case No. 00-03043.

In her lawsuit, Izzo claimed that Philadelphia Magazine had intended to "utilize nudity" in order to generate some publicity and create a "sexier image," and that she was selected as the "victim" of this conspiracy because of her local celebrity status as a professional model and the fiancé of chef Georges Perrier. She further claimed that she had requested no photos be taken of her "private parts."

The defense argued that Izzo's cause of action for theft by deception should fail because the Pennsylvania Statute on which she based her claim is a criminal statute and nothing in its language suggested that it was designed to protect professional models from "losing control over the use of their body and their likeness."

As to the fraud cause of action, the defense argued that Izzo's claim should fail because she was aware she was being photographed while completely naked. Izzo had said she assumed the photographer was shooting a "silhouette profile" of her body in which her breast would not be visible. The defense argued that Izzo could not recover for her assumption since, by her own testimony, the photographer

never made that representation. The defense argued that the negligent misrepresentation claims should fail for the same reasons.

Without an opinion, the judge granted the defendants' motion for summary judgment for the theft by deception claim, fraud, negligent misrepresentation, as well as the claims for intentional infliction of emotional distress, unjust enrichment, conspiracy and injunctive relief.

The court also held that the plaintiff was not entitled to punitive damages because plaintiff had insufficient evidence that the defendants acted with either common law malice or actual malice.

The judge's order, however, let stand two of Izzo's three causes of action for invasion of privacy. While dismissing Izzo's cause of action for false light, the judge did not dismiss the invasion of privacy claims relating to the alleged appro-

priation of Izzo's likeness and the publicity given to her private life.

Carl Solano, Margaret Woodruff and Stephen Shapiro, of Schnader Harrison Segal & Lewis in Philadelphia, represent Philadelphia Magazine and photographer Pascal Blancon. Paul Rosen and Suzanne Schiller, of Spector Gadon & Rosen in Philadelphia, represent Angela Izzo.

Judge Moore's order granted summary judgment against all of Izzo's claims except for her invasion of privacy claims for appropriation and publicity given to her private life.

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Maury Show Denied Motion to Dismiss in Negligence Case Arising from the Rape of a Minor Guest

On November 12, 2003, Justice Lebedeff of the New York County Supreme Court issued a decision granting in part and denying in part the defendants' motion to dismiss in *Craver v. Povich*, a case characterized by the Court as one in an emerging line of "Talk Show Torts." Craver, a teenager from Texas who was taped in New York to appear on the Maury Show, sued the show and certain individuals — including "John Doe" an alleged limousine driver — for negligence, negligent hiring and retention, negligent infliction of emotional distress, negligence per se and slander. These causes of action all arise out of an alleged rape of Craver by John Doe whom, Craver claims in the Complaint, she met during a taping session outside the show's studios.

The Defendants moved to dismiss the entire Complaint for failure to state a cause of action. The Court granted the motion with respect to three of the claims, finding that Plaintiff had failed to plead essential elements for negligent infliction of emotional distress and slander, and that Plaintiff's negligence *per se* claim was based on a statute — a provision of New York's child endangerment law (Penal Law S. 260.10 (1)) — that could not give rise to a negligence *per se* claim.

As to the negligence claim, defendants cited the undisputed fact that on the night of the alleged rape, Craver, al-

though still in New York, had been returned to the custody of her mother and grandmother. Accordingly, the defendants argued, they had no duty of supervision and hence could not, as a matter of law, be found negligent.

Distinguished Jenny Jones Case

The Court rejected this argument and distinguished the case before it from that in "the Jenny Jones case" (*Graves v. Warner Bros.*, 253 Mich.App. 46, 656 N.W.2d 195 (2002)). Unlike the facts in the Jenny Jones case, "no great legal scrutiny is required to identify a legally cognizable duty which underlies the negligence claim." Such a claim allows, according to the court, holds even a non-parent responsible for negligent supervision of a child when that individual undertakes the care and supervision of a child, the child is injured, and those injuries are foreseeably related to inadequate supervision.

To the court's mind, the complaint alleged that the defendants brought a child they knew was considered by her mother to be an "out-of-control" teenager with disclosed emotional problems to New York, having asked that she be escorted by her grandmother and mother, presented itself as having special expertise in treating such a child (the show

Even a non-parent [can be] responsible for negligent supervision of a child when that individual undertakes the care and supervision of a child, the child is injured, and those injuries are foreseeably related to inadequate supervision.

(Continued on page 34)

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Maury Show Denied Motion to Dismiss in Negligence Case*(Continued from page 33)*

had offered post-program treatment options), allowed some stranger to come in contact with the girl on the show's property and obtain her contact information, left her after the show in the hands of her family members who had already told them they could not control her, and made no further efforts to protect her while she was in New York from herself or from the stranger, the "limo driver," she met at the show taping. (It is known that the alleged rapist was not, in fact, Maury Povich's limousine driver, as his driver is a woman.)

"The complaint describes an active relationship between the Show and the plaintiff at the time of the claimed rape, in that the plaintiff was subject to the Show's travel care and chaperone arrangements at the very time of the assault. Further, the Show is described as having a continuing bargained-for future obligation to provide plaintiff with counseling, to send her to a remedial camp, and to return her to her home state..."

"Clearly, the pleading states a fact pattern very different from the Jenny Jones case."

Physical Proximity Not Required

The court reasoned that even if the Plaintiff were no longer under the physical supervision of any of the defendants, the negligence claim could proceed because "a caretaker is not automatically exempt from responsibility merely because of a suspension of physical supervision of an injured minor where, as here, the conditions created by the caretaker are still in effect."

Neither the fact that there may have been contributory negligence on the part of the mother and grandmother, nor the fact that the plaintiff was a teenager, and not a young child, was fatal to the claim, the court found.

The court went on to say, however, that the defendants' argument could be "left to a later date to weigh whether the facts are such that the duty to supervise no longer lay with defendants."

With respect to the negligent hiring and retention claim, the Court likewise held that dismissal would be premature, reasoning that the merits of the claim could be evaluated only after the "role and status of each moving

defendant — and, indeed, of the alleged limousine driver and rapist — [was] clarified in the course of discovery."

The moving defendants have stated that they intend to vigorously fight the remaining claims.

Defendants are represented by Covington & Burling, New York.

**Oklahoma Court Denies
Prior Restraint*****Allows KOCO-TV to Air
Interview of Trial Witness***

Brenda Evers Andrew, a woman accused of killing her estranged husband, failed in her attempt to restrain KOCO-TV in Oklahoma from broadcasting an interview of Janna Larson, the daughter of Andrew's convicted co-defendant James Pavatt. *Oklahoma v. Andrew*, No. CF-2001-6189 (Okla. Dist., Okla. Cty). KOCO-TV aired the interview on its November 7 evening newscast as previously scheduled.

Oklahoma County District Judge Susan Bragg denied a motion filed by Andrew's attorneys that requested the court bar or delay public airing of a recorded interview with a trial witness. Andrew's attorneys asserted that the broadcast would impair Andrew's right to a fair trial by tainting the jury pool.

Robert Nelon, attorney for KOCO-TV, argued in his brief that Andrew's claim was of necessity speculative because although pretrial publicity *might* impair the defendant's fair trial right, the extent of such risk could not be determined prior to broadcast.

Moreover, Nelon argued that under *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), a court must place the burden of proof on the movant to show that the record clearly demonstrates that further publicity would so distort public opinion that it would be impossible to find 12 individuals who could reach a verdict based exclusively on evidence presented in court. In the absence of convincing evidence, Nelon's brief contended, the court must deny the motion for a prior restraint on broadcasting the interview.

U.S. Supreme Court Considers Whether to Review Florida Secret Docket Sealed Cases in Florida, Elsewhere Raise Question: "Pattern of Secrecy"?

The U.S. Supreme Court has asked Solicitor General Theodore Olsen to respond by Dec. 3 to a *certorari* petition filed by a Florida man in a habeas corpus case challenging his detention after the Sept. 11 terrorist attacks, which lasted

until March 2002. *M.K.B. v. Warden*, No. 03-6747 (U.S. order Nov. 4, 2003).

The petition is available only in heavily redacted form at <http://news.findlaw.com/hdocs/docs/scotus/mkbwarden62703cpet.pdf>. Among the information missing from the redacted petition are the name of the plaintiff and the appellate court from which the case comes to the Supreme Court.

But in March the *Miami Business Review* reported that the case was brought by Deerfield Beach, Fla. resident Mohammed Kamel Bellahouel, who was detained and then released. The suit was apparently originally filed in the Southern District of Florida, but was initially missing from the public docket of that court. A closed hearing in the case was held, apparently before District Judge Paul C. Huck.

An appeal to the 11th Circuit was initially listed on that court's docket and oral argument schedule, but removed from both when the *Business Review* asked the court clerk about the case. The appellate argument itself was held in closed session. See *MLRC MediaLawLetter*, March 2003, at 47.

According to the redacted *certorari* petition, the 11th Circuit affirmed the trial judge's order sealing the case docket, but ordered that the existence of the case itself be reflected in the court's public records. The case is now listed on the court's PACER docket system as *In re Petition for Writ of Habeas Corpus*, No. 01-20034 (S.D. Fla. filed Jan. 7, 2002), but all 66 docket entries in the public record are noted as sealed. According to the *Business Review*, the case was filed with the caption *Bellahouel v. Wetzel*, naming as defendant Monica S. Wetzel, former warden of the Federal Correctional Institution in Miami.

The case is still missing from the 11th Circuit's public docket. It is listed on the U.S. Supreme Court's public docket under the name *M.K.B. v. Warden*.

The *certorari* petition argues that the trial court improperly sealed the case without making the requisite findings required by *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

(Continued on page 36)

US Judicial Conference Decides To Make Federal Criminal Filings Available Online

The U.S. Judicial Conference has adopted new requirements that will make federal criminal filings available to the public over the internet. The new rules have not yet been implemented and the Judicial Conference did not set a deadline for when the rules must go into effect.

In September 2001, this policy-making body of the federal courts approved similar rules for remote public electronic access to civil, bankruptcy and appellate case files. At that time, however, the Conference did not wish to extend access to criminal cases opting instead to create a pilot program in which 10 district courts and one appellate participated. After monitoring this program for one and a half years, the Federal Judicial Center released its findings that there was no evidence of harm to any individual whose information was made available online. Nevertheless, the new rules stop short of granting unbridled access to entire case files.

The new policy prohibits certain documents – such as pretrial and pre-sentence investigations and sealed documents – from being made publicly available. The new rules also require that certain personal information be redacted to help prevent identity theft and maintain privacy in appropriate instances. For example, social security numbers and personal financial accounts will be reported by their last four digits and children will be identified by initials only. The party that files the document will bear responsibility for redacting personal identifier information. Failure to comply with these guidelines will result in sanctions.

The Judicial Conference consists of 27-members, with Chief Justice Rehnquist presiding over the Chief Judges from the 13 Circuit courts, 12 district court judges and the Chief Judge of the Court of International Trade.

Supreme Court Considers Cert. In Sealed Case

(Continued from page 35)

This petition raises the common-law and First Amendment rights of the public and the news media, who are oblivious to the proceedings below and cannot be heard themselves. Their ignorance of these proceedings is due to an improperly sealed dual-docket in the district court, which did not even acknowledge the existence of the case; and a refusal of the court of appeals to publicly acknowledge the appeal pending before it, that it decided the case, or the nature of its decision. ... The public and media are, therefore, still unaware that the courts below have held undocketed federal judicial proceedings in which all court filings are completely sealed from public view. *cert. petition*, at 9-10.

The Supreme Court was slated to consider whether to grant the *certorari* petition at its Nov. 7 conference, but is now likely to wait until it receives the government's response. Olsen had originally declined to respond to the petition.

The court's order requesting that Olsen respond came the same day that the Reporters Committee for Freedom of the Press submitted an amicus brief in the appeal. "This case is perhaps the most egregious recent example of an alarming trend toward excessive secrecy in the federal courts, particularly in cases that bear even an tangential connection to the events of Sept. 11, 2001," the brief states. Amicus brief at 1. It is available at <http://www.rcfp.org/news/documents/20031103-mkbvwarden.pdf>.

Other Sealed Cases Raise Concerns

Besides the *Bellahouel* case, reports of other sealed cases and statement by an aide to the chief judge of the federal District Court for the District of Columbia have raised concerns about secret cases and dockets across the nation.

On Oct. 23, the *St. Louis Post-Dispatch* reported on a sealed case in which eight Columbians are charged with the kidnapping and murder of a Missouri native who was working as an oil worker in Ecuador. The

newspaper reported that, in addition to all the documents in the case, except the indictment, being sealed and all proceedings taking place in closed courtrooms, the case's docket itself is also sealed.

But it was a comment in the article by an aide to D.C. District Court Chief Judge Thomas F. Hogan that garnered the most attention. The aide, Shelly Snook, said that he and Hogan estimated that "30 to 40 percent of the criminal cases that come over here are sealed – and that's at the motion of the prosecutors." Snook added that most of the sealed cases are drug prosecutions with a cooperating defendant.

The statement led the Reporters Committee for Freedom of the Press and the Society of Professional Journalists to send separate letters to Attorney General John Ashcroft, expressing concern that the Justice Department may be violating the letter and spirit of 28 C.F.R. § 50.9, which states a "strong presumption" against closed proceedings. The provision also requires approval of the Deputy Attorney General or the Associate Attorney General before a federal prosecutor seeks closure, requires "adequate" public notice of the closure motion, and requires release on transcripts of any closed proceedings as soon as "the interests requiring closure no longer obtain."

The two letters called for the Justice Department to investigate whether federal prosecutors in the D.C. District Court were complying with the regulations.

Previously, there were reports of secret dockets in the Southern District of Florida, and Connecticut. See *MLRC MediaLawLetter*, March 2003, at 47; and May 2003, at 41.

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Federal Judge Closes Door to Thousands of Connecticut Court Files

By Stephanie S. Abrutyn

In a decision that effectively could leave thousands of Connecticut court files locked away from public view forever, United States District Court Judge Gerard Goettel dismissed a lawsuit filed by *The Hartford Courant* and *The Connecticut Law Tribune* seeking access to docket sheets for a multitude of cases that appear to have been sealed by administrative fiat. *Hartford Courant v. Pellegrino*, No. 3:03 CV 00313, (D. Conn. Nov. 3, 2003). Judge Goettel found that neither the Chief Court Administrator nor the Chief Judge, the named defendants, had the authority to grant the relief sought by the lawsuit.

Systemic Secrecy

The suit came about earlier this year, after journalists discovered a memorandum issued by the Office of the Chief Court Administrator documenting a system for the wholesale removal from public view of thousands of court files and dockets. The memo instructed clerks on how to designate and handle certain court files.

In those cases designated "Level 1," the entire case file is sealed and the very existence of the file is secret. In those designated "Level 2," the case name and docket number are disclosed, but the rest of the file, including what is commonly known as a docket sheet, is sealed. In those designated "Level 3," certain individual documents are sealed.

Significantly, prior to the recent news articles, the vast majority of Connecticut citizens and members of the judiciary, including the Chief Judge, were unaware of the system or the existence of thousands of sealed Level 1 and Level 2 case files.

According to Chief Justice William J. Sullivan, who testified in a Connecticut Judiciary Committee hearing called after public disclosure of the practice, this type of sealing started in the 1970's, "when it became an unwritten rule" among Superior Court judges that they would seal an entire file "whenever they felt it was necessary." When the judicial branch was computerized in the mid-1980's, the clerks developed the Level 1, 2, and 3 designations.

No Public Notice of Sealing

Significantly, there is no indication or evidence that the constitutionally-mandated processes for public notice and an opportunity to be heard set forth in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984), were followed prior to any files being designated Level 1 or 2. Nor does it seem that the designations followed any specific, on-the-record findings that closure is necessary to advance a compelling government interest and that there are no less restrictive alternatives. In fact, there is no indication that sealing orders actually were entered in the vast majority of cases.

Practically speaking, the absence of public dockets, or any other information about the cases, makes it impossible for anyone to seek to intervene and unseal any individual files. Where would one file? Who would one serve? Is one seeking access to the file from the clerk because it is being withheld in the absence of a sealing order, or

is one seeking to unseal files because whatever order was entered is impermissibly broad? Even if a motivated party wanted to seek access to some or all of the Level 1 and Level 2 files, there simply is not enough information available to do so.

Press Sues for Docket

Facing the practical problem of being unable to proceed in individual cases, *The Hartford Courant* and *Connecticut Law Tribune* filed a lawsuit against Chief Court Administrator Joseph Pellegrino and Chief Justice William J. Sullivan alleging violation of the First Amendment right of access to court documents and proceedings. The case seeks injunctive relief requiring the defendants to provide a copy of the docket sheet for each Level 1 and Level 2 case (whether concluded or ongoing), or to produce such other documents as will disclose the names and status of the parties, the Judicial District and docket number of the case, the nature of the case, and the nature and description of every document in the file of the case. Significantly, the newspa-

(Continued on page 38)

This type of sealing started in the 1970's, "when it became an unwritten rule" among Superior Court judges that they would seal an entire file "whenever they felt it was necessary."

Federal Judge Closes Door to Conn. Court Files

(Continued from page 37)

pers are not seeking to unseal any substantive case documents or files.

Judge Pellegrino and Justice Sullivan moved to dismiss the complaint on a variety of grounds. First, they claimed that the federal court should abstain from hearing the case under a variety of different theories, arguing that the case more properly lies in Connecticut State courts. Judge Goettel rejected those arguments, finding that the facts of the case “do not fit neatly into one of the ... abstention doctrines.”

Second, defendants argued that neither of them has the authority to provide the information sought in the case. According to defendants, to provide the information requires them to alter or reconsider sealing orders entered by other judges in each of the Level 1 and 2 cases.

The newspapers countered by pointing out, first and foremost, that there is no evidence anywhere that a single order was entered sealing any of the files. They also observed that the docket sheets to which they are seeking access are maintained by and in the custody of the Office of the Chief Court Administrator. Finally, they reminded the

Court that the clerks denying access are doing so under the instruction of Judge Pellegrino as set forth in his memorandum.

Nonetheless, glossing over the absence of any evidence in the record that such sealing orders exist, Judge Goettel granted the motion to dismiss, concluding that defendants do not have “the authority nor the power to provide the plaintiffs with the relief they seek.” Neither defendants in their motion nor Judge Goettel in his decision identified who, if not defendants, would properly be empowered to grant the relief.

Plaintiffs plan to seek expedited appeal of the decision.

Stephanie S. Abrutyn is Sr. Counsel/East Coast Media for Tribune Company, owner of The Hartford Courant. Outside counsel for The Courant in this case is Ralph G. Elliot of Tyler, Cooper, and Alcorn (Hartford, CT). The Connecticut Law Tribune is represented by Robert A. Feinberg, Deputy General Counsel of American Lawyer Media and Daniel Klau of Pepe & Hazard (Hartford, CT). Judge Pellegrino is represented by Carmody & Torrence (Waterbury, CT).

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Federal Court Requires Equal Press Access to Official Portion of Mexican Independence Day Event

By James Lichtman

In a September 10, 2003 opinion reinforcing the First Amendment right of equal press access to official public events, Federal District Court Judge Audrey B. Collins of the Central District of California prohibited the City of Los Angeles from granting preferential access to one media outlet over all others to cover the official portion of the annual "El Grito" ceremony. *Telemundo of Los Angeles, Inc. v. The City of Los Angeles*, Case No. CV 03-6288ABC (JTLx), ___ F. Supp. ___, 2003 WL 22226852 (C.D. Cal. Sept. 10, 2003).

Sponsored by City and TV

"El Grito" is an event commemorating the cry ("grito") of Father Miguel Hidalgo y Costilla in 1810 that was the symbolic beginning of Mexico's war for independence from Spain. It is held in Mexico City and simulta-

neously in locations around the world every year on September 15, the eve of Mexican Independence Day.

In Los Angeles, the event is held in City Hall Plaza. It begins with a live musical concert, and culminates in an official 15-minute ceremony on the steps of City Hall that features a reenactment of the historic cry by the Los Angeles Mexican Consul General and includes appearances by the Mayor, the City Attorney, Council President Alex Padilla and other City officials.

For a number of years, the El Grito event in Los Angeles has been jointly sponsored by the City, the Mexican Consul General, a private civic organization called the Comité Mexicano, and KMEX, the Los Angeles station of Spanish-language broadcaster Univision.

Several months before this year's event, the Los Angeles stations of Telemundo, another Spanish-language network, informed the City that it wanted to cover the official portion of the El Grito event with equal access for its journalists and news technicians to that granted KMEX. The Telemundo stations attempted numerous times to discuss their access request with City Council President Alex Padilla, who organized this year's El Grito event for the

City. They were put off until August 1, when Council President Padilla responded with a letter stating that Univision would have "exclusive rights to broadcast from the stage" due to its financial interest in the event, and that the Telemundo stations and other broadcasters would be relegated to covering the event from a media riser across the street from the ceremony. Subsequent correspondence from the Telemundo stations and a meeting between them, Council President Padilla and the Los Angeles City Attorney failed to alter the City's position.

Telemundo Seeks TRO

On September 3, 2003, Telemundo filed a Complaint alleging a violation of 42 U.S.C. § 1983 against the City and Council President Padilla, along with an ex parte application for a TRO and a preliminary injunction preventing the City from denying the Telemundo stations equal access to the official portion of the El Grito event. The Court granted the

requested TRO on September 5, and set a hearing on the preliminary injunction motion for September 10, five days before the event.

The Court allowed KMEX, the Univision station, to intervene in the case; in its opposition papers and declarations, KMEX offered to provide Telemundo and other news outlets pool feed of its coverage of El Grito on the condition that these news outlets broadcast the pool feed on the same one-hour time delay that Univision intended for its broadcast.

State Action Found

Judge Collins granted the preliminary injunction sought by the Telemundo stations, ordering the City to grant the Telemundo stations equal camera positioning to that granted KMEX, places for an equal number of cameras, equal truck positioning, equal access to stage audio, equal press credentials, equal access to production meetings, and equal access to rehearsal meetings.

As an initial matter, the Court rejected the City's and Univision's argument that no "state action" was present,

(Continued on page 40)

As an initial matter, the Court rejected the City's and Univision's argument that no "state action" was present.

Federal Court Requires Equal Press Access

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holding that the City's denial of equal access to the El Grito ceremony "was committed as part of a formal policy or custom." The Court pointed to the City's "longstanding practice of sponsoring the El Grito ceremony and partnering exclusively with Univision to broadcast the event," and to the fact that the event was to occur at City Hall and include appearances by the Mayor, Council President Padilla, and other high-ranking City officials. The Court also cited minutes from City Council meetings indicating that the City expends public money and resources on the El Grito celebration.

First Amendment Analysis on Access

Having found state action, the Court turned to the principal first recognized in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578-82 (1980), that the First Amendment gives the press and public an affirmative right of access to newsworthy matters. In applying that right, the Court stated that it first needed to consider the character of the location

where the expressive activity will occur. The Court held that the El Grito ceremony is a public forum, noting that "for at least three years, the entertainment and official ceremony have taken place on government property, transforming publicly owned property into a public forum for expressive activity."

The Court then examined whether the City was acting in a proprietary or governmental capacity, because in its proprietary capacity the government may restrict access to performances produced by private entities on public property if the restrictions are not arbitrary and the event is purely commercial. The Court found that the City was acting in a governmental capacity with regard to El Grito, inasmuch as the official portion of the event featured City officials and the City Council declared the El Grito celebration a "Special Event" sponsored by the City.

The Court turned to the central question of whether the City's restrictions on Telemundo's broadcast of the El Grito official ceremony were reasonable. The Court held that they were not, citing a number of cases for the proposition that

discriminatory access to public forums or information is generally violative of the First Amendment. *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir.1986); *American Broadcasting Companies v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir.1977); *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C.Cir.1977); *United Teachers of Dade v. Stierheim*, 213 F. Supp.2d 1368, 1373-74 (S.D.Fl.2002); *Westinghouse Broadcasting Co., Inc. v. Dukakis*, 409 F. Supp. 895, 896 (D.Mass.1976); *Borreca v. Fasi*, 369 F. Supp. 906, 909-10 (D.Haw.1974).

The Court held that "Defendants have not presented one reason, compelling or otherwise, why they initially decided that KMEX's cameras should be granted access to the official ceremony while Telemundo should be required

to use a pool feed," and rejected the City's efforts to come up with reasons for the first time in their opposition papers.

Turning to the next factor bearing upon the appropriateness of preliminary injunction relief, the Court held that the Telemundo stations had

"demonstrated such a substantial likelihood of success on the merits of their claims, they need only show a reasonable possibility of irreparable injury" The Court found that the Telemundo stations had made such a showing, stating that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury for purposes of the issuance of a preliminary injunction." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

The Court rejected the defendants' argument that Telemundo would not be irreparably harmed since it would be provided a pool feed of KMEX's broadcast, holding that "embodied in Telemundo's First Amendment rights is its right to decide what to film, what to emphasize, and what images to relay to viewers." The Court also found that the defendants had not shown that pooling was necessary.

With regard to the balance of hardships, the Court rejected KMEX's argument that the Telemundo stations had delayed in seeking judicial relief until shortly before the event when it would be difficult to modify the access ar-

The Court turned to the central question of whether the City's restrictions on Telemundo's broadcast of the El Grito official ceremony were reasonable. The Court held that they were not.

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rangements. The Court found the record to be clear that “Telemundo sought access . . . almost four months before the event, when it raised the issue with Council President Padilla.” The Court further held that KMEX’s commercial interest in the production of the El Grito ceremony did not outweigh Telemundo’s First Amendment rights. As to the final factor bearing upon preliminary injunctive relief, the Court found that the public interest favored a diversity of coverage of newsworthy events.

Plaintiffs Telemundo of Los Angeles, Inc. and Estrella Communications, Inc. are represented by Theodore J. Boutrous, Jr., William E. Thompson and Gregory D. Brown of Gibson, Dunn & Crutcher LLP. Defendant-Intervenor Univision Television Group, Inc. d.b.a. KMEX-TV is represented by Richard K. Simon and Matthew Oster of McDermott, Will & Emery.

James Lichtman is Vice President, Litigation, National Broadcasting Company, Inc.

Gag Order Remains in South Dakota Custody Fight

By John Borger

A South Dakota circuit court judge has refused to modify a stipulated gag order in a juvenile custody dispute that received national attention, despite a joint request by two parties and ABC to allow one final interview. *Meldrum v. Novotny*, Tripp County File No. 98-59, Sixth Judicial Circuit of South Dakota, October 6, 2003.

In July 2003, circuit judge Max Gors had approved the choice of 13-year-old Timmie Meldrum, Jr., to live in South Dakota with Chuck Novotny, the boyfriend of his deceased mother, rather than with his father in Illinois. Novotny had raised Timmie since moving in with his mother in 1992. The mother died in a car accident in 1998, leading to a long custody fight between Novotny and Tim Meldrum, Sr. *See Meldrum v. Novotny*, 640 N.W.2d 460 (S.D. 2002) (holding that circuit judge could consider whether extraordinary circumstances could overcome presumption in favor of custody by biological parent). In 2001, journalists watched and photographed as Timmie lashed out at Meldrum during a court-ordered custody change in Missouri Valley, Iowa.

In August 2002, the two adults and the child (separately represented) stipulated that both men would share legal custody of Timmie, who would spend the school year in Illinois and 2003 summer break in South Dakota before making a final decision in summer 2003 where he would live until his majority.

Because the unusual custody battle had received extensive media attention, the stipulation and subsequent order of August 20, 2002, provided that “the parties, their attorneys, and their immediate families shall all refrain from discussing the case with the media or internet exchanges,” and that any

breach would be treated as contempt of court. Timmie and Novotny, joined by ABC, asked the court to lift that protective order. Meldrum Sr. opposed the request, arguing that it would resurrect extensive and demanding media coverage that had disrupted family relationships before the protective order.

Judge Gors denied the request, noting that not all parties agreed to the change, that “a deal is a deal,” and “if the protection order is removed, it would disturb the finality of the settlement.” The protective order preserves the confidentiality of juvenile proceedings and only applies until Timmie is 18, while the state “has an interest in promoting the harmony of families,” he wrote.

The court expressed a “trust” in ABC and local media to act appropriately, but feared others would not. The judge wrote: “The problem is that if I let Timmie talk to the media, then I have to let all of the parties and their lawyers talk to the media. And if I let all of the parties talk to ABC and the [Sioux Falls] Argus Leader, then I also have to let them all go on Springer and talk to the National Enquirer and Hustler.”

“The tabloids at the checkout counter of the grocery store graphically illustrate how peoples’ lives are exploited for the entertainment of the public,” the court continued. “None of us wants the parties to get on the ‘Springer’ program and have Meldrum and Timmie and Novotny duke it out on national television. Missouri Valley in 2001 was bad enough. Enough is enough. . . . Reopening the wounds in this case is not in Timmie’s best interest.”

Craig Pfeifle of Lynn, Jackson, Shultz & LeBrun, P.C., Rapid City, SD, represented intervenor ABC in the proceeding. No plans for appeal are apparent.

Records on Sexual Abuse of Minors by Deceased Priests Ordered Released by Maine Superior Court

By Sigmund Schutz

On October 22, 2003, a Maine Superior Court Justice ordered the Maine Attorney General to disclose to the public records received from the Catholic Diocese concerning *deceased* priests accused of sexually abusing minors, as well as records generated by the State's investigation into those allegations. *Blethen Maine Newspapers, Inc. v. State of Maine*, slip op. AP-02-43 (Me.Super.Kennebec Cty. Oct. 22, 2003).

In earlier proceedings, *Blethen Maine Newspapers, Inc.*, publisher of the State's largest dailies, initiated a state freedom of information action in Superior Court to gain access to those records. At that time, the Attorney General objected, based in part on grounds that disclosure of the records would interfere with law enforcement proceedings. While a Maine Superior Court Justice denied access to the records, the Court retained jurisdiction pending the outcome of the investigation.

Blethen Maine Newspapers, Inc. v. State, 2002 WL 31360637 (Me.Super. Sept. 11, 2002).

Issue is Privacy

Six months later, the Attorney General notified the Court that the records would in no way interfere with law enforcement proceedings. However, the Attorney General still declined to make the records public on the grounds that disclosure would constitute an unwarranted invasion of personal privacy.

The "personal privacy" exemption in Maine's Criminal History Record Information Act, 16 M.R.S.A. § 614, contains language similar to Exemption 7(C) of FOIA, 5 U.S.C. § 552(b)(7)(C). Exemption 7(C) of FOIA is now a hot issue as the United States Supreme Court is due to examine it this session in connection with the release of certain Polaroids of the dead body of former Deputy White House Counsel Vincent Foster. *Favish v. Office of Indep. Counsel*, 217 F.3d 1168 (9th Cir. 2001), (*summary judgment granted on remand*, No. CV. 97-1479, 2001 WL 770410 (C.D. Cal. Jan.

11, 2001)), (*aff'd* 37 Fed.Appx. 863, 2002 WL 1263948 (9th Cir. Jun 06, 2002)), (*reh'g en banc denied* (9th Cir. Aug. 16, 2002)), *cert. granted* 123 S.Ct. 1928 (2003).

Public Interest Outweighs Privacy

On October 22, 2003, the Maine Superior Court, asserting its retained jurisdiction, found that while there "might" be a "residual privacy right" implicated by disclosure of the records at issue, disclosure was warranted after balancing any residual privacy interest against the public's interest in disclosure. The Court found that "[a]ny privacy rights the alleged victims, witnesses and alleged abusers originally had have been eroded by time, life and the manner in which the information came to the Attorney General" (*Blethen*, at 4) –

While there "might" be a "residual privacy right" implicated by disclosure of the records at issue, disclosure was warranted after balancing any residual privacy interest against the public's interest in disclosure.

an apparent reference to the voluntary action by the Diocese to make certain of the records available to the State. In contrast, the Court found,

"the public interest in allegations of sexual abuse of minors, particularly how

such allegations were or were not investigated by the Diocese and law enforcement officials is of great and appropriate public interest." (*Blethen*, at 4)

Accordingly, any residual personal privacy rights "must bend to the public interest."

The Attorney General filed a notice of appeal on November 12, 2003. The appeal will explore in detail the extent to which "personal privacy" concerns can impact disclosure of records concerning deceased persons. In addition, the appeal may address the Superior Court's determination that redacting identifying information concerning alleged victims from the records was not warranted given "how much information would have to be taken out and the extent to which this information is likely known, at least at a local level." *Blethen*, at 4 n.2.

Blethen Maine Newspapers, Inc. is represented by Jonathan S. Piper and Sigmund D. Schutz of Preti, Flaherty, Bellevue, Pachios & Haley, LLC. The State of Maine is represented by Assistant Attorney General Leanne Robbin of the Maine Department of Attorney General.

Montana Supreme Court Upholds Release of County Commissioner's Drunk Driving Arrest Materials

Lower Court's Ban on Copying and Publishing Records Not Addressed

By Kevin Twidwell

Finding that a county commissioner's off-duty decision to drive drunk and without a valid driver's license raised questions about her ability to perform her elected duties, the Montana Supreme Court has upheld a newspaper's right to examine arrest video tapes and law enforcement investigatory reports about her arrest. *Jefferson County v. Montana Standard*, 2003 MT 304, 2003 WL 22532925 (Mont. Nov. 6, 2003).

A unanimous five-judge panel rejected the county official's argument that the state's "right to privacy" provision in its Constitution protected her from disclosure of the investigatory material because she was not acting in her capacity as a county commissioner when she was arrested. Balancing privacy against the state Constitutional "right to know" provision, the Supreme Court affirmed the lower court's release of the information. The Court's opinion did not address, however, the propriety of the judge's decision to allow the newspaper to report on the content of the materials but prohibit the newspaper from copying and publishing the actual records and video tapes. That portion of the lower court decision will stand unless the newspaper initiates a new challenge.

The Arrest and Lower Court's Decision

On February 26, 2001, a sheriff's deputy arrested Beaverhead County Commissioner Donna Sevalstad on charges of driving under the influence of alcohol and driving without a valid license. The arrest and sobriety tests administered to her were captured on video tape. Ms. Sevalstad, who was arrested in neighboring Jefferson County in Southwestern Montana, pleaded guilty to both charges on April 3, 2001. The *Montana Standard*, a daily newspaper in nearby Butte, reported the arrest and later her guilty pleas and sentence. On April 5, 2001, the newspaper requested that county officials release the investigation reports and any video tapes taken at the time of the arrest.

Instead of releasing the information, the County Attorney's Office filed a declaratory judgment action under the Montana Criminal Justice Information Act, requesting that

the district court determine whether the information could be released to the press.

In a series of four orders, the district court collected the records and weighed the interests of the parties under two competing provisions of the Montana Constitution. The newspaper argued that it was entitled to the information under Montana's Constitutional "right to know" provision, which provides:

No person shall be deprived of the right to examine documents or to observe the deliberations of all public bodies or agencies of state government and its subdivisions, except in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure.

Art. II, Sec. 9., Mont. Const. Conversely, Ms. Sevalstad argued that, even though she was a public official, the information was protected from disclosure under the Montana Constitution's "right to privacy" provision, which states:

The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest.

Art. II, Sec. 10, Mont. Const.

Noting the inherent conflict between the two provisions as they apply to law enforcement's investigatory materials, the district court ordered an *in camera* inspection of the documents, which included:

- the arresting officer's written report;
- video tapes of the arrest and transport of the commissioner to the Sheriff's office and the booking process at the Sheriff's office;
- a dispatcher's log;
- an arrest report;
- a "Montana Department of Justice Implied Consent Advisory" that indicated the defendant refused to submit to a breath analysis; and
- an "Alcohol Influence Report" regarding the sobriety test conducted by the officer.

See Brief for Appellant, Exhibit 4 (Jan. 25, 2002).

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Montana Upholds Release of Arrest Materials

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After examining the documents and tapes, the district court ordered the county to provide copies to the newspaper. The court directed the clerk to redact the driver's license and social security numbers from the written materials and further ordered that the newspaper "may examine and review the evidence and may report accurately on its contents and may publish its report" but "shall not copy nor publish the video tapes nor the written materials."

Ms. Sevalstad appealed the court's decision to release the information. The newspaper did not appeal any aspect of the court's ruling.

The Supreme Court's Decision

In its opinion, the Montana Supreme Court held that in cases involving confidential criminal investigation materials, such as those sought by the newspaper, "an inevitable conflict exists between the public's right to know and an individual's right to privacy." *Montana Standard*, 2003 MT 304, slip op. at 6, 2003 WL 22532925 at *3. The Court found that the newspaper was an authorized party to receive the arrest information under the Montana Criminal Justice Information Act, but that the newspaper's Constitutional right to know must be balanced against commissioner's Constitutional right to privacy. *Montana Standard*, 2003 MT 304, slip op. at 6-7, 2003 WL 22532925 at *3.

On appeal, Ms. Sevalstad argued that her expectation of privacy was reasonable because her arrest was not related to her duties as a public official. Conversely, the newspaper argued that Ms. Sevalstad's conduct violated the public trust and raised questions about her ability to exercise proper judgment as a public official. *Id.*

Balancing the competing Constitutional provisions, the Supreme Court found that given Ms. Sevalstad's status as public official, the newspaper was entitled to the information because any expectation of privacy Sevalstad had in her arrest information was unreasonable. *Montana Standard*, 2003 MT 304, slip op. at 7-8, 2003 WL 22532925 at *4.

While Sevalstad's driving habits may not pertain to her position as a County Commissioner, her

decision to violate the law directly relates to her ability to effectively perform her job duties. That is, Sevalstad's decision to violate the law questions her judgment. Her violation of the law may also have an effect on her ability to work effectively with her peers and to properly supervise other employees. Society will not permit complete privacy and unaccountability when an elected official is accused of misconduct which is related to the performance of his or her public duties. Therefore, we conclude that because the information sought by *Montana Standard* relates to Sevalstad's ability to perform her duties as a County Commissioner, any expectation of privacy she has regarding such information is unreasonable. *Id.*

Because Sevalstad's expectation of privacy was unreasonable, the Supreme Court further found that the demands of individual privacy did not clearly exceed the merits of public disclosure. *Montana Standard*, 2003 MT 304, slip op. at 8, 2003 WL 22532925 at *4.

Finally, finding that Ms. Sevalstad retained a privacy interest in personal information not relevant to her status as a public official, the Supreme Court held that the district court properly ordered the redaction of her social security and driver's license numbers. *Id.*

Although the Supreme Court mentions that the district judge, in weighing the interests of the parties, prohibited the newspaper from copying and publishing the written documents and the video tapes, the Court did not address the propriety of that portion of the district judge's order. *Montana Standard*, 2003 MT 304, slip op. at 8-9, 2003 WL 22532925 at *5

The *Montana Standard* was represented by Ronald F. Waterman and Laura D. Vachowski of the Helena Law firm of Gough, Shanahan, Johnson & Waterman. Ms. Sevalstad was represented by Robert T. Cumins of Helena.

The opinion and the parties' briefs are available at: <http://www.lawlibrary.state.mt.us/dscgi/ds.py/View/Collection-9413>

Kevin A. Twidwell is with Garlington, Lohn & Robinson, PLLP, Missoula, Montana.

Washington State Court Judge Orders City Government To Disclose Date Of Birth Records Pursuant To Public Disclosure Act

By Michael D. Rothberg

In a case of first impression in the state of Washington, a superior court judge ordered the city of Tacoma to produce to Seattle television station KIRO-TV date of birth records of city employees pursuant to KIRO's request under Washington's Public Disclosure Act. *KIRO, Inc. v. City of Tacoma*, No. 03-2-10567-3 (Wash. Super. Ct. Aug 28, 2003).

On May 6, 2003, KIRO made an open records request to the city of Tacoma for the full names, departments, job positions and descriptions, salaries, dates of birth, start dates and end dates for all city employees. KIRO intended to use this information to run criminal background checks on city employees and to determine the manner in which the city screened for, and responded to, such individuals. KIRO's investigation came on the heels of widespread press reports and public criticism of city officials for their handling of police officers with histories of domestic violence.

The city provided all of the requested records except the dates of birth of its employees, claiming that this information did not constitute a "public record" under Washington's Public Disclosure Act. After KIRO threatened to file suit, the city agreed to turn over the date of birth records. However, in the face of pressure from the union representing the city's employees, the city again reversed course and refused to produce the records, this time claiming that they were exempt from disclosure because of "prevailing privacy considerations." On August 19, 2003, KIRO filed suit in Washington's Superior Court for violation of the Public Disclosure Act.

Washington State's Public Disclosure Act

Washington's Public Disclosure Act, Wash. Rev. Code 42.17.250 *et seq.*, requires that each public agency "shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions . . . of this Section . . . or other statute." The statute defines "public record" to include "any writing containing information relating to the conduct of

government or the performance of any governmental or proprietary function..."

The statute specifically exempts from disclosure information that would violate an individual's right of privacy. For the privacy exemption to apply, the state agency must establish that the requested information if disclosed

- (i) would be highly offensive to a reasonable person, and
- (ii) is not of legitimate concern to the public.

Unlike the federal Freedom of Information Act, Washington's statute does not permit the balancing of these two factors, but rather requires that both conditions be satisfied.

The Parties' Arguments Regarding Disclosure

In its motion to compel production of the requested information, KIRO asserted that date of birth records plainly were "public records" under the statute. Indeed, the statute itself expressly provides that "[p]ersonal information in files maintained for employees . . . of any public agency" must be disclosed unless doing so would violate the employees' right of privacy. KIRO further noted that the dates of birth of city employees were no less "public records" than employee names, departments, job positions or descriptions, salaries, start dates and end dates – information that the city freely provided to KIRO.

KIRO also asserted that the city could not establish that date of birth records were exempt from disclosure under the statute's privacy exemption. First, the disclosure of such information, which is of public record, would not be "highly offensive" to a reasonable person. The Washington Supreme Court has stated that the right to privacy applies only to the intimate details of one's personal and private life, such as "sexual relations . . . family quarrels, many unpleasant or disgraceful or humiliating illnesses, most intimate personal letters, most details of a man's life in his home, and some of his past that he would rather forget." *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 136, 580 P.2d 246, 253 (1978). Thus, the exemption would not extend to a person's date of birth, which is present on the driver's licenses of Washington residents and is regularly disclosed as part of everyday commerce (e.g., filling out credit card, insurance or mortgage applications, etc).

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Wash. State Court Judge Orders City Gov't To Disclose Date Of Birth Records Pursuant To Public Disclosure Act

(Continued from page 45)

Second, KIRO asserted that the disclosure of the date of birth records was of legitimate public concern because it would help facilitate the station's reporting on a matter of significant importance to the public. The station noted that the disclosure of this information would provide a distinct, additional identifier necessary for the station to properly match the names of city employees against names in other public databases that KIRO intended to search, such as local, state and national databases reflecting criminal records. KIRO argued that, without this important identifier, it would be extremely difficult for it to distinguish among city employees with the same name as one another, or with the same name as individuals in other public databases, thereby increasing the risk of misidentification.

City: Info Not Public Record

In its opposition brief, the city asserted that dates of birth records were not "public records" under the statute because they purportedly did not shed any light on the performance of any governmental role or function. The city also asserted that disclosure of dates of birth would be "highly offensive to a reasonable person" because it purportedly is not the type of information that normally is shared with strangers, and because such information, when coupled with the simultaneous release of other identifying data (e.g., names), would subject its employees to an undue risk of identity theft and other forms of fraud.

Interestingly, despite the statute's requirement that both prongs of the privacy exemption be satisfied, the city did not directly contest that KIRO's request was of legitimate public concern, but rather more generally alleged that KIRO's intended database search was "cynical" and purely speculative.

The Court Orders the Disclosure of the Date of Birth Records, Awards Attorneys' Fees and Costs to the Station, and Imposes a Monetary Penalty on the City

Judge Bryan Chushcoff heard oral argument on KIRO's request on August 29, 2003. Ruling from the bench at the conclusion of the parties' arguments, Judge

Chushcoff ordered the city "immediately" to produce the date of birth records to KIRO. The Court also ordered the city to reimburse KIRO for its reasonable attorneys' fees and costs, and to pay a statutory penalty of \$5 for each day the records were withheld.

The Court first noted that, if names of public employees are considered "public records" under the Public Disclosure Act, then date of birth information, which is merely an additional identifier of the named individual, must be as well. In addition, the Court ruled that the city failed to satisfy the "legitimate public concern" prong of the privacy exemption, noting:

"I think that it is a legitimate concern of the public, if they can get the name of a person, that they also need to be able to identify precisely who that person is. A date of birth identifier seems to me something that does not intrinsically lead to other information. It simply identifies that particular person."

The city produced the requested records to KIRO several hours after the hearing ended, and has elected not to appeal the Court's ruling. A copy of the court's ruling can be obtained from MLRC or counsel.

Michael D. Rothberg and William A. Goldberg of Dow, Lohnes and Albertson in Washington, D.C., and Judith A. Endejan of Graham & Dunn in Seattle, Washington represented KIRO-TV. Steven H. Winterbauer and Adam G. Cuff of Winterbauer & Diamond in Seattle, Washington represented the city of Tacoma.

Any developments you think other MLRC members should know about?

Call us, send us an email or a note.

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Minnesota Supreme Court to Review University's Claim That Presidential Search Not Subject to Open Meetings and Open Records Laws

By John Borger

Do state constitutional provisions vesting the internal management of universities with their university governing boards prevent the application of state open meeting and open records laws? The Minnesota Supreme Court will address that issue in the next year.

The Supreme Court has granted review of a decision by the Minnesota Court of Appeals that held such access laws do apply to university boards. *Star Tribune Co. v. University of Minnesota Board of Regents*, 667 N.W.2d 447 (Minn.App., Aug. 19, 2003), *rev. granted*, 2003 Minn. LEXIS 653 (Minn. Oct. 21, 2003). The court of appeals had reasoned that

The restrictions imposed by the DPA [Data Practices Act] and the OML [Open Meeting Law] ... are merely procedural: the board may choose the president at its sole discretion, but it must do so in accord with the DPA and the OML. We conclude that the constitution does not preclude imposing the OML and the DPA on the university's procedure for selecting its president.

667 N.W.2d at 451.

Press Sought Finalists' Info

This case presents claims for public access to information surrounding the November 2002 selection of Robert

Bruininks as the president of the University of Minnesota. Bruininks already was serving as interim president. The Regents decided to offer him the presidency only two days after announcing that – contrary to earlier expectations – they would secretly conduct the interviews of finalists.

Five media organizations – the Star Tribune, St. Paul Pioneer Press, Rochester Post-Bulletin, Minnesota Daily, and the Minnesota Joint Media Committee – sued to obtain the names and other background information on the unsuccessful finalists and to declare that the Re-

gents had violated the OML. In March 2003, the Hennepin County District Court held that the Regents were subject to the access laws and ordered disclosure of the finalist names, but appellate courts have stayed that disclosure pending resolution of the merits.

The Minnesota Court of Appeals observed that although results among the states have not been consistent, "the trend appears to be towards open presidential searches."

Precedents From Other States

The University relies heavily on *Federated Publications, Inc. v. Board of Trustees of Michigan State University*, 594 N.W.2d 491 (Mich. 1999), which held in the context of a presidential search that the Michigan Constitution prevented application of that state's open meeting and open records acts to "informal" meetings of MSU board of trustees.

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"Website of the Month"

By Steve Zansberg

OK, so you just filed your reply brief with the United States Supreme Court (or other appellate tribunal) and you'd like to relax for a second before preparing your outline for oral argument. What to do next? You might enjoy *hearing* how some of your fellow First Amendment practitioners made their pleas before the Justices in several landmark First Amendment cases. Just point your browser to the oral arguments, available as audio files, on the "Oyez" website, compiled and hosted by Professor Jerry Goldman at Northwestern University. <<http://www.oyez.org>> A listing of ten cases in the area of "libel or defamation" is available at <<http://www.oyez.org/oyez/portlet/directory/400/415/>> Enjoy!

Please send your suggestions for helpful websites to be featured here to szansberg@faegre.com. Thanks.

Minn. Sup. Ct. to Review University's Claim That Presidential Search Not Subject to Open Meetings & Open Records Laws

(Continued from page 47)

In contrast, *Board of Trustees of State Institutions of Higher Learning v. Mississippi Publishers Corp.*, 478 So.2d 269, 276 (Miss. 1985), *reh'g denied*, held that Mississippi's constitutional grant of powers to the higher education board did not provide any reason to exempt the board from statutes designed to keep the public informed of official action, including meetings to assess the strengths and weaknesses of academic programs.

The Minnesota Court of Appeals observed that although results among the states have not been consistent, "the trend appears to be towards open presidential searches." 667 N.W.2d at 451 n.3, *citing* Charles N. Davis, *Scaling the Ivory Tower: State Public Records Laws and University Presidential Searches*, 21 JOURNAL OF COLLEGE AND UNIVERSITY LAW 353, 354, 367 (1994) ("most state public-records laws require open presidential-search records" and "cases ... demonstrate that the public's right to access to the

search process outweighs the privacy interests of either the applicants or the university").

Amici in the case before the Minnesota Supreme Court include the Reporters' Committee for Freedom of the Press, the Student Press Law Center, and some unidentified presidential finalists. The court has not yet set a date for oral argument, which is expected sometime in early 2004.

Justice Alan Page, a former regent of the University of Minnesota, recused himself from participation in the case. An even division of the remaining six justices would result in affirmance of the court of appeals decision in favor of access.

John P. Borger is a partner at MLRC member Faegre & Benson LLP in Minneapolis, MN. Together with Eric Jorstad and Patricia Stenbridge, he represents lead plaintiff Star Tribune in the appeal before the Minnesota Supreme Court.

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Disney's George of the Jungle Avoids TRO

Bulldozers Used By Movie Bad Guys Prompts Caterpillar to Sue Over Trademark

By David P. Sanders, Matthew M. Neumeier and
Steven McMahon Zeller

Thanks to the quick work of Chief Judge Joe Billy McDade of the Central District of Illinois, George of the Jungle, the klutzy jungle king from the classic 60's cartoon, made it onto store shelves in the new movie *Disney's George of the Jungle 2* ("George 2") as planned on October 21, 2003, despite the efforts of Caterpillar Inc. to block the release of the movie under the trademark laws because of its objection to how its products were depicted in the movie. *Caterpillar Inc. v. The Walt Disney Co., et al.*, 68 U.S.P.Q.2d 1461, 2003 WL 22384756 (C.D. Ill. Oct. 20, 2003).

Background and Complaint

George 2, distributed by Buena Vista Home Entertainment ("Buena Vista"), is the live action cartoon sequel to the successful theatrical release of *Disney's George of the Jungle*. *George 2* revolves around the scheme of George's mother-in-law Beatrice and Lyle, the former fiancé of George's wife Ursula, to separate Ursula and her son from George and to destroy George's jungle home. The movie culminates with a scene in which George and his computer-animated animal friends battle to save the jungle from Lyle's cronies, who happen to be driving actual, unaltered Caterpillar bulldozers bearing Caterpillar trademarks.

Caterpillar filed suit and a motion for a TRO against The Walt Disney Company and Buena Vista on October 14, one week before the October 21st release date. Caterpillar's complaint asserted claims, among others, for trademark infringement and trademark dilution by tarnishment. Caterpillar's principal argument was that the use of the branded bulldozers was likely to cause confusion as to the sponsorship or approval by Caterpillar of *George 2* because the public, familiar with the concept of "product placement," would believe that Caterpillar was endorsing the movie.

According to Caterpillar, this was particularly harmful to its image as an environmentally friendly company because the movie portrayed the bulldozers in an environmentally unfriendly light, which could cause a negative effect on sales of Caterpillar's licensed merchandise (such as toys, clothing, books, etc.) and of Caterpillar's equipment.

Buena Vista's Arguments

A hearing on Caterpillar's TRO motion was held less than 48 hours after the complaint was filed. Caterpillar's arguments focused on the particular use of product placements in *George 2*, where in one scene the product placement of a different product is called out by the narrator. Caterpillar contended that movie studios need to obtain the permission of trademark owners for all products used in movies showing the trademark, unless the depiction of the trademark is incidental.

In response, Buena Vista argued that there was no trademark use, and in any event its depiction of Caterpillar equipment needed to be viewed in the context of the entire movie, a cartoon-like farce. There was no likelihood of confusion because no one would believe that Caterpillar endorsed the message. Moreover, Buena Vista argued that the movie was not impugning qualities of the equipment nor showing the equipment being misused or in a false light because the use was consistent with their intended purpose.

Apart from the issues on likelihood of success, Buena Vista argued that the balance of the harms militated against a restraining order since Buena Vista had already expended \$9 million promoting that the movie would be available on October 21, it would cost over \$1.1 million to recall the existing copies, and Buena Vista would suffer an irreparable harm to its relationships with its distributors and retailers and, ultimately,

(Continued on page 50)

Caterpillar's principal argument was that ... the public, familiar with the concept of "product placement," would believe that Caterpillar was endorsing the movie.

Disney's George of the Jungle Avoids TRO

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with the buying public who would not have the movie when promised. Further, Buena Vista argued that a restraining order would injure 35,000 innocent retail outlets, many of whom already advertised, at their own expense, the availability of the movie on October 21.

The Court's Opinion

The Court's ruling was released on October 20, just one day before the movie's release date. Using colorful language, the court's opinion makes clear at the outset that the film was a farce not to be taken seriously. The court then reviewed the requirements for temporary injunctive relief and applied the factors to Caterpillar's case, concluding that the balance of the harms favored denial of the motion.

In reviewing Caterpillar's likelihood of success on the merits, the court only addressed Caterpillar's trademark infringement and trademark dilution claims. With respect to the first, the court struggled with the "likelihood of confusion" requirement, noting, for example, that "there are no competing trademarks at issue in this case, there is only one," and that there "is no apparent competition between Caterpillar bulldozers and *George of the Jungle 2* videos and DVDs."

The court also noted the absence of evidence that Buena Vista used Caterpillar's trademarks to drive the sales or consumer awareness of *George 2* DVDs and videos, or any other evidence that it intended to "poach or free-ride" on the fame and goodwill of Caterpillar's trademarks. In particular, the court noted that it is a common phenomenon that products bearing well known trademarks appear in cinema and television programs, finding that it was doubtful that "consumers would be more likely to buy or watch *George 2* because of any mistaken belief that Caterpillar sponsored the movie." Despite its substantial misgivings, the court declined to find that Caterpillar had no likelihood of success of proving its claim.

The court, however, found that Caterpillar was not likely to succeed on its claim of trademark dilution based on tarnishment. While acknowledging that Caterpillar's marks were famous, the court stated, as a thresh-

old matter, that in light of *Moseley v. V. Secret Catalogue, Inc.*, 537 U.S. 418 (2003), Caterpillar might be required to show actual dilution for a tarnishment case. There was no basis in the record, however, for the court to find that there was a likelihood that Caterpillar would be able to prove actual dilution.

On the merits, the court found Caterpillar's trademarks were not portrayed in an unwholesome or unsavory light. The court did not accept the argument that the live action cartoon cast Caterpillar as George's enemy, finding that it would be "clear to even the most credulous viewer or child that the bulldozers in the movie are operated by humans" and not acting on their own.

The court ultimately held that Caterpillar could not prevail on the balance of the harms test:

"[i]t is incredible for this Court to imagine a consumer's decision to purchase Caterpillar's primary product line of heavy machinery and equipment, costing substantial sums of money, being affected after watching this film."

As for Caterpillar's licensed goods directed at children, Caterpillar failed to offer evidence of the proportion of Caterpillar's sales comprised by that merchandise, thus preventing the court from gauging the potential effect of the movie on it. In contrast, the court believed that a TRO would cause Buena Vista significant injury based on its large expenditures for marketing the movie and projected costs of halting the release. The court concluded that "the costs of being mistaken" weighed in favor of denying the restraining order.

The authors, with the DCS member firm Jenner & Block, LLC, represented Buena Vista and The Walt Disney Company in the lawsuit. Davis S. Fleming and Joseph Norvell of Brinks, Hofer, Gilson & Lione, in Chicago, represented Caterpillar.

Ridiculing Comic Stripper's Public Access Television Show Is Protected Fair Use

Federal Judge Grants Comedy Central's Motion for Summary Judgment in Copyright and Trademark Infringement Action

By Jeffrey H. Blum and Elizabeth A. McNamara

When Comedy Central's "The Daily Show," hosted by Jon Stewart, made fun of some of the more absurd shows on public access television in a segment called "Public Excess," it did not expect to be sued by a bikini-clad, comic stripper named Sandy Kane, whose program "The Sandy Kane Blew Comedy Show" airs regularly on public access television. During her 29-minute show, Kane strips, tells dirty jokes, interviews the porn industries' glitterati, and, sings her theme song "I Love Dick." One journalist in reviewing Kane's show said that watching it is like accidentally seeing your grandparents having sex.

Two Second Clip

Kane sued in federal district court in New York City over a two-second clip of her show that was used in the introduction to the "Public Excess" segment. Jon Stewart introduced the "Public Excess" segment by saying,

"They say that some of the best shows on television are on public access. If you happen to see any, please let us know. Until then, here is Rich Brown with Public Excess."

The clip shows Kane dancing in her bikini and mouthing the words to "I Love Dick." The introduction also includes brief clips from other public access television. Throughout the six-second introduction, the words "Public Excess" flash across the screen accompanied by music. The rest of the "Public Excess" segment shows longer clips from public access shows, while Rich Brown makes snide remarks in introducing the clips.

Comedy Central also used a half-second image of Kane from the "Public Excess" introduction in commercials pro-

moting "The Daily Show." A voice-over to the commercial promises, "The Daily Show: comprehensive, extensive, offensive." The announcer hits the word "offensive" in conjunction with the appearance of the half-second clip from "The Sandy Kane Show."

Kane was not amused and sued Comedy Central for copyright infringement, trademark infringement, misappropriation, defamation and unfair competition in the federal court in the Southern District of New York. The case was assigned to Judge Daniels. Kane took it upon herself to send several letters to Judge Daniels telling

him about the case, concluding each letter with the tagline "Keep it Up!!" She also included pictures of herself stripping. Judge Daniels promptly submitted her case to the Pro Bono Panel, where Milbank, Tweed, Hadley & McCloy, LLP agreed to represent her.

Kane argued that the clip used by Comedy Central was the "heart" of her show because it showed her mouthing the words to her signature song "I Love Dick." Judge Daniels rejected this argument, noting the difficulty in applying the "heart" test to cases involving criticism or commentary.

Grants Motion

On October 15, 2003, Judge Daniels granted Comedy Central's motion for summary judgment, and dismissed all of Kane's claims. *Kane v. Comedy Central*, 2003 WL 22383387 (S.D.N.Y., Oct 16, 2003). On the copyright infringement claim, Judge Daniels found that the use of Kane's image in the "Public Excess" introduction and "The Daily Show" commercial was a fair use.

As to the first fair use factor (the purpose and character of the use), Judge Daniels found that "by airing plaintiff's clip in a segment called 'Public Excess' and adding some derisive commentary, defendants unquestionably used her material for the purpose of criticism." Distinguishing cases in which a defendant attempts to "usurp plaintiff's material in order to 'avoid the drudg-

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Ridiculing Comic Stripper's Public Access TV Show Is Protected Fair Use

(Continued from page 51)

ery in working something fresh," Judge Daniels held that by presenting plaintiff's clip, defendants "sought to critically examine the quality of plaintiff's public access television show." He concluded that the first factor of the fair use inquiry, "strongly favors defendants."

Judge Daniels gave little, if any weight, to the second fair use factor (the nature of the copyrighted work). While this factor generally affords "creative" works, like Kane's show, greater protection, Judge Daniels held that "this factor may be of less (or even of no) importance when assessed in the context of certain transformative uses."

As to the third factor (the amount and substantiality of the use), Judge Daniels found this factor in favor of Comedy Central because the two-second clip used by Comedy Central amounted to only "one-tenth of one percent of plaintiff's [29-minute] television show." Kane argued that the clip used by Comedy Central was the "heart" of her show because it showed her mouthing the words to her signature song "I Love Dick." Judge Daniels rejected this argument, noting the difficulty in applying the "heart" test to cases involving criticism or commentary:

"Given this difficulty, the inaudibility of the song, and the infinitesimal portion of the material use, the Court finds this factor favors defendants."

No Effect on Its Market

With respect to the fourth factor (the effect upon the potential market), Judge Daniels recognized that though both "The Sandy Kane Blew Comedy Show" and "The Daily Show" may serve a similar market for comedy, "defendants use of plaintiff's material is highly unlikely to negatively affect the market for plaintiff's show." Explaining that even if the audience for both

"a satirical news program and a scantily clad singing dancer were identical, it cannot be credibly argued that defendants' use of two seconds of plaintiff's show in the introduction to 'Public Excess' would have the effect of siphoning away demand for her comedy routine."

Judge Daniels further found that fans of plaintiff's television show would not choose to watch "The Daily Show" instead of "The Sandy Kane Show" because of defendants' use of plaintiff's clip.

Dismissed Trademark and Unfair Competition

Judge Daniels also dismissed Kane's trademark infringement claim, finding that Comedy Central did not "make any attempt to pass the trademark off as their own." Rather, Comedy Central made "it clear that someone else's work is being displayed and ridiculed." Quoting the Tenth Circuit's decision in *Jordache v. Hogg World*, 828 F.2d 1482 (10th Cir. 1987), Judge Daniels held that the "requirements of trademark law is that a likely confusion of source, sponsorship or affiliation must be proven, which is not the same as a right not to be made fun of."

As to Kane's state law claim for unfair competition, Judge Daniels concluded that Kane had not introduced any evidence that the audience for "The Daily Show" is reasonably likely to be confused by the appearance of Kane in the "Public Excess" introduction and "The Daily Show" commercial. Judge Daniels also found that Kane's right of publicity claim under New York Civil Rights Law 50-51 failed because "presenting and criticizing plaintiff's comedy routine falls within the 'entertainment and amusement' branch of the newsworthy exception." Finally, Judge Daniels dismissed Kane's defamation claim, which alleged that calling her show "offensive" was defamatory. Judge Daniels held that such a statement was protected opinion because of the "impossibility of proving it true or false."

Although the facts are quite amusing, Judge Daniels's decision addresses many of the common arguments raised by plaintiffs when their work is the subject of criticism and ridicule. Kane has appealed.

Elizabeth A. McNamara and Jeffrey H. Blum of Davis Wright Tremaine LLP represented Comedy Central. Parker H. Bagley of Milbank, Tweed, Hadley & McCloy, LLP represented Sandy Kane.

Sound Recording Royalty Rates for Radio on the Internet

By Adam I. Cohen and Seth A. Gastwirth

The Early Years Under the Digital Millennium Copyright Act

Streaming radio services available via the Internet (“webcasting”) include both “Internet-only” services as well as over-the-air broadcasters who simultaneously retransmit their programming on the Web (“simulcasting”). The Digital Millennium Copyright Act of 1998 (“DMCA”) established a license available to any qualifying webcaster desiring to transmit digital performances of recorded music (and make “ephemeral” copies to facilitate those performances). The DMCA also set forth a procedure to determine the rates and terms for such license. That procedure involves a period of negotiation, and in the event negotiations are unsuccessful, a determination by a Copyright Arbitration Royalty Panel (“CARP”).

For the period October 1998 (enactment of the Act) through 2002, following unsuccessful negotiations, a CARP was convened and a determination reached in connection with the license applicable to non-subscription services. The CARP’s determination was subsequently modified by the Librarian of Congress. Generally, the rates set by the Librarian enabled webcasters either to pay on a “per performance” or “hourly” basis. The rates set were:

- (a) .07 cents per performance or,
- (b) if paying on an hourly basis, the same .07 cents rate *multiplied by* the aggregate number of a webcaster’s streaming hours (or “Aggregate Tuning Hours”), *multiplied by* 15 for Internet-based webcasters or 12 for broadcast radio “simulcasting” activities (the difference attributable to the fact that it was found that there were on average 15 songs per hour streamed by Internet webcasters versus 12 songs per hour by simulcasters).

On top of this fee, the Librarian set an additional 8.8% of the performance fee calculated per the above formula to cover the “ephemeral” reproductions made by webcasters to facilitate their streaming activities. The Librarian’s decision was appealed to the D.C. Cir-

cuit Court of Appeals by various parties, however, most of the major parties ultimately reached a negotiated settlement for both the 1998-2002 period and the ensuing 2003-04 license period. However, some parties (including terrestrial radio stations involved in “simulcasting” their signals on the Internet) are still pursuing appeal of the 1998-2002 rates.

2003 – 2004 Proposed Fee Regulations

For the 2003-2004 license period, the Copyright Office has published proposed regulations which are the result of such negotiations and would cover commercial “nonsubscription” webcasters, new subscription webcasting services, and simulcasting of AM or FM broadcasts. Once again, licensees would have the option of paying on a per performance or aggregate tuning hour (“ATH”) basis subject to a minimum fee. The per performance fee is .0762 cents (which is inclusive of the ephemeral reproduction fee), with performance defined as each instance in which any portion of a sound recording is transmitted to a listener, *minus* 4% (as 4% of performances bear no royalty under the per performance calculation).¹

The aggregate hourly fee option (which also is inclusive of the ephemeral reproduction fee) requires multiplying the total hours of programming by the number of listeners per hour, by a royalty rate that varies with the type of programming transmitted: (a) for non-music programming, i.e., news, talk, sports, or business programming, the rate is .0762¢ per ATH; (b) for broadcast simulcasts (not reasonably classified as non-music), the rate is .88¢ per ATH; and (c) for other programming (meaning music-based webcasting), the rate is 1.17¢ per ATH. Qualifying subscription services, as opposed to non-subscription services, have the additional option of paying, at their election, 10.9% of defined revenues associated with the service.

Small Webcasters Settlement Act

In response to concerns raised by certain small webcasters, Congress passed the Small Webcaster Settlement Act of 2002 (“SWSA”). Pursuant to negotiations

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Sound Recording Royalty Rates for Radio on the Internet*(Continued from page 53)*

authorized by the SWSA, small commercial webcasters and noncommercial webcasters reached separate agreements with the recording industry for a reduced rate structure. To qualify as an eligible small webcaster, a webcaster must fall within certain gross revenue thresholds as set under the SWSA. The royalty rates for small webcasters are based on a percentage of revenue rather than a performance basis. To qualify as a noncommercial webcaster, a webcaster must be eligible for taxation exemption under § 501 of the Internal Revenue Code or be operated by a state or federal governmental entity. Under the settlement agreement for noncommercial webcasters, the royalty rates include minimum annual fees for digital audio transmissions not totaling more than 146,000 aggregate hours, and additional fees for transmissions in excess of 146,000 aggregate hours.

The mutual displeasure on the part of the webcasting and recording industries in the wake of the 2002 CARP determination appears to have incentivized attempts to negotiate industry wide royalty rates. However, interested parties who are unhappy with rates agreed to by others still have the CARP process to fall back on. Efforts to reform that process to make it less expensive, quicker, and more efficient are being pursued on the legislative front by several media industry groups.

Many parties, with different counsel, participated in the CARP proceedings. Most of the Internet-only webcasters and some of the major over-the air broadcasters were represented by Weil, Gotshal & Manges LLP. Wiley Rein & Fielding LLP also represented certain major broadcasters. The RIAA was represented by Arnold & Porter.

Mr. Cohen is a partner and Mr. Gastwirth is an associate in the Intellectual Property and Media Practice Group of Weil, Gotshal & Manges LLP.

¹ Royalty payments should be remitted to the "designated receiving agent," currently SoundExchange, which until recently was a division of the RIAA. Contact information for SoundExchange, along with the form of monthly statement to accompany payment, is available on www.soundexchange.com.

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Recent Internet Jurisdiction Cases

By Colin Rushing

As three recent cases indicate, personal jurisdiction based on Internet contacts, like all personal jurisdiction questions, continues to be fact-intensive and to some extent, ad hoc. But there also appears to be an emerging distinction between defamation cases, in which courts increasingly require the allegedly tortious Internet communications to be directed at the forum, and trademark and unfair competition cases, in which relatively slim contacts with the forum state form the basis for a finding of personal jurisdiction.

Archer and White v. Tishler

Reflecting the emerging consensus in defamation cases, in *Archer and White, Inc. v. Tishler*, No. Civ. A. 3:03-CV-0742-D, 2003 WL 22456806 (N.D. Tex. Oct. 23, 2003), the Northern District of Texas refused to exercise personal jurisdiction over an Illinois dentist who posted allegedly defamatory comments on the Internet about a dental tool manufactured and shipped to the defendant by the Texas-based plaintiff.

The Internet posting alone was not a sufficient basis for establishing personal jurisdiction in Texas: Although the plaintiff's "largest customer base is composed of Texas dentists," absent "evidence that [the defendant] intended to target or focus on Texas readers as distinguished from readers in other states," the court held that the fact of the website posting was not sufficient to establish personal jurisdiction over the defendant.

Brach's Confections v. Keller

But in *Brach's Confections, Inc. v. Keller*, No. 03 C 2032, 2003 WL 22225617 (N.D. Ill. Sept. 24, 2003), the Northern District of Illinois found sufficient minimum contacts based on the New Jersey defendant's sale of candy to four Illinois residents. In that case, the defendant — operator of websites through which candy was sold — allegedly infringed the Illinois-based plaintiff's trademark rights both by using allegedly infringing domain names and using the plaintiff's trademarks in the contents of the website itself. (Confusingly, the district court thought it was compelled to apply the law of the Federal Circuit, and not the Seventh

Circuit, because the claims presented a "federal question.")

Citing the "sliding scale" analysis first outlined in the now-famous *Zippo* case (the district court, based on the few sales to Illinois residents, held that the defendant was "The district court also denied the defendant's motion to dismiss on venue grounds.

Electronic Broking Services, Ltd. v. E-Business Solutions & Servs.

Demonstrating that personal jurisdiction determinations remain an essentially *ad hoc* inquiry, however, in *Electronic Broking Services, Ltd. v. E-Business Solutions & Servs.*, _ F. Supp. 2d _, 2003 WL 22298059, No. CIV JFM-03-1350 (D. Md. Sept. 30, 2003), the District of Maryland refused to exercise personal jurisdiction over an Egyptian company that did some business in Maryland through a semi-interactive website.

In that case, the plaintiff (based in the United Kingdom) alleged that the defendant, an Egyptian company, sold financial services that were principally advertised on the Internet under an infringing trademark. Although one of the defendant's customers was based in Maryland, the district court refused to exercise personal jurisdiction over the company: In the absence of evidence that the defendant "intentionally targeted residents in Maryland through its website or directed its electronic activity into Maryland with the manifested intent of conducting business within the state," the district court held that the website alone could not establish the basis for personal jurisdiction.

Nor was the defendant's business relationship with a Maryland company sufficient: Because the plaintiff was a British company, and the defendants were in Egypt, the district court held that the burdens on the defendants were too great, and Maryland's interest in the litigation (and the plaintiff's interest in litigating in Maryland) too small, to warrant the exercise of personal jurisdiction.

Colin Rushing is an associate with Wilmer, Cutler & Pickering in Washington, D.C., and a member of MLRC's Cyberspace Committee.

Government Seeks to Reverse Conviction For Revealing Software Flaws

By Jack Greiner

Federal prosecutors recently asked the Ninth Circuit Court of Appeals to reverse the conviction of Bret McDanel, a little over one year after those same prosecutors put him in jail.

In June, 2002, McDanel had been convicted for causing damage to a computer system in violation of the Federal Computer Fraud and Abuse Act. He was sentenced to 16 months in prison, which was, at the time, the maximum sentence.

The conviction resulted from the statute's ambiguous language and, in application, was a content based regulation. By moving for a reversal of the conviction, the feds apparently are willing to admit that the conviction never should have happened.

McDanel, who used the online handle "Secret Squirrel" was employed as a computer administrator at Tornado Development, Inc. in El Segundo, California. Tornado offered a unified messaging service that let customers retrieve e-mail, voice mail and faxes through one website. McDanel discovered that when users sent a web address as part of an e-mail, recipients and other outsiders could gain access to the sender's account.

The undisputed evidence demonstrated that McDanel warned his supervisors, but they failed to fix the problem. McDanel left the company in 2000, but learned that Tornado had still not taken care of the problem. Apparently frustrated by Tornado's inaction, McDanel, in late summer 2000, delivered 5600 e-mails to Tornado customers warning them about the problem.

At trial, the prosecutors claimed that the message regarding the security vulnerability, coupled with the flood of e-mails that allegedly crashed Tornado's e-mail server, caused over \$5,000 in damage, the statutory threshold. The Computer Fraud and Abuse Act bars anyone from sending information with the intent to cause damage to a protected computer. "Damage" includes "impairment to integrity" of a system of data.

In McDanel's case, the prosecutors contended that

"impairment to integrity" includes the publication of a security vulnerability in a system. This was the ultimate "shoot the messenger" kind of prosecution. McDanel disclosed to Tornado's customers – who surely had a right to know – that the system was flawed. These customers in turn contacted Tornado to demand a fix. Tornado was forced to fix the problem (which it should have done in the first place) and deal with angry customers (which it wouldn't have had to do had it fixed the problem in the first place). For his role in bringing the problem to light, McDanel was sentenced to 16 months in prison.

McDanel used his valid account on the system to send his mass mailing, so there was no allegation that he gained system access improperly. And the security flaw that McDanel disclosed was easily detectable by security experts, so it couldn't be considered confidential. McDanel's

only "crime" was spilling the beans and forcing his former employer to address a problem.

Apparently guided by the adage that "wisdom often never comes, so it should not be rejected merely because it comes

late" the feds are now willing to admit that they erred in prosecuting McDanel. In their October 15 filing, prosecutors said "[t]he government concedes that the evidence did not establish an intent to 'damage' within the meaning of the statute."

Unfortunately for McDanel, the government filed its petition *after* McDanel served his 16-month term. Tornado is out of business. If any good can come from this mess, hopefully it is the reiteration of the principal that the First Amendment must protect "messengers" (or in this case, "Secret Squirrels") from being shot based on the content of their message.

Ronald Cheng, assistant U.S. Attorney for the Central District of California filed the petition to reverse the conviction. Mr. McDanel is represented by Jennifer Granick, Executive Director of Stanford law School's Center for Internet and Society.

Jack Greiner is a partner in the Cincinnati law firm of Graydon, Head & Ritchey.

The conviction resulted from the statute's ambiguous language and, in application, was a content based regulation.

Scope of Section 230 Immunity Questioned by Two Recent Decisions

By Patrick Carome and C. Colin Rushing

Two appellate decisions — one state and one federal — have recently been issued challenging the scope of federal statutory immunity available for the “provider or user” of interactive computer services from claims based on third-party content, departing from the otherwise unanimous published precedent confirming the broad scope of that immunity.

Beginning with *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997), appellate courts have until October of this year uniformly agreed that 47 U.S.C. § 230 provides the providers and users of interactive computer services with broad immunity from claims based on third-party content. The Third, Ninth and Tenth circuits have all agreed with *Zeran*, as have the Supreme Court of Florida, state intermediate courts of appeal in California, Connecticut, and Illinois, and numerous federal and state trial courts.

But in *Doe v. GTE Corp.*, No. 02-4323, ___ F.3d ___, 2003 WL 22389811 (7th Cir. Oct. 21, 2003), a panel of the Seventh Circuit declined to apply Section 230 immunity in a case brought against companies whose sole connection to the alleged tort was hosting certain web-sites, deciding instead to affirm dismissal of the claims on state law grounds. And in *Barrett v. Rosenthal*, 5 Cal. Rptr. 3d 416 (Cal. Ct. App. Oct. 15, 2003), the California Court of Appeal for the First District held that Section 230 does not apply when the defendant asserting immunity “knew or had reason to know” that the content at issue was defamatory.

Seventh Circuit Affirms Dismissal Using State Law Not Section 230

In *Doe v. GTE Corp.*, the plaintiffs alleged that GTE Corp. and Genuity, Inc. were liable for hosting web sites where certain allegedly tortious materials were sold (namely, videotapes surreptitiously taken of the plaintiffs in locker rooms, showers, and bathrooms). Consistent with *Zeran* and all other decisions confronting similar facts, the district court rejected these claims on the basis of Section 230.

The Seventh Circuit affirmed, but only on the alternative ground that, as a matter of state law, GTE Corp. and Genuity were not under a duty to investigate their custom-

ers’ web sites for harmful materials. The court considered but then did not rule on the question whether Section 230 immunized GTE and Genuity from the plaintiffs’ claims. Instead, Judge Easterbrook mused that *Zeran* and the three other federal courts of appeal that have construed Section 230(c)(1) — which provides that the provider or user of an interactive computer service “shall not be treated” as the publisher or speaker of “information provided by another information content provider” — might have been wrong.

First, he suggested that Section 230(c)(1) might simply be “definitional,” delineating the types of entities that can take advantage of the immunity provided in Section 230(c)(2) — a separate provision that establishes that providers or users of interactive computer services cannot be held liable when they block or remove objectionable third-party content. Second, the opinion hypothesizes that Section 230(c)(1) immunity might be available only for torts for which publication is an explicit element, such as defamation.

Ultimately the Seventh Circuit did not decide the Section 230 issue in the case, and ruled instead in favor of the defendants on state law grounds. While all of Judge Easterbrook’s observations concerning Section 230 are therefore mere *dicta*, the opinion represents the first time that a federal court of appeals has not readily embraced an expansive construction of the immunity statute.

California Court of Appeal Rejects Zeran

Writing for the California Court of Appeal for the First District in *Barrett v. Rosenthal*, Judge Kline agreed with *Zeran* that Section 230(c)(1) was a source of immunity but disagreed with *Zeran* on a central aspect of that immunity, holding that Section 230(c)(1) does not apply where the defendant “knew or should have known” that the content at issue was defamatory.

According to Judge Kline, because Congress used the term “publisher or speaker” in Section 230(c)(1), it did not bar the type of defamation claims that historically have been allowed against mere “distributors” of other people’s content — claims that ordinarily require a showing that the distributor knew (or, perhaps, should have known) that it was distributing tortious material.

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Scope of Sect. 230 Immunity Questioned by Recent Decisions*(Continued from page 57)*

By doing so, Judge Kline rejected arguably the most important element of the Section 230 immunity; under his construction, a dispositive motion on the basis of Section 230 might be difficult if not impossible in the face of an allegation or evidence that the defendant asserting the immunity was somehow “on notice” of the allegedly tortious content — a requirement that might be satisfied merely by sending an e-mail.

In reaching this conclusion, the *Barrett* court deviated not only from the established federal precedent but from a recent decision of another appellate court in California: In *Gentry v. eBay, Inc.*, the California Court of Appeal for the Fourth District explicitly considered and rejected the argument that Section 230 did not apply to claims based on theories of “notice-based” liability. See 121 Cal. Rptr. 2d 703, 718 (Cal. Ct. App. 2002) (recognizing that notice-based liability was “the classic kind of claim that *Zeran* found to be preempted by Section 230” and that other courts applying Section 230 had “uniformly rejected” such claims).

Importantly, the *Barrett* court rejected *Zeran* and the subsequent authority in a relatively unique context: the defendant asserting Section 230 immunity in *Barrett* was not a provider of an interactive computer service, but was instead a “user” who had selected an allegedly tortious e-mail for republication on an Internet newsgroup. The defendant could raise the Section 230 defense because, on its face, Section 230(c)(1) appears to apply equally to the “provider[s]” and the “user[s]” of interactive computer services.

Notwithstanding this parity in the language, nearly all reported Section 230 decisions have involved cases in which the defendant is a company that provides some sort of Internet-based service, including Internet service providers such as AOL and web-based services such as eBay and Amazon.com. Nonetheless, it was in this context that the California court in *Barrett* explicitly rejected *Zeran* and its progeny and held that Section 230 would not apply whenever the defendant asserting the immunity “knew or had reason to know” that the information at issue was tortious.

Ironically, Stephen Barrett, one of the plaintiffs in *Barrett v. Rosenthal*, subsequently lost this same issue in parallel litigation that he brought in Illinois against the operator of a website on which allegedly tortious articles were

posted. When asked to reject *Zeran* and hold that Section 230 did not apply to claims in which the defendant asserting immunity was allegedly on notice of the tortious content, the Appellate Court of Illinois, Second District, relied instead on the “perfectly uniform” chain of federal cases and held that Section 230 did apply to such claims. See *Barrett v. Fonorow*, ___ N.E.2d ___, 2003 WL 22455494 (Ill. App. 2d Dist. Oct. 28, 2003). The decision in *Barrett v. Fonorow* mentions neither the California *Barrett* case nor Judge Easterbrook’s opinion in *Doe v. GTE Corp.*

Patrick J. Carome is a partner, and C. Colin Rushing is an associate, at Wilmer, Cutler & Pickering, in Washington, D.C. Mr. Carome represented AOL in the Zeran case.

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 Deborah H. Patterson
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MLRC Annual Meeting November 12, 2003

The meeting was called to order by Harold W. Fuson, Jr., chairman of the Board of Directors.

Mr. Fuson welcomed the MLRC media members to the meeting and thanked them for their support of the organization during the past year.

Mr. Fuson gave special thanks to Robin Bierstedt, Time, Inc. and Mary Ann Werner, The Washington Post Company, who will retire from Board service when their terms expire this year. Mr. Fuson reported that Stephen Fuzesi, Jr., Newsweek, Inc. and Katherine Hatton, Philadelphia Newspapers, Inc. had been nominated by the Board of Directors, per the MLRC by-laws, to join the board of directors. A motion was made, seconded and adopted unanimously by voice vote.

Next on the agenda was the re-election of Dale Cohen, Tribune Company and Henry Hoberman, ABC, Inc., each to a two-year term. A motion was made, seconded and adopted unanimously by voice vote.

After the elections, Mr. Fuson congratulated the MLRC for this year's London Conference and David Heller for his efforts in managing the conference.

Next on the agenda was the DCS Executive Committee President's Report by Lee Levine. Mr. Levine reported on the many projects undertaken by committees this year. While initially manned by DCS members, the committees now include many in-house counsel as well — and more are welcome. (For a full report on the committees, see the DCS report below.)

Next on the agenda was the Executive Director's Report. Mr. Fuson introduced Sandy Baron. After thanking Mr. Fuson, and all of the current Board of Directors — with special thanks to Ms. Bierstedt and Ms. Werner — Ms. Baron thanked the DCS membership for its efforts stating that MLRC thrives and prospers from the energy and ideas that the DCS provides.

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Defense Counsel Section Annual Meeting November 14, 2003

The meeting was called to order by Lee Levine, president of the DCS Executive Committee.

Lee Levine welcomed the DCS members and described the year as one of many successes, mentioning briefly membership interest and participation in the various publications, task forces and conferences. Mr. Levine bestowed special thanks upon Kurt Wimmer of Covington & Burling and Jim Borelli of Media/Professional Insurance for their work on this year's London Conference.

Election of Treasurer:

Kurt Wimmer. Mr. Levine then moved to the election of the new treasurer. Kurt Wimmer of Covington & Burling in Washington, D.C. was nominated by the DCS Executive Committee to serve as next year's treasurer. There were no other nominations from the membership. Mr. Levine welcomed a motion for the election of Mr. Wimmer. The motion was made, seconded, and unanimously adopted.

Prior to the Executive Director's Report, Bruce Johnson, this year's vice-president of the DCS Committee, expressed the membership's heartfelt appreciation for Mr. Levine's leadership of the DCS.

Executive Director Report:

Sandy Baron had a number of "thank yous" — starting with the membership for their support of MLRC.

Ms. Baron gave special thanks to Harold (Hal) W. Fuson, Jr., Chairman of the MLRC Executive Board, for his hard work and leadership of the entire organization. Ms. Baron also thanked Lee Levine for his terrific work as President of the DCS Executive Committee and reminded Mr. Levine that he inherits the position of President Emeritus. Ms. Baron noted that David Schulz of Levine, Sullivan, Koch & Schulz will relinquish the President Emeritus position and leave the Executive Board altogether. Ms. Baron expressed sincere gratitude for Mr. Schulz's help

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MLRC Annual Meeting

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Next, Ms. Baron told the board how proud she was that the London Conference was so well received by the membership. Ms. Baron thanked David Heller, Kurt Wimmer and Jim Borelli, and all of the members of the planning committee, for all of their help in making the conference as successful as it turned out to be.

Ms. Baron announced September 29, 30 and October 1 as the dates for next year's NAA/NAB/MLRC Conference in Virginia. While the budget for the Conference is sound, the organizers are seeking sponsors for the event. Additionally, Ms. Baron stated that MLRC hopes to present a First Amendment Leadership Award to an individual, or individuals, who have made a great contribution to the expansion of First Amendment rights. Ms. Baron noted, however, that if a suitable candidate does not arise, MLRC reserves the right to not present the award.

Ms. Baron reported that the new website is still under construction and announced January 2004 as the tentative launch date. Ms. Baron anticipates that the website will be an indispensable resource that will provide members with MLRC materials online. In order to protect MLRC material, Ms. Baron told the board that the website will be password protected and the organization will require its members help in not allowing further distribution of materials to non-members. Ms. Baron reported that the website will be accessible through the domain names Medialaw.org and Medialaw.com. Ms. Baron conferred special thanks to Jon

Hart and Elisa Rosen of Dow Lohnes & Albertson in Atlanta, GA who volunteered legal services to MLRC for the website initiative. Additionally, Ms. Baron thanked Nicole Wong and her colleagues at Perkins Coie for her help with developing a privacy policy. And she thanked David Schulz and his former colleagues at Clifford Chance, specifically Bob Penchina, for their assistance on trademark issues.

Ms. Baron told the Board that MLRC will co-sponsor a conference on January 29, 2004 with the Donald E. Biederman National Entertainment and Media Law Institute at Southwestern Law School in Los Angeles, at which David Kohler is now executive director. The conference will explore current and developing legal issues arising from fact-based and unscripted programming. The program would be divided into three parts: reality programming, newsgathering and ethics. Ms. Baron suggested that if the event goes well, MLRC and Southwestern might consider making it an annual event.

Ms. Baron reported that MLRC Bulletin for the fourth quarter 2003 will focus on the use of the Lanham Act, while in 2004, in addition to the annual damage survey and Supreme Court cert survey, the Bulletin will report a summary judgment survey and will devote an issue to reporters privilege.

Finally, Mr. Fuson asked if there was any new business. Being none, the meeting was adjourned.

DCS Annual Meeting

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over the past year. Ms. Baron then introduced the MLRC staff and thanked the staff for their hard work and determination.

Leaving the discussion of the London Conference for the International Committee report, Ms. Baron told the DCS that planning was underway for the 2004 NAA/NAB/MLRC Conference in Virginia, co-chaired by Dan Waggoner of Davis Wright & Tremaine in Seattle, WA and Peter Canfield of Dow Lohnes & Albertson in Atlanta, GA. They are accepting suggestions and comments on ideas for the conference.

In order to ensure that the budget for the Conference is met, and that registration fees do not need to be raised, the Conference will again be soliciting sponsors. Any firm

interested in becoming a sponsor should contact Ms. Baron, René Milam of Newspaper Association of America or Jerianne Timmerman of National Association of Broadcasters.

Ms. Baron also announced that MLRC was taking suggestions and nominations for candidates for The First Amendment Leadership Award to be presented at the Virginia Conference.

Next, Ms. Baron reported on the status of the MLRC's updated website. Ms. Baron said that the web designer had been unable to meet its commitments to MLRC with regard to the schedule of development of the site. As a result, the site was not available this Fall, but MLRC expects to launch its new website in January 2004.

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DCS Annual Meeting

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Ms. Baron thanked:

- **Jon Hart and Elisa Rosen of Dow Lohnes & Albertson** in Atlanta, GA for their legal counsel in this matter.
- **David Schulz and Clifford Chance, specifically, Bob Penchina**, for their assistance on trademark matters.
- **Nicole Wong, Abigail Phillips and Kurt Opsahl of Perkins Coie**, for their assistance in developing a privacy policy for the website.
- **Eric Robinson, MLRC Staff Attorney**, for his stewardship of the project.

Ms. Baron said the website promises to be an enormous service for members. The MLRC will make available archived information, newsletters, MLRC Bulletins, Model Trial Brief and other litigation resources, the brief bank, and countless committee reports via the website.

Finally, Ms. Baron informed the DCS members that the Second Quarter Bulletin will cover new developments with the “reporters’ privilege” and that MLRC is taking suggestions for future Bulletin topics.

MLRC Committees

Next on the agenda were the MLRC Committee Reports.

- **The Advisory Committee on New Legal Developments:** **Nathan Siegel** informed the DCS members that his committee is working on developing an academic conference where litigators would discuss with legal academics the bar/academy gulf that too often exists on key constitutional issues.
- **Advertising & Commercial Speech Committee:** **Richard Goehler** warned that although the case that his committee had been watching closely, *Nike v. Kasky*, “fizzled,” the evolving definition of commercial speech will be resurrected this year as a hot topic for the courts.
- **ALI Task Force Committee:** **Thomas Leatherbury** reported that the ALI’s proposed statute on foreign judgments is still in draft form. Members of MLRC had argued, both in written and oral form, against the Reporters Notes in the draft that undercut the ability of defendants to fight the enforcement of foreign libel judgments in the United States. A new draft is anticipated in January. Mr. Leatherbury is accepting help from all MLRC members.
- **Conference & Education Committee:** **Dan Waggoner** reported that his committee was working on new ideas for the Conference, including possible focus groups on libel defense presentations, a panel on coverage of elections, and breakout discussion groups on various topics including proprietary rights and reporters privilege.
- **Cyberspace Committee:** **Nicole Wong**, said her committee is monitoring newly enacted state laws involving spam, defamation claims against service providers who traditionally have been protected under Sec. 230 of the Telecommunications Act.
- **Employment Law Committee:** Sandy Baron delivered the report for **Sanford Bohrer**, who was unavailable. Ms. Baron announced that the Employment Libel and Privacy Law 50-State Survey was underway, and that it is a valuable resource because it puts forth certain common law theories not present in MLRC’s libel books.
- **Ethics Committee:** **Richard Goehler** gave the report because Bob Bernius was not able to attend the meeting. Mr. Goehler reported that the “Ethics Corner” articles have become a consistent and important part of the MediaLawLetter. Mr. Goehler thanked the dedicated group that produces the ethics articles and encouraged all DCS members who wish to write an article.
- **International Media Law Committee:** **Kurt Wimmer** and **Jim Borelli** reported for the International Media Law Committee. Mr. Borelli reported that the London Conference was a tremendous success drawing participants from several countries. He said that the Committee wishes to build upon this success and plans on introducing

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International panels for the 2004 Virginia Conference. Mr. Wimmer reported that the committee is reviewing the "Rome II" Treaty. Additionally, Mr. Wimmer announced that **Thomas Kelley** will replace him as co-chairman of the committee.

- **Jury Debriefing Project:** **Jim Stewart** introduced **Mark Hornak** as the new chair. Mr. Stewart expressed his pride in the completion of two reports in specific this year, one by Nancy Hamilton of Jackson Walker and the other by Mark Hornak of Buchanan Ingersoll.
- **Jury Committee:** Standing in for **David Klaber**, **Dianna Karg**, an associate at Kirkpatrick & Lockhart, reported that the committee plans to create an updated version of the Jury Instruction Manual and she requested that members submit instructions for the new edition.
- **Legislative Affairs Committee:** **Kevin Goldberg** stated that his committee intends to implement a three-part plan of action to inform lawyers and the public at-large about legislative affairs. First, the Committee will maintain a database on the MLRC website that will provide summaries of pending bills and a hotlink to the Bill itself. Second, the Committee will ensure that there are monthly updates about legislative affairs in the MediaLawLetter. Third, the Committee will try to build a network that would be responsible for providing newspapers with articles that explain pending bills in Congress. Additionally, Mr. Goldberg mentioned that a report on HIPAA could be a longer, more in-depth project.
- **MediaLawLetter Committee:** **Lee Levine** reported on the MediaLawLetter Committee. Mr. Levine said that MediaLawLetter has become the primary source for media law news for most DCS members. Mr. Levine indicated that members have given the newsletter high marks for the breadth of its coverage.
- **Membership Committee:** **Susan Grogan Faller** stated that DCS Membership was strong and continues to grow. She requested that current members help recruit other outside counsel for media companies.
- **Newsgathering Committee:** **Dean Ringel** and **Kelli Sager** reported for the Newsgathering Committee. Mr. Ringel reported that this past year the Committee oversaw the production of publications on government access in the wake of 9/11 and HIPAA reports, one of which is intended as a guideline for journalists and public officials. Ms. Sager said that next year the committee will issue model briefs on access issues, such as assess to jury panel information and questionnaires, a privacy report headed by Steven Zansberg; and will develop a criminal defense lawyer and bail bondsman directory that will help members procure competent local representation for journalists in all 50 states if they are ever incarcerated.
- **Pre-Publication/Pre-Broadcast Committee:** **Bob Bertsche** thanked **Katherine Hatton** and **Mary Ellen Roy** for their efforts in producing a survey on companies' policies on retaining and destroying notes and electronic mail. Mr. Bertsche said his committee wants to do a comparative analysis of pre-publication law in the United States and foreign sovereignties. Mr. Bertsche also reported that the committee is in the early stages of looking at how the media is using Anti-SLAPP statutes.
- **Pre-Trial Committee:** **Mike Epstein**, filling in for **Henry Abrams**, said the committee is in the process of revising drafts on a report on strategic and practical considerations for discovery.
- **Trial Techniques Committee:** **Gylin Cummins** and **David Sanders** reported for the Trial Techniques Committee. Ms. Cummins announced that the Committee is working on an updated database on Expert Witnesses. Ms. Cummins noted that a new section will be added to the database that describes what criteria are necessary for an individual to qualify as an expert.

Legislative Update

By Kevin Goldberg

All remains quiet on the Capitol Hill front. Congress continues to shy away from actions that would either benefit or harm a free press. This is good, but unnerving for those who are used to seeing this happen, only for a bill to be introduced suddenly with little time for any defensive action. Given the rumors that are constantly buzzing among civil liberties organizations of a sequel to the USA Patriot Act, such a scenario would not be unlikely. Due to the lack of substantive legislating on First Amendment and Freedom of Information issues, much of this month's update may seem redundant. However, there is one interesting (mostly for anecdotal purposes) offshoot of an appropriations act that was passed last week which is included at the end of this update:

Patient Safety and Quality Improvement Act (S 720 / HR 663)

- Introduced in the House on February 11, 2003 by Rep. Michael Bilirakis (R-FL), with approximately twenty co-sponsors. The Senate version was introduced by Sen. Jim Jeffords (I-VT), Bill Frist (R-TN) and John Breaux (D-LA) on March 26, 2003.
- The bill notes that "research on patient safety unequivocally calls for a learning environment, rather than a punitive environment, in order to improve patient safety." Increased voluntary data gathering, but not increased mandatory data gathering, from within the health care field is apparently necessary to achieve this goal of a learning environment. Organizations supporting this increased voluntary data gathering also support legal rules that will allow them to review this protected information in order to "collaborate in the development and implementation of patient safety improvement strategies."
- It contemplates the creation of "patient safety organizations" who will receive "patient safety data" that is voluntarily provided by health care providers.
- These "patient safety organizations" are public or private entities that:
 - Conduct efforts to improve patient safety and quality of health care delivery;
 - Collect and analyze patient safety data voluntarily submitted by a provider;
 - Develop and disseminate information to providers regarding patient safety,
 - Including recommendations, protocols or information on best practices; or
 - Utilize patient safety data to encourage safety and minimize patient risk.
- "Patient safety data" is defined as any data, reports, records, memoranda, analyses, deliberative work, statements, or quality improvement process. This does not specifically include individual medical records, nor is it information that contains personally identifiable information. Rather, patient safety data will most likely consist of aggregated statistics reflecting trends in a given organization or office, such as the number of people who died during surgery in the past year or the number of patients who died from post-operative infection. It may also include individual reports — minus personally identifying information — of medical or administrative errors which are reported to the patient safety organization in order to receive feedback regarding the ability to avoid similar mistakes in the future.
- A health care provider submitting this information can be any person or entity furnishing medical or health care services, including, but not limited to, physicians, pharmacists, renal dialysis facilities, ambulatory surgical centers, long term care facilities, behavioral health residential treatment facilities and clinical laboratories.
- The bill's controversial provisions grant confidentiality to this patient safety data. The legislation states that all patient safety data shall remain privileged and confidential, preventing its release even in the face of a subpoena or discovery request (or its use as evidence) in any civil, criminal or administrative proceeding, or its disclosure pursuant to FOIA. Disclosure of this information can only occur if:

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- A health care provider makes the disclosure as part of a separate request for information that contains this information (such as a proper request for a patient's file when that file contains a reference to patient safety data or the data itself); or
- A health care provider or patient safety organization releases the information as part of a disciplinary proceeding or criminal proceeding if the information is material to the proceeding, within the public interest and not available from any other source.
- Some believe that S 720 and S 663 would trump existing state laws, such as a recently-passed Illinois law which requires the reporting of hospital-acquired infections. This concern stems from the very broad definition of "patient safety data". Any advocacy against this bill must contain opposition to this definition. By including "any data, reports, records, memoranda, analyses, or statements that could result in improved patient safety or health care outcomes that are (1) collected or developed by a provider for reporting to a patient safety organization, (2) requested by a patient safety organization, or (3) collected from a provider", in the definition of "patient safety data", the bills would allow health care providers or patient safety organizations to bring records, information, or other evidence of improper care through the back door into the safe haven of protection from disclosure (the bills' supporters disagree, claiming that the bills would not limit the availability of any information already in the public domain, nor would they relieve physicians from maintain a proper standard of care). In addition, the exception for information that has been collected or developed separately from patient safety data is not sufficiently precise to allow a requestor to claim access to such records -- they would apparently allow medical information such as specific patient records to be grouped with patient safety data in a way that results in both being protected by the law. It almost certainly would restrict access to the self-generated "hospital report cards" that are a good indication of a hospital's health care practices.

- HR 663 has passed the entire house and has been referred to the Senate Committee on Health, Education, Labor and Pensions. That Committee has already passed S 720, which awaits a floor vote, which at this time has not been scheduled. Any comments or views on either bill should be directed to members of that Committee. A list of those Senators can be found at: http://health.senate.gov/committee_members.html.

Antiterrorism Tools Enhancement Act (HR 3037)

- Introduced September 9, 2003 by Rep. Tom Feeney (R-FL). It has been referred to the House Judiciary Committee, which has not voted on the bill.
- This bill would expand the potential reach of "administrative subpoenas" which are essentially a blank check for the Attorney General to subpoena documents (or personal testimony) in cases involving a federal terrorism crime, as defined in Title 18, Section 2332b(g)(5) of the US Code. The defining characteristic of an administrative subpoena is that it does not require prior court approval to be effective, essentially allowing the Attorney General to write and enforce his own subpoenas to obtain information at his whim. Expanded use of these subpoenas has been proposed in many drafts of legislation thought to be sequels to the USA Patriot Act. The only judicial review that is provided by this statute will occur if the recipient of the subpoena affirmatively goes to federal district court and files a Motion to Quash the subpoena -- essentially shifting the burden of proof required for the subpoena to become effective.

Representatives Green and Shays Remove Congressional Research Service documents from their personal websites

- The Congressional Research Service ("CRS") is considered the top source for nonpartisan objective evaluation of legislation-related issues. These materials include issue and legislative briefs, and authorization and appropriation products. Citizens, scholars, journalists, librarians, businesses, and many others have long wanted access to CRS reports via the Internet. Despite

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the fact that the CRS is a taxpayer-funded service, the results of its research are available to the public only if a citizen requests certain information from his or her Congressman.

- Legislation has been introduced in each of the last 4 Congresses which would increase access to CRS documents, with Rep. Chris Shays (R-CT) introducing bills in the House in both 1998 and 1999.
- Though legislative efforts to increase access to CRS documents never moved very far in Congress, Reps. Shays and Mark Green (R-WI) took it upon themselves to effect that result. They created portals on their websites that would allow the public to access CRS documents they had accumulated as part of a self-described “pilot program” which lasted for 3 years. However, it appears that the pilot program will not become permanent, as they removed their links to this CRS material, without explanation for their actions, just last week.
- Several organizations interested in right to know issues sent letters to the offices of both congressmen, asking them to reconsider their decision and resume access to the CRS documents. There has been no answer or action in response to these efforts.

HR 3289 Iraq Reconstruction Relief Funds Bill

- Introduced on October 14, 2003 by Rep. C.W. Bill Young (R-FL), this is the bill that appropriates billions of dollars to rebuilding Iraq and Afghanistan. It was passed into law on November 6, 2003
- An largely unnoticed section of this bill was allocated to the creation of a “Free Trade Area of the Americas” which would mainly comprise the Caribbean region, including the southeastern United States, but not including Cuba. The bill contemplated the spending of \$8.5 million for costs associated with the November 17, 2003 ministerial meeting of this organization in Miami, Florida. Some of that \$ 8.5 million was to be used for security purposes, allowing the Miami Police Department, and those of the surrounding areas to ensure that protests do not physically damage the local community.

- Though not specifically provided for in the bill, the Miami Police Department used its discretion in allocating this \$8.5 million to create an “embedding program” for reporters covering the protests expected to occur during this ministerial meeting. Reporters can ride or walk along with Miami police officers on their side of protest barricades, reporting on how the police maintain order while allowing protest. Reporters would have to sign releases in order to participate which would exonerate the police department from liability for an injuries to the reporter but also agreeing not to report on certain topics such as the number of police officers or units in any given protest area.

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

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Ethics Corner: Government Investigations and the Emerging Law of “Selective Waiver” of Privilege

By Jennifer A. Short and Anand Ramana

The notion of advising a client to waive a privilege and answer the government’s questions would rarely enter the mind of the typical media lawyer. Ordinarily, the subpoena comes in from a prosecutor or law enforcement agent who wants to see the interview tape, talk to the reporter, leaf through the notebook. The journalists we represent have a promise to keep and a First Amendment principle to uphold. In that situation, the lawyer’s role usually is clear: our job is to get between the journalist and the government, keeping the client completely mum.

But we easily overlook the fact that for many of our clients, particularly those that are publicly traded corporations, the journalism they produce is not the only aspect of their business that may catch the eye of a government agency. In many instances, inside and outside counsel for a media client could find themselves with far more to consider than their jurisdiction’s take on *Branzburg v. Hayes*. Unlike the newsroom context, when faced with a government demand for business information, circling the wagons and setting up an impenetrable shield may not always be the right move for the client.

“Incentives” to Cooperate

In fact, in the post-Enron, WorldCom, Global Crossing, and HealthSouth environment, the government has developed significant incentives to promote “cooperation” from its corporate targets. In a January 2003 internal memorandum, U.S. Deputy Attorney General Larry D. Thompson forwarded a revised set of principles for “Federal Prosecution of Business Organizations” to the heads of the various divisions at the Department of Justice and to United States Attorney’s offices across the country.

Available at www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00161.htm, the memo instructs prosecutors to consider, when making charging

decisions, “the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection.” Companies that follow certain protocols or otherwise make voluntary disclosures can receive reduced penalties or amnesty from prosecution. That can put powerful pressure on counsel when it comes to making recommendations about waivers of privilege with respect to the company’s internal investigation of the issue, and even, potentially, disclosures of specific communications between corporate officers and their in-house counsel.

Will it Be a Waiver?

Equally as weighty, though, are the consequences down the road of a disclosure of internal corporate information for near-term advantage in the face of a government probe or prosecution. A number of courts have wrestled with the question of whether sharing privileged information with the government in an effort to resolve, settle, and overcome an investigation will create a permanent waiver of the company’s privilege. Unfortunately, the results are not always consistent.

Just last year, for example, in *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002), the Sixth Circuit held that once a company has waived privilege, it cannot protect those materials from discovery in a subsequent civil action. In that case, Columbia/HCA conducted several internal audits of its healthcare billing practices in response to a Department of Justice investigation.

Initially, the company claimed privilege and work product, refusing to produce the results. As the government’s investigation wore on, however, and in order to advance settlement negotiations, Columbia/HCA agreed to produce some of its privileged materials. The company’s production was subject to stringent confidentiality provisions that

Unlike the newsroom context, when faced with a government demand for business information, circling the wagons and setting up an impenetrable shield may not always be the right move for the client.

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included the government's agreement that disclosure "does not constitute a waiver of any applicable privilege or claim under the work product doctrine."

Soon after a settlement was announced, a rash of civil fraud cases was filed against Columbia/HCA on behalf of private insurance companies and individuals based on the same underlying conduct. During discovery, the plaintiffs sought disclosure of the company's internal investigation materials, claiming that the protections of the attorney-client and work product privileges had been waived when the company turned those materials over to the government. The trial court ordered disclosure. Upon interlocutory review, the Sixth Circuit rejected the concept of a selective waiver and held that the company must turn over the documents. Acknowledging that voluntary disclosures to the government encourages settlement of those disputes, the court nonetheless concluded that

"[t]he decision to enter into settlement negotiations, and to disclose otherwise confidential information in the process, is a tactical one made by the client and his or her attorney." *Id.* at 303-04.

The law of waiver in this context is developing along very specific jurisdictional lines.

Delaware Decides

Several months later, a Delaware state court reached a different conclusion. In *Saito v. McKesson HBOC, Inc.*, 2002 WL 31657622, No. Civ. A 18553 (Del. Ch. Nov. 13, 2002), the defendant had conducted an internal investigation following inquiries from the Securities and Exchange Commission. The company offered to disclose the results of its investigation to the government under a confidentiality agreement. Subsequently, a number of the company's shareholders filed a derivative suit in Delaware related to the government's allegations of wrongdoing and demanded production of the documents that the company had shared with the government. The company claimed attorney-client privilege and work product.

On the plaintiffs' motion to compel, the court noted that the bulk of the documents disclosed to the govern-

ment were subject to a confidentiality agreement. The court reasoned that

"[t]here is no waiver of privileged information to third parties if a disclosing party had a reasonable expectancy of privacy when it made an earlier disclosure."

The court recognized the pressures a government investigation can bring to bear and suggested that it was loathe to further tip the balance against cooperation by enforcing an unrestricted waiver after confidential materials are shared:

Imposing the harsh consequence of a waiver upon disclosing parties would discourage confidential disclosures. When the benefits of leniency from the SEC are uncertain, yet the burden of exposing a company's Achilles heel to a flood of adversaries is

certain, corporations will be less likely to choose to disclose work product to the SEC. It seems inconsistent to deny a selective waiver rule and expect continued cooperation with law enforcement agencies when a confidential disclosure is such a double-edged sword for the corporation.

The court endorsed the notion of a selective waiver, holding that the company had properly withheld from the shareholder plaintiffs work product materials submitted to the government pursuant to the confidentiality agreement.

California Court Orders Disclosure

Interestingly, another court ordered disclosure, in a criminal case against the corporation's former directors, of the very same information that was protected from discovery in *Saito*. In *United States v. Bergonzi*, 216 F.R.D. 487 (N.D. Cal. 2003), the judge was not persuaded that the company's confidentiality agreement with the government extended the privilege. In fact, the court found that because the company had agreed to share information with the government prior to conducting its internal investigation, no privilege ever attached:

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Ethics Corner

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“communications between client and attorney for the purpose of relaying communication[s] to a third party is not confidential and not protected by the attorney-client privilege.”

The law of waiver in this context is developing along very specific jurisdictional lines. The Third, Fourth, Federal, and D.C. Circuits follow the Sixth Circuit’s approach in *Columbia/HCA* and hold that the attorney-client privilege cannot be “selectively waived” — once waived, it is gone forever. See *Genentech, Inc. v. United States Int’l Trade Comm’n*, 122 F.3d 1409 (Fed. Cir. 1997); *Westinghouse Electric Corp. v. Rep. of the Philippines*, 951 F.2d 1414, 1424 (3d Cir. 1991); *Martin Marietta Corp. v. United States*, 856 F.2d 619 (4th Cir. 1988); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981); *In re Grand Jury Investigation of Ocean Transportation*, 604 F.2d 672 (D.C. Cir. 1979).

The First and Second Circuits have issued conflicting opinions, sometimes rejecting selective waiver, and at other times accepting it. Compare *In re Leslie Fay Companies, Inc. Securities Litigation*, 161 F.R.D. 274 (S.D.N.Y. 1995), and *United States v. Billmyer*, 57 F.3d 31 (1st Cir. 1995), with *Bank of America v. Terra Nova Ins. Co.*, 212 F.R.D. 166, 175 (S.D.N.Y. 2002).

The Eighth and Ninth Circuits recognize the doctrine. See *United States v. Bergonzi*, 216 F.R.D. 487 (N.D.Cal. 2003); *Diversified Industries v. Meredith*, 572 F.2d 596 (8th Cir. 1977). Work product waivers are analyzed differently, and many courts acknowledge that work product disclosures to a particular third party do not necessarily waive the protections with regard to other third parties.

How to Advise a Client

So where do these inconsistent decisions leave corporate counsel when faced with a decision of whether to bar the doors or lay out the welcome mat in a bid for leniency from the government?

- First, counsel needs to research the law on selective waiver in their jurisdiction.
- Second, counsel must weigh the risks to the company of not disclosing to the government against the risk that any information provided during a government

investigation could later become available to private-party litigants.

- Third, if the decision is made to share protected information with the government, counsel should negotiate a rigid confidentiality agreement regarding the scope of the disclosure and the limits on the government’s ability to use and distribute the information.
- Fourth, any decisions about sharing with the government, even under a confidentiality agreement, may need to be postponed until an internal investigation can be completed, so that the protections of privilege may attach in the first instance.

By appropriately girding themselves with information and anticipating the potential consequences of releasing privileged materials to the government, counsel can minimize – if not entirely eliminate – their companies’ exposure to subsequent invasions of privilege.

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