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MLRC Media Law Resource Center

MEDIALAWLETTER

Reporting Developments Through November 25, 2009

MLRC

LIBEL & PRIVACY

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"These are giants of the art, music, theater world, and it's an honor to be here with them," said panel moderator Ken Paulson. Pictured from left to right: Arnold Lehman, Oskar Eustis, Ken Paulson and Peter Yarrow.

MLRC Honors Former Czech President, Playwright Václav Havel

Ken Paulson Moderates Panel on Arts and Social Change with Oskar Eustis, Arnold Lehman and Peter Yarrow

Approximately 650 MLRC members and guests gathered on November 11th for MLRC's annual dinner held at the Grand Hyatt in New York City. MLRC honored Václav Havel, a playwright and the former President of the Czech Republic, with its *WILLIAM J. BRENNAN, JR. DEFENSE OF FREEDOM AWARD*. President Havel was lauded for his commitment to free expression throughout the struggle for democracy in the former Czechoslovakia. The award was accepted by Ambassador Martin Palouš, the Permanent Representative of the Czech Republic to the United Nations.

President Havel was an early leader of the dissident movement in Czechoslovakia. In 1970, he was publicly condemned by the Communist regime in its official media and became a banned writer. His plays were pulled from schools and libraries, and it became unlawful to publish or perform them. President Havel continued to write, boldly calling on the government to respect human rights, and became more politically engaged. For his political activities and writings, he was repeatedly arrested and jailed. Almost twenty years later, President Havel played a key role in the revolution – called the Velvet Revolution – that led to the downfall of the Communist government in 1989 and spread through Eastern Europe in the early 1990s.

MLRC's *WILLIAM J. BRENNAN, JR. DEFENSE OF FREEDOM AWARD* was established to honor those whose actions have advanced the cause of freedom of expression. First given to Mr. Justice Brennan, and then named in his honor, the award serves as a symbol and celebration of the principles of the First Amendment.

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MLRC annual dinner also featured a panel discussion entitled "The Power of Creativity: The Arts and Social Change." It was moderated by Ken Paulson, and the panelists were Oskar Eustis, Arnold Lehman and Peter Yarrow. Ken Paulson is the President and Chief Operating Officer of the Freedom Forum, Newseum and the Diversity Institute. Oskar Eustis is the Artistic Director of The Public Theater in New York. Arnold Lehman is the Director of the Brooklyn Museum. Peter Yarrow sang in the famed 1960s folk trio,

Ambassador Martin Palouš: I remember 20 years ago when [Havel] came here for the first time as the President of the Czech Republic, of Czechoslovakia because he was here before in '68, he gave a speech in the Joint Session of the United States Congress. And he said there one interesting thing, I remember it very well. He basically said that now it's time, we will need to thank you for all the help, assistance, know-how, even material support you can offer us for our transition. And there is hardly anything we can offer you back as a compensation. But one thing, and it is maybe a situation of a man who lays on the ground with a big boulder on his chest, being pressed down by the gravity, and having his thoughts and dreams about freedom. And maybe in the wisdom or the message of this man is something that can even inspire, or say something positive to the free world as well.

Ken Paulson: So much art that has an impact takes risks, and a great example is a work you produced, "Angels in America." Could you talk about where that came from, and how it came about?

Oskar Eustis: … it did something that is exactly what you said, Peter, that was in a way far deeper than simply a response to the AIDS crisis. In response to that crisis, you had a work of art, and it was a huge, ambitious work of art that for the first time really in mainstream culture posited that gay people were not simply human, were not simply just like you and me, but that gay humans had the chance to stand in for all of us. Had the chance to be every man. And in that claim, was making the fundamental claim that a work of art or a work of theater can make, which is that we all share the same core, ultimately.

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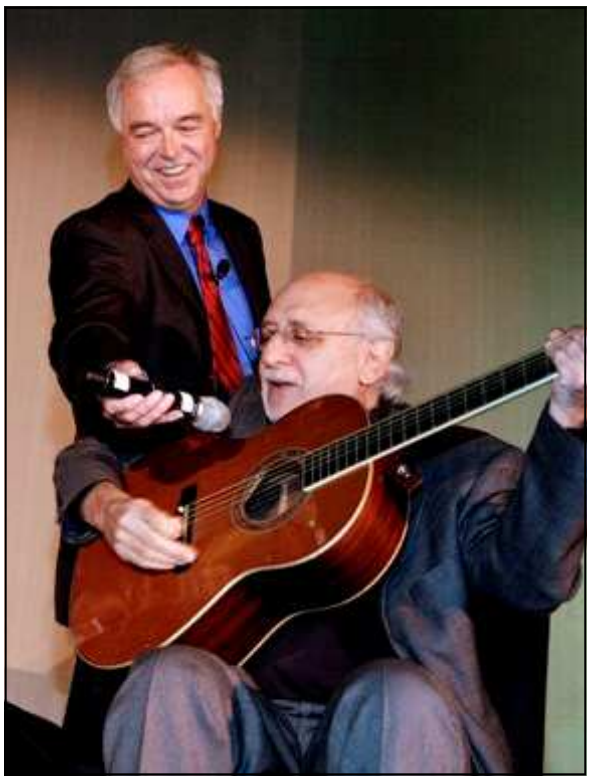

Ken Paulson: In terms of the visual arts, Arnold, is there a way to start a movement or drive a movement with art?

Arnold Lehman: I certainly think there's a way to comment on a movement. I'm not sure there's a way to begin a movement, but you certainly can become an active participant. I've seen that over and over again, both through the eyes of artist friends, and certainly in the museum community. I think the commentary is very important because it's what brings the work of art into some kind of relationship with the viewer, the visitor. I'm not sure, I'm not sure the something begins with the work of art. It may be in music. But commentary is very important.

Peter Yarrow: [Singing] Was it Cesar Chavez, or Rosa Parks that day? Some say Dr. King or Gandhi set them on their way. No matter who your mentors are, it's pretty plain to see, that if you been to jail for justice, you're in good company. Have you been to jail for justice? I want to shake your hand, 'cause sitting in and lying down are ways to take a stand.

Ken Paulson: I need to make one thing clear, singing along is not grounds for disbarment. You should feel free to join in.

More from the 2009 MLRC Dinner:

- Photos from the cocktail party and dinner
- Video of speeches and panel discussion
- Full transcript

Coming soon to www.medialaw.org

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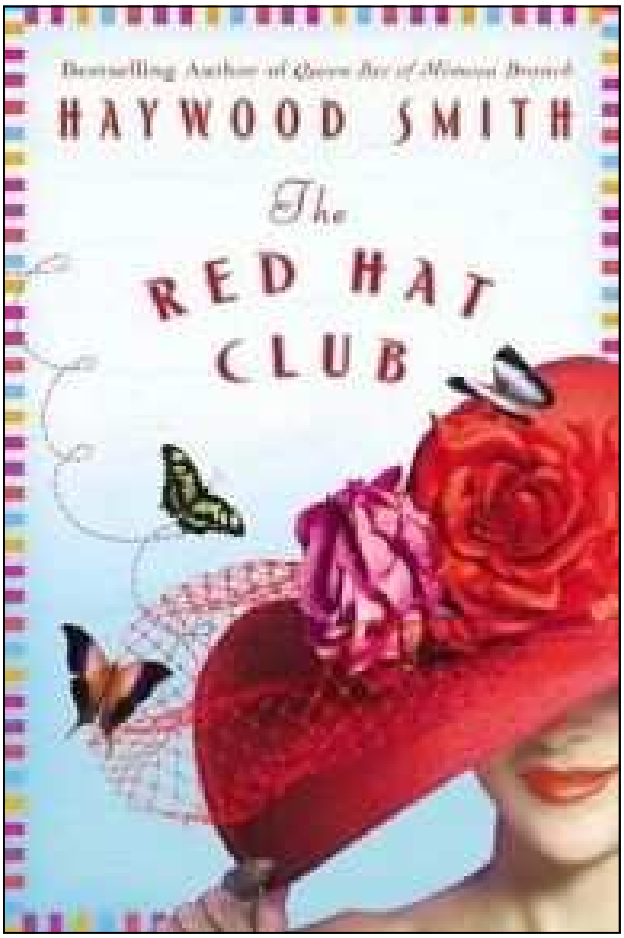
Georgia Jury Returns Mixed Verdict in Libel-in-Fiction Case Involving *The Red Hat Club*

By Tom Clyde

After five years of litigation and an eight day trial, a jury ruled in mid-November on a Georgia woman's claim that she was defamed and her privacy was invaded by the depiction of a fun loving, hard-drinking, sexually-active character in the novel, *The Red Hat Club*. *Stewart v. Smith*, No. 2004-SV-1137-D (Ga. Sup. Ct.).



On November 19, the jury of eight men and four women returned a verdict that awarded plaintiff Vickie Stewart $100,000 on her libel claim but rejected Stewart's claim for invasion of privacy as well as her claim for attorneys' fees, which would have required the jury to find that the novel was published in "bad faith."

The case arises from author Haywood Smith's eighth novel and second work of contemporary fiction. *The Red Hat Club* tells the story of five, colorful, middle-aged, female characters who gather regularly in a lunch club, reminisce about growing up together in Atlanta, and ultimately execute a fanciful plot to take revenge on a philandering husband.

The book's jacket describes it as the author's "tribute to the 'Jilted Generation' – women who, like her, emerged victorious through divorce, terrible teens, menopause, the Internet, tennis elbow, spreading waistlines, nothing but tacky clothes in stores and countless other modern tribulations."

When it was published in 2003, the novel met with positive reviews and commercial success, reaching position 15 on *The New York Times* fiction bestsellers list. As sales of the novel grew, Stewart waited until the last day of the one year statute of limitations period and then filed a multi-count lawsuit against Smith and her publisher St. Martin's Press.

In the suit, Stewart claimed that the character "SuSu" in the novel was identifiable as her based on more than 30 distinct similarities between Stewart's life and the character's backstory.

The similar or identical traits included items from Stewart's and SuSu's upbringing in Atlanta, the death of their first husbands in South Carolina, the circumstances of their divorce from their second husbands in Atlanta, the fact that they both eventually became flight attendants late in their lives and the fact that both gave their daughters similar names: "Mindunn" (Stewart's daughter) and "Mignon" (SuSu's daughter).

At trial, Stewart belittled the fact that Smith alerted readers of the novel that the life experiences of her friends served merely as the "jumping off point" for her "overactive imagination."

Because of the similarities, Plaintiff claimed that she was defamed by the character's participation in escapades including drinking and sex with "stud puppies."

She also claimed that the depiction of the character revealed private matters involving her childhood relationship with her working parents and the fact that she had undergone a facelift as a adult.

Stewart was a close friend of Smith's older sister growing up, and Smith and Stewart had remained in occasional touch

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ever since, including attending a seminar for aspiring authors together.

The case reached the jury framed by a 2008 Georgia Court of Appeals' decision that examined the case on an interlocutory appeal from the trial court's denial of summary judgment. The Court of Appeals' opinion dismissed a variety of Stewart's claims, including claims for false light invasion of privacy and infliction of emotional distress, but allowed the case to proceed to a jury against the author and publisher on her claims for libel and public disclosure of embarrassing private facts.

Trial began on November 9, 2009 in Gainesville, Georgia, a city approximately 50 miles north of Atlanta at the southern base of the Appalachian mountains. Gainesville is the county seat of Hall County, where Smith resides. Stewart is from the Buckhead area of Atlanta.

Following a Monday devoted to jury selection, Stewart's attorneys presented her case over the course of the rest of the week. Stewart's attorneys called a succession of Stewart's friends who expressed outrage and frustration at the number of recognizable similarities between the character SuSu's backstory and Stewart's life. Although the friends testified that the novel had caused Stewart to be less outgoing, they also consistently testified that the novel did not lead them to believe that Stewart was promiscuous or that she abused alcohol.

Stewart herself testified that she had been deeply hurt by the novel and felt that she had no choice but to file the lawsuit. The latter claim permitted introduction of evidence that she had on prior occasions resorted to bringing legal actions, including an EEOC complaint against a prior employer and a claim against her sister in connection with the probate of her father's estate.

Stewart's attorneys called Smith during their case and cross-examined her, including with email and other records obtained from her computer through electronic discovery. Notably, in one such email, Stewart had encouraged aspiring writers to draw from real life when creating characters, but suggested "disguising" the characters sufficiently "to avoid problems."

Stewart's attorneys also called two experts. The first was a local psychologist who testified that Stewart suffered from lifelong depression (a fact that even Stewart conceded was unknown to Smith). Stewart's psychologist testified that the publication of *The Red Hat Club* had thrown Stewart into a serious, unresolved bout of depression just as she was emerging from one of her most significant depressive episodes. The expert also testified that during his examination of Stewart, he had discarded one of the tests he administered to her because it showed signs of exaggeration.

Stewart's second expert was Jonathan Kirsch, a Los Angeles-based publishing attorney, who testified that any novel that suggests that it is inspired by the lives of real people and contains characters that do "disreputable" things should be subjected to careful pre-publication vetting. He claimed that by failing to vet this novel, the defendants had failed to meet the standard of care in the industry.

Defendants presented their case in a two day period. Smith and her editor Jennifer Enderlin both testified to their work in preparing and editing the novel, which they understood would be read as a work of fiction, particularly given the implausible plot of the novel.

The novel contains some serious moments, but these are woven into a variety of fanciful events including a suburban "dominatrix" who systematically takes revenge on cheating husbands, a character who amasses a twenty million dollar fortune by investing her household budget in penny stocks, and a exuberant round of cheerleading by the whole group of "Red Hats" after they succeed in executing an elaborate plot to prevail over a philandering spouse.

In addition to the author and editor, defendants also presented two experts, Daniel Menaker, former Editor in Chief of Random House, and Hugh Ruppersburg, a professor of English and associate dean at University of Georgia.

Both Menaker and Ruppersburg testified that the defendants were reasonable in publishing the novel with the understanding that it would be read as fiction and that the existence of similarities between characters and real people is not unusual in novels, both past and present.

Ruppersburg testified that authors such as Ernest Hemingway, F. Scott Fitzgerald and Flannery O'Connor were examples of authors who created characters "modeled" after real people, but their work was nonetheless understood as fiction.

On directed verdict motions, the trial court dismissed Plaintiff's claims for punitive damages. The court ruled that under Georgia's retraction statute, Stewart's failure to send a pre-lawsuit retraction demand was fatal to her libel-based punitive damages claim. Likewise, the court concluded that

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Stewart's election to seek damages under a Georgia statute that authorizes recovery where a party's entire injury is to her "peace, happiness, and feelings" was fatal to her privacy-based punitive damages claim.

Closing arguments included Stewart's counsel throwing out a swath of white fabric before the jury and writing "slut" on it with indelible marker.

Over objection, Stewart's counsel followed this up by telling the jury to "send a message" to publishers with their verdict. "What is her reputation worth?" Stewart's counsel asked the jury. "Is it $1 million, $3 million, $5 million? I can't answer that for you."

The court then charged the jury with instructions derived mostly from Stewart's proposed instructions. Most notably, the court's charge effectively merged the "of and concerning" standard into the test of whether the novel could be reasonably understood as stating "actual facts."

In effect, under the court's instruction, if the jury concluded that the character SuSu could be identified with Stewart, that was sufficient to conclude it was actionable as libel.

After deliberating into the evening on November 18, the jury returned its verdict by midday on November 19. The jury awarded $100,000 to Stewart on the libel claim, but rejected Stewart's claims for invasion of privacy and for the recovery of attorneys' fees under a Georgia statute that Stewart claimed authorized such recovery in tort actions if "bad faith" is shown.

In conversations with several jurors that remained after the verdict, they indicated that they were troubled by the number and specificity of similarities between Stewart and SuSu, but many jurors thought it was an unintentional error that should have been resolved between Stewart and Smith without resorting to litigation.

Given the length of and significant investment in the case prior to and during trial, the $100,000 award is not likely to cover the Plaintiff's costs involved in presenting the case.

It remains unclear at this point whether either side in the case will pursue an appeal.

Tom Clyde is a member of Dow Lohnes PLLC in Atlanta. Defendants are represented by Peter Canfield, Tom Clyde, Michael Kovaka and Lesli Gaither of Dow Lohnes. Plaintiff is represented by Jeffrey D. Horst and David A. Sirna of Krevolin & Horst in Atlanta and Joann Brown Williams of Dalton, Georgia.

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Doctor Wins $10.1 Million Jury Verdict in Florida Libel Trial

Newspaper Reported That Doctor Was Being Investigated for Sexual Harassment and Misuse of Money

In a recent Florida libel trial, a jury awarded $10.1 million to the former chief of medicine at the Bay Pines VA Medical Center in St. Petersburg, Florida for three articles published in the *St. Petersburg Times* reporting on then-pending investigations of the plaintiff. *Kennedy v. Times Publ. Co.*, No. 05-8034-CI-11 (Fla. Cir. Ct., Pinellas Co. jury verdict Aug. 28, 2009).

The articles, published in December 2003 in the *St. Petersburg Times* and authored by staff writer Paul de la Garza, reported that plaintiff, Dr. Harold L. Kennedy, was ousted as chief of medicine and reassigned to a lesser position in the hospital as he was under federal investigation for sexual harassment and misuse of money.

The first article, published on December 4, 2003, stated that plaintiff was being investigated by the Department of Veterans Affairs Inspector General for accepting money from pharmaceutical companies to pay for private parties. The article also reported that plaintiff was facing several Equal Employment Opportunity complaints, including one alleging "sexual harassment" and another claiming that plaintiff routinely told staff members they were too old and should consider quitting.

The reporter reached plaintiff by telephone the night before the article was published. The article reported that plaintiff confirmed the existence of the investigations but stated "he had done nothing wrong." The article also reported his explanation that the harassment complaint arose from his giving a colleague an apron as a gift and asking someone to make coffee.

The article also quoted the VA hospital's director who confirmed that investigations were pending and that plaintiff was asked to step down as chief of medicine, but who also stated that plaintiff had not been found to have done anything wrong.

Subsequent articles on December 9 and 10 focused on additional complaints and investigations involving other officials at the VA hospital, but repeated the earlier statements about plaintiff being ousted as chief and reassigned while under investigation for sexual harassment and misuse of money.

Libel Complaint & Pretrial Rulings

Plaintiff filed suit in December 2005 against the newspaper and reporter for libel and false light, claiming that the term "ousted" in the articles falsely implied that he had been fired from the hospital; and that the articles falsely implied that he had been reassigned because of the pending investigations. Plaintiff also alleged that the articles falsely mischaracterized the nature of the investigations against him. He emphasized that he was never found guilty of "sexual harassment" or of misusing federal funds.

The reporter who wrote the stories, Paul de la Garza, died in October 2006, and was dropped as a defendant in the case. By the time the case got to trial, the plaintiff had only one count of libel remaining.

In a pretrial ruling, the plaintiff was held to be a public official because of his position in a federal hospital. However, the trial court denied the newspaper's motions for summary judgment asserting lack of sufficient evidence of actual malice, privilege based on the reporting of information obtained from public officials, and insufficiency of plaintiff's March 2004 retraction demand to support the suit.

The trial court's orders did not contain explanations for its rulings. (The retraction demand, a condition precedent under section 770.01 of the Florida Statutes, asserted that "ousted" connoted "removal for cause" under federal employment statutes and asserted the article was in error because plaintiff had not been found guilty of sexual harassment or misusing funds.)

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Libel Trial

At trial, plaintiff argued that the newspaper articles were false because he was innocent of "sexual harassment." Plaintiff called a VA hospital employee and introduced a letter from a Veterans Administration official to give evidence on the meaning of sexual harassment which plaintiff argued was distinct from the mere "gender discrimination" of which he claimed he was accused, also falsely. The plaintiff also argued that the article falsely implied he had stolen or used VA money for personal benefit. Although the defense introduced evidence that the reporter's sources for the information were VA officials, those officials -- whose testimony was presented by deposition because they had since transferred out of state -- either denied memory of being the source of the phrases "sexual harassment" and "misuse of money."

The newspaper was precluded from introducing de la Garza's handwritten notes. Although the trial court found they were authenticated and qualified under the "business records" hearsay exception, he refused to admit them because the defendant could not present independent evidence of the dates and circumstances of their creation.

This ruling left plaintiff's account of his telephone conversation with de la Garza without specific contradiction. Plaintiff described the telephone conversation as one in which de la Garza called to tell him the Times would be printing stories about his commission of sexual harassment at the VA, and then deceitfully misrepresented plaintiff's expressions of confusion and denial as "confirmation" of the existence of investigations.

The defense was also precluded from introducing evidence that the VA settled, with payments of money to the claimants, all of the EEO complaints arising out of the plaintiff's behavior. However, two VA Inspector General reports, from February and August 2004, were admitted in evidence. The February report focused on plaintiff's solicitation of funds from pharmaceutical companies that were doing business with the VA and found that he was neither cooperative nor truthful in the course of the VA's inquiry. The August report found that plaintiff misused federal funds in connection with a community education program he had planned while at the VA and that he had created a hostile work environment while employed as the chief of medicine.

As for damages, the plaintiff testified that job offers at the University of Michigan and a private medical school in the Caribbean were rescinded after the employers saw the articles, and that he was unable to find a position as a professor in the U.S.. The department chief at the University of Michigan responsible for rejecting plaintiff's application testified he did so for reasons other than the Times stories. The hiring official at the Caribbean medical school testified that documentation showing plaintiff was found innocent or unjustly accused would have adequately answered his questions about plaintiff's VA employment. Plaintiff has practiced medicine and worked on a medical project in Greece and as a consultant since the articles were published. The trial lasted five days.

At the conclusion of plaintiff's case and at the close of the evidence, the defense moved for directed verdict on a number of grounds, including lack of evidence of falsity and lack of evidence of actual malice. The trial judge reserved ruling on the motion at the close of the evidence, but submitted the case to the jury.

The six-member jury found for the plaintiff, finding that the newspaper had published false and defamatory statements about him with actual malice. It awarded $5,149,137 in compensatory damages ($1,673,137 in lost past earnings, $2,226,000 in lost future earnings, and $1.25 million for damage to reputation), and $5 million in punitive damages. Immediately after the Friday afternoon verdict, the trial judge asked the parties to agree on a hearing time the following week for further argument on the directed verdict motion or other matters.

The defense filed a written brief in support of directed verdict in advance of the hearing on September 3. The plaintiff did not.

At the conclusion of the hearing, the court directed the plaintiff to serve a brief once the trial transcript was finalized and to specifically point out the evidence supporting the jury's verdict on the issues of falsity and actual malice. The plaintiff served his brief on November 10, 2009. The defense has the right to reply. The court is not expected to take up the motion again until January 2010. The defense has also moved for JNOV and/or new trial on a number of additional grounds.

Alison Steele and Thomas E. Reynolds of Rahdert Steele& Reynolds, P.A. in St. Petersburg, Fla. represented the newspaper. The plaintiff was represented by Timothy W. Weber of

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Pa. Supreme Court Vacates $3.5M Judgment Due to Appearance of Impropriety By Judges

By Kevin Abbott

On November 4, 2009, the Pennsylvania Supreme Court, after exercising its rarely used King's Bench jurisdiction to take plenary jurisdiction over a matter, vacated a $3.5 million libel judgment "to remedy the pervasive appearance of impropriety in this case, and to give justice, and the appearance of justice, an opportunity to prevail." *Joseph v. Scranton Times*, No. 19 MM 2009 (Pa. November 4, 2009).

The Supreme Court accepted the findings of the Honorable William Platt, President Judge of the Court of Common Pleas of Lehigh County, that there was an appearance of impropriety in both the assignment and trial of the *Joseph* case because of the actions of Michael Conahan, former president judge of Luzerne County, and Mark Ciavarella, a former judge in Luzerne County. Conahan assigned the non-jury trial to Ciavarella, who denied the newspaper's motion for summary judgment and entered the verdict of $3.5 million against the newspaper. Both Conahan and Ciavarella are awaiting trial on federal charges related to their acceptance of payments in excess of $2 million from persons related to juvenile detention centers in Luzerne County.

Background

The *Joseph* case involved a series of 10 articles published by the *Citizens' Voice* newspaper in Wilkes-Barre, Pennsylvania. The articles reported on a federal criminal investigation into Joseph's alleged ties to reputed organized crime boss Billy D'Elia and searches of Joseph's home and business. The government contended that D'Elia was the head of the organized crime family in the area and that Joseph was his associate. Significant pretrial motions, including the newspaper's motion for summary judgment, were assigned to former judge Ciavarella and he ruled against the newspaper on all of them.

The newspaper asked former president judge Conahan to assign an out-of-county judge because it was suspicious of the assignments to Ciavarella and the plaintiffs' insistence that Ciavarella hear the motions and the trial. The request was denied but Conahan, Ciavarella and the Court Administrator, William Sharkey, all assured the newspaper that the assignments of pretrial matters and the trial would be made on a random, rotational basis.

The non-jury trial was then assigned to Ciavarella who entered judgment in favor of Joseph and his business for $3.5 million. The judgment was affirmed on appeal by the Superior Court, which relied upon Ciavarella's findings of fact, including his finding that Joseph no longer had a close relationship to D'Elia.

While the newspaper's petition for appeal was pending, Conahan and Ciavarella pleaded guilty to federal charges arising out of a scheme in which the two judges were paid $2.6 million by the owner and builder of a juvenile detention facility. Both judges were removed from office. The guilty pleas, however, were not accepted by the federal court and the former judges are now awaiting trial. Court Administrator Sharkey also pleaded guilty to federal embezzlement charges.

Petition to Vacate Judgment

After the guilty pleas of Conahan and Ciavarella, the newspaper petitioned the Supreme Court to exercise its King's Bench powers to vacate the judgment. Finding that there was a colorable claim of irregularity in the assignment and trial of the case, the Supreme Court appointed President Judge Platt to hold an evidentiary hearing and make a report and recommendation on whether the newspaper was entitled to any relief. After holding the evidentiary hearing, Judge Platt found an appearance of impropriety in both the assignment and trial of the *Joseph* action. He recommended that the judgment be vacated, along with the substantive orders entered by Conahan and Ciavarella.

As to the assignment of the trial, Judge Platt found, and the Supreme Court agreed, that the assurances of Conahan and Ciavarella that the pretrial motions and the non-jury trial would be randomly assigned were misleading or plainly false. In fact, Conahan and the Court Administrator (Conahan's cousin) hand-selected Ciavarella to preside over the trial. The assignment was so unusual that the deputy

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court administrator made a notation in the court's records in order to protect herself.

Based on Ciavarella's own testimony at the evidentiary hearing, President Judge Platt found and the Supreme Court agreed that "Conahan and Ciavarella were confederates in what appears to have been (by Ciavarella's own admissions here) a long-term criminal conspiracy." Moreover, evidence was presented at the hearing that Conahan, who assigned the trial to Ciavarella, had a long-term relationship with D'Elia which included Conahan accepting unmarked envelopes delivered to the courthouse by D'Elia and regular meetings with D'Elia, even after D'Elia was arrested by federal authorities.

Conahan, along with D'Elia and the former Court Administrator, invoked his Fifth Amendment privileges against self-incrimination and refused to testify. The Supreme Court noted that their refusal to testify could be considered in this "distinct supervisory inquiry into the assignment and trial of this case" without affecting their constitutional rights. The Court likewise rejected Joseph's argument that the judgment could be vacated only if the Court found actual prejudice resulting from the judges' misconduct. *In Interest of McFall*, 617 A.2d 707 (Pa. 1992), the Supreme Court emphasized that the appearance of impropriety was enough to warrant relief. The Court emphasized that "a jurist is either fair or unfair; there are no acceptable gradations."

The Supreme Court found that "[t]he inherently troubling nature of Conahan's and Ciavarella's compromised positions of jurists is enhanced, in this case, given that the subject matter of this defamation lawsuit concerned newspaper articles reporting on the undisputed fact of a federal criminal investigation into D'Elia's and Joseph's alleged ties to organized crime activities, an investigation which included search warrants for Joseph's home and business." Given the relationships between Conahan, Ciavarella, D'Elia and Joseph, the Supreme Court agreed with President Judge Platt that the judgment and all substantive orders of former judges Conahan and Ciavarella should be vacated and the case remanded.

No schedule has been set by the Luzerne County Court of Common Pleas but the plaintiffs have moved for appointment of an out-of-county judge.

The Scranton Times is represented by J. Timothy Hinton, Jr. of Haggerty, McDonnell, O'Brien & Hinton and W. Thomas McGough, Jr., Kevin C. Abbott, Kim M. Watterson and Mark L. Tamburri of Reed Smith LLP.

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Second Circuit Affirms Dismissal of Three Lawsuits Over Borat Movie

Releases Signed by Plaintiffs Fraudulent Inducement and Related Claims

By Katherine M. Bolger and Rachel F. Strom

The United States Court of Appeals for the Second Circuit unanimously sided with Borat Sagdiyev, the fictional Kazakh reporter in *Borat – Cultural Learnings of America for Make Benefit Glorious Nation of Kazakhstan*. In *Psenicska v. Twentieth Century Fox Film Corporation, et al*, Nos. 08-4604-cv; 08-6503-cv; 08-4818-cv (2d Cir. Nov. 17, 2009), the Second Circuit affirmed the dismissal of three lawsuits brought by various participants in the *Borat* motion picture against Twentieth Century Fox Film Corporation, the distributor of *Borat*, Sacha Baron Cohen, the actor who plays and created the character Borat and a writer and producer of the film, and others involved in the production and distribution of the movie. In dismissing the three lawsuits, the Court held that the plaintiffs were all bound by the clear and unambiguous wording in releases that they had all signed.

Borat

Borat tells the story of Borat, a fictional Kazakh TV personality dispatched to the United States by the Kazakhstan Ministry of Information to report on the American people. In the film, Borat travels across America with his friend and producer, Azamat Bagatov. During this transcontinental journey, Borat encounters a homophobic rodeo owner, kindly Jewish inn keepers, drunken fraternity boys and various other individuals. Mr. Cohen employs antics ranging from total buffoonery, to eccentric and prejudicial commentary, to evoke reactions from the Americans whom Borat encounters. In keeping with this theme, one of the plaintiffs Michael Psenicska – a high school math teacher and owner of a driving school in Maryland – is depicted in one scene attempting to teach Borat how to drive in preparation for Borat's cross-country trip. In the scene, Borat is constantly making off-color comments to Psenicska and shouting offensive remarks to other drivers while he is dangerously flouting the rules of the road.

Later in the movie, another plaintiff Kathie Martin – the owner of an etiquette training business in Alabama – is depicted attempting to teach Borat how to "dine like gentleman" for a dinner party he has planned with "high society" – in Alabama. The scene goes well until Borat shows Ms. Martin nude photos of his purported son. In the movie, the scene with Ms. Martin is intercut with a scene of Borat at a dinner party with plaintiff Cindy Streit – another etiquette coach from Alabama – and Streit's acquaintances, some of whom are the remaining plaintiffs Sarah Moseley, Ben K. McKinnon, Michael M. Jared and Lynn S. Jared. Borat is supposedly putting Ms. Martin's etiquette lesson to use. All three scenes illustrate the main theme of Borat – depicting the culture clash between everyday Americans and the supposedly "backwards" Borat. In the film, all of the plaintiffs are portrayed reacting to Borat's antics and – often patiently – attempting to teach him how to behave properly in American society.

The Releases

Before any of the plaintiffs were filmed for *Borat*, they signed nearly identical releases that stated that in exchange for a specified amount of money and the "opportunity…to appear in a motion picture" the plaintiffs would agree to certain conditions. Specifically, plaintiffs agreed "to be filmed and audiotaped … for a documentary-style film …." The releases also stated that "It is understood that the Producer hopes to reach a young adult audience by using entertaining content and formats." *Id.* (emphasis added). Further, they acknowledged that "in entering into [the releases, the plaintiffs were] not relying upon any promises or statements made by anyone about the nature of the Film or the identity of any other Participants or persons involved in the Film." And, the plaintiffs agreed to waive numerous, specified claims against anyone involved in the creation and production of *Borat.*

The Proceedings

Plaintiff Martin originally brought suit against the producers

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of *Borat* on December 22, 2006 in the Jefferson Circuit Court in Alabama. But, on January 18, 2008, the Supreme Court of Alabama held that Martin was bound by the forum-selection clause of the release she signed, which stated that all claims must be brought in State and County of New York. *See Ex parte Cohen*, Case No. 1061288, 2008 WL 162598, at *1, *3 (Ala. Jan. 18, 2008). While Martin's case was still pending in the Alabama court, apparently concerned that the Alabama courts might dismiss her case and that the New York statute of limitations would expire, Martin, on October 22, 2007, filed a summons with notice in the Supreme Court of the State of New York, County of New York. On February 22, 2008, the Defendants removed the action to the Southern District of New York. On March 28, 2008, after the Alabama court dismissed her claims, Martin filed a complaint in federal court. Finally, in April 2008, Martin filed an amended complaint in the Southern District of New York alleging the she was fraudulently asked to appear in a "documentary" about a "Foreign Reporter's travels and experiences in the United States," which would be shown on "Belarus Television." Martin was paid $350 and although she signed a release, asked the court to rescind that release due the defendants' alleged fraudulent representations about the film. She also sought damages for fraudulent inducement, quasi contract/unjust enrichment and intentional infliction of emotional distress based on her appearance in *Borat.*

Plaintiff Michael Psenicska, right, in a scene from the Borat movie.

Plaintiffs Streit, Moseley, McKinnon and the Jareds originally brought suit on October 22, 2007, in the United States District Court for the Northern District of Alabama. That court also enforced the forum-selection clauses of the releases they signed and transferred the case to the Southern District of New York. On April 7, 2008 these plaintiffs filed an amended complaint in the Southern District of New York alleging that the producers of *Borat* asked Streit to appear with a few friends of her choosing – plaintiffs Moseley, McKinnon and the Jareds, among others – in an "educational documentary" about a "foreign dignitary's tour of the United States," which would be shown on Belarus Television." They were also paid for their appearances in *Borat* and also signed releases, and like Martin, these plaintiffs also sought the rescission of their releases and asserted causes of action for unjust enrichment, fraudulent inducement and intentional infliction of emotional distress based on their appearances in *Borat*.

On December 3, 2007, Psenicska brought his suit against the producers of *Borat*, alleging that the producers of *Borat* fraudulently asked him to appear in a "documentary" regarding "'the integration of foreign people into the American way of life.'" Psenicska admits that he was paid $500 in cash and signed the release, but, like the other plaintiffs, he alleged that the release should be held invalid due to the defendants' fraudulent representations about the film. He also asserted causes of action for fraudulent inducement, a violation of Section 51 of the New York Civil Rights Law, quantum meruit and prima facie tort based on his appearance in *Borat.*

The defendants moved to dismiss the complaints in these three separate actions on the grounds that the plaintiffs' claims were barred by the releases they had signed. In the motions, the defendants argued that the releases contained specific waiver clauses, whereby the plaintiffs "acknowledge [d] that in entering into [the releases, plaintiffs were] not relying upon any promises or statements made by anyone about the nature of the Film or the identity of any other Participants or persons involved in the Film." Accordingly, the defendants argued that under well-settled New York law, the plaintiffs' claims, which were all based on alleged misrepresentations about the nature of *Borat*, must be dismissed. In response, the plaintiffs argued that the defendants' alleged fraud

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voided the releases. Further, the plaintiffs argued that the releases themselves were invalid because they were ambiguous and misleading, particularly since they described *Borat* as a "documentary-style film."

The Lower Court's Decision and Order

In a Memorandum and Order dated September 3, 2008, Judge Loretta A. Preska of the United States District Court for the Southern District of New York granted defendants' motions to dismiss in their entirety in all three cases and held that the plaintiffs' claims were barred by the releases they had signed. *Psenicska v. Twentieth Century Fox Film Corp., et al*, Nos. 07 CIV 10972 (LAP), 08 CIV 01571 (LAP), 08 CV 1828 (LAP), 2008 WL 4185752 (S.D.N.Y. Sept. 3, 2008). In the Order, Judge Preska first rejected the plaintiffs' argument that the term "documentary style" in the releases is ambiguous. In so holding, the court noted that *Borat*:

> comprises interviews with real people and depictions of real events that are intended to provide a "factual record or report" albeit of a fictional character's journey across America. … The fact that Borat is a fictional character, however, does nothing to diminish the fact that his fictional story is told in the *style* of a true one. Indeed, *Borat* owes such effectiveness as it may have to that very fact.

Next, the court held that the specific and clear waiver clauses in the releases barred plaintiffs' arguments that they signed the releases based on misrepresentations about the nature of film. Finally, the court rejected the plaintiffs argument that even if the waiver clause was specific and clear, the "Defendants had a duty to disclose the nature of the film and the identities of those involved in the film." In so holding, the court stated that "[t]hese Plaintiffs cannot avoid the consequences of their waivers, however, simply by restyling their allegations of misrepresentation as allegations of omission. … Such would empower these Plaintiffs to avoid the clear wording of their own contracts in a manner I must decline to condone under well-settled New York law." The Court held that the plaintiffs were all bound by the releases, which barred all of the claims they asserted in their complaints. All of the plaintiffs timely appealed.

The Appeal

On appeal, the plaintiffs argued that Judge Preska incorrectly held that *Borat* is a "documentary-style" film as a matter of law. They claimed the term "documentary-style," at the very least, was ambiguous, and thus the interpretation of the release was an issue of fact for the jury. Plaintiffs then argued, again, that the releases are void because plaintiffs were fraudulently induced to sign them and that the defendants owed the plaintiffs some "duty" to fully explain the nature of the film to them before they signed the releases. Finally, the plaintiffs argued that it was simply unfair to allow the defendants to prevail under these circumstances.

In response, the defendants argued that fairness here would be to enforce the releases because parties to a contract should have some sense of certainty that their agreements would be upheld. They also argued that plaintiffs contention that they were fraudulently induced to sign the releases was foreclosed because the releases contained an explicit waiver clause that clearly disclaims reliance on "the nature of the Film or the identity of any other Participants or persons involved in the Film."

In addition, the plaintiffs' allegations of fraud are insufficient to invalidate the releases because each and every alleged misrepresentation is directly contradicted on the face of the release itself. For example, the plaintiffs claimed they were misled because *Borat* is offensive, but the releases expressly state that the film may contain "offensive behavior or questioning." Plaintiffs also protested that the film was not shown on Belarus Television, but the releases granted the defendants the right to use the plaintiffs' images "without restriction in any media throughout the universe."

Ms. Martin's release even contained a specific provision that she agreed not to bring "any claim arising out of the Participant's viewing of any sexually-oriented materials or activities."

Next, as to plaintiffs' argument that *Borat* is not a documentary-style film, the defendants focused on the fact that in the parties' motions papers they actually agreed on a definition of documentary-style – i.e. that it "means a work displaying the characteristics of a film that provides a factual record or report." And, the defendants argued that the District Court correctly concluded: "[t]here can be no reasonable debate …

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that *Borat* is a film 'displaying the characteristics of a film that provides a factual record or report.'"

Finally, as to plaintiff's attempts to impose a duty on the defendants to explain the "true nature" of the Film to them, the Defendants argued that they had no such duty because they correctly described the film to the plaintiffs in the release and because plaintiffs could have simply decided to refuse to sign the release if they did not believe the defendants or the release was unclear. Defendants argued that no one forced the plaintiffs to appear in the film.

Oral Argument

On October 28, 2009, the parties appeared for oral argument before Judges Reena Raggi, John M. Walker Jr. and Roger Miner. At oral argument, the court seemed to focus on three main issues: (1) whether *Borat* is a documentary-style film, (2) whether defendants owed the plaintiffs a duty to explain the nature of the film, despite the waiver clause in the releases, because the defendants had "superior knowledge" about the true contents of the film and (3) whether the law should condone the defendants' alleged behavior.

In this respect, Judges Raggi and Walker were fairly clear that they believed *Borat* was a documentary-style film. Judge Walker noted that, as far as the plaintiffs themselves were concerned, *Borat* was a documentary – let alone a documentary-style film.

The plaintiffs had no idea that Borat was a fictional character so their reactions to Borat were real. There was nothing fictional about it. Judge Raggi also stated that because the releases stated the film would be a "documentary style" film and not a "documentary," whatever the plaintiffs thought they were filming they could not have reasonably understood it to mean they would be in a documentary. Judge Miner, however, did not seem to agree. He noted that the district court focused on the "style" from "documentary-style" but it would be just as reasonable to focus on the word "documentary." And, Judge Miner was not sure that *Borat* could be seen as a documentary.

As to the duty argument, Judges Miner and Raggi made clear that they did not believe the defendants owed the plaintiffs any duty to explain the nature of the film. They stated that the "peculiar knowledge" exception only applies in situations where one party to a contract would face a high burden to finding out the truth of a situation. And here, they stated, the plaintiffs did not do anything to find out the truth about *Borat.* They never even asked to meet Borat before signing the releases. They should not expect the defendants to explain the film to them when they never even asked.

Toward the end of the hearing, Judges Miner and Raggi expressed some reservation about siding with the defendants. They stated that, *assuming* that the allegations of the complaints were accurate, they were not sure the law should allow the defendants to orally tell the plaintiffs that they would be filmed for a documentary and then to poke fun of them in a fictional movie.

In response, the defendants pointed out that the plaintiffs here all came off as decent and patient people who were trying to teach Borat the correct way to behave in our society. But, the defendants also stated again that the case was really about a contract – a contract the plaintiffs willingly signed and which barred all of their claims.

The Second Circuit Decision

On November 17, 2009, the Second Circuit unanimously affirmed the District Court's dismissal of plaintiffs' complaints. The Court first rejected the plaintiffs' argument that the term "documentary-style" as applied to *Borat* is ambiguous. The Court stated that "no reasonable trier of fact could conclude that *Borat* is not a documentary-style film." The Court reasoned that "[w]hile the character Borat is fictional, the film unmistakably tells the story of his travels in the style of a traditional, fact-based documentary. Indeed, the film's stylistic similarity to the straight documentary form is among its central comedic conceits, employed to set the protagonist's antics in high relief….Whatever the outer reaches of the 'documentary-style' genre, Borat falls well shy of the frontier."

The Court then affirmed the District Court's holding that the waiver clause in the release barred the plaintiffs' fraudulent inducement claims.

The Court held that the specific waiver clause, in which plaintiffs agreed they were not relying on plaintiffs' representations about the nature of the film, destroyed plaintiffs' argument to the contrary. And, the Court held that the "peculiar knowledge" exception to that rule did not apply here because that "exception is meant to address circumstances where a party would face high costs in determining

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the truth or falsity of an oral misrepresentation." And here, the Court noted that the "plaintiffs apparently appeared in the film without taking any steps to confirm" any of the alleged oral misrepresentations they allege they relied on. The Court also pointed out that the plaintiffs could not show they would have suffered any "harm in simply walking away from the defendants' film offer if they were denied written terms that precisely satisfied their conditions for appearing."

Finally, the Court held that the defendants could not have reasonably relied on any representation that they would be filmed for a documentary because the releases cannot be read to suggest "that the film was a documentary about a foreign reporter's travels in the United States."

And, because reasonable reliance is essential to a claim for fraud, the plaintiffs' claims must be dismissed.

In short, the Court held, "dismissal was compelled by the short, clear, unambiguous disclaimer of reliance on any oral statement about the film or the identities of the people making it."

The defendants were represented by Slade R. Metcalf, Katherine M. Bolger and Rachel F. Strom of Hogan & Hartson LLP, New York City.

Plaintiff Michael Psenicska was represented by Peter M. Levine, New York City. Plaintiffs Kathie Martin, Cindy Streit, Sarah Moseley, Ben K. McKinnon, Michael M. Jared and Lynn S. Jared were represented by Adam Richards, New York City.

Libel, Emotional Distress Claims Reinstated Against Korean Language Newspaper

Court Analyzes Per Se/Per Quod Distinction; Delivers Divided Decision on Outrageous Conduct

Delving into the arcane libel per se / per quod distinction, the Colorado Court of Appeals reinstated a libel and emotional distress lawsuit against a Korean language newspaper that criticized plaintiff for being disloyal to her late husband. *Lee v. Colorado Times, Inc.* No. 08 CA 2233 (Colo. App. Oct. 29, 2009) (Taubman, Booras, Dailey, JJ.). The panel unanimously held that the statements at issue constituted defamation per se even though extrinsic evidence was used to identify the plaintiff.

The panel divided over whether the column was sufficiently outrageous to sustain a claim for intentional infliction of emotional distress. The majority held that the newspaper could have acted "beyond all possible bounds of decency" by relying on an unsubstantiated rumor for the column.

Background

The plaintiff and her husband had owned an managed a liquor store in Colorado Springs. In 2001, the husband was murdered at the store during an armed robbery. The shooter pled guilty to murder. An alleged accomplice was initially convicted, but following an appeal and retrial was acquitted. Plaintiff witnessed the murder and testified at both trials.

The Colorado Times is a free newspaper widely distributed to the Korean-American community in Colorado Springs. The column at issue was published approximately one year after the acquittal. It was headlined "The Grief of Loss of Husband, the Joy of Loss of Husband." The column recounted a story about the loyalty and bravery of a Korean general's wife and then contrasted that to plaintiff, claiming that the accomplice was acquitted at the second trial because plaintiff did not testify.

Although the column did not directly name plaintiff, it discussed in detail her husband's murder and subsequent trials. Writing about the acquittal of the alleged accomplice, the column stated "it was unbelievable that he got free because of absence of the victim's wife at trial." The column went on to state: "It is just very difficult to accept the victim's wife's negligence that led the killer of her husband to be freed. We

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can not expect all wives to be YulYeo (truthful or respectful) but the victim's wife must have thrown away her anger that could make snow in summer when she came here across the Pacific Ocean." The column claimed it was relying on information published in another local newspaper, the Colorado Springs Gazette.

Following an objection from plaintiff, the Colorado Times published a retraction in its next issue. The retraction admitted that the source for the allegations was not another newspaper but simply rumors the author had heard from a local Korean man who said he saw an article in the Gazette. The newspaper apologized to plaintiff for causing her pain by publishing "bogus information."

The plaintiff sued the newspaper, owner and editor for libel and outrageous conduct under Colorado law (the equivalent of intentional infliction of emotional distress). The trial court granted defendants' motion for summary judgment, holding in part that plaintiff's complaint was for libel per quod and she failed to allege special damages.

Libel Per Se / Per Quod Analysis

The court began by reviewing the general per se / per quod distinction, noting that under Colorado law "Statements are libelous per se if (1) the defamatory meaning is apparent from the face of the publication without the aid of extrinsic proof; and (2) the statement is specifically directed at a particular person. Lee at *3, *citing Lininger v. Knight*, 123 Colo. 213, 221, 226 P.2d 809, 813 (1951). If a statement is libelous per se, damage is presumed. If a statement is defamatory per quod, special damages must be pleaded.

The court reasoned that for purposes of the libel per se rule, the determination of the identity of the defamed is separate and distinct from the determination of the defamatory character of the statement. Here the plaintiff could use extrinsic evidence to establish that the column was "of and concerning" her without transferring her claim to libel per quod. (The newspaper did not dispute the defamatory nature of its column.)

Outrageous Conduct

The Colorado Appeals Court panel divided over reinstating the claim for outrageous conduct. Colorado has adopted the Restatement definition of intentional infliction of emotional distress and thus "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Lee* at *5, *quoting* Restatement (Second) Torts § 46 cmt. d.

The majority held that reasonable jurors could view the column as outrageous because it was based on an unfounded rumor, was falsely attributed to another source, was published under no time pressure and harmed plaintiff by characterizing her (a crime victim herself) as disloyal to her deceased husband.

In addition, the majority held that the retraction was only relevant to the issue of damages and could not be used to determine whether defendants' conduct was outrageous.

The dissent strongly argued that plaintiff failed to state a claim for outrageous conduct. "Defamation," the dissent noted, "does not, in and of itself, constitute extreme and outrageous conduct." The single column followed by a retraction was not conduct sufficiently outrageous to meet the threshold requirements of the claim. Moreover, the dissent argued that the retraction should be considered on the substance of the claim. "I am at a loss to understand why a particular type of conduct-namely, a retraction or repudiation of earlier offensive conduct-would not be taken into consideration." *Lee* at *10.

Plaintiff is represented by Richard C. Whaley, Colorado Springs. The media defendants are represented by Richard C. Cornish, Englewood, Colorado.

Any developments other MLRC members should know about?

Let us know.

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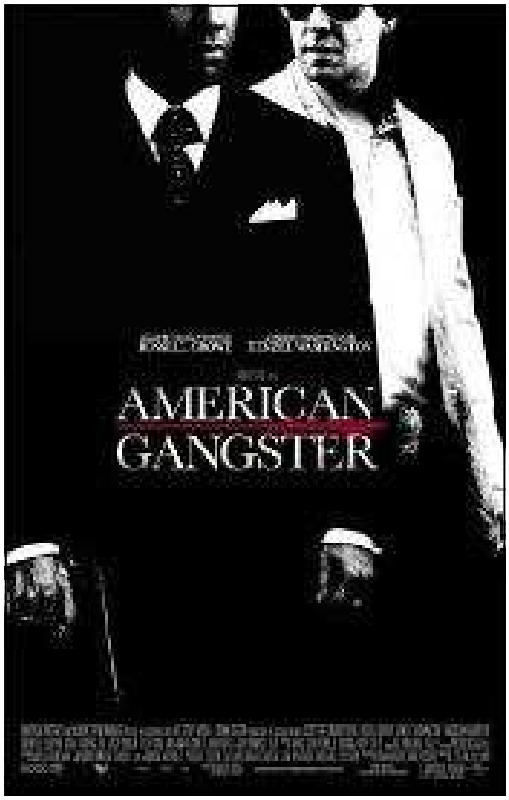
No Republication from Links and Kindle

By Theresa M. House

Though they may not know him by name, anyone who has seen the popular film *American Gangster* has heard the story of Frank Lucas, a convicted major narcotics trafficker and alleged organized crime boss who operated in Harlem during the late 1960s and early 1970s.

Mr. Lucas tells a story emphasizing two points: one, that on January 28, 1975, a group of officers arrested Lucas in his New Jersey residence, and two, that when they took Lucas into custody, the officers took some millions of dollars in confiscated cash.



Mark Jacobson, a writer employed by *New York* magazine, wrote an article for the magazine wherein he interviewed Lucas many years after his arrest. In that interview, Lucas alleged that, although only $585,000.00 in small bills were recovered from his residence, there actually had been "nine or ten million" dollars in his possession at the time he was arrested. The arresting officers, he claimed, pocketed the rest.

The Lucas interview was initially published in the August 7, 2000 issue of *New York* magazine, then owned by Primedia, Inc., in an article written by Jacobsen and entitled, "The Return of Superfly." At the time of the article's print publication, it was also uploaded to *New York* magazine's website, where it remained, unaltered and in its original form, continuously since its initial publication.

Some eight years later, on October 22, 2008, two former law enforcement officials named James R. Haefner and Richard Crawford brought an action, on behalf of themselves and/or a purported class of other law enforcement officials who claimed to have been involved in Lucas's 1975 arrest, entitled *James R. Haefner and Richard Crawford, on Behalf of Themselves and as Representatives of the Class v. New York Media, L.L.C., Primedia, Inc., Mark Jacobson, Frank Lucas, and Grove/Atlantic, Inc.*, No. 150189/08, in the Supreme Court of the State of New York, County of New York.

The suit alleged claims for libel and intentional infliction of emotional distress against the current and former owners of *New York* magazine, Jacobsen, Lucas, and the book publisher Grove/Atlantic, Inc., which published a book of Jacobsen's collected works under the title "American Gangster and Other Tales of New York." Although the one-year statute of limitations had long since passed on the original print and online publication of the Superfly article in 2000, the plaintiffs argued that the defendants were liable for various alleged republications of the work – by posting internet weblinks to the Superfly article on sidebars of web-based articles on related subjects published on *New York* magazine's website and on IFC.com, by including the allegations from the Superfly article in the print and Kindle editions of Jacobsen's collected works, and by adapting the work in the film *American Gangster*.

In a decision dated October 18, 2009, Justice Walter B. Tolub dismissed the action as against all of the moving defendants, finding that the single publication rule barred liability for both for posting the weblinks and releasing the Kindle edition and holding that the *American Gangster* republication was not of and concerning plaintiffs, who were not reasonably identifiable by the alleged defamation.

Republication Takes More Than Kindles and Links

Plaintiffs alleged that their claims against Jacobsen and New York Media, the present owner of *New York* magazine, were timely because the defendants had posted links to the

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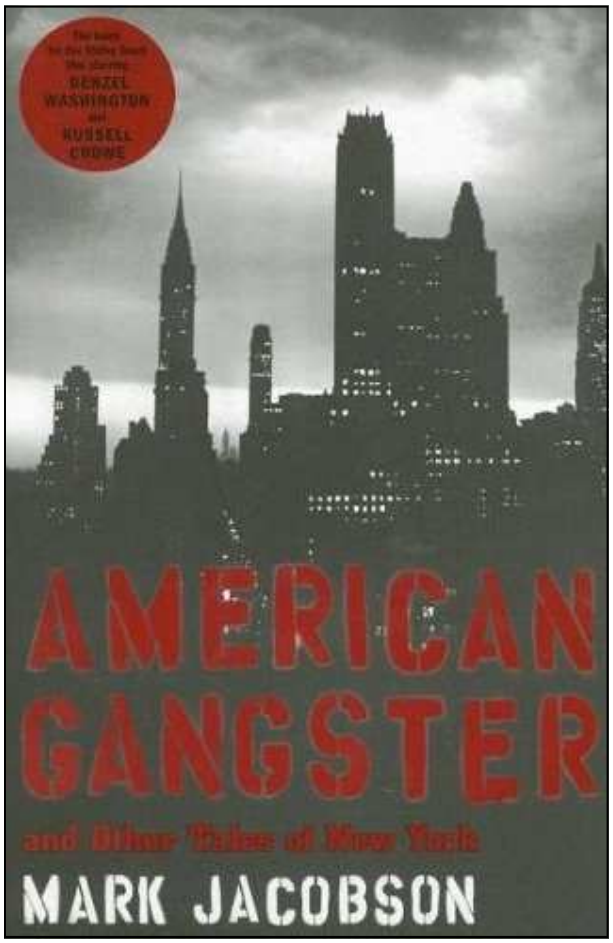
Superfly article that were displayed on the sidebars of other, newly published articles on similar topics published on two websites, accessible through www.nymag.com and www.ifc.com, within a year of the suit.

Neither the new articles nor the text of the links themselves, however, mentioned anything about Plaintiffs, the NYPD, or the DEA – rather, they were merely weblinks that redirected readers to the original, unaltered Superfly article that had been all along and was still available on the *New York* magazine website. Citing *Firth v. State of New York*, 98 N.Y.2d 365 (2002), the court agreed with defendants' argument that New York's single publication rule, adopted in *Gregoire v. G.P. Putnam's Sons*, 298 N.Y. 119, 123, 81 N.E.2d 45, 47 (1948), barred plaintiffs' claims because merely publishing a link to an unaltered web article could not qualify as a republication of the linked work sufficient to retrigger the limitations period.



Under New York's well-known single publication rule, the publication of a defamatory statement in a single issue of a newspaper, or a single issue of a magazine, is treated, in legal effect, as one publication which gives rise to only one cause of action, even if the publication consists of thousands of copies that are widely distributed. In *Firth*, the New York Court of Appeals extended the single publication rule to apply to publications on the internet, ruling that absent some later modification of the text of the allegedly defamatory publication itself, a cause of action arising out of an internet publication accrued on the date it was published on the web and not any subsequent time.

The single publication rule is, of course, not absolute – with respect either to print or online publications. New York courts have long recognized that a subsequent republication of a work in a different form than it was originally published – and directed towards a new audience – will trigger the limitations period to begin to run anew. Under *Firth*, however, and as a general rule, for a subsequent publication to retrigger the limitations period there must be a separate publication of the original, on a different occasion, which is not merely "a delayed circulation of the original edition." In the internet context, this means that a web-based publication may only give rise to a subsequent cause of action where there has been a change to the very article or report about which the plaintiff complains.

Applying this rule, the *Haefner* court found that, like merely continuing to display an unedited article on a website, posting internet links that directed readers to the original, unmodified Superfly article could not qualify as a republication that retriggered the limitations period. Under *Firth*, merely redirecting readers to its unaltered content could not restart plaintiffs' time to sue absent some change to the underlying linked material. Because the links in no way changed the Superfly article, they were not a republication of its allegedly libelous contents, and plaintiffs' claims remained timed-barred.

The court reached the same conclusion regarding defendants' alleged republication of the allegations in the Superfly article in the print and Kindle editions of Jacobsen's book. The print edition of the book was clearly outside the limitations period: uncontradicted documentary evidence showed it was published on September 12, 2007, and plaintiffs filed their claims more than a year later on October 22, 2008.

For the first time in their opposition, rather than in their complaint, plaintiffs argued that the release of an electronic Kindle edition of the book on November 13, 2007 retriggered

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the statute of limitations because it reached a new audience of digital book readers. Rather than adopting a special rule for Kindle books, however, the court found that Kindle editions, like webpages, were not a republication for the purpose of restarting the statute of limitations. Because the Kindle version was not alleged to differ at all from the print version, the court determined that it should be treated as merely a delayed circulation of the original edition. Thus, under *Firth*, plaintiffs' allegations that defendants had linked to the Superly article on various websites and published Jacobsen's book, both in print and Kindle form, within a year of suit could not save their time-barred claims.

The court also dismissed the claims against Primedia, Inc. on statute of limitations grounds. Although Primedia was the publisher of *New York* magazine at the time the Superfly article was first published in 2000, some four years thereafter it sold the publication to New York Media's parent company, New York Magazine Holdings, L.L.C.

Although plaintiffs argued that Primedia "foresaw" the later alleged publication of the Superfly article, the court found that Primedia could not be liable for any republication because the contract of sale specifically divested Primedia of any post-sale interest in, or liability for, any article published by New York Media. Applying the same rules, however, the court reached a different conclusion for the defendants' alleged republication of the Superfly article in the *American Gangster* film. The court found that Jacobsen's agreement to allow Universal Pictures the right to develop his article into a motion picture counted as a republication under *Firth*. Since the film had been released in November 2007, plaintiffs' claims as based on it were timely. They were not, however, sufficient to state a cause of action for libel or intentional infliction of emotional distress.

Small Group Libel Not Available Where Group Is Not Small Enough

In the alternative to the statute of limitations defense, defendants argued that the alleged libel, derived from the Superfly article and portrayed in *American Gangster*, was not "of and concerning" plaintiffs and was barred under the group libel doctrine, which holds that a member of a large group may not sue for libel based on statements about the group unless the circumstances of the publication reasonably give rise to the conclusion that there is a particular reference to the member.

Plaintiffs countered that their claim should be permitted under the "small group libel" doctrine, which they alleged rendered the group libel doctrine inapplicable if a plaintiff can show that the circumstances surrounding publication give rise to the inference that there is a particular reference to a specific individual.

The parties' disagreement was not novel – in a separate action involving an identical libel claim brought by a class of DEA agents involved in Lucas's arrest against NBC Universal, Inc., the producer of the film, the United States District Court for the Southern District of New York found, and the United States Court of Appeals for the Second Circuit affirmed, in *Diaz v. NBC Universal, Inc.*, 536 F. Supp. 2d 337 (S.D.N.Y. 2008), *aff'd*, 2009 WL 2143216 (2d Cir. 2009), that any libelous material in *American Gangster* was not "of and concerning" plaintiffs and that plaintiffs' claims were not sustainable under the "small group libel doctrine." The *Haefner* court agreed with the *Diaz* court's analysis, finding that the only difference between this action and the one litigated in federal court was that plaintiffs' class here was comprised of both DEA and NYPD law enforcement officials, whereas the federal action was composed entirely of DEA agents.

Like the federal plaintiffs, none of the *Haefner* plaintiffs were referred to specifically in the film – rather, Lucas described plaintiffs indiscriminately as "cops."

Accordingly, adopting the Second Circuit's analysis, and in fact finding that it barred plaintiffs' claims under the doctrine of res judicata, the court found that plaintiffs' claims could not be sustained under a small group libel theory because nothing in the challenged statements could define a group discrete enough to reasonably identify plaintiffs as the subjects of the alleged libel. The action continued against Grove/Atlantic, Inc.

Theresa M. House is an associate in the Media Law Group at the New York office of Hogan & Hartson, LLP. Defendants New York Media, LLC and Mark Jacobson were represented by Slade R. Metcalf and Laura M. Leitner of Hogan & Hartson LLP, New York City. Defendant Primedia, Inc. was represented by Scott R. Emery of Lynch Daskal Emery LLP, New York City. Plaintiffs James R. Haefner and Richard Crawford were represented by Michael Q. Carey of Cary and Associates LLC, New York City.

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Libel, False Light and Distress Claims Against Illinois TV Station Dismissed

Innocent Construction, Fair Report, and Pleading Requirement Judged Grounds for Dismissal

By Steven P. Mandell, Steven L. Baron and Lindsay H. LaVine

An Illinois trial court this month issued an oral ruling dismissing libel, false light and emotional distress claims against a Champaign television station for a news broadcast about stalking incidents at the University of Illinois campus. *Nexstar Broadcasting, Inc., d/b/a WCIA 3 News v. Reddy* (Ill. Cir. Ct. Nov. 16, 2009).

Background

During the ten o'clock news on March 31, 2008, Nexstar Broadcasting, Inc., d/b/a WCIA 3 News, reported that the plaintiff, a University of Illinois student, had appeared in court earlier in the day for allegedly stalking another student at the main library on campus.

The report then stated that "Now people are realizing stalking is a bigger problem than they may think" and went on to discuss other complaints from women who had been stalked and harassed.

As part of her newsgathering efforts, the reporter contacted the University of Illinois' police department's spokesperson to learn more about the incident, interviewed women who had been victims of stalking, spoke with a volunteer at the Champaign Rape Crisis Center, and provided details in her report about other stalking incidents and an upcoming workshop aimed at educating women about the dangers of stalking.

On March 30, 2009, plaintiff sued the television station, anchors, and reporters at WCIA, as well as the University of Illinois police officers involved in his arrest. Against the media defendants, plaintiff complained that the broadcast defamed him, placed him a false light, and intentionally inflicted emotional distress upon him.

(Plaintiff's claims against the police officers ranged from false arrest, intentional infliction of emotional distress, violations of sections 1981 and 1983, and the Illinois Civil Rights Act of 2003. The police officers were voluntarily dismissed from the lawsuit, without prejudice, after they filed a motion to dismiss.) Plaintiff claimed that the broadcast's reference to other stalking incidents in which he had no involvement falsely imputed that he had committed a felony (stalking) in those cases.

The media defendants filed a combined motion to dismiss under the Illinois Code of Civil Procedure, 735 ILCS 5/2-619.1, asserting that: 1) plaintiff failed to plead *in haec verba*; 2) the statements made by the defendants were not defamatory and were capable of a reasonable innocent construction; 3) the statements were not "of and concerning" plaintiff; 4) plaintiff failed to plead that the statements were made with actual malice as required to sustain a false light claim; 5) plaintiff failed to adequately plead a claim for intentional infliction of emotional distress and, 6) in any event, the broadcast was protected under the fair report privilege.

Complaint Dismissed With Prejudice

On November 16, 2009, following oral argument, Judge Michael Q. Jones of the Sixth Judicial Circuit in Urbana, Illinois issued an oral ruling in defendants' favor and dismissed the complaint with prejudice. Specifically, the Judge found that plaintiff failed to plead the defamatory statements *in haec verba* or with requisite particularity when he paraphrased statements in the broadcast, and plaintiff's invitation to Defendants to "go find" the defamatory language in the broadcast was not sufficient.

Next, the court noted that the media has both the right and the responsibility to report on issues of public concern. It is the role of the media to report on court proceedings, the court noted, though it may upset the parties involved.

The court agreed with the media defendants' arguments that the statements were not defamatory and that the fair re-

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port privilege applied. It noted that plaintiff's only colorable complaint was the temporal position of the commentary about the other stalking cases next to the defendants' statement that plaintiff had appeared in court on stalking charges. The statement, however, was capable of an innocent construction.

Finally, the court noted that the Defendants' broadcast was protected by the fair report privilege because they were reporting mere allegations that had been relayed to them by a police spokesperson. Under Illinois procedure, Plaintiff has 30 days from entry of the judgment to file a notice of appeal.

Steven P. Mandell, Steven L. Baron and Lindsay H. LaVine are with Mandell Menkes LLC in Chicago and represented the media defendants.

The plaintiff was represented by Robert G. Kirchner and Ruth E. Wyman of the Robert G. Kirchner Law Office in Champaign, Illinois.

$90,000 Verdict for Libelous Blog Postings

Post-Trial Injunction Bars Defendant from Repeating Libelous Statements

In early November a federal district court issued a rare post-trial injunction barring the losing defendant in a libel case from repeating his statements in the future. *Saadi v. Maroun*, No. 8:07-CV-1976-T-24MAP , 2009 WL 3617788 (M.D.Fla. Nov. 2, 2009) (Bucklew, J.).

The injunction came after a jury awarded the attorney-plaintiff $90,000 in early October for libelous blog and Internet forum postings. *Saadi v. Maroun*, No. 8:07-CV-1976-T-24MAP (M.D. Fla. verdict Oct. 1, 2009).

Postings and Background

The postings, on the "Biggestloosers" blog (biggestloosers.blogspot.com; now-defunct) and in the forums of other websites about Lebanese politics, stated that plaintiff was a "criminal" and "traitor" connected to Hezbollah, consorted with terrorists, diverted funds from a non-profit to support terrorism, had not gone to law school and had a teenage girlfriend.

Many of the postings were written in the breezy informal style typical of online postings. For example, one posting stated: "Edward Saadi, is a nerd/geek/stalker form [sic] Ohio. He claims to have a law degree but never worked or tried a case. Too geeky to stand before a judge, he is mentally unstable and has a complex. He hates anyone who is successful or good looking because he lacks both."

In 2007, the plaintiff Edward Saadi, an Ohio lawyer, sued Pierre Maroun (his cousin), an alleged alter ego company, Hala Maroun, and several pseudonymous defendants. The case apparently stemmed from political disputes in Lebanon and the Lebanese-American community. Pierre Maroun is secretary-general of the American-Lebanese Coordination Council and a senior policy advisor for the American Lebanese Coalition, and has publicly objected to Syrian control of Lebanon. Maroun stated that Saadi's libel lawsuit was "politically motivated."

Motions and Trial

The defendants apparently did not contest that plaintiff was a private figure. They moved to dismiss the complaint for failure to state a claim, arguing that they did not write the postings and alternatively that the postings were protected statements of opinion. The district denied the motion to dismiss, holding the statements at issue were statements of fact.

> statements that Plaintiff is a mentally unstable stalker, a criminal, and that he has received gifts paid for with money stolen from the Lebanese government, as well as statements that suggest that Plaintiff falsely purports to have a law degree and has committed statutory rape, imply factual knowledge.

Saadi v. Maroun, No. 8:07-CV-1976-T-24MAP, 2008 WL 4194824 (M.D. Fla. Sept. 9, 2008).

The court later denied a motion for summary judgment, holding that a jury could find that the defendants wrote the postings, that they were libelous, and that additional threats against plaintiff could constitute intentional infliction of emotional distress. *See Saadi v. Maroun*, 2009 WL 1424184

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(M.D.Fla. May 20, 2009).

The case went to trial on Sept. 29, 2009. After the conclusion of the plaintiff's case, the court narrowed the case to a defamation claim against Pierre Maroun. After three days of trial, the jury found that Maroun posted the statements and that they were false and defamatory. It awarded Saadi $30,000 in compensatory damages ($5,000 for medical care and treatment, $25,000 for lost past and future earnings), and $60,000 in punitive damages. The court denied defendant's post-trial motion for judgment notwithstanding the verdict, or a new trial. 2009 WL 3736121 (M.D. Fla. Nov. 4, 2009).

Injunction

The court also issued a permanent injunction ordering defendant not to repost the defamatory statements, and to remove the ones that remained on various websites. 2009 WL 3617788 (M.D.Fla. Nov. 2, 2009). In issuing the injunction, Judge Bucklew noted that "under Florida law, it is a well established rule that '[i]n the absence of some other independent ground for invoking equitable jurisdiction, equity will not enjoin either actual or threatened defamation.'" *Id.* at *1, quoting *Weiss v. Weiss*, 5 So.3d 758, 758 (Fla. 5th DCA 2009).

The court stated that while "generally, injunctive relief is not appropriate to deter future defamation or libel in the instant case, such relief appears both appropriate and necessary." *Id.* at *2.

> Generally, a judgment provides a strong incentive for a defendant to remove any of his statements that the jury has found to be defamatory, because the continued existence of the statements would expose the defendant to further, likely successful, legal action to be taken against him. However, in the instant case, the judgment does not appear to have this effect, and as a result, some of the defamatory statements remain. Therefore, the judgment is not providing Saadi with a complete remedy, and as such, an injunction is appropriate. *Id.*

The defendants were represented by Jill A. Schuh of Lior Segal, Segal & Schuh Law Group, PL, in Clearwater, Fla., and Mark E. Pena of Tampa, Fla.. Plaintiff Edward T. Saadi represented himself, along with William J. Brown of Miami. Numerous documents from the case are available at http://www.citmedialaw.org/threats/saadi-v-maroun

Gross Negligence Lawsuit Against *Entrepreneur* Business Magazine Dismissed

Company on Magazine's "Hot 100" List Busted as Ponzi Scheme

A New York federal district court dismissed for failure to state a claim a lawsuit against Entrepreneur magazine over its 2008 "Hot 100" list of fast growing small businesses. *Abraham v. Entrepreneur Media, Inc.*, No. 09-CV-2096, 2009 WL 4016515 (E.D.N.Y. Nov. 17, 2009) (Seybart, J.).

Plaintiffs, a group of investors, alleged that the magazine was grossly negligent for including New York-based hedge fund Agape on its list. In January 2009, the FBI raided the company and arrested its founder for running a $300M Ponzi scheme. Plaintiffs alleged the magazine relied on false information provided by Agape and that with "minimum due diligence" the magazine would have discovered the information was false and Agape would not have been included in the list.

The district court dismissed the complaint as frivolous, though as a matter of discretion it declined to apply Rule 11 sanctions. The court agreed with the magazine's argument that "under New York law, a magazine publisher owes no duty of care to subscribers or readers, and thus cannot be found liable for negligently publishing non-defamatory misstatements…. Indeed, New York courts have uniformly held this way for 88 years."

Plainitff was represented by Eliot Bloom of Mineola, NY. Entrepreneur Media was represented by Richard Eskey and Steven Pokotilow of Stroock Stroock & Lavan, New York, NY.

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Public Nuisance Complaint Against Craigslist, Inc. Dismissed

Section 230 Bars Claim Over Prostitution Ads on Website

An Illinois federal district court applied Section 230 of the Communications Decency Act to dismiss a complaint against Craigslist, the popular online classifieds service, for allegedly facilitating prostitution through its "adult services" section. *Dart v. Craigslist, Inc.*, No. 09 Civ. 1385 (N.D. Ill. Oct. 20, 2009) (Grady, J.).

Thomas Dart, the Sheriff of Cook County, Illinois, sued Craigslist in March 2009 for public nuisance. The complaint alleged that Craigslist knowingly facilitated prostitution through its "adult services" section and sought a permanent injunction to shut down that portion of the Craigslist website for the Chicago area.

On a motion to dismiss, plaintiff conceded that Craigslist was an "interactive computer service provider" within the meaning of Section 230, but argued that Craigslist could be liable under the exception outlined by the Ninth Circuit in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162-63 (9th Cir.2008), for causing users to post illegal ads. Plaintiff argued that the searchable "adult services" category, together with 21 various subcategories for specific preferences (such as "w4m," "m4m," "m4m," etc.), made it responsible for the content of the ads.

The district court rejected the argument, agreeing that "[n]othing in the service craigslist offers induces anyone to post any particular listing." *Dart* at *6 quoting *Chicago Lawyers Committee For Civil Rights Under The Law, Inc. v. Craigslist, Inc.*, 519 F.3d 666, 671 (2008) (holding that Section 230 barred federal housing discrimination claims against Craigslist for user posted ads).

Here the court reasoned that the phrase "adult services" and the various subcategories are not unlawful on their face nor do they necessarily call for unlawful content. The court noted, for example, that erotic dancing offered through the site "may even be entitled to some limited protection under the First Amendment. *Citing City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000).

The court also found the complaint undercut by the fact that Craigslist repeatedly warns users not to post illegal content and even if that warning is flouted by users, "it is not because Craigslist has caused them to do so." *Dart* at *6.

Finally, the word search function is a "neutral tool" that permits users to search for terms that they select in ads created by other users: "It does not cause or induce anyone to create, post, or search for illegal content." *Id.*

Craigslist was represented by Eric D. Brandfonbrener, Perkins Coie LLC, Chicago, IL. Plaintiff was represented by Daniel Francis Gallagher, Christopher Paul Keleher, Paul A. Ogrady, Querrey & Harrow, Ltd., Chicago, IL.

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Court Applies Reporter's Privilege to Notes, Drafts, and Peer Review of Research Article

By Steven P. Mandell, Steven L. Baron, and Shari R. Albrecht

In a case involving a subpoena to a scientific journal, the Circuit Court of Cook County, Illinois, recently upheld the application of the reporter's privilege to materials such as notes, drafts, and comments of peer reviewers.

In the underlying case, *Cagney v. Johnson & Johnson et al.*, Docket No. 08 L 6170, plaintiffs brought products liability claims against various parties involved in manufacturing and distributing a pharmaceutical patch that allegedly caused the death of plaintiffs' decedent. The plaintiffs sought discovery by subpoena from Preston Industries, Inc. ("Preston"), which publishes the *Journal of Analytical Toxicology*, regarding an article in the Journal that questioned the reliability of a type of postmortem test that plaintiffs hoped to use to prove causation in the underlying tort case. Plaintiffs sought all documents regarding the article, including any drafts, author's notes, and peer-review comments on the article.

Motion to Quash

Preston moved to quash the subpoena, arguing that the information sought was protected from discovery (1) by the Illinois Reporter's Privilege Act, 735 ILCS 5/8□901 et seq., and (2) because it was not sufficiently relevant to overcome the public interest in confidentiality of peer reviews, citing Magistrate Judge Keys's ruling in *In re Bextra & Celebrex Marketing Litig.*, 2008 WL 4345158 (N.D. Ill. Mar. 14, 2008).

The Illinois Reporter's Privilege Act protects from disclosure "the source of any information obtained by a reporter," but a court may order divestiture of the privilege if it finds that other available sources of information have been exhausted and disclosure of the protected information is essential to the public interest. The statute defines "source" as "the person or means from or through which the news or information was obtained."

The plaintiffs did not contest whether the Journal and the article's author were "reporters" for purposes of the statute, but they asserted that a "source" is only the identity of someone providing information to a reporter, not the information itself. In *People v. Slover*, 323 Ill. App. 3d 620 (Ill. 4th Dist. 2001), an Illinois appellate court indicated that the Reporter's Privilege Act protects more than just identifying information when it applied the Reporter's Privilege Act to unpublished photographs, and numerous lower-court decisions have applied the privilege more broadly. However, no Illinois appellate court has directly addressed the application of the privilege to information that a third party communicates to a reporter. Plaintiffs also asserted that information concerning the drafting and review of the article was particularly relevant to their case because one of the article's authors and the Journal's editor-in-chief had consulted with or testified as an expert for some of the defendants in other, similar products liability cases.

On September 23, 2009, the court held a hearing and granted Preston's motion to quash the subpoena. In his oral ruling, Judge Jeffrey Lawrence held that the Reporter's Privilege Act's application is not limited to an individual's identity. Judge Lawrence interpreted the *Slover* case to allow for a broad definition of the term "source." He noted that Magistrate Judge Keys, in the *Bextra* opinion, had interpreted *Slover* more narrowly, but he disagreed with that analysis and did not find the federal magistrate's opinion binding. Judge Lawrence further interpreted the privilege to apply to drafts of the article by interpreting the statutory term "means" within the definition of "source" as "whatever is necessary to accomplish the goal."

Judge Lawrence rejected the plaintiffs' argument that the relevance of the relationship between the Journal and defendants' experts could overcome the reporter's privilege, stating that the plaintiffs could seek to impeach the experts' testimony without the use of privileged materials. Judge Lawrence cited *Reda v. Advocate Health Care*, 199 Ill. 2d 47 (2002), for the principle that privilege (in that case, a medical records privilege) applies regardless of relevance.

Preston Industries was represented by Steven P. Mandell, Steven L. Baron, and Shari R. Albrecht of Mandell Menkes LLC in Chicago. Plaintiffs Jamie Lee Cagney and Casey Cagney were represented by John Cushing III of Chicago and James Craig Orr, Jr., and Charles Miller of Heygood, Orr, Reyes & Bartolomei in Dallas.

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Appeals Court Affirms Censorship of Valerie Plame Wilson Memoir

Concurring Judge Faults Majority for "Blinking Reality"

A Second Circuit panel held that because former covert intelligence officer Valerie Plame's "possible" pre-2002 federal service dates negligently released by CIA in a post-employment retirement annuity letter (subsequently reprinted in the Congressional Record) remain "properly classified" and Plame was obligated by a secrecy agreement with the CIA not to disclose classified information, Plame and her publisher, Simon & Schuster, could not demonstrate a First Amendment violation when the Bush administration censored Plame's references in her memoir FAIR GAME to that public domain information. *Wilson v. CIA*, No. 07-4244-cv, 2009 WL 3763830 (2d Cir. Nov. 12, 2009) (Raggi, CJ, Keenan, DJ) (Katzmann, CJ, concurring in the judgment).

Valerie Plame Wilson

The court affirmed an award of summary judgment by the district court in favor of the government defendants. *Wilson v. McConnell*, 501 F.Supp.2d 545 (S.D.N.Y. 2007). The majority also held that the Agency, then under the direction of Gen. Michael V. Hayden, was not the proximate cause of Congressional release of CIA's annuity planning letter to Plame, and therefore CIAs negligence did not constitute an "official disclosure" of Wilson's pre-2002 dates of service. The majority reasoned that Plame – who received the letter from CIA's Chief of Retirement & Insurance Services via First-Class mail and which the record shows was for her retirement "planning purposes" – broke the chain of negligent causation by CIA when she "did not object to any otherwise permissible inclusion or [her] personal financial information as contained in [the February 10, 2006 letter" in connection with proposed Congressional legislation.

Plame had previously been 'outed' improperly by former Bush administration senior officials. Consequently, Representative Jay Inslee (D-Wash.) had requested the information from Plame to establish the necessary basis for a proposed private bill in Congress. The proposed private bill, which has not been enacted, would have permitted Plame to receive full retirement benefits available by federal statute to intelligence officers with 20 years of service despite the fact that she had not reached the requisite age.

The majority opinion did not refer to the sentence in CIA's letter stating it was provided by CIA to Plame for her "planning purposes." The court also did not address Plaintiffs-Appellants' argument that the letter from CIA's Chief of Retirement & Insurance Services constituted a vicarious admission by CIA of the information it contained, binding upon the Agency itself pursuant to Fed. R. Evid. 801(d)(2)(D) and therefore an "official acknowledgement" for First Amendment purposes.

Judge Katzmann, writing separately, observed that "the CIA's position in this litigation blinks reality in light of the unique facts of this case and the policies behind the doctrines at issue here. Indeed, the CIA's litigation posture may very well be counterproductive to its purpose." Judge Katzmann further observed:

> [T]he CIA's position in this litigation, set forth in unclassified, publicly filed court documents, has served only to give credence to the perception that the February 10 Letter accurately set

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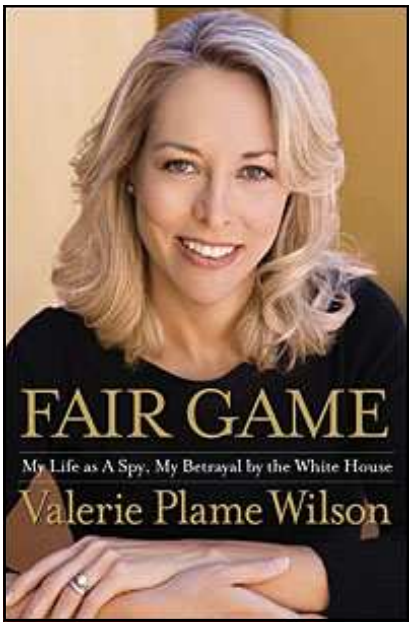
forth Ms. Wilson's dates of service. Senator Daniel Patrick Moynihan, a student of secrecy, believed that the obvious need to protect legitimate secrets is undermined when agencies proceed reflexively without a fully reasoned assessment of the likely consequences of positions contemplated. *See* Daniel Patrick Moynihan, *Secrecy*, with a new preface by the author (1998). This may have been such a case.

(Katzmann, CJ., concurring in the judgment.)



FAIR GAME was published by Simon & Schuster in redacted form in October 2007 with an afterward by reporter Laura Rozen. A film version of FAIR GAME, with Sean Penn appearing as Joseph Wilson and Naomi Watts appearing as Valerie Plame Wilson, is currently in post-production and scheduled for release in 2010. Plaintiff-Appellant Valerie Plame Wilson plans to file in December 2009 a petition for panel rehearing and/or rehearing en banc. A fuller report on the case and the petition for rehearing will appear in a future MLRC MediaLaw Letter.

Plaintiffs-Appellants Valerie Plame Wilson and Simon & Schuster, Inc. were represented by David B. Smallman, Smallman Law PLLC, New York, NY. R. Bruce Rich and Jonathan Bloom, Weil, Gotschal & Manges LLP, New York, NY, represented Amici Curiae Association of American Publishers, Inc., et al. in support of Plaintiffs-Appellants. Defendants-Appellees were represented by Benjamin H. Torrance, Assistant United States Attorney, Southern District of New York. Elizabeth McNamara, Davis Wright Tremaine LLP, New York, NY, also represented Simon & Schuster, Inc. as co-counsel in the district court proceeding.

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Arizona Supreme Court Holds "Metadata" Subject to Public Records Law

By David J. Bodney and Chris Moeser

The Arizona Supreme Court held last month that metadata is subject to the state's Public Records Law and clarified that electronic versions of records are open to public inspection. The landmark decision is the first by a state supreme court to hold that metadata – information about the history, tracking and management of an electronic document – is a public record. *Lake v. City of Phoenix*, 2009 WL 3461304 (Ariz. Sup. Ct. Oct. 29, 2009).

The opinion will benefit journalists and members of the public immediately by requiring government bodies in Arizona to provide public records in electronic format upon request, if such records are maintained electronically. Previously, many public bodies, including the City of Phoenix, refused to provide electronic versions of public records. In some instances, the practice required requestors to pay copying fees for thousands of pages of documents when the information could have been provided for the cost of a CD.

Background

David Lake, a Phoenix police officer, filed an administrative complaint and federal employment discrimination lawsuit against the City of Phoenix. He also submitted a public records request to the City for his supervisor's notes, which he received. Lake, however, suspected that his supervisor had backdated the notes. He then requested that the City provide the "[metadata] or specific file information contained inside [the notes], including the TRUE creation date, the access date, the access dates for each time it was accessed, including who accessed the file as well as print dates etc." The City denied Lake's request, asserting that metadata is not a public record under the definitions in *Mathews v. Pyle*, 251 P.2d 893 (Ariz. Sup. Ct. 1952).

Lake filed a special action under the Arizona Public Records Law, but a superior court judge denied jurisdiction and relief. Lake appealed, and the Arizona Court of Appeals affirmed his right to inspect many police records but held that metadata is not a "public record" as defined by case law. *Lake v. City of Phoenix*, 207 P.3d 725 (Ariz. Ct. App. 2009). In a 2-1 decision, the Court of Appeals noted that the statute embraces a distinction between "records" and "public records," and noted that that "[t]he legislature ha[d] broadly defined a 'record' but ha[d] chosen not to define a 'public record,'" instead "defer[ing] to the courts on this issue." In dissent, Judge Patricia Norris noted that metadata is not an "electronic orphan," but is instead part of the requested electronic document. *Id.* at 740. Because the City never argued that the notes were not a public record, Judge Norris concluded that "[w]hen . . . an [an] electronically created document is a public record, then so too is its metadata." *Id.*

The Arizona Supreme Court's Decision

The Arizona Supreme Court rejected the Court of Appeals' narrow reading of the Public Records Law. Specifically, the supreme court held that "if a public entity maintains a public record in an electronic format, then the electronic version, including any embedded metadata, is subject to disclosure." *Lake*, 2009 WL 3461304, at *1 ¶ 1. The court noted that the Public Records Law defines the public's right of inspection broadly, and that the Court of Appeals erred in parsing the statutory and common law definitions in an attempt to determine whether they included metadata.

The court tracked Judge Norris' dissent, observing that the metadata in an electronic document "is part of the underlying document." *Id.* at *3 ¶ 13. The public is entitled to inspect the "real record" under the Arizona Public Records Law, the court ruled, and the "real record" of an electronically-created document is the electronic version. *Id.* The court noted that "[i]t would be illogical, and contrary to the policy of openness underlying the public records laws, to conclude that public entities can withhold information embedded in an electronic document . . . while they would be required to produce the same information if it were written manually on a paper public record." *Id.*

Writing for the supreme court, Justice Scott Bales observed: "The pertinent issue is not whether metadata considered alone is a public record. Instead, the question is whether

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a 'public record' maintained in an electronic format includes not only the information normally visible upon printing the document but also any embedded metadata." *Id.* at ¶ 12.

The court explicitly rejected the City's argument – echoed in amicus curiae briefs filed by the State of Arizona and the League of Arizona Cities and Towns – that allowing inspection of metadata would create an "administrative nightmare" for government bodies. *Id.* at *4 ¶ 15. The court pointed out that most public records requests do not involve electronic records, and agencies can satisfy a request for electronic records "merely by providing the requestor with a copy of the record in its native format." *Id.*

The court did not decide "when" public bodies are required to retain records in electronic format, nor did it find that "every" public records request will require disclosure of the "native file." *Id.* But it clearly held that metadata is subject to the public records law, and remanded the case to superior court for appropriate action, including a possible attorneys' fees award.

David J. Bodney and Chris Moeser are attorneys in the Phoenix office of Steptoe & Johnson LLP, who, together with Peter S. Kozinets, filed an amici curiae brief in the Arizona Supreme Court on behalf of The Associated Press, Gannett Co., Inc., The Reporters Committee for Freedom of the Press and The E.W. Scripps Company.

Reporter Barred From Tweeting Criminal Trial

Federal Ban on "Broadcasting" Extends to Twitter

A Georgia federal district court this month denied a reporter's request to use Twitter to cover a criminal trial, holding that the ban on broadcasting in federal court extends to any "contemporaneous transmission of electronic messages from the courtroom describing the trial proceedings." *U.S. v. Shelnutt*, No. 4:09-CR-14, 2009 WL 3681827 (M.D. Ga. Nov. 2, 2009) (Land, J.).

A reporter for the Columbus Ledger-Enquirer newspaper, covering the trial of a Georgia lawyer accused of laundering money for a drug ring, had asked the court for permission to "tweet" the proceedings, i.e., send regular electronic messages of 140 or less characters from his cell phone to the newspaper's "Twitter" website.

The court held that Rule 53 of the Federal Rules of Criminal Procedure prohibits "tweeting" from the courtroom and that Rule 53 does not violate the First Amendment. Rule 53 states in relevant part: "[T]he court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."

The court reasoned that the term "broadcasting" in Rule 53 includes sending electronic messages from a courtroom that contemporaneously describe the trial proceedings and are instantaneously available for public viewing. The court noted that "broadcasting" is typically associated with television or radio, but concluded that the plain meaning of the term is broader than that, citing to dictionary definitions of broadcast that include: "casting or scattering in all directions" and "the act of making widely known."

Moreover, the court cited the 2002 amendments to Rule 53 which eliminated the modifier "radio" from broadcasting. This change "reveal[ed] that the Committee made the change with the intention that additional types of broadcasting would be covered by the Rule. See Fed.R.Crim.P. 53 advisory committee's note ("Given modern technology capabilities, the Committee believed that a more generalized reference to 'broadcasting' is appropriate.")

Finally, the court considered the First Amendment implications of banning trial coverage by "tweets." The court concluded that it is "well settled" that Rule 53 does not restrict the freedom of the press in an unconstitutional manner.

> The press certainly has a right of access to observe criminal trials, just as members of the public have the right to attend criminal trials. In this case, the press will be able to attend, listen and report on the proceedings. No restriction is being placed upon their legitimate right of access to the proceedings. Accordingly, the Court finds that its application of Rule 53 in this case does not violate the First Amendment.

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Second Circuit Affirms Jury Verdict for *New York Times* In Freelancer Copyright Case

By Tom Curley

The U.S. Court of Appeals for the Second Circuit has rejected an attempt to overturn a jury verdict for *The New York Times* in a copyright infringement action brought by a freelance photographer who alleged that the newspaper had no right to publish approximately one hundred of his photographs on the *Times'* website.

The Second Circuit's decision in *Dallal v. New York Times Co.*, 2009 WL 3680501, came one week after oral argument. In a seven-page summary order issued November 5, the court affirmed a unanimous jury verdict for the *Times* in late 2007.

The case arose out of the publication on the *Times'* website of photographs created by plaintiff Thomas A. Dallal while on assignment for the newspaper. The plaintiff, a *Times* freelancer from 1994 until 2002, alleged that he had granted the *Times* only the right to use his photographs in the printed newspaper and inclusion of his photographs on the *Times'* website exceeded the scope of his authorization.

In affirming the verdict below, the Second Circuit held, *inter alia*, that the district court was correct to submit to the jury the *Times'* defense that its publication of plaintiff's photographs on its website was permitted as a privileged "revision" of a collective work (here, the *Times'* print edition) under Section 201(c) of the Copyright Act.

Under Section 17 U.S.C. § 201(c), the owner of the copyright in a collective work is, by operation of the statute, permitted to reproduce and distribute a separately copyrightable contribution as part of later revisions of the collective work. The question presented to the jury with respect to Section 201 (c) was whether the *Times'* website was, at the time of events at issue in the lawsuit, a "revision" of the printed edition of the newspaper. The scope and applicability of the so-called revision privilege under Section 201(c) has been vigorously litigated in recent years. *See, e.g.*, *New York Times Co. v. Tasini*, 533 U.S. 483 (2001); *Faulkner v. Nat'l Geographic Enters.*, 409 F.3d 26, 40 (2d Cir. 2005).

On appeal, plaintiff mainly attacked the district court's denial of his motion for judgment as a matter of law pursuant to Fed. R. Civ. Proc. 50(a) following the close of evidence at trial. Concisely summarized, plaintiff argued that all of the *Times'* defenses should have been precluded by written invoices submitted by plaintiff. He contended that the *Times'* desire to obtain "first exclusive" rights to publish his work meant that the *Times* had sought a "transfer of copyright ownership" within the meaning of 17 U.S.C. § 204(a). To properly effect such a transfer, a writing is required by Section 204(a).

Plaintiff contended that because his invoices to the *Times* requesting payment after his photo assignments were shot were the only writings that could satisfy Section 204(a), the boilerplate legal terms on the invoices must govern.

According to plaintiff, the existence of his written invoices (the terms of which, in his view, precluded web publication by the *Times* of any of his photographs) mandated that the trial court strike the three independent defenses that the *Times* put to the jury, specifically that: (1) publication of the plaintiff's photographs in the web edition of the *Times* was authorized pursuant to an oral or implied license granted by the plaintiff (and was *not* governed by plaintiff's invoices); (2) publication was permitted in any event as a privileged revision to a collective work under Section 201(c); and (3) even if the *Times* did not at the time have a right to publish his photographs on its website, the plaintiff was equitably estopped from asserting his claims after years of accepting assignments knowing that his works were being published on the web.

The Second Circuit concluded that, contrary to plaintiff's assertions, there was scant evidence at trial to suggest that in fact "the *Times* [had] sought an exclusive license, *e.g.*, any suggestion that it ever tried to prevent Dallal or anyone else from republishing his work[,]" that could have implicated the writing requirement of 17 U.S.C. § 204(a).

Furthermore, the evidence introduced at trial supported the *Times'* position that plaintiff in fact knew and agreed that his photographs would be published in the newspaper's print *and* web editions and that such use was consistent with the parties' oral communications and their multi-year course of dealing with one another.

Summarizing the trial record, the court found the evidence demonstrated that "*Times* employees told Dallal that

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the *Times* did not intend to be bound by the invoices; that Dallal was aware the photos would be published on the Internet; and that Dallal nevertheless accepted more than 1,000 assignments from the *Times*. In the face of such evidence, the district court properly denied Dallal's Rule 50 motion and permitted the jury to consider whether an oral agreement existed that the *Times* would acquire a nonexclusive license permitting publication of Dallal's work on the Internet, as well as the question of equitable estoppel."

The trial judge, the Hon. Alvin K. Hellerstein of the Southern District of New York, initially granted summary judgment for the *Times* in the action in May 2005, which was later reversed by the Second Circuit based on the conclusion that there were genuine factual issues for trial with respect to the *Times'* defenses. *See Dallal v. New York Times Co.*, 2006 WL 463386 (2d Cir. Feb. 17, 2006). The verdict for the *Times* at the subsequent jury trial in November 2007 was previously the subject of an article in the February 2008 issue of the MediaLawLetter, *Jury Finds New York Times Did Not Violate Freelancer's Copyrights by Republishing His Photos In Web Edition*, at p. 29.

The Times was represented by Robert Penchina, Thomas Curley and John B. O'Keefe of Levine Sullivan Koch & Schulz, L.L.P and by George Freeman, assistant general counsel of The New York Times Company. The plaintiff was represented by Eric Vaughn-Flam of Sanders Ortoli Vaughn-Flam Rosenstadt LLP.

The Other Side of the Pond: Update on U.K. Media Law Developments

Super Injunctions, Libel Reform Proposals, Defamation Statistics and More

By David Hooper

Super-injunctions – a Carter-Ruck Own Goal?

There has been an inexorable and controversial growth in super-injunctions – so called because not only do they bind third parties not to reveal a particular piece of information, but the very existence of the injunction itself cannot be reported. The Guardian, which was on the receiving end of litigation involving a super-injunction brought by Carter-Ruck on behalf of an oil trading company called Trafigura, has noted that it has received 12 such injunctions in the last year whereas it only had 6 in 2006 and 5 in 2005. Such super-injunctions are, however, much more common in the privacy field and tabloids are routinely receiving a couple of such super-injunctions each week.

The background to the case was that Trafigura had been accused of causing toxic waste to be discharged during the cleaning of a ship's tanks off the Ivory Coast which was said to have injured the health of a large number of citizens of the Ivory Coast. On 14 September 2006, Trafigura's lawyers had commissioned a report into the possible causes of the disaster so that they could be advised on their liabilities. With some justification, they asserted that this report was simply a work in progress which looked at the potential causes of what had happened.

A draft of this confidential report was leaked to the Guardian. On 11 September 2009 Mr Justice Maddison granted preventing the Guardian from reporting the contents of the draft report ("the Minton report") – which the Guardian did not at that stage contest. The underlying litigation had in fact been settled upon payment of £30 million to 30,000 Claimants in compensation and legal costs. While Trafigura had a strong claim to protect their legally privileged document, the litigation undoubtedly itself raised considerable issues of public interest and concern.

When the injunction against the Guardian had been obtained, details of the injunction were served upon the rest of the press. This underscored the fact that this was a super-injunction as other papers were told that they could not even report that such an injunction had been obtained, nor could they report the very existence of the proceedings, nor could they even say who the claimants were. The claimants were anonymized so that they were shown simply by way of unidentifiable initials and the court file was sealed. Any journal-

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ist who might have been interested in doing a little detective work to see what this was all about, would have had his attention drawn by his legal department to a penal notice set out in capital letters which, in unequivocal language, informed him that any person who knew of the order and disobeyed it or did anything to help any person to whom the order applied, could be held in contempt of court, imprisoned, fined or have their assets seized.

Had matters ended there, the claimants would have been reasonably successful and the outcome of the litigation would in due course have been reported without reference to the confidential and privileged Minton report which they had obtained. However, at this stage Paul Farrelly MP, who those who attended the MLRC conference in London will recollect is a member of the parliamentary committee looking into the law of libel, put down a question in Parliament about the use of super-injunctions. The reporting of this question appeared to the Guardian lawyers to be covered by the wide-terms of the super-injunction granted by Mr Justice Maddison. Carter-Ruck confirmed to the Guardian that it was their view that reporting the parliamentary question would breach the order and could render the paper in contempt of court.

The paper reported their dilemma the next day, making it clear that they were unable to state what the prohibition applied to. Needless to say it made a more intriguing story. This gap in the public's knowledge was rapidly filled by the Twittersphere and Bloggersphere. Members of Parliament went ballistic in that this appeared to them to breach Article 9 Bill of Rights 1689 – the nearest the United Kingdom comes to a written constitution and a law which regulates the relationship between Parliament and the Courts. Carter-Ruck now found themselves under attack in the press and in Parliament with people raising the question of whether this might constitute a contempt of Parliament.

One MP even reported Carter-Ruck to the Law Society – distinctly optimistically. To many there appeared to be a degree of back-peddling when Carter-Ruck made it clear that they had had no wish to gag the reporting of proceedings in Parliament. Carter-Ruck did, however, helpfully suggest that the matter should be treated as sub judice and so should not be reported.

Defeat had been grabbed from the jaws of victory and it was little surprise that Carter-Ruck very shortly thereafter withdrew their objection to the Guardian reporting this matter. The fact of the super-injunction became public and even the confidential Minton report entered the public domain. The unfortunate Carter-Ruck even found their offices beset by gagged Twitterers protesting.

The upshot of this litigation is that Jack Straw has now launched a consultation with lawyers from major newspapers and with senior judges about the use of such super-injunctions and the Lord Chief Justice, the appropriately-named Lord Judge, has raised concerns about the extent to which super-injunctions are used. He expressed the view that while such injunctions could well be appropriate where, for example, action had to be taken against people committing fraud and secrecy was vital to prevent the disappearance of assets, he said that he would need very powerful persuasion for it to be constitutionally possible or proper for a court to make an order which might prevent or hinder discussion of any topic in Parliament. Underlying the comments of Lord Judge appeared to be real concern as to the use currently being made of super-injunctions.

Precisely what changes in the law there will be bearing in mind that there are pressures on parliamentary time in the lead up to the general election is unclear, but it is likely that more will be heard on the subject from Mr Straw and from the parliamentary committee looking into the law of libel.

Are There Changes Afoot?

A powerful report by English PEN and the Index on Censorship has recently been published http://www.libelreform.org/our-report. It suggests that no cases should be heard in this jurisdiction unless at least 10% of the copies of the relevant publication have been circulated here in order to prevent libel tourism, it also advocates a single publication rule and a cap of damages of £10,000.

These, and other changes they recommend, may turn out to be aspirational, but the issue has caught the attention of the Justice Secretary, Jack Straw. He has observed that no-win no-fee arrangements have got out of hand and the system has become unbalanced. Very high levels of remuneration for defamation lawyers in Britain seem to be incentivising libel tourism, he observed, and he expressed concern that current arrangements in libel law are being used by big corporations to restrict fair comment, not only by journalists but also by academics.

Bearing in mind that there are also due to be reports by Lord Justice Jackson on costs in defamation proceedings and by the parliamentary committee into the law of libel, changes

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do seem to be on the way, but on past form it may be some time before any such changes are implemented in legislation. Freedoms of speech tends to be fairly low on the list of vote-catching measures at election time.

Reporting Restrictions in Criminal Courts

New guidelines have been published on 1 October 2009 concerning the restrictions in reporting criminal trials, which is a joint publication by the Judicial Studies Board, the Newspaper Society, The Society of Editors and Times Newspapers Limited. It incorporates the recent legislative changes. Its pedigree is underscored by the fact that the foreword is by the Lord Chief Justice, Lord Judge.

Damian Green MP

Readers of this column may recollect the description of the arrest of the Conservative immigration spokesman on the grounds that by receiving leaked Home Office documents he was complicit in the misfeasance of public duties by a civil servant. No charges were brought against Green or the civil servant after the Director of Public Prosecutions, Keir Starmer QC said that the damage to the Home Office did not appear to be substantial and that the matter was of legitimate public interest. This has been followed up by a police inquiry chaired by Chief Constable Ian Johnson who concluded that the arrest was not proportionate and the leak did not threaten national security, but was more in the realm of political embarrassment.

The matter could have been dealt with by way of interview by prior agreement without all the palaver of his arrest when he could have been accompanied by his legal representative. One could not escape the conclusion that the action taken against Mr Green was politically motivated and designed to intimidate those in receipt of politically embarrassing leaked documents. Reports such as this therefore are a welcome antidote.

Defamation Statistics

As can be seen from a recent report, the number of defamation cases launched in the High Court jumped 11% last year to a figure of 259. The vast majority of those cases were resolved before court proceedings and this increase in the number of such claims needs to be seen against the enormous growth in content as a result of the internet. Anyhow reports of the death of libel are greatly exaggerated.

Dismissal of Ecclestone Libel Claim

Mrs Justice Sharp struck out a bizarre claim brought by Petra Ecclestone, the daughter of the head of Formula 1 motor racing. *Ecclestone v. Telegraph Media Group* [2009] EWHC 2779 (QB). Through her solicitors, Schillings, she had complained about a comment in a column where she was reported to have said in relation to a call by Sir Paul McCartney for meat-free Mondays "*I'm not a veggie and I don't have much time for people like the McCartneys and Annie Lennox*". By the time this came to court aggravated damages were sought and this was depicted as a gratuitous attack on two distinguished musicians and a successful fashion designer. One rather doubts this would have seen the light of day in an American court. The judge noted that the threshold for the exclusion of meaning was a high one, but concluded that the words complained of were not capable of bearing any meaning defamatory of the Claimant. The ordinary reader would simply have seen it as nothing more than an expression of a permissible view about an issue on matters on which some people hold strong opinions.

Fair Comment Appeal

Readers may recollect an earlier article in this column where Mr Justice Eady decided that remarks made by Simon Singh about The British Chiropractic Association amounted to a statement of fact rather than an expression of opinion. *See MediaLawLetter* July 2009 at 29. The Court of Appeal have now given permission for the ruling to be appealed on the basis that it was arguable that the judge's approach to the issue of whether something that was objectively verifiable could be a comment, was legally erroneous. *British Chiropractic Association v. Singh* [2009] EWCA Civ 1154. It is a case of some importance in view of the perception that the expression of medical and scientific opinion is being stifled by the law of libel.

Third Party to Pay Costs of Slander Action

Although it is a decision at first instance, a High Court Master (a procedural judge) granted an order in *RFC Capital –v- MD7 Europe* that costs be paid by a third party Raoul Witteveen who was not party to the original action. The claim which related to mobile phone contracts had been discontinued by the Claimant companies. The Master concluded that the case was of the most speculative kind imaginable.

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Injunctions Against Books, Potential Contempt

The Attorney General obtained an injunction against Random House preventing the publication of a book *The Terrorist Hunters* by the former head of the Metropolitan Police anti-terrorism squad on the grounds that there was a substantial risk that the retrial of 8 people in an airline bomb plot trial could be seriously impeded or prejudiced. *HM Attorney General –v- Random House Group Ltd* [2009] EWHC 1727.

Mr Justice Tugendhat decided there was a substantial risk that a juror could read the book and be prejudiced by it. He was satisfied that it was in the public interest for the book to be published, but the public interest in the trial being fair could not be higher. He therefore felt when one considers the various interests, including the cost of publishing and promoting the book against a person's right to a fair trial and the enormous cost of bringing such a case to trial with the attendance risk of a mistrial the balance was in favour of delaying publication.

Statements in Court After Offer of Amends

In a decision which will be exploited by lawyers representing celebrities, the actress, Kate Winslet, obtained a ruling from Mr Justice Eady that she was entitled to read a Statement in Open Court vindicating her reputation after accepting an offer of amends. *Winslet –v- Associated Newspapers* [2009] EWHR 2735. She had complained about a somewhat waspish article entitled "*Should Kate Winslet Win an Oscar for the World's Most Irritating Actress."*

Through her lawyers, Schillings, she complained that the article implied that she had lied about her exercise regime. The newspaper believed it had sufficiently resolved the matter when it agreed to pay her £25,000 damages plus her costs and it published an apology. Ms Winslet was dissatisfied with the apology. As there was no express provision in the offer of amends regime set out in the Defamation Act 1986 for a claimant to require a Statement in Open Court in such circumstances and as there was a provision that actions could not be continued after the acceptance of an offer of amends, the newspaper argued that this was an end of the matter.

Mr Justice Eady, however, disagreed saying that this was not a continuation of the action, but all part and parcel of its resolution. The upshot is likely to be that more people will in such circumstances demand a Statement in Open Court even if it is unilateral. Claimants in such circumstances can given themselves a glowing endorsement – bearing in mind that it is, after all, written by them, or at any rate their lawyers – and they will obtain a fair amount of good publicity for themselves. Furthermore, the process may add a few thousand pounds extra in costs which will have to be paid by the defendant.

Talking of Costs

The high level of costs and potential absurdity of the English law of libel came into focus in the case of *Dee –v- Telegraph Media Group* [2009] EWHC 2546. Mr Dee complained of a mocking article in the Telegraph which suggested that he was the worst professional tennis player in the world, drawing attention to the fact that he had lost 54 consecutive matches on the tennis circuit, but making the point with an exaggerated sense of congratulation that he had triumphed against opponent number 55, an unranked 17 year-old Spaniard.

Mr Dee had apparently recovered damages of £12,500 from the BBC, £15,000 from the Mail and £5,000 from the Express for similar allegations. What was the issue in that phase of the litigation was whether Mr Dee should disclose details of how his opponents were measured in terms of world rankings. His apparent resistance to doing so was given fairly short shrift by Mr Justice Eady who expressed some astonishment that the likely costs of this litigation were projected to be £500,000 and did not include a conditional fee agreement or After the Event insurance. It was, the judge noted, difficult to understand how such a case could give rise to such expenditure.

However Criminal Libel Has Been Abolished

Bad as English libel law may be, one will now no longer be sent to prison for libelling people. Criminal libel together with its cousins seditious and obscene libel have been abolished in the recently passed Coroners and Justice Bill, Blasphemous libel had succumbed to Section 9 Criminal Justice and Immigration Act 2008. It has to be said that it is an extremely long time since anyone went to jail for such libels, but so long as they remained on the statute book they could be used – albeit unsuccessfully – by pressure groups or wealthy people like Sir James Goldsmith as in his campaign in the 1970s against Private Eye.

Update Your Archives : Flood –v- Times Newspapers

This was an interesting decision where the Times de-

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scribed in June 2006 how a police officer was under investigation for corruption where the allegation was that information was being passed to a private security company relating to extradition warrants against Russians. *Flood –v- Times Newspapers* [2009] EWHC 2375.

Subsequently, it was found that there was insufficient evidence to investigate further and the Metropolitan Police wrote to the Times in September 2007 informing the paper of the outcome of their inquiry. After Mr Flood had originally complained to the Times that he had been libelled, the archive version of the article was prominently marked *"this article is subject to legal dispute and should not be relied upon or repeated."*

The Judge took the view that the original article did constitute responsible journalism so as to satisfy the Reynolds test and that it was a proportionate interference with Mr Flood's right to reputation given the legitimate aim and subject matter of the article. However, Mr Flood did succeed in his claim in respect of the internet archive version of the article where the court considered that, notwithstanding the warning, there was an insufficient updating of the article in the sense that if one judged the archive article at the time that it was subsequently accessed, the newspaper could not meet the test of responsible journalism, as there was no footnote drawing attention to the discontinuance of the investigation and consequent exoneration of Mr Flood.

The case underscores the need to update archived versions of an article. The fact that the police had written to the paper in September 2007 was no doubt felt to be significant by the judge. So long as we do not have a single publication rule and while the Reynolds Defence falls to be judged at the time of publication, which under English law will be when the archive is accessed, it will be important for newspapers to keep their archives updated.

Even if the United Kingdom does adopt a single publication rule (*see MediaLawLetter* Sept. 2009 at 25) it is likely that there will be some provision requiring newspapers to update – probably by means of a footnote – their archives when material new facts come to their attention. One would not imagine that newspapers would actively have to look out for information about an individual about whom they have written in the past, but if matters are drawn to their attention they are likely to have to deal with them by some form of explanatory note when it is appropriate to do so.

Bulletin Boards and E-Commerce Regulations

One of the more colourful members of my profession, a Mr Karim, failed in his claim against Newsquest Media Group. He was unhappy with a report captioned "*crooked solicitor spent client money on a Rolex, loose women and drink*". That, however, was a report of disciplinary proceedings against him and, as such, was held by Mr Justice Eady to be privileged, so that Mr Karim's claim failed. He also complained about comments on the bulletin board which accompanies the online article about which he had complained. These, it seems, included some unflattering reflections on his suitability to remain a member of the legal profession. Mr Justice Eady dismissed this claim as well ruling that the paper had acted as hosts for the purpose of Regulation 19 Electronic Commerce (EC Directive) Regulations 2002. It had no contemporaneous control over the content and had acted expeditiously to remove the postings in question when a complaint was received.

Abuse of Process

It has been disappointing how few cases have met the abuse of process threshold laid down in *Jameel –v- Dow Jones*. However the claim brought by LonZim, an Isle of Man company, its Chairman and Executive Director against one of its shareholders, Andrew Sprague, and a South African weekly publication called Financial Mail, was decisively struck out by Mr Justice Tugendhat as an abuse of process. *LonZim –v- Sprague* [2009] EWHC 2838.

The Judge said the claim was wholly without merit. Mr Sprague had accused the company and its officers of self enrichment at the expense of shareholders at a meeting attended by 30 people, but only four or so of whom had actually heard what Sprague said. It was a slander action, but the Judge found no evidence of financial damage to the company as would be required in a slander action and he also thought damages would if all the available defences failed be very modest and the costs disproportionate.

Report of these remarks in the Financial Mail seem to have had, at best, minimal publication within the jurisdiction. Interestingly, the Judge was dismissive of the attempts by the Claimants to prove publication in the jurisdiction relying on organisations such as Alexa who seek to analyse website traffic and tend to be relied upon by Claimants who are trying to prove that foreign publications were in fact accessed in the UK. Tugendhat J's comments on that are well worth reading

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for anyone faced with internet forum shopping.

Fair Comment

The decision by Sir Charles Gray (now a retired High Court Judge who periodically hears libel actions) in *Thornton –v- Telegraph Media Group* [2009] EWHC 2863 illustrates the difficulties that can arise in relation to the fair comment defence. At issue was a review by Lynn Barber in the Telegraph about Canadian academic, Dr Sarah Thornton's book on the contemporary art world. The passage the newspaper ran into difficulty over was *"a decorative Canadian with a seemingly limitless capacity to write pompous nonsense. She claims her book was based on hour long interviews with more than 250 people. I would have taken this on trust except my eye flicked down the list of her 250 interviewees and practically fell out of its socket when it hit the name Lynn Barber. I gave her an interview?"*

While the Judge was willing to accept that it was arguable that this was comment rather than an allegation of fact, he held that the defence of fair comment was bound to fail because the facts upon which the comments were formulated as to how Dr Thornton carried out her interviews, were erroneous. There was a clear and material misstatement and this, in the Judge's view, was fatal to the defence of fair comment. The moral, it seems, is that one must have one's facts right before one wields the scalpel of fair comment.

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Ethics Corner

Ethical Environments

By Len Niehoff

Two overarching principles have driven the three ethics codes drafted and adopted by the ABA—the Canons of 1908, the Code of Professional Responsibility of 1970, and the Model Rules of 1983. The first principle is that an ethics code should describe the highest possible level of professionalism to which all attorneys should aspire. The second principle is that an ethics code should set the lowest acceptable level of professionalism, which all attorneys must meet or exceed on pain of disciplinary action.

It is not clear that the ABA's efforts met with much success with respect to the first principle. Indeed, it seems unlikely that attorneys who held themselves to the highest standards and ideals did so because the ABA told them to do so. The incorporation of the first principle into the ABA ethics codes therefore arguably did little to elevate the level of professionalism in the bar. Unfortunately, the incorporation of that principle inarguably created confusion about what the rules meant and required.

As a result, the Model Rules largely and deliberately abandoned the first principle in favor of the second. The lawyer ethics codes of most states therefore do little or nothing beyond setting a baseline for attorney conduct. And those codes offer a single incentive for compliance with this minimal standard: the possibility of punishment. In other words, our lawyer ethics codes have abandoned most hope of inspiration and have focused instead on deterrence. (For a fuller discussion of this history *see* Len Niehoff, *In the Shadow of the Shrine: Regulation and Aspiration in the ABA Model Rules of Professional Conduct*, 54 Wayne L. Rev. 3 (2008)).

There are, however, multiple problems with this approach. One problem is that there are good reasons to believe that a great deal of attorney misconduct goes undetected and therefore unpunished and therefore undeterred. This seems likely because clients often will have insufficient information or expertise to identify incompetence, failings of diligence, prohibited conflicts, and similar violations. In addition, disciplinary bodies face the challenges presented by limited resources and, in some cases, vague standards: a lawyer's advertisement claiming that he or she is the "most aggressive" in town and has "won millions" may be misleading or even downright false, but a disciplinary body may conclude it has neither the time nor the capacity to police such matters.

Another problem is that the possibility of punishment says nothing about the validity of the rule itself. Indeed, over the past century disciplinary authorities have imposed severe punishments on attorneys based on rules that were misguided not only ethically but legally—consider, for example, the Supreme Court cases holding unconstitutional various regulations of solicitation, advertising, and trial publicity. *See, e.g.*, *In re Primus*, 436 U.S. 412 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); and *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). In other words, the threat of discipline does not answer the fundamental question of why lawyers should follow the rules and should not simply ignore them when they seem too draconian, cumbersome, or expensive. We do not have the luxury to write this off as an academic question. We have too much evidence that too many lawyers remain unconvinced that the ethics rules deserve their attention and allegiance.

The ABA Model Rules actually anticipate this problem and try to address it. Accordingly, they impose on lawyers with managerial responsibility in a firm or an in-house office certain duties to ensure that the lawyers and non-lawyer assistants under their supervision comply with the rules. *See* ABA Model Rules 5.1, 5.2, and 5.3. In the same spirit, many states have continuing legal education requirements to ensure lawyers are informed about what the ethics rules demand. At bottom, though, these efforts come down to the same two messages: (1) here is what the ethics rules say; and (2) lawyers should obey them because, well, they are the ethics rules. It is a

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kind of moral instruction—but not a very compelling or effective kind.

Indeed, personality psychologists who have looked at the question have concluded that ethical behavior is influenced by a variety of considerations other than the simple teaching of rules and principles. In a recent book, Kwame Anthony Appiah summarizes some of the most famous scholarly work on this front. He describes a 1972 study that found that "when you dropped your papers outside a phone booth in a shopping mall, you were far more likely to be helped by people if they had just had the good fortune of finding a dime in the phone's coin-return slot." He recounts a 1973 study that discovered that Princeton seminary students "were much less likely to stop and help someone 'slumped in a doorway, apparently in some sort of distress,' if they'd been told that they were late for an appointment." He cites a 1975 study finding that "people were much less likely to help someone who 'accidentally' dropped a pile of papers when the ambient noise level was 85 decibels than when it was 65 decibels." And he notes a 1994 study that "showed that you were more likely to get change for a dollar outside a fragrant bakery shop than standing near a 'neutral-smelling dry-goods store.'" Kwame Anthony Appiah, Experiments in Ethics (2008), p. 41. It turns out that environmental factors can have a significant impact on people's ethical decision-making.

Interestingly, the ABA Model Rules recognize this idea, although they do so summarily and in passing. Thus, comment [3] to Rule 5.1 observes that "the ethical atmosphere of a firm can influence the conduct of all its members."

Accepting this as true, the question remains of how to cultivate such an environment. After all, it seems unlikely that most firms and in-house legal offices will opt to leave spare change around the premises, require everyone to speak in hushed tones, or blow the scent of cinnamon buns down the hallways.

The answer may lie in rediscovering the tremendous power that the telling of stories—as opposed to the recitation of rules—has in moral pedagogy. Stories can serve as calls to virtue or as cautionary tales. They bring a texture and complexity to issues that abstract directives do not. They are memorable. And they help define the communities that share them.

The prominent twentieth-century virtue ethicist Alasdair MacIntyre suggested that the only way to answer the question "What am I to do?" is to ask "Of what story or stories do I find myself a part?"

Indeed, it could be argued that the telling of stories has been the most important and influential method of moral instruction—but only for the past several thousand years.

There was a time when law firms and in-house offices were hotbeds for wonderful and useful stories. Less experienced lawyers would gather around the library table while more senior attorneys talked about how they handled a client that wanted to indulge in a little friendly perjury, or how they dealt with a troublesome document that the discovery rules compelled them to produce, or how the diligent pursuit of an obscure but important fact made all the difference in a cross-examination. People told stories, and laughed, and learned.

But the environment has changed. We've gotten bigger. We're spread around. We sit in front of computers in splendid isolation. We focus on meeting our billable hour requirements or on trying to keep up with the burdensome workload created by reduced in-house staffs. We have no time for stories. After all, telling stories is neither lucrative nor an efficient use of time. And the fact that it may be essential to the cultivation of an ethical environment escapes our notice.

The ABA Model Rules are, in many respects, a substantial improvement over the prior ethics codes. By design, however, they also reflect a regulatory sensibility and an emphasis on the lowest acceptable standards of attorney behavior.

Law firm, in-house legal office, and continuing legal education seminars that do nothing more than provide instruction on the parameters of these rules seem extraordinarily unlikely to cultivate an environment of any true moral depth.

For that to occur—personality psychologists and normative ethicists assure us—lawyers must gather together, talk about their experiences, tell some stories, and spend less time thinking about what the rules say and more time thinking about the right thing to do.

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MLRC Defense Counsel Section Reviews Projects and Goals at 2009 Annual Meeting

Robert D. Nelon Incoming DCS President; Robert P. Latham Joins as Treasurer

The Defense Counsel Section's annual meeting was held on November 12, 2009, in New York at the Proskauer Rose Conference Center. DCS Executive Committee President Kelli Sager called the annual meeting to order, welcomed everyone to lunch and thanked them for attending.

President's Report Election of Treasurer

Kelli Sager noted that the past year has been challenging for the MLRC, as some members have been forced to relinquish their memberships to meet newly tightened budgets, but that the MLRC has weathered the economic climate well. She remarked that events over the last year, including the MLRC Dinner the previous evening, were very well-attended, and that the Conferences at and with Southwestern and Stanford, and in London were all very successful.

Kelli noted the new format for the presentation of committee reports at the meeting, explaining that instead of having committee chairs give lengthy presentations on what their committees have done over the past year, such information was summarized in written reports distributed at the meeting. Committee chairs would be presenting their plan for 2010 at the meeting.

The first order of business was the succession of DCS Executive Committee Officers. In 2010, Robert D. Nelon will be DCS President; Nathan Siegel will be Vice President, and Elizabeth Ritvo, Secretary. Next, Kelli reported that the Executive Committee had nominated Robert P. Latham of Jackson Walker to be Treasurer. No other nominees for the Executive Committee had been received and, by a voice vote, the membership approved by acclamation Robert Latham as Treasurer. Kelli Sager will join Dean Ringel in emeritus status. Peter Canfield will rotate off of the Executive Committee, where he currently was in emeritus status.

Incoming DCS president Robert Nelon

Welcome from MLRC Chairman

Ken Richieri thanked the DCS for all of their contributions to MLRC, noting that they were an integral and critical part of the membership. He remarked on the changing media landscape and the need for the organization to keep pace with it. He solicited the input of the membership on ways to help the organization adapt to these changes and improve overall.

Bob Nelon thanked Kelli Sager for her impressive work as Chair of the Executive Committee and commended her for her ability to keep an eye on the big picture while tending to the details, as well as for being responsible in large part for the enormous accomplishments of the DCS as a whole this year.

Executive Director's Report

Sandy Baron opened her report by thanking all the DCS members for their service to the organization during the past year. She thanked the sponsors of the highly successful London Conference, highlighting the closing session which was a meeting and series of international presentations to three Members of Parliaments. Moving onto plans for 2010, Sandy

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said that the NAA/NAB/MLRC Conference would once again be held in Chantilly, Va., and would take place on September 29, 30, and October 1. She expressed her hope that the firms represented by those in attendance at the DCS lunch would consider underwriting, especially in light of the challenges faced by the sponsoring organizations this year.

Next, Sandy reported that the 2010 Southwestern Conference would be held on January 14 in Los Angeles, and shared her profound sadness about the death of David Kohler, our active partner in the Conference. David also facilitated MLRC's use of Southwestern facilities for its Cal Chapter quarterly meetings.

She also reported on the Stanford Digital Media Conference, to take place at Stanford Law School May 6-7, 2010, in connection with the Stanford Law School Center for Internet & Society. While the MLRC has previously partnered as well with Stanford Professional Publishing Courses for that Conference, it will not be doing so this year due to the cancellation of that program as a result of the economic downturn. However, the Knight Fellowship Program at Stanford has stepped up to fill in. The outline was not ready in time for distribution at the DCS meeting, but will be ready within the next two months.

Sandy stated that the Forum on Tools to Control and Monetize Media Content, held on November 11, 2009, was enormously well-received. She thanked David McCraw, Jerry Birenz, and John Abel for their work on the Forum.

In discussing the MLRC's publications, Sandy outlined the new publishing contract with Oxford University Press, emphasizing that MLRC retains exclusive control over all editorial content.

Sandy made special mention of two committee chairs who would be rotating off this year due to limits on their terms: the Ethics Committee chair, Lucien Pera, and the Entertainment Law Committee chair, Lou Petrich.

She also noted the important work done on the federal shield bill over the last few year by MLRC members, which includes a smaller group in which both Sandy and Maherin Gangat participated. She mentioned that the MLRC's grasp on state legislation—with the exception of right to publicity—is less firm, given the difficulty of keeping abreast of new trends at the state level. She asked members to submit their ideas for how the membership can better stay on top of state issues.

Committee Reports

Kelli then asked for the reports from the committees. She said that the reason for having the committee chairs submit written reports this year was twofold: to get the chairs thinking about what they want to do in 2010, and to encourage the audience to get involved. Reports were presented out of order for scheduling reasons.

Trial Committee

Robb Harvey reported that the committee finished the Jury Instruction Manual it started last year, which will be posted on the MLRC website. He said that they are looking for project suggestions for next year. As there are currently not a lot of cases going to trial, they are interested in working on evidentiary hearing issues.

Advertising & Commercial Speech Committee

Nancy Felsten reported that the committee has been holding regular conference calls on behavioral advertising, among other topics, and Scott Dailard added that they have added an open-mic component to the calls to discuss issues faced by members in their daily practice. Scott stated that the committee is undertaking to produce a collective work, which will be a substantive outline of the steps necessary to clear an advertising campaign for publication.

ALI Task Force Committee

Tom Leatherbury stated that his committee's work tracks the American Law Institute's agenda. The Task Force members have not taken an active role in any ALI projects this year, but they continue to keep an eye out for the privacy law project.

California Chapter

Kelli Sager spoke in place of the California Chapter co-chairs, who were unable to attend. She mentioned the California Chapter holds quarterly meetings, which anyone can join by phone.

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Conference & Education Committee

David Bralow reported that the international session at the NAA/NAB/MLRC Conference will be blended into the regular program. As was discussed at the planning meeting held that morning, the breakout sessions will be redesigned to account for the fact that digital issues pervade every category.

Employment Law Committee

Jim Dines announced that his committee's publication on blogging was published in March and is available on the MLRC website. The committee is currently working on a survey of laws related to employer indemnification of employees, and a publication on the legal issues and dangers involved in the intentional and unintentional monitoring of media employees. The committee is also monitoring pending legislation on independent contractors. Jim thanked Eric Robinson for his participation

Entertainment Law Committee

Katherine Bolger reported that the Entertainment Committee has been busy this year, holding eight conference calls where issues discussed included developments in right of publicity legislation and anti-SLAPP motions. David Aronoff is working with the MLRC to organize a compendium of articles for the MLRC Bulletin 2009:4. Two other members are working on a joint project with the Pre-Publication/Pre-Broadcast Review Committee to publish a Best Practices guide on the use of release forms.

Ethics Committee

Tim Connor noted that Ethics Committee members primarily write articles published in the monthly MediaLawLetter, which this year were on topics such as inadvertent disclosure and attorney-client privilege, the ethical implications of social media, New York's adoption of the ABA Model Rules, unsolicited e-mail, and web site design. The committee has writers lined up through September 2010.

International Law Committee

Kevin Goering reported that the committee made a number of contributions to the MediaLawLetter, particularly on the development of privacy in England. He thanked the current co-chair, David McCraw, who is rotating off. A new vice-chair will be added to the committee in the near term. The committee will be working with the Virginia Conference planners on international issues.

Internet Law Committee

Mark Sableman announced the new edition of the Practically Pocket-Sized Internet Law Treatise, which came out in July. It is available on the MLRC website, and contains many updates on articles published in the September 2008 addition, as well as new articles on subjects such as Wikipedia jurisprudence, news aggregation, and data breach laws. Mark said that he plans to start accepting and adding articles on a rolling basis to keep it up-to-date.

Legislative Affairs Committee

Laurie Babinski said that it has been a slow year in legislative affairs, other than the activities surrounding the shield law, which has been managed for MLRC members by MLRC staff. The committee has been focusing on the future of the industry, and will be assisting the Federal Trade Commission with a workshop on December 1 and 2 on the problems plaguing the news industry in the internet age. That will be followed on March 9 and 10 by a workshop dealing with the legal and policy solutions to the problems.

Shield Law Update & Model Shield Law Task Force

Kurt Wimmer thanked everyone for their help over the last five years on the shield law. He reported that the bill passed the House in the spring and is now pending before the Senate Judiciary Committee. Kurt warned that although the bill represents a compromise between the Democratic sponsors and Obama Administration, it will not necessarily zip through the Judiciary Committee. He asked members to continue and even ramp up their work with Senate contacts to help push the bill through.

Charles Tobin reported that the Model Shield Law Task Force committee spent much of the year producing a catalogue of subpoena decisions by state and subject matter. He

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intends for the document to be made available on the Internet so members can access it, and plans to accept updates to the document from members through Maherin.

MediaLawLetter Committee

David Tomlin reported that his committee has continued to look for ways to improve the MediaLawLetter through digital technology. While thoroughly revamping the website would require a significant capital investment, the committee and staff are planning to make specific, modest improvements to the digital MediaLawLetter. In particular, the committee would like to add the ability to print out single articles, archive articles in a way that allows users to retrieve individual articles through searches, and improve the overall appearance of the home page of each issue so that readers may be more likely to link to articles or explore other parts of the MLRC website. David Heller noted that a prototype URL would be available shortly. David Tomlin added that the committee going forward will focus more on substive than technological issues.

Membership Committee

Jay Brown referenced a report made at the MLRC Annual Meeting the previous day that there had been a net loss of members in 2009. The committee's goal is to reverse that loss in 2010, attracting new members by making membership materials available at the Southwestern and Stanford Conferences, and other events. Jay also suggested borrowing from non-profit boards and instituting a recruiting policy whereby members would make three personal approaches to either "tap or get" new members. Guylyn Cummins added that while the committee will make efforts to diversify membership in general, it has a particular interest in attracting members involved in the entertainment sector, with a focus on the gaming industry.

New Legal Developments

Robin Bierstedt reported that online issues were the theme of 2009, particularly the protection and monetization of content, and online corrections and complaints. Robin expressed the committee's interest in compiling a survey of websites' policies, including subpoena policies relating to anonymous sources. She predicted that advertising issues , such as behavioral advertising, data collection, Payola, product placements and endorsements, would continue to be a hot topic in 2010, and would make a good Bulletin subject.

MLRC 2009 Articles and Reports

"To Recuse or Not Recuse? That is the Question"
November 2009

"Model Shield Law Task Force:Catalog of Subpoena Decisions by Category of Material and Reasons Sought"
September 2009

"MLRC's Practically Pocket-Sized Internet Law Treatise"
July 2009

"Media Law Opinions of Supreme Court Nominee Sonia Sotomayor"
June 2009

"Media Law Legislative Record of President Barack Obama"
January 2009

"Invasion of the Blogs"
January 2009

"Recent Efforts to Enact State Shield Laws"
December 2008

Newsgathering Committee

Tom Williams stated that in 2010 the committee hoped to wrap up projects begun in 2009. One deals with the issue of the award or denial of attorney's fees in FOIA litigation. Another is putting together a model decorum order. He also announced that the committee also plans to look at judicial restrictions on the use of electronic communication devices in court rooms.

Kelli added that members in California are pushing for the state to experiment with new provisions in court rules on sealing orders, such as adding penalties for parties who unsuccessfully attempt to seal records.

Pre-Publication/Pre-Broadcast Committee

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Samuel Fifer reported on a joint project with the Entertainment Committee on best practices in the field of releases. The committee is also considering a shared project with the Newsgathering Committee on new technologies and investigative techniques.

Pre-Trial Committee

John Borger reported that one of the three White Papers on defamation approved by the committee has been completed. Robert Clothier added that the other two papers, including one on post-publication issues, are still in the works.

Report on the MLRC Institute

Maherin Gangat began her report by discussing its main project, the First Amendment Speakers Bureau. Under the program, speakers are placed in public forums such as universities, libraries and bookstores to talk about freedom of speech, the First Amendment, and freedom of the press. In 2009, the Institute put together 35 talks, which focused on reporters' privilege and publishing online. Maherin estimates that these talks reached over 1000 people, thanks to the help of the DCS.

Maherin noted that one of the Institute's new projects is the creation and maintenance of a Facebook page. The goal is to build an internet audience, and to that end the Institute is also considering other social media forums such as Twitter.

New Business

There being no new business, Kelli thanked everyone for coming and the meeting was adjourned.

Defense Counsel Section 2009 Annual Meeting:Committee Reports

Advertising & Commercial Speech Committee
Scott D. Dailard , DowLohnes PLLC
Nancy Felsten, Davis Wright Tremaine LLP

The co-chairs, Nancy Felsten and Scott Dailard, had three goals for the Advertising and Commercial Speech Committee for 2009. First, we wanted to add a substantive component to our meetings - i.e., presentations by Committee members on current advertising law developments and issues of concern to the advertising bar. Second, we decided to use a portion of each call as an "open mic" forum for members to ask questions and share knowledge about whatever issues they found most pressing in their daily practices. The goal was to develop the Committee as a resource that the members could use to help each other manage the challenges of their day-to-day practices. Third, in lieu of soliciting individual articles for publication in the Bulletin, we decided to organize an effort to produce a collective written product of the Committee that would fill an unserved need for practice resources. After floating a few different ideas, the Committee decided to pursue an advertising clearance guide - i.e., a substantive but practical outline of the steps necessary to clear an advertising campaign for publication. We envisioned an outline would cover substantiation requirements for specific types of advertising claims, rights of publicity issues, intellectual property and music licensing issues, testimonial advertising issues, and other issues that lawyers must grapple with when clearing an ad produced by a client.

We think the first two initiatives have been very successful. This year, we've used our Committee calls to host substantive presentations on testimonial and endorsement advertising issues, developments in the self-regulatory framework governing behavioral advertising and online privacy issues. We've also had substantive discussions of other topics, including state laws restricting marketing to children, sponsorship ID rules, telemarketing issues and issues that have arisen in our members' prac-

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tices before the NAD.

Progress on the third initiative has been uneven but has regained momentum. The Committee has agreed on a detailed list of topics for the outline. Two of the major sections on advertising substantiation are complete and assignments have been accepted for most of the remaining sections, with a due date set for early December. We are hopeful that the Committee will be in a position to circulate the final clearance guide early in the New Year.

ALI Task Force Committee

Thomas S. Leatherbury, Vinson & Elkins

The purpose of the ALI Task Force is to monitor the ongoing projects of the American Law Institute in which we have an interest and to which we can contribute our work and our scholarship. Two examples of ALI projects in which our members have participated are The Restatement (Third) of Torts and the project on Recognition and Enforcement of Foreign Judgments. This year there have been no ALI projects in which the Task Force members have taken an active role. The ALI has not yet launched its project on the law of Privacy, but we will continue to keep an eye out for it.

California Chapter

Jennifer Dominitz, NBC Universal Television Group
Jean-Paul Jassy, Bostwick & Jassy LLP

The Southern California Chapter has had three quarterly lunch meetings in 2009, with the fourth one scheduled for December 16. A brief summary of each of the meetings is included below.

March 2009 Meeting: Paul Smith, of Jenner & Block, counsel for the Video Software Dealers Association, led our discussion of the Ninth Circuit's decision in *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009). In that case, the Ninth Circuit struck as unconstitutional a California law that required restrictions and labeling requirements on the sale and rental of "violent video games."

Then, led by Tom Burke and Rochelle Wilcox of Davis Wright Tremaine, and Kent Raygor of Sheppard Mullin, we discussed two right of publicity cases involving bands and their inclusion (in different ways) in *Rolling Stone* magazine. Tom and Rochelle discussed the *Stewart v. Rolling Stone* case, which involves right of publicity claims made by bands that were included in an editorial feature that was published in a magazine pull-out containing Camel cigarette advertising. Kent then discussed similar cases in which he represented Miller Brewing Company and advertising agencies and in which two bands asserted right of publicity and Lanham Act false endorsement claims arising out of a Miller advertisement in *Rolling Stone* that included as background a collage of many ticket stubs from rock shows covering a 32-year time span.

June 2009 Meeting: Guylyn Cummins of Sheppard Mullin led our discussion of *Balzaga v. Fox News Network*, 173 Cal. App. 4th 1325 (4th Dist. 2009). In that case, the Court of Appeal affirmed the grant of Fox's anti-SLAPP motion. Guylyn represented Fox in that matter.

John Zucker, Senior Vice President, Law & Regulation at ABC, joined us to discuss *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009), the Supreme Court's recent "fleeting expletive" decision. In that case, the Court held that the FCC's order imposing liability for fleeting expletives spoken during two nationally broadcast award ceremonies was not "arbitrary and capricious" notwithstanding the FCC's previous position that such expletives would not be subject to enforcement action.

September 2009 Meeting: In September, a panel of speakers joined us to discuss the California Supreme Court decision in *Christoff v. Nestle, 47 Cal. 4th 468 (2009), a case involving the use of a model's image on Taster's Choice coffee labeling and advertising. The Court held that right of publicity claims are subject to the single publication rule. Our speakers included Jeremy Rosen and John Taylor of Horvitz & Levy, who represented Nestle, and Kevin Vick, who, along with Kelli Sager and Doug Mirell, served as counsel for the amici in suport of Nestle.*

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In addition, James Lichtman, Senior Vice President of Litigation and Policy at NBC Universal, spoke to the group about the legislation pending at the time (AB524), now signed into law, that amended California's invasion of privacy (anti-paparazzi) statute (Cal. Civ. Code. § 1708.8). Those amendments purport, under certain circumstances, to impose liability on the media for disseminating a photograph or other image that was taken by a third party in violation of the statute.

Conference & Education Committee
David S. Bralow, Thomas, LoCicero & Bralow PL
Thomas S. Leatherbury, Vinson & Elkins
Natalie J. Spears, Sonnenschein, Nath & Rosenthal LLP

The MLRC/NAA/NAB Conference is scheduled for September 29–October 1, 2010 and will be held again at the Westfields Marriott in Chantilly, Virginia. The MLRC staff has been hard at work with NAA and NAB staff to coordinate logistics and details. The Committee has held a number of brainstorming conference calls about the substance and the format of the conference. The basic format of plenary sessions, breakout sessions, and boutiques is expected to remain the same, but we expect to move the International issues discussion from Wednesday afternoon and to make International issues the subject of a plenary session as well as several boutiques. On November 12, we held a breakfast meeting for all those MLRC and DCS members interested in helping to plan the conference. If you were not able to attend that meeting, please send your ideas and thoughts to David Bralow, Natalie Spears, Tom Leatherbury, or Sandy Baron. We look forward to seeing all of you in Virginia next September.

Employment Law Committee
Jim Dines, Dines & Gross, P.C.
David Jacobs, Epstein Becker & Green, P.C.

In 2008, after a review of several topics, the Committee concluded that a paper focusing on the legal issues of blogging would be appropriate. In March 2009, the publication entitled *Invasion of the Blogs: An Introductory Survival Guide for Assessing, Addressing and Managing Employee Blogs and Other Alien Publication Life Forms* was issued. That publication, available on the MLRC website, discusses the relevant law in this emerging area, as well as recommended policy considerations for media employers. Our thanks to Bob Blackstone, Courtney Bru, Corey Devine, Gerald Lutkus, Thomas Wilson and Brian Barger for their work on crafting that paper.

Currently the Employment Law Committee is working on two items. One is a survey of laws regarding employer indemnification of employees (for defamation, invasion of privacy and related torts that are regularly asserted against media defendants). The second is a publication surrounding the legal issues and dangers of monitoring, both intentional and unintentional, of media employees via GPS units, cell phones, and other communication devices. Tom Wilson is taking the laboring oar on this publication which we expect to issue in early 2010.

The Committee is also monitoring relevant pending legislation such as the proposed bills on Independent Contractors.

Entertainment Law Committee
Katherine M. Bolger, Hogan & Hartson LLP
Louis P. Petrich, Leopold, Petrich & Smith, APC

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Ethics Committee
Lucian T. Pera, Adams and Reese LLP
Timothy J. Conner, Holland & Knight LLP

The MLRC Ethics Committee has had another busy year, providing a number of articles for publication with topics ranging from inadvertent disclosure and the attorney-client privilege, ethical implications involving social media, New York's adoption of the ABA Model Rules, and what to do about unsolicited e-mail and web site design. The primary function of the Ethics Committee is to provide helpful information about ethical issues of current interest. The Committee also participates in coordinating panels on ethics for the MLRC Conference held every other year. If you have an interest in serving on a committee, the Ethics Committee provides a great opportunity to interact and network with colleagues, and to submit articles for publication.

International Media Law Committee
Kevin W. Goering, Sheppard Mullin Richter & Hampton LLP
David E. McCraw, The New York Times Company
Brian MacLeod Rogers, Barrister & Solicitor

Over the past year the International Committee has made significant progress on keeping our members apprised of the developments in libel and privacy abroad. We had a very productive conference call followed by volunteers to deal with specific regions and countries and developments in these and related topics in those regions. We invite members to access the MLRC web site to see the fruits of our efforts. Perhaps the most significant contribution came for Eric Robinson, who was able to archive most of the international web references from the relevant countries and regions from the MLRC Daily. These have been very helpful in our clients' needs for information from those areas. Of course, David Hooper and Mark Stephens were frequent contributors to the Media Law Letter and to the general discussion of developments in England. Others from both sides of the pond contributed their observations on developments by e-mail.

Internet Law Committee
Mark Sableman, Thompson Coburn LLP

Legislative Affairs Committee
Bruce D. Brown, Baker & Hostetler LLP
Kathleen A. Kirby, Radio/Television News Directors Association

Much of the legislative activity over the past year has been wrapped up in the federal shield law, which of course has its own special working group. But the Legislative Affairs Committee remains active with other legislative proposals including libel tourism and the future of the news industry. On February 12, the House Subcommittee on Commercial and Administrative Law held a hearing on the problem of libel tourism and potential solutions. Committee co-chair Bruce Brown testified at the hearing, participated in follow-up meetings with House and Senate staff, and is currently helping to draft legislative language. The Legislative Affairs Committee has also offered the Federal Trade Commission its assistance with the workshop scheduled for December 1 and 2 addressing the problems plaguing the news industry in the Internet age. The FTC put that offer on hold as it pushed back the second part of the workshop dealing with potential legal and policy solutions to March 9 and 10. The Committee will continue to try and find opportunities on Capitol Hill and in other forums, such as the FTC, to offer its assistance.

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MediaLawLetter Committee
David Tomlin, The Associated Press

Membership Committee
Guylyn Cummins, Sheppard Mullin Richter & Hampton LLP

The Committee continued during the past year to focus its efforts on recruiting on the West coast to increase membership as follows: (1) by making membership materials available at the Southwestern and Stanford conferences, and (2) by making materials available or by announcements at various other media and entertainment bar functions in Los Angeles, San Diego and San Francisco. The Committee, in consultation with the Executive Director, also followed up with specific West coast law firms that had not renewed their membership.

Model Shield Law Task Force
Charles D. Tobin, Holland & Knight LLP

Our committee focused its energies this year on producing a new and hopefully useful research tool: the MLRC Catalog of Subpoena Decisions by Category of Material and Reasons Sought.

The catalog is a compilation of cites and squibs from cases involving subpoenas for specific subject matters, across all jurisdictional. It will enable a lawyer looking, for example, for precedent on accident-scene photos or jailhouse interviews to turn to this one research tool to find decisions from every state and circuit that has addressed the issues.

The committee hopes the catalog will become a living document on MLRC's website, allowing DCS members to add new categories and update the information as courts hand down decisions.

The catalog was compiled by:
Charles D. Tobin (Chair), Holland & Knight LLP, Washington, D.C.
Laurie A. Babinski, Baker Hostetler LLP, Washington, D.C.
Maherin Gangat, Media Law Resource Center, New York, N.Y.
Laura R. Handman, Davis Wright Tremaine LLP, Washington, D.C.
Kathleen A. Kirby, Wiley Rein LLP, Washington, D.C.
Elizabeth A. Ritvo, Brown Rudnick LLP, Boston, MA

New Legal Developments
Robin Bierstedt, Time Inc.
David Sternlicht, NBC Universal, Inc.

The mission of the New Developments Committee is to identify developments that should be monitored or reported on to the larger MLRC membership. At our first meeting of the year, in February, we discussed online corrections and complaints, the consequences of the bad economy, a proposed MLRC survey of online cases, a possible MLRC survey of website policies, and subpoenas for anonymous sources. In our April meeting we talked about the second, third and fourth quarter Bulletins, as well as the London conference and the November forum, and also discussed possible law school clinic programs and taking the Fifth in subpoena cases. In July we continued discussion of the November forum, and talked about the various proposals to protect and monetize online content. This last subject is clearly a hot topic, and we continued to address it at our final meeting in October. At our last meeting we also discussed possible changes to the Damages Survey, as well as a variety of advertising issues. We agreed that advertising and online issues would both be good Bulletin topics for 2010.

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Newsgathering Committee

Thomas J. Williams, Haynes and Boone LLP

William L. Chapman, Orr & Reno, P.A.

The MLRC Newsgathering Committee held regular conference call meetings every other month this year, and focused on completing projects carried over from 2008.

Led by Tom Julin of Hunton & Williams, the Committee updated its previously prepared "Journalists' Quick HIPAA Guide" to reflect recent cases and interpretations. Led by Bob Latham of Jackson Walker, the Committee gathered and collated by jurisdiction the results of cases considering the award of attorney's fees in Freedom of Information Act litigation, and is in the final stages of putting this data into a useful format for dissemination to the full membership. Finally, Cynthia Counts is leading a project to draft a Model "Decorum Order," for use in high-profile cases, and the Committee has gathered orders entered in previous cases and has begun analyzing issues the orders have addressed. The Committee plans to conclude these two projects in 2010.

In the fall of this year, the Committee agreed to undertake a new project which will carry over into 2010, analyzing the scope and effect of judicial restrictions on the use of electronic communication devices (Blackberries, texting, twittering, etc.) within the courtroom. The Committee is also considering undertaking a "white paper" project concerning the effect of the economic downturn on FOIA litigation.

Pre-Publication/Pre-Broadcast Committee

Kai Falkenberg, Forbes

S. Douglas Dodd, Doerner, Saunders, Daniel & Anderson, L.L.P.

The 2009 MLRC Pre-Publication/Pre-Broadcast Review Committee was co-chaired by Kai Falkenberg, Editorial Counsel for Forbes and S. Douglas Dodd, partner with Doerner, Saunders, Daniel & Anderson, L.L.P. More than 50 attorneys from across the United States, The United Kingdom and Australia, were members of the committee

The committee met by conference call each month in 2009 except July and August with participation ranging from 10 to 15 attorneys on each call. Each conference call featured wonderful discussions led by a variety of committee members on subjects including:

Privacy tourism
The UK's Press Complaints Commission
Libel issues that can arise as a result of language translation
Less stringent vetting practices as applied to persons charged with crimes as the underlying action develops/duty to update reporting.
Legal review of Website Content
1st Circuit Noonan v. Staples case
Covering medical issues — overcoming doctor's privacy constraints
Pre-action discovery of anonymous posters
Geo-Filtering of GQ Cover Story on Russian Bombings
Publisher's Advertising Liability
Recent Rulings on Revealing Identities of Anonymous Internet Posters:
Disclosing Anonymous Speech on the Internet, Solers, Inc. v. Doe
Neutral reporting
Fair report privilege

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Google Italy indictment
Crookes v. Wikimedia
Moreno v. Hanford Sentinel
Barnes v Yahoo! Inc. (9th Cir): ISP liability for promissory estoppel
Gardner v Martino (9th Cir)
Involuntary Public Figures: Will a substantial truth defense protect the press when it republishes allegations by private parties concerning their activities?
Libel by implication: where "literally true statements can be defamatory where they create a false impression."
Federal libel tourism legislation
Recent fair use cases involving music clips & parody use
Grand jury subpoenas of online comments
Fair use of music cases
Dealing with subpoenas for anonymous commenters.

Committee members completed work on a number of pending projects, including:

1. **"Perpetual" Prepub Review**. Technology has now made prepub review an around the clock job. In addition, full reproduction of documents on web sites such as www.thesmokinggun.com prior to vetting by anyone holds the potential for significant exposure including defamation, copyright, privacy, national security, etc.). The project is to create a survey of issues and concerns relating to prepub of "always on" 24 hour, online, internet news sites (either original content or "mirrors" or "adjuncts" of other media, whether print or electronic). The notion would be to collect these issues and then create a checklist that would address the concerns and suggest best practices.

2. **Reality Programming**. The prevalence of reality programming in recent years has led to claims of emotional distress, invasion of privacy and violations of the right of publicity. This survey will include cases arising from reality programming which involved those sorts of claims.

3. **Undercover Sting Ops**. Many news organizations conduct "sting operations" for consumer stories, for example utilizing hidden cameras testing the honesty of service providers. A checklist of best practices would be useful in advising reporters and producers.

4. **Fair Use Primer.** A short checklist for counsel to assist reporters and producers to know what the essential rules are in reusing the content of others in news stories is the goal.

5. **Checklist for Advertising Issues**. The list of issues attendant to advertising in both print and broadcast is continuing to grow. This would include issues related to ad acceptance policies for issues of public controversy, open housing ads, Craig's List-type sites and others. Recognizing them is a key to properly advising clients. A checklist would be a useful tool.

6. **Dealing with Quotes**. A variety of legal issues often arise in connection with publication of quotes. For example, what are the publication's obligations when a source retracts a quote pre-publication? What if the quote is merely modified? What obligations does a publication to read back quotes to a source pre-publication? This survey of the case law dealing with the use of quotes will answer these sorts of questions.

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7. **Blogging.** Blogs today are everywhere. Every day a new reporter or writer decides to start a blog. This will be a set of guidelines to be used in advising new bloggers on legal issues they are likely to face in connection with their blog.

In June, four members of the committee joined with two members of the MLRC Entertainment Law Committee in a joint project of the two committees to establish a set of Best Practices regarding use of Releases in both news and entertainment contexts. That project is scheduled to be completed by the end of 2009.

The committee will be discussing project ideas for 2010 during the last two meetings of this year.

Pre-Trial Committee

John P. Borger, Faegre & Benson LLP
Robert C. Clothier, Fox Rothschild LLP

The Pre-Trial Committee approved three White Papers dealing with three significant legal issues in defamation cases, as follows:

1. A paper addressing the use of post-publication conduct or events in libel actions. This paper addresses situations where the libel plaintiff is trying to use such post-publication events against the media (e.g., corrections and clarifications), and where the media is trying to use its post-publication conduct in defending the case (e.g., subsequent articles/broadcasts, later acquired information showing truth). This topic is fairly substantial and will cover a number of sub-topics, including corrections/ clarifications, republication of the article at issue, post-publication evidence of truth, subsequent events/statements impacting the plaintiff's reputation and plaintiff's efforts to mitigate damages.
2. A paper addressing the implications in libel cases where the evidence to support the truth of a alleged defamatory statement is unavailable -- e.g., where a party is unable to compel the FBI or U.S. Attorneys' office to provide evidence showing that the libel plaintiff was, as reported, the subject or target of an investigation. Aside from relying on the burden of proof (where it is plaintiff's burden of proving falsity, not defendant's burden of proving truth), what other recourse does a libel defendant have? Is there support to seek dismissal of the claim?
3. A paper addressing any court opinions and strategic considerations relating to a libel defendant's effort to seek the trial judge's recusal due to bias. When should a libel defendant consider such a motion? What proof is sufficient?

We have completed the paper addressing the third topic and continue to work on the other two topics.

Trial Committee

Robb S. Harvey, Waller Lansden Dortch & Davis, LLP
James A. Hemphill, Graves, Dougherty, Hearon & Moody, P.C.

This year, the Trial Committee focused its attention on completing the project of updating the MLRC Jury Instruction Manual, which is now nearly ten years old. We anticipate that the Committee's work will be completed and in the hands of MLRC staff by the time of the annual meeting on November 11, 2009. With the extremely able assistance of MLRC's Eric Robinson, our Committee combed through scores of sets of instructions for inclusion.

The update of the jury instruction manual required the hard work of several lawyers. Vice-Chair Jim Hemphill captained the effort, and got it completed. Committee members participating in the effort included Jim Hemphill, Robb Harvey, David Sanders, Gary Bostwick, Jim Dines and Greg Williams, David Donaldson, Stuart Gold, David McCraw, Amelia Seewann, Banks Sewell, Michael Sullivan, and Paul Watler. Our thanks are extended to all.

The Committee has not made plans for future projects, but we are open to suggestions.

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