

**MILRC** Media Law Resource Center  
**MEDIA LAW LETTER**

Reporting Developments Through November 29, 2004

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**In last month's MediaLawLetter we inadvertently omitted the following Media Law Conference facilitators: Access Subpoenas Session: Saul Shapiro, Patterson Belknap. Ethics Breakout Session: Paulette Dodson, Tribune; Jonathan Anshell, CBS Television.**

**Media Law:**  
**Canada/United States Cross-Border Issues**

**Toronto (May 12-13, 2005)**

**Presented jointly by Media Law Resource Center and  
Advocates In Defence of Expression in the Media**

*The first seminar devoted to media law issues affecting Canadian and American publishers and broadcasters. Intended for counsel advising media on risks under Canadian law and procedure when their content is distributed in Canada – or is simply accessible on the Internet. Recent cases, such as *Bangoura v. Washington Post* provide a wake-up call for U.S. publishers and broadcasters. There may be more to fear just to the north, across the world's longest undefended border, than across the oceans in England or Australia.*

**What you will learn?**

- When will Canadian courts take jurisdiction over claims against U.S. media?
- Can access on the Internet be enough for Canadian lawsuits against U.S. media defendants?
- What are the key differences under Canadian libel and privacy law?
- What advantages do plaintiffs have under Canadian law and procedure?
- Is it true that publishing a photograph taken in public can result in liability under Quebec law?
- What special defences are available under provincial libel legislation?
- What standards of fault apply?
- When can covering Canadian court cases get you into trouble?
- How to reduce the risks of being at the wrong end of Canadian lawsuit? Why is pre-publication/broadcast review different in Canada?
- What does Canadian litigation mean for discovery, protection of sources, trial conduct, damage awards and legal costs?

*In under two days, get a handle on exposure under Canadian law from top media counsel and position yourself to steer your clients through challenges north of the border.*

**Save the date – more information to follow.**

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## MLRC's William J. Brennan Jr. Defense of Freedom Award Presented to Ted Turner

It was the hottest spot north of Havana at Manhattan's Copacabana restaurant and nightclub on Wednesday November 17th as close to 600 MLRC members and their guests gathered together for this year's Annual Dinner.

The highlight of the evening was the presentation of the William J. Brennan Jr. Defense of Freedom Award to Ted Turner, Chairman of Turner Enterprises and founder of the Cable News Network ("CNN"), the first 24-hour news channel.

Since CNN officially launched on June 1, 1980, its combined branded networks and services have become available to more than 1.5 billion people in more than 212 countries and territories around the world, changing forever the global media landscape.

As noted in a speech before the Radio-Television News Directors Association in 2000, Christiane Amanpour, CNN's chief international correspondent who joined CNN in 1983, said:

We were thrilled and we were privileged to be part of a revolution, because make no mistake about it, Ted Turner changed the world with CNN. Not only did he create 24-hour news, and all that that has meant, but he truly created the global village. And as corny as that sounds, nothing has been the same since.

Ted Turner has also continually been recognized for his philanthropic activities, which have included the establishment of the Better World Society in 1985, as well as the Turner Foundation in 1990.



Tom Brokaw and Ted Turner

Chief Executive Officer of CNN who began working at the company the day before the Iraqi invasion of Kuwait, introduced Turner and recalled his longstanding dedication to providing his audience with comprehensive coverage of news from around the globe.



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

In characteristic candor and humor, Turner discussed the impetus behind the founding of CNN, as well as his views on the importance of the dissemination of global news.

MLRC honored Ted Turner for starting the Cable News Network, and, in so doing, changing the way news is delivered and used, here and abroad. He realized, before anyone else in the cable industry, the power of telecommunications to bring people together.

Tom Johnson, the former Chairman and Chief Executive Officer of CNN who began working at the company the day before the Iraqi invasion of Kuwait, introduced Turner and recalled his longstanding dedication to providing his audience with comprehensive coverage of news from around the globe.

Tom Brokaw, Anchor and Managing Editor of the "NBC Nightly News," conducted an hour-long interview with Turner that covered topics as diverse as Turner's dedication to environmental issues and his views of reality television.

*MLRC would like to thank all those who helped make this year's Annual Dinner such a success, and looks forward to seeing everyone again next year!*

Photos by Julienne Schaer



Hal Fuson and Ted Turner



Ted Turner



Tom Johnson introducing Ted Turner



Tom Brokaw and Ted Turner

## Senator Dodd Introduces Federal Shield Law Bill

On November 19, Senator Christopher Dodd (D-Conn.) introduced a reporters shield bill in Congress. The “Free Speech Protection Act of 2004” would establish a federal reporters’ shield law.

The proposed legislation would create absolute protection against compelled disclosure of sources, whether or not the source was promised confidentiality. And it would create a qualified privilege against compelled disclosure of news and information, such as unpublished notes and outtakes.

The privilege on news and information could be overcome where the information is critical and necessary to the resolution of a significant legal issue; the information could not be obtained by any alternative means; and there is an overriding public interest in the disclosure.

In his remarks on introducing the bill, Senator Dodd cited the Taricani case, as well as the host of subpoenas issued to reporters in the Plame investigation. He called the subpoena issued to New York Times reporter Judith Miller “Perhaps the most alarming instance in recent months of the growing threat to the sacred right to freedom of speech in America.”

Senator Dodd also noted that “a strong and uniformed Federal law on shielding would provide uniformity and consistency to the patchwork of inconsistent court decisions and State statutes currently in place.”

The bill will not be acted on in the current session of Congress, but Senator Dodd will reintroduce the bill in next year’s new Congress.

**An MLRC Task Force is examining proposals for a federal shield law. For more information contact MLRC Executive Director Sandy Baron, sbaron@medialaw.org.**

## Senator Dodd’s Proposed Federal Shield Law

108<sup>TH</sup> CONGRESS  
2d Session

### IN THE SENATE OF THE UNITED STATES

Mr. DODD introduced the following bill; which was read twice and referred to the Committee on \_\_\_\_\_

## A BILL

To establish protections against compelled disclosure of sources, and news or information, by persons providing services for the news media.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### SECTION 1. SHORT TITLE.

This Act may be cited as the “Free Speech Protection Act of 2004”.

### SEC. 2. DEFINITIONS.

In this Act:

- (1) COVERED PERSON—The term “covered person” means a person who –
  - (A) engages in the gathering of news or information; and
  - (B) has the intent, at the beginning of the process of gathering news or information, to disseminate the news or information to the public.

(2) NEWS OR INFORMATION—The term “news or information” means written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national, or worldwide events, or other matters.

(3) NEWSMEDIA—The term “the news media” means—

- (A) a newspaper;
- (B) a magazine;
- (C) a journal or other periodical;
- (D) radio;
- (E) television;
- (F) any means of disseminating news or information gathered by press associations, news agencies, or wire services (including dissemination to the news media described in subparagraphs (A) through (E)); or
- (G) any printed, photographic, mechanical, or electronic means of disseminating news or information to the public.

### **SEC. 3. COMPELLED DISCLOSURE PROHIBITED.**

(a) IN GENERAL—Except as provided in section 4, no entity of the judicial, legislative, or executive branch of the Federal Government with the power to issue a subpoena or provide other compulsory process shall compel any covered person who is providing or has provided services for the news media to disclose —

(1) the source of any news or information procured by the person, or any information that would tend to identify the source, while providing services for the news media, whether or not the source has been promised confidentiality; or

(2) any news or information procured by the person, while providing services for the news media, that is not itself communicated in the news media, including any —

- (A) notes;
- (B) outtakes;
- (C) photographs or photographic negatives;
- (D) video or sound tapes;
- (E) film; or
- (F) other data, irrespective of its nature, that is not itself communicated in the news media.

(b) SUPERVISORS, EMPLOYERS, AND PERSONS ASSISTING A COVERED PERSON—The protection from compelled disclosure described in subsection (a) shall apply to a supervisor, employer, or any person assisting a person covered by subsection (a).

(c) RESULT—Any news or information obtained in violation of the provisions of this section shall be inadmissible in any action, proceeding, or hearing before any entity of the judicial, legislative, or executive branch of the Federal Government.

### **SEC. 4. COMPELLED DISCLOSURE PERMITTED.**

(a) NEWS OR INFORMATION—A court may compel disclosure of news or information described in section 3(a)(2) and protected from disclosure under section 3 if the court finds, after providing notice and an opportunity to be heard to the person or entity from whom the news or information is sought, that the party seeking the news or information established by clear and convincing evidence that—

- (1) the news or information is critical and necessary to the resolution of a significant legal issue before an entity of the judicial, legislative, or executive branch of the Federal Government that has the power to issue a subpoena;
- (2) the news or information could not be obtained by any alternative means; and
- (3) there is an overriding public interest in the disclosure.

(b) SOURCE—A court may not compel disclosure of the source of any news or information described in section 3(a)(1) and protected from disclosure under section 3.

### **SEC. 5. ACTIVITIES NOT CONSTITUTING A WAIVER.**

The publication by the news media, or the dissemination by a person while providing services for the news media, of a source of news or information, or a portion of the news or information, procured in the course of pursuing professional activities shall not constitute a waiver of the protection from compelled disclosure that is described in section 3.



## Update: Rhode Island Investigative Reporter Held in Criminal Contempt for Failure to Disclose Confidential Source

### *Sentencing Scheduled for December 9*

Having found that civil contempt sanctions had not worked, and refusing to simply drop the matter, on November 18 Rhode Island Federal District Court Chief Judge Ernest Torres found WJAR reporter James Taricani in criminal contempt for refusing to divulge the identity of a confidential source who leaked to the reporter a surveillance videotape from the criminal investigation of several Providence officials. *In re Special Proceedings*, M.C. 01-47 (D. RI 2004). See also *MediaLawLetter* October 2003 at 19, March 2004 at 30 and June 2004 at 6.

A partial transcript is available online at the district court's website [www.rid.uscourts.gov/](http://www.rid.uscourts.gov/).

Taricani is scheduled to be sentenced on December 9 and faces up to six months in jail. The criminal contempt proceedings lasted less than one hour since there was no factual dispute concerning Taricani's refusal to comply with an October 2003 court order requiring that he disclose the identity of his source to the special prosecutor investigating the leak.

### **Background**

The reporters' privilege issue arose in connection with several federal corruption cases against city officials in Providence, Rhode Island, including then Mayor Vincent "Buddy" Cianci, Jr. and his Administrative Assistant Frank Corrente.

Corrente received copies of law enforcement surveillance tapes under a protective order in his corruption trial.

Approximately six months later in February 2001, Taricani obtained a copy of one of the surveillance tapes from a confidential source and portions were broadcast on WJAR Channel 10 in Providence, an NBC owned and operated station. The tape showed a government witness handing Corrente an envelope allegedly containing a cash bribe.

Following a complaint by the defense, the trial court appointed a special prosecutor to investigate the leak. After interviewing approximately 14 people and deposing five potential witnesses, the prosecutor subpoenaed Taricani, who refused to identify the source of the tape relying on the reporters privilege.

While it was feared that the leak of the videotape would harm the criminal trials of Cianci and Corrente, those proceedings concluded without any fair trial complaints – and both defendants were convicted.

Last year, Judge Torres ordered Taricani to submit to questioning from the special prosecutor investigating the leak. See 291 F.Supp.2d 44, 32 Media L. Rep. 1075 (D.R. I. 2003). He found the source's identity was germane to a good faith criminal investigation, and that the government had made reasonable efforts to obtain the information elsewhere. Citing *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir.1998); *United States v. The LaRouche Campaign*, 841 F.2d 1176 (1st Cir.1988); and *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir.1980).

*(Continued on page 10)*

## D.C. Circuit to Hear Miller and Cooper Contempt Appeal on Dec. 8th

On December 8, the D.C. Circuit Court of Appeals will hear the combined appeals of reporters Judith Miller and Matthew Cooper who were held in contempt last month for refusing to answer questions from the special prosecutor investigating whether any government official(s) violated the Intelligence Identities Protection Act of 1982 by leaking to the press the identity of undercover CIA agent Valerie Plame. *In re Grand Jury*, No. 04-3138.

Circuit Judges David Sentelle, Karen Henderson and David Tatel will hear the appeal.

Last month D.C. District Court Chief Judge Thomas F. Hogan held both reporters in contempt – a decision stayed pending appeal. In September, Judge Hogan ruled the reporters had no First Amendment or common law privilege to resist answering questions before the grand jury.

## Rhode Island Investigative Reporter Held in Criminal Contempt for Failure to Disclose Confidential Source

(Continued from page 9)

In March 2004, Judge Torres held Taricani in civil contempt for refusing to obey the court order. In June 2004, a unanimous First Circuit panel affirmed. *In Re Special Proceedings*, 373 F.3d 37, 32 Media L. Rep. 1897 (1st Cir. 2004). Citing *Branzburg* and First Circuit precedent, the Court, in a decision written by Chief Judge Boudin, joined by Judges Lipez and Howard, held there was no First Amendment basis for Taricani to resist the district court's order to reveal the identity of a confidential source since it was highly relevant to an ongoing criminal investigation into the leak and the government had made reasonable efforts to obtain the information elsewhere.

The First Circuit noted Judge Posner's recent decision in *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003), rejecting a First Amendment based reporter's privilege, but observed that the First Circuit's "own cases are in principle somewhat more protective."

### ***Criminal Contempt***

At a hearing on November 4, Judge Torres concluded that civil fines had failed to coerce Taricani to obey the order. And he refused to drop the matter, noting that "condoning or ignoring the violation of court orders, would undermine the very foundation of rule of law on which our system of government rests."

The fact that the leak did not ultimately interfere with ongoing grand jury investigations or the criminal trials, "does not provide a reason for ignoring the violation of the protective order any more than the fact that a murder attempt was unsuccessful provides a reason for ignoring the attempted murder."

While Judge Torres noted that the option of holding Taricani in criminal contempt is "very unpalatable," his status as a journalist and his motives do not "place him above the law or excuse his violation of the court order."

Addressing Taricani, Judge Torres concluded:

Now if it hasn't been apparent to you since 1972 when the Supreme Court decided *Branzburg*, I think it should be apparent to you now that you have no legal right to refuse to answer the special prosecutor's questions, and you certainly have no legal or other right to disobey lawful court orders.

He also asked Taricani to consider whether contempt proceedings fell outside his promise to the source and reminded Taricani that once held in criminal contempt he could not purge the sanction by complying with the court order.

At the November 18 hearing, Judge Torres found that defense counsel "basically rehashed arguments" that were rejected by both the district court and First Circuit. The court reaffirmed that regardless of Taricani's good motives he was willfully violating the court's order.

Prior to sentencing the court will receive additional medical information on Taricani (who is the recipient of a heart transplant). Judge Torres also noted that while Taricani is under no obligation to testify at the sentencing hearing, a significant factor in determining the sentence is whether at the time the tape was provided, Taricani knew that it was being provided in violation of the protective order.

James Taracani was represented by Martin Murphy, Bingham McCutchen LLP, Boston; Deming Sherman, Edwards & Angell, LLP, Providence; and Susan Weiner, NBC. Special Prosecutor Mark DeSisto appeared for the state.

**SAVE THE DATE!**

**I'M A LAWYER, HELP ME OUT HERE!  
KEY ISSUES IN ENTERTAINMENT & MEDIA LAW**

**Los Angeles, January 27, 2005**

*Presented by Southwestern Law School, Donald E. Biederman Entertainment & Media Law Institute ([www.swlaw.edu/entertainment](http://www.swlaw.edu/entertainment)) & MLRC*

## **ABC Prevails in Jury Trial on Hidden Cameras 20/20 Segment at Issue in *Turnbull v. ABC***

By Steve Perry and Lynn Scaduto

In February 2002, the California Department of Labor announced that workshops at which actors paid a fee to perform a short scene in front of a casting director were illegal. The Labor Department ordered 14 different workshop operators to “cease and desist” these “exploitive” practices. In response, the workshop operators argued that they were offering an educational service rather than charging actors for the opportunity to audition.

Into this dispute stepped an ABC Network News team led by ABC’s chief investigative correspondent, Brian Ross. In March 2002, an ABC associate producer with an acting background enrolled in several Los Angeles area workshops and, using an “eyeglass camera,” recorded footage of the workshops in an effort to determine whether the Labor Department’s allegations were accurate.

### ***20/20 Segment on LA Acting Workshops***

On November 8, 2002, ABC’s “20/20” program broadcast a story about the Labor Department’s challenge to the workshops. The 11-minute story included interviews with: a casting director whose complaints had led to the Labor Department’s investigation; a spokesperson for the workshop operators; several actors who supported the workshops; and two well-known actors, one of whom was a member of the board of the Screen Actors Guild.

The story also included short clips from the hidden camera footage that the producer had shot, including a clip of an actor performing a chicken imitation, an actress pointing her finger and shouting, and an actress attempting a karate kick.

### ***Plaintiffs First Sued in State Court***

Shortly after the broadcast, over a dozen actors and two workshop operators brought suit in California state court against ABC, Brian Ross, two ABC producers, two

ABC editors, and the “20/20” anchor who had introduced the program.

The actor plaintiffs asserted claims for common law invasion of privacy (intrusion), unlawful eavesdropping under California Penal Code § 632, intentional infliction of emotional distress, and invasion of privacy under California’s “anti-paparazzi” statute, Civil Code § 1708.8.

The workshop operators asserted a trespass claim. All plaintiffs sought a permanent injunction against ABC’s future use of hidden cameras in California pursuant to California’s unfair practices statute, Business and Professions Code § 17200.

Plaintiffs were represented by Neville Johnson, who has brought several previous suits involving hidden cameras against ABC and other media defendants.

### ***Pretrial Motions & Discovery***

Defendants’ initial response to the suit was an anti-SLAPP motion to strike on behalf of the “20/20” anchor who was alleged only to have introduced the story. As a result of the motion, the plaintiffs dismissed their claims against the anchor (a California resident).

The remaining defendants removed the case on diversity grounds to federal court, where it was assigned to Judge S. James Otero.

As discovery progressed, a few of the actors and one of the workshop operators dismissed their claims. In March 2004, the defendants moved for summary judgment on all claims. While the motion was pending, the plaintiffs voluntarily dismissed their claims for intentional infliction of emotional distress.

In August 2004, the defendants’ motion for summary judgment, and their separate motion for partial summary judgment on plaintiffs’ claims for publication damages, were denied in almost all respects. (The claim for a permanent injunction against any use by ABC of hidden cameras to gather the news in California was rejected by the Court as overly broad and on standing grounds).

*(Continued on page 12)*

## ABC Prevails in Jury Trial on Hidden Cameras

(Continued from page 11)

### Summary Judgment Denied

A discussion of the unreported summary judgment opinion appeared in September's MLRC *MediaLawLetter* at 21. *Turnbull v. American Broadcasting Co.*, No. CV 03-3554 SJO (FMOx) (C.D. Cal. Aug. 19, 2004) (Otero, D.J.J.). The opinion denying summary judgment was unfortunate in that it liberally borrowed plaintiffs' inflammatory rhetoric on such issues as ABC's alleged motives for using the hidden camera footage in the broadcast and its alleged failure to follow its own policies with respect to hidden cameras.

The opinion also contained several erroneous legal conclusions regarding the applicable California statutes. For example, section 632 of the California Penal Code expressly *excludes* from its reach the taping of communications in "any ... circumstance in which the parties to the communication may reasonably expect that the communication may be overheard *or* recorded" (emphasis added).

The Court appeared to hold, however, that plaintiffs could recover under the Penal Code *even if* they expected their conversations at the workshops would be overheard by others, as long as they did not *also* expect that the conversations were being recorded. The Court also appeared to hold that a jury could find ABC's conduct to be "highly offensive," thus satisfying one of the necessary elements of a common law intrusion claim, if it believed that hidden cameras were not "essential" to the news story in question.

Defendants filed a motion seeking certification under 28 U.S.C. § 1292(b) of an interlocutory appeal with respect to the Court's Penal Code interpretation and its denial of the defendants' separate motion to bar publication damages. That motion was denied. Just prior to trial, the plaintiffs voluntarily dismissed their claims against the individual defendants, after expressing a concern that those claims might unduly complicate the special verdict form.

### Motions in Limine

On the first day of trial, the Court decided numerous motions *in limine*, including the following:

- (1) ABC's motion to exclude or limit the testimony of plaintiffs' expert on journalistic ethics, Syracuse University

professor Robert Lissit, was denied in part and granted in part.

Lissit, who had testified for the plaintiff in the *Food Lion* case, was allowed to testify about ethical standards that, in his view, should be utilized whenever journalists consider the use of hidden cameras.

Lissit was not allowed to testify about ABC's purported motives or otherwise attempt to summarize the facts of the case, and he was not permitted to testify about purported surveys of journalists' opinions about hidden cameras.

- (2) ABC's motion to bar plaintiffs from introducing a question and answer from a 1994 deposition of former ABC News producer Rick Kaplan was denied.

Kaplan's testimony – that hidden camera footage might cause some viewers to believe that those caught on tape were involved in wrongdoing – was allowed even though Kaplan had left ABC News long before the investigation in question.

- (3) Plaintiffs' motion to bar any evidence of the Labor Department's allegations that the workshops were operating unlawfully was denied.
- (4) Plaintiffs' motion to bar ABC from introducing evidence that the plaintiff who was shown imitating a chicken had previously performed his chicken imitation on national television – on the "Wheel of Fortune" game show – was denied.
- (5) Plaintiffs' motion for an order that ABC had waived the attorney-client privilege when its witnesses stated during their depositions that they had sought the advice of counsel before using the hidden camera was denied.
- (6) The Court granted ABC's request to bifurcate the issue of the amount of punitive damages that might be awarded by the jury. As part of the first phase of trial, the jurors would be asked, if they found liability and awarded compensatory damages, whether plaintiffs had proven by clear and convincing evidence that ABC had acted with "malice, fraud or oppression," as required under California law for an award of punitive damages.

(Continued on page 13)

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**The opinion denying  
summary judgment was  
unfortunate in that it  
liberally borrowed plaintiffs'  
inflammatory rhetoric**

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## ABC Prevails in Jury Trial on Hidden Cameras

(Continued from page 12)

The Court also denied ABC's motion to exclude evidence of ABC's net worth from the second phase. ABC had argued that such evidence was irrelevant, and its admission unconstitutional, under *State Farm* and *Gore*.

### Other Rulings

The trial judge made several other rulings on the first day of trial on issues that had arisen in the parties' trial briefs and other pre-trial papers. For example, the Court barred the actor plaintiffs on hearsay grounds from describing the reactions of their relatives and friends to the ABC News broadcast.

The Court also ruled that plaintiffs could not show the jury any hidden camera footage that did not contain the image or voice of one or more of the plaintiffs. The Court also imposed time limits on the parties: 900 minutes per side, including opening and closing.

The trial began on October 13, 2004. Jury selection went quickly, as the trial judge conducted voir dire. A panel of nine jurors (four men and five women) was sworn. All nine would deliberate.

### Opening Statements

Plaintiffs' counsel was passionate and emotional in his opening statement. He promised to show that ABC's motive in using the hidden camera footage in the broadcast was to increase ratings and profits by humiliating the actors for the titillation of the viewing audience.

ABC's counsel stated that the evidence would show that Brian Ross and his team had decided to use the hidden camera because it was the most effective way to resolve the central factual dispute in the controversy over the workshops, and that the ABC News team had been careful to avoid invading anyone's privacy.

### Trial Testimony & Dynamics

The first witness was the ABC News producer who had worn the hidden camera at the workshops. Plaintiffs' counsel was hostile and aggressive in his questioning; the producer was unyielding and assertive in her answers.

Plaintiffs also presented videotaped deposition testimony from several ABC witnesses, including the executive producer of "20/20" and an ABC vice president who had approved the hidden camera. The other live witnesses in the plaintiffs' case included the casting director whose complaints had led to the Labor Department's investigation, all 14 individual plaintiffs, Brian Ross, and Professor Lissit.

Ross, who testified in both the plaintiffs' case and in the defense case, was a very effective witness. He took complete responsibility for the ABC broadcast and for its newsgathering techniques and proffered an articulate and persuasive defense of undercover reporting in general and hidden cameras in particular.

Among other things, Ross explained that he seeks approval to use hidden cameras only when they are the most effective way to report an important story. He described some of the other stories in which he has used hidden cameras (such as testing post-9/11 port security and exposing charity scams), and he pointed out that 98% of his stories do not involve hidden cameras.

Ross also explained the irrelevance of "sweeps" to television networks (the story had run during a "sweeps" period, and plaintiffs' counsel wanted the jury to infer that the story had been viewed by ABC as a ratings-getter).

The testimony of the individual plaintiffs followed a common pattern. Each plaintiff explained that he or she had viewed the workshops as a safe haven, that he or she had not expected any of the other participants to be reporters posing as actresses, and that he or she had suffered substantial, life-altering emotional distress upon seeing the broadcast and realizing that his or her privacy had been invaded.

The Court did not allow the plaintiffs to testify about the amount of money that would, in their view, compensate them for their distress. This ruling was grounded upon the plaintiffs' refusal to provide damage figures at the Rule 26 stage.

The cross-examination of each plaintiff was short and was intended to establish that: (1) only one or two had visited a doctor or taken medication for their distress; and (2) they were aware when they saw the ABC producer at the workshops that she was a stranger.

In addition, specific plaintiffs were examined about instances in which they had demonstrated indifference to the

(Continued on page 14)

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**Plaintiffs' counsel was passionate and emotional in his opening statement.**

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## ABC Prevails in Jury Trial on Hidden Cameras

(Continued from page 13)

publication of their photograph or of personal information. For example, one of the plaintiffs appears scantily clad in an Internet “television series,” while another had sought publicity in tabloids for his role as Robert Duvall’s “butt double” in the film “Phenomenon” and has a website that contains pictures of his bedroom and kitchen.

The jury also viewed the chicken imitation on “Wheel of Fortune” by the actor who had complained about ABC’s inclusion in the broadcast of a similar imitation performed at a workshop. Another actor admitted that after the broadcast, he had allowed a television crew into his home to tape a “makeover” show for Home & Garden Television. The same plaintiff had posted personal information on a website about his childhood leukemia, his parents’ divorce, and the deaths of his brother and mother.

The jury also saw emails written to ABC News immediately after the broadcast by four of the actor plaintiffs. Those emails did not refer to any invasion of privacy or assert that the actors were suffering emotional distress. Instead, the actors expressed their disappointment and anger because the ABC News broadcast was supposedly “slanted” against the workshops and favored the Labor Department’s position that the workshops were a scam.

Among the last of the plaintiffs to testify was the workshop operator, Mr. Turnbull. Turnbull supported his trespass claim by testifying that reporters, cameras and recording devices were barred from his workshops and that he had suffered emotional distress upon learning that he had not been able to protect the actors attending his workshops from ABC’s prying. On cross, he testified that upon seeing the broadcast, he became very angry at Brian Ross for taking a position against the workshops.

He said that he believed that Ross was trying to shut his workshops down and that as a result, he “declared war” on Ross. He also testified that a few weeks later, he hosted a meeting of actors who might want to sue ABC.

### ***Experts’ Testimony***

Plaintiffs’ ethics expert, Robert Lissit, testified about the SPJ Code of Ethics, which suggests in part that hidden cameras be used only when all other methods of obtaining the information in question have been exhausted and only to report on substantial risks to health and safety or to expose “great systems failure.”

On cross, Lissit conceded that ethics codes seek to foster “ideal” behavior and that his testimony “had nothing to do” with the legal questions involved in the case. He also acknowledged that reporters have a “vital role” in uncovering wrongdoing, that there is a “long tradition” of undercover reporting in this country, and that there have been important stories – including several that were described for the jury in some detail – that could not have been reported without the use of hidden cameras.

He also described an instance in which he, while a news producer, had asked a photographer with a concealed camera to photograph prostitutes approaching a car parked near a police station in Gary, Indiana. Lissit justified his use of the hidden camera in that situation by claiming that he had used it to establish “great systems failure.”

The defense case took only a few hours and consisted of additional testimony by Brian Ross and rebuttal testimony by ABC’s journalism expert, Professor Steve Weinberg from the University of Missouri School of Journalism. Professor Weinberg also has a long association with the group IRE (Investigative Reporters & Editors).

Weinberg spoke briefly and focused primarily on the fact that the SPJ Code of Ethics was not accepted or utilized by newsrooms. On cross, plaintiffs’ counsel established that Mr. Weinberg had worked on a high school newspaper with Brian Ross (in the 1960’s) and had seen him once or twice since then.

### ***Jury Instructions & Verdict Forms***

After both sides had rested, the trial judge announced that because of his travel schedule and calendar conflicts, closing arguments would be held one week later. In the interim, the judge held two lengthy hearings to discuss jury instructions and special verdict forms. The outcome of those hearings suggested that the judge’s view of the applicable law was more fully developed than it had been at the time of his summary judgment opinion.

With respect to the common law intrusion claim, plaintiffs’ counsel argued that the jury should be told that the plaintiffs needed to show only a reasonable expectation that their conversations were not being recorded *by a member of the mass media*. The judge instead instructed the jury as follows:

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### ABC Prevails in Jury Trial on Hidden Cameras

(Continued from page 14)

“Each of the plaintiffs other than Mr. Turnbull claims that ABC violated his or her right to privacy. To establish this claim, each plaintiff must prove all of the following:

1. That the plaintiff had a reasonable expectation of privacy in the conversations or conduct he or she participated in at the workshops;
2. That the plaintiff’s conversations or conduct that ABC taped captured the plaintiff’s private or personal affairs;
3. That ABC intended to tape conversations or conduct that captured the plaintiff’s private or personal affairs;
4. That ABC’s conduct would be highly offensive to a reasonable person;
5. That the plaintiff was harmed; and
6. That ABC’s conduct was a substantial factor in causing the plaintiff’s harm.

In deciding whether an intrusion is highly offensive, you should consider, among other factors, the following:

- (a) The circumstances surrounding the intrusion;
- (b) ABC’s motives and goals;
- (c) The setting in which the intrusion occurred; and
- (d) How much privacy the plaintiff could expect in that setting.”

The judge also gave (over plaintiffs’ strenuous objections) the following instruction, which tracks the language used by the California Supreme Court in *Shulman v. Group W Productions, Inc.*, 18 Cal.4th 200, 236-7 (1998):

“Under the law, even an intrusion into an allegedly private place, conversation or matter may be lawful if it was, under the circumstances, justified by the legitimate motive of gathering the news.”

With respect to the plaintiffs’ claims based upon the anti-paparazzi statute, Civil Code § 1708.8(a), the judge had neither a form instruction, nor any reported case interpreting this new statute, to guide him. The instruction followed the language of the statute and was largely agreed to by the parties. One point of contention involved § 1708.8(f), which had been included in the statute after a lobbying

effort by, among others, the insurance industry and the media defense bar. That section provides that the statute:

“shall not be construed to impair or limit any otherwise lawful activities of . . . employees of governmental agencies or other entities, either public or private who, in the course and scope of their employment, and supported by an articulable suspicion, attempt to capture any type of visual image, sound recording, or other physical impression of a person during an investigation, surveillance, or monitoring of any conduct to obtain evidence of suspected illegal activity [or] the suspected violation of any administrative rule or regulation. . . .”

ABC argued that the jury should be told that if ABC had the motive described in § 1708.8(f), it must find for ABC on this claim. Plaintiffs argued that ABC’s motive was only one factor to be considered and that the jury should only be told to “consider, among other factors, . . . the defendant’s motives and goals. . . .” Ultimately, the judge used plaintiffs’ proposed language but also told the jury that:

“You may also take into account whether ABC and [the producer] were acting upon a belief that in entering onto another’s property, [the producer] intended to investigate the suspected violation of a law or suspected violation of an administrative regulation.”

With respect to the plaintiffs’ Penal Code § 632 claims for unlawful eavesdropping, the judge rejected plaintiffs’ argument that the critical issue was whether plaintiffs expected their conversations to be overheard or recorded by a “member of the mass media.”

The judge also rejected ABC’s request that the jury be instructed that plaintiffs must show that ABC intended to tape conversations that it knew or should have known were “confidential” within the meaning of section 632. See *People v. Smith*, 70 Cal.2d 123, 133-4 (1969). The judge instructed the jury as follows:

“Each of the plaintiffs other than Mr. Turnbull claims that ABC unlawfully eavesdropped on his or her conversations. To establish this claim, each plaintiff must prove all of the following:

(Continued on page 16)

## ABC Prevails in Jury Trial on Hidden Cameras

(Continued from page 15)

1. That ABC intentionally recorded the plaintiff's conversation by using an electronic device;
2. That a reasonable person would not have expected that the conversation may be overheard;
3. That a reasonable person would not have expected that the conversation may be recorded;
4. That ABC did not have the consent of all parties to the conversation to overhear or record it;
5. That the plaintiff was harmed; and
6. That ABC's conduct was a substantial factor in causing the plaintiff's harm."

This instruction departs from the Judicial Council form instruction in three respects: (1) subparagraphs (2) and (3) are combined in the Judicial Council instruction; they were separated here for purposes of clarity; (2) the word "plaintiff" in subparagraphs (2) and (3) was replaced by "a reasonable person," in order to reflect the case law holding that the standard is an objective one; and (3) the phrase "may be" was used in place of the phrase "was being" in subparagraphs (2) and (3) of the Judicial Council instruction, in an effort to track the language of the statute. All of these modifications were requested by ABC.

On the workshop operator's trespass claim, the judge gave an instruction that closely tracked the form instruction and that included the following paragraph:

"In considering whether Turnbull or his agent gave permission to enter Turnbull's property, you must consider whether the scope of the permission given was exceeded and whether the permission was obtained by fraud. If you find that the scope of Turnbull's consent to enter the workshop was exceeded or obtained by fraud, then Turnbull did not give permission for the entry."

ABC unsuccessfully objected to the above paragraph as an inaccurate statement of the law under *Baugh v. CBS*, 828 F.Supp. 745, 757 (N.D. Cal. 1993), and *Shulman*, 18 Cal.4th at 241 n.19.

The judge gave standard instructions on intent and damages and rejected ABC's request that the jurors be told that they could not award any damages for any distress caused by negative messages allegedly contained in the broadcast.

### Closings

Closing arguments followed the reading of the jury instructions. Plaintiffs' counsel was angry, loud and passionate in his closing argument. He accused several ABC witnesses of lying and accused Brian Ross (who was present for the closing and who had attended 3 of the 5 days of testimony) of being "mean."

His principal themes in his closing were that ABC

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***Shortly after the jurors began their deliberations, they asked to and did see the ABC News broadcast. A few hours later, they announced that they had reached a unanimous verdict.***

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News had been hurried and careless in deciding to use a hidden camera in this case and that the use of the hidden camera footage in the broadcast was "gratuitous" and was intended to "humiliate" the actors. Plaintiffs' counsel also argued that the broadcast had made the actors

look like "whores" and "losers."

Plaintiffs' counsel also suggested that the jury award \$100,000 to each plaintiff. After ABC's counsel objected under Rule 37 in light of plaintiffs' prior refusal to provide Rule 26 damage information, the Court instructed the jury that counsel's arguments about damages were not evidence.

The principal themes in the closing by ABC's counsel were: (1) that ABC's motive in using the hidden camera was to gather the news by using the most effective tool available to answer the question of "what really happens in the workshops;" (2) that when using the camera, the ABC News producer had taken steps to avoid invasions of privacy (such as by using an on/off switch in one-on-one situations and by not initiating conversations with other workshop attendees); and (3) that the actors' claims of emotional distress were unsupported by the evidence (for example, not a single doctor or psychiatrist testified on behalf of the plaintiffs) and appeared to have been invented or at least exaggerated in an effort to further Mr. Turnbull's "war" against Brian Ross.

Plaintiffs' counsel began his short rebuttal argument by pointing at ABC's counsel and stating (some would say

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### ABC Prevails in Jury Trial on Hidden Cameras

(Continued from page 16)

shouting) that everything counsel had said was “a big lie.” The remainder of the rebuttal argument was similar in tone.

#### **Unanimous Verdict for ABC**

Shortly after the jurors began their deliberations, they asked to and did see the ABC News broadcast. A few hours later, they announced that they had reached a unanimous verdict. *Turnbull v. American Broadcasting Co.*, No. CV 03-3554 SJO (FMOx) (C.D. Cal. Oct 28, 2004 (jury verdict).

With respect to the actors’ common law intrusion claims, the jury found that none of the actors had had “a reasonable expectation of privacy in their conversations or conduct at the workshops,” which resolved those claims. With respect to the actors’ claims under the anti-paparazzi statute, the jury found that ABC did not “knowingly enter onto the land of another without permission or otherwise commit a trespass,” which resolved those claims.

Although not required to do so by the special verdict form, the jury also found that plaintiffs had not shown “by clear and convincing evidence that ABC was guilty of malice, fraud or oppression in its conduct.”

With respect to the actors’ Penal Code § 632 claims for unlawful eavesdropping, the jury found as to each plaintiff that a “reasonable person [would] have expected that the conversation(s) may be overheard,” thus resolving those claims. With respect to Mr. Turnbull’s trespass claim, the jury found that Mr. Turnbull or his agent had given permission for ABC’s producer to enter his property, thus resolving that claim.

The judge ordered counsel not to speak to any juror about the deliberations or the verdict. Plaintiffs have not yet announced if they will appeal.

*Steven M. Perry and Lynn H. Scaduto of Munger, Tolles & Olson LLP in Los Angeles represented ABC. Neville L. Johnson, Brian A. Rishwain, and James T. Ryan of Johnson & Rishwain LLP in Los Angeles represented the plaintiffs.*

## Ohio Appellate Court Affirms Defense Verdict In Hidden Camera Case

By **Kenneth A. Zirm**

On October 21, 2004, the Eighth District Court of Appeals of Ohio affirmed a unanimous defense verdict rendered in May, 2003 for Cleveland television station, WJW-FOX8 and its former I-Team Reporter, Carl Monday. *AAA All City Heating and Air Conditioning and Home Improvement v. New World Communications of Ohio, Inc.*, No. 83334, 2004 Ohio App. LEXIS 5022. (Ohio Ct. App., Oct. 21, 2004) (Cooney, J.).

At issue in the case was a two-part investigative report broadcast in February, 1996 entitled “Furnace Repair or Scare.” The hidden camera investigation caught a number of heating contractors, including plaintiffs, exploiting public concern over carbon monoxide by using scare tactics in an attempt to sell furnaces to home owners.

The initial complaint asserted defamation, fraud, invasion of privacy, tortious interference, intentional and negligent infliction of emotional distress and illegal wire tapping.

Only defamation and fraud survived summary judgment, and the fraud claim was dismissed by the trial court at the close of plaintiffs’ case at trial.

After two weeks of trial, the jury deliberated for only an hour and a half before returning with a unanimous defense verdict, answering all three jury interrogatories on falsity, negligence and causation/damages in favor of the defendants. *See MediaLawLetter* May 2003 at 13.

***The hidden camera investigation caught a number of heating contractors, including Plaintiffs, exploiting public concern over carbon monoxide by using scare tactics in an attempt to sell furnaces to home owners.***

#### **Appeal of Defense Verdict**

Plaintiffs set forth ten assignments of error on appeal, dealing with pretrial discovery issues as well as evidentiary rulings at trial.

The assignment of error most likely to be of interest to media law practitioners pertained to defendants’ invocation of the Shield Law privilege during discovery. The Better Business Bureau was an identified source in the broadcast at issue, and plaintiffs’ initial interrogatories in the case asked defendant to identify its contacts at the BBB.

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**OH App. Ct. Affirms Defense Verdict In Hidden Camera Case**

(Continued from page 17)

Defendants refused to do so under Ohio's Shield Law which protects both confidential and non-confidential sources. Although plaintiff never pursued the issue during discovery, defendants issued third-party subpoenas on the BBB and extensively used BBB documents as exhibits during discovery depositions.

Then, when defendants used an affidavit from a BBB representative to authenticate those documents in support of is motion for summary judgment, plaintiffs attempted to reopen discovery to take that person's deposition. The trial court did not allow for additional discovery, and it also denied plaintiffs' motion in limine to prevent the trial testimony of any BBB witness.

On appeal, plaintiffs alleged that defendants had improperly used the Shield Law as both a shield and a sword, and argued that it was improper to allow defendants to rely on the testimony of a BBB witness after refusing to disclose BBB sources.

The Court of Appeals held that the Shield Law did not prevent plaintiffs from engaging in their own discovery of the BBB where it could have easily learned the identity of the BBB employees involved in the matter.

Further, plaintiffs failed to establish that the BBB representative who testified at trial was actually a source for defendants during their investigation of plaintiffs as the BBB witness testified at trial that she had no contact with defendants

during their investigation of plaintiffs, and was actually used by defendants primarily to establish plaintiffs' prior bad reputation through BBB complaints and correspondence.

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***On appeal, plaintiffs alleged that defendants had improperly used the Shield Law as both a shield and a sword, and argued that it was improper to allow defendants to rely on the testimony of a BBB witness after refusing to disclose BBB sources.***

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*Kenneth A. Zirm, Michael T. McMenamin and Susan M. Zidek of Walter & Haverfield LLP in Cleveland, and Muriel Reis and Carolyn Forrest of Fox Television, represented WJW-FOX8 and reporter Carl Monday. Charles Gruenspan of Charles Gruenspan Co., L.P. A. also of Cleveland, represented plaintiffs.*

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**District Court Awards Damages in Boehner v. McDermott Wiretap Case**

The D.C. federal district court awarded \$60,000 in damages, plus attorneys fees to be determined at a later date, to Representative John Boehner (R-Ohio) on his wiretap claim against Representative James McDermott (D-Wash). *Boehner v. McDermott*, Civ. No. 98-0594 (TFH), (D.D.C. Oct. 20 2004)(Hogan, C.J.).

At issue in the case is McDermott's release to the media of an illegally intercepted 1996 conference call involving Boehner, then-House Speaker Newt Gingrich and other Republican Congressmen discussing how to deal with an ethics committee ruling against Gingrich. A Florida couple recorded the call and gave the tape to Congressman McDermott along with a letter explaining that it contained a "conference call heard over a scanner."

In August, the court granted summary judgment to Boehner, finding that McDermott entered into an "illegal transaction" when he accepted the tape with knowledge

that it was acquired unlawfully. *See MediaLawLetter* Aug. 2004 at 5.

Last month, Chief Judge Hogan awarded Boehner \$10,000 in statutory damages under 18 U.S. C. §2520 (c)(2), \$50,000 in punitive damages and reasonable attorneys fees – which news reports estimate at \$600,000. McDermott has filed an appeal to the D.C. Circuit.

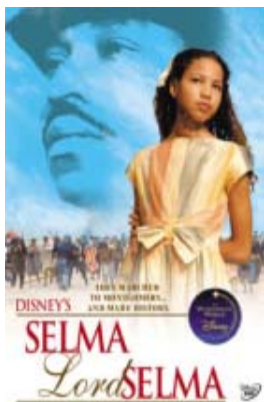
McDermott argued that damages were inappropriate because there was no evidence of financial gain to him or loss to Boehner, that his actions were motivated by a good faith belief that he was acting in the public interest and protected by the First Amendment.

Judge Hogan rejected this argument, ruling that Congressman McDermott participated in an illegal transaction by accepting the tape and subsequently causing it to be widely disseminated. In addition, punitive damages were appropriate "given Defendant's outrageous conduct in this case."

## Alabama Jury Finds for Disney

### *Civil Rights Movie Did Not Depict Woman in False Light*

After a four-day trial and half-hour of deliberations, an Alabama jury determined on November 18 that the ABC television movie “Selma, Lord, Selma” had not placed civil right activist Amelia Boynton Robinson in a false light, as she alleged in a lawsuit claiming that the movie depicted her as an emotional “Aunt Jemima.” *Robinson v. Walt Disney Television*, No. CV199900686700 (Ala. Cir. Ct., Jefferson County jury verdict Nov. 18, 2004).



The film, which Disney advertises as “a truly inspiring motion picture that accurately captures one of the most historically significant events in the struggle for civil rights,” tells the story of “Bloody Sunday” – March 6, 1965 – when a group of 600 civil rights marchers from Selma to

Montgomery were attacked by police just six blocks from the start of the march.

The story is told from the perspective of two girls, ages eight and nine. The film was based on the 1980 book *Selma, Lord, Selma: Girlhood Memories of the Civil-Rights Days* by the two girls, Sheyann Webb and Rachel West Nelson, as told to Frank Sikora.

The attempted march, and two successful ones that followed (the last under the protection of federal troops) led to enactment of Civil Rights Act of 1965.

Robinson, who was 54 in 1965, was one of the marchers who was beaten by the police. She is now on the board of directors of the Schiller Institute, an organization founded by perennial presidential candidate Lyndon LaRouche and his wife.

Robinson, now 93, alleged that the film – which aired on Jan. 17, 1999, the day before Dr. Martin Luther King, Jr. Day., and is now available on video and DVD – placed her in a false light because the actress who portrayed her was heavier than she was and used an “Aunt Jemima” dialect. The movie also showed her as

an unregistered voter who was forced to guess the number of jellybeans in a jar, while Robinson said that she had been a registered voter since 1933. She was depicted during seven minutes of the 88-minute film.

After the verdict, Robinson told *The Birmingham News* that the film’s depiction of her “wasn’t my style of living, in that I’m not a gospel singer, I’m not a vivacious person, I’m not an emotional person.”

Defense attorneys J. Banks Sewell III and Terrance W. McCarthy of Lightfoot Franklin & White in Birmingham argued that the compression of events and characters in the movie was protected by the First Amendment, and that the defendants had not acted with actual malice. Robinson conceded that she was a public figure.

In his closing argument, Sewell stated that “Mrs. Robinson is a hero, and every person in the courtroom owes her a debt of gratitude for helping make this state and this nation a better, fairer place.” “But,” he added, “even heroes can be wrong, and Mrs. Robinson is wrong about this lawsuit.”

“Your verdict,” he told the jurors, “will send a message and that message will be whether the voice of Disney, a voice that speaks to our kids in a way that we as adults never can, is silenced.”

Robinson was represented by her son, Bruce Boynton of Selma, Ala. Boynton said that he would file a motion for a new trial. As a law student in 1958, Boynton was arrested while trying to order food at a “white” section of a bus stop café in Richmond, Va. The arrest led to the U.S. Supreme Court’s decision in *Boynton v. Virginia*, 364 US 454 (1960), holding that restaurant facilities that were an integral part of interstate transportation were covered by the Interstate Commerce Act provisions barring discrimination.

The case was heard by Alabama Circuit Judge Tennant Smallwood.

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## Lawyer Who Gives Pleading to Reporter Can Be Held Liable for Defamation

By Carl A. Solano

On October 20, 2004, the Supreme Court of Pennsylvania handed down two notable defeats for First Amendment interests in Pennsylvania. The first was in *Norton v. Glenn*, which was the subject of a report in last month's MLRC *MediaLawLetter* at 11. The other was *Bochetto v. Gibson*, 2004 Pa. LEXIS 2466, 2004 WL 2358289, (Pa. Oct. 20, 2004) (Nigro, J.) in which the Court held that a lawyer can be held liable for defamation merely because he or she faxed a copy of a filed civil complaint to a reporter.

### Background

The case involved name-calling by two Philadelphia lawyers who were in the midst of hotly-contested litigation. The plaintiff was George Bochetto, a former Pennsylvania Boxing Commissioner who is known to a number of media entities for his representation of plaintiffs in recent libel actions brought against press organizations.

In 1997, he was retained by a Pennsylvania fox-hunting group to defend it in local real estate litigation. After the fox hunters lost at trial, they retained a new lawyer, Kevin Gibson, to sue Bochetto for malpractice, charging that Bochetto had failed to inform the fox hunters that an expert report prepared on their behalf contained information suggesting that they were likely to lose the case.

After filing the complaint, Gibson faxed a copy of it to a reporter for a Philadelphia legal newspaper, *The Legal Intelligencer*, which then published a story about the malpractice case and quoted some of the allegations. Bochetto sued Gibson for defamation, arguing, among other things, that the faxing of the complaint to the reporter made Gibson liable for publication of any of the complaint's defamatory content. (Gibson filed a defamation counterclaim for statements made by Bochetto to the same newspaper in an interview, but lost that claim on summary judgment because he could not prove damages.)

### Judicial Proceedings Privilege

Gibson defended on the basis of judicial privilege, arguing that he was absolutely immune from suit because he merely provided the reporter with a judicial pleading, and he won on that basis at summary judgment. The Philadel-

phia trial judge, Albert Sheppard, reasoned that he could not "ignore the chilling effect that could result from effectively precluding attorneys from forwarding copies of the pleadings they have filed to the press." *Bochetto v. Gibson*, 2002 WL 434551 (Pa. Ct. C.P.) (Mar. 13, 2002). The Pennsylvania Superior Court affirmed, but, on further appeal, the Supreme Court reversed in a 4-2 decision written by Justice Russell Nigro.

The Court drew a distinction between two publications by Gibson of the information in his complaint against Bochetto. First, there was the publication to the trial court through the filing of the complaint. Gibson had an absolute privilege from liability for that publication because it was a communication made in the regular course of a judicial proceeding that was pertinent and material to the redress sought — a traditional application of judicial privilege. However, the Court held that Gibson's separate publication of the information in the complaint to the reporter was not privileged.

It "was an extrajudicial act that occurred outside of the regular course of the judicial proceedings and was not relevant in any way to those proceedings." In entering summary judgment for Gibson because of concerns about a "chilling effect" on reporting, the trial court erred, in the Supreme Court's view, because the judicial privilege "is not meant to promote the airing of pleadings to the media" and "is only meant to promote the airing of issues and facts during judicial proceedings."

The Court continued, "although the failure to apply the judicial privilege to an attorney's communication with the media may inhibit the ability of the media to access the documents filed in a case, that problem is not one that the judicial privilege was designed to remedy."

Two members of the Court, Justices Ronald Castille and Max Baer, dissented. They noted that the information given by Gibson to the reporter was no more than the reporter could have gotten by obtaining a copy of the complaint at the courthouse, and they saw "no principled distinction" between those two situations. Both were methods of furnishing legitimate information to the public and, they concluded, both should be privileged. Justice Sandra Newman did not participate in the decision.

The Court's decision does not disclose whether Gibson's faxing of his complaint to the reporter was unsolic-

(Continued on page 22)

### Lawyer Who Gives Pleading to Reporter Can Be Held Liable for Defamation

(Continued from page 21)

ited or was in response to the reporter's request, and the decision does not distinguish its result on that basis. In his argument, Bochetto suggested that a lawyer who makes scurrilous charges against another lawyer in a pleading and then sends that pleading to a reporter engages in unprofessional conduct, and that theme may have resonated with some of the justices. In his own case, Bochetto successfully defended against the malpractice action that Gibson had filed, winning a jury verdict just a few days after the Supreme Court's decision.

But the Supreme Court's decision is not limited to internecine lawyer battles and will have much broader implications. Obtaining of pleadings, briefs, and other

court documents from lawyers is a common part of everyday reporting to which the Court's decision presents a serious obstacle. In answer to the trial court's concerns about press interests, the Supreme Court observed that a reporter can always obtain a filed document from a courthouse and, without

explanation, declared that court clerks cannot be held liable for distributing copies "so long as they act in accordance with the law."

But obtaining a filed document from counsel often is quicker, more convenient, and less expensive than going to court, and can be done while interviewing the lawyer for an explanation of what the document provides. Perhaps, as courts migrate to electronic filing systems, the inconvenience of obtaining documents from a court office may dissipate, but that day is not yet here and it will not eliminate the other advantages of direct lawyer contact.

Meanwhile, the "chilling effect" feared by the trial court will be real. Lawyers — usually a cautious group to begin with — are unlikely to risk personal litigation to assist a reporter. Pleadings often contain allegations that might be characterized as defamatory, and complaints are particularly susceptible to such a claim, since they typically will accuse a defendant of some sort of unlawful conduct.

Of course, defenses other than absolute privilege should apply to defamation claims based on dissemination of pleadings, and the Supreme Court itself left open the possibility of a *qualified* immunity defense for Gibson. But such defenses often present factual issues not susceptible to pretrial disposition, and few lawyers can be expected to want to engage in protracted litigation regarding them.

Therefore, as word of the *Bochetto* decision spreads, it is not difficult to imagine that law firms throughout Pennsylvania will develop policies that discourage or forbid forwarding of litigation documents to reporters, and that they will advise their clients to follow similar practices. And if such caution applies to the mere sharing of filed

pleadings, the reticence will likely spread to the making of any comments about a case at all, since no privilege applies to extrajudicial statements.

Doctrinally, as a strict matter of *judicial* privilege, the Supreme Court's decision is not without legal support. While public relations often are an

important component of a lawyer's comprehensive legal strategy in high-profile litigation, the dissemination of pleadings to reporters does not perform the type of direct *judicial* function to which that privilege typically has applied. But from a policy standpoint, the *Bochetto* decision makes little sense. It provides scant protection to plaintiffs' reputations, since the allegedly defamatory information already is in the public domain in official court files.

The main effect of the decision will be inhibition of the press by forcing reporters to go to a courthouse to obtain the same information that they could more easily obtain by fax or e-mail from counsel. The quick brush-off that the Court's opinion gave to the policy of informing the public is of deep concern.

One answer to this concern may be that the *Bochetto* case was argued under the wrong privilege. Rather than claiming a *judicial* privilege to disseminate court documents to the press, such communication can be viewed as a natural adjunct to the fair report privilege of the press to

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**As word of the [Bochetto] decision spreads, it is not difficult to imagine that law firms throughout Pennsylvania will develop policies that discourage or forbid forwarding of litigation documents to reporters, and that they will advise their clients to follow similar practices.**

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(Continued on page 23)

### Lawyer Who Gives Pleading to Reporter Can Be Held Liable for Defamation

(Continued from page 22)

report about judicial proceedings. After all, a lawyer who provides a court document to a reporter is merely enabling the press to report about it.

The Supreme Court hinted at the possibility that it may entertain this argument, citing to Section 611 of the Second Restatement of Torts in a brief footnote suggesting that some sort of qualified privilege may be applicable. While not absolute, the fair report privilege provides more robust

protections for defendants than do other qualified privileges in Pennsylvania. Fair report was not argued by Gibson, and that issue therefore remains open.

*Carl A. Solano is a partner with Schnader Harrison Segal & Lewis LLP in Philadelphia. Mr. Bochetto of Bochetto & Lentz, P.C., represented himself in the Supreme Court. The defendant was represented by Abraham Reich of Fox, Rothschild, O'Brien & Frankel LLP.*

## Alabama Supreme Court Alters Standard for Proof of Common Law Malice

By Dennis R. Bailey

The Alabama Supreme Court in *Wiggins v. Mallard*, No. 1030937, 2004 WL 2367838 (Ala. Oct. 22, 2004) (Woodall, J.) has made it significantly easier for private figure plaintiffs to overcome a claim of qualified privilege when a newspaper publishes false information gathered from law enforcement sources concerning arrests.

The case involved the misidentification of the first name of a person arrested on drug charges. The article was written after the editor/reporter of a community newspaper personally spoke with the local police chief over the telephone to obtain the arrest information which, after publication and an irate call from the innocent "victim," the chief promptly disavowed.

Once the chief recanted and denied providing the incorrect name to the newspaper, the newspaper promptly published a retraction – which in Alabama could insulate the paper from punitive damages.

Because there was absolutely no evidence of a prior history of ill will, hatred or malice between the editor/reporter or the police chief and the misidentified person, the trial judge granted summary judgment for both the police chief and the newspaper.

Such a ruling would have been consistent with the existing pattern jury instruction based upon cases defining common law malice to require a prior history of ill will creating a motive to publish a false defamatory fact.

### *Alabama Supreme Court Remands for Trial*

However, the Alabama Supreme Court reversed the trial judge and remanded the case for jury trial. The court opined that in addition to previous ill will, hatred or spite, common-law malice could also be proven by (1) recklessness of the publication and (2) prior information regarding its falsity.

The court determined that the conflict between the testimony of the editor and the police chief created a factual question from which a jury could reasonably conclude that a "deliberate falsehood" was published if the jury believed the police chief instead of the editor.

Unfortunately, this opinion blurs the distinction between common-law and constitutional malice. Historically, common-law malice was thought to have to be based upon a prior history of dealings between the parties

establishing a motive to publish a falsehood and harm the private figure plaintiff whereas constitutional malice focused primarily on the attitude of the author toward the truth or falsity of the publication.

This concept was embodied in the existing Alabama Pattern Jury Instruction 23.13, which – after this case – appears to no longer be valid. And, in the court's defense, the law in Alabama prior to this opinion was not a model of clarity.

But, the problem with unofficially combining the concepts is that there is no requirement that a private figure plaintiff prove common-law malice by clear and convincing evidence.

(Continued on page 24)

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***The conflict between the testimony of the editor and the police chief created a factual question from which a jury could reasonably conclude that a "deliberate falsehood" was published.***

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**Alabama Ct. Alters Standard for Proof of Common Law Malice**

*(Continued from page 23)*

It was noted in the most recent issue of the Alabama Libel Law Survey by this writer that the case of *Delta Health Group Inc. v. Stafford*, No. 1021675, 2004 WL 406760 (Mar. 5, 2004) may be a harbinger of a negative trend in Alabama. There I said in *Delta Health Group, Inc.*, “the Alabama Supreme Court found sufficient evidence of actual malice to overcome a qualified privilege on rather weak evidence. ... [I]t may have a chilling effect on the ability of media defendants to get sources to relay information.”

Unfortunately, the trend of lowering the bar on evidence sufficient to get the actual malice question to a jury has not only continued but has spread to a media case. The result is the combination of constitutional malice concepts with common law concepts such that the former has unofficially swallowed the latter.

Of course the court is quick to note that the making of a statement with knowledge of its falsity is not “conclusive” evidence of malice and the court leaves for another day whether constitutional malice can officially be substituted for common law malice to overcome a qualified privilege.

However, their actual holding is quite chilling:

“We do hold ... that a private-party defamation plaintiff may overcome a qualified-immunity defense with testimony indicating that the defendant intentionally lied about the plaintiff.”

This is, in effect, a constitutional malice standard.

The practical effect of this opinion is to underscore the importance of obtaining public records – such as incident/offense reports or arrest reports – prior to publishing information concerning arrests as opposed to relying upon oral, unrecorded statements of law enforcement officials which they can later disavow – thereby creating a disputed issue of fact for the jury to determine.

Code of Alabama 1975 § 13A-11-161 provides that:

The publication of a fair and impartial report of the return of any indictment, the issuance of any warrant, the arrest of any person for any cause or the filing of any affidavit, pleading or other document in any criminal or civil proceeding in any court, or of a fair and impartial report of the con-

tents thereof, or of any charge of crime made to any judicial officer or body, or of any report of any grand jury, or of any investigation made by any legislative committee, or other public body or officer, shall be privileged, unless it be proved that the same was published with actual malice, or that the defendant has refused or neglected to publish in the same manner in which the publication complained of appeared, a reasonable explanation or contradiction thereof by the plaintiff, or that the publisher has refused upon the written request of the plaintiff to publish the subsequent determination of such suit, action or investigation.

Although even under this statute obtaining a written copy of the arrest record would not completely insulate a reporter from a later claim of actual malice, having the written report would lessen the chance that law enforcement officials will disavow the report and leave the reporter hanging in the wind as happened here.

*Dennis R. Bailey is General Counsel of the Alabama Press Association.*

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## Texas Supreme Court to Review *Freedom Newspapers v. Cantu* May Reexamine Summary Judgment Standard

The Texas Supreme Court recently granted review in *Freedom Newspapers of Texas v. Cantu*, 126 S.W.3d 185 (Tex. App. 2003), signaling that it may be ready to reexamine a four-year-old case that has made it unnecessarily difficult for media defendants to obtain summary judgment on defamation claims brought by public figures. See *MediaLawLetter* Oct. 2003 at 59.

The plaintiff in the case, Conrado M. Cantu, was a successful candidate for sheriff in a predominantly Hispanic county. Cantu sued his local newspaper for defamation, claiming that the paper's coverage of a political debate misrepresented statements he made about the importance of his heritage and Spanish language fluency.

In rejecting summary judgment, the court of appeals held that a fact issue existed as to whether the article was substantially true and declined to recognize a qualified privilege for accurate reports of statements made during political campaigns.

Importantly, the courts of appeals also held that despite Cantu's status as a public official, he did not have to produce clear and convincing evidence of a fact issue on actual malice. In support of this holding, it cited the Texas

Supreme Court's decision in *Huckabee v. Time Warner Entertainment Co.*, 19 S.W.3d 413 (Tex. 2000) (affirming dismissal of defamation claim brought by family court judge against makers of documentary film), which concluded that a public official's ultimate burden to show actual malice by clear and convincing evidence is irrelevant at the summary judgment stage.

Since that decision, every jurisdiction to consider the issue has rejected the *Huckabee* approach; now only Alaska remains in agreement with the Texas position. *Cantu* offers the Texas Court an opportunity to overrule *Huckabee* and bring Texas actual malice law into line with the vast consensus of federal and state courts.

John A. Bussian, The Bussian Law Firm, Raleigh, North Carolina, and Jeffrey T. Nobles, Beirne, Maynard & Parsons LLP, Houston, Texas, represent Freedom Newspapers of Texas. Jorge C. Rangel, Jon D. Brooks, The Rangel Law Firm, PC, represented Amici Curiae Scripps Newspapers of Texas, LP and Southern Newspaper Publishers Association. Plaintiff is represented by Victor Quintanilla and Larry Zinn.

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## New York Court of Appeals to Review Ban on Cameras in Courts

The New York Court of Appeals, New York's highest court, has agreed to hear an appeal filed by Court TV challenging the state's ban on cameras in courtrooms.

In June 2004, a unanimous five judge appeals court panel rejected Court TV's constitutional challenge to New York's statutory ban on televising court proceedings. *Courtroom Television Network LLC v. State of New York*, 2004 N.Y. Slip Op. 05386, 2004 WL 1382325 (N.Y.A.D. 1 Dept. June 22, 2004). See also *LDRC LibelLetter* October 2001 at 47; *MLRC MediaLawLetter* July 2003 at 34; *MLRC MediaLawLetter* June 2004 at 19.

The intermediate appeals court ruled that the public right of access to trials recognized by the U.S. Supreme Court in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) and *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984), does not include television coverage. The court

reasoned that the value of openness outlined in these cases was grounded "not in how many people actually attend (or watch a broadcast of) a trial, but "in the fact the people not attending trials can have confidence that standards of fairness are being observed.'" *Quoting Press-Enterprise*, 464 U.S. at 508.

Further, even assuming that the ban restricts speech, the court held that it is content-neutral and sufficiently tailored to the state's interest in fair trials. Thus, the statute would not be found invalid if the state's interest could be served by less restrictive alternatives.

Jonathan Sherman of Boies, Schiller & Flexner LLP represents CourtTV.

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## **Court Strikes Libel Suit Against San Francisco Chronicle, Barry Bonds and Roger Craig**

By Karl Olson

A San Francisco judge has dismissed an unusual libel lawsuit against the publisher of the *San Francisco Chronicle*, baseball superstar Barry Bonds and former San Francisco 49er Roger Craig arising from a story about a former podiatrist who allegedly exaggerated his ties to prominent athletes. *Carver v. Bonds, et al.*, No. CGC-03-427734 (Cal. Super. Ct. July 29, 2004) (Quidachay, J.).

San Francisco Superior Court Judge Ronald E. Quidachay ruled in July that the *Chronicle* story was a fair and true report of a state investigation of Andrew Carver, a former San Francisco podiatrist.

Judge Quidachay also ruled that Carver was a public figure, because of his extensive promotional activities, who could not show actual malice; that the *Chronicle* article was true; and that portions of the article were opinion.

The Court also ruled that Bonds' comment, "I don't like that man. I don't like that man. He's a liar," was opinion.

The California Board of Podiatric Medicine launched an investigation of Carver, apparently prompted by several patient complaints, which focused on whether he had made false statements under oath as an expert witness in an Arizona trial.

The Board eventually filed an accusation against Carver seeking to revoke his medical license. The accusation gave as grounds for license revocation a prior spousal

abuse conviction; alleged lies under oath in the Arizona trial; and false advertising. Carver eventually agreed to surrender his medical license after moving to Hawaii.

Carver sued the *Chronicle*, two reporters and two prominent athletes – Bonds and Craig – who were quoted in the article. All of the defendants filed Special Motions to Strike under the California anti-SLAPP statute.

The *Chronicle's* motion was supported by no less than 15 declarations obtained from athletes, former employees of Carver, doctors and former patients who all supported the truth of the article and raised questions about Carver. Carver responded by filing a motion for leave to conduct discovery – which is stayed by the filing of an anti-SLAPP motion – and his own declarations.

Judge Quidachay, in a May ruling from the bench which was memorialized in a July 29 order, granted the defendants' anti-SLAPP motions and denied Carver's Motion for discovery. On October 27 Judge Quidachay granted the *Chronicle's* and Bonds' motions for fees under the anti-SLAPP statute. Carver has appealed.

*Karl Olson and Erica L. Craven, of Levy, Ram & Olson in San Francisco represented the Hearst Corporation, Mark Fainaru-Wada and Ulysses Torassa. William Turner and Merri Baldwin, Rogers, Joseph, O'Donnell & Phillips, represented Barry L. Bonds. Thomas Burke, Davis Wright Tremaine, represented Roger Craig. Carleton Briggs represented plaintiff.*

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## Court Dismisses Sharper Image's Product Disparagement Suit

A California federal court recently granted an anti-SLAPP motion to dismiss product disparagement and related claims against Consumers Union over a negative product review published in *Consumer Reports* magazine. *Sharper Image Corp. v. Consumers Union of United States, Inc.*, 03-4094 MMC (N.D. Cal. Nov. 10, 2004) (Chesney, J.).

The court found that plaintiff failed to show that any of the complained of statements in the product review were false.

### Background

Plaintiff Sharper Image manufactures an electrostatic room air purifier known as the "Ionic Breeze Quadra Air Purifier" ("Ionic Breeze"). Defendant Consumers Union ("CU"), the publisher of *Consumer Reports*, published performance-based rankings of a variety of air purifiers and cleaners in its February 2002 and October 2003 issues.

Among other things, the magazine said the Ionic Breeze "barely worked at all," was "not effective," and "had little air-cleaning capability."

Sharper Image alleged that these and other statements were false and sued CU for product disparagement, unfair competition under § 17200 of the California Business & Professions Code, tortious interference with prospective economic advantage, and negligence. Sharper image also alleged that CU was responsible for the republication by other media of these negative reviews.

Sharper Image alleged that CU's product testing was inaccurate, misleading and improperly conducted.

In January 2004, CU moved to strike under California's anti-SLAPP statute. In February the court denied the motion in part. The court held that Sharper Image's claims fell within the scope of the anti-SLAPP statute, that the statements were not opinion and that Sharper Image was entitled to take further discovery on the issue of falsity.

The motion was reheard in July.

### Product Reviews

Granting the motion to strike, the district court quoted with approval a Third Circuit decision which explained:

Consumer reporting enables citizens to make better informed purchasing decisions. Regardless whether

particular statements made by consumer reporters are precisely accurate, it is necessary to insulate them from the vicissitudes of ordinary civil litigation ....

*Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 280 (3d Cir. 1980).

The court then examined in detail the complained of articles, including statements in the February 2002 issue of *Consumer Reports* that the Ionic Breeze "barely worked at all," and "proved unimpressive in our tests."

The October 2003 issue of *Consumer Reports* stated among other things that "our tests showed Ionic Breeze is not effective," that Sharper Image's testing of the product was "irrelevant to the question of whether the Ionic Breeze was an effective air cleaner," and that it "didn't come close to the performance of the [other tested products]."

Sharper Image argued that such statements – most specifically defendant's claim that the Ionic Breeze was "ineffective" – were false in light of the faulty protocol employed by defendant in testing the air filter products. In addition, plaintiff claimed that defendant had reached the conclusion that the product was "ineffective" by misinterpreting and omitting relevant data, as shown by tests run by the plaintiff.

### Reviews Not False

Although the court recognized that various scientists had "criticized" the testing methodology employed by CU, it found that such evidence did not mean that the test results were scientifically invalid, or that statements relying on such results were false. In addition, the court found that defendant's application of the tests to the Ionic Breeze had not produced "unreliable" results.

The court further concluded that Sharper Image's argument that the Ionic Breeze was "effective" based on its own independent testing only served to show that "there exists divergent views as to what factors or criteria should be considered in determining whether a portable air cleaner is 'effective,'" and did not prove that CU's conclusions were untrue.

The court found that CU had informed consumers of the criteria on which it had based its rankings, and that

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**Ct. Dismisses Sharper Image's Product Disparagement Suit**

*(Continued from page 27)*

plaintiff's claims that defendant's statements were "false" were more aptly characterized as a "marketing dispute" concerning the characteristics consumers would conclude rendered an air filtering device "effective."

The court held that plaintiff had "not provided sufficient evidence to support a finding that, under any of these theories, whether alone or in combination, it has a

reasonable probability of establishing that any of the challenged statements are false," and granted defendant's motion to strike.

E. Robert Wallace of the Law Offices of E. Robert Wallach, P.C., and Alan L. Berry of Bell, Boyd & Lloyd LLC represented Sharper Image. Steven N. Williams of Cotchett, Pitre, Simon & McCarthy represented Consumers Union.

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## Kentucky Court of Appeals Grants Summary Judgment to Newspaper Over Prom Photo

By Jon L. Fleischaker, Jeremy S. Rogers and  
Kimberly K. Greene

Late last month the Kentucky Court of Appeals upheld a Knott (County, Kentucky) Circuit Court's grant of summary judgment dismissing a libel suit brought by a high school student over a photograph in the school newspaper that depicted her dancing at the prom with her skirt lifted to her underwear. *Combs v. Knott County Publishing Company, Inc.*, No. 2003 000372, 2004 WL 2413579 (Ky.App. Oct. 29, 2004) (designated not for publication). The decision can also be found at [www.kycourts.net/Appeals/COA\\_Opinions.shtm](http://www.kycourts.net/Appeals/COA_Opinions.shtm).

Although the girl's face was blacked out, the photograph clearly depicts her lifting her skirt to expose her upper thigh and underwear as she slow-danced at the Knott County Central High School prom in May 2001.

The photograph accompanied an editorial in the school newspaper of Knott County Central High School, *Patriot Voices*. The editorial was entitled "KCC Prom XXX-sposed," and criticized the prom attendees for their behavior at the prom.

The student editorial writer lamented the provocative dress, dirty dancing, and crude behavior of prom-goers but did not name any names. The editorial described the prom generally as "just down right nasty" quoting the observation of one student that "[i]t was sex with clothes on." The editorial discussed students groping one another and contained a caption "Shame! Shame! Shame!"

The school newspaper was routinely distributed as an insert to the local newspaper, *The Troublesome Creek Times*. The plaintiff claimed to be the girl pictured in the photograph and sued the publisher of *The Troublesome Creek Times*. She did not sue the high school or *Patriot Voices*. Because she was a minor when the lawsuit was initiated, her mother sued on her behalf.

The plaintiff alleged that many of her classmates recognized her in the photograph and that the school principal asked her to stay out of school for a couple of days because of the photograph. She admitted that the photograph was an accurate depiction of her dancing at the prom. However, plaintiff seized on the phrase "sex with

clothes on" and pursued the theory that the article falsely insinuated that she actually engaged in sex with her clothes on at the prom.

The newspaper moved for summary judgment. The newspaper argued that the article was protected opinion, was not of and concerning the plaintiff, that the *Times* lacked the requisite state of mind, and that the *Times* was protected by a news carrier defense.

At oral argument, the trial court judge stated his disbelief that the plaintiff's identity could be ascertained from the photograph. The trial court granted the newspaper's motion for summary judgment in a one sentence opinion and order.

### ***Editorial Was Protected Opinion***

The Court of Appeals performed a de novo review and held that the editorial was opinion as a matter of law. Therefore, the editorial was protected by the First Amendment, and the plaintiff failed to present the element of a defamation case requiring a false statement of fact concerning the plaintiff. The Court stated that the editorial amounted at most to a "crude metaphor" and was not presented as a factual report that sexual intercourse had actually occurred.

Additionally, because the comments were phrased as a blanket indictment of the behavior of a substantial group of attendees, the Court held that the editorial was not of and concerning the girl in the photograph. The Court did not reach the news carrier defense or the arguments concerning the defendant's state of mind.

As of the date of this article, the plaintiff has not appealed the decision to Kentucky's Supreme Court.

*Jon L. Fleischaker, Jeremy S. Rogers and Kimberly K. Greene are attorneys at Dinsmore & Shohl in Louisville, Kentucky, and represented Knott County Publishing in this case.*

**MLRC would like to thank Fall Interns  
Odelia Levy, Brooklyn Law School; and  
Alison M. Norris, NYU Law School  
for their contributions to  
this month's MediaLawLetter.**

## Sixth Circuit Holds Media Can't Be Barred from Polling Places

On election day, a divided Sixth Circuit panel granted an emergency appeal by an Ohio newspaper and ruled that the paper's reporters and photographers could not be barred from Ohio polling places. *Beacon Journal Publishing Company, Inc., v. Blackwell*, No. 04-4313, 2004 WL 2439856 (6th Cir. Nov. 2, 2004) ( Keith, Clay, and Cook JJ.).

At issue was an October 20 directive from Ohio's Secretary of State Kenneth Blackwell advising all Ohio Boards of Elections that Ohio Code § 3501.35 barred all nonvoters, including reporters and photographers, from polling places.

Section 3501.35 provides in pertinent part:

[N]o person shall loiter or congregate within the area between the polling place and the small flags of the United States placed on the thoroughfares and walkways leading to the polling place.... No person, not an election official, employee, witness, challenger, or police officer, shall be allowed to enter the polling place during the election, except for the purpose of voting.

Blackwell's directive stated that § 3501.35 applied to any non-voters attempting to enter polling areas.

The Beacon Journal brought a § 1983 action, alleging that on October 29, 2004 its journalists were denied access to a polling area where early voting was held.

The district court denied the publisher's request for a temporary restraining order to suspend the directive finding that the state had "a compelling interest in making sure that voters vote freely and without intimidation."

Reversing, the Sixth Circuit, in a decision by Judge Clay, held that the denial of the publisher's request for an injunction was an abuse of discretion. Accepting that the state may have a compelling interest in orderly elections, the state's regulations still must be narrowly drawn to achieve that end. The court reasoned that barring the press – "whose objective, far from interfering with the right to vote, is rather to report the news of the day to their fellow Ohio citizens" – was overly broad.

Indeed, the fear of "turmoil that could be created by hordes of reporters and photographers" is purely hypothetical and could not support the restriction on the press. The court ordered that defendants allow journalists to "have reasonable access to any polling place for the purpose of news-gathering and reporting so long as Plaintiffs do not interfere with poll workers and voters as voters exercise their right to vote."

Dissenting, Judge Cook simply noted that the district court did not abuse its discretion in denying the publisher's request for an injunction and did not otherwise address the First Amendment issues.

The Beacon Journal was represented by Ronald S. Kopp, Roetzel & Andress, and Karen C. Lefton, Akron.

*To be Published in November*

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## Colorado Federal Court Dismisses Constitutional Challenge to Criminal Libel Statute

The Colorado federal district court dismissed a civil and declaratory judgment lawsuit brought by a college student who had been threatened with a felony criminal libel prosecution for statements and pictures on his website that ridiculed a college professor. *Mink v. Salazar*, No. Civ.04-B-23(CBS), 2004 WL 2430092 (D. Colo. Oct. 27, 2004) (Babcock, C.J.).

Granting a motion to dismiss without oral argument, Chief Judge Lewis T. Babcock held that the student had no standing to sue for damages (or apparently seek a declaratory judgment) because no criminal charges are actually pending and the district attorney stated that no charges would be filed. Moreover, another prosecutor involved in the case enjoyed absolute immunity from suit, notwithstanding allegations that she knew of or should have known that the threatened prosecution was unconstitutional.

### Background

Thomas Mink, a student at the University of Northern Colorado ("UNC") publishes a website called "The Howling Pig" ([www.geocities.com/thehowlingpig](http://www.geocities.com/thehowlingpig)) which contains commentary and satire about the UNC community.

On December 12, 2003, police officers in Greeley, Colorado executed an extraordinarily broad search warrant at his home, seeking any computer systems, electronic storage media, and related documents, as well as all correspondence, journals, and any other of his communications in printed form. Mink was told he was being investigated for "felony criminal libel." His computer was seized by police and he was later told it was being examined for evidence and that he would likely be charged.

The basis of the search was a complaint by UNC Professor Junius Peake. The site ridicules Peake, featuring an altered photograph of the professor and the statement that it is an "old photo from Mr. Puke's rebellious days as a roadie for KISS is a sym-



bolic return to a time before his days on Wall Street where he managed to luck out and ride the tech bubble of the nineties like a \$20 whore and make a fortune."

### Plaintiff's Lawsuit

In January 2004 the Colorado ACLU filed a complaint in federal court on behalf of Mink and his web publication seeking to enjoin the investigation, asserting § 1983 and related violations, and seeking to obtain a declaratory judgment that Colorado's criminal libel statute is unconstitutional on its face and as applied.

Chief Judge Babcock granted an emergency order enjoining local Colorado police and prosecutors from investigating or bringing any criminal libel charges against Mink. *Mink v. Dominguez*, (D. Co. Jan. 9, 2004). The court also ordered the return of Mink's computer. At a subsequent court hearing on January 20, the Weld County district attorney filed formal notice that it would not pursue any charges. See *MediaLawLetter* Jan. 2004 at 41.

Plaintiff's argued that a "reasonable prosecutor would have known, or upon reasonable investigation could have discovered, ... that Professor Peake was widely known for publicly expressing his views and was a public official or public figure" and therefore outside the reach of Colorado's criminal libel statute. Moreover plaintiff alleged that "Without intervention from this Court, Plaintiffs will have to choose whether to risk criminal prosecution or forego engaging in what they believe to be constitutionally-protected expression."

### Colorado Statute Limited to "Private Libels"

Colorado's criminal libel statute, Colo. Rev. Stat. § 18-13-105, does not require actual malice nor does it recognize truth as an absolute defense, but the Colorado Supreme Court has held that while the statute would be unconstitutional as applied to statements about public figures and issues of public concern, it could be constitutionally applied to "purely private libels." *People v. Ryan*, 806 P.2d 935, 938-39, 19 Media L. Rep. 1074 (Colo. 1991), cert. denied, 502 U.S. 860 (1991).

(Continued on page 32)

## Colorado Federal Court Dismisses Constitutional Challenge to Criminal Libel Statute

(Continued from page 31)

### ***Immunity and Standing***

Much of the decision addresses an assistant district attorney's immunity from suit and includes no discussion or even acknowledgment of the First Amendment issues involved in criminal libel law.

Among other things, the court found that the district attorneys involved in the investigation was immune from § 1983 claims under the theory of absolute prosecutorial immunity. Citing to the U.S. Supreme Court's decision in *Imbler v. Pachtman*, 424 U.S. 409 (1976), the court noted that "subjecting prosecutors to liability for prosecuting unsuccessful cases would ... undermine performance of the prosecutor's duties."

The court also rejected plaintiff's claim that he may be subject to future prosecution under the statute, concluding that plaintiff has no "standing to preempt a potential prosecution." The court concluded that "assurances from prosecutors that they do not intend to bring charges are

sufficient to defeat standing, even when the individual plaintiff had actually been charged or directly threatened with prosecution for the same conduct in the past."

Interestingly, last year the First Circuit Court of Appeals held that a reporter who had been threatened with a criminal libel prosecution – but not ultimately prosecuted – satisfied the requirement for standing to challenge the constitutionality of the Puerto Rico criminal libel statute. *Mangual v. Rotger-Sabat*, 317 F.3d 45, 31 Media L. Rep. 1297 (1st Cir. 2003).

Plaintiff will appeal the decision to the 10th Circuit.

A. Bruce Jones and Marcy Glenn of Holland & Hart in Denver represented plaintiff on behalf of the Colorado ACLU. Tom Kelley and Steven Zansberg of Faegre & Benson in Denver filed an amicus brief on behalf of the Colorado Press Association and the Reporters Committee for Freedom of the Press. The defendants were represented by David R. Brougham of Hall & Evans in Denver and by William V. Allen of the Colorado Attorney General's Office.

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## Virginia Man Fined for Criminal Libel

In what appears to be the first modern use of Virginia's criminal libel statute, Ned Carey, a 61-year-old resident of Williamsburg, and a pastor of the Morning Star Baptist Church in Grove, was fined \$100 for calling a former employer a "Negro Nazi."

Carey, who had unsuccessfully sued Anheuser Busch for wrongful termination, began picketing the company's Williamsburg plant in January. On October 19, he was confronted by police as he was parked outside the plant, with a large sign with the offending words taped to his car.

The police first told Carey to take his signs and leave. They then reappeared with a ticket for slander and libel.

This month Carey appeared pro se in Williamsburg-James City County General District Court to challenge the ticket. After hearing from the ticketing officer and Ned Carey, Judge Colleen Killilea issued a fine of \$100.

Carey was fined under Virginia Code § 18.2-417, which makes publication of several types of statements about reputation a misdemeanor although there are no modern cases under any of these provisions.

The statute provides that:

Any person who shall falsely utter and speak, or falsely write and publish, of and concerning any female of chaste character, any words derogatory of such female's character for virtue and chastity, or imputing to such female acts not virtuous and chaste, or who shall falsely utter and speak, or falsely write and publish, of and concerning another person, any words which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace or shall use grossly insulting language to any female of good character or reputation, shall be guilty of a Class 3 misdemeanor.

The maximum fine under the statute is \$500.

The statute appears archaic and unconstitutional on First Amendment as well as on equal protection grounds. The Alabama Supreme Court recently called a similar chastity provision in a criminal libel statute "without question unconstitutional." *Ivey v. State*, 821 So.2d 937, 945, 29 Media L. Rep. 2089 (Ala. 2001).

Carey will appeal the fine.

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## European Leak Investigation Threatens Confidential Source Protection

By Christoph Arhold

In an interesting European case with parallels to the Plame investigation, European courts are considering whether and to what extent a reporter's right to protect a confidential source gives way to the government's interest in identifying and punishing officials who leak information to the press.

In this case, the reporter's files and documents have already been seized, and three courts have given little or no weight to protecting confidential sources.

### Background

Early in 2002 the German magazine *Stern* published articles by its Brussels-based EU correspondent Hans Martin Tillack on allegations by an EU official of fraud and mismanagement in the Community Institutions, and the investigation of those allegations by the EU's Anti-Fraud Office (OLAF).

OLAF, an independent investigation body within the European Commission (the executive body of the EU), was established in reaction to the resignation of the Commission in 1999 following numerous internal scandals. OLAF's task is to investigate fraud to the financial detriment of the EU.

Tillack's articles relied on copies of internal OLAF documents, so in March 2002 OLAF began to investigate the source of the leak. Because of internal rumours that Mr. Tillack might have paid for the documents, the Commission even considered withdrawing Mr. Tillack's accreditation to the European Union, but eventually decided not to.

However, OLAF suggested in press releases that a journalist (evidently Mr. Tillack) might have bribed an EU official to obtain the documents. Following a complaint by Mr. Tillack, the European Ombudsman decided in November 2003 that OLAF had committed an act of maladministration by publicly accusing Mr. Tillack of bribery in the press releases and elsewhere, with no supporting evidence other than rumors and hearsay.

Undeterred, Mr. Tillack continued to publish articles critical of the Commission, including a general article in November 2003 on OLAF's Director-General. In January 2004, OLAF complained officially to the Belgian and German judicial authorities that Mr. Tillack had bribed Commission officials to procure documents, and asked them to launch investigations against him.

The German authorities (*Untersuchungsrichter*) found the evidence insufficient to justify a search warrant.

The Belgian *Procureur du Roi* (Public Prosecutor), thought otherwise. Perquisitions (searches) are covered in Belgium by the *Code d'instruction criminelle* (the Criminal Investigation Code or "CC"), and except in

cases of *flagrante delicto*, they may only be carried out at the request of the *Procureur du Roi* or a *partie civile* (a victim complainant).

Once the *Procureur du Roi* is aware of an alleged offense, he

takes charge of gathering information and then decides either to close the file or to ask for a *perquisition* in order to obtain additional evidence. In the latter case he appoints a *juge d'instruction* (examining magistrate) who is then obliged to investigate the case. In this case OLAF filed a complaint with the *Procureur du Roi* of Brussels, who then requested the *juge d'instruction* Daniel Fransen to investigate the case.

On March 19 the Belgian police searched Mr. Tillack's home and office, and sealed or seized nearly all his and *Stern's* archives, working documents and computers. He was detained for a day of questions while his lawyer tried to make contact with him.

No one in Brussels seriously believes that *Stern* or Tillack was in the habit of buying copies of official correspondence for large sums of cash.

The suspicion arose because a then Commission spokesman claimed that he had heard a rumor to that effect from a former colleague. But the supposed source subsequently denied making the allegation.

By contrast "everyone" in Brussels believes the goal of OLAF was to identify its own employee who leaked the documents. As the victim of the alleged bribery,

(Continued on page 34)

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**Belgian police searched Mr. Tillack's home and office, and sealed or seized nearly all his and Stern's archives, working documents and computers.**

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## European Leak Investigation Threatens Confidential Source Protection

(Continued from page 33)

OLAF (i.e. the Commission) might become a *partie civile* to the Belgian proceedings. It may therefore request access to the seized documents at any time, and thus identify officials who acted as Mr. Tillack's sources.

### ***No Protection of Sources in Belgian Law***

Following the seizure of his journalistic resources, Mr. Tillack fulfilled his ethical duty by trying to protect his sources.<sup>1</sup>

He petitioned the Belgian *juge d'instruction* to release the seized documents, arguing that the investigation had disregarded the principle that journalistic sources are protected, as specified in Article 10 (freedom of expression) of the European Convention on Human Rights ("the Convention").<sup>2</sup>

Under the case law of the European Court of Human Rights ("ECHR"), interference with this fundamental principle is only permissible on three conditions: it must be provided by law, the aim of the interference must be legitimate, and the interference must be necessary in a democratic society to attain that legitimately pursued aim.

It is doubtful whether the Belgian Criminal Code constitutes a sufficiently detailed "law," as it does not explicitly define the limits of possible interference.

Indeed, the ECHR recently held that Belgium violated Article 10 of the Convention by searching a journalist's home for evidence in a third party criminal investigation. *Ernst v. Belgium*, No. 33400/96 (ECHR July 15, 2003) (unpublished).

Belgium now intends to adopt new legislation which will specify the exceptional circumstances in which such interference is possible. They do not include investigation of the making of payments for information.

Identifying leaks by public officials cannot as such justify interference with a journalist's right to protect his sources. That right would otherwise depend on any authority's arbitrary definition of what information was confidential. Vague allegations of bribery based solely on convenient rumor should not justify interference either, or the right would effectively cease to exist whenever the sources were officials.

### ***Belgian Court Said Search Was Justified***

However, in April 2004 the *juge d'instruction* declared Mr. Tillack's petition unfounded. The Judge refused to acknowledge a breach of Article 10 ECHR, arguing that:

*in view of the supposition that the plaintiff had obtained secret documents, a search of the premises where he works was justified even though he is a journalist, bearing in mind his probable involvement in the matters under investigation, which by their nature are particularly serious.*

The Judge's decision was based mainly on the alleged breach of confidentiality by EU officials, which he considered sufficient to override the interest in protection of sources. He added that *the plaintiff might be personally implicated, alone or with others, in a case of corruption*, and went on to conclude that it would in general be unacceptable to use the right to keep sources secret in order to conceal offences, since this would be likely to endanger public safety by creating a state of impunity.

Mr. Tillack challenged the order by a petition to the *Chambre des mises en accusation*, which on September 22, 2004 confirmed the order and its reasoning. He then appealed to the *Cour de Cassation* (the supreme appellate instance in this case) on September 28, 2004. A judgment is expected for December 1, 2004.

### ***European Court of First Instance***

As Belgian law did not offer him effective legal protection, Mr. Tillack also filed an application for interim measures with the European Court of First Instance in Luxembourg ("CFI"), asking it to order OLAF not to obtain, inspect, examine or hear the contents of the documents and information seized by the Belgian judicial authorities.

Applications for interim measures, which are heard by the President of the CFI, are only admissible if they are linked to a substantive action before the Court, and their granting is subject to three basic conditions:

- A *prima facie* case (*fumus boni juris* – "likelihood of good law") in the main proceedings;

(Continued on page 35)

### European Leak Investigation Threatens Confidential Source Protection

(Continued from page 34)

- Urgency, owing to possible irreparable harm without the interim measure requested (*periculum in mora* – “danger in delay”); and
- The balancing of the interests involved must favour the granting of interim measures.

Prima facie case: Mr. Tillack’s first task was to frame the terms of an appropriate substantive action. The EC Treaty offers only limited possibilities for legal action by individuals against acts of the EU Institutions.

In this case he had two claims: an action for annulment of OLAF’s decision to address a complaint to the Belgian authorities, under Article 230(4) EC Treaty; and an action for damages under Article 288(2) EC Treaty to compensate for injury resulting from that decision.

Annulment of an official act may only be sought if the act has produced binding legal effects which affect the applicant’s interests by bringing about a distinct change in his legal position.

As there is little case law on acts by OLAF, it was uncertain whether the decision to demand action by the Belgian authorities was such an act. Mr. Tillack also filed an action for damages.

Both actions were based mainly on the fact that OLAF had infringed most of its few procedural obligations during its investigations. Above all, under Article 11(7) of Regulation 1073/1999, the Director of OLAF must inform OLAF’s Supervisory Committee: (i) of cases which require forwarding to the judicial authorities of a Member State; and (ii) when internal investigations take longer than nine months.

Although both these conditions were fulfilled, OLAF did not inform the Committee. Moreover, OLAF sent the national authorities misleading information, presumably to induce them to act immediately: it said Mr. Tillack was about to move to Washington and take important evidence with him, which was not the case.

National authorities are obliged to cooperate with OLAF and would feel bound to execute its requests. Mr.

Tillack also argued that the complaints were the culmination of a veritable defamation campaign which harmed his reputation as a journalist and citizen.

To support the *urgency* of his application, Mr. Tillack argued that the identification of his sources would cause serious prejudice not only to his ability to function as a professional journalist, but also to the fundamental right of press freedom on which he depends. Discovery could not be undone: the damage would therefore be irreparable.

The application claimed that the *balancing of interests* favoured the granting of interim measures, as OLAF’s interest in identifying the informants was in

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***Tillack argued that the identification of his sources would cause serious prejudice not only to his ability to function as a professional journalist, but also to the fundamental right of press freedom***

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contradiction to Article 10 of the Convention. There was no need to examine whether, in principle, the prosecution of crimes such as bribery might be of sufficient interest to prevail over the protection of sources, since only the Belgian authorities and not OLAF had competence to prosecute bribery.

As long as the national authorities had found no evidence of bribery, there was no justification for disclosing any information to OLAF which could lead to the identification of informants.

On October 15, 2004, the President of the CFI dismissed Mr. Tillack’s application for interim measures on the ground that a *prima facie* case was lacking in the main proceedings. *Tillack v. Commission of the European Communities*, Case T-193/04 R. (The decision is available online through [www.curia.eu.int](http://www.curia.eu.int)).

The action for annulment was considered manifestly inadmissible, and the action for damages manifestly unfounded, for the same reason - the discretion of the Belgian authorities:

*“Any decision by the national authorities to take action on information forwarded by OLAF flows from the independent exercise of the powers vested in those authorities. [...] They remain free to decide what action should be taken on OLAF’s investigations.”*

(Continued on page 36)

## European Leak Investigation Threatens Confidential Source Protection

(Continued from page 35)

As OLAF's requests were not legally binding, they did not constitute challengeable acts, and since the Belgian authorities therefore had discretion in responding to them, there was no direct causal link between OLAF's complaints and the injury resulting from the search of Mr. Tillack's home and office. In other words, the President viewed OLAF as merely a complainant offering information, with no decisive influence on the actions taken by the Belgian authorities.

### Conclusion

This is the first case to deal with both the powers and duties of the exceptionally autonomous OLAF and the fundamental right to protection of journalistic sources in the European Institutions.

So far, both the Belgian and the European Courts have failed to protect that fundamental right. The Belgian courts have hidden behind the current Belgian legal situation which admittedly breaches the Convention.

The CFI has relied on the discretion of the Belgian authorities as to whether they should fulfill OLAF's requests. OLAF must respect fundamental rights, both directly and when it seeks assistance from other authorities. The Court could have effectively protected those rights by ordering OLAF not to take advantage of fruit from the poisoned tree, without deciding whether OLAF or the Belgian prosecutor who willingly executed OLAF's request had administered more.

Everything now depends on the Belgian Supreme Court: if it fails to protect Mr. Tillack's sources, the ECHR might again rule against Belgium; but by then it may be too late for Mr. Tillack's sources.

*Christoph Arhold is a senior associate with White & Case LLP in Brussels and represents Hans-Martin Tillack before the EC courts with Ian Forrester QC and Nathalie Flandin of the firm. Thierry Bosly and Juliette Siaens, also with White & Case in Brussels, represent Mr. Tillack in the Belgian court proceedings.*

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**Both the Belgian and the European Courts have failed to protect that fundamental right. The Belgian courts have hidden behind the current Belgian legal situation which admittedly breaches the Convention.**

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<sup>1</sup> Under ethical standards, journalists must actively protect their sources: see *inter alia* (i) the Declaration of the Rights and Duties of Journalists signed in Munich on November 25, 1971 by the International Federation of Journalists or (ii) Resolution No. 2 "Journalistic Freedoms and Human Rights," Fourth European Ministerial Conference on Mass Media Policy, *The Media in a Democratic Society*, Prague, December 7-8, 1994, DH-MM (2000).

<sup>2</sup> Under Belgian law anyone injured by a *perquisition*, including search and seizures, can apply to the *juge d'instruction* to have them lifted. The decision may be appealed to the *Chambre des mises en accusation*. See Article 61*quater* CC.

<sup>3</sup> See the European Parliament's Resolution A3-0434/93 on confidentiality for journalists' sources and the right of civil servants to disclose information, OJ C 44, 14.2.1994, p. 34, especially point 2. See also Recommendation No. R (2000) 7 of the

Committee of Ministers to member states of the Council of Europe on the right of journalists not to disclose their sources of information, adopted on 8 March 2000.

<sup>4</sup> Proposal by Geert Bourgeois - *Doc. parl., Sénat*, n/51 0024/017- Session 2003. The proposal was adopted by the Belgian Chamber of Representatives on May 6, 2003 and is now being examined by the Senate.

<sup>5</sup> Article 4 of the proposal, *Doc. Parl.*, No 51 0024/017.

<sup>6</sup> Italics: own translation of the original order in French.

<sup>7</sup> See Articles 230 *et seq.* EC Treaty.

<sup>8</sup> The Supervisory Committee is OLAF's sole supervisory body. Its five members, chosen from outside, and totally independent of, the Community Institutions, are experts in investigation matters. It is currently chaired by Raymond Kendall, Honorary General Secretary of Interpol.

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## Illinois Reporter's Privilege Trumps Interests of Private Litigants

By Chad Bowman

A civil litigant's interest in exposing discrepancies in the testimony of an opposing party is insufficient to overcome a statutory reporter's privilege, according to an Illinois judge who rejected an attempt to subpoena video outtakes from WBBM-TV, a Chicago station owned by CBS Broadcasting Inc. *Smith v. Advocate Health Care Network*, No. 01 L 11814 (Ill. Cir. Ct. Cook County Sept. 10, 2004) (Lawrence, J.).

It is one of the first Illinois cases to give more than passing consideration to the "public interest" prong of a three-part test to strip a nonparty reporter of the statutory privilege.

Judge Jeffrey Lawrence ruled on a motion to divest WBBM-TV of the protections of the Illinois Reporter's Privilege Act, 735 Ill. Comp. Stat. 5/8-901 *et seq.* Under the statute, a litigant seeking to divest a nonparty reporter of the privilege must demonstrate: (1) that the specific information sought is relevant to the party's case, (2) that disclosure is "essential to the protection of the public interest involved," and (3) that the litigant has exhausted other possible sources of the information. Judge Lawrence decided that the case turned on the second prong – whether disclosure served a "public interest."

### ***Outtakes at Issue***

The motion to divest in *Smith* arose in the context of a medical malpractice lawsuit brought by plaintiff Ophelia Smith against, among others, the hospital Michael Reese Healthcare Corp.

Prior to being deposed in her lawsuit, Smith discussed her case during a videotaped interview with WBBM-TV investigative reporter Pamela Zekman. The station broadcast a portion of the interview on March 3, 2004, in a report on the general problem of errors in laboratory testing. In the broadcast portion of the interview, Smith claimed that she was shocked when she awoke from surgery to find that, in addition to removal of a malignant tumor, doctors excised surrounding tissue, muscle, and bone.

The following day, the hospital subpoenaed the complete videotape of the interview. WBBM produced the broadcast portion, but asserted a privilege in the unbroadcast portions of the videotape. The hospital then moved to divest WBBM of the statutory privilege.

Meanwhile, Smith was deposed. Under oath, she admitted that her doctors warned her of the risk that, if a tumor was found in surgery, surrounding healthy tissue would have to be removed along with the malignancy.

The hospital nevertheless claimed, in its motion to divest WBBM of the privilege, that the outtakes, which it "presumed" contained additional statements about her treatment, were relevant and unavailable elsewhere, and that

public interests in "resolving litigation, promoting accurate reporting and preventing perjury" justified stripping the station of the privilege.

### ***Defining "Public Interest"***

While assuming that the outtakes were relevant and unavailable elsewhere, Judge Lawrence focused on the public interests articulated by the hospital, which rested its argu-

ment on a 2000 Illinois Supreme Court decision, *People v. Pawlaczyk*, 189 Ill.2d 177 (2000).

Illinois courts were largely silent on the contours of the public interest element of divestiture motions until *Pawlaczyk*, which concluded that, in the context of a grand jury subpoena, the prosecution of perjury represented a sufficient public interest to compel disclosure from nonparty reporters, at least where their testimony would have amounted to first-hand evidence of commission of a crime. *Pawlacz*k involved a special prosecutor's motion to divest reporters of the privilege in a grand jury investigation of whether city officials had committed perjury in civil depositions when they testified they were not the reporters' sources.

Judge Lawrence distinguished the public interest in actually investigating and prosecuting potential criminal perjury from a purely private interest in discovering and exploiting discrepancies in witness testimony:

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***Judge Lawrence distinguished the public interest in actually investigating and prosecuting potential criminal perjury from a purely private interest in discovering and exploiting discrepancies in witness testimony.***

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### III. Reporter's Privilege Trumps Interests of Private Litigants

*(Continued from page 37)*

“Merely exposing potentially embarrassing discrepancies in a plaintiff’s recollection for the benefit of a private litigant is not a public purpose, compelling or otherwise, which warrants protection from this court.”

The court further declined to credit unsupported arguments that disclosure of the outtakes could “help resolve this complicated medical malpractice suit involving other plaintiffs and other defendants” or “promote reportorial accuracy.” As such, the hospital failed to carry its burden to divest the privilege.

#### ***Separate Subpoena: Same Result***

In a coincidence of timing, an unrelated subpoena matter involving WBBM was on for hearing before Judge Lawrence on the same day he heard the *Smith* matter. While Judge Lawrence did not issue a written opinion in the second case and actually disposed of the second subpoena on procedural grounds, he noted in a bench ruling that the “public interest” element of the test would likely be dispositive in that case as well: “[A]s it did in the [*Smith*] case ... I think it’s probably going to turn on whether or not there’s a demonstration of public interest,” he said. *Shine v. Little Co. of Mary Hosp. and Health*

*Care Ctrs.*, No. 02 L 7023 (Transcript of Proceedings, Sept. 10, 2004).

Judge Lawrence explained that, even if that plaintiff “made statements in the outtakes which are inconsistent with his deposition testimony or somehow undermine his claim,” the situation was not one that “would warrant disregarding the reporter’s privilege because unlike the *Pawlaczyk* case I would not be punishing crime or preventing the commission of a crime. ... It’s a private lawsuit that ought to be determined on the merits, and I just don’t see that getting the outtakes – that allowing a private litigant to obtain this information serves a public purpose of sufficient magnitude to warrant disregarding the reporter’s privilege.”

*Chad Bowman is an associate with Levine Sullivan Koch & Schulz, L.L.P. Anthony Bongiorno of CBS Broadcasting Inc. and Jay Ward Brown, a partner in Levine Sullivan Koch & Schulz, L.L.P., were principal counsel for WBBM in both actions. Subpoenaing attorneys in the Smith action were Susan M. Wilda and Mary N. Nelson, of Hall Prangle & Schoonveld, LLC. Subpoenaing attorneys in the Shine action were Richard B. Foster and Jean G. Cleveland, of Donohue Brown Mathewson & Smyth.*

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## Court Affirms NBC Outtakes Not Subject to Compulsory Process

The United States Court of Appeals for the Armed Forces, the highest military court, has affirmed the ruling of a military judge that an NBC videotape of a traffic stop during the course of a government investigation is not subject to production under the Rules for Court-Martial. *United States v. Rodriguez*, 60 M.J. 239 (C.A.A.F. 2004).

### Background

Appellant Jorge Rodriguez, a member of the United States Navy, was the subject of an investigation by the Bureau of Alcohol, Tobacco and Firearms (“ATF”) and the Naval Investigative Service (“NIS”) into an interstate weapons transportation network.

While ATF was observing Rodriguez in transit from Virginia to New York, an NBC camera crew was permitted to ride in an ATF vehicle “to film what the agents and crew believed would be a newsworthy event.”

ATF enlisted the aid of a Maryland state trooper during the course of the surveillance operation, and Rodriguez was eventually pulled over for a traffic violation and consented to a “routine search” of his vehicle by the trooper.

Although the search revealed no contraband, a Special Agent read Rodriguez his Miranda rights and confronted him with the evidence concerning his handgun purchases, at which point he made a number of incriminating statements.

Rodriguez was tried by a general court-martial and subsequently convicted of, *inter alia*, conspiracy, unlawful transfer of firearms and the unlawful possession of firearms under the Uniform Code of Military Justice.

### Defendant Seeks Videos

Prior to Rodriguez’s trial, the defense sought the assistance of the government in obtaining NBC’s video recording of the traffic stop, a portion of which was broadcast on “NBC Nightly News” as part of a news report on illegal gun trafficking.

The government served three subpoenas on NBC in order to obtain footage of the traffic stop, as well as “[a]ll NBC recordings, video, audio or written produce [sic]” involving “the purchase, sale or transport of firearms which may relate to [Rodriguez].”

While NBC provided the broadcast portion of the footage that was included in its news program, it asserted a First Amendment news-gathering privilege in refusing to produce either video outtakes or reporter notes.

Rodriguez subsequently filed a pre-trial motion to compel production of the NBC video recordings, claiming such evidence was material in challenging the voluntariness of his statements during the traffic stop.

Under military procedure, NBC was not a party to the motion to compel proceeding. A military judge denied Rodriguez’s motion to compel, finding that Rodriguez had failed to prove the existence of the tapes, and that the video tape was not of “central importance” to the issue of his admissions, in that the videographer had focused on the conduct of the search and not the conversation between Rodriguez and the special agents, and that the videotape, even assuming it existed, was cumulative and unnecessary.

More than a decade of complicated appellate proceedings ensued in Rodriguez’s case, which did not conclude until after he had completed serving his ten-year sentence.

### Appeals Court Decisions

On the appeal of his conviction to the Navy-Marine Corps Court of Criminal Appeals, an intermediate appellate court in the military system, the court affirmed the denial of the defense motion to compel, but on the different – and significant – ground that “it is highly likely that NBC would have prevailed in its efforts to resist production” based on its assertion of a qualified First Amendment privilege. *United States v. Rodriguez*, 44 M.J. 766 (N-M. C.C.A. 1996).

However, the Court of Appeals for the Armed Forces subsequently vacated that intermediate appellate decision and remanded to the trial court for a hearing (“DuBay hearing”) specifically “(1) to fully develop the record on the issue of the news media’s refusal to comply with the federal subpoena issued for the videotape requested by the defense in this case, (2) to establish the availability of the videotape for production and inspection, and (3) to address the applicability, if any, of a news-gathering privilege.” *United States v. Rodriguez*, 50 M.J. 38 (C.A.A.F. 1998).

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### **Court Affirms NBC Outtakes Not Subject to Compulsory Process**

*(Continued from page 39)*

#### ***NBC Intervenes as Amicus***

At this point, NBC intervened in the case as *amicus curiae*, and provided information concerning its exhaustive and fruitless search for videotape footage responsive to the subpoenas, as well as an affidavit from the former NBC news correspondent (by then working for CNN) who had accompanied the ATF during the events at issue, stating that the NBC videographer had not obtained any footage of the highway stop of Rodriguez's car nor of any communications between Rodriguez and any law enforcement officials.

NBC argued that the newsgathering privilege issue was therefore moot, but further argued, in the alternative, that the court should recognize such a privilege as a matter of military law. The military judge conducting the DuBay hearing relied on the evidence submitted by NBC in concluding that as of the time of the DuBay hearing any videotape responsive to subpoenas that had not been previously provided no longer existed, and that "no videotape of an interrogation of the appellant was made."

The DuBay hearing court therefore did not reach the newsgathering privilege issue. The Navy-Marine Corps Court of Criminal Appeals adopted the findings of the DuBay hearing and upheld the denial of Rodriguez's motion to compel, ruling that the "videotape outtakes were neither necessary nor clearly of central importance and essential to a fair trial on the issue of voluntariness."

Rodriguez challenged the ruling on the grounds that he had not been allowed access the videotapes and thus was not given the opportunity to prove their relevance and necessity.

The case then went up again to the Court of Appeals for the Armed Forces, which affirmed Rodriguez's conviction in its August 25, 2004 decision.

With respect to the issue of enforcement of the subpoenas to NBC, which was only one of several issues raised by Rodriguez on his appeal, the Court did not reach any issue of First Amendment newsgathering privilege, but instead rested its decision on Rule 703(f) (1) of the Rules for Courts-Martial ("R.C.M."), which provides that "[e]ach party is entitled to the production

of evidence which is relevant and necessary." 60 M.J. at 246. Under R.C.M. 703(f)(1), "relevant evidence is 'necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue.'"

While noting that the Government was "obligated to produce by compulsory process evidence requested by the defense that is 'relevant and necessary,'" the Court found that Rodriguez had failed to carry his "threshold" burden of proving that the requested material existed.

Although NBC had indicated its intent to assert a First Amendment privilege before turning over any additional materials, the Court found this did not mandate the conclusion that NBC would not have responded to an attempt by the defense to determine whether NBC actually possessed any footage relevant to Rodriguez's claim.

The Court affirmed the military judge's denial of Rodriguez's motion, concluding that by failing to show that the outtakes existed, Rodriguez could not carry his burden of proving they were "relevant and necessary" and thus subject to compulsory process.

*Daniel M. Kummer and Eugene R. Fidell represented NBC as amicus curiae.*

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## Arkansas Supreme Court Upholds Newspaper's Right to Recover Fair Market Value for Subpoenaed Photographs

By Beth Deere

A party cannot avoid paying fair market value to a newspaper for its copyrighted investigative photographs by issuing a Rule 45 subpoena duces tecum, according to a recent opinion by the Supreme Court of Arkansas. *Arkansas Democrat-Gazette, Inc. v. Judge Ellen Brantley*, No. 03-1456 2004 WL 2249505 (Ark. October 7, 2004) (Dickey, C.J.).

In a 6-1 decision, the Court reversed a trial court's ruling that the value of the Arkansas Democrat-Gazette, Inc.'s copyrights in its photographs could not be considered in determining the "reasonable cost of producing" documents of other tangible things under Rule 45 of the Arkansas Rules of Civil Procedure.

### Background

The *Arkansas Democrat-Gazette*, Arkansas's only statewide daily newspaper, dispatched its award-winning photojournalist to the scene of a two-car accident in which two small children were seriously injured. The photographer took twenty-five photographic images of the aftermath of the accident, one of which appeared in the newspaper.

The remaining twenty-four images were stored as "negatives" in the newspaper's archives. The Arkansas Democrat-Gazette, Inc., publisher of the *Democrat-Gazette*, owns the copyrights in all twenty-five images.

The mother of the injured children filed suit against the driver of the other car, and her attorney contacted the newspaper to obtain copies of the photographs taken at the scene. The *Democrat-Gazette*, a nonparty to the lawsuit, offered to sell a limited license for use of the accident-scene photographs pursuant to its written policy requiring that all images of a particular scene be purchased, and at the usual and customary price for its copyrighted photographs – \$25 for published photographs and \$100 per print for unpublished images.

The newspaper had adopted its policy to accommodate litigants' need for accident photographs without becoming a public archive subsidizing private litigation. The attorney declined to pay the newspaper's set fee and instead issued a subpoena duces tecum, demanding production of the twenty-five photographs.

The *Democrat-Gazette* filed a motion to quash the subpoena, arguing that, while it was willing to provide copies of its photographs, it should be permitted to recover the fair market value of its copyrighted works. The trial judge found both the *Democrat-Gazette*'s policy of requiring buyers to purchase an entire set of images of a given scene and its usual and customary fees for its photographs to be "not unreasonable."

She nonetheless held that Rule 45 precluded the *Democrat-Gazette* from recovering the fair market value of its copyrights in the photographs, holding that the fair market value of the copyrights could not be included as a part of the "reasonable cost of producing" the "tangible things" demanded in a subpoena. The trial court ordered the newspaper to produce the twenty-five photographs without recovering its usual and customary fee.

The newspaper sought a writ of certiorari from the Arkansas Supreme Court, asking it to set aside the trial court's order and to quash the subpoena duces tecum.

In Arkansas, such a writ requires a finding that there has been a plain, clear, and gross abuse of discretion by the trial judge, and there is no other adequate remedy available.

The *Democrat-Gazette* argued that the trial court's order was a plain, clear, and gross abuse of discretion because the order abrogated its property rights, *i.e.* copyrights, by requiring it to create and produce photographic prints for use in a lawsuit to which it was not a party, while prohibiting it from recovering fair market value for its intellectual property.

The Arkansas Supreme Court agreed with the *Democrat-Gazette* and held: "This case is about copyrights and the appropriation of private property, and the court hereby grants the petition for writ of certiorari of the *Arkansas Democrat-Gazette, Inc.*" *Brantley*, 2004 WL 2249505 at \*1.

### Intersection of Rule 45 & Federal Copyright Law

Although the wording of Rule 45 of the Arkansas Rules of Civil Procedure varies significantly from that of Federal Rule 45, both rules permit parties to subpoena documents and other "tangible things" from nonparties. ARK. R. CIV. P. 45(b); FED. R. CIV. P. 45(a)(1)(C).

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## Arkansas Supreme Court Upholds Newspaper's Right to Recover Fair Market Value for Subpoenaed Photographs

(Continued from page 41)

Likewise, both Federal Rule 45 and Arkansas Rule 45 include provisions protecting nonparties from shouldering significant expense in producing the requested documents or other tangible things. FED. R. CIV. P. 45(a)(2)(B) (“[A]n order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.”); ARK. R. CIV. P. 45(b) (“[T]he court . . . may [require] . . . the reasonable cost of producing the books, papers, documents or tangible things.”)

The question arises, however, of whether federal copyright protection is abrogated when a party to a lawsuit demands copyrighted documents or other tangible things from a nonparty pursuant to a subpoena duces tecum. Is the value of a nonparty's copyright in the “thing” to be produced a legitimate interest to be protected and considered in determining “reasonable costs” or “significant expense”? Stated another way, can a procedural rule preempt and abrogate the substantive intellectual property rights of a nonparty?

The Advisory Committee Notes accompanying Federal Rule 45 acknowledge the “growing problem” of the use “of subpoenas to compel the giving of evidence and information by unretained experts,” noting that “compulsion to give evidence may threaten the intellectual property of experts denied the opportunity to bargain for the value of their services.” FED. R. CIV. P. 45, Advisory Committee Notes (1991 Amendments). The *Democrat-Gazette* analogized the subpoena requiring it to turn over its intellectual property to a subpoena directed to a non-retained expert.

The newspaper argued that there is, in fact, no conflict between a party's right to “every man's evidence” and a nonparty's intellectual property rights. (“The familiar expression ‘every man's evidence’ was a well-known phrase as early as the mid-18th century. Both the Duke of Argyll and Lord Chancellor Hardwicke invoked the maxim during the May 25, 1742, debate in the House of Lords concerning a bill to grant immunity to witnesses who would give evidence against Sir Robert Walpole, first Earl of Orford. 12 T. Hansard, Parliamentary History of England 643, 675,

693, 697 (1812).” *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996)).

Rather, Rule 45 should be read in harmony with federal copyright law, with Rule 45 requiring access for litigation purposes, and copyright law protecting the private property interests of the copyright owner. Copyrighted material may have to be produced, but the copyright owner should be permitted to recover fair market value for its intellectual property.

### *Fair Use Not at Issue*

The Arkansas Supreme Court relied on an opinion in a federal district court case holding that “where judicial proceedings are one of the intended markets, the copyright holder is entitled to exercise control over the use of his works within this market; the fair use doctrine does not require the wholesale abandonment of copyright protection at the courthouse door.” *Images Audio Visual Productions v. Perini Building Company, Inc.*, 91 F. Supp. 2d 1075, 1086 (E.D. Mich. 2000).

The fair use doctrine was not an issue in this case because this was not a copyright infringement case. The doctrine's use is limited in that it is only an affirmative defense to a claim of copyright infringement creating a limited privilege to reproduce copyrighted works for purposes such as “criticism, comment, news reporting, teaching, scholarship, or research.” 17 U.S.C. § 107.

In this case, the *Democrat-Gazette* had recognized a market for its accident scene photographs for use in litigation and had established a policy to sell limited licenses for the use of its copyrighted works. Thus, the newspaper was entitled to recover the fair market value of its property, even when the property was required to be produced pursuant to a subpoena duces tecum.

Absent its policy of allowing litigants to purchase a limited license to use its photographic images within the context of their lawsuits, the *Democrat-Gazette* would likely assert its reporter's qualified privilege.

One federal district court in Arkansas has expressly recognized the reporter's qualified privilege in a recent

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***The Democrat-Gazette analogized the subpoena requiring it to turn over its intellectual property to a subpoena directed to a non-retained expert.***

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(Continued on page 43)

### Arkansas Supreme Court Upholds Newspaper's Right to Recover Fair Market Value for Subpoenaed Photographs

(Continued from page 42)

decision. In *Richardson v. Sugg*, 220 F.R.D. 343 (E.D. Ark. 2004), Judge William R. Wilson, Jr. "recognize[d], in accordance with the weight of authority, a First Amendment in civil cases against compelled disclosure of the identity of the confidential sources and of information, both confidential and nonconfidential, gathered by the in the news gathering process." *Id.* at 347.

The *Democrat-Gazette* acknowledged to the Arkansas Supreme Court that, by adopting the policy that it

has, it has effected a limited waiver of its reporter's qualified privilege. The policy, however, obviates costly court hearings each time the *Democrat-Gazette* receives a request or a subpoena duces tecum for its investigative, copyrighted photographic images. As an added benefit, the policy creates a secondary market for the newspaper's photographs.

*Beth Deere, Williams & Anderson in Little Rock, Arkansas, represented the Arkansas Democrat-Gazette.*

## Ohio Supreme Court Dismisses Reporter's Privilege Appeal Upholds, Depublishes Ruling that Statute Doesn't Apply

After initially agreeing to hear argument in the case, on November 1 the Ohio Supreme Court dismissed an appeal on the question of whether Ohio's shield law covers remarks made on a radio morning show. *Svoboda v. Clear Channel Communications, Inc.*, No. 2004-0612, 2004-Ohio-5723.

Although the Supreme Court's action effectively affirmed the lower court's ruling that Ohio's shield law did not apply, the court also ordered, upon its own motion, that "the opinion of the court of appeals may not be cited as authority."

### Radio Defamation Case

The reporter's privilege issue arose in a slander suit brought by Toledo Blade newspaper reporter Sandra Svoboda against WVKS-FM radio host Denny Schaffer, who alleged on the air that Svoboda was having an affair with her editor.

During discovery Tricia Tischler, whose title at the station was news director, said that she had second-hand information that Svoboda and her editor were dating, but she refused to reveal the source of the information citing Ohio's shield law, Ohio Rev. Code § 2739.04. Tischler was then named as a defendant.

In September 2002, Ohio Circuit Judge William Skow held that although "her function in part on the radio show ... is that of a news person, it's mainly by default and all she does is rip and read wire service stories ... and that doesn't include gossip, and this is gossip

at best." Based on this reasoning, Skow ruled that the reporters' shield statute did not apply under the circumstances.

This year a divided panel of the Sixth District Court of Appeals affirmed. *Svoboda v. Clear Channel Communications, Inc.*, No. L-02-1302, 2004-Ohio-894, 2004 WL 368120 (Ohio Ct. App., 6th Dist. Feb. 27, 2004); see *MLRC MediaLawLetter*, March 2004 at 27.

The appellate court reasoned that the shield statute does not apply to a person who "merely perpetuates a rumor that he or she heard from another" because a person "who spreads rumors is not a 'source,'" within the meaning of the statute.

Tischler appealed to the Ohio Supreme Court. After the underlying slander case was settled, Svoboda moved for dismissal on the grounds that the appeal was moot. The court granted this motion on Nov. 1.

Schaffer and the other defendants were represented by Thomas G. Pletz and Neema Bell of Shumaker, Loop & Kendrick in Toledo. Sandra Svoboda was represented by C. Thomas McCarter of Toledo, Ohio, and Frederick Gittes and Kathaleen Schulte of Columbus, Ohio.

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## Eighth Circuit Explains Conflict Rules for Internet Defamation Claims

By Mark Sableman

A recent Eighth Circuit non-media libel case provides guidance on choice of law principles in Internet libel actions, finding a strong presumption in favor of applying the law of the plaintiff's home state. The unusual twist in this domestic application of this *Gutnick*-like rule was that the plaintiff lost because his home state's defamation law was stricter than that of the defendants' state. *Fuqua Homes, Inc. v. Beattie*, 2004 WL 2495842 (8th Cir. Nov. 8, 2004) (Arnold, J.).

The decision involved buyers in Iowa of a modular home manufactured by a Missouri company. The buyers, the Beatties, believed the home had various defects, and they set up an Internet website criticizing the manufacturer. They also drove a van with a sign critical of the manufacturer around parts of both Iowa and Missouri.

The manufacturer, Fuqua Homes, sued for libel in the Western District of Missouri. The defendants moved for judgment as a matter of law during trial, because Fuqua had failed to prove any actual damages. At this point, choice of law became determinative, because Missouri law requires proof of actual damage and Iowa does not; the motion was well taken under Missouri law, but not under Iowa law.

The district court applied Missouri law, apparently on the sole basis that the plaintiff had filed the case in Missouri.

### ***Eight Circuit Analyzes Choice of Law***

On appeal, the Eighth Circuit noted that the choice of law was far more complex than the simple matter of where the case was filed. It instead reviewed conflict of law rules in the context of libel actions, and ultimately concluded, in agreement with the district court's ruling, that Missouri law would apply.

Missouri's applicable conflict of laws rule was the "most significant relationship" test, under which the contacts of each state are to be evaluated according to their relative importance. In general, courts are to consider where the injury occurred, the place of the conduct

causing the injury, the domicile of the parties, and the center of the parties' relationship.

In defamation cases, under Missouri law, the most important consideration in cases of widespread dissemination is the residence of the party allegedly defamed, because, according to a Missouri Supreme Court decision, "defamation produces a special kind of injury that has its principal effect among one's friends, acquaintances, neighbors and business associates in the place of one's residence" (quoting *Elmore v. Owens-Illinois*, 673 S.W2d 432, 437 (Mo. 1984)).

This is consistent with the Restatement of Conflict of Laws, section 150, which creates a presumption that the plaintiff's home has the most significant relationship in the case of aggregate communications.

The Eighth Circuit concluded that publication of defamatory matter on the Internet is "closely analogous" to the aggregate communications foreseen by section 150 of the Restatement, and hence that under Missouri law, the presumption in favor of the plaintiff's forum would apply.

The court then examined the other considerations – including the initiation of the defamatory statements and some of the underlying transactions in Iowa, but found them insufficient to overcome the presumption in favor of the plaintiff's home state.

Accordingly, the Court affirmed the District Court's application of Missouri law, and the judgment against the plaintiff because of his failure to prove the necessary element of actual damages.

*Mark Sableman is a partner with Thompson Coburn LLP in St. Louis, Mo. James J. Jarrow, Kansas City, Mo. (Chris J. Stucky, Kansas City, Mo. on brief) for appellant. Stephen C. Scott, Columbia, Mo., for appellee.*

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## North Dakota Court Upholds Personal Jurisdiction Based on Website

The federal district court in North Dakota ruled that it has personal jurisdiction over an out-of-state defendant who “targeted” her allegedly defamatory website to the state. *Zidon v. Pickrell*, 2004 WL 2549686 (D.N.D. Nov. 8, 2004) (Hovland, J.).

Applying the “effects test,” the court found that a website which complained about an specific identified person in North Dakota sufficiently targeted the state for the court to exercise jurisdiction.

### Background

This Internet defamation case grew out of an online romance gone bad. After the parties’ relationship ended, the defendant created a website at [www.patrickzidon.com](http://www.patrickzidon.com) entitled “Monster of Love: Surviving Love/Sex Adicts and Spiritual Predators.”

Defendant, a Colorado resident, posted allegedly defamatory statements about plaintiff and sent links to the site to people in North Dakota, as well as to the “public at large.”

Among other things the website wrote about plaintiff:

As a businessman and community leader in Bismarck, North Dakota, few would suspect his double life of deceit, lies and the trail of tears he leaves behind him. A warning, this man plans to pursue a career in psychological therapy. If you have a history with this man you’d like to share, please contact webmaster @patrickzidon.com.

The site also revealed where plaintiff worked and concluded “He is a predator.”

Plaintiff brought a claim for defamation and intentional infliction of emotional distress, and defendant moved to dismiss for lack of personal jurisdiction and improper venue.

### Jurisdiction Analysis

The court first recognized that the issue of personal jurisdiction under the North Dakota long-arm statute as well as the federal Constitution would be collapsed into the

question of whether defendant maintained “minimum contacts” with the state of North Dakota so as not to offend “traditional notions of fair play and substantial justice.”

Under Eighth Circuit law, minimum contacts analysis takes into consideration: “1) the nature and quality of [a defendant’s] contacts with a forum state; 2) the quantity of such contacts; 3) the relation of the cause of action to the contacts; 4) the interest of the forum state in providing a forum for its residents; and 5) [the] convenience of the parties.” *Citing Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1073-74 (8th Cir. 2004) (additional citation omitted).

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***The district court found that defendant had “deliberately and knowingly directed the website, e-mail, and Internet comments at the State of North Dakota because North Dakota is [plaintiff’s] residence.”***

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### Sliding Scale Test

In determining whether defendant’s website established the contacts necessary to allow for the exercise of personal jurisdiction, the court first applied the *Zippo* “sliding scale” test that distinguishes between “active” and “passive” websites.” *Citing Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997).

While the court found that the website was “interactive” because it featured an e-mail hyper link, offered detailed information about plaintiff which included his place of residence, contained a bulletin board to exchange information about the plaintiff, and encouraged visitors to contact the webmaster, it concluded that it was unable to exercise general jurisdiction over the defendant based solely on the level of interactivity of the website.

Instead, it would determine whether the website was targeted at the forum state, *citing Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002).

### Effects Test

The court turned to the Supreme Court’s opinion in *Calder v. Jones*, 465 U.S. 783 (1984), in which the Court stated jurisdiction would be based upon whether a defendant in a defamation suit had “aimed” its actions at the forum state, had known of the “potentially devastating impact” the plaintiff would experience in the state, and

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**North Dakota Court Upholds  
Personal Jurisdiction Based on Website**

*(Continued from page 45)*

had realized the “brunt of the harm” to the plaintiff would be felt in the forum state.

In applying the *Calder* “effects test,” the district court found that defendant had “deliberately and knowingly directed the website, e-mail, and Internet comments at the State of North Dakota because North Dakota is [plaintiff’s] residence.”

The court went on to address the additional factors laid out by the Eighth Circuit. While the court found that the quantity of defendant’s contacts with North Dakota

and the convenience of the parties were not determinative, it ruled that because all of defendant’s contacts were related to Zidon’s claims and North Dakota would have an interest in adjudicating the claims at issue and providing a forum for its citizens to bring suit, defendant was amenable to personal jurisdiction in North Dakota.

Rodney E. Pagel, Pagel Weikum, PLLP, Bismarck, ND, for Plaintiff. Lawrence R. Klemin, David Schweigert, Bucklin, Klemin & McBride, P.C., Bismarck, ND, for Defendant.

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## Update: ALI International Jurisdiction and Judgments Project

By Thomas Leatherbury

The ALI International Jurisdiction and Judgments Project draft federal statute is in the process of being revised, and we anticipate that a new draft will be circulated shortly in advance of the ALI Annual Meeting in May 2005.

The proposed Reporters' Note on the First Amendment cases and the public policy exception, which was reprinted in the *MLRC MediaLawLetter* in January 2003 at 5, continues to raise concerns.

Since the 2004 Annual Meeting, our working group has drafted a proposed substitute Reporters' Note which we believe more accurately reflects the state of the law in a very neutral way.

Our proposed substitute Reporters' Note is reprinted below.

We have recently submitted it to the Project Reporters, Professors Linda Silberman and Andreas Lowenfeld at NYU, and are awaiting their feedback.

We continue to welcome feedback and participation in this effort from you and from any of the members of your firm who are members of the American Law Institute and will keep you posted as we approach a vote on the project at the 2005 Annual Meeting.

*Thomas Leatherbury is with Vinson & Elkins in Dallas, Texas and can be contacted at [tleatherbury@velaw.com](mailto:tleatherbury@velaw.com).*

### PROPOSED SUBSTITUTE REPORTERS' NOTE

(d) *The public-policy exception and the First Amendment.* Recent American cases have invoked the public-policy exception to deny enforcement of libel or other judgments obtained in foreign countries after determining that the libel or other law of those countries was contrary to the “fundamental importance of the free flow of ideas and opinions on matters of public interest and concern” at the heart of the First Amendment. *Telnikoff v. Matusevich*, 347 Md. 561, 602, 702 A.2d 230, 251 (1997) (declining to enforce a British libel judgment involving core political speech), *aff'd*, 159 F.3d 636 (D.C. Cir. 1998); *see also Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Anti-semitisme*, 169 F. Supp. 2d 1181 (N.D. Cal. 2001) (barring enforcement of a French injunction requiring Yahoo! to block French internet users from accessing on-line auctions of Nazi paraphernalia on ground of inconsistency with First Amendment), *rev'd on other grounds*, 379 F.3d 1120 (9th Cir. 2004) (holding District Court lacked jurisdiction to reach First Amendment issue prior to an attempt to enforce the French injunction in the U.S.); *Bachchan v. India Abroad Pubs., Inc.*, 154 Misc. 2d 228, 585 N.Y.S.2d 661 (Sup. Ct. N.Y. Cty. 1992) (declining to enforce a British libel judgment when British common law imposed strict liability for false statements about matters of public concern, including statements concerning bribes allegedly paid by arms manufacturers to politically well-connected Indians). In a fourth case, *Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *aff'd*, 346 F.3d 357 (2d Cir. 2003), denying an anti-suit injunction against a foreign libel action, a federal district court stated in dictum that it would have no trouble refusing to enforce a judgment not conforming to First Amendment requirements, citing *Telnikoff*, *Bachchan*, and the district court decision in *Yahoo!*.

There has been an academic debate over two issues raised by these American courts' non-enforcement of foreign judgments implicating First Amendment rights. One issue is whether there are some foreign judgments that would not pass muster under the First Amendment that do not rise to the level of “repugnance to the public policy of the United States.” Compare EUGENE F. SCOLES ET AL., *CONFLICT OF LAWS* 1211 n.12 (3d ed. 2000); Joachim Zekoll, *The Role and Status of American Law in the Hague Judgments Convention Project*, 61 ALB. L. REV. 1283, 1305-06 (1998) (criticizing the implicit holding in *Bachchan* that even “minor” deviations from American free-speech standards violate public policy and render judgments unenforceable), with Kyu Ho Youm, *Suing American Media in Foreign Courts: Doing an End-Run Around U.S. Libel Law*, 16 HASTINGS COMM. & ENT. L.J. 235 (1994) (pointing out that American libel law offers publishers significantly more protections than does British law). The second issue is whether a territorial connection or nexus with American interests other than the presence of

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**Update: ALI International Jurisdiction Project**

*(Continued from page 47)*

assets in the United States should be necessary to trigger the public policy exception in American courts. *See generally* Craig A. Stern, *Foreign Judgments and The Freedom of Speech: Look Who's Talking*, 60 BROOK. L. REV. 999 (1994) (arguing that *Bachchan* misconstrues the First Amendment by making it a universal declaration of human rights rather than a limitation designed specifically for American civil government).

However these issues are resolved in particular cases, the practical importance of the public policy exception has increased with the advent of the World-Wide Web. *See Don King v. Lennox Lewis*, 2004 WL 2330166, [2004] EWCA Civ 1329 (affirming a decision of the High Court, Queen's Bench Division, to allow American citizen Don King to proceed in a British court with a libel action brought against Lennox Lewis, Lewis's American promotion company, and Lewis's American lawyer for comments made to American boxing publications and then distributed over the internet); *Bangoura v. The Washington Post*, [2004] 235 D.L.R. (4th) 564 (finding that Ontario was an appropriate forum for a libel suit against the Post, based on a single internet download in Canada, even though neither the Post nor the plaintiff had any initial "connection to Ontario" because "the defendants should have reasonably foreseen that the story would follow the plaintiff wherever he resided," and noting that "[the court] would be surprised if [the Post] were not insured for damages for libel or defamation anywhere in the world, and if it is not, then it should be."); *Dow Jones & Co., Inc. v. Gutnick*, (2002) 194 A.L.R. 433 (exercising jurisdiction, in an Australian court, over Dow Jones in a case involving an article published on the *Barron's* magazine web site, while observing that "plaintiffs are unlikely to sue for defamation published outside the forum unless a judgment obtained in the action would be of real value to the plaintiff. The value that a judgment would have may be much affected by whether it can be enforced in a place where the defendant has assets.").

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## Defamation Claim Against Schwarzenegger Aide Can Proceed in London

On October 29, 2004, the High Court in London ruled that a libel case could go forward against Sean Walsh, an aide to California Governor Arnold Schwarzenegger. *Richardson v. Schwarzenegger et al.*, [2004] HQ 04X01371 (Oct. 29, 2004) (Eady, J.).

Walsh, Schwarzenegger, and Sheryl Main, a Hollywood publicist, were all sued by UK television presenter Anna Richardson for statements they made, or authorized, in last Fall's recall election campaign disputing Richard's account of an episode with Schwarzenegger.

The decision only addresses Walsh's motion to set aside service abroad. The Governor and his publicist were served later and their time to object has not yet run.

### Background

On October 2, 2003, the *Los Angeles Times* ("Times") published an article entitled "Women Say Schwarzenegger Groped, Humiliated Them." Among other things, the article recounted a story about an interview Richardson conducted with Schwarzenegger four years ago.

According to her account, she interviewed Schwarzenegger in London in December 2000 during his promotional tour for the movie "The Sixth Day." At the end of the interview he grabbed her onto his knee, asked her "if your breasts are real" and "circled" her nipple with his finger.

But, according to Sheryl Main, a longtime publicist for Schwarzenegger, who said she was at the interview, it was Richardson who approached Schwarzenegger provocatively, cupping her breast and asking "what do you think of these?"

The article also includes general comments from Walsh that Schwarzenegger had not engaged in appropriate conduct with women and that Democrats were using this to try and hurt the campaign.

### Libel Claim

The libel suit is based both on hard copies of the article published in the jurisdiction as well as publication of the article on the Internet. Mr. Justice Eady found that the natural and ordinary meaning of these statements is that

Richardson "deliberately and dishonestly fabricated" her allegation against Schwarzenegger.

Walsh denied that he told the *Times* that Schwarzenegger had "not engaged in inappropriate conduct towards women" and claimed that his comment was in any event not specifically about Richardson.

Mr. Justice Eady, however, accepted an alternate theory of publication liability – that Walsh authorized Sheryl Main's statements.

He also considered and found premature the argument that Walsh's statements would be privileged under the circumstances.

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**While expressing some sympathy that a spokesman for a foreign politician should not have to answer in England Judge Eady concluded that this position "would seem to ignore the clear and recently stated principles of English law."**

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Citing to the Australian High Court's decision in *Gutnick v. Dow Jones* and the English Court of Appeal's recent decision in *King v. Burstein*, Judge Eady stated that:

"it is well settled now that an internet publication takes place in any jurisdiction where the relevant words are

read or downloaded.... There is no 'single publication rule' applying to trans-national libels."

As to concerns over forum, Judge Eady found that the scales come down strongly in favor of England because claimant is a UK citizen with an established reputation in the country. Moreover, English law should govern because there was publication and injury in England.

While expressing some sympathy to Walsh's argument that a spokesman for a foreign politician should not have to answer in England for statements made in the foreign press, Judge Eady concluded that this position "would seem to ignore the clear and recently stated principles of English law."

Claimant is represented by barrister David Sherborne of 5 Raymond Buildings and the solicitors firm Campbell Hooper. Sean Walsh is represented by barristers Richard Spearman QC and James Strachan and the solicitors firm Schillings.

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## Right of Reply Update: Council of Europe's Recommendation Moves Forward but the UK Has Reservations

By Timothy Pinto and Max Remington-Hobbs

The Council of Europe has recently agreed on a final draft Recommendation on the Right of Reply in the New Media Environment (the "Recommendation"). As previously reported, the Recommendation is intended to extend the right of reply to online publications that are equivalent to traditional news media. See *MediaLawLetter* Feb. 2004 at 41.

The latest draft of the Recommendation applies to "any means of communication for the periodic dissemination to the public of edited information, whether on-line or off-line, such as newspapers, periodicals, radio, television and web-based news services."

According to the draft explanatory notes "the aim of the definition is to cover those types of new services available on publicly accessible networks which are similar to traditional media." However, its scope is not entirely clear and the definition could possibly extend to certain political or commercial websites if they are edited in the journalistic sense.

The draft is likely to be adopted by the Council of Europe at a meeting of the Committee of Ministers on 15 December 2004. At this meeting, almost all the 46 Member governments of the Council of Europe are likely to vote in favor of the draft Recommendation.

However, two countries, the United Kingdom and Slovakia, have concerns about the proposed Recommendation. It is understood that the UK, for example, will not vote in favor or against the Recommendation, but will instead reserve its position. This would still enable the Recommendation to be passed in December.

### ***The UK Position***

In the summer, the UK government sought views within the UK to gauge the attitude towards the draft Recommendation. The responses they received were overwhelmingly negative, with all those responses from within the UK media industry expressing concern at the possible implications of the Recommendation.

It is believed that the UK government supports the concept of a right of reply, but feels that the current system in the UK works well. The Office of Communications (Ofcom) and the Press Complaints Commission already provide for a right of reply on a voluntary basis. The UK government feels that this is a sensible and sufficient system which should not be augmented.

The UK government's main concern with the Council of Europe's draft Recommendation is that, by imposing a right of reply on online publications, the draft will create an impractical and unenforceable system.

It also feels that it would discourage new online publications being set up, which would be detrimental to freedom of speech. The UK position is that the public already has a form of right of reply on the internet: namely that if a person feels aggrieved at material fea-

tured on a website, he/she is able to easily create their own website with a link to the offending website, rebutting the offending material.

The UK government also has reservations about applying the right of reply to specific types of websites, e.g. news service providers. It is concerned that it would be difficult to limit the right of reply to specific types of online publications, as any definition of "media" could encompass information service providers such as small magazine sites, which the UK government feel should be excluded.

Although it looks like the Council of Europe will adopt its Recommendation by the end of 2004, it will be up to member governments to decide whether to follow the non-binding text. In the light of the UK government's current position, the Recommendation is unlikely to result directly in any new UK laws implementing the right of reply.

### ***European Union Developments***

A similar non-binding recommendation on the right of reply is also under discussion at the European Union level and representatives of the UK government have raised

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***In the light of the UK government's current position, the Recommendation is unlikely to result directly in any new UK laws implementing the right of reply.***

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(Continued on page 52)

### Right of Reply Update

*(Continued from page 51)*

similar concerns to those mentioned above. The recommendation is currently under review in the European Parliament, but it is thought that it will be similar to the Council of Europe's Recommendation.

As the EU has the power to require member states to adopt its proposals into domestic law, the right of reply discussions within the EU bear close watching.

*Timothy Pinto and Max Remington-Hobbs are media lawyers with Taylor Wessing in London.*

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## European Court of Human Rights Reverses Libel Judgment *One-sided Reports on Matter of Public Interest Protected*

In an interesting and potentially important case for the media, the European Court of Human Rights (“ECHR”), reversed a libel judgment against a Finnish reporter who wrote a series of articles on the death of a patient who was operated on by an allegedly drunk surgeon. *Selisto v. Finland*, No. 56767/00 (ECHR Nov. 16, 2004).

In a 6-1 decision, the ECHR found that the articles covered an important matter of public interest and were protected notwithstanding the fact that they selectively drew from public documents and did not report that the doctor was never charged with criminal wrongdoing.

The decision is available online at: <http://portal.nasstar.com/75/files/Selisto-v-Finland%20ECHR%2016%20Nov%202004.pdf>.

### **Background**

In 1996, the defendant, a reporter with a regional daily newspaper in Vaasa, Finland, wrote a series of articles discussing the 1992 death of a hospital patient who was operated on by an unnamed “Doctor X,” who was allegedly drunk during the surgery.

The patient died from a burst vein and internal bleeding during a procedure to shorten a rib that was pressing against an artery. Later investigations concluded that the patient’s death was not caused by doctor error, but that the rib punctured her artery.

Doctor X’s identity was apparently a matter of public record, but the newspaper chose not to reveal his name.

The first article quoted the patient’s widower: “How is it possible that a surgeon is allowed to conduct surgery with alcohol in his blood – is it not a fact that pilots only get to maneuver a plane when they are absolutely sober?” The reporter also stated the “surgeon cost the life of [his] wife.”

A second article made no reference to Doctor X, but described the need for sober surgeons and pilots.

A third article took up the theme of the first report and issues of patient safety. It quoted statements by hospital staff members made during investigations of Doctor X that followed the patient’s death.

Among other things it republished statements that:

“Often he had a visible hangover, which showed in his not being neatly dressed, in his reddish and swollen face, in his shaking hands and in his breath which smelled freshly of alcohol.” “The patients operated on by surgeon X have suffered from more post-operative complications.” “During the round, surgeon X came over to my left side. Then I noticed that he was clearly drunk.”

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***The European Court reversed a libel judgment against a Finnish reporter who wrote a series of articles on the death of a patient who was operated on by an allegedly drunk surgeon.***

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The article also reported that following the patient’s death, Doctor X was not allowed to operate for two years and required to take regular breathalyser tests.

The article was illustrated with a drawing depicting a seemingly drunk surgeon using a pen to mark where to cut open a patient’s stomach.

The article did not include statements from these records that might have balanced the report and there was a factual dispute as to whether the reporter sought comment from Doctor X before publication.

### ***Procedural History***

Upon complaint from Doctor X, the reporter was charged with two counts of intentional defamation; the editor-in-chief of the newspaper was charged with negligent abuse of the press for failing to supervise the publication of the articles.

Both were apparently charged under criminal code provisions that parallel Finland’s civil libel – a common feature in civil law jurisdictions in Europe. Generally, these actions filed by prosecutors at the behest of the libel victim result in monetary fines only, although in some countries, such as Italy, courts have ordered reporters jailed.

The journalist was convicted of one count of intentional defamation and the editor was convicted of negligent abuse of the press. The court found that Doctor X

*(Continued on page 54)*

## European Court of Human Rights Reverses Libel Judgment

*(Continued from page 53)*

was sufficiently identified by the articles and that they implied he was drunk while operating on the patient and responsible for her death.

In addition, the court found that the articles were not a fair report of the post-mortem investigations because the reporter “selected only those elements that supported her [own] opinion without clearly stating that the National Medico-Legal Board” ... and the “County Prosecutor had made a reasoned decision not to bring charges.”

The reporter and her editor were fined approximately 1,400 euros and assessed an additional 3,500 euros in costs. The convictions were affirmed on appeal and the fines were almost doubled.

### **Article 10**

Article 10 of the European Convention on Human Rights guarantees freedom of expression and is incorporated into Finland’s domestic law. Interference with the right of free expression may stand only if (1) it corresponded to a “pressing social need,” (2) it was proportionate to the legitimate aim pursued, and (3) the reasons for the interference are relevant and sufficient.

In the libel context, this results in a balancing test that weighs under the circumstances the interest in protecting reputation against the newsworthiness and accuracy of the publication.

In her appeal to the ECHR, the reporter argued that her articles involved important matters of public interest, that they were based on accurate facts, and that her reporting was responsible and in good faith.

### **ECHR Decision**

The ECHR reversed the conviction, holding that it did not strike a fair balance between the public’s interest in the articles and the interests of X.

The Court first noted that it is appropriate for the press to use an individual case, such as the patient’s death, to discuss a broader matter of public concern – here, the problem of alcohol abuse.

Second, the Court noted that the articles were factually accurate and that the conviction was essentially based on libel by omission. In language that may prove very helpful to the press the Court stated:

“[I]t is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists.”

And in a strong endorsement of the principle of the fair report defense, the Court reasoned that there is “no general duty to verify the veracity of statements contained in [public documents].” Even though the articles were “one-sided,” the Court gave great weight to the fact that they were based on public records that supported the reporter’s view that there were grounds to press charges against Doctor X.

The Court also gave weight to the newspaper’s decision not to identify Doctor X. And it found that Doctor X was given sufficient opportunity to respond to the articles *after* publication. Both these facts supported the conclusion that the reporter acted responsibly.

Finally, the Court noted that the relatively minor fine imposed on the reporter was not relevant to determining whether her conviction violated Article 10. “What is of greater importance,” the Court concluded, “is that the journalist was convicted.”

### **UK Judge Dissents**

Interestingly, the one dissent on the Court was by Sir Nicolas Bratza, the UK judge. Noting that “the more serious and damaging the allegation made, the stronger the obligation to confirm the truth of the information” (the traditional English standard), he would have upheld the domestic courts’ finding of liability.

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***“It is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists.”***

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## California Voters Pass Open Government Constitutional Amendment

On November 2, an overwhelming 83.1% of California voters passed Proposition 59, a measure to amend Article 1 of California's Constitution and grant residents greater access to government bodies and documents.

The so-called "Constitutional Sunshine Amendment" creates a constitutional right of public access to government meetings and records

Among other things, Proposition 59 adds to the California Constitution that:

(1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

The full text and legislative history of the amendment is available online on the website of the California First Amendment Coalition at <http://www.cfac.org/sca/sca1.html>.

The amendment exempts legislative meetings and records, and additionally provides that it does not supersede or modify any provision of the Constitution guaranteeing citizens the right to life, liberty, property or equal protection, and preserves existing limitations restricting access to certain government meetings and records.

While state statutes including the California Public Records Act and Legislative Open Records Act had previously made government documents accessible to the public, California's Attorney General recognized the significance of the amendment in that it "adds to the State Constitution the requirement that meetings of public bodies and writings of public officials and agencies be open to public scrutiny."

### *Group Seeks Governor's Calendar*

On November 3, the day the amendment took effect, the California First Amendment Coalition requested all of Governor Schwarzenegger's appointment calendars, schedules, and meeting logs since he took office in November 2003.

Proponents of the amendment hope that it can be used as a tool in overturning the California Supreme Court's decision in *Times Mirror Co. v. Superior Ct.*, 283 Cal. Rptr. 893 (1991), in which the court held that California Governor Deukmejian's appointment calendars and schedules were exempt from disclosure under the Public Records Act.

In a surprise move, Governor Schwarzenegger announced that he would comply with the request.

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## Seventh Circuit Rules in Favor of CBS on ‘Survivor’ Trademark Claim

The Seventh Circuit has affirmed an Illinois district court’s ruling that CDs and other merchandise bearing the logo of CBS’s television show “Survivor” do not infringe the trademark of a rock band with the same name. *Sullivan v. CBS Corp.*, 385 F.3d 772 (7th Cir. 2004) (Wood, J.).

Plaintiff Jim Sullivan was a member of Survivor (“the Band”), a rock band which released a number of popular songs during the 1980s, including “Eye of the Tiger,” the theme song of Rocky III.

In 1994, Sullivan and a second band member applied to register the term “Survivor” as a trademark. Although the Band has released no new music in the United States since 1993, Sullivan continues to perform and sell CDs and merchandise under the Band’s name.

In May 2000, the “Survivor” reality television show (“the Series”) debuted on CBS. Subsequently, CBS began marketing a soundtrack and other merchandise bearing the “Survivor” logo, an oval-shaped mark featuring a drawing relevant to the setting of the series coupled with the words “Outplay, Outlast, Outwit.”

On appeal, the Seventh Circuit considered Sullivan’s claim that the defendants’ use of the term “Survivor” amounted to trademark infringement and dilution.

As the court recognized, a claim for trademark infringement hinges upon a showing that the plaintiff’s mark “is entitled to protection and that there is a likelihood of confusion between his mark and CBS’s mark.” The court thus framed the crucial question for decision as “whether the mark is strong enough that the public will form an association between the mark and the source of that particular good.”

The court applied a seven-factor test as a “heuristic device” in determining likelihood of confusion, looking at “(1) the similarity of the marks; (2) the similarity of the products; (3) the area and manner of concurrent use; (4) the degree of care likely to be used by consumers; (5) the strength of the plaintiff’s mark; (6) whether any actual confusion exists; and (7) the defendant’s intent to palm off its goods as those of the plaintiff.”

The court began its analysis by looking at the “strength” of plaintiff’s mark, recognizing that marks that are “arbitrary” or “fanciful” will be granted greater

protection against infringement than those marks that are merely “generic” or “descriptive.”

Although the court held that the registration of the term “Survivor” for a band name was “arbitrary” and could be used to prevent other bands from using the same mark, the plaintiff had failed to provide any type of evidence – such as promotional materials or advertising – to prove that the Band would be recognized as the “originator of any products” outside of the realm of “rock albums and concert t-shirts.”

The court went on to find that while the marks at issue were similar in that each featured the word “Survivor,” the CBS series logo was “quite different” when looked at in its entirety. Furthermore, CBS had incorporated additional distinguishing characteristics in marketing its CDs – the product plaintiff expressed greatest concern about – that made it clear to consumers the goods were associated with the Series.

The court recognized that while each party also manufactured similar products – including CDs – that featured the term “Survivor,” the goods were not marketed together, and the defendant had made no attempt to convince the public the goods originated with the plaintiff’s band.

Finally, the court rejected plaintiff’s claim that actual confusion between the goods exists, recognizing that surveys of the type conducted by the defendant to demonstrate an absence of actual confusion had previously been upheld, and that plaintiff’s evidence that a search engine query for “Survivor” retrieved information concerning both the Band and the television show did not prove that consumers would be “confused” as to the source of the sites.

After concluding that no triable issue of fact existed as to likelihood of confusion, the court rejected plaintiff’s claim for dilution on the grounds that plaintiff had failed to present any proof of actual dilution through survey, financial, or circumstantial evidence.

Plaintiff was represented by Annette M. McGarry, Wildman, Harrold, Allen & Dixon, Chicago. Defendants were represented by Andrew M. White and David Fink of White, O’Connor, Curry, Gatti & Avanzado, Los Angeles; Richard J. O’Brien, Sidley, Austin, Brown & Wood; and Christopher B. Wilson, Perkins Coie, Chicago, IL.



## Speculation about Litigation Insufficient to Close Meeting to Public

By Scott B. Sievers

An Illinois school board violated the state's Open Meetings Act by citing the need to discuss litigation to justify closing a meeting to the public when no such litigation existed, a trial court judge ruled in September. *Whitney and The Carroll County Review v. Board of Education of Thomson Community School District No. 301*, Carroll County Case No. 02-MR-1, 32 Media L. Rep. 2441 (Ill. Cir. Ct. Sept. 23, 2004), (Ursin, J.).

### Background

The case got its start back in 2001. Defeating an incumbent, write-in candidate Rebecca Atherton was elected in the spring of 2001 to the school board in Thomson in northwestern Illinois. During the summer, the school district's new superintendent learned that Atherton might have a conflict of interest, as Atherton was part-owner of the vendor supplying the school district's fuel.

In a letter to board members, board attorney Karl Ottosen warned them of a state statute making conflicts of interest by board members a felony and offenders subject to removal from office. A week before the early November meeting in which Atherton was to take her seat, the board called a special meeting that included a closed session to discuss "[c]onsideration of a person to fill a public office or the discipline, performance or removal of occupant of a public office."

Several people contacted Jonathan Whitney, publisher of *The Carroll County Review*, the local weekly newspaper, to ask why the board was meeting to consider Atherton. Knowing there was no vacant public office for the school board to fill, and reasoning that the board could not consider the discipline, performance or removal of Atherton as she was not yet an occupant of a public office, Whitney telephoned the superintendent to say he thought it would violate the Open Meetings Act to close that night's special meeting to discuss Atherton.

Whitney was not the only one making calls prior to the meeting. A board member had called the county State's Attorney earlier that day about whether the board member herself could get in trouble by seating Atherton.

The State's Attorney told her he did not think the Atherton potential conflict was a problem; that no matter what the board member did it would not affect whether Atherton was seated; and that he did not think the board was in violation if everything the board member told him was true.

At the outset of that evening's special meeting, the superintendent announced a change in the agenda, replacing the closed meeting language to which Whitney had objected with the text of an entire exception from the Open Meetings Act allowing for closed meetings:

"Litigation, when an action against, affecting or on behalf of the particular public body has been filed and is pending before a court or administrative tribunal, or when the public body finds that an action is probable or imminent, in which case the basis for the finding shall be recorded and entered into the minutes of the closed meeting."

Board members understood this agenda item to refer to the Atherton potential conflict. Whitney objected to the agenda change, saying the board could not change the agenda to the litigation exception to discuss the Atherton matter. The superintendent disagreed with Whitney, and Whitney threatened the board with an Open Meetings Act lawsuit. Nonetheless, the board voted to close the meeting, relying on the cited litigation exception.

During its closed meeting, the board discussed the conflict of interest statute, attorney Ottosen's opinion of the situation, and the various options available to the board, Atherton, or both to address the situation. No attorney for the board, including Ottosen, was present during the closed meeting. The board later opened its meeting to the public and invited Atherton in, then informed her of the consensus it had reached on the matter.

After Whitney filed his Open Meetings Act lawsuit, all board members present at the closed meeting, the superintendent, and Atherton herself were deposed. Their testimony revealed that, not only had no litigation arising out of the Atherton potential conflict ever been filed, but no identifiable person or entity had ever threatened litigation either – including the county State's Attorney. Atherton herself had not even consulted an attorney on the matter, let alone threatened suit.

(Continued on page 58)

**Speculation about Litigation  
Insufficient to Close Meeting to Public**

*(Continued from page 57)*

***No Imminent Legal Action***

The parties later filed cross motions for summary judgment, and on September 21 Associate Circuit Judge Theresa L. Ursin ruled:

“This court does not believe in this that there was any basis to find that any legal action was probable or imminent.... The court notes the defendants use of words such as ‘definite possibility’ and ‘very conceivable’ to support the speculative nature of the Board’s opinion that litigation was probable or imminent. There is no evidence of any specific person or persons having threatened litigation or discussed the filing of a suit over these matters.”

The court continued: “While . . . Atherton’s conflict of interest on the school board was clearly sensitive and controversial in the community, that reason does not equate with the exception under the Act.”

During the litigation the school board had argued that Whitney’s threat of an Open Meetings Act lawsuit for closing its special meeting provided a basis for the board to find that litigation was probable or imminent, thereby justifying the closure of the meeting under the litigation exception. But the Court dismissed the argument: “The court disagrees that plaintiff’s threat to sue over the possible closing of the meeting justifies the closing. To bootstrap the weak argument for closing with plaintiff’s assertion that he would sue over the improper closing does not make the original reason for closure valid.”

The Court granted summary judgment in favor of Whitney and *The Carroll County Review*, holding that the school board held a closed meeting to discuss subjects not within any of the Open Meetings Act’s exceptions to the Act’s general rule that all meetings of public bodies are open to the public.

The Court, however, found that the school board had not violated the act when it amended its agenda at the time of the special meeting. The plaintiffs had argued that amending the agenda at the outset of the meeting violated the Act’s requirement that the agenda be posted 48 hours prior to the meeting. The Court did not reach the plaintiffs’ allegation that the board had failed to cite a valid specific exception, as required by the Act, finding that its prior ruling made the matter moot.

Plaintiffs have since briefed the Court on their request for a permanent injunction prohibiting the school board from future violations of the Open Meetings Act and for \$13,391.25 in attorney’s fees and \$1,770.91 in litigation costs. The defendant’s brief in response was due October 26, and plaintiffs’ reply brief is due November 3. A conference call is set with Judge Ursin on November 4, but no ruling has been made whether she will hear oral argument on the briefs prior to ruling.

*Scott B. Sievers, an attorney with Donald M. Craven, P.C., in Springfield, Illinois, represented the plaintiffs. Karl R. Ottosen of Ottosen Trevarthen Britz Kelly & Cooper, Ltd. of Wheaton, Illinois, represented the defendant.*

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## Ninth Circuit Reinstates § 1983 Claim Against Police Chief for Mistaken Arrest under Washington Privacy Act

By Judith A. Endejan

A divided Ninth Circuit panel reinstated a § 1983 claim against a local Washington police chief who arrested a man for videotaping the chief in a public parking lot, allegedly in violation of the Washington Privacy Act. *Johnson v. Howe*, No. 03-35057 2004 WL 2376506 (9th Cir. Oct. 26, 2004) (Wardlaw, Canby, Gould JJ.).

### Background

The plaintiff, Anthony Johnson, was in a skateboard park videotaping friends. The police chief came to the park in his vehicle. Plaintiff trained his camera on him, walked to the passenger side of the police car and continued filming the police chief while he was using his police radio.

After a struggle over the video camera, the Police Chief arrested Johnson for violating Washington's Privacy Act, RCW 9.73.030 claiming that Johnson could not re-

cord his conversation without his consent. All charges were eventually dropped.

Washington State, like eleven other states, requires the consent of all parties prior to the recording of a private conversation. However, RCW 9.73.030 expressly addresses consent issues for news media.

Subsection (4) allows the media "to record and divulge communications or conversations otherwise prohibited by this chapter if the consent is expressly given or if the recording or transmitting device is readily apparent or obvious to the speakers.

Moreover, "withdrawal of the consent after the communication has been made shall not prohibit any such employee of a newspaper, magazine, wire service or radio or television station from divulging the communication or conversation."

Thus, had Johnson been a member of the media, his visible display of his videotape equipment would have provided the requisite "consent."

*(Continued on page 60)*

*To be Published in November*

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### **Ninth Circuit Reinstates § 1983 Claim Against Police Chief for Mistaken Arrest under Washington Privacy Act**

(Continued from page 59)

#### ***No Privacy Act Violation***

The Ninth Circuit, in a decision by Judge Wardlaw, found that Johnson could not have violated Washington's Privacy Act through his actions. The court relied on Washington State case law that has found no violation of the act in the tape recording of a police officer in the performance of an official function on a public thoroughfare.

Quoting from *State v. Flora*, 68 Wn. App. 802, 845 P.2d 1355 (Wash. Ct. App. 1992), the Ninth Circuit said "[s]uch conversations are not 'private' under the Privacy Act." Under the circumstances, the Ninth Circuit found the Police Chief could have no reasonable expectation of privacy for several reasons, the first of which was the aforementioned *Flora* decision.

Second, the Ninth Circuit found there was no reasonable expectation of privacy in the police radio communications because the Chief's police radio was operating as he sat in his police cruiser in the parking lot of a public park with his driver's side window rolled down. The Chief's conduct did not reflect an intent to keep the radio communications private.

Third, the Chief could have no reasonable expectation of privacy in communications over police dispatch radio in any event because those communications are knowingly exposed to the public by virtue of their transmission.

#### ***No Probable Cause***

The Ninth Circuit concluded that the Police Chief arrested Johnson without probable cause in violation of the Fourth Amendment because Johnson's conduct did not violate Washington's Privacy Act. Furthermore, the Ninth Circuit held that because the law was sufficiently clear at the time of arrest, the Chief should have known that he had no lawful basis to arrest Johnson for violating the Privacy Act.

This knowledge stripped the Chief of his qualified immunity. Finally, the Ninth Circuit held that the District Court erroneously dismissed Johnson's state law outrage claim for failure to state a *prima facie* case, ruling that the question should go to the jury.

#### ***Dissent***

Judge Gould dissented, arguing that the circumstances of the *Flora* case were not present. Judge Gould characterized the majority's decision as holding that an on-the-job police officer in Washington has no reasonable expectation of privacy in a conversation with dispatch over the radio. Such a holding should have come from the Washington State Supreme Court, not the Ninth Circuit, Judge Gould argued. He also disagreed with the majority's conclusion regarding municipal liability and the reinstatement of Johnson's state law court claim for "outrage."

The appellant, Anthony L. Johnson, was represented by R. Stuart Phillips, Poulsbo, Washington. The appellee, City, County and Chief were represented by Lee Smart Cook Martin & Patterson, PS, Inc., and Duncan K. Fobes, Seattle.

*Judith A. Endejan is a partner with Graham & Dunn PC in Seattle, Washington.*

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## ETHICS CORNER

### Confidentiality Risks for In-House Lawyers Overseas

By **Bruce E. H. Johnson**

One of the little-known ethics risks for American lawyers, especially in-house counsel – a risk that is aggravated as global commerce increases and the media industry becomes more internationalized – is the danger that some jurisdictions outside the United States may not recognize the existence of an attorney-client privilege for communications with a corporation’s inside counsel.

Indeed, lawyers working for American companies should not assume that other nations will automatically recognize the same evidentiary privileges that are available here.

A good example is the European Union. As one commentator has noted:

“Many U.S. firms discover all too late that [their] assumption [that European Union countries will recognize the same privileges as the U.S.] is incorrect as European law either does not recognize or, at best, significantly limits these safeguards.”

The danger cannot be exaggerated. “Put simply, in-house counsel enjoy the attorney-client privilege in the United States. In the European Union, they do not, which presents some unique problems.”

As a result, some E.U. investigations, especially in the area of antitrust law, will begin with a government demand targeting all internal corporate documents, including specifically reports to and from in-house counsel.

Several years ago, the American company John Deere was the recipient of one of these orders. Deere suddenly learned that its inside lawyers could claim no privilege and was forced to turn over attorney-client documents that would be considered, in the U.S. at least, to be completely confidential.

Indeed, after an investigation initiated in 1982, Deere was penalized approximately \$2.4 million as a result of the European Commission’s review of information that it had obtained from the company’s in-house lawyers, which the

company had mistakenly assumed would be covered by attorney-client privilege protections.

A similar penalty was visited on Sabena Airlines a few years later, with the Commission relying upon in-house counsel’s opinion letters.

Privilege law in the E.U. is governed by different principles from those at work in the U.S. For a lawyer-client communication to be privileged under E.U. law, the lawyer must be independent. An employee is not considered independent.

Also, under applicable E.U. law, the privilege extends only to attorneys licensed to practice in Member States

(which suggests that these risks may also extend to overseas outside counsel as well).

The problem is aggravated by its implications when lawsuits are filed in the United States. Under American privilege law, once otherwise confidential documents have

been turned over to a third party, they can no longer be deemed privileged, and third parties may obtain access to them in civil discovery.

In addition, there may be choice of law issues regarding whether in-house counsel communications made in a jurisdiction that does not recognize the privilege may be deemed privileged in a United States lawsuit, where the privilege would normally be recognized. There are two American cases on point, and, unfortunately, they reached different conclusions.

Any in-house lawyer considering the implications of these privilege rules should pay close attention to the scope of protection available in various nations.

In this regard, an excellent resource is Lex Mundi’s annual publication entitled “In-House Counsel and the Attorney-Client Privilege”, which is available for free download at the Lex Mundi website: [http://www.lexmundi.com/images/lexmundi/pdf/attyclient\\_Survey2004.pdf](http://www.lexmundi.com/images/lexmundi/pdf/attyclient_Survey2004.pdf)

*Bruce Johnson is a partner in the Seattle, Washington office of Davis Wright Tremaine LLP.*

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***Lawyers working for American companies should not assume that other nations will automatically recognize the same evidentiary privileges that are available here.***

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