80 Eighth Avenue, Suite 200, New York, New York 10011-5126 (212) 337-0200 www.medialaw.org

MEDIALAWLETTER

Reporting Developments Through November 30, 2005

IN THIS ISSUE

MLRC Calendar

January 26, 2006
MLRC & Donald E. Biederman Entertainment & Media Law Institute of South Western Law School
Los Angeles
Legal Challenges of Creativity in a Changing and Increasingly Regulated Media Environment

Conference brochure and registration information available at www.medialaw.org

September 27-29, 2006
NAA/NAB/MLRC Media Law Conference
Arlington, Virginia

MLRC's Annual Dinner Marks Organizations 25th Anniversary

Panel Discusses Reporters Privilege Issues

(*from left to right*) Henry Hoberman, Congressman Mike Pence, Jim Taricani, Judith Miller, Terry Moran, Matthew Cooper and Sandy Baron

MLRC's 25th Anniversary was celebrated at the Annual Dinner on November 9th at the Sheraton Hotel and Towers in New York. MLRC Chair Henry Hoberman marked the occasion with a tribute to MLRC's founders, including Floyd Abrams, Henry Kaufman, Harry Johnston, Victor Kovner, Chad Milton, Bruce Rich, Bruce Sanford and Larry Worrall.

Henry Hoberman

Reflecting on the founding of MLRC, Henry Hoberman noted that a series of troublesome Supreme Court decisions inspired individual media companies and their lawyers to come together in a "collective self-defense." Similarly, in the last few years members of MLRC have again endured a rude awakening. "After decades of case law confirming the existence of a reporter's privilege it's all begun to unravel." "As Harry Johnston said so eloquently at that time 25 years ago, 'It's time to brush the moth balls off the turrets and resume position again,' only this time, the stakes are higher" and can mean a loss of liberty for a reporter.

Photographs by Julienne Schaer

Reporters Privilege Panel

These issues were then discussed by a journalists Judith Miller, Matt Cooper and Jim Taricani joined Congressman Mike Pence (R-IN) in a panel led by Terry Moran of ABC News.

The three journalists panelists – all of whom have been in the headlines this past year – brought the discussion about the reporter's privilege and the need for a federal shield law to the forefront.

Cooper, TIME magazine's White House correspondent, and Miller, a former correspondent at The New York Times, fought subpoenas from a federal special prosecutor to reveal their sources in connection with the disclosure in July 2003 of the identity of CIA operative Valerie Plame. Ms. Miller notably served 85 days in a federal prison in Alexandria, Virginia for refusing to reveal her source before a grand jury.

Mr. Taricani, an investigative reporter for WJAR-TV, served four months of a six-month sentence of home confinement for refusing to reveal to a federal special prosecutor the source of a videotape under seal that caught a mayoral aide accepting a bribe. Shortly after Mr. Taricani's conviction but before his sentencing, the source went public, yet the court punished Mr. Taricani nonetheless.

Congressman Pence is an author of the Free Flow of Information Act (H.R. 3323), a bill that would create a federal shield law. Together with Rep. Rick Boucher (D-VA), Rep. Pence co-sponsored introduction of the bill in the House of Representatives earlier this year, and fellow Indiana legislator, Senator Richard Lugar, introduced the bill in the Senate. The Senate Judiciary Committee has held two hearings on the bill, most recently in October.

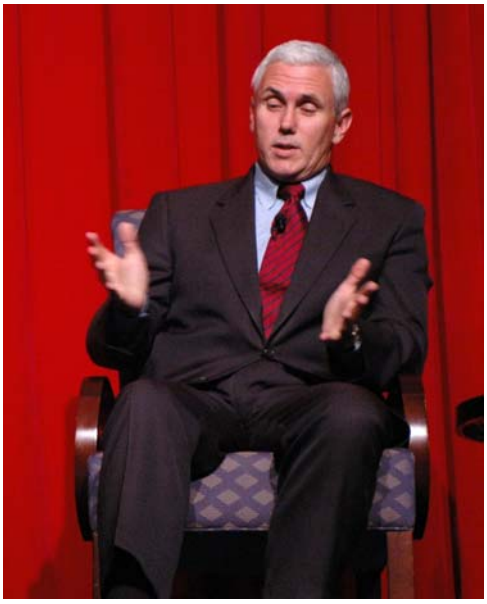
Terry Moran was recently named co-anchor of ABC News "Nightline" and will assume anchor duties at the end of November. Based in Washington, D.C., he is ABC News' Chief White House correspondent, a position he has held since September 1999.

(*from left to right*) Jim Taricani, Judith Miller, Congressman Mike Pence

2005 Annual Dinner: A Discussion on the Reporter's Privilege

Judith Miller

JUDITH MILLER: I had become part of the story, I had actually become the news and that's something that no New York Times reporter wants to be.... Just so much had happened from the time that I came out of jail to the present day that I really thought it was time to move on.



Congressman Mike Pence

CONGRESSMAN MIKE PENCE: It is, as one investigative reporter who is here tonight proved to me, it is blowing a chill wind across the body politic. And I had an investigative reporter of great stature tonight tell me, "I am losing sources."

Terry Moran

TERRY MORAN: I have a brother who has a website called rightwingnut-house.com – there's one in every family, it's actually a very good website [LAUGHTER] He's a fine writer, bit of a loon. But would he be covered? That's the question of the moment, I noticed in the first sentence of your Bill, it covers "certain persons" Is my brother a "certain person"? [LAUGHTER]

CONGRESSMAN PENCE: Sounds like it.

Photographs by Julienne Schaer

Matthew Cooper

MATTHEW COOPER: Of course, one of the funniest parts of this whole thing was when this e-mail got exposed, that said I just spoke to Rove on "double super-secret background," was to watch the journalistic and legal punditocracy scratch their chins, and say, "Huh, double super-secret background, what did he mean by double super-secret?" Whereas all fans of Animal House, know [LAUGHTER] that was an homage to Dean Wormser and the double super-secret he gave John Belushi's frat. That was probably the funniest part of this whole thing.

Jim Taricani

JIM TARICANI: I think I ran into a judge who does not have a great appreciation for the First Amendment and a great appreciation for the vital role we play in a democracy. I really don't think he has that appreciation.

2005 Annual Dinner: A Discussion on the Reporter's Privilege

Terry Moran and Congressman Mike Pence

Judith Miller

Karen Pence and Matthew Cooper

Henry Hoberman

Photographs by Julienne Schaer

D.C. Circuit Denies Rehearing of Wen Ho Lee Contempt Citations

District Court Holds Another Reporter in Contempt

By Deanna K. Shullman and Charles D. Tobin

The D. C. Circuit, over stirring dissents, in a 4-4 vote declined to rehear four journalists' appeal from contempt citations for refusing to reveal their sources to Privacy Act plaintiff Wen Ho Lee, while the District Court this month held a *Washington Post* reporter in contempt in the same case against the government. *Lee v. Dept. of Justice, et al.*, Case Nos. 04-5302, 04-5321, 04-5322, 04-5323, 2005 WL 2874940 (D.C. Cir. November 2, 2005); *Lee v. Dept. of Justice, et al.,* Case No. 99-3380 (D.D.C. November 16, 2005).

The pair of decisions were remarkable in very different respects. While the D.C. Circuit's split-vote rejected without comment the journalists' First Amendment and common law arguments, Circuit Judges David Tatel and Merrick Garland strongly urged adoption of a new public-private interest balancing test in leaks cases. Moreover, Judge Judith Rogers – a member of the original panel that upheld the contempt citations – voted in favor of en banc rehearing and wrote a separate dissent.

In the district court, Judge Rosemary Collyer not only held the *Post* reporter in contempt, but she also ordered him to contact his sources, seek waivers of his confidentiality pledges to them, and then let her know whether he will continue to refuse to testify.

Wen Ho Lee, a former computer scientist fired from his job at Los Alamos National Laboratory during the government investigation, was indicted in 1999 on 59 counts of mishandling classified nuclear information. He pleaded guilty to one count of unlawful retention of national defense information in a plea bargain.

In the Privacy Act lawsuit, Lee sued the Department of Justice, Department of Energy and the FBI alleging that the government leaked information prior to his felony conviction, including officials' suspicions that he was a Chinese spy, a charge the government subsequently did not bring.

After deposing 20 government witnesses, including former FBI Director Louis Freeh and former Energy Secretary Bill Richardson, Lee subpoenaed five non-party journalists: Pierre Thomas (at the time with CNN, now with ABC News), Jeff Gerth and James Risen (both with the *New York Times*), Robert Drogin (with the *Los Angles Times*), and Josef Hebert (with the Associated Press). All five moved to quash.

Despite arguments that Lee failed to ask meaningful questions about some of the reporters and failed to push the government at all for the result of any internal leaks investigations, then District Judge Thomas Penfield Jackson in October 2003 denied the motions to quash and ordered the journalists to sit for depositions and reveal their sources. *Lee v. Department of Justice, et al.*, 287 F. Supp. 2d 15 (D.C. Cir. 2003).

After they appeared at the depositions and invoked privilege, in August 2004, Jackson held all five journalists in civil contempt and fined them $500 per day, stayed pending appeal. *Lee v. United States Dep't of Justice, et al.*, 327 F. Supp. 2d 26 (D.C. Cir. 2004).

On appeal, in a unanimous opinion, the D.C. Circuit – comprised of Judges David Sentelle, Raymond Randolph, and Judith Rogers – on June 28, 2005, upheld the contempt citation for four of the five Wen Ho Lee journalists. *Lee v. United States Dept. of Justice, et al.*, 413 F.3d 53 (D.C. Cir. 2005).

Though upholding the existence of the privilege in civil cases as set forth in *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), the panel of the D.C. Circuit without any individualized discussion of the subpoenaed reporters, held that the information Lee sought went to the "heart of the case" as *Zerilli* requires, and that the trial judge had not abused his discretion in deciding that Lee had exhausted reasonable alternatives to the journalists.

It upheld four of the five contempt citations, reversing as to *New York Times* reporter Jeff Gerth on grounds that the one question he refused to answer was ambiguous enough to cover confidential sources in stories other than the Lee investigation.

In its November 2, 2005, per curiam opinion, the full D. C. Circuit – in a split 4-4 vote (two judges recently named to the bench did not participate) – refused to rehear the case. *Lee v. Dept. of Justice, et al.*, Case Nos. 04-5302, 04-5321, 04-5322, 04-5323, 2005 WL 2874940 (D.C. Cir. November 2, 2005). Three of the four Circuit Judges who voted for *en banc* rehearing, including, curiously, Judge Rogers who was

(Continued on page 10)

DC Cir. Denies Rehearing of Wen Ho Lee Contempt Citations

(Continued from page 9)

a member of the original three-judge panel that upheld the journalists' contempt citations, filed dissenting opinions.

In dissent, Judge Rogers acknowledged that the First Amendment implications of the case were "obvious," and that the court should take the opportunity to describe the contours of *Zerilli* and its other leading precedent, *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974), in the context of the Lee case.

Though *Zerilli*, like Lee, involved a Privacy Act claim, Judge Rogers, citing various opinions and pleadings in the Lee case, described the disagreement over the proper application of *Zerilli* as "evident." Judge Rogers asserted that she would grant rehearing *en banc* because the journalists' cases present "significant issues" of the proper standard of review and the application of the balancing test in overcoming the privilege.

Judge Tatel, with whom Judge Garland joined, in his dissent asserted that the three-judge panel never balanced the public and private interests, simply limiting its analysis to rigid application of the centrality and exhaustion prongs. The panel's application of *Zerilli*, according to Judge Tatel's dissent, "allows the exigencies of even the most trivial litigation to trump core First Amendment values."

In Privacy Act cases, Judge Tatel explained, the rigid two-factor test for overcoming the privilege will almost always be met, regardless of the import of the information to the public. The panel's failure to balance Lee's interests in disclosure against the public's interest in protecting the sources raised questions of "exceptional" importance necessitating full court review.

In the third dissent, Judge Garland, with whom Judge Tatel joined, asserted that application of *Zerilli*'s need and exhaustion prongs without also balancing the public and private interests at stake results in "effectively no privilege at all" in leaks cases. According to Judge Garland, limiting *Zerilli* to consideration of need and exhaustion is inconsistent with the commitment the court made in *Zerilli* to conduct a balance of interests and to "be mindful of the preferred position of the First Amendment and the importance of a vigorous press."

Judge Garland further recognized that limiting *Zerilli* to need and exhaustion and the resultant ease with which the privilege would be overcome in leaks cases, would make sources reluctant to disclose any confidential information to reporters. This, Judge Garland recognized, would "undermine the Founders' intention to protect the press 'so that it could bare the secrets of government and inform the people.'" Because the panel failed to conduct the balancing enunciated in *Zerilli*, Judge Garland likewise agreed that the full court should consider the matter.

Because circuit rules require a majority of judges to grant a petition for rehearing *en banc*, the 4-4 split acts as a denial of the journalists' petitions. The journalists have until January 31, 2006 to petition the United States Supreme Court for certiorari.

Two weeks after the en banc ruling, on November 16, 2005, District Judge Rosemary Collyer (now presiding following Judge Jackson's retirement last year), issued an order holding a sixth journalist, Walter Pincus of the *Washington Post*, in contempt and imposing a $500/day fine. She stayed the fine pending appeal.

In a 33-page decision, she held that Pincus had no different argument than the other journalists under *Zerilli's* rendition of the First Amendment privilege. Writing that "new privileges should be created sparingly and with caution," she also rejected Pincus' argument for adoption of the common law privilege, citing the failure of the other journalists, as well as New York Times reporter Judith Miller in her challenge to a grand jury subpoena, to command majority support in the D.C. Circuit. *See In Re Grand Jury Subpoena, Judith Miller*, 405 F.3d 17 (D.C. Cir. 2005).

In a provocative and unprecedented move, citing her wish to "avoid a repetition of the Judith Miller imbroglio," Judge Collyer further ordered Pincus to contact his sources, advise them of the court's order, and then let the judge know whether he will continue to refuse to testify.

Charles D. Tobin, with the Washington, D.C. office of Holland & Knight LLP, and Deanna K. Shullman with the firm's Ft. Lauderdale office, represent journalist Pierre Thomas in this matter. Lee Levine, Nathan Siegel, and Chad Bowman, Levine Sullivan Koch & Schulz LLP, Washington, D.C., represent journalists Bob Drogin and Joseph Hebert. Floyd Abrams and Joel Kurtzberg of Cahill Gordon & Reindel LLP, New York City, represent journalist James Risen. Kevin Baine and Kevin Harding of Williams & Connolly, Washington, D.C., represent journalist Walter Pincus. Wen Ho Lee is represented by Brian Sun, with the Los Angeles office of Jones Day, and Elizabeth Miller of the firm's Washington D.C. office.

Media Groups Seek to Unseal Opinion in Miller Cooper Case

By Thomas H. Dupree Jr.

Dow Jones & Company, joined by Bloomberg L.P., The Reporters Committee for Freedom of the Press, and USA Today, have filed a motion to unseal the eight pages that were redacted from the D.C. Circuit's opinion in the CIA leak case involving reporters Judith Miller and Matthew Cooper.

On February 15, 2005, the D.C. Circuit affirmed the district court's refusal to quash grand jury subpoenas issued to Miller (then with the *New York Times*), Cooper (with TIME magazine) and Time Inc. In so holding, the panel split three ways as to whether the common law and Federal Rule of Evidence 501 recognized a reporter's confidential source privilege.

The panel agreed, however, that "if [a common law] privilege applies here, it has been overcome" by the Special Counsel's *ex parte* evidentiary proffer that purportedly established the need for the reporters' testimony and documents. *See In re Grand Jury Subpoena,* 397 F.3d 964, 973 (D.C. Cir.), *cert. denied*, 125 S.Ct. 2977 (2005).

The panel stated that on this point it was adopting the reasoning of Judge Tatel's concurring opinion, which devoted eight pages to explaining how the Special Counsel, with his "voluminous classified filings," had "met his burden of demonstrating that the information [sought from the reporters] is both critical and unobtainable from any other source." 397 F.3d at 1002.

Those pages, however, were redacted from the versions of the opinion made available to the reporters and the public on the basis that they contained nonpublic grand jury information protected from disclosure pursuant to Federal Rule of Criminal Procedure 6(e).

The motion to unseal argues that in light of the October 28, 2005 indictment of the Vice President's then-chief of staff, I. Lewis "Scooter" Libby, as well as the Special Counsel's public statements in announcing the indictment, the D.C. Circuit should unseal its opinion in full, or at a minimum unseal those portions that are no longer protected under Rule 6(e). Moreover, many of the witnesses who appeared before the grand jury or have otherwise testified – including Miller, Cooper, Tim Russert of NBC News and Walter Pincus of the *Washington Post* – have publicly disclosed the substance of their testimony.

The motion argues that due to the extensive public discussion of these facts, the redacted portions of Judge Tatel's opinion have lost their character as Rule 6(e) material and are no longer protected from disclosure. *See In re: Motions of Dow Jones & Co.*, 142 F.3d 496, 505 (D.C. Cir. 1998) (while "[i]t is true that Rule 6(e) does not create a type of secrecy which is waived once public disclosure occurs, . . . it is also true that when information is sufficiently widely known . . . it has lost its character as Rule 6(e) material").

Consistent with D.C. Circuit precedent, the motion also requests that the Court provide an explanation for its action if it chooses to keep the redacted material secret in whole or in part.

This case involves a matter of great public importance that has already received considerable publicity, and the motion points out that unsealing the opinion will enable the public to scrutinize the basis for the court's ruling, and to understand why the court concluded that any common law reporter's privilege was overcome.

Dow Jones and the other media organizations are represented by Theodore J. Boutrous, Jr., Jack M. Weiss, and Thomas H. Dupree, Jr. of Gibson, Dunn & Crutcher LLP.

Now available online....

CLOSING ARGUMENTS

A collection of closing argument transcripts from recent media trials is now available on the MLRC website at

http://www.medialaw.org/Litigation Resources/ClosingArguments

Class Action Plaintiffs Overcome Publications' Qualified Privilege

Confidential Data Critical to Plaintiffs' Energy Price Fixing Suit

A New York federal magistrate judge this month granted a motion by class action plaintiffs to compel McGraw-Hill Companies and Intelligence Press, Inc. to produce energy pricing information gathered from confidential sources. *In re Natural Gas Commodity Litigation*, No. 03 Civ. 6186, 2005 WL 3036505 (S.D.N.Y. Nov. 14, 2005) (Peck, J.) (granting motion to compel but with limitations on scope).

Platts, a division of McGraw-Hill, and Intelligence Press both publish gas industry pricing information based, in part, on data submitted by participating companies under a promise of confidentiality. Plaintiffs in the class action alleged that the defendant energy companies submitted false information to the publishers to manipulate gas futures prices.

While acknowledging that the publishers' information is newsgathering material protected by a qualified privilege, the court held that the privilege was overcome where the information sought from the publishers was critical to plaintiffs' price fixing suit and was unavailable from other sources. The court rejected the publishers' claim that the information might be obtained from other energy companies, noting that plaintiffs are only required to exhaust alternative sources that are reasonably available, not every other conceivable source.

In an interesting parallel to the recent leak investigations, Magistrate Judge Peck noted that providing false data to the publishers was the gravamen of the alleged price fixing scheme, making the publishers the unwitting "instrumentality" of the alleged wrongs.

The decision follows on the heels of last month's decision by D.C. District Court Judge Royce Lambeth involving Platts. In that case the D.C. Court held that the Commodity Futures Trading Commission overcame the privilege in an investigation of an energy company for violating the Commodities Exchange Act. *U.S. Commodity Futures Trading Commission v. The McGraw-Hill Companies, Inc*., No. 05-235, 2005 WL 2431262 (D.D.C. Oct. 4, 2005).

The publishers in the instant case have until the first full week of December to file an appeal to the district court.

Victor Kovner of Davis, Wright & Tremaine, LLP, represented The McGraw-Hill Companies, Inc.

Shield Law Proposals in Washington and Utah

This month Washington Attorney General Rob McKenna announced plans to introduce a shield law bill that would provide absolute protection for confidential sources and information. Washington does not have a shield statute, but state courts have recognized a common law qualified privilege to protect confidential sources. *See, e.g., Senear v. Daily Journal American*, 641 P.2d 1180, 8 Media L. Rep. 1151 (1982).

A draft bill was presented this month to the legislative committee of the Washington State Bar Association. It would cover people who earn a substantial portion of their income from publishing or broadcasting. The bill proposal is backed by King County Prosecutor Norm Maleng.

In the Spring, McKenna joined an attorneys general amicus brief asking the U.S. Supreme Court to review the Miller Cooper case.

Utah's Attorney General Mark Shurtleff has also spoken out in favor of adopting a shield law in his state, either through legislation or by judicial rule. Utah does not have shield law and there is only sparse case law involving non-confidential source issues.

Shurtleff also joined the attorneys general brief to the U.S. Supreme Court.

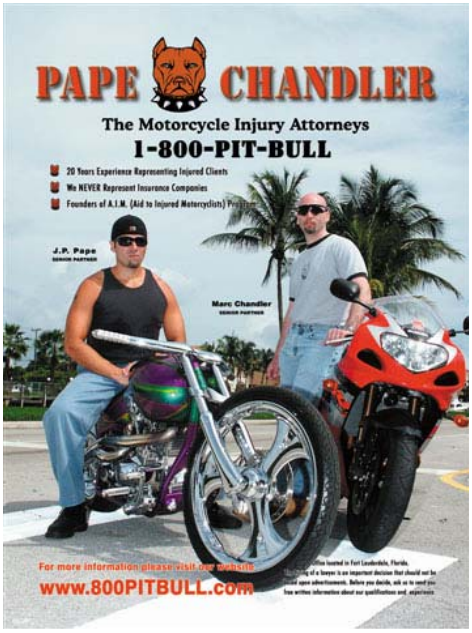
Pit Bulls and Piranhas and Sharks, Oh My!

Florida Supreme Court Holds Scary Animal Depictions in Lawyer Ads Are Unprotected by the First Amendment

By Eric M. Stahl

The Florida Supreme Court has ruled that a law firm's advertisement featuring a fierce dog logo and the telephone number 1-800-PIT-BULL violates state ethics rules, and is not constitutionally protected commercial speech. *The Florida Bar v. Pape*, 2005 WL 3072013 (Fla. November 17, 2005).

The unanimous decision all but brushes aside the First Amendment arguments raised by the law firm. Instead, taking an oddly literal view of the advertising at issue, the court found that the lawyers were suggesting that they would behave like actual pit bulls by engaging in "combative and vicious tactics that will maim, scar, or harm the opposing party."



The court also reasoned that its decision was necessary to prevent a true parade of horribles: if the pit bull lawyer ads were allowed to stand, "images of sharks, wolves, crocodiles, and piranhas could follow. For the good of the legal profession and the justice system … this type of non-factual advertising cannot be permitted."

Background

The ad that formed the basis for the bar complaint was a television commercial aired by John Pape and Marc Chandler. Pape and Chandler are "motorcycle injury attorneys," according to their firm's website, which prominently features their grim, spike-collared pit bull logo; a photograph of the t-shirt clad attorneys posing with their own motorcycles; and the telephone number 1-800-PIT-BULL.

The television spots likewise contained the dog logo and the phone number, and apparently were widely seen in Florida. According to news accounts, the pit bull campaign has been cited by some Florida legislators as a prime example of the need to rein in aggressive lawyer advertising.

A referee who heard the complaint initially ruled that the ads did not violate the rules of professional conduct, and that any interpretation prohibiting the ads would render the rules unconstitutional as applied.

Florida Supreme Court Decision

The bar association appealed to the Florida Supreme Court, which unanimously reversed. First, the court found that the ads violated the rule prohibiting "statements describing or characterizing the quality of the lawyer's services." The court rejected the referee's conclusion that the ads said nothing about the quality of the attorney's services, finding that "[f]rom the perspective of a prospective client unfamiliar with the legal system and in need of counsel…. a 'pit bull' lawyer" can be expected to be "vicious to the opposition."

The court also found that the advertising violated a rule stating that all depictions "of persons, things, or events must be objectively relevant to the selection of an attorney and shall not be deceptive, misleading, or manipulative." The court found that the spike-collared pit bull logo was manipulative and misleading, as it "would suggest to many persons not only that the lawyers can achieve results but also that they engage in a combative style of advocacy."

The referee had concluded that the ads depicted qualities relevant to the selection of an attorney, in that pit bulls are perceived as loyal, tenacious, and aggressive. Again, the court disagreed: "We consider this a charitable set of associations that ignores the darker side of the qualities most often associated with pit bulls: malevolence, viciousness, and unpredictability." Indeed, the

(Continued on page 14)

Pit Bulls and Piranhas and Sharks, Oh My!

(Continued from page 13)

court seemed oblivious to the possibility that the ads depicted merely metaphoric, as opposed to literal, pit bulls:

> This Court would not condone an advertisement that stated that a lawyer will get results through combative and vicious tactics that will maim, scar, or harm the opposing party, conduct that would violate our Rules of Professional Conduct. See, e.g., R. Regulating Fla. Bar 4-3(g)-(h) (prohibiting threats to present criminal or disciplinary charges solely to gain an advantage in a civil matter). Yet this is precisely the type of unethical and unprofessional conduct that is conveyed by the image of *the pit bull and the display of the 1-800-PIT-BULL phone number.*

The court concluded that allowing lawyers to engage in "non-factual advertising" depicting pit bulls, crocodiles, or other dangerous creatures "would make a mockery of our dedication to promoting public trust and confidence in our system of justice."

The court concluded that allowing lawyers to engage in "non-factual advertising" depicting pit bulls, crocodiles, or other dangerous creatures "would make a mockery of our dedication to promoting public trust and confidence in our system of justice."

Ad Falls Outside First Amendment

The court next addressed whether applying the bar rules to prohibit the ads in question would violate the First Amendment. The court's constitutional analysis consists largely of a recitation of some of the U.S. Supreme Court cases addressing lawyer advertising. The Florida court focused on *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985), which held that state bar rules could not prohibit a lawyer from using a non-deceptive illustrations of a Dalkon Shield in an advertisement offering to represent women injured by the device.

The *Pape* court found that *Zauderer* was distinguishable because the illustration in that case "*informed* the public that the lawyer represented clients in cases involving this device. The 'pit bull' commercial produced by the attorneys in this case contains no indication that they specialize in either dog bite cases generally or in litigation arising from attacks by pit bulls specifically. Consequently, the logo and phone number do not convey objectively relevant information about the attorneys' practice."

The court's constitutional analysis concludes that "an advertising device that connotes combativeness and viciousness without providing accurate and objectively verifiable factual information falls outside the protections of the First Amendment."

Notably missing from *Pape* is any discussion of the four-part *Central Hudson* test that the Supreme Court applies in evaluating whether government restrictions on commercial speech are permissible under the First Amendment. *See Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). That test requires that (i) the subject matter of the regulated speech not be false, misleading, or illegal; (ii) the regulation supports a real and substantial governmental interest in support of its regulation; (iii) there be proof that the regulation directly and materially advances the asserted government interest, and (iv) the regulation be narrowly drawn.

Perhaps it could be argued that *Pape* in effect holds that the 1-800-PIT-BULL ads fail to satisfy the first, threshold requirement, in that the court found the ad to be misleading or illegal. That argument seems dubious, given the court's holding that the ads violated the bar rules precisely because the pit bull depiction was "non-factual."

Further, although pit bull *ownership* has been regulated and even banned in a few localities (a point the *Pape* opinion makes at length), the advertisements at issue were promoting lawyers, not actual pit bulls. The notion that the ads could be banned because they suggest that the lawyers may actually maul opposing counsel or otherwise behave illegally seems preposterous on its face.

In addition to ignoring the *Central Hudson* test, the Florida court also ignored the point that the government bears the burden of presenting concrete evidence suffi-

(Continued on page 15)

Pit Bulls and Piranhas and Sharks, Oh My!

(Continued from page 14)

cient to establish each element of the constitutional test. Among the cases making this point is *Florida Bar v. Went for It, Inc.*, 515 U.S. 618 (1995) – which, remarkably, the *Pape* court does not cite.

In *Went for It*, the Supreme Court upheld a 30-day restriction on lawyer solicitation of accident victims, but it did so only after noting that the bar association had presented both statistical and anecdotal evidence that lawyer solicitation in the immediate wake of an accident was perceived "as an intrusion on privacy that reflects poorly on the profession."

The Florida Supreme Court in *Pape* imposed virtually no evidentiary burden on the bar association. The court cites no survey or other evidence indicating that the public perceived the attorney ads negatively, much less in the same literally fashion that the court did.

The court cites evidence of pit bulls' reputation for vicious behavior, and legislative findings of a Miami ordinance banning pit bull ownership. How these prove that banning depictions of pit bulls in lawyer ads is necessary to further the asserted government interest in maintaining public trust in the justice system, however, is not stated in the opinion.

As a result of the Supreme Court decision, Pape and Chandler received a public reprimand, and will be required to attend at a Florida Bar "Advertising Workshop."

Barry Richard and M. Hope Keating of Greenberg Traurig, P.A., Tallahassee, represented the Florida Bar. Attorneys Pape and Chandler represented themselves.

Eric M. Stahl is a partner with Davis Wright Tremaine LLP in Seattle. He disapproves of pit bull lawyering, but would consider making Rosie, his six-month-old labradoodle, available as a mascot to any law firm wishing to promote itself as playful, family-oriented, or non-shedding. (Offer not valid in Florida).

$225,000 Damage Award to Private Figure Veterinarian in Libel Suit Against Boston Herald

Following a two-week trial and a day and a half of deliberations, a Massachusetts jury this month awarded $225,000 in damages to a Cape Cod veterinarian in a libel suit against the Boston Herald. *Reilly v. Boston Herald,* Case No. 01-P-1619 (Mass. Super. Ct. jury verdict Nov. 4, 2005). The jury also found that the Herald was not liable for seven of the thirteen statements on which they deliberated.

At issue in the case was a 1995 front page article entitled "Bereaved pet owners doggedly seek justice." Among other things, the article quoted the owner stating: "This should never happen to another pup – Zeke is dead because of lazy treatment by a vet who decided to play golf instead of doing his job," said Joe Palermo, 46...." And it reported that "Palermo says [medical] records were doctored to imply that Reilly made a more complete diagnosis on the first day of Zeke's illness."

Reilly sued the Herald and the Associated Press, which disseminated a condensed version of the article. He also brought separate actions against several local newspapers that also covered the dog owners' allegations.

The trial court dismissed Reilly's claims against the Herald and AP in part on grounds of opinion. In 2003 the Massachusetts Appeals Court reinstated certain of the claims against the Herald. *Reilly v. Associated Press*, 797 N.E.2d 1204, 32 Media L. Rep. 2293 (Mass. App. 2003).

The Appeals Court reasoned that, while general statements regarding Reilly's treatment were protected opinion, e..g., allegations of "sloppy" and "lazy" treatment, certain other statements were statements of fact. These included allegations that Reilly played golf instead of treating the dog and altered medical records. The Appeals Court also held that certain factual statements might reflect adversely on the plaintiff's competence and thus those specific statements might be found to be defamatory if false.

(Continued on page 16)

$225,000 Damage Award to Private Figure Veterinarian in Libel Suit Against Boston Herald

(Continued from page 15)

Negligence Standard at Trial

Plaintiff had been deemed a private figure and a negligence standard applied at trial. An issue at trial was whether the newspaper contacted Reilly before publication to get his side of the story.

Reilly testified that the newspaper never contacted him for comment before publication and did not follow up on his call to the *Herald* approximately three weeks before the story was published. Reilly said he asked to be interviewed and spoke to an editor.

However, the editor that Reilly allegedly spoke to did not work on the *Sunday Herald* in which the article ran and for which the reporter wrote: rather, the editor was a night editor for the daily *Herald*. Tom Mashberg, the reporter who wrote the article, was unaware of this alleged discussion between Reilly and the night editor. Mashberg testified that he had called one of Reilly's lawyers, who said Reilly would not comment.

As to the truth of the allegations, Reilly testified that he responded during his golf game to a page from the dog owners.

The Herald was represented at trial by M. Robert Dushman and Elizabeth A. Ritvo of Brown Rudnick Berlack Israels LLP, Boston. Plaintiff was represented by Edward Reilly (his brother) and John Kerr of Lexington, MA.

Default Judgment Against Texas Weekly in Public Official Libel Suit

County Commissioner Awarded $852,000


ELITE NEWS
INSIDE THIS EDITION

A default libel judgment of $852,000 was entered this month against a Texas weekly newspaper after it refused to comply with discovery orders in a libel case brought against it by a Dallas County Commissioner. *Price v. Elite News,* (default judgment entered Nov. 14, Detroit Cty. Ct.)

The defendant, *Elite News*, is a weekly newspaper catering to black religious communities around Dallas, Texas. The paper was sued in April 2004 by Dallas County Commissioner John Wiley Price. The newspaper had opposed Price's bid for reelection, calling him in an editorial a politician "whose incompetence has wrecked the spirit of inclusion for black folks in politics." The editorial writer reportedly got into a physical altercation at Dallas City Hall with plaintiff, and claimed that plaintiff threatened to kill him.

Plaintiff sued over articles that recounted his history of run-ins with the law, including charges and convictions.

As the case proceeded, *Elite News* refused to comply with the court's discovery orders and apparently fired its defense counsel. The newspaper's lawyer, Phillip E. Layer, sought to withdraw from the case. Detroit County Court Judge Mark Greenberg denied the request, entered a default judgment and held a damages hearing.

During that proceeding, the plaintiff presented testimony that the statements damaged his political reputation, but did not specify a damages figure. Defendant's lawyer argued that *Elite News* republished stories that had all already been published elsewhere, and that plaintiff had not sued those publications. After less than a hour of testimony, the judge awarded damages of $852,000.

Elite News said that it would appeal the ruling. Plaintiff said that he would donate the damages award to charity.

Elite News was represented by Phillip E. Layer of Dallas, who has now withdrawn from the case. Price was represented by Edgar Leon Carter of The Carter Law Firm, P.C. in Dallas.

Utah Supreme Court Throws Out Bulk Of Damage Award Against Television Station

Hidden Camera Report Led to False Light and Intrusion Claims

By Steven D. Zansberg & Thomas B. Kelley

The Utah Supreme Court this month reversed the bulk of a $3.2 million judgment that had been entered against Salt Lake City TV station KTVX and its health reporter Mary Sawyers. *Jensen v. Sawyers*, 2005 UT 81 (November 15, 2005).

Background

The case arose from a series of three broadcasts concerning Dr. Michael Jensen, who had been caught on hidden camera prescribing weight loss drugs (Phen-Fen) to Sawyers, without first conducting a complete physical exam, medical history, or weighing her.

KTVX aired its first report of Dr. Jensen's prescribing practices on September 5, 1995, and asked the question, "Are doctors prescribing these pills too freely?" During the hidden camera coverage of Jensen prescribing the drugs to Sawyers in his examination room, Jensen was captured on tape saying that if Phen-Fen did not work for Sawyers, he'd be "willing to work" with her using Dexedrine, a Schedule II controlled substance that Jensen acknowledged was "technically not legal for that reason." (In a subsequent on camera interview prior to the first broadcast, Jensen, confronted with this information, stated that he had done further investigation and had determined that he was no longer able to "work with" her to prescribe Dexedrine for weight loss.)

The day after the September 5, 1995 broadcast, Jensen's employer, Columbia First Med, terminated his employment and the IHC Health Plans removed Dr. Jensen from its insurance panel.

The second broadcast on KTVX, nine months later, reported on a petition filed against Dr. Jensen by the Utah State Department of Professional Licensing ("DOPL"), alleging violations of the Utah Administrative Code. Later that year, Jensen settled with the DOPL, admitting that he had failed to comply with some of the requirements of Utah's Controlled Substance Rules, agreeing to a public reprimand, to meet quarterly with professional licensing board members for one year, and to take courses in prescribing practices and medical ethics.

The third broadcast aired on November 6, 1996. Plaintiff was shown among a group of doctors under the banner headline "Questionable Doctors" as they were featured in a book published by Public Citizen focusing on doctors whose professional licenses had been sanctioned or suspended, but who were still practicing medicine. As part of this report, Sawyers stated, "And what about Dr. Michael Jensen? In July 1995, we caught him on camera promising me illegal drugs for weight loss."

Plaintiff was shown among a group of doctors under the banner headline "Questionable Doctors."

Based upon the three broadcasts, Jensen filed a suit against Sawyers and KTVX, alleging five separate causes of action (defamation, fraud, intentional interference with prospective economic relations, negligent misrepresentation, and negligence). In response to KTVX's motion for summary judgment on grounds that the defamation claims based upon the first and second broadcasts were barred by the one-year statute of limitations (which was granted), Jensen sought leave to file an amended complaint adding claims for invasion of privacy by false light, interference with contract, wiretapping violation (both federal and state), and intrusion upon seclusion.

The trial court dismissed the libel claims based upon the first and second broadcasts as time-barred under the statute of limitations, but allowed Jensen to re-plead those claims as false light invasion of privacy. The district court ruled that the catch-all four-year statute of limitations for unspecified torts applied to the reformulated false light claims.

After a five-week trial, the jury returned a verdict for Dr. Jensen for a total of $2,130,000 on the publishing claims, for all three broadcasts, and a total of $150,000 on the newsgathering claims for intrusion and statutory privacy. The jury also awarded punitive damages of

(Continued on page 18)

Utah Supreme Court Throws Out Bulk Of Damage Award Against Television Station

(Continued from page 17)

$720,600 on the publishing claims, and $120,000 on the newsgathering claims. Subsequently, Jensen was also awarded $75,058 in attorneys fees on the statutory claims and $7,412 in costs, bringing the total judgment to $3.2 million. (The trial court reduced this by $180,000 because of overlapping common law and statutory intrusion claims).

Libel Statute of Limitations Applies

On direct appeal to the Utah Supreme Court, KTVX asked the Court to revisit the trial court's refusal to dismiss the false light invasion of privacy claims premised on the first two broadcasts because they were time-barred by Utah's one-year statute of limitations applicable to libel claims. The trial court judge had dismissed the libel claims premised on the first two broadcasts as time-barred, but permitted Jensen to file an amended complaint that re-pleaded those claims as ones for false light invasion of privacy. The trial court ruled that the applicable statute of limitations was not the one applicable to libel and slander (Utah Code Ann. § 78-12-29(4)), but the general catch-all provision for unspecified torts, which provided a four-year limitations period. Utah Code Ann. § 78-12-25(3).

Pointing to the comment in the Restatement of Torts (RESTATEMENT (SECOND) TORTS § 652E, cmt. e), the Utah Supreme Court held that "the statute of limitations for defamation governs claims based on the same operative facts that would support a defamation action." Accordingly, the false light claims premised on the first two broadcasts (for which the jury awarded $605,000 in compensatory damages and $245,300 in punitive damages) were time-barred.

One False Light Claim Affirmed

The Utah Supreme Court rejected KTVX's argument that the district court committed "plain error" by submitting to the jury Jensen's false light claim on the third broadcast, which focused exclusively (as did the other two) on Jensen's professional conduct as a state-licensed medical doctor. Because this issue was not raised below, it was reviewed, and the judgment was affirmed, under the extremely deferential "plain error" standard.

Nevertheless, the Court commented in dicta that the trial court would have "likely committed error if it had instructed the jury that to recover for false light invasion of privacy, Dr. Jensen must show that the broadcast portrayed private information about him."

KTVX had argued that since the report focused on Dr. Jensen's professional conduct, i.e, state-regulated provision of medical care that pose s a risk to the health and safety of the general public , those broadcasts could form the basis of a claim that purports to protects one's sphere of personal privacy. See, e.g., Cort v. St. Paul Fire & Marine Ins. Co., 311 F.3d 979, 987 (9th Cir. 2002) ("[A] false light claim still requires the invasion of some type of privacy interest.").

Intrusion Claim Survives

The Utah Supreme Court also rejected the challenge raised by KTVX to the jury's verdict on Jensen's "intrusion upon seclusion" claim. KTVX argued that a doctor enjoys no legitimate/reasonable expectation of privacy in his discharge of professional duties to a patient within the confines of a medical examination room. To the contrary, KTVX argued, the only person who enjoys a legitimate expectation of privacy in such a setting is the patient, not the medical professional.

For purposes of appellate review, KTVX argued that while the subjective expectation of privacy component of a plaintiff's claim presents a question of fact, the objective reasonableness of that expectation of privacy (a separate and independent prerequisite to a valid claim) presents a mixed question of law and fact or a pure question of law; in either case, the issue should be reviewed de novo.

Utah's Supreme Court rejected this argument, and adopted the view of the California Supreme Court articulated in Sanders v. American Broadcasting Co., 978 P.2d 67 (Cal. 1999), that the question "whether a person is entitled to solitude of seclusion is a relative and highly fact-dependent matter." Accordingly, and consistent with the treatment of objective reasonableness in negli-

(Continued on page 19)

Utah Supreme Court Throws Out Bulk Of Damage Award Against Television Station

(Continued from page 18)

gence cases as a fact question for the jury, the Court reviewed this issue as one challenging the sufficiency of the evidence.

Under this extremely deferential standard of review, the Court was not prepared to reverse the jury's finding that Jensen enjoyed an expectation of privacy with respect to his dispensing professional services in a patient examination room. Remarkably, the Court stated that it declined "to conclude that it was unreasonable for the jury to determine that the falsely represented presence of Ms. Sawyers in Dr. Jensen's examination room deprived that environment of the privacy status it almost certainly held if Dr. Jensen were to have occupied the room alone."

Equally notable, the Court overlooked its own prior holding, in the Fourth Amendment context, that the question "whether [a person's] . . . expectation of privacy is reasonable . . . is a legal issue" that the Court reviews de novo. See State v. ACC, 44 P.3d 708 (Utah 2002).

No Independent Review of Substantial Truth

The Utah Supreme Court also let stand the defamation/false light claim premised on KTVX's third broadcast, despite KTVX's assertion that the broadcast was substantially true. Here, too, the Court's assessment of the substantial truth argument turned primarily upon its determination of what was the appropriate standard of appellate review. KTVX had argued that substantial truth, the negation of which is a constitutionally-based element of a plaintiff's claim against a media defendant in a case involving matters of public concern (see Philadelphia Newspapers Co. v. Hepps) requires the court to exercise "independent appellate review" of a jury's finding on that issue.

Utah's Supreme Court expressly rejected this position: "Unlike actual malice, obscenity, and other 'constitutional facts,' the act of assessing whether an allegedly defamatory statement is substantially true does not require the finder of fact to apply a constitutional standard to a particular set of facts." Accordingly, the Court determined that it would review whether defendants' statements were substantially true "as a traditional question of fact."

Moreover, the Court referred to "the defense of substantial truth," ignoring that Hepps places the burden of falsity upon the plaintiff in the case of a publication on a matter of public concern against a media defendant. Having determined that substantial truth would be reviewed under the extremely deferential standard applicable to findings of fact, the Court concluded that the defendants had not met Utah's arcane requirement of "marshalling the evidence" in support of the verdict, and therefore upheld the verdict.

Proof of Economic Damages

After chastising the defendants for failing, again, to "marshal the evidence" surrounding the jury's award of $1 million in economic losses stemming from the third broadcast, the Utah Supreme Court ultimately concluded that there was no such evidence to marshal. After carefully surveying all of the trial testimony of the plaintiff, his expert witnesses, and the arguments of his counsel in trial, post-trial motions, and closing arguments, the Court was unable to find a single shred of evidence that demonstrated Dr. Jensen had suffered economic losses as a result of the third broadcast by KTVX.

All of the evidence presented demonstrated that Jensen's earning capacity became severely damaged as a result of the first and second broadcasts, which apparently caused him to lose his hospital privileges and qualification for insurance reimbursement of his fees. In a bit of turnabout, the Court criticized Jensen's appellate argument that denigrated the defendants' apparent failure to "marshal the evidence" in support of the economic damages award; Jensen's attempt to transfer the burden to defendants did not make sense, the Court said, because such burden "cannot be met because there is, in fact, no discrete evidence to support an award of [economic] damages on the third broadcast."

Accordingly, the $1 million of economic damages awarded premised upon that broadcast was vacated.

Punitive Damages Thrown Out

Despite its rejection of "independent appellate review" on the issue of substantial truth, the Utah Supreme Court exercised such review with respect to the jury's finding of actual malice to support the award of

(Continued on page 20)

Utah Supreme Court Throws Out Bulk Of Damage Award Against Television Station

(Continued from page 19)

$450,600 in punitive damages flowing from the third broadcast. The statements at issue in that broadcast were "And what about Dr. Michael Jensen? In July 1995, we caught him on camera promising me illegal drugs for weight loss." The report then showed the video clip of Jensen telling Sawyers that "if Fastin didn't work for you, I'd be willing to work with you, uh, maybe using Dexedrine. It's technically not legal for that reason." Jensen argued that it was false to state that he had "promised" Sawyers illegal drugs, when he only indicated that he might, or "maybe" be willing to prescribe Dexedrine.

Looking to the Black's Law Dictionary for the definition of "promise" as including "the manifestation of an intention to act or refrain from acting in a specified manner that another is justified in understanding that a commitment has been made," the Court found that neither Sawyer nor KTVX had actual malice when they used the word "promise" to describe Jensen's statements.

The Court opined that it did "find the general tenor of the third broadcast troubling," by lumping Jensen together with other "questionable doctors" who had committed misdeeds far more egregious than his. Nevertheless, the Court concluded that "while clearly an aberration from 'fair and balanced' journalism, the content of the third broadcast leaves us unconvinced that it was the product of actual malice. Accordingly, the Court vacated the punitive damages award based upon that broadcast.

Dr. Jensen cross-appealed on several issues that resulted in a reduction by the trial court of the jury's duplicative damages awards, and his request for attorneys' fees and court costs. The Court rejected each of those cross-appeal issues, and found that the district court had properly reduced duplicative awards, and limited the scope of attorneys' fees and costs awarded to Jensen (totaling $82,471).

The Court concluded that "while clearly an aberration from 'fair and balanced' journalism, the content of the third broadcast leaves us unconvinced that it was the product of actual malice.

Conclusion

Although the Justices of the Utah Supreme Court characterized the record in a way that indicated their belief that KTVX had caught Dr. Jensen red-handed in exercising lax and unethical prescribing practices in dispensing weight loss medications, the Court was unwilling to approve the use of hidden camera investigative techniques to expose and report this information.

Thus, the Court ignored its prior precedent holding that whether an individual has an objectively reasonable expectation of privacy in a location or activity is a question of law subject to de novo review, and also that a claim of false light invasion of privacy may be premised upon allegations concerning only the discharge of a person's professional duties owed to the public and subject to state licensing and regulation.

The Court was willing to throw out the punitive damages award on the third broadcast for lack of clear and convincing evidence of actual malice, but refused to apply the same standard under independent appellate review with respect to the question of the substantial truth of the broadcast, notwithstanding Hepps.

KTVX has not yet determined whether it will file a petition for rehearing and/or a petition for certiorari challenging any or all of the portions of the jury verdict left undisturbed by Utah's Supreme Court.

Tom Kelley and Steven Zansberg of Faegre & Benson, Denver, were appellate counsel to KTVX_TV and Mary Sawyers, along with Robert M. Anderson and Jennifer Anderson Whitlock of Van Cott, Bagley, Cornwall & McCarthy in Salt Lake City (who also served as trial counsel to defendants). Dr. Jensen was represented by Wesley F. Sine and Douglas Gardiner, both of Salt Lake City.

Court Denies Motions by Condé Nast, Reader's Digest and Don Foster to Dismiss Claims for Defamation and Intentional Infliction of Emotional Distress Brought by Steven Hatfill

By Alia L. Smith

In early November, Judge Colleen McMahon of the Southern District of New York denied motions by Condé Nast, Reader's Digest and Dr. Donald Foster to dismiss claims for defamation and intentional infliction of emotional distress brought by Steven Hatfill, the American scientist who had been publicly identified by then-Attorney General John Ashcroft as a "person of interest" to the FBI in connection with the investigation into the mailings of anthrax-laced letters in the fall of 2001. *Hatfill v. Foster*, No. 04 Civ. 9577, 2005 U.S. Dist. LEXIS 26794, (S.D.N.Y. Nov. 2, 2005). The Court did grant motions to dismiss an accompanying claim for injurious falsehood.

Hatfill's claims arose out of an article written by Foster, published in *Vanity Fair* by Condé Nast in October 2003, and a revised version of which was later published in *Reader's Digest*. As summarized by the Court, in one or both of the articles, Foster described leads that he, an English Professor at Vassar College and an expert in "literary forensics," provided to the FBI during its investigation of the anthrax mailings. Specifically, the article focused on information that led Foster to believe that Hatfill warranted further investigation.

The article was critical of the FBI's handling of the investigation and questioned how someone with plaintiff's background could have obtained the security clearances necessary to assume significant positions in the government's bioterrorism defense efforts.

Applying Virginia law and the Fourth Circuit's recent decision in another case brought by Hatfill, Judge McMahon rejected arguments that the articles did not convey the defamatory meaning alleged by Hatfill and that they were protected opinion. She likewise held that Hatfill's claim for intentional infliction of emotional distress was not an impermissible end-run around the constitutional obligations imposed on libel plaintiffs and that publication of the articles may be conduct sufficiently "outrageous" to support the claim.

Background

In the fall of 2001, shortly after the September 11 terrorist attacks, the nation was again traumatized when anthrax-laced letters were sent through the U.S mail to several news organizations and members of Congress. At least five people died as a result of the mailings, and the postal service was severely disrupted. The federal government immediately launched an investigation.

The press widely reported that Hatfill, a former government scientist, was one of the individuals the FBI was investigating. Indeed, on August 6, 2002, then-attorney general John Ashcroft held a press conference at which he specifically named Hatfill as a "person of interest." Nevertheless, to date, neither Hatfill nor anyone else has been indicted in connection with the anthrax mailings.

In October 2003, nearly two years after the anthrax mailings, and one year after Ashcroft publicly named Hatfill a "person of interest," Foster wrote an article describing his involvement in the matter. Apart from being an English professor, Foster is a "literary forensic scientist" – that is, he looks at "punctuation, spelling, word usage, regionalisms, slang, grammar, sentence construction, document formatting, topical allusions, ideology, [and] borrowed source material" to try to identify anonymous authors.

These methods usually are employed to identify works of long dead writers, but Foster (and others) have begun applying them to criminal investigations to identify possible perpetrators and to identify other anonymous authors. (Using this technique, Foster identified Joe Klein as the author of the book *Primary Colors* and has assisted law enforcement agencies in other investigations.)

Frustrated with the FBI's handling of the investigation, including its refusal to follow up on linguistic evidence, Foster decided to "speak out" in an article ultimately headlined "The Message in the Anthrax." The article explained Foster's application of literary forensics techniques to the anthrax letters, and described the linguistic traits and habits he found in the letters.

Foster detailed how the literary evidence, together with the timeline of events surrounding the FBI's investigation, led him to conclude that Hatfill warranted further attention from the FBI. A different version of Foster's article was published in *Reader's Digest* in December 2003 under the headline "Tracking the Anthrax Killer."

(Continued on page 22)

Court Denies Motions to Dismiss Claims for Defamation and Intentional Infliction of Emotional Distress Brought by Hatfill

(Continued from page 21)

Plaintiff's Complaints

Hatfill has since brought lawsuits against the federal government and several of its employees alleging defamation and violation of the Privacy Act and against The New York Times Company alleging defamation based on a series of Op-Ed columns critical of the FBI's failure to adequately investigate the anthrax mailings, in which the Bureau's incomplete investigation of Hatfill was cited as evidence of official ineptitude.

The former action is in active discovery, while the latter has been stayed in the trial court pending the outcome of a petition for a writ of certiorari after the Fourth Circuit reversed the district court's dismissal of Hatfill's claims. *See Hatfill v. New York Times,* No. 04-2561, 2005 WL 1774219 (4th Cir. July 28, 2005); *MLRC MediaLawLetter* Aug. 2005 at 5.

In August 2004, Hatfill also filed suit over Foster's article, alleging that both versions of it defamed him by implying he is the anthrax mailer, by asserting that he was unqualified for his high-ranking positions as a government scientist, and by making a number of specific, allegedly false statements contained in one or both of the articles, including that: Hatfill was a "concept man with a detailed vision for building mobile germ labs," he once designed a "homemade spray disseminator," he was "building a mobile germ lab," and he had a "canister of Bacillus thuringiensis" in his refrigerator, among other things.

Hatfill also pled claims for intentional infliction of emotional distress and injurious falsehood. He initially brought suit in the Eastern District of Virginia, which transferred the case to the Southern District of New York. Judge McMahon subsequently ruled that Virginia law applies to Hatfill's claims against all defendants. *Hatfill v. Foster*, 372 F. Supp. 2d 725 (S.D.N.Y. 2005); *Hatfill v. Foster*, 2005 U.S. Dist. LEXIS 26794, No. 04 Civ. 9577 (S.D.N.Y. Nov. 2, 2005).

The Motions to Dismiss

Prior to the transfer to New York, all defendants moved to dismiss the complaint. Applying Virginia law, and relying heavily on the Fourth Circuit's opinion reversing the favorable outcome in the *Times* case, Judge McMahon held that the articles were capable of defamatory meaning, based both on the alleged implication that Hatfill is guilty of the anthrax mailing (and unfit for government security clearance) and on the underlying specific statements he claims to be false. The Court also rejected the argument that the statements at issue were protected opinion. The Court first examined the *Vanity Fair* article.

Defamatory Meaning. The Court summarized the lengthy article, finding that, in it, Foster "chronicle[d] a string of . . . coincidences involving Hatfill and various [earlier] bioterror threats and hoaxes," which led him to conclude in the article that "Steven Hatfill is now looking . . . like a suspect."

The Court then reviewed some of the "clues" Foster identified linking Hatfill with the 2001 mailings, including his former employment at a government agency that has conducted extensive biodefense research; his move to Louisiana around the time that anthrax letters were mailed from Louisiana; the discovery by the FBI of an alleged "anthrax stimulant" during a search of Hatfill's residence; Hatfill's unpublished novel about a bioterror attack on America; and Hatfill's connection to a leading bioterror expert, among others.

The Court also pointed out Foster's reference to Richard Jewell, who was wrongly accused of the 1996 Olympic bombing: "It is my opinion . . . that Hatfill is no Richard Jewell." After completing its synopsis, the Court found that the article could "be read to impute the commission of the anthrax murders to Hatfill" and "to assert that Hatfill is unfit to have the security clearance necessary to work in his chosen profession." The Court held the article capable of defamatory meaning despite Foster's express disclaimer that Hatfill "remain[s] innocent until proven guilty." The Court then went on to address some of the specific defenses raised by defendants.

Defamatory Intent. The Court acknowledged that, under Fourth Circuit law as articulated in *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993), it must "assess whether the words used support the conclusion that the defamatory implication was intended by the publisher." The Court found both that (1) a showing of intention is *not* required, under the Fourth Circuit's decision in the *Times* case, where the plaintiff also challenges the factual assertions underlying the implication, and (2) in any event, the complaint adequately alleged facts tending to show the implication was intended.

(Continued on page 23)

Court Denies Motions to Dismiss Claims for Defamation and Intentional Infliction of Emotional Distress Brought by Hatfill

(Continued from page 22)

In particular, the court found that the article's reference to Richard Jewell "is more than sufficient for me to conclude, as a matter of law, that Foster intended to imply that Hatfill was the anthrax murderer."

Report on Government Proceedings. The Court, relying almost entirely on the Fourth Circuit's decision in the *Times* case, rejected wholesale the notion that the article was protected under the First Amendment as a report on, and criticism of, the FBI's investigation. Rather, the Court concluded, the report focused primarily on Foster's own investigation, and not the FBI's.

The Court found inapplicable the Seventh Circuit's recent decision in *Global Relief Found., Inc. v. New York Times Co.*, 390 F.3d 973 (7th Cir. 2004), which challenged reporting about the government's investigation into whether that plaintiff had ties to terrorism. The Seventh Circuit held that the gist of the articles at issue was that government was investigating links to terrorism, not that plaintiff was in fact guilty of the conduct for which it was being investigated. As such, the articles were "true" and not actionable.

In contrast, Judge McMahon held, the *Vanity Fair* article was a report about *Foster's* investigation ("the article unmistakably implies that Hatfill is guilty of the anthrax murders, as suggested by *Foster's* evidence and *Foster's* investigation"), not the government's, and thus apparently was not entitled to be considered a report on government action. (The court likewise found that the fair report privilege did not apply in this case, because "only an unreasonable reader would conclude that the articles were merely reports about an official investigation.")

Accurate Report of Charges of Wrongdoing. The Court recognized the line of authority establishing that accurate reports of charges of wrongdoing are not actionable, citing, *inter alia*, *Green v. CBS Inc.*, 286 F.3d 281, 285 (5th Cir. 2002) and *Janklow v. Newsweek Inc.*, 759 F.2d 644, 648-40 (8th Cir. 1985). It held, nevertheless, that this principle did not apply here, "since Hatfill has not been charged with any crime" and the articles therefore "cannot be described as accurate reports of *charges of wrongdoing*" (emphasis in original).

Opinion. The Court also rejected the argument that the article was Constitutionally protected as an expression of Foster's opinion that Hatfill warranted further investigation by the FBI, giving little weight to the proposition that Foster's clear signals to the reader that he was offering only opinions, the forums in which the article appeared, and the context in which the statements were made (i.e., amid great public controversy about the FBI's handling of the anthrax investigation) would have led reasonable readers to understand that the article was not offered as a factual charge against Hatfill.

The Court likewise held that the *Reader's Digest* article "retains Foster's central theme – that Hatfill was the author's prime, and indeed sole, suspect in the anthrax case." The Court also found that *Reader's Digest* used a more "lurid" title: "Tracking the Anthrax Killer." As a result, the Court concluded that this article too was capable of defamatory meaning.

Plaintiff's Remaining Claims

Intentional Infliction of Emotional Distress. Finally, again relying almost exclusively on the Fourth Circuit's decision in the *Times* case, the Court refused to dismiss Hatfill's claims for intentional infliction of emotional distress.

It held that (1) Virginia law permits "concurrent claims of defamation and intentional infliction of emotional distress," (2) publication of the articles at issue here may be considered "extreme and outrageous" conduct, and (3) to properly plead "emotional distress" in a federal court, plaintiff must allege nothing more than that his emotional distress was "severe," which he did.

Injurious Falsehood. The Court dismissed Hatfill's claim for injurious falsehood, finding the claim unavailable under Virginia law, and, in any event, duplicative of his defamation claims.

Judge McMahon has scheduled a conference in early December, and the parties anticipate the discovery will get underway shortly thereafter.

Alia Smith is one of the attorneys at Levine Sullivan Koch & Schulz, L.L.P. who are representing The Condé Nast Publications. Defendant Reader's Digest is represented by Laura Handman and Wendy Tannenbaum of Davis Wright Tremaine LLP. Defendant Don Foster is represented by Kevin Goering of Sheppard Mullin Richter & Hampton LLP. Plaintiff is represented by Thomas Connolly and Mark Grannis of Harris Wiltshire & Grannis LLP in Washington.

University Professor Not a Public Figure

Statements Made in Classroom Not Part of Public Debate on Iraq

The Georgia Court of Appeals this month reinstated a university professor's libel action against two local newspapers that published allegations that the professor made anti-American statements in his classroom and refused to allow a student to express a contrary view. *Sewell v. Trib Publications, Inc., et al.,* No. A05A2077, 2005 WL 2901674 (Ga. App. Nov. 4, 2005) (Andrews, Mikell, Phipps, JJ.) (reversing summary judgment on libel claims and affirming dismissal of invasion of privacy and emotional distress claims).

The professor's claims against the media defendants (the newspapers and individual journalists) had been dismissed on summary judgment for lack of evidence of actual malice. The appellate court ruled that it was error to deem plaintiff a public figure. It held that while there is certainly a public controversy about America's military activities in Iraq, the professor's classroom statements about it "in no way thrust him to the forefront of the controversy in any public forum."

While there is certainly a public controversy about America's military activities in Iraq, the professor's classroom statements about it "in no way thrust him to the forefront of the controversy in any public forum."

Background

The plaintiff, Said Sewell, is an assistant professor of political science at the State University of West Georgia. In April 2003, one of his students in an American government class contacted a local reporter to complain about statements Sewell made in class.

The Fayette Daily News published an article headlined "American troops murdered people ... Fayette student at West Georgia walks out of class after political science professor Said Sewell makes anti-American statements."

The article quoted the student saying that Professor Sewell had deviated from his lesson plan by discussing the war in Iraq, had accused American troops of murdering people, and had likened President Bush to a fascist. It also reported the student's claim that when he raised his hand to object, Sewell suggested that he leave the class, which he did, and that he was demanding an apology from the professor.

Another article by the same reporter was published the following week in *Today in Peach City* summarizing the earlier article.

Sewell sued the newspapers and others for libel, false light and intentional infliction of emotional distress. He denied making the statements attributed to him and alleged defendants were negligent in failing to verify the articles.

Public Figure Analysis

Reviewing recent Georgia appellate court decisions, the court concluded that access to the media or actual participation in the controversy is necessary to create public figure status. In *Atlanta Journal-Constitution v. Jewell*, 555 S. E.2d 175 (Ga. App. 2001), for example, "plaintiff allowed himself to be photographed by the press, granted press interviews, and occupied a central, albeit involuntary, role in the controversy."

Here plaintiff made no comments to the media, did not appear on television, "and certainly was not an actor in the events giving rise to the public controversy." And prior to publication of the articles, plaintiff "was in no way a public figure with respect to the controversy either in that community or in the global community."

Actual Malice Required for Privacy Claims

The court affirmed dismissal of plaintiff's related false light and emotional distress claims for lack of evidence of actual malice. The reporter and editor of the articles had no reason to doubt the student's allegations. Moreover the court rejected plaintiff's claim that they were biased against him because he had an Islamic first name and was a convert to Islam.

Plaintiff is represented by K. Reddy, of Reddy & Silvis, L.L.C., Atlanta. Tyron Elliott, Manchester, for Appellee.

Civil Rights and Intrusion Claim Over News Report of Rape Dismissed, But Private Facts Claim Survives Motion to Dismiss

By Michael Berry

A federal court in Oklahoma dismissed at the outset a federal civil rights claim and a state-law intrusion claim against a local television station and its reporter that grew out of a news report containing excerpts from a videotape of the alleged rape of the plaintiff. Without viewing the challenged news report itself, the court found plaintiff's complaint sufficient to proceed only on a claim for publication of private facts. *Anderson v. Blake*, No. CIV-05-0729, 2005 U.S. Dist. LEXIS 25654 (W.D. Okla. Oct. 21, 2005).

In dismissing the civil rights and intrusion claims, Judge Joe Heaton of the U.S. District Court for the Western District of Oklahoma ruled that (1) the television station and reporter had not engaged in "state action" when a police officer permitted them to view and copy a videotape that plaintiff had given to police to support her claim that she had been raped by her estranged husband, and (2) the defendants had not intruded on plaintiff's privacy by viewing and copying the tape, even though the officer may have acted improperly in providing them with access to it.

Although the defendants argued that plaintiff's public disclosure claim was also defective because the broadcast was newsworthy and the plaintiff was not identifiable in any way, Judge Heaton concluded it would be premature to address either issue on a motion to dismiss when the "exact nature of the video depiction and surrounding circumstances [were] not presently before the Court."

Background

Plaintiff's claims arose from a news report that aired on July 3, 2003. The report described plaintiff's allegation that she had been raped by her estranged husband, a local attorney who already had been charged with two other rapes in less than a year. The news report described the police investigation of the charges and the unusual circumstances of plaintiff's allegations – she allegedly was raped weeks earlier, while unconscious, but only recently discovered a videotape that documented the rape.

Plaintiff gave the videotape to Officer Don Blake of the Norman, Oklahoma police department after Officer Blake allegedly assured her that the tape would be kept confidential. Officer Blake subsequently permitted Kimberly Lohman, a news reporter for KOCO-TV, to view the videotape and copy portions of it. Officer Blake then called plaintiff and put Lohman on the phone to speak with her. Plaintiff refused to answer the reporter's questions and did not respond when Lohman said that she had viewed the tape.

The news report broadcast by KOCO included statements by Lohman reporting live from outside the Norman Police Department, a pre-recorded interview with Officer Blake, videotape footage of the attorney being arrested and charged with the two earlier rapes, and brief excerpts from the videotape of the attack on the plaintiff. The attacker was identified by name and his image was shown.

According to plaintiff's complaint, the excerpts of the videotape used in the news report showed "[n]aked portions of Plaintiff's body," but the excerpts actually only showed her leg and foot, and did not show any explicit sexual activity. Moreover, the report never named plaintiff, and she could not be identified in any way from the KOCO news report.

Based on these factual allegations, plaintiff filed suit against Lohman and Ohio/Oklahoma Hearst-Argyle Television, Inc., which owns KOCO-TV, asserting three claims: a federal claim under 42 U.S.C. § 1983 for an alleged violation of her constitutional right of privacy and two state law claims for invasion of privacy, one alleging intrusion and one alleging disclosure of private facts.

The KOCO defendants moved to dismiss each claim and, consistent with federal practice and procedure, attached a CD-ROM containing the news report in question as an exhibit. (The plaintiff also filed suit against Officer Blake and the City of Norman.)

Media Not State Actors

The KOCO defendants argued that plaintiff could not state a § 1983 claim against them because they were not state actors and had not engaged in state action. The court agreed, dismissing plaintiff's civil rights claim.

Plaintiff attempted to demonstrate that the KOCO defendants acted under color of law by pursuing a "joint action" theory. To succeed on this theory, she was required to show that the KOCO defendants were willful participants in a

(Continued on page 26)

Civil Rights and Intrusion Claim Over News Report of Rape Dismissed, But Private Facts Claim Survives Motion to Dismiss

(Continued from page 25)

scheme with police and shared a "common, unconstitutional goal." The court rejected each of the four bases advanced by plaintiff to demonstrate joint action.

First, the court held that plaintiff could not establish state action based on the fact that the police officer permitted Lohman to view the videotape. As the court explained, "[t]he media does not engage in state action merely by its use or receipt of information from state officials."

Second, plaintiff argued that joint action was present because the officer supposedly traded access to the tape for an opportunity to be interviewed on camera. The court held that this alleged "wink and a nod understanding" demonstrated that the officer and television station had independent objectives and did not evidence a conspiracy to violate plaintiff's constitutional rights.

Third, the court ruled that the officer's initiation of the telephone call to plaintiff and the presence of both the officer and reporter on the same phone line could not constitute state action. Finally, the court held that KOCO-TV's filming the alleged attacker's earlier arrest as part of a ride-along with Officer Blake did not support a finding of state action.

The court stated that plaintiff's allegations were "not inconsistent with the normal interplay between newspersons and a public official from whom they seek information and fall far short of suggesting any common goal of violating plaintiff's rights."

No Intrusion On Seclusion

Plaintiff claimed that the KOCO defendants intruded her seclusion by viewing, copying, and broadcasting the videotape plaintiff had provided to police. After holding that the broadcast did not constitute an intrusion, the court ruled that the viewing and copying were not actionable either:

> The fact that it may have been improper for Blake to have permitted access to the tape, based on the police department's internal policy or otherwise, does not make it improper for the media defendants to seek or acquire the information from the police.

Absent any unlawful conduct by the television station or its reporter, plaintiff could not state a claim for intrusion.

Private Facts Claim

Plaintiff claimed that the KOCO defendants invaded her privacy by broadcasting excerpts from the videotape documenting her rape. Although she conceded that her rape was newsworthy, plaintiff argued that the excerpts were not a matter of legitimate public concern and that their broadcast was highly offensive. The KOCO defendants moved to dismiss this claim based on the fact that the report did not identify plaintiff in any way and that the excerpts were substantially related to the rape.

The court denied the motion to dismiss plaintiff's claim. The court recognized that publication of information substantially relevant to a legitimate matter of public concern is constitutionally privileged. Nevertheless, it stated, "there may be some facts about an individual which are sufficiently personal or private as to be outside the constitutional privilege."

"there may be some facts about an individual which are sufficiently personal or private as to be outside the constitutional privilege."

In ruling on the motion to dismiss, the court acknowledged that there was "a nexus or relevant connection between the video clip played and the newsworthy event." The court concluded, however, that it would be premature to reach the newsworthiness or identification issues on a motion to dismiss because the "exact nature of the video depiction and surrounding circumstances [were] not presently before the Court."

The court did not review the news report that formed the basis for plaintiff's claim, even though it was attached as an exhibit to the KOCO defendant's motion, "as the motion before the Court is a motion to dismiss, which tests the sufficiency of the complaint."

On November 4, 2005, the KOCO defendants filed an answer and motion for summary judgment on the remaining privacy claim. As of this writing, plaintiff has not responded to the motion.

Ohio/Oklahoma Hearst-Argyle Television, Inc. and Kimberly Lohman are represented by David A. Schulz and Michael Berry of Levine Sullivan Koch & Schulz, L.L.P.; Robert D. Nelon and Jon Epstein of Hall, Estill, Hardwick, Gable, Golden & Nelon; and Jonathan Donnellan and Kristina Findickyan of Hearst Corporation. The plaintiff is represented by Micheal Salem.

Oregon District Court Reaffirms Breadth of Section 230 Immunity

By Samir C. Jain and Kalea Seitz Clark

In *Barnes v. Yahoo! Inc.*, Civil No. 05-926-AA, 2005 WL 3005602 (D. Or. Nov. 8, 2005), the federal district court for the District of Oregon held that Yahoo! Inc. was immune under 47 U.S.C. § 230 ("Section 230") from liability to a victim of a third party's online campaign of sexual harassment, notwithstanding the plaintiff's claim that Yahoo! had failed to follow through on an alleged promise to remove the offending third-party content. In doing so, the court confirmed the breadth of the immunity that Section 230 affords to providers of interactive computer services.

Background

Plaintiff Cecilia Barnes alleged that her ex-boyfriend used one of Yahoo!'s services – Yahoo! Profiles – to carry out a cruel hoax against her. Profiles are publicly available web pages on which a person typically displays personal information about herself such as name, address, age, hobbies, pictures, or other content.

Barnes alleged that her ex-boyfriend, masquerading as her, created and made available on the Internet a series of "unauthorized profiles" that falsely appeared to have been posted by Barnes herself.

The profiles allegedly contained pornographic photographs of Barnes, as well as information regarding how to contact her at work. Barnes further alleged that the ex-boyfriend went into online chatrooms where he impersonated her and directed men to the unauthorized profiles that he had posted. As a result of the ex-boyfriend's actions, Barnes asserted that various men visited and harassed her at her workplace.

Barnes further claimed that, beginning in January 2005, she attempted to get Yahoo! to remove the unauthorized profiles, but that Yahoo! did not respond to her requests. According to the complaint, at the end of March 2005, when a local new program was allegedly planning to air a report about the ex-boyfriend's harassment of Barnes, a Yahoo! employee allegedly telephoned Barnes regarding the profiles.

The employee asked Barnes to fax her statements regarding the problem to Yahoo!, and allegedly promised to "'walk the statements over to the division responsible for stopping unauthorized profiles' and that 'Yahoo! would put a stop to the unauthorized profiles.'" *Id.*

In her Complaint, Barnes asserted a claim for negligence. Specifically, she alleged that, once the Yahoo! employee "promised" to take down the profiles, "Yahoo! 'assumed an affirmative duty to do so with care,'" and that Yahoo! breached that duty when it "negligently and carelessly failed to remove the unauthorized profiles and prohibit them from being posted again." *Id.* at *2.

The district court rejected Barnes' argument that Yahoo!'s alleged failure to follow through on its purported promise to remove the unauthorized profiles somehow removed her claim from the purview of Section 230.

Yahoo! moved to dismiss on the ground that Section 230(c)(1), which provides that "no provider or user of an interactive computer service shall be treated as a publisher or speaker of any information provided by another information content provider," immunized it from Barnes' claim.

In support of its motion, Yahoo! relied on the long line of federal and state cases that have held that Section 230 generally bars claims that seek to hold the provider of an interactive computer service liable for tortious or unlawful information that someone else disseminates using that service. Barnes argued that Section 230 did not apply to her claim because it did not seek to hold Yahoo! liable as a publisher, but rather based on Yahoo!'s alleged breach of the independent duty that it undertook to remove the unauthorized profiles through its employee's purported promise.

The district court rejected Barnes' argument that Yahoo!'s alleged failure to follow through on its purported promise to remove the unauthorized profiles somehow removed her claim from the purview of Section 230. The court reasoned that Barnes' claim "remain[ed] an effort to hold the service provider liable for failing to perform the duties of a publisher, such as screening or removing third-party content," and was therefore "controlled by Ninth Circuit law holding that § 230 provides service providers, such as [Yahoo!] with 'broad immunity for publishing content provided primarily by third parties.'" *Id.* at *4

(Continued on page 28)

Oregon District Court Reaffirms Breadth of § 230 Immunity

(Continued from page 27)

(quoting *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003)).

The court explained that Barnes' allegations were indistinguishable from those in the seminal decision in *Zeran v. America Online, Inc.*, 129 F.3d 327, 328 (4th Cir. 1997), in which the Fourth Circuit applied Section 230 immunity to negligence claims that were premised in part on America Online's alleged failure to follow through on a supposed promise to remove fraudulent postings. *Barnes*, 2005 WL 3005602, at *3 (citing *Zeran*, 129 F.3d at 327).

The *Barnes* court reasoned that, as in *Zeran*, Barnes' allegation that "she was harmed by third-party content, and that [Yahoo!] allegedly breached a common law or statutory duty to block, screen, remove, or otherwise edit that content" sought to "treat[ed] the service provider as 'publisher' of the content and [was] barred by § 230." *Id.* at *4.

The decision in *Barnes* thus reaffirms that Section 230 immunity does not depend on the cosmetics of how a claim is labeled or packaged, but on the fundamental question whether the claim, as a practical matter, seeks to hold a service provider liable for harm resulting from the dissemination or availability of content that someone else originated.

Samir Jain is a partner, and Kalea Seitz Clark is an associate, at Wilmer, Cutler, Pickering, Hale and Dorr LLP in Washington, D.C. They represented Yahoo! in this case. Plaintiff was represented by Thomas R. Rask, of Kell, Alterman & Runstein, Portland, Oregon.

Federal Court Allows Libel Plaintiff to Serve Australian Defendants By E-mail

A West Virginia federal district court granted a libel plaintiff's motion to serve a foreign defendant by e-mail after he had evaded service by regular means. *Williams v. Advertising Sex LLC, et al.*, No. CIV.A. 1:05CV51, 2005 WL 2837574 (N. D. W. Va. Oct. 26, 2005) (Keeley, J.).

The plaintiff, a former Miss West Virginia, sued over 50 individuals and companies for defamation for falsely identifying her as a participant in a graphic Internet video they distributed and using her image in web advertisements that included sexually explicit images from the video.

Among the defendants are an Australian man and two connected companies. Numerous attempts to serve process in person and by registered had failed. Plaintiff thereafter brought a motion to serve via e-mail pursuant to FRCP 4 (f) (3). That subsection allows courts to authorize alternative service on individuals in foreign countries "by other means not prohibited by international agreement as may be directed by the court."

Granting the motion, the court found that service by e-mail was appropriate, particularly where defendants are "sophisticated participants in e-commerce" with well-established and maintained websites used to conduct business. The court noted with approval that plaintiff would serve process by e-mail utilizing a website service called "Proof of Service – electronic" (www.proofofservice.com) which offers encrypted on-line delivery of documents and returns a digitally signed proof of delivery once the document has been received by the target e-mail, thus enhancing the reliability of electronic service.

Federal Court Dismisses Internet Defamation Action Brought By Vincent "Bo" Jackson

By Natalie Spears and Mindi Richter

On October 27, 2005, an Illinois federal court ruled that it lacked personal jurisdiction over defamation and related claims brought by former professional athlete Vincent "Bo" Jackson against a California newspaper and other non-Illinois defendants. *Jackson v. The California Newspapers Partnership, et. al.*, No. 05 C 3459, 2005 WL 2850116 (N.D. Ill. Oct. 27, 2005) (Moran, J.).

Jackson argued for jurisdiction in Illinois based solely on the publication of the allegedly defamatory article on the California newspaper's website, *www.dailybulletin.com*. However, in the end, the defendants arguments against jurisdiction carried the day.

Background

On March 24, 2005, the *Inland Valley Daily Bulletin*, a newspaper in Ontario, California, with a circulation of approximately 65,000, published an article in its print edition and on its website, *www.dailybulletin.com*, about a youth sports forum in Riverside, California on the dangers of steroid use. The story contained a quote from the forum speaker, Ellen Coleman, who stated "Bo Jackson lost his hip because of anabolic abuse."

Jackson is a former professional athlete who played baseball for the Chicago White Sox and football for the Oakland Raiders, but retired from sports following a career-ending hip injury.

Jackson now lives in Illinois and allegedly discovered the *Inland Valley Daily Bulletin* news article on the paper's Internet website, *www.dailybulletin.com*. Jackson denies ever using steroids and promptly filed suit in the Circuit Court of Cook County, Illinois against The California Newspapers Partnership, which owns the *Inland Valley Daily Bulletin*, as well as the newspaper's editor, publisher, the author of the article, and two related Colorado companies, MediaNews Group, Inc. and MediaNews Group Interactive, Inc.

The defendants removed the case to the Northern District of Illinois based on federal diversity, and then filed a motion to dismiss for lack of personal jurisdiction and improper venue, or in the alternative, to transfer to California.

District Court Decision

Jackson argued that the Illinois court had both "general" and "specific" personal jurisdiction over defendants solely because the allegedly defamatory article was published on the California newspaper's website, which is accessible to residents of Illinois every day. The district court quickly dismissed Jackson's arguments for general jurisdiction, finding that none of the defendants were domiciled in Illinois or had continuous and systematic contacts with Illinois, and that the mere maintenance of a website alone, even an interactive one, is insufficient to exercise "general" jurisdiction.

The court also declined to exercise "specific" jurisdiction over the defendants based on the website publication alone. In conducting the specific jurisdiction analysis, the court recognized that two tests control in an Internet jurisdiction defamation case: the defamation "effects" test set forth in *Calder v. Jones*, 465 U.S. 783 (1984), underscored by the sliding scale Internet interactivity analysis from *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D. Pa. 1997).

The court further noted that while the Seventh Circuit has not yet ruled on an Internet jurisdiction case in the defamation context, the "defendants rightly suggest that the internet provides a different context for analyzing personal jurisdiction" by pointing to the Seventh Circuit's recent holding in *Jennings v. Hydraulic*, 383 F.3d 546 (7th Cir. 2004), a product liability case involving Internet jurisdiction claims.

In *Jennings*, the Seventh Circuit found that maintenance of a passive website alone is not sufficient to confer personal jurisdiction on a defendant, but the court did not address what level of website interactivity is required. Accordingly, in the absence of Seventh Circuit authority directly on point, the district court focused on the tests in *Calder* and *Zippo*.

Under the *Calder* "effects test," jurisdiction exists when a publication is expressly aimed at the forum state and intentionally directed at a forum resident, and thus calculated to cause injury in that state. The defendants argued that the facts in the case at bar were distinguish-

(Continued on page 30)

Federal Court Dismisses Internet Defamation Action Brought By Vincent "Bo" Jackson

(Continued from page 29)

able from those in *Calder* because the *Inland Valley Daily Bulletin*'s reporters did not contact any sources in Illinois, the news article was not focused on Illinois residents or events, and the defendants did not know that Plaintiff Jackson now lived in Illinois.

In addition, only one of the *Inland Valley Daily Bulletin*'s 65,000 print subscribers resided in Illinois and none of the paper's Internet news subscribers resided in Illinois. Defendants also argued that since Jackson pled national injuries to his reputation, his injury was not necessarily felt most greatly in his state of residence, as would normally be presumed. The district court fully agreed with the defendants, adopting all of their reasons for distinguishing *Calder* and declining jurisdiction in its written opinion.

In analyzing the *Zippo* sliding scale Internet test, the district court explained that a finding of injury in the forum state, with nothing more, is inadequate to confer jurisdiction, and in the Internet context, the necessary addition is website "interactivity."

The district court explained that a finding of injury in the forum state, with nothing more, is inadequate to confer jurisdiction.

Jackson argued that the *Inland Valley Daily Bulletin*'s website was highly interactive and subjected defendants to jurisdiction in Illinois because users anywhere can subscribe to and pay for the newspaper's print edition online through the website, can submit classified advertising online, and can search the paper's website for jobs, cars for sale and real estate listings.

However, the defendants submitted evidence showing that although the newspaper's website had some interactivity, the website was directed to California residents – not Illinois residents – and any interactivity was with California residents. The district court agreed with the defendants, finding that the newspaper's website was directed to residents of California and "thus, the defendants did not foresee, much less did they target, the transmission of the allegedly defamatory story into Illinois."

The court also found that the website's use of hyperlinks to other websites, which house national information and target national users, was likewise insufficient to confer specific personal jurisdiction. Finally, the court examined Illinois' interest in adjudicating the suit and found that, although Illinois has an interest in providing a forum for redressing alleged injuries to Illinois residents inflicted by out-of-state actors, the interest was not very high in this case because the defendants did not target Illinois residents, and Jackson pled injury to his national reputation, not his local Illinois reputation.

James Klenk, Natalie Spears and Mindi Richter of Sonnenschein Nath & Rosenthal LLP and James Manning of Reid & Hellyer represented and California Newspapers Partnership and all other defendants in this matter. Daniel Biederman, Daniel Galivan, and Julie Fournier of Grotefeld & Denenberg, LLC represented the plaintiff.

Internet Reports Support Finding That Plaintiff Is a Public Figure

By Jennifer Mansfield

Blogs and other Internet publications about a Jacksonville, Florida woman's alleged effort to move her brain-damaged husband to hospice care and remove his feeding tube rendered her a public figure in her defamation claim against a Florida broadcaster, according to a state trial court. *Thomas v. Patton, et al.*, Case no. 16-2005-CA-003777, 2005 WL 3048033 (Fla. 4th Cir. Ct. Oct. 21, 2005) (Cole, J.)

The judge in the case last month granted summary judgment to the Jacksonville broadcaster, Gannett's "First Coast News," finding, among other reasons, that the woman failed to prove actual malice.

Background

The defamation and privacy litigation arose on the heels of the Terri Schiavo controversy. First Coast News was sued for defamation, invasion of privacy, and conspiracy to defame, after airing two news reports May 16 and 17, 2005, and posting summaries on the stations' website. Those reports centered on a guardianship dispute over one Darrel Scott Thomas.

First Coast News emphasized that, prior to the reports at issue, multiple weblogs and internet articles discussed and debated the guardianship contest.

In 2004, Scott Thomas suffered an injury which caused severe brain damage. His wife – who became the plaintiff in the lawsuit against First Coast News – told police he fell from an unknown cause, striking his head on the floor.

In November 2004, Scott Thomas' mother, Pamela Patton, filed an emergency Petition for Guardianship over Scott Thomas and an ex parte Motion for Temporary Guardian, which the judge granted the same day.

Eliza Thomas opposed her mother-in-law's petition, and during the guardianship battle, her mother-in-law presented evidence that that the State Attorney's office had been conducting a review of Scott Thomas' injury and any possible involvement by Eliza Thomas. Eliza Thomas denied any involvement.

On May 16, 2005, First Coast News received a press release from the Terri Schindler-Schiavo Foundation, a non-profit that was founded in 2002 and whose current purpose is to educate the general public regarding current guardianship laws and state laws on death by dehydration and starvation.

The press release noted the contest over the guardianship and stated that Eliza Thomas' "intention is to move her husband [Scott Thomas] to the Community Hospice of Northeast Florida and seek the authority to direct the removal of his gastric feeding tube, causing his death by dehydration and starvation."

Upon receipt of the press release, a First Coast News reporter contacted Thomas and asked her for an interview. When asked if it were true that Thomas planned to put Scott Thomas in Hospice and remove his feeding tube, Eliza Thomas did not deny the allegation and terminated the interview. Other attempts to contact Thomas were met with no response.

First Coast News in its broadcasts reported that the guardianship was being contested, the state attorney's office was investigating Eliza Thomas, and that the mother-in-law said Thomas wanted to move her husband to hospice and remove the feeding tube. Claiming each of these items was false, Eliza Thomas sued First Coast News, her mother-in-law, and Robert Schindler, Sr., a founder of the Terry Shindler-Schiavo Foundation.

Motion For Summary Judgment

After limited discovery, First Coast News moved for summary judgment on multiple bases. First, it argued that Thomas was a public figure and could not prove actual malice. The broadcaster also argued that, even if the reports were false, their contents were not capable of defamatory meaning because they did nothing more than report on something that Eliza Thomas has a legal right to do. First Coast News also argued that the news reports were fair and accurate summaries of official proceedings and/or disinterested accounts of newsworthy information about matters of public concern.

In its motion, First Coast News emphasized that, prior to the reports at issue, multiple weblogs and internet articles discussed and debated the Jacksonville guardianship contest, comparing it to the Schiavo controversy. In support of its motion, First Coast News attached copies of eleven different

(Continued on page 32)

Internet Reports Support That Plaintiff Is a Public Figure

(Continued from page 31)

websites reporting on the Thomas controversy before the station's broadcasts, and seventeen other websites that posted discussions on the same day as the First Coast News reports.

Trial Court's Order

In its order granting summary judgment to First Coast News, Circuit Court Judge Karen Cole agreed with the broadcaster that it accurately reported a court contest was underway for Scott Thomas' person and property. The court also noted that, in opposing summary judgment, Elisa Thomas admitted to having discussed with healthcare providers the possibility of transferring her husband to hospice, and that the discussion included the possibility that his feeding tube would be removed. The court also noted that the affidavit First Coast News filed to demonstrate no actual malice was uncontradicted.

Based on this evidence, the court held that for the purposes of First Amendment analysis Eliza Thomas is a limited purpose figure and she had failed to demonstrate a disputed issue of actual malice. The court held that by petitioning to be appointed guardian of her husband, Eliza Thomas "took purposeful, considerate actions intended to affect the outcome of the guardianship case."

Because of her purposeful actions, "she could have, and should have, realistically expected that her actions would have an impact on the resolution of the action."

Moreover, the court held, Eliza Thomas had ample opportunity to rebut the allegedly defamatory statements, relying on the internet publications about the guardianship litigation.

> Plaintiff also had access to the media in order to rebut the allegedly defamatory statements. Several articles had appeared in electronic media about the Thomas-Patton guardianship litigation. First Coast News contacted Eliza Thomas before the first broadcast and offered her an opportunity to rebut. Although, on advice of counsel, Ms. Thomas declined to commit, this access to media is a hallmark of a public figure.

Thomas at *2.

Citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1985), the court also held that, as a public figure, Thomas had failed as a matter of law to meet her burden to prove actual malice by clear and convincing evidence. Casting doubt on the credibility of a journalist's sources, as Thomas had attempted to do in opposing summary judgment, is insufficient to sustain her burden, the court held.

The court additionally held that under the state's common law fair reports privilege, the press has no duty to go behind statements made at official proceedings and determine their accuracy.

> As a matter of law, Plaintiff has no valid claim here because the undisputed facts show that First Coast News' reports were substantially true, fair and accurate reports of the judicial proceedings of the Clay County Probate (Guardianship) Court. The reports of First Coast News thus fall within the Fair Reporting Privilege.

Id. at *3.

The Court also held that the reports were protected by the neutral reporting privilege, "because the reports are disinterested accounts of news worthy information about matters of public concern."

Finally, the court held that – because Eliza Thomas had the lawful right to control where her husband would receive care at the time the controversy arose – the content was not capable of defamatory meaning.

> As a matter of law, a report that a person will or has taken an action which that person has a legal right to take is not capable of defamatory meaning. Thus, as a matter of law, a report indicating that [Eliza Thomas] intended to admit her husband to a hospice facility and to seek to have his feeding tube removed is not defamatory because the law permits here to do that.

Id.

After awarding summary judgment on Eliza Thomas' defamation count in favor of First Coast News, the court then relied on Florida's single publication/single action rule and granted summary judgment against Thomas on her invasion of privacy and conspiracy counts as well.

Eliza Thomas is appealing the decision to Florida's First District Court of Appeal.

George D. Gabel, Jr. and Jennifer A. Mansfield of Holland & Knight LLP's Jacksonville, Florida office, and Charles D. Tobin of the firm's Washington, D.C. office, represent First Coast News. Thomas C. Powell and Roy Derzen represented Eliza Thomas, the plaintiff.

Libel Claim Against KISS Star Survives Motion to Dismiss

VH1 Profile Implied Plaintiff Was "Unchaste"

In an interesting decision, a New York state trial court this month refused to dismiss a libel claim by an ex-girlfriend of rock star Gene Simmons and Viacom over a VH1 profile of the KISS frontman. *Ward v. Klein,* No. 100231-05, 2005 WL 2997758 (N.Y.Sup. Nov. 9, 2005) (Richter, J.).

The court held that photographs of plaintiff, together with commentary describing Simmons' legendary promiscuity, could create the defamatory implication that "plaintiff was available to satisfy Simmons's desire for a casual sexual encounter at his whim."

"When KISS Ruled the World"

In 2004, Simmons and KISS were profiled in a VH1 "rockumentary" entitled "When KISS Ruled the World." In a segment entitled "24 Hour Whore" Simmons discussed his casual sexual encounters with women, such as a hotel maid who came to clean the room and a nurse in his doctor's office. Plaintiff's photograph was briefly shown at or about the same time as Simmons's remarks and again when the narrator stated: "These guys were wild." The narrator also stated in the program: "Everywhere [Simmons] went he found a woman and it didn't matter who they were, what size, shape or anything, he'd find a woman and disappear with her."

The plaintiff, Geogeann Walsh Ward, was indeed a former girlfriend of Simmons. But she alleged that she was in an "exclusive, monogamous romantic relationship"with him at the relevant time. Defendants urged the court to find dismiss the libel claim on grounds of truth because plaintiff admitted having a relationship with Simmons.

The court declined to do so for two reasons. First, it noted that falsity is not part of the plaintiff's prima facie case but is instead a defense, so raising it at this stage is premature. Secondly, the plaintiff only admitted a three year "romantic" relationship which does not necessarily mean they ever had sex.

The court also rejected defendants' argument that Simmons was only describing his own behavior, stating "the fact that Simmons is recounting his own behavior does not defeat the inference that plaintiff participated in that behavior."

The court also noted that while "consensual sexual relations between unmarried persons are certainly viewed differently than they once were, defendants do not cite to any legal authority or social science data to support their argument that allegations of unchastity, when combined with claims of promiscuity and casual sexual encounters such as those here, can no longer support a finding of defamation per se."

Right of Publicity Claim Dismissed

Plaintiff's right of publicity claims over the use of her photographs, though, were dismissed because the use of the pictures was not "for advertising purposes." The program was not used to promote KISS's music and any use of it in advertising on VH1 was incidental.

Court Grants Anti-SLAPP Motion to Strike Defamation Claim Over "Amityville Horror" Movie

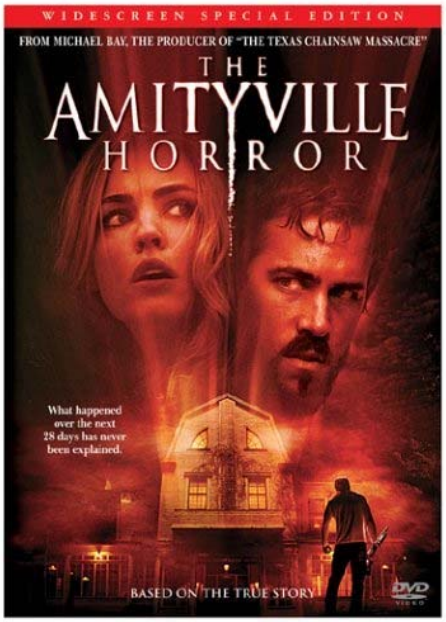
By Daniel Mayeda

On October 26, 2005, the Los Angeles County Superior Court granted a Special Motion to Strike the plaintiff's defamation claim pursuant to California's anti-SLAPP statute. *Lutz v. Dimension Films, et al.*, case number BC 334845 (filed June 10, 2005) (Treu, J.).

The lawsuit was filed by plaintiff George Lutz after the 2005 release of the motion picture "The Amityville Horror" which Lutz alleged falsely depicted him as a "homicidal maniac," engaged in such acts as killing his dog with an axe, choking his wife and shooting at his wife and children. The motion picture in question was released with a disclaimer that it was "based on a true story."

Background

In 1975, George Lutz and his family fled their home in Amityville, New York, claiming it was possessed by supernatural forces that terrorized them. Lutz participated in the publication of a best-selling book entitled *The Amityville Horror* that retold this purportedly true story.



In 1979, a blockbuster motion picture was released based on a 1977 Literary Purchase Agreement ("LPA") granting motion picture rights in the book. In connection therewith, Lutz signed a Release in which he waived any right to claim that the Picture (defined as a motion picture based on the book) defamed him.

Although decades have passed since the original events giving rise to the notoriety, the Amityville haunted house has continued to fascinate the public. Books and documentary films have been released exploring whether the story was true or a hoax, and Lutz himself has continuously sought to capitalize on the story through speeches, writings and websites.

In 2003, Metro-Goldwyn-Mayer Studios Inc. ("MGM Studios"), through various subsidiaries and affiliates, began developing a remake ("the Remake") based on rights it had acquired from Orion Pictures Corporation, successor-in-interest to the signatories of the 1977 LPA.

When Lutz questioned MGM Studios' right to produce the Remake, MGM Studios sued Lutz in Nevada District Court for declaratory relief, *Metro-Goldywn-Mayer Studios Inc. v. Lutz*, case number CV-S-04-0875 RLH (RJJ). The District Court granted MGM Studios partial summary judgment, holding that it had the right under the LPA to produce a Remake motion picture based on the book even if the Remake departed somewhat from the specific events described in the book.

After the Remake was released this year, Lutz brought suit in Los Angeles County Superior Court for defamation against Metro-Goldwyn-Mayer Inc. ("MGM") and related entities (but not MGM Studios), and breach of contract against Dimension Films with which Lutz allegedly had some sort of contractual agreement to release "Amityville" motion pictures.

In his defamation claim, Lutz alleged that the Remake depicted him committing various criminal acts that did not actually take place. The complaint notes that the Remake states that it is "based on a true story" thereby allegedly giving the impression that what Lutz is depicted as doing in the film really happened.

The Anti-SLAPP Motion

The defendants filed a Special Motion to Strike under California's Anti-SLAPP Statute, Code of Civil Procedure Section 425.16. The Statute enables a defendant to curtail at the outset of litigation, a meritless lawsuit brought "to chill the valid exercise of . . . freedom of speech." C.C.P. § 425.16(a). The statute requires a two-step analysis. First, a defendant must make a prima facie showing that the claim arises from an act "in furtherance of the [defendant's] right of petition or free speech under the United States or California Constitution in connection with a public issue." C.C.P § 425.16(b)(1), (e)(4). *See*

(Continued on page 35)

Court Grants Anti-SLAPP Motion to Strike Defamation Claim Over "Amityville Horror" Movie

(Continued from page 34)

Rivero v. American Federation of State, County & Municipal Employees, 105 Cal.App.4th 913, 918-19 (2003). Second, if that showing is made, the burden then shifts to the plaintiff to "demonstrate a probability that he or she will prevail on the claim." C.C.P. § 425.16(b)(1); *Rivero*, 105 Cal.App.4th at 919.

Defendants first argued that Lutz's suit arose directly out of defendants' exercise of free speech rights via the Remake motion picture. The First Amendment and the California Constitution protect motion pictures even if they are dramatic or works of fiction. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (motion pictures, no less than other media, are a "form of expression whose liberty is safeguarded by the First Amendment"); *Polydoros v. Twentieth Century Fox Film Corp*., 67 Cal. App.4th 318, 323-24 (1997) ("film is a 'significant medium for the communication of ideas' and . . . is protected by Constitutional guarantees of free expression.") (citation omitted).

Defendants further argued that the content of the Remake reflects a public issue or an issue of public interest. For support, defendants pointed to prior litigation in which courts expressly found that the Amityville story was a matter of public interest. *See, e.g., Bauman v. Anson*, 6 Media L. Rep. 1487, 1491 (N.Y.Sup.Ct. 1980) ("It is clear that the psychic phenomena purportedly manifested at the 'Amityville Horror house' became a matter of public interest in 1976."); *Lutz v. Hoffman*, 4 Media L Rep. 2294, 2296 (E.D.N.Y. 1979) (news and magazine articles about the events that took place at the Amityville house were "a matter of legitimate public interest"); *Cammaroto v. Anson*, 70 A.D.2d 649, 650 (N.Y.App. 1979) (the subject matter of the book was "one of public interest").

Defendants also cited California authority that "a matter in the public interest is not restricted to current events but may extend to the reproduction of past events." *Montana v. San Jose Mercury News*, 34 Cal.App.4th 790, 793 (1995). Defendants further noted the more recent documentaries about the Amityville story, current public interest as reflected in the number of "hits" on Amityville websites and the fact that Lutz is "a person in the public eye" who has continued to speak publicly about the Amityville story. *Commonwealth Energy Corp. v. Investor Data Exchange, Inc*., 110 Cal.App.4th 26, 33 (2003); *Seelig v. Infinity Broadcasting Corp*., 97 Cal.App.4th 798, 808 (2002).

Once defendants meet their burden of establishing that Lutz's libel cause of action arose out of defendants' free speech activities in connection with a public issue, the burden shifts to the plaintiff to show a probability of success on the merits of their defamation claim. California courts have held that to discharge this burden, a plaintiff must proffer "competent and admissible evidence" sufficient to establish that it is likely to prevail on the merits of the claim. *See Macias v. Hartwell*, 55 Cal. App.4th 669, 675 (1997). Where the defendant raises a defense to the plaintiff's claim, the plaintiff has the statutory burden to present "facts which, if accepted, would negate" the defense. *Wilcox v. Superior Court,* 27 Cal. App.4th 809, 824 (1994).

In their Motion to Strike, defendants raised as a defense to Lutz's libel claim that in 1977 Lutz had signed a Release of any defamation claim related to a motion picture based on the original Amityville Horror book and that the original 1977 LPA between Lutz and the book's author and defendants' predecessors-in-interest granted the unlimited right to change the portrayal of the book's characters and prohibited Lutz and the author from suing the producers for defamation based on motion pictures produced hereunder.

Defendants introduced evidence that in federal court in Nevada, Lutz had taken the position that an agreement to which the Release was attached required MGM Studios to provide a brief screen credit to Lutz in the Remake; since both the screen credit agreement and the Release applied to a "Picture" (a motion picture based on the *Amityville Horror* book), defendants argued that Lutz was now estopped from contending that the Release applied only to the 1979 motion picture and not to the 2005 Remake.

Defendants also introduced District Court Orders holding that MGM Studios had the right to alter the Lutz character in making the Remake and that Lutz had covenanted not to sue the producers for any such changes.

(Continued on page 36)

Court Grants Anti-SLAPP Motion to Strike Defamation Claim Over "Amityville Horror" Movie

(Continued from page 35)

Lutz's Opposition first contended that defendants cannot meet their first prong burden regarding the exercise of their First Amendment rights because defamatory speech is not Constitutionally protected. Second, Lutz contended that he was likely to prevail on the merits of his libel claim because the 1977 Release applied only to the original 1979 motion picture and not to the 2005 Remake; that the defendants in suit have not shown that they are the successors-in-interest to the Release; and that the provision in the LPA in which Lutz and the book's author agreed not to sue the motion picture producers for altering the book's characters encompassed only a waiver of the book's author's moral rights ("droit moral") and not a waiver of Lutz's personal right to his reputation.

Defendants' Reply reinforced the evidence presented in the Motion that Lutz, in the pending Nevada District Court litigation, had expressly conceded that MGM Studios is the successor-in-interest of rights to the LPA and related documents, including the Release, and that the Release's reference to a "Picture," on its face and in context, encompasses not only the original 1977 film but also any subsequent motion pictures based on the *Amityville Horror* book. Defendants had presented numerous pleadings and court orders from the Nevada litigation and requested the Superior Court to take judicial notice of them.

Superior Court Decision

The court found that Defendants met their initial burden of establishing that the Anti-SLAPP Statute applied because the acts of writing, producing and distributing the Remake are protected free speech activities and the subject matter of the film was of widespread public interest. The court further held that it was not defendants' burden to show that their actions were Constitutionally protected but only that the challenged claim arose out of defendants' free speech activities about a matter in the public interest.

Since defendants met their burden, the court turned to whether Lutz met his burden of establishing a probability of prevailing on the merits of his defamation claim. In its Tentative Ruling, the court seemed to be in agreement with defendants that the 1977 Release and LPA established defenses to Lutz's libel suit in connection with the Remake but the court tentatively found that defendants had not shown that they were successors or assigns of the Release.

After defendants argued that the Court should take judicial notice of Lutz's admissions and Court orders in the Nevada lawsuit that defendants were assignees of MGM Studios which was a successor-in-interest to the 1977 documents, the court agreed to take the motion under submission.

On October 12, 2005, the court issued a Minute Order revising its tentative ruling and deciding to grant the Anti-SLAPP Motion. The court ordered the defendants to prepare a formal order which was eventually entered on October 26, 2005. As a result, Lutz's first cause of action for libel against all defendants was dismissed, leaving Lutz to pursue his second cause of action for breach of contract against Dimension only

Louis P. Petrich and Daniel M. Mayeda of Leopold, Petrich & Smith, a professional corporation, were counsel for MGM Studios in the Nevada litigation and counsel for MGM and the producers, distributors and screenwriters of THE AMITYVILLE HORROR Remake in the Los Angeles action. Mark B. Helm and Marc A. Becker of Munger, Tolles and Olsen LLP were co-counsel for MGM, and Steven A. Marenberg and Stephen S. Hasegawa of Irell & Manella LLP were counsel for Dimension Films in the Los Angeles action. Plaintiff Lutz was represented by Richard J. Idell of Idell Seitel & Rutchik LLP and Larry Zerner.

SAVE THE DATE

NAA/NAB/MLRC Media Law Conference
Arlington, Virginia

September 27-29, 2006

Florida Newspaper Wins Summary Judgment in Libel Action Brought by ESPN Founder

By Mark I. Bailen

The *Naples Daily News* ("*Daily News*") was granted early summary judgment in a libel action brought by the founder of the ESPN cable network over statements that it published in 26 articles and editorials over a two-year period. *Rasmussen v. Collier County Publishing Co.*, No. 04-1962-CA (Fla. Cir. Ct. Nov. 21, 2005) (Schoonover, J.).

The Court found that the challenged statements were true and protected by the fair report privilege. Although plaintiff would qualify as a public figure, the *Daily News* did not raise lack of actual malice in its motion for summary judgment, thereby avoiding protracted discovery into state of mind issues while obtaining an efficient resolution of the case.

Background

Plaintiff William Rasmussen sold his stake in ESPN in the 1980s and moved to Naples, Florida where he assumed control over the annual Senior PGA Golf Tournament in Collier County and secured public funding through the county for the tournament.

In October 1996, Rasmussen announced a new golf stadium concept that he envisioned as serving as a permanent venue for the golf tournament. Rasmussen turned to the chairman of the Collier County Commission, John Norris, for assistance, along with local real estate developers and a financier. The project, which was never built, was dubbed "Stadium Naples" by Rasmussen and his partners.

When Rasmussen and his partners announced publicly in June 1997 that Norris, the highest elected public official in the county, had a financial stake in the stadium project, allegations of favoritism and corruption swirled through the community. Amidst the growing controversy, Rasmussen and his partners abandoned their efforts to build Stadium Naples. But shortly thereafter, Rasmussen teamed with A.S. Goldmen & Co., a brokerage house with offices in Naples, in a second attempt to finance and build Stadium Naples.

After the disclosure of Norris' involvement in the stadium deal, local, state, and federal investigators, including a special prosecutor appointed by Governor Bush, probed into the financial dealings between county commissioners, local developers and others. In 2001, the special prosecutor charged Rasmussen and nine others – including four county officials, three real estate developers, and a local lawyer – with corruption and racketeering.

The special prosecutor brought additional charges against Rasmussen for stock fraud relating to his involvement with A.S. Goldmen brokers who were convicted in New York courts for, among other things, defrauding investors in the second Stadium Naples project. Nine of the ten defendants – including Rasmussen – pleaded guilty or no contest to the charges.

As part of his plea agreement and in exchange for his cooperation, Rasmussen pleaded guilty to reduced charges in the stock fraud case. The charges against him in the corruption case were dismissed.

The *Daily News* published hundreds of articles about Stadium Naples from October 1996 through January 2004. The newspaper reported on the proposal of the stadium development as well as the subsequent investigations and prosecutions and were based in large part on thousands of documents obtained by the *Daily News* through public records requests to the special prosecutor in the Stadium Naples criminal cases.

Rasmussen's claim for defamation against the *Daily News* challenged statements describing the disposition of the criminal charges against him in the corruption and stock fraud cases and his involvement in the golf tournaments and/or the Stadium Naples deals.

He also claimed that certain statements relating to a local attorney who served as counsel to the Stadium Naples partnership (of which Rasmussen was a partner) were false and defamatory. After receiving Rasmussen's discovery responses but before any depositions, the *Daily News* filed its motion for summary judgment.

Truth and Fair Report

Rasmussen alleged that in over 20 articles, the *Daily News* falsely accused him of pleading guilty or no contest to charges in the Stadium Naples corruption case by stating that Rasmussen, along with other Stadium Naples defendants, pleaded guilty to "reduced or related" charges.

(Continued on page 38)

Florida Newspaper Wins Summary Judgment in Libel Action Brought by ESPN Founder

(Continued from page 37)

Rasmussen argued that the stock fraud charges against him were not related to the corruption charges because they were filed in a separate case and involved different crimes. He contended that the newspaper should have reported that the charges against him for corruption had been dismissed.

The Circuit Court for Collier County, through Judge Schoonover, sitting by designation, agreed with the *Daily News* that the charges in the stock fraud and corruption cases were "related." As noted by the Court, both sets of charges were brought by the special prosecutor whose authority was limited to investigating and prosecuting crimes *related* to Stadium Naples. The Court stressed that "journalists should have certain leeway in their choice of language when covering the criminal justice system."

"Journalists should have certain leeway in their choice of language when covering the criminal justice system."

The Court also applied the "fair report" privilege because the newspaper's report that Rasmussen pled to "related charges" were fair and accurate descriptions of the charging documents, executive orders, and plea agreement relied upon by the *Daily News*.

Rasmussen further alleged that the newspaper libeled him by implying that he was responsible for debts incurred by a foundation that he established to operate the Senior PGA tournament. The Court rejected Rasmussen's arguments, finding that the reference to Rasmussen as having a "role in the operation of the [f]oundation was clear from the beginning . . . [and it] was a colloquial way of describing information and is a widely accepted practice and recognized and protected."

"Pure Opinion"

Rasmussen claimed that two editorials published by the *Daily News* were false and defamatory. The editorials criticized Rasmussen for, among other things, being at the center of the Stadium Naples controversy and "jilting" charities and investors. One editorial stated in part:

> Bill Rasmussen came to Naples with a winning smile and a reputation, as founder of ESPN, for a golden touch. He now affirms his niche in history as the man who left everything in his path in shambles -- county government, charities, and investors.

The Court agreed with the *Daily News* that the editorials were all based on facts "disclosed in the editorials themselves or in the coverage of the Stadium Naples controversy that was widely reported and readily available to the reader" and as such, were non-actionable "pure opinion." The Court itemized numerous, undisputed facts supported by the public record that provided a sufficient underlying basis for the opinions expressed in the editorials.

The Court did not address Rasmussen's allegations that he was libeled by statements regarding the attorney for the Stadium Naples partners because Rasmussen's counsel indicated at oral argument that plaintiff was no longer pursuing claims based on those statements. The Court also found that it need not address the argument raised by the *Daily News* that Rasmussen, based upon his own admission, did not suffer actual harm from the newspaper's reporting as opposed to the criminal charges brought against him.

Plaintiff has indicated that he plans to appeal the Court's ruling.

Bruce W. Sanford and Mark I. Bailen of Baker Hostetler LLP in Washington, D.C., along with Denis L. Durkin in the firm's Orlando, FL office, represent the defendants. Joel Magolnick and Farah Martinez of Moscowitz, Moscowitz & Magolnick, P.A. in Miami, FL represent the plaintiff.

UK Parliamentary Committee to Consider England's Conditional Fee Problem

The Constitutional Affairs Committee of the UK Parliament announced this month that it will undertake an inquiry into conditional fee arrangements ("CFA's") in libel and related cases. The issue of CFAs was discussed extensively at MLRC's London Conference, and is a matter of particular concern to the UK media and to any media outlet sued in England.

Under the scheme claimant's lawyers are entitled to not only receive their fees – standard in English libel actions – but to obtain a so-called "success rate" of up to 100%, e.g., a doubling of their hourly rates. This has led to claims for fees of 800 pounds or more per hour.

Among the most gross examples of this is the appeal of Naomi Campbell to the House of Lords on her breach of confidence action against the Mirror Newspaper. She had obtained a damage award of 3500 Pounds. Her counsel fees for the hearing before the Law Lords was £594,470.

Last month the House of Lords rejected the newspaper's Article 10 challenge to the CFA regime. *Campbell v. MGN Ltd* [2005] UKHL 61. *See also MLRC MediaLawLetter* October 2005 at 45. In last month's decision, the House of Lords deferred to Parliament's prerogative to legislate a system to increase plaintiffs' access to justice. The system is apparently working in personal injury and similar negligence claims, but has caused major problems in libel and related cases. And the House of Lords suggested legislative reform was needed

The Constitutional Affairs Committee invited interested parties to submit comments and several English newspapers and media companies submitted letters outlining their concerns.

MLRC submitted comments to the Committee, as well. Below is the text of the letter.

House of Commons Constitutional Affairs Committee Conditional Fee Arrangements in Libel and Related Cases

The Media Law Resource Center ("MLRC") welcomes the opportunity to submit comments to the Constitutional Affairs Committee in connection with its inquiry on "Compensation Culture" and Contingency Fees.

About MLRC

MLRC is a non-profit information clearinghouse organized in 1980 by leading media entities to monitor and report on developments and trends in the law in libel, privacy and related fields of media law and assess how these impact the right to publish and impart information to the public.

MLRC is headquartered in the United States, but has members worldwide. The membership is comprised of major publishers in all media; media associations representing a wide range of journalists, editors, publishers, broadcasters; and media insurers. MLRC also has a Defense Counsel Section, the members of which include leading media and libel defense law firms across the United States, as well as in Canada, England, Europe, Australia, New Zealand and Asia. More information about MLRC and a list of its members is available at www.medialaw.org.

Comments

The current CFA scheme has raised alarm among MLRC's UK-based members because of the enormous and disproportionate legal fees now being sought by claimant lawyers in libel and related cases. These concerns are set out in detail in the letters to the Committee from English publishers.

(Continued on page 40)

(Continued from page 39)

This submission by MLRC is intended to emphasize that the alarm over CFA's in libel and related cases is not limited to UK publishers. Many American and other foreign media entities regularly publish in the UK and/or make information available on the Internet that is downloaded and read in the UK.

For several years now, American and other foreign publishers have been concerned with claimants "forum shopping" in England to exploit the juridical advantages of English libel law. In contrast to U.S. law, for example, English libel law places the burden of proving truth on the defendant and permits liability without fault. Added to those concerns, is the new and growing risk that media defendants will be assessed punishing legal costs for engaging in free expression.

Legal fees of £800 per hour or more as permitted under the CFA scheme are extraordinarily high by any standards, including American standards. (Under the U.S. contingency fee system, by contrast, lawyer's fees are generally a fixed percentage of the damage award, establishing some proportionality between the value of the legal claim and the work performed.)

The current CFA scheme creates an incentive for lawyers to engage in extravagant and unnecessary litigation tactics, as recognized by Lord Hoffman in Campbell v. MGN Ltd [2005] UKHL 61 at ¶ 31. Certainly, there is no client-based incentive to adjust legal expenditures to the weight of the actual claim or even the rational needs of the litigation. Lord Hoffman described the "blackmailing" effect of the "freespending claimant's solicitor" who forces media defendants to run up substantial defense costs and face the risk "not only as to liability but also twice the claimant's costs."

Legal costs in libel cases conducted under a CFA can dwarf the actual damages that might be recovered by a factor of 10 to 20 times or more. Moreover, under the CFA scheme a successful media defendant will in many instances have no realistic chance of recovering the bulk of its legal costs if sued by an impecunious claimant.

As Lord Justice Brooke of the Court of Appeal observed, "The obvious unfairness of such a system is bound to have the chilling effect on a newspaper exercising its right to freedom of expression … and to lead to the danger of self-imposed restraints on publication." Musa King v Telegraph Group Ltd [2004] EMLR 429 at ¶ 99.

The chilling effect described by Lord Justice Brooke is not limited to England. Specialist libel lawyers have aggressively sought celebrity clients in the U.S. by trumpeting the legal advantages of bringing libel claims in London. Some firms advertise their services on the Internet, inviting potential claimants – in England and abroad – to submit their complaints for free evaluation and potential representation under a CFA.

Ultimately this scheme is bound to chill publishers from doing business in the UK or making their information available to the public worldwide over the Internet. As one American publisher defending a CFA libel action in London stated: "If the price of fighting to prove the truth is too high, suppression of the truth will prevail." Al-Koronky v. Time Life Entertainment Group, Ltd. [2005] EWHC 1688 (QB) at ¶ 55.

We understand that Parliament did not contemplate these consequences in libel and related cases – and on Article 10 rights in general – when it enacted the Access to Justice Act 1999. Legislative reform is therefore well-timed and appropriate.

Finally, MLRC understands and respects the goal of increasing citizens' access to justice. We believe, however, that this goal must be better expressed in legislation that does not interfere and chill the fundamental right of freedom of expression.

Newspaper Gains Access to Columbine Journals

Lawfully Seized Material Is Subject to Colorado Open Records Laws

By Steven D. Zansberg

The Colorado Supreme Court unanimously ruled this month that the writings of Dylan Klebold and Eric Harris, the Columbine High School shooters, that were seized by the sheriff from their families' homes in conducting the criminal investigation into Columbine, are "criminal justice records" subject to Colorado's Criminal Justice Records Act. *Harris v. Denver Post Corp.*, No. 04SC133, 2005 WL 3046652 (Colo. Nov. 15, 2005).

The Court then remanded the case to the Court of Appeals with instructions to remand to the current Jefferson County sheriff to determine whether disclosure of such records would be "contrary to the public interest." Should the sheriff deny access to the records requested by *The Denver Post*, under the Court's ruling, *The Denver Post* has the right to seek judicial review of that denial.

Protracted and Tortured Procedural History

This records case began approximately one year after the shootings at Columbine High School (April 20, 1999), that left twelve students and one teacher dead, as well as the two killers, Eric Harris and Dylan Klebold.

The surviving family members of the victims asked to review the then-ongoing investigative file being compiled by Sheriff John Stone, to help them determine whether to would file civil actions against his office. When Sheriff Stone refused to provide such access, citing the "contrary to public interest" standard in the Criminal Justice Records Act, the families sought judicial review of that denial under the Act, which applies to records in the possession, custody, or control of law enforcement agencies.

In a series of eight sequential rulings, Jefferson County District Court Judge Brooke Jackson ordered the release of more than 17,000 pages of the investigative file the Sheriff had compiled, representing the largest criminal investigation in Colorado history. However, shortly after the victims' families filed their open records complaint, the parents of Eric Harris and Dylan Klebold were permitted to intervene and challenged the inspection of any of the writings (which includes videotapes and audiotapes) that were seized from their homes subject to the search warrants executed on the evening of the shootings.

Thereafter, all of the victims' families agreed with the Harrises and Klebolds and withdrew their request to inspect any of those records. (Earlier, in December 1999, Sheriff Stone had made the video tapes seized from the families homes, known as "the Basement Tapes," available for review to *Time* magazine, *Denver Post*, *Rocky Mountain News*, and a handful of other news media).

In December 2001, a Denver-based free weekly magazine, *Westword*, obtained from an unnamed source portions of Eric Harris' handwritten journal, [available at http://columbine.free2host.net/diary.html] which was among the items seized by the sheriff in executing the search warrant on the Harris home.

Shortly thereafter, *The Denver Post* requested that Sheriff Stone provide access to all of the records that were seized subject to the search warrant from the killers' homes for use in the investigation into Columbine. Through counsel, Sheriff Stone denied *The Denver Post*'s request, claiming that disclosure would be "contrary to the public interest." In the alternative, the Sheriff argued, the records requested by *The Denver Post* were simply not "criminal justice records" subject to the Act, because they remained the private property of the Harris and Klebold families.

Prior Rulings

In May 2002, State District Judge Brooke Jackson ruled that the records seized subject to a search warrant and reviewed by the sheriff in conducting his criminal investigation were not "criminal justice records" to which Colorado's statute applied.

The Denver Post appealed that ruling, and obtained two separate decisions from Colorado's intermediate

(Continued on page 42)

Newspaper Gains Access to Columbine Journals

(Continued from page 41)

Court of Appeals. In the first ruling, the appellate court found that the records *might* be "criminal justice records" depending upon whether they were in active use by the sheriff on the particular date when *The Denver Post* had first requested them.

The appellate court then granted *The Denver Post*'s petition for rehearing, withdrew that decision and ruled, *sua sponte*, that the records seized from the Harrises' and Klebolds' homes were not "criminal justice records" but were "public records" under Colorado's companion statute that applies to civilian (non-law enforcement) agencies. This statute also provides for a mandatory award of attorneys fees to a prevailing plaintiff.

The Jefferson County Sheriff (and the Harrises and Klebolds) sought *certiorari* review of that appellate decision. The Colorado Supreme Court granted *certiorari* review on two questions: (1) whether the Court of Appeals erred in finding that the records at issue were "public records," and (2) whether records seized from a private home subject to a valid search warrant and used in a criminal investigation are "criminal justice records" as *The Denver Post* had advocated below.

Colorado Supreme Court Decision

The Colorado Supreme Court held that under the unambiguous language of Colorado's twin open records statutes, records that are "made, maintained or kept" by a sheriff for use in the exercise of functions authorized or required by law or administrative rule are declared to be"criminal justice records," not "public records." (The Public Records Act expressly excludes "criminal justice records" from the definition of "public records," so that they are governed by the statute more directly address to records in the hands of law enforcement agencies).

This was the position advocated by *The Denver Post* to the Colorado Supreme Court and to both courts below.

Colorado's Supreme Court relied on two of its recent (and controversial) rulings in cases decided under the state's "Open Records Act," which had narrowly interpreted the terms "made, maintained or kept" *for use in official functions*, with respect to writings generated by government agents who were found not to be acting in an official capacity (i.e., a personal diary of a County Manager and several hundred salacious, sexually explicit e-mail messages exchanged between an elected official and his mistress employee).

The Court distinguished the facts of those cases: "Here there is no question that the Sheriff holds the recordings in his official capacity. . . . [Furthermore, he] used the content of the recordings in investigating the murders, bringing charges against an individual who helped Eric Harris and Dylan Klebold obtain the weapons they used in the crimes, and making [his] report to the public concerning the crimes." Therefore, the Court concluded, the records in question satisfied the the statutory definition of "criminal justice records."

At several points in the decision, the Court notes that neither the Harrises nor the Klebolds ever challenged the legality of the searches conducted on their homes or the sufficiency of the search warrants. Had there been a judicial determination that documents were obtained illegally and ordered their return to the owner with no public inspection allowed, the Court stated, then the Sheriff would have no discretion to disclose them, because an "order of any court" (a statutory exemption) would apply.

Because there is no such order finding the search was invalid, the disclosure of these records is subject to the general "contrary to the public interest" standard in the Act that vests initial discretion over disclosure in the hands of the criminal records custodian.

Court Offers Unsolicited Advice

Having determined that the records at issue are "criminal justice records" – the only question that had been accepted for review – the Court proceeded to offer guidance to criminal justice records custodians (including the Sheriff on remand) on how to determine, in the first instance, whether disclosure of "criminal justice records" is "contrary to the public interest."

To make this determination, the Court instructs, records custodians should consider the following factors: "the privacy interests of individuals who may be im-

(Continued on page 43)

Newspaper Gains Access to Columbine Journals

(Continued from page 42)

pacted by a decision to allow inspection; the agency's interest in keeping confidential information confidential; the agency's interest in pursuing ongoing investigations without compromising them; the public purpose to be served in allowing inspection; and any other pertinent consideration relevant to the circumstances of the particular request."

The Court then declared, *sua sponte,* that "a decision to allow or not allow inspection of a record is subject to judicial review under an abuse of discretion standard." In fact, the text of the Act does not so state. In support of this final proposition, the Court cites to a prior case that involves the standard of *appellate* review of *a trial court's* ruling on whether to "seal" criminal arrest records information, a question that is governed by a *different* statutory provision than the one applicable to *judicial* review of a *custodian's* denial of the right of inspection.

The Harrises have filed an uncontested Motion with the Supreme Court for an extension of time in which to file their petition for rehearing.

Steven Zansberg and Tom Kelley of Faegre & Benson, Denver, represented The Denver Post. The Harrises were represented by C. Michael Montgomery of Montgomery, Kolodny Amatuzio & Dusbabek, Denver. The Klebolds were represented by Franklin D. Patterson of Patterson, Nuss & Seymour, Denver. The Jefferson County Sheriff's Office was represented by Lily Oeffler of the Jefferson County Attorney's Office. Marc Flink, of Baker and Hostetler, Denver, filed an amicus brief in support of The Denver Post, on behalf of the Colorado Press Association.

Civil Rights Complaint Against Broadcaster Dismissed

A federal court in Wisconsin dismissed for failure to state a claim a complaint alleging that an allegedly defamatory news report violated 42 U.S.C. § 1981. *Dr. R.C. Samanta Roy Institute of Science and Technology v. Journal Broadcast Group, Inc.*, No. 05-C-0423, 2005 WL 2657149 (E.D. Wis. Oct. 18, 2005) (Griesbach, J.).

Section 1981 outlaws racial discrimination in contracting between private parties. Plaintiff alleged that a news report that referenced her East Indian ethnicity defamed her and damaged her business, "interfering with [her] business and banking relationships."

Dismissing the complaint the court stated that "defamation does not become a § 1981 claim simply by claiming it is racially motivated." Moreover, the court noted that plaintiff could not circumvent the constitutional restrictions on a libel claim by pleading a civil rights cause of action.

Gregory B. Conway and Tony A. Kordus of Liebmann Conway Olejniczak & Jerry SC, Green Bay, Wisconsin represented defendants. Rebekah M. Brown, Hastings, MN, represented the plaintiff.

Pa. Court Affirms Summary Judgment for Newspaper

A Pennsylvania appellate court last month affirmed dismissal of a police officer's libel suit against a local newspaper for two articles that discussed complaints about the officer's aggressive enforcement tactics. *Bartlett v. Bradford Publishing*, No. 794 WDA 2004, 2005 WL 2622739 (Pa. App. Oct. 17, 2005). The court found no evidence of actual malice to support the claim.

The first article included, among other things, a resident's complaint that plaintiff "overuses his authority" and "is way way over zealous." The second article discussed complaints and calls for plaintiff's resignation that were made at a town meeting.

Affirming summary judgment for the newspaper, the court found that the newspaper had no duty to further investigate its sources' statements. The sources where known members of the community and there was no reason to doubt the truthfulness of their statements.

Moreover, in an interesting point, the court found no evidence of actual malice where there was inconsistent deposition testimony between the reporter and one of her sources regarding the number of times they had spoken prior to publication of the articles. Plaintiff argued that the reporter deliberately lied about how well she knew the source thereby making her reliance on him reckless. The court, however, ruled that even if the reporter lied the matter was not material to the issue of actual malice.

Closed Pretrial Hearing in High Profile Murder Case Was Error

By Scott B. Sievers

An Illinois appeals court in October reversed a trial judge's ruling to close to the public a court hearing in a triple murder case. The opinion is *People v. LaGrone*, 2005 WL 2766517 (Ill. App. 4th Dist. Oct. 24, 2005).

Background

Maurice LaGrone, Jr. has been charged along with his former girlfriend with first-degree murder for the deaths of her three children, who drowned in her car when it sank in a central Illinois lake in 2003.

After reporters covering LaGrone's case repeatedly found court documents to have been filed under seal and court proceedings to have been held in conference rooms or the judge's chambers without notice or access to the public, their news organizations took action.

The Associated Press and two central Illinois daily newspapers, the *Herald & Review* in Decatur and *The Pantagraph* in Bloomington, filed petitions to intervene to seek access to judicial records and proceedings in February 2005. Circuit Judge Stephen H. Peters allowed the news organizations to intervene, but before ruling on access Judge Peters suggested the attorneys meet privately in the adjacent jury room to attempt to reach an agreement on access.

The attorneys did so, and an agreed order governing the filing of documents under seal and the closure of court records and proceedings was entered.

The news organizations' efforts appeared to be paying off when, just a month later, Judge Peters denied LaGrone's motion to close a hearing on barring the statements of minors concerning conversations they had with the victims. The news organizations had objected to the closure, citing the U.S. Supreme Court's ruling in *Press-Enterprise II*, 478 U.S. 1 (1986), and underscoring LaGrone's failure to present Judge Peters with anything beyond argument to satisfy *Press-Enterprise II*'s two-part test.

But the LaGrone case returned to its secretive ways in May. LaGrone once again moved Judge Peters to close a pretrial hearing, this time on a motion to suppress victims' statements and bar evidence of LaGrone's unidentified "character attributes." While no one argued that *Press-Enterprise II* did not apply, LaGrone failed to present any evidence to Judge Peters demonstrating either a substantial probability that LaGrone's fair trial rights would be prejudiced by publicity that closure of the hearing would prevent or the inadequacy of reasonable alternatives to closure in protecting those rights.

LaGrone presented only argument – that merely uttering the subjects of the two motions in open court would irreparably prejudice the jury pool against him. Prosecutors tacitly supported LaGrone's motion, contending they did not want to be hamstrung during oral argument to obliquely referring to the subjects so as not to disclose them.

Though he had been presented with no new evidence of prejudice since denying LaGrone's closure motion in March, Judge Peters viewed LaGrone's latest closure motion differently:

> There has been by way of proffer sufficient evidence presented to me to show me the facts that are going to be argued here. . . . I think that this would jeopardize the selection of a jury. At this point, I see no alternative other than at least for these two motions to have a closed hearing. . . . I will indicate[,] however, that upon selection of the jury, the transcript of this hearing will be released.

The news organizations filed an interlocutory appeal, arguing that the trial court had failed to satisfy the *Press-Enterprise II* requirements for closure of a pretrial proceeding. *Press-Enterprise II* requires specific, on-the-record findings demonstrating that there is a substantial probability that the defendant's right to a fair trial would be prejudiced by publicity that closure of the hearing would prevent and that reasonable alternatives to closure could not adequately protect the defendant's fair-trial rights.

LaGrone countered that the trial court did satisfy the *Press-Enterprise II* requirements, including providing specific, on-the-record findings justifying closure. The Appellate Court of Illinois, Fourth District, sided with the news organizations.

(Continued on page 46)

Closed Pretrial Hearing in High Profile Murder Case Was Error

(Continued from page 45)

Appeals Court Decision

In a unanimous opinion for the three-justice panel, Justice Robert J. Steigmann began by addressing the possibility that the issue of a closed hearing already held was moot – an argument not raised by LaGrone. But the Court held the issue qualified for review because it involved "a question of great public interest" and the trial court's restrictions were capable of repetition, yet evading review.

Turning to the merits, the Court noted that opening criminal proceedings assured their fairness. "Accordingly, a high threshold must be crossed to justify the closure of criminal proceedings," the Court held.

After citing authority that the *Press-Enterprise II* requirements applied to pretrial suppression hearings, the Court then applied the requirements to the trial court's ruling. The Court said the trial court had made three findings: (1) if the evidence were made public but ruled inadmissible, it would "tend" to present "more than a potential problem" in selecting a jury; (2) the history of publicity in the case showed the media were likely to constantly repeat the inadmissible evidence; and (3) the trial court saw no alternatives to closure.

"[A] speculative concern for how the media will use information should not justify the closure of criminal proceedings,"

The Court held that the trial court's findings were not sufficient for closure under *Press-Enterprise II*. "The trial court's findings that the inadmissible evidence in the hands of the media would 'tend' to create 'more than a potential problem' selecting a jury is not a fact-specific finding showing a substantial probability that an impartial jury could not be chosen," wrote Steigmann.

"Nor is it a finding that provides this court with sufficient factual material to conduct a meaningful review of the trial court's decision."

Further, the Court rejected the trial court's reliance on the likelihood that the evidence would be repeated in media reports. "[A] speculative concern for how the media will use information should not justify the closure of criminal proceedings," wrote Steigmann. "The potential always exists that the media will misuse, misstate, or misconstrue the facts in reporting. A concern that the press will misuse inadmissible information is not sufficient to support a finding that a substantial probability exists that the defendant's fair-trial rights will be impinged."

The Court also held that the trial court failed to sufficiently address alternatives to closure:

> The trial court's findings, in addition to being vague and conclusory, fail to address the question that should lie at the heart of a trial court's decision to close a criminal proceeding. That question is not whether the information would taint potential jurors, but whether the circumstances of access would make it so that voir dire could not remedy any taint. Widespread publicity does not necessarily result in widespread knowledge among potential jurors of the facts reported [citations], and voir dire is the preferred method for guarding against the effects of pretrial publicity ....

The Court then considered the fact that, prior to the closed hearing, the trial court had already changed venue. "In such cases, the likelihood that the court would need to conduct proceedings in secret is (or at least should be) dramatically diminished," Steigmann wrote. "Thus, under these circumstances, an even greater need exists for the trial court to make specific factual findings as to why closure was warranted."

The Court ended its opinion by underscoring the high bar proponents must clear for closure: "[W]e reiterate that in criminal proceedings, openness is the norm and closure should occur only in rare cases."

LaGrone is not expected to ask the Appellate Court to reconsider its ruling nor to petition the Illinois Supreme Court for leave to appeal. The Appellate Court was expected to issue its mandate on November 21. A copy of the transcript of the closed hearing had not been released at the time of writing.

The Associated Press, Herald & Review, and The Pantagraph were represented by Scott B. Sievers of Donald M. Craven, P.C., in Springfield, Ill. The People of the State of Illinois were represented by Special Prosecutors Roger Simpson and Ed Parkinson. Maurice LaGrone, Jr. was represented by Jeff Justice of Decatur, Ill.

Ninth Circuit Holds That California Statute Criminalizing False Reports of Police Misconduct is Unconstitutional

Statute Is Not Viewpoint Neutral

The Ninth Circuit this month ruled that a California statute that makes it a misdemeanor to knowingly file a false report of misconduct against a peace officer is unconstitutional. *Chaker v. Crogan*, No. 03-56885, 2005 WL 2978600 (9th Cir. 2005) (Hug, Berzon, Pregerson, JJ.).

The Court, in a decision by Judge Harry Pregerson, ruled that the statute was not viewpoint neutral because it "leaves unregulated knowingly false speech supportive of peace officer conduct."

Last year a California federal district court reached the same conclusion and enjoined enforcement of the statute. *Hamilton v. San Bernadino*, No. CV 00-107-RT, 2004 WL 1551460 (C.D. Cal. July 7, 2004). *See MLRC MediaLawLetter* Aug. 2004 at 24.

Both federal decisions conflict with a 2002 decision by the California Supreme Court which specifically rejected viewpoint neutrality and related First Amendment arguments against the statute. *See People v. Stanistreet*, 29 Cal.4th 497, 58 P.3d 465, 127 Cal. Rptr.2d 633 (Cal. 2002), *cert. denied*, 538 U.S. 1020 (2003).

Background

California Penal Code § 148.6 was enacted in 1996 and provides that "Every person who files any allegation of misconduct against any peace officer ... knowing the allegation to be false, is guilty of a misdemeanor."

The statute requires complainants to read and sign an advisory that states in part:

> "You have the right to make a complaint against a police officer for any improper police conduct. California law requires this agency to have a procedure to investigate citizens' complaints.... It is against the law to make a complaint that you know to be false. If you make a complaint against an officer knowing that it is false, you can be prosecuted on a misdemeanor charge."

The statute was enacted in an attempt to curb a perceived rising tide of knowingly false citizens' complaints of misconduct by police officers in the years following the Rodney King incident.

Habeas Petition

The challenge to the statute in the instant case was raised in a federal habeas corpus petition. In 1996, the petitioner, Darren Chaker, filed a misconduct report against several San Diego police officers, claiming they used excessive force against him. Following an investigation of the charges, Chaker was charged with violating § 148.6. In 1999, he was tried before a jury and convicted, sentenced to two days in jail, fifteen days of public service, and three years of probation. The court also ordered Chaker to pay a fine and restitution totaling $1,142.

After numerous state habeas petitions were denied, Chaker filed a federal petition in 2002.

Ninth Circuit Decision

While the Ninth Circuit panel agreed that California "may prohibit knowingly false speech made in connection with the peace officer complaint process," it held that the state must do so in a "viewpoint neutral" way. *Citing R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) and *Virginia v. Black*, 538 U.S. 343 (2003).

In *R.A.V.*, the Supreme Court struck down a St. Paul, Minnesota law which prohibited the display of symbols which one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender."

Assuming the statute was intended to reach only "fighting words" – a category unprotected by the First Amendment – the Supreme Court nevertheless struck down the law because it applied only to certain "disfavored" subjects. Those who wish to use "fighting words" to express hostility on the basis of political affiliation, union membership, or homosexuality were not covered. "The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 391.

(Continued on page 48)

Ninth Circuit Holds That California Statute Criminalizing False Reports of Police Misconduct is Unconstitutional

(Continued from page 47)

The Ninth Circuit found that § 148.6, like the ordinance at issue in R.A.V., "regulates an unprotected category of speech, but singles out certain speech within that category for special opprobrium based on the speaker's viewpoint. Only knowingly false speech critical of peace officer conduct is subject to prosecution under section 148.6. Knowingly false speech supportive of peace officer conduct is not similarly subject to prosecution."

The Ninth Circuit noted, but did not discuss at length, that such speech would likely interfere with misconduct investigations as much as false statements of misconduct, thus undermining the state's rationale for the statute.

The Ninth Circuit added in conclusion that the constitutional defect could be easily cured by making "all parties to an investigation of peace officer misconduct subject to sanction for knowingly making false statements."

MLRC Annual Meeting
November 9, 2005, The Sheraton, New York

The annual meeting of the Media Members of the MLRC took place on November 9, 2005 in New York City. The meeting was called to order by Henry Hoberman., Chairman of the MLRC Board of Directors.

Election of Directors

The first order of business was the election of Directors. Mr. Hoberman read the slate of candidates to be elected to the Board of Directors. The candidates included himself, Stephen Fuzesi, Jr. of Newsweek, Inc. and Marc Lawrence-Apfelbaum of Time Warner Cable. The members conducted a voice vote to elect all three to the board.

DCS President's Report

James Stewart began his report by thanking Sandy Baron, MLRC's Executive Director, for her tireless work on behalf of the organization.

Mr. Stewart then noted the changing composition of the DCS Executive Committee. Bruce Johnson, who served as President Emeritus of the Committee in 2005, will rotate off in 2006. Joyce Meyers is leaving the Committee to go on to position as editor of Litigation Magazine. The DCS Executive Committee has nominated Dean Ringel of Cahill, Gordon & Reindel as Secretary and Kelli Sager of Davis, Wright Tremaine LLP as Treasurer.

Mr. Stewart then outlined the goals of the DCS Executive Committee this past year. First and foremost the Committee sought to increase services to DCS members, most of whom do not engage in full time media defense work. Second, the Committee sought to engage in outreach in four areas. Expanding MLRC's international reach remained a goal, one that was furthered this year. Outreach to Southern California has begun by creating a California chapter and increasing MLRC's focus on entertainment law. Furthering participation by in-house attorneys and the Media Members overall were also major outreach goals for 2005.

Mr. Stewart went on to outline the accomplishments in the DCS of the past year.

Successes were many, including the effort, led by Jerry Fritz and Sam Fifer, to create the extremely helpful Pre-publication/Prebroadcast Checklist. In addition, Mr. Stewart noted that a draft of a "Panic Book," which includes brief legal outlines that allow for quick responses to urgent problems, was delivered by Steve Zansburg, and should be out at year end.

The sole misstep was two DCS committees revising the same section of a model trial brief unbeknownst to the other. However, those two committees are now collaborating.

MLRC's international efforts this year include co-hosting a conference with Ad IDEM in Toronto. Mr. Stewart also cited Bruce Johnson's creation of the Entertainment Law Committee as a major success.

Executive Director's Report

Sandy Baron began by thanking MLRC's staff, membership, and Board of Directors for all their work this past year.

Ms. Baron then proceeded to highlight several of this and next year's projects. Sandy thanked Eric Robinson for his continued stewardship of MLRC's website and asked the membership for ways it could be improved. In addition, Ms. Baron requested members send along decisions they are involved in and interesting articles for posting in the MediaLawDaily.

Ms. Baron reported that the London Conference was a huge success. She thanked co-chairs Kurt Wimmer and Jan Constantine, the entire planning committee and MLRC staff attorney David Heller for their efforts in helping to organize it. Mr. Wimmer commented that everyone enjoyed the sessions as well as the focus on European law.

The next conference, Ms. Baron noted, is the now annual MLRC/Southwestern Law School Conference on Media and Entertainment Law, to be held in January 2006. The conference will include two sessions on product placement, a session on blurring fact and fiction, as well as one on vetting programs for indecency concerns. Furthermore, the first meeting of the newly organized California chapter will occur over lunch before the conference.

Planning has already begun for the 2006 NAA/NAB/MLRC Conference in Virginia.

(Continued on page 50)

MLRC Annual Meeting
November 9, 2005, The Sheraton, New York

(Continued from page 49)

Other recent developments outlined by Ms. Baron included the continued operation of a Task Force on a Federal Shield Law. Initially created to both coalesce the media behind the need for a federal shield law and to begin drafting a model bill, the Task Force turned to actual bills at the end of 2004 and in 2005. It meets periodically by conference call to keep up to date on the progress of the bills. The initial drafting group, a subset of over fifty in the main group, has undertaken to draft a model shield law. The model has now been vetted by the entire Task Force, the Board of Directors and the DCS Executive Committtee and will be presented to the entire membership shortly. Even in draft form, it is being used in several states as a basis for developing shield laws.

The Ethics Committee and the Legislative Affairs Committee continue to publish excellent monthly reports in the MediaLawLetter. Lastly, the ALI Task Force is now moving to advise on the upcoming Restatement of Privacy Torts.

Ms. Baron thanked Debra Seiden and Kelly Chew for their fantastic work. Thanks also went out to Maherin Gangat for her efforts on the state shield law survey. Eric Robinson was acknowledged for compiling statistical bulletins, including MLRC's important annual Damages Survey. Ms. Baron further thanked Dave Heller for organizing the Canada and London conferences and editing numerous MLRC publications.

Maherin Gangat spoke briefly regarding the MLRC Institute's reporter's privilege project. A Powerpoint presentation on reporter's privilege has been prepared and only requires journalists and media lawyers to present it. Ms. Gangat asked the membership to let MLRC know of willing speakers and good venues for presentations.

Conclusion

The meeting then turned to the topic of New Business. The membership took the opportunity to thank Henry Hoberman for his stewardship of the organization. Mr. Hoberman graciously thanked the members for all their efforts. Their being no new business, the meeting was adjourned.

Defense Counsel Section Annual Meeting
November 11, 2005

President's Report

The Defense Counsel Section Annual Meeting was called to order by James Stewart, President of the DCS Executive Committee. Mr. Stewart welcomed the assembly, particularly the in-house attorneys, who the DCS has actively been trying to involve more in DCS committees

Henry Hoberman, the Chairman of MLRC's Executive Board, briefly took the floor to thank Jim Stewart and outline some of the accomplishments from the past year. First, Mr. Hoberman was glad to report that the DCS had involved more people from outside New York this year. Mr. Hoberman then highlighted some of the DCS's major accomplishments for 2005. These included the Newsgathering Committee's initiation of a "Panic Book" designed to help members quickly respond to problems requiring immediate attention.

Jerry Fritz was thanked for his work on the Prepublication/Prebroadcast Checklist. Lastly, all those who worked on the Canada Conference were to be congratulated for its success.

James Stewart again took the floor to thank Sandy Baron for her efforts and to say goodbye to Bruce Johnson, who is leaving the DCS Executive Committee. Kurt Wimmer interjected to once again thank James Stewart for his extraordinary leadership of the DCS over the year, including his energizing the committees and involving many new people in the DCS.

Election of Secretary and Treasurer

The DCS Executive Committee nominated Dean Ringel as a member of the Executive Committee and Secretary. In addition, the DCS Executive Committee nominated Kelli as a member of the Executive Committee and Treasurer. Both motions were made, seconded, and unanimously adopted.

Executive Director's Report

Sandy Baron began by thanking the DCS members and the Executive Committee for all their work this past year. Bruce Johnson was thanked for starting the Entertainment Law Committee, which will be chaired by Lou Petrich with Mr. Johnson serving as vice-chair.

Ms. Baron then proceeded to highlight several of MLRC's recent projects. Sandy lauded Eric Robinson for his continued stewardship of MLRC's website and asked the membership for ways it could be improved. In addition, Ms. Baron requested members send along decisions they are involved in and interesting articles for posting in the MediaLawDaily.

Sandy noted that his has been a big conference year for MLRC. The next conference, Ms. Baron announced, is the MLRC/Southwestern Law School Conference on Media and Entertainment Law to be held on Thursday January 26. The conference will include two sessions on product placement, a session on blurring fact and fiction, as well as one on vetting programs for indecency concerns. Furthermore, the first meeting of the California chapter, an effort to better serve members in the California, will occur over lunch before the conference. This is MLRC's first effort at regional meetings. If successful it may be tried elsewhere.

Ms. Baron thanked all of those involved in the Canada conference, for an enormously positive and successful event. Furthermore, Sandy reported that the London Conference was a huge success and hopes that the Board will authorize another conference in two years.

Other recent developments outlined by Ms. Baron included the creation of a Task Force on a Federal Shield Law. Initially created to both coalesce the media behind the need for a federal shield law and to begin drafting a model bill, the Task Force turned to actual bills at the end of 2004 and in 2005. It meets periodically by conference call to keep up to date on the progress of the bills.

The initial drafting group, a subset of over fifty in the main group, has undertaken to draft a model shield law. The model has now been vetted by the entire Task Force, the Board of Directors and the DCS Executive Committtee and will be presented to the entire membership shortly. Even in draft form, it is being used in several states as a basis for developing shield laws.

(Continued on page 52)

Defense Counsel Section Annual Meeting

(Continued from page 51)

The "big list," a group of sixty different organizations interested in a Federal shield law has met frequently over the past year. The model state shield law will be released to the DCS membership for comment soon. Sandy praised Maherin Gangat for organizing much of this effort.

Ms. Baron thanked all of the committees and taskforces and urged anyone who wants to get involved to do so. Finally, Sandy thanked Debra Seiden and Kelly Chew for their invaluable work.

The DCS Committee reports were then delivered.

New Legal Developments

Elizabeth A. Ritvo reported that the Committee had initiated the ideas for the Symposium on Blogging held before the annual dinner and is also working on a variety of pieces for upcoming issues of the MLRC Bulletin.

Advertising & Commercial Speech

Bruce Johnson spoke on behalf of Joshua Koltun and Peter Raymond, who were unavailable. Mr. Johnson reported that it had been a quiet year in the area of commercial speech and as a consequence a quiet year for the Committee. The Committee would welcome anyone interested in the subject as members.

ALI Taskforce Committee

Tom Leatherbury reported that the Task Force's work for the year had been completed. Tom commented that the Taskforce had successfully neutralized what could have been a negative development in international law by helping to modify a reporter's note on enforcing foreign libel judgments in the United States. Next ALI takes on privacy, and the Taskforce will reactivate for that project.

Conference & Education

Mary Ellen Roy spoke on behalf of herself, Slade Metcalf and Dan Waggoner. She reported that the Committee had a successful planning session but was always looking for new ideas. The conference schedule had yet to be decided, but the Committee had suggested that there be two boutique sessions this year where attendees could pick between four or five different subjects.

These subjects could include: ethics, insurance, cyber law, prepublication/ prebroadcast review, book publishing issues, preparing reporters and editors for depositions, the reporter's privilege, and trial techniques, among others. As for breakout session topics, the committee had decided on libel, access, and property. There has been some demand for more free time during the conference. Ms. Roy would like to invite the members to send the Committee any comments or ideas they might have.

Internet Law

Tom Burke began by noting that the Committee's name had been changed to the Internet Law Committee. The Committee had been consulting with members, including more in-house attorneys, and is currently looking for more people to get involved and suggest projects.

Employment Law

John Henegan commented that the Employment Law Committee had grown from its original eight members to now include twenty-five people. He thanked all those that participated. The big project that they have been working on this year is an employment libel and privacy pamphlet written for lay managers. This pamphlet will be approximately sixty pages long and is currently being edited. The Committee hopes to have it out later this year.

Entertainment Law

Kate Bolger spoke on behalf of the newly formed Entertainment Law Committee, which is chaired by Lou Petrich. The purpose of the Committee is to keep the media and entertainment law bars talking to each other. Currently, the Committee is planning to make contributions to the MediaLawLetter and the upcoming conferences.

Ethics Committee

Lucian Pera, a self-described "ethics nerd," commented that the Ethics Committee now has approximately forty members. The Committee's main function is writing monthly articles for the MediaLawLetter which help keep members out of ethics trouble.

(Continued on page 53)

Defense Counsel Section Annual Meeting

(Continued from page 52)

International Media Law Committee

David McCraw spoke on behalf of himself, Tom Kelley and Jan Constantine. He began by thanking Kurt Wimmer and Jan Constantine for Chairing the organizing of the London Conference. The Conference covered a variety of issues including libel and privacy. The mock jury presentation also proved to be enlightening. The Committee has spent much of its time this year trying to develop an update on international law for the website. The site will include notable cases and legislation on the media organized by country.

Jury Debriefing Project

Nancy Hamilton gave the report on behalf of Mark Hornak. She thanked Eric Robinson for his timely reports on trials, which provides invaluable information. Using the example of the *Tribune* case, Ms. Hamilton noted that it is often necessary to be creative to gain access to jurors. In this case, the judge announced that the jurors had asked not to be contacted and issued an order that the parties were not permitted to disseminate any juror information to the press. In response, they invited all of the jurors to a cocktail party and acquired much useful information. All of this will be published in the upcoming MLRC Trial Reports.

Legislative Affairs Committee

Kevin Goldberg reported that the Committee was interested in the shield law proposals and the Open Government Act. Mr. Goldberg thanked Eric Robinson for his assistance in setting up the Committee's website, accessible from MLRC's site, where members can view pending bills and proposals in Congress. Mr. Goldberg noted that the Committee was publishing articles in each month's issue of the MediaLawLetter and asks the membership to suggest topics for longer, more substantive articles if there is a particular piece of legislation they are interested in. Currently, the Committee is looking into the Patriot Act provisions but since everything is being done in secret, it is difficult to know what exactly is occurring in Congress.

MediaLawLetter Committee

David Tomlin spoke on behalf of himself and Bruce Rosen. The Committee had recently conducted a poll on reader satisfaction for which a small sample of the MediaLawLetter readership was surveyed. The reaction was overwhelmingly positive, with many respondents saying the Letter was more useful than any other comparable publication.

Membership Committee

Susan Grogan Faller noted that although media members and insurance companies often have the most success with asking firms to become members, the DCS can still make a large contribution. She asked DCS members to let her know of any prospects for new members.

Newsgathering Committee

Tom Julin, on behalf of himself and Dean Ringel, outlined the projects the Committee has been focusing on. The Committee has been distilling media law issues that require instant or quick responses by counsel into short summaries to create the "Panic Book," which will be coming out shortly. Mr. Julin thanked Steve Zansberg for all his labors on this project. Upcoming undertakings include an article on ride-alongs and developments in electronic access to court records.

Pre-Publication/Pre-Broadcast Committee

Jerry Fritz reported that the Committee had been very active with three recent projects. First, was the creation of the Prepublication/Prebroadcast Checklist which includes approximately three-hundred questions to consider or prompt thought about the prepublication/prebroadcasting process. Second, the Committee created a *Watchwords,* a compendium of words that may or may not have been found defamatory in litigation and the context in which that occurred. Lastly, the committee has been working on a children's checklist, detailing issues to consider when doing stories about kids. This will be released later this month.

Pre-Trial Committee

Mike Epstein gave the report on behalf of himself and Henry Abrams. The Committee has finished updating the dispositive motions outline and turned to updating the Model Trial Brief. However, the Trial Commit-

(Continued on page 54)

Defense Counsel Section Annual Meeting

(Continued from page 53)

tee was also working on the Model Trial Brief so the two committees have coordinated their efforts

Task Force on Shield Laws

Nathan Siegel began by thanking the others on the Task Force as well as Kurt Wimmer and Maherin Gangat, for all of their efforts. The Task Force had two major jobs this year. First, the Task Force reviewed the provisions of the various federal shield law bills with the larger Task Force group in order to build a media consensus. More recently, the Taskforce has been working on a model state shield law, which is already being used as a base for discussions on shield laws in a number of states considering adoption of such a bill. The final product will be distributed shortly to the entire MLRC membership.

Trial Committee

Bob Nelon reported that the Committee had been busy updating the Model Trial Brief and the Model Jury Instructions. It is now coordinating efforts with the Pre-Trial Committee and hopes to have the trial brief completed and on the website next year.

New Business

Maherin Gangat spoke briefly regarding the MLRC Institute's reporter's privilege project. A Powerpoint presentation on reporter's privilege has been prepared and only requires journalists and media lawyers to present it. Ms. Gangat asked the DCS to let MLRC know of willing speakers and good venues for presentations.

There being no other new business, James Stewart adjourned the meeting.

Twenty-five years ago this Saturday …

By Henry R. Kaufman

Five years ago Harry Johnston, our founding Chair, felicitously recorded his recollections of the Libel Defense Resource Center on the occasion of its 20th anniversary. Harry reviewed the adverse legal developments of the 1970s that led a small group of media lawyers and organizations to come together and take action under the umbrella of LDRC. Recently, Sandy Baron asked me to mark the occasion of LDRC's – now MLRC's – 25th anniversary. Drawing upon minutes from the early years, which still exist, permit me record a few vignettes about the institutional origins of MLRC.

How LDRC Got Its Name

In the beginning, there was LDRC. Actually, just before the beginning there was JMCC – the "Joint Media Coordinating Council." Our founders were a visionary group. Among their many wise decisions was that this provisional designation was not particular catchy and should be changed. Those who have worked with the organization recently are aware that the process of changing the organization's name from LDRC to MLRC took several years, study committees, polls and referenda to achieve. Such is the nature of a mature, broadly-representative, democratically-run organization.

Not so in 1980. The early minutes reveal that LDRC's first name change took less than a month. In July of that year, at the first formal meeting of the JMCC, the minutes record the Steering Committee's consensus that "if possible, a better and more descriptive name should be found for the organization." Some support was expressed for "Libel Resource Center," or "National Libel Resource Center," as alternatives, but no final action was taken. The very next month, on August 6, 1980, my proposal to change the organization's name to the Libel Defense Resource Center was unanimously approved.

In some ways it is good to be a founding father, writing on a blank slate, with only a small constituency to consult and persuade. But the decision to change the organization's name to LDRC was not merely cosmetic. The genius of that seminal act, as it turned out, was the mandate to work intensely on a single issue. That enabled LDRC to focus its activities and to concentrate on developing a solid reputation, unimpeachable credibility and a tradition of excellence. It was not until more than two decades later that LDRC, responding to the broadening needs of its constituency, put "media" back into its name.

The Night LDRC Was Born

On November 12, 1980, a date I have always recalled with fondness because it coincidentally was my birthday, LDRC was formally established at a meeting of its newly renamed Steering Committee. (As this is not the place for extended personal confessionals, let me simply say I was a remarkably young attorney for my age even back twenty-five years ago).

On that historic evening, at the University Club on Fifth Avenue in Manhattan, the Steering Committee's initial formal acts were to appoint Harry Johnston as LDRC's first Chair and then to retain me as General Counsel. Victor Kovner's firm, which I was about to join as of counsel, was designated to provide staff services.

In attendance on that evening were other still familiar leaders of the media bar, including Floyd Abrams, Bruce Sanford, Burt Joseph, Chad Milton (then of Employers Reinsurance) and Larry Worrall (then of Media Professional, which celebrated its own 25th anniversary earlier this year).

The Annual Dinner

The annual dinner meeting was from the outset held in November, generally the evening before the PLI Communications Law Seminar. In contrast to the hundreds it now attracts, attendance was at first limited to the handful of members of the LDRC Steering Committee.

Other guests, in town for PLI, then asked to attend and informal programs were set up to address issues of concern. Finally, in 1983, the annual dinner morphed into a fundraising event. At first Jim Goodale, PLI's founding Chair, was concerned that the fledgling LDRC would be unfairly profiting from proximity to his already well-established program.

(Continued on page 56)

Twenty-five years ago this Saturday …

(Continued from page 55)

Little did Jim, or any of us, realize that the LDRC dinner would itself become a major annual event, complementing PLI by adding another justification for lawyers travel to New York for the ever-expanding array of November media law meetings and programs. In the early years LDRC's fundraising dinner was held in the Empire Room, and later the Starlight Roof, of the Waldorf-Astoria Hotel.

The formal program attracted celebrated guest speakers ranging from Fred Friendly, Gene Roberts and Judge Harold Tyler at the very first dinner, to the star-studded panel scheduled for tonight's 23rd annual fundraiser.

The list of luminaries in between is too long to single out, except perhaps for three, with apologies to the many others. Preeminent recognition must of course be given to the program that – at least historically – can never be equaled. In 1992, LDRC had the unparalleled privilege of honoring retired Supreme Court Justice William Brennan, author of *New York Times v. Sullivan* and father of modern constitutional libel law, who became the first to receive LDRC's "Brennan Award."

In 1988, the "speaker" was Pulitzer-prize winning political cartoonist, Pat Oliphant. Oliphant set the record for the fewest words uttered; instead, he memorably supplemented his laconic remarks with caricatures of recent U.S. Presidents that he drew as he spoke, his apt and memorable tagline being that "a cartoon without malice is just a joke."

Oliphant's drawings from that evening hang on the wall of my law office to this day. Last but not least, for those who were there, can anyone ever forget that evening in 1987 when investigative journalist Jack Anderson appeared at the dinner by telephonic feed from Washington, unable because of severe weather to fly into New York.

Due to the limits of the hotel's technology at the time, no outgoing message could be transmitted advising Anderson that he had exceeded his allotted time, with Tony Lewis and Rollie Evans still waiting to speak. Several minutes after I had made the decision to discretely pull the plug, Anderson's disembodied voice suddenly came back on the line; he was still speaking!

The Origin of LDRC's Logo

The dusty archives record that, on November 11, 1980, just a day before LDRC's birth, and reflecting optimism that the next day's founding meeting would go according to plan, I wrote to Bob Scudilari, legendary director of the Random House art department, and asked him to design the logo that still graces (albeit with a couple of different letters) the organization's letterhead and other publications. I'm not sure how many realize that the striking font and design Scudilari created – LDRC's initials followed by its full name inside the final letter "C" – can also be found on the classic Random House volume of the Selected Short Stories (published two years earlier in 1978), and also on later reissues of his other works, of Pulitzer-prize winning author John Cheever. Perhaps one of the Cheever "C" covers, presaging the design of LDRC's logo, resides somewhere on your own bookshelf.

Original Purposes and Activities of LDRC

Shortly after the founding meeting, our first project was to develop and distribute a promotional brochure, also lovingly designed and produced by Bob Scudilari in the familiar tan colors he selected for LDRC's letterhead. That initial publication, officially announcing LDRC's formation, briefly set out the organization's "goals and activities" central among them "collection and dissemination of dependable … information" and publication of "bulletins and special study reports" for the benefit of "media organizations, attorneys and other groups working to advance the defense of libel and privacy claims."

The fact is that, although our general goals were reasonably well understood, we had no idea specifically how they would be accomplished. The core information gathering and dissemination programs of LDRC were formulated on the fly, adhering to the fundamental premise that developing indispensable, reliable, objective and thus wholly credible data and analyses was the *sine qua non* of accomplishing LDRC's mission. Although we were winging it at the time, essentially all of LDRC's early publications and projects remain central features of the organization to this day.

(Continued on page 57)

Twenty-five years ago this Saturday …

(Continued from page 56)

Damages and Other Statistical Studies

The first major statistical study, one that put LDRC on the map in that area, also came about serendipitously. The possibility of developing industry-wide statistics on all aspects of libel claims, related business costs and litigation trends had been discussed early on. It was concluded that such a comprehensive project was too ambitious and might delve into confidential areas not supported by all of LDRC's constituents. As an alternative, Harry Johnston suggested institution of a "Damages Watch" program, limited to larger damage awards.

In 1981, while such discussions were still ongoing, I was invited on short notice to speak at a local media conference. Almost overnight, and literally on the back of an envelope, I pulled together what we then knew about litigation trends, comparing previously published academic studies with LDRC's our own preliminary information gathering. The reaction to my presentation of even this limited data was so positive that it immediately became evident there was a great thirst for accurate and systematic statistics rather than the anecdotal reports of adverse developments that had typically been the fodder of hand-wringing, but little positive action, by media watchers.

LDRC published an early version of my trends summary in one of its first Bulletins. The next year LDRC produced its first two full-blown statistical studies – one covering trials and damages and another summary judgment results. Today, building upon those early studies, MLRC now regularly reports on litigation and other trends and has generated a powerful database of more than two decades of statistical information that is the gold standard in its field.

The 50-State Survey

It was evident from the outset that LDRC's information gathering had to be national in scope. Again, however, it was not clear precisely how this could be accomplished. Ultimately, we undertook to develop a comprehensive network of correspondents asking them to respond to a "survey" of local developments in every state.

We proceeded cautiously, first drafting a tentative survey outline and then publishing sample state chapters in the LDRC Bulletin before rolling out the survey to all 50 states. This sample publication also helped in our recruitment of survey preparers, with Media Professional generously sharing its state by state list of recommended local counsel.

We've come a long way from the initial arm-twisting that was required to enlist some state reporters. Today, by contrast, many preparers proudly include their survey participation in Martindale and other biographical listings. The nationwide network of top media attorneys we put together also presaged our later establishment of the Defense Counsel Section that has become another vital mainstay of LDRC.

As for the form of the published survey, that developed organically as well. At first, I envisioned the survey as no more than a stapled compilation, along the lines of a thick LDRC Bulletin. Happily Bob Stein, then General Counsel of Warner Books, volunteered his art department to help us produce a cover and the 50-State Survey became a book.

Not to be outdone by Bob Scudilari's brilliant logo, Warner's Art Director designed the beautiful three-color cover that graced the survey for more than a dozen years. I've always felt it was the change of the cover colors each year that helped to overcome possible resistance to the annual purchase of completely new and updated volumes and that made the survey so financially valuable to the organization. Beginning in 1982 with a single survey, today the 50-State Survey has three annual editions – libel, privacy and employment – and is the backbone of MLRC's publishing program.

The Biennial Conference

It was understood from early on that LDRC had an information dissemination, and in that sense also an educational, role to play. But we did not initially envision LDRC as the sponsor of educational conferences. This idea, as I recall, was first broached by Terry Maguire, then General Counsel of the American Newspaper Publishers Association (now the NNA), who was looking for a high quality legal program to present as a service to ANPA members.

Terry offered to provide administrative and financial support for a substantive program that LDRC would

(Continued on page 58)

Twenty-five years ago this Saturday …

(Continued from page 57)

develop and soon thereafter the NAB joined in the effort. The first ANPA/NAB/LDRC conference was held in Chicago in August 1983, "on the tarmac," as we joked at the time, at the Hyatt Regency O'Hare. We opted for a central location in the mid-West to best attract a national audience of media attorneys.

The Conference, held thereafter biennially, soon developed a reputation for excellence and also for programming non-stop sessions, from and during breakfast until after dinner, with panels, expert speakers and specially prepared studies and presentations. Feedback was nonetheless almost unanimously positive, with one notable exception.

After each of the early conferences, George Freeman of the *New York Times* complained that we worked our attendees too hard. George's view was that a more leisurely schedule should be adopted, where families could attend in attractive and restful settings, the program punctuated by such pleasures as golf and tennis in the afternoon.

Some of you may recognize that George's very different approach became the genesis of the excellent ABA Communications Forum's Media Law Conference, held each year during the cold winter months at sunny resorts in Florida, Arizona or California.

But that was not LDRC's style. For LDRC the point was always content and hard work. Now, under the new regime, with perhaps greater confidence that an LDRC event can offer a bit of fun as well as education, Sandy Baron and the Board have supplemented the NNA/NAB program with MLRC's London Conference, held in alternating years. Although the locale is far more exciting, as an old warhorse I'm pleased to see that the London Conference is still run from early morning into the night and that it offers a superb, substantive program.

* * *

I could go on, but I won't. Let me conclude by simply observing on this, MLRC's 25th anniversary, that it is most gratifying to see how our early, uncertain efforts to invent an effective coalition for the advancement of the media's first amendment interests, have been realized. Indeed, our constant striving toward excellence in the work that we did has not only been carried on and sustained under the leadership of Sandy Baron and successor Chairs and Boards, but also supported by a loyal and ever expanding base of media organizations and defense counsel.

It has also been taken to new heights and in new directions that we, the founding fathers and mothers of LDRC, could never have envisioned. So congratulations to all of us – and here's to the progress and the successes that, building on the solid foundation of its first quarter century, we can optimistically envision the next 25 years at MLRC will bring.

Henry Kaufman was LDRC's General Counsel from 1980-1996.

Save the Date

LEGAL CHALLENGES OF CREATIVIVITY IN A CHANGING AND INCREASINGLY REGULATED MEDIA ENVIRONMENT

January 26, 2006
Los Angeles, California

LEGISLATIVE UPDATE

Shield Law, Cameras in the Supreme Court, Biodefense Office Exempt from FOIA

By Kevin M. Goldberg

As the 109th Congress nears the end of its first session, the major bills that started with so much progress have become bogged down as legislators get distracted by other issues. The major reforms to the Freedom of Information Act found in the Open Government Act received a large amount of attention upon introduction in March but have not progressed past a single hearing that occurred soon afterward.

Though momentum surrounding the Free Flow of Information Act has slowly but surely intensified, it now appears that the bill will receive no more legislative activity until Congress reconvenes in January. However, the possibility of cameras in the courts received a strong boost with a recent hearing.

Free Flow of Information Act (HR 3323 and S 1419)

- On February 2, 2005, Rep. Mike Pence (R-IN) introduced the "Free Flow of Information Act" (HR 581), which is largely based on existing Department of Justice guidelines for issuing subpoenas to members of the press. On February 9, 2005 Senator Richard Lugar (R-IN) introduced the same bill in the Senate as S 340.
- These bills were met with some minor concerns from House and Senate staff and the Department of Justice, especially where national security concerns would be implicated and, perhaps, threatened when the identity of a source could not be revealed. For that reason, the bills were redrafted and reintroduced by their original sponsors on July 18, 2005 as HR 3323 and S 1419; the bills now contain the following major provisions:
    - An absolute privilege against compelled testimony before any federal judicial, legislative, executive or administrative body regarding the identity of a confidential source or information that would reveal the identity of that source – unless there exists an "imminent and actual" harm to national security, in which case the reporter may be compelled to testify.
    - A qualified privilege against the production of documents to these bodies unless clear and convincing evidence demonstrates that the information cannot be obtained by a reasonable, alternative non-media source and:
        - (1) in a criminal prosecution or investigation, there are reasonable grounds to believe a crime has occurred and the information sought is essential to the prosecution or investigation or
        - (2) in a civil case, the information is essential to a dispositive issue in a case of substantial importance.
    - Protection for information about a reporter that is sought from a third party, such as telephone toll records or E-mail records, which provides that, in the event that such records are sought, the party seeking the information shall give the covered entity reasonable and timely notice of the request and an opportunity to be heard before the records are disclosed.
    - Definition of a "covered entity", which is the publisher of a newspaper, magazine, book journal or other periodical; a radio or television station, network or programming service; or a news agency or wire service, with a broad listing of media such as broadcast, cable, satellite or other means. It also includes any owner or operator of such entity, as well as their employees, contractors or any other person who gathers, edits, photographs, records, prepares or disseminates the news or information.
- The Senate Judiciary Committee convened a second hearing on this issue on October 19, 2005 (there had previously been a hearing in that committee on July 20, 2005). The most eagerly anticipated testimony at this hearing came from the Department of Justice, which was represented by Chuck Rosenberg, the United States Attorney for

(Continued on page 60)

LEGISLATIVE UPDATE

(Continued from page 59)

the Southern District of Texas. His testimony argued:

- A federal reporters' privilege would significantly interfere with the government's law enforcement activities
- The inflexible, mandatory standards for subpoenaing reporters are not a required extension of the DOJ's own voluntary guidelines which are already in place
- The only exception allowing the government to obtain the identity of a confidential source – applying when there is clear and convincing evidence of imminent and actual harm to national security – is too narrow, especially in the post-9/11 world.
- The requirement that the government bear the burden of overcoming the privilege in court would threaten the traditional secrecy associated with grand juries and ongoing law enforcement activities.
- The definition of "covered media" (i.e., the definition of a journalist) contemplated by the bill is too broad and would allow terrorist organizations such as Al-Queda to take advantage of the bill to hide from US law enforcement officials.
- The bill itself is simply unnecessary because there is no evidence that the subpoena power is currently being abused by the Department of Justice.

- It appears that other business in the Senate Judiciary Committee, including the confirmation hearings for Judge Samuel Alito, Jr., will preclude the committee from considering the Free Flow of Information Act prior to the end of 2005.

Cameras in the Supreme Court (S 1768)

- Every year, Senator Charles Grassley introduces a bill that would permit the televising of federal court proceedings. This year was no different, with the introduction of the Sunshine in the Court Room Act of 2005 (S 829). However, every year the bill gets stonewalled by the House Judiciary Committee because the Chairman of that Committee, Rep. James Sensenbrenner (R-WI) opposes the legislation. This year appears to be no different.
- The bill is not the final statement on the matter, allowing the Justices to override the legislation, as it reads in its entirety that: "The Supreme Court shall permit television coverage of all open sessions of the Court unless the Court decides, by a vote of the majority of justices, that allowing such coverage in a particular case would constitute a violation of the due process rights of 1 or more of the parties before the Court." Still, there is a presumption of openness that is explicit in the bill and one can presume that most oral arguments would be proper for television.
- A hearing was held in the Senate Judiciary Committee on November 9, 2005 with three panels of witnesses testifying at the hearing:
  - Panel 1: The Honorable Chuck Grassley, Senator from Iowa
  - Panel 2:
    - The Honorable Diarmuid O'Scannlain, United States Court of Appeals for the Ninth Circuit
    - The Honorable Jan E. DuBois United States District Court for the Eastern District of Pennsylvania
  - Panel 3:
    - Barbara Bergman, President, National Association of Criminal Defense Lawyers
    - Peter Irons, Professor of Political Science, Emeritus, University of California at San Diego
    - Seth Berlin, Partner, Levine Sullivan Koch & Schulz, L.L.P.
    - Brian Lamb, Founder & Chairman, C-SPAN
    - Henry Schleiff , Chairman and CEO, Court TV Networks
    - Barbara Cochran, President Radio-Television News Directors Association & Foundation

(Continued on page 61)

LEGISLATIVE UPDATE

(Continued from page 60)

Biodefense and Pandemic Vaccine and Drug Development Act of 2005 (S 1873)

- On October 17, 2005 Sen. Richard Burr (D-NC) introduced a bill that would create a new office within the Department of Health and Human Services.
- This office, to be named the Biomedical Advanced Research and Development Agency ("BARDA"), would be dedicated to countering bioterrorism. However, all of its activities and information would be exempt from the Freedom of Information Act and Federal Advisory Committee Act, unless the Secretary of Health and Human Services or Director of BARDA determined that release of the information would not harm the national security – a determination that was not subject to judicial review.
- The bill moved quickly through the Senate Committee on Health, Education, Labor and Pensions, passing on October 18. It took another 10 days before anyone outside of that committee took notice of the bill's existence and began to mount opposition. The bill has received no more attention from the Senate.

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

©2005
MEDIA LAW RESOURCE CENTER, INC.
80 Eighth Avenue, Suite 200
New York, NY 10011

ETHICS CORNER

Communicating With the Government Lawyer's Client

By Mark Tuft

Lawyers generally understand that it is inappropriate to communicate with a person represented by counsel about the subject of the representation without the consent of that person's lawyer. When it comes to representing a private citizen or the media in a dispute with the government, it is equally well established that clients have a legal right of access and a First Amendment right to petition the government for the redress of grievances.

Yet, the interplay between the "anti-contact" rule when the government is represented by counsel in the matter and the First Amendment right of access and right to petition is anything but clear. What little guidance there is in the way of rules, ethics opinions and case law is, unfortunately, not consistent, and lawyers seeking to communicate on behalf of their clients with public officials, boards and committees are often faced with difficult and sometimes controversial issues.

Striking the proper balance between the rule and the First Amendment has eluded many authorities resulting in lawyers either being overly restrictive in communicating with a represented government agency, or being accused of "overreaching."

Striking the proper balance between the rule and the First Amendment has eluded many authorities resulting in lawyers either being overly restrictive in communicating with a represented government agency, or being accused of "overreaching" by undermining the government client-lawyer relationship. There are practical considerations, however, that can assist lawyers in deciding how to exercise this important exception to the "anti-contact" rule.

The Basic "Anti-Contact" Rule

Understanding the "authorized by law" exception in this context requires a solid grounding on how the "anti-contact" rule works. The basic prohibition on contacts with represented parties is deeply imbedded in the law and has a long history dating back to the early 1800s. The ethical rules promulgated by the ABA have consistently included an "anti-contact" provision beginning with Canon 9 of the ABA Canons on Professional Ethics in 1908. Since that time, rules reflecting this fundamental concept generally follow the model offered by the ABA and have been adopted in every jurisdiction. ABA Formal Opinion 95-396.

The basic prohibition followed in most jurisdictions is succinctly stated in ABA Model Rule 4.2: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

The rule seeks to promote the proper functioning of the legal system by protecting against unreasonable interference with the client-lawyer relationship, possible overreaching by other lawyers who are participating in the matter and the uncounseled disclosure of information relating to the representation. Rule 4.2, comment 1. The rule shields represented parties not only from approaches by another lawyer which are intentionally improper, but from approaches that are well intended but misguided.

The rule is designed to permit a lawyer to adequately function as attorney for a represented party and to prevent opposing counsel from impeding that performance. Therefore, it is the lawyer for the represented person whose consent is required and not the represented party. The consent requirement exists regardless of the sophistication of the represented person and applies whether the represented person initiates the communication or elects to waive the protection under the rule. Restatement 3d § 99, comments b and g.

According to the Restatement, however, a represented person's lawyer may impliedly consent to a communication where, for example, the lawyer is present at a meeting and observes the communication. Consent may also be implied where direct contact occurs rou-

(Continued on page 63)

ETHICS CORNER

(Continued from page 62)

tinely as a matter of custom unless the opposing lawyer affirmatively protests. Restatement 3d § 99, comment j.

The rule applies in transactional and litigation matters and includes represented persons whose interests are aligned as well as those who are adverse parties. Rule 4.2, comment 2; Restatement 3d § 99, comment c. The rule is enforced as a "bright line" rule in a variety of ways, including discipline, disqualification, evidentiary rulings and equitable relief.

Rule 4.2 is intended to work in tandem with Model Rule 4.3 (Dealing with Unrepresented Person), which prevents a lawyer from taking advantage of a lay person to secure admissions against interests or achieve an unfair advantage. Rule 4.3 prevents a lawyer from overreaching an unrepresented party, while Rule 4.2 prevents a lawyer from undermining the protection a represented party has achieved by retaining counsel.

Limitations on the Basic Rule

The "anti-contact" rule applies only if the contact is made in connection with the representation of a client. Restatement 3d § 99, comment e. The rule is not intended to prevent the parties themselves from communicating directly with one another; nor does the rule prevent a lawyer from advising a client that such communication can be made, so long as the lawyer does not "mastermind" the communication. Rule 4.2, comment 4.

The prohibition against unilateral contact applies when the contacting lawyer actually knows that the person is in fact represented in the matter with respect to the subject of the communication. Rule 4.2, comment 8. Although the rule requires actual knowledge, knowledge may be inferred from the circumstances. Thus, a lawyer may not avoid the bar against communications with a represented person "simply by closing her eyes to the obvious." ABA Formal Opinion 95-396.

The "anti-contact" rule makes reference to both the subject matter of the contacting lawyer's representation and the matter in which the person to be contacted is represented and requires a connection between the two. The requirement that a lawyer not communicate "about the subject of the representation" (referring to the communicating lawyer's representation) with a party the lawyer knows to be represented by another lawyer "in the matter" means that the rule applies if the second representation is "within the compass of the inquiring lawyer's representation." ABA Formal Opinion 95-396. The required connection imparted by the phrase "in the matter," therefore, defines the scope of the rule. When a person is represented by a lawyer in a particular matter, that representation will bar communications regarding that matter and on related matters, but not communications that do not relate to the representation. Rule 4.2, comment 2; Restatement 3d § 99, comment d.

The rule contemplates that "in the matter" be sufficiently specific so that the communicating lawyer is on notice. The fact that a local government agency is represented by city or county counsel does not prevent a lawyer from contacting local government officials unless the contacting lawyer knows that the agency is represented by counsel with respect to subject matter of the proposed communication.

Practical difficulties arise when the represented person is a public or private organization. Comment 7 to Rule 4.2 states that the rule prohibits communications with "a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability."

Contact with an officer, director or managing agent of a represented entity is, therefore, improper. Contact with other employees may be improper if the subject of the communication is an act or omission of such a person which may be binding on or imputed to the organization. Some jurisdictions extend the prohibition to employees whose statements may constitute an admission on the part of the organization. California Rule of Professional Conduct 2-100 (B)(2). However, Rule 4.2 was amended in 2002 to eliminate this category of employees from the scope of the model rule.

Authorization by Law Exception

When it comes to communicating with government personnel, the "authorized by law exception" comes into play. Prosecutors and other government lawyers frequently rely on this exception in seeking to communicate directly with a private citizen or organization that is a target of an investi-

(Continued on page 64)

ETHICS CORNER

(Continued from page 63)

gation even if the person is known to be presented by counsel. This has led to a great deal of controversy.

The Department of Justice claimed in 1989 in the so-called Thornburgh memorandum that unilateral contact with represented suspects has always been considered a legitimate law enforcement activity and, in addition, federal prosecutors are exempt from the "anti-contact" rule under the supremacy clause of the United States Constitution. The government later refined it's position in 1994 under the "Reno Rules". Congress answered by passing the Citizen Protection Act (also known as the McDade Amendment) in 1999 confirming that government lawyers are subject to the same professional conduct rules as all other lawyers.

Application of the exception in the converse situation where a lawyer for a private citizen or the media seeks to communicate with government officials is no less controversial. The First Amendment provides a constitutional right for citizens to petition the government for the redress of grievances. Because the government has a responsibility to supply information to the public concerning government policy and decision-making, and to be responsive to public views as to how the government should be run, public policy favors direct access to government decision makers. Statutory rights such as the Freedom of Information Act, the Federal Advisory Committee Act, and state and local open meeting laws also require a balance between open government and protection of the government client-lawyer relationship.

Most jurisdictions recognize that a citizen's right to communicate with the government extends to the citizen's lawyer. ABA Formal Opinion 97-408, note 10; Colorado Formal Opinion No. 93 (1994), note 3 (23 Colo. Law 329). As a result, some courts have held that these legal rights take priority over the "anti-contact" rule. *See, e.g.*, *Vega v. Bloomsburgh,* 427 F. Supp. 593 (D. Mass. 1977).

At the same time, the public interest served by the attorney-client privilege applies to public as well as private organizations, and the government client-lawyer relationship is entitled to the same protections as other client-lawyer relationships. *Galaraza v. United States*, 179 F.R. D. 291, 295 (S.D. Cal. 1998); *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 381 (1993).

Applying to Contacts with the Government Lawyer's Client

Jurisdictions differ considerably in applying the "authorized by law" exception to communications with a represented government agency or official. A broad application of the "anti-contact" rule would be hostile to the constitutional guarantees and statutes protecting open meetings and access to government. But, taking the "authorized by law" exception literally would permit ex parte communications that could unreasonably interfere with the government lawyer's relationship with the government client and could be detrimental to government officials who are adverse parties in an active litigation.

All jurisdictions recognize that direct contact is permitted under the First Amendment right to petition the government for redress of grievances, yet there is little judicial authority defining what contact is protected. Most ethics opinions do not address the extent to which the First Amendment or "sunshine" and "whistleblower" statutes override the "anti-contact" rule. *See* Bar Association of New York Formal Opinion 91-4 (1991) and ABA Formal Opinion 97-408, note 5. However, Maryland Formal Opinion 91-46 concludes that a request under a state public records act clearly falls within the "authorized by law" exception.

Comment 5 to Rule 4.2 states that "communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government." ABA Formal Opinion 97-408 limits this exception to government officials (1) who have authority to take or recommend action in the matter; (2) where the sole purpose of the communication is to address a policy issue, including settling the controversy; and (3) only after the lawyer gives government counsel reasonable advance notice of the lawyer's intent to communicate and affords government counsel the opportunity to consult with the government official on the advisability of entertaining the communication.

Restatement 3d § 101 is similar to ABA Opinion 97-408 with respect to the right to communicate regarding policy issues, but does not require advance notice to government counsel prior to initiating contact with a govern-

(Continued on page 65)

ETHICS CORNER

(Continued from page 64)

ment officer. Section 101 exempts from the application of the "anti-contact" rule (Restatement § 99) communications with employees of a represented government agency and with a government officer who is being represented in the officer's official capacity. However, this exemption does not apply to negotiation or litigation of a specific claim against the agency or officer, unless the contact involves "an issue of general policy." Under the Restatement approach, the exception has a particularly wide application to governmental clients. *See* § 101, comment b. The application of the "anti-contact" rule is narrowly limited to those instances in which the government stands in a position that is analogous to a private litigant with respect to the ex parte contact and where the potential for abuse is clear.

The New York City Bar Association interpreted the "authorized by law" exception in New York's DR 7-104 (a) to require that any written communication to a government "decision maker" must be accompanied by a disclosure that the matter being addressed is in litigation and that the official may wish to consult government counsel before responding. A copy of the disclosure must also be sent to the public official's counsel.

The communication could include a request to meet with the public official, but the official's counsel should be present at the meeting. New York City Bar Association Formal Opinion 1991-4. In New York City Bar Association Formal Opinion 1988-8, the committee concluded that a lawyer may submit written comments to the head of a government agency provided the lawyer notifies the agency's lawyer of the intended communication and provides the lawyer with copies of the submissions. The comment to Colorado's rule 4.2, on the other hand, simply provides that "[c]ommunications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter." Colorado extends that right to the party's lawyer. *See* Colorado Formal Opinion No. 93 (1994), note 3.

D.C. Rule 4.2(d) permits communications with government officials having authority to redress grievances involving the government (but not with other government personnel) without prior consent of government counsel, provided that prior to the communication, the contacting lawyer discloses to the official the lawyer's identity and the fact that the lawyer represents a party with a claim against the government. See D.C. Formal Opinion 280. The exception is not intended to permit a lawyer to bypass government counsel on every issue that may arise in the course of a dispute, but is intended to provide access to government decision makers with respect to "genuine grievances," such as presenting the view that the government's policy position in the matter is wrong or that government personnel are conducting themselves improperly. D.C. Rule 4.2, comments 6 and 7.

North Carolina Rule 4.2(b) applies the exception to communications with "elected officials" who have authority over the represented government agency or body but only if the communication is (1) in writing with a copy promptly delivered to government counsel; (2) given orally upon adequate notice to counsel or (3) given in the course of public proceedings. Utah's Rule 4.2(d)(3) (effective November 1, 2005) states: "this rule does not apply to communications with government parties, employees or officials, unless litigation about the subject of the representation is pending or eminent. Communications with elected officials on policy matters are permissible when litigation is pending or imminent after disclosure of the representation to the official."

California is the only jurisdiction with an unqualified exception to unconsented contacts with a represented government agency. The exception, which has been part of the rule in California since 1928, provides: "[t]his rule shall not prohibit communications with a public officer, board, committee or body." California rule 2-100(C)(1). One case has interpreted the term "public officer" to apply to the "duly appointed or elected public officers of a state, county, township, city or other subdivision of the state, as distinguished from mere employees thereof." *H.O. Cleland v. Superior Court*, 52 Cal. App. 2d 530,533 (1942).

Practical Considerations

The application of the "authorized by law" exception to direct contacts with a represented government entity has not been adequately defined in the law. Most ethics opinions and commentary acknowledge that the exception

(Continued on page 66)

ETHICS CORNER

(Continued from page 65)

is largely a matter for the courts and is, therefore, outside the scope of ethics rules. The extent to which the Constitution and statutory rights of access override the "anti-contact" rule will likely depend on the purpose of the intended communication and the status of the public official or governmental employee with whom the lawyer seeks to communicate. As a result, an individual lawyer seeking to approach a government lawyer's client will need to strike the proper balance between advancing the client's legitimate right of access and right of petition and respecting the government lawyer-client relationship.

Communications with represented public officials and government agencies should be open and straightforward and not used as a means to simply bypass counsel. Unless the client's right of access or right to petition would be unreasonably compromised, or there is an overriding need for confidentiality, it is often better practice to tell government counsel about the intended communication if for no other reason than to avoid unnecessary disputes. Unilateral communications with government officials and represented bodies should involve issues that further the client's legitimate grievance and right to public information and not routine aspects of litigation.

An individual lawyer seeking to approach a government lawyer's client will need to strike the proper balance between advancing the client's legitimate right of access and right of petition and respecting the government lawyer-client relationship.

A private person's lawyer should have greater latitude when appearing before a government board, committee or body. However, in approaching an official or employee of the government, the lawyer should first ascertain the status of the person sought to be interviewed. Most states limit the exception to communications with "government officials" or "public officers," (although the Restatement applies the exception to employees of a represented government agency).

For the most part, these terms are not well defined and will largely depend on the particular agency. If the person sought to be contacted is a government employee and not a public official, lawyers are well advised to follow comment 7 to Rule 4.2 and avoid communicating with a staff member that is included within the definition of a represented organization. *See, e.g.,* California State Bar Formal Opinion 1977-43 (attorney for claimant entitled to communicate directly with the city manager about the claim without the consent of the city attorney and with city staff who are not deemed to be a "party" under the rule).

Where it is permissible for counsel to interview officials or employees of a represented government entity, the contacting lawyer should identify the lawyer's role, and unless confidential, the lawyer's client in the matter. Even where the exception clearly applies, the contacting lawyer may not imply that the lawyer is disinterested. *See* Model Rule 4.3. Likewise, the contacting lawyer should not use the opportunity as a means to seek privileged or other confidential information the lawyer knows or reasonably should know the person contacted may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive. Model Rule 4.4(a), and see New York State Bar Association Formal Opinion 700. Moreover, there is authority that overreaching by lawyers in ex parte communications with current or even former employees of a represented party may constitute a violation of Model Rule 8.4(c) (engaging in conduct involving dishonesty, fraud, or misrepresentation) or Rule 8.4 (d) (engaging in conduct that is prejudicial to the administration of justice).

Rule 4.2 was amended in 2002 to specifically exempt communications that are authorized by court order. Where the reach of the exception is uncertain, lawyers should consider seeking court approval to contact a particular government official under the Constitution or applicable open government or whistleblower statute. See ABA Formal Opinion 97-408, note 16.

In any event, a lawyer should immediately terminate communication with a person if, after commencing the communication, the lawyer learns that the person is one with whom communication is not permitted by the exception to the rule.

Mark Tuft is a partner with Cooper, White & Cooper LLP in San Francisco.