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LDRC Libel Defense Resource Center

LIBELLETTER

October 1996

Alternative Dispute Resolution - An Effective Approach To Settling Defamation Cases

By Mark C. Morril
Emily R. Renes

Many media companies believe that alternative dispute resolution, while perhaps useful in commercial cases, is somehow inappropriate or less useful in defamation cases. Simon & Schuster, however, has found ADR procedures to be an especially useful device to dispose of these cases.

We are addressing here, of course, the relatively small subset of defamation cases where we believe it acceptable to attempt a negotiated settlement. In many, if not most, defamation cases, we do not pursue settlement because there is a principle to uphold, a law to challenge, the plaintiff's demands are simply beyond reason, or, most commonly, a decision is made that the conduct of the author and publisher should be defended through a fully litigated judgment and, if necessary, appeals.

In our experience, defamation cases can be susceptible to settlement on a non-financial basis or for modest financial sums since even a determined plaintiff may be persuaded that prolonged litigation is unlikely to lead to a significant judgment that will be sustained on appeal. Moreover, often the libel plaintiff's motive in suing is at least in part to have a "day in court."

It turns out, we find, that the "day in court" need not take place in an actual courtroom setting. Some libel cases are brought by plaintiffs who cannot find another opportunity to tell his/her side of the story to someone who will listen and who has the power to pro-

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Texas Jury Awards $5.55 Million in *Turner v. Dolcefino* Libel Case

In a 10-2 verdict, a jury in Houston, Texas, awarded $550,000 in compensatory damages and $5 million in punitive damages to Texas state representative and former mayoral candidate Sylvester Turner in his suit against ABC owned-station KTRK-TV and its reporter, Wayne Dolcefino. The verdict came in on Monday, October 14, after a six week trial and jury deliberations lasting over 5 days.

The jury found that the plaintiff suffered $275,000 in reputational harm and $275,000 in mental anguish. It awarded $500,000 in punitive damages against the reporter, and $4.5 million in punitive damages against the station.

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New Hampshire Supreme Court Finds Personal Jurisdiction Over Author/Source and Ghost Writer

Finding that the defendant's activities were "purposefully directed" at New Hampshire, the Supreme Court of New Hampshire recently held that the state could exercise jurisdiction over Beach Boy Brian Wilson, his ghost writer, Todd Gold, and Brains and Genius (B & G), the partnership that hired Gold to write Wilson's autobiography, in a libel suit arising out of the 1991 publication of *Wouldn't It Be Nice – My Own Story. Brother Records, Inc., et al., v. HarperCollins Publishers, et al.*, No. 95-214 (N.H. Sup. Ct., Sept. 25,

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UPCOMING IMPORTANT LDRC EVENTS

LDRC ANNUAL DINNER
Wednesday, November 6, 1996, 7:30 p.m.
The Sky Club, 200 Park Avenue, 56th Floor, NYC

LDRC ANNUAL DCS BREAKFAST
Thursday, November 7, 1996, 7:00 a.m.
Crowne Plaza Manhattan Hotel's
Samplings Restaurant
1605 Broadway at 49th Street, NYC

LDRC ANNUAL MEETING
Wednesday, November 6, 1996, 5:00 p.m.
Rogers & Wells, 200 Park Avenue, 50th Floor, NYC

LDRC FOURTEENTH ANNUAL DINNER
Wednesday, November 6, 1996 at 7:30 p.m.

WITH PRESENTATION OF THE
WILLIAM J. BRENNAN, JR. DEFENSE OF FREEDOM AWARD TO

KATHARINE GRAHAM of theWashington Post Company
and
ARTHUR OCHS SULZBERGER of the The New York Times Company

TO HONOR THE 25TH ANNIVERSARY OFTHE *PENTAGON PAPERS* DECISION

The Annual Dinner will be preceded by a cocktail party at the Sky Club commencing at 6:00 p.m. sponsored by Media/Professional Insurance, Inc. and Scottsdale Insurance Company.

Please call LDRC immediately at (212) 889-2306 for reservations if you have not already done so.
Single seats: $300; Table of Ten: $2,750; Table of Eleven: $3,000

LDRC Defense Cousel Section Annual Breakfast
November 7th at 8:00 a.m.
Crowne Plaza Hotel
$30 per person/Continental Breakfast

- ⇒ **Election for office of DCS Treasurer**
- ⇒ **President's Report from Cam DeVore**
- ⇒ **Review of DCS current and future LDRC projects**
- ⇒ **Bruce Sanford of Baker & Hostetler's discussion of his upcoming book : "Shooting the Messenger: America's Hatred of the Media"**

LDRC Annual Meeting
November 6th at 5:00 p.m.
200 Park Avenue
Rogers & Wells, 50th Floor

- ⇒ **Reports from Executive Committee members**
- ⇒ **Review of 1997 budget and upcoming projects**
- ⇒ **Election of LDRC Executive Committee Members**

Please notify LDRC at (212) 880-2306 or by fax at (212) 689-3315 if you plan to attend

In This Issue . . .

TEXAS JURY AWARDS $5,550,000 IN *TURNER v. DOLCEFINO* LIBEL CASE

(Continued from page 1)

The case arose out of local news broadcasts in 1991. Rep. Turner was at that time in a runoff race for Houston mayor. KTRK-TV reporter Dolcefino reported on an attempted insurance fraud, engineered through a man's staged death and disappearance. Turner was the "dead" man's lawyer and had prepared a will for him immediately prior to his disappearance. Turner alleged that the KTRK-TV report accused him of participation in the fraud.

The initial broadcast was on the 5:30 newscast. Turner held a press conference that evening denying his involvement in the insurance scheme. Turner brought to the press conference others serving, in effect, as character witnesses, including the judge in the insurance fraud matter, who said that the "allegations" against Turner were fairly ridiculous.

KTRK-TV ran the package again on its 10:00 newscast. It included Turner's denial and his comment that the false information was probably coming from the camp of his mayoral opponent. The 10:00 also included a response from a spokesman for Turner's opponent, but it failed to include any reference to or statements by the character witnesses. Turner asserted that the broadcasts cost him the race.

Defendants presented the jury with the live testimony of a principal source for the broadcast: the woman who had served as the court appointed investigator in the insurance fraud case. She testified without contradiction that she had told Dolcefino the information that he broadcast, that KTRK-TV had broadcast it accurately, that she believed it to be true then and that she continued to believe it to be true.

In response to a jury verdict form, the jury indicated that it found the broadcasts at issue false, defamatory, and published with actual malice. In post-verdict discussion with counsel, however, the jurors indicated that they thought that Dolcefino believed what he put in the news report was true, but had acted in a reckless manner – suggesting more of a super-negligence standard than actual malice.

KTRK-TV has stated that it plans to appeal the verdict.

KTRK-TV and Mr. Dolcefino were represented by Charles L. Babcock of Jackson & Walker, L.L.P. in Houston, Texas.

Damages Bulletin Due Out in January

Please send in verdict/damages updates

With LDRC's Damages Study slated for publication in January we strongly encourage all members to forward any information regarding jury verdicts in media cases. In addition, updated information concerning previously reported cases would be greatly appreciated.

Damages Update

The $5.55 million verdict in *Turner v. Dolcefino* follows on the heels of another Texas jury verdict of $4.5 million earlier this year in *Merco Joint Venture v. Sony-TriStar Television*. *See LDRC LibelLetter*, March 1996 at 17. The defendant in *Merco* is currently awaiting a Fifth Circuit decision on whether it will grant oral argument.

Including *Turner* and *Merco*, LDRC has received reports of seven jury verdicts in libel suits against the media in 1996, with defendants prevailing in only two trials. Of the five verdicts for plaintiffs, three have resulted in multi-million dollar awards, with an Iowa state court verdict of $2.38 million in *Schlegel v. The Ottumwa Courier* joining *Turner* and *Merco*. Fortunately in *Schlegel*, a new trial was granted following the jury verdict.

In the two other plaintiff victories, the damage awards were substantially less with a $50,000 award in *Fitzhugh v. Little Rock Newspapers*, an Arkansas state court case, and a $55,007 award in *Q-Tone Broadcasting Co. v. Musicradio of Maryland, Inc.*, a media vs. media case coming out of the state court in Delaware.

This year has also already seen the resolution of two long-running libel suits. In *Sprague v. Philadelphia Newspapers*, the parties settled a 23 year-long suit after the Supreme Court of Pennsylvania left standing a $24 million verdict.

And in *Prozeralik v. Capital Cities/ABC Inc.* the parties have also settled after New York's highest court, in September, refused to review the verdict. (See p. 19 of this month's *LDRC LibelLetter*).

Further, the U.S. Supreme Court's recent refusal to review a $750,000 judgment against the *Philadelphia Tribune* in *Brown v. Philadelphia Tribune*, 668 A.2d 159, 447 Pa.Super. 52, 24 Media L. Rep. 1505 (Pa. Super. Ct. 1996), *cert. denied*, 65 U.S.L.W. 3245 (10/8/96, No. 96-71), makes the award the seventh highest standing libel verdict in LDRC's records.

World War II Ensign Held a Public Official By Massachusetts Court

By Joseph D. Steinfield

In the book *Trapped at Pearl Harbor: Escape from Battleship Oklahoma*, Stephen Bower Young tells the harrowing story of the Japanese attack on the USS *Oklahoma*. He was one of 55 enlisted men and two officers called to general quarters in turret 4 as the Japanese planes flew overhead. The senior division officer in charge of the turret was Ensign Herbert Rommel (who, as it happens, announced the attack over the ship's PA system); the junior division officer was Ensign Joseph Spitler, a 1941 graduate of the Naval Academy.

The men of turret 4 can be divided into three groups: those who died during the attack; those who left during the attack but before the ship capsized and sank; and those who were trapped in an upside-down, mostly under-water ship. Rommel and Spitler were in the second group; Young and a number of others were in the third. They found air in a compartment called the "Lucky Bag," and there they remained for over 24 hours. During the morning of December 8, 1941, rescuers were able to cut through the part of the hull exposed above the water line, work their way along the ship, and cut through to the men trapped below. In all thirty-two *Oklahoma* seamen were saved, including Young and a handful of others from turret 4.

Based on his own recollections and on interviews with other survivors, Young pieced together the story of the attack and rescue; and the book was published by Naval Institute Press in 1991 and in paperback by Dell Publishing the next year.

In 1994 Mr. Spitler, who retired from the Navy in 1968 with the rank of captain, brought a libel action in Massachusetts against the author and the publishers. He alleged that the book defamed him by stating that he had abandoned ship to save his own life while his men were still behind in the turret.

After nearly two years of discovery -- including depositions of the parties and several of the survivors -- the publishers filed two motions. The first was a joint motion to determine the plaintiff's status; the other was Dell's motion for summary judgment based on the theory that, irrespective of the plaintiff's status, he could not recover against the paperback reprinter of a book originally published by a reputable publisher, absent a showing that it had some reason to doubt the accuracy of the book.

Context is Critical

On October 3, 1996, a Superior Court judge ruled that the plaintiff is a public official for purposes of this litigation. *Spitler v. Young*, Civ. Action No. 94-4368D (Mass. Sup. Ct. Oct. 3, 1996) (order holding plaintiff a public official). The judge's theory is not that a naval officer is automatically a public official but rather that the court must consider the context in which the officer acted. In *Medina v. Time, Inc.*, for example, the plaintiff was an army captain leading enlisted men on a raid of a village; and in *Arnheiter v. Random House*, the plaintiff was in command of a vessel on patrol during wartime. Both were held to be public officials. Although these and other cases do not focus on whether the alleged defamatory remarks concerned an officer's actions under fire, that consideration, in the judge's view, is critical to the public official inquiry.

> "Command of men and women in the face of enemy fire is a governmental activity of a most sensitive nature," the judge wrote, an activity of "such importance that the public has an independent interest in the qualifications and performance of the person who executes such a vital function."

Thus the judge ruled that an officer, under fire from the enemy and responsible for the lives of men and women under his command, is a public official within the meaning of *New York Times* and *Rosenblatt v. Baer*.

No Actual Malice but Rejects "Wire Service Defense" For Republisher

On Dell's motion for summary judgment, the judge ruled that on the undisputed facts this public official plaintiff could not establish actual malice on the part of the paperback reprinter. *Spitler v. Young*, Civ. Action No. 94-4368D (Mass. Sup. Ct. Oct. 3, 1996). The judge noted that Dell published an identical reprint of a book first issued by a "respected and reputable publishing house," and was entitled to rely on that original publisher's fact investigation and contractual warranty that the book contained no libelous material. For purposes of an actual malice determination, the judge said, it made no difference that the reprinter had not independently fact-checked the manuscript or verified the author's sources; had not investigated the degree of fact-checking by the original publisher; and had not trained its editor regarding what constitutes libel.

The ruling rested entirely on the public official holding. The paperback reprinter had urged the judge to extend Massachusetts' wire-service defense to comprise paperback reprinters as well; had the judge accepted the invitation, the reprinter in this case would have been entitled to judgement even if the plaintiff were deemed a private figure. In dictum, however, the judge declined to go that far, and said he was "unwilling to recognize a republisher's 'immunity' from defamation suits."

Deposition testimony, especially that of the plaintiff, played a major role in the resolution of the status motion. Mr. Spitler testified that upon entering the turret he understood that Ensign Rommel was out of the turret and that, in those circumstances he, Spitler, was in charge of the men. As such he was responsible for issuing orders to those under his command and had the power to make decisions having potentially dire consequences. The judge's final words on the status motion are, "A writer who criticizes an officer's actions in that context is entitled to the heightened protection of the actual malice standard."

Joseph D. Steinfield and Robert A. Bertsche of Hill & Barlow, Boston, represent Naval Institute Press and Bantam Doubleday Dell in this case.

Summary Judgment Granted Globe in *Krauss* Case

NY Court Finds Joan Lunden's Spouse is Public Figure

Joan Lunden's husband, Michael Krauss, is a public figure, according to New York State Supreme Court Judge Carol H. Arber, having sought public attention for years in his role as Ms. Lunden's producer, appearing on her programs and with her at various functions. Subsequently, the judge found that Krauss could not meet the actual malice standard and granted the defendants' motion for summary judgment dismissing the libel complaint. *Krauss v. Globe International, Inc.*, No. 18008/92 (N.Y. Sup. Ct. Sept. 16, 1996).

The case arose out of an article published by *Globe Magazine* (the "*Globe*") on March 15, 1992, which reported that the plaintiff had an encounter with a prostitute. The article, which was based upon statements the prostitute revealed to *Globe* correspondent Ken Harrel, was published after the widely publicized announcement of the separation of Mr. Krauss, television producer, author and newspaper columnist, and his wife, Joan Lunden, a television personality.

[LDRC reported on an earlier decision in this case in October 1995. In that instance, Judge Arber denied Krauss' attempt to amend his complaint by adding claims based upon the recording of his phone conversations. Judge Arber ruled that New York's one-party consent rule should apply, rather than Pennsylvania's two-party consent rule. *See LDRC LibelLetter*, October 1995 at 7.]

A Plaintiff Who Sought Attention

In ruling on the motion, the court first addressed whether Krauss

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Standard of Review For Libel in Texas

Directed Verdict Affirmed

By William W. Ogden

Ricardo Gonzales v. The Hearst Corporation d/b/a the Houston Chronicle Publishing Company, Case No. 14-94-0096-CV in the Fourteenth Court of Appeals at Houston, Texas (September 12, 1996)

A Texas appellate court recently affirmed a directed verdict in a libel case against a Houston newspaper, restating some significant principles regarding the standard of review in libel suits by public officials.

The case is *Ricardo Gonzales v. The Hearst Corporation d/b/a the Houston Chronicle Publishing Company*, decided September 12, 1996 by the Fourteenth Court of Appeals in Houston, Texas. The case involved an admitted misidentification of a Houston police officer involved in an off-duty after-hours car chase which resulted in the shooting death of a civilian.

Facts

The plaintiff and appellant was Ricardo Gonzales, a Houston police officer. In the early morning hours of October 31, 1989, three off-duty Hispanic Houston police officers were involved in a car chase in a private car after drinking at a late-night party. The chase allegedly began when a car driven by a civilian black female, Ms. Ida Lee Delaney, cut in front of the off-duty officers. As the chase picked up speed, Ms. Delaney allegedly brandished a gun to frighten her pursuers. Apparently unaware that the three men pursuing her were off-duty police officers, Ms. Delaney pulled off a Houston freeway near

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Cyberspace Jurisdiction: *Are Judges Finally Getting It?*

By Charles J. Glasser, Jr.

Recent judicial opinions in the Southern District of New York and the Sixth Circuit may indicate some settling of law in what has so far been an unsettled area. As the popularity of the Internet increased, so did anxiety on the part of defense counsel about the extent to which a client's electronic communications in cyberspace may expose a client to personal jurisdiction in far-flung areas.

However, two recent cases, *CompuServe v. Patterson*, 89 F.3d 1257 (6th Cir. 1996) and *Bensusan v. King d/b/a The Blue Note*, No. 96 Civ. 3992 (SHS) (S.D.N.Y., Sept. 9, 1996) can be read together to form a better picture of jurisdictional issues in cyberspace. Although neither of the cases explicitly hold as such, it can be cogently proposed that jurisdiction--or the lack of it--should turn on the form of the Internet communication, and the affirmative acts which the parties take to access the communication.

In *Patterson*, the defendant was a software writer in Texas who had contracted with Ohio's CompuServe to upload his shareware to their system, which other CompuServe members could later download and purchase. CompuServe later offered other programs which Patterson alleged had infringed upon his proprietary rights in the original shareware. CompuServe filed a declaratory judgment action in Ohio, but the District Court dismissed the claim for a lack of personal jurisdiction, holding that the electronic communications between the two parties was "too tenuous to support the exercise of personal jurisdiction."

Although the Sixth Circuit reversed the dismissal, on plenary review the court looked to more than the electronic communications between

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Libel in Texas

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a Highway Department service truck with flashing lights, evidently seeking assistance. The three off-duty officers quickly converged, and in the ensuing gunfire, Ms. Delaney was killed and one of the officers was injured.

The story was an explosive one and, as Police Department spokespersons admitted, a public relations nightmare. On the day of the shooting, *Houston Chronicle* reporter James Campbell accurately reported that the three officers under investigation were Alex Gonzales, the driver and shooter, and two other officers identified only as A.R. Romero and R.C. Gonzales. On the following day, November 1, the *Chronicle* did a lengthy follow-up story which improperly identified the third officer as "Ricardo" Gonzales. In fact, the third officer was named "Robert" Gonzales. The *Chronicle's* continuing stories from November 2 forward correctly identified the third officer as Robert Gonzales.

The Houston Post also misidentified the third officer as Ricardo Gonzales in its November 1 editions. Both newspapers claimed they received the incorrect name from a Police Department spokesman, a charge which the spokesman strongly denied. In its initial reply to Mr. Gonzales' lawyer, the Chronicle offered to publish a correction of the November 1, 1989 story. Gonzales never responded to the Chronicle's offer. Four years later, Mr. Gonzales hired a new lawyer, who promptly demanded a correction. The Chronicle then printed a correction on May 8, 1994–roughly four and one half years after the original article.

The case was called to trial June 6, 1994. The trial court granted the Chronicle's motion for instructed verdict at the close of the plaintiff's case, and this appeal followed.

Standard of Review

The court recited well-settled rules to review instructed verdicts, noting that an appellate court usually considers all evidence in the light most favorable to the appellant, disregarding all contrary inferences. The Chronicle argued that this standard of review must be tempered by the requirement that a public figure prove actual malice by "clear and convincing" evidence. The newspaper argued that the instructed verdict should be affirmed since, after indulging all inferences in the plaintiff's favor, the evidence failed to demonstrate by clear and convincing proof that the mistaken name was published with actual malice.

Conceding that this standard would apply under federal case authority, the court found that no Texas court had addressed this issue. It noted that the federal and Texas standards of review for directed verdicts were "virtually the same," and a series of Texas family law cases adopting a similar standard in a non-media context.

Ultimately, the Court of Appeals failed to decide whether the constitution required a heightened standard of review for instructed verdicts in public official libel cases, holding that Gonzales raised no evidence, clear and convincing or otherwise, to support a finding of actual malice.

The Evidence of Actual Malice

Officer Gonzales argued that the court could infer actual malice for three reasons: (1) the reporter's source denied furnishing the wrong name, (2) the Chronicle refused to publish a correction, and (3) the Chronicle published three different names in three days. The court rejected all arguments.

As to the fact that the police spokesman denied furnishing the wrong name, the court assumed this evidence in favor of the appellant, but held it was unreasonable to infer that the reporter must have simply fabricated the wrong name. The court noted that the reporter involved in the article, James Campbell, was a veteran reporter with a reputation for fairness and accuracy which even the police spokesman admitted. The court's opinion details Mr. Campbell's thorough investigation in the 48 hours following the shooting, finding he spoke with at least four different police officers in three different departments. Finally, the court also noted that a competing newspaper, The Houston Post, also printed the same incorrect name on the same day. From this, the court noted that a fact finder would only be permitted to make reasonable inferences from the record, not unreasonable ones. A jury might reasonably infer negligence, but not malice.

The court next examined the Chronicle's failure to run a correction for four years, carefully noting that the newspaper never refused to run a correction, but that its offer to run a correction had never been accepted by the appellant's first lawyer. The court held that refusal to print a correction standing alone is not clear and convincing evidence of actual malice. Significantly, the court also disregarded appellant's expert's testimony with regard to journalistic standards. Gonzales called two expert witnesses to testify that refusal to print a correction was reckless disregard for the truth, and that sound journalism required printing a correction immediately upon realization of the mistake. The court correctly noted that expert testimony was objective in nature, while the standard for actual malice was a subjective review of whether the reporter or the publisher actually entertained serious doubts as to the accuracy of the story. The expert's testimony, said the court, is not probative of actual malice.

Finally, the court also held that printing three different names in three stories over three days cannot constitute proof of actual malice. Placing the error in context, the court agreed that it should take into account the circumstance that this news article was a "fast breaking" story with wide-reaching social implications. Deadline pressure precluded a painstaking review of every detail. In sum, there was no evidence that the Houston Chronicle or its reporter acted with actual malice, regardless of whether the court adopted a state or federal standard of review.

The opinion, which will be published, is a thorough and thoughtful analysis of the standard of review in public official libel cases.

William W. Ogden is with the firm Ogden, Gibson, White & Broocks, L.L.P. in Houston, Texas.

Cyberspace Jurisdiction: *Are Judges Finally Getting It?*

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Patterson and CompuServe, and relying on *Burger King v. Rudewicz*, 417 U.S. 462, 474-75 found that it was the contractual relationship between the parties which raised sufficient "purposeful availment" to warrant personal jurisdiction.

In early September of this year the Southern District of New York was asked to determine whether "the existence of a site on the World Wide Web of the Internet, without anything more, is sufficient to vest the court with personal jurisdiction over the defendant." *Bensusan v. King d/b/a The Blue Note*, No. 96 Civ. 3992 (SHS) (S.D.N.Y., Sept. 9, 1996). The Southern District's Judge Sidney Stein found that it is not sufficient. In *Bensusan*, the defendant was the operator of a small nightclub in Columbia, Missouri called "The Blue Note" which had also appeared on his Web page of the same name. Suit was filed by Bensusan, the operators of New York City's "Blue Note," a well-established and world-famous jazz club. Bensusan alleged trademark infringement, dilution and unfair competition claims because King had used the same name in an offer of tickets and promotional goods related to his own "Blue Note."

Citing *Vanity Fair Mills, Inc. v. T.Eaton*, 234 F.2d 633 (2d Cir. 1956), the court acknowledged that "merely offering for sale of even one infringing copy, even if no sale results, is sufficient to vest a court with jurisdiction over the alleged infringer...accordingly, the issue in this action is whether the creation of a Web site, which exists either in Missouri, or in cyberspace–i.e. anywhere the Internet exists--with a telephone number to order the allegedly infringing product, is an offer to sell the product in New York."

The courts' analysis turned upon the operational aspect of the World Wide Web: "It takes several affirmative steps by the New York resident, however, to obtain access to the Web site... The user in New York has to access a web site using his or her computer or hardware and software...The fact that a person can gain information on the allegedly infringing product is not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product in New York."

The court also found that merely putting a web site on the WWW did not satisfy the "forseeability" prong of personal jurisdiction, and added that "Creating a site, like placing a product into the stream of commerce, may be felt nationwide–or even worldwide–but, without more, it is not an act purposefully directed toward the forum state." The court also distinguished the result in *Patterson* from *Bensusan* because of Patterson's separate contractual relationships with CompuServe.

A new article by UCLA Law Professor Eugene Volokh, *"Computer Media for the Legal Profession"* 94 Mich. L.Rev. 2058 (May 1996) may help explain why Web pages should be treated differently in jurisdictional issues from other Internet communications such as chat rooms, LISTSERVS and other Internet applications. Although the article does not address jurisdictional and procedural matters, it does explain in clear language the different forms of Internet communications in terms analogous to real-world situations. For example, the World-Wide Web is described as "essentially a collection of electronic books, bookshelves, and libraries...that you can go to and read." On the other hand Electronic Discussion Groups and Newsletters, like their real-world cousins the magazine, newspaper and nationwide broadcast, are affirmatively "sent" from one place to another.

These two recent cases represent closer technical analysis than a previous criminal case involving computer communications. In *U.S. v. Thomas*, 74 F.3d 701 (6th. Cir. 1996) a husband-and-wife team of pornography dealers in California were arrested and held to stand trial in Tennessee for six counts under 18 U.S.C. Sec. 1465 (employing a means of interstate commerce for the purpose of transporting obscene, computer-generated materials through interstate commerce). The defendants argued that they never "sent" the electronic graphics to Tennessee, but the files were instead "retrieved" by a postal inspector in Tennessee. The court found that the distinction didn't matter because "Section 1465 is an obscenity statute, and federal obscenity laws, by virtue of their inherent nexus to interstate and foreign commerce, generally involve acts in more than one jurisdiction or state. Furthermore, it is well-established that there is no constitutional impediment to the government's power to prosecute pornography dealers in any district into which the material is sent." *Thomas* at 709. Hence, the limited applicability of *Thomas* to civil tort cases may best be understood by the fact that the *Thomas* addressed jurisdiction solely through application of a federal criminal statute that would allow jurisdiction regardless of which party sent or received the illegal material.

In contrast to *Thomas*, there may be a newly-found willingness of courts to realize that different Internet activity carries with it differing levels of interstate activity—and subsequently differing levels of "purposeful availment" in terms of personal jurisdiction. In turn, this may provide corporate counsel with means by which to inform clients of potential liabilities as more and more businesses develop online presence, and may also provide defense counsel the means to draw upon well-developed jurisdictional defenses.

Former LDRC intern Charles Glasser is an associate at Preti, Flaherty, Beliveau & Pachios in Portland, Maine.

Summary Judgment Granted for Globe in Krauss Case

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was to be considered a public or private figure. Despite the fact that Krauss produced and appeared on a regular basis in the nationally-broadcast parenting programs, gave interviews on the subject to the press, posed for the publicity pictures and regularly gave quotes to the press to promote his various television ventures with Joan Lunden, he argued that he should be considered a private figure under *Time, Inc. v. Firestone*, 424 U.S. 448 (1976).

In *Firestone*, the Supreme Court held that the plaintiff was not a public figure by reason of fame since she had not attracted any national press attention before her publicized divorce. Contrary to Krauss' argument, however, Judge Arber noted that *Firestone* did not create an exception in the libel law for stories dealing with divorce or other personal disputes. Rather, its core holding, Judge Arber pointed out, was "that persons who had never obtained public attention do not become public figures solely by being compelled to participate in the litigation or the like." *Slip op.* at 12.

Indeed, the court wrote, the *Firestone* line of cases "has been rejected as inapposite where the plaintiff sought and/or received public attention before involvement in a dispute or before publication of an allegedly libelous statement." *Slip op.* at 12.

Thus, the court held that Krauss was a public figure before the *Globe* article was published in March of 1992. He came to the attention of the public not by involuntary participation in divorce litigation, but through his own voluntary efforts to publicize and promote himself, his wife and their family lifestyle. Further, the court noted, since Krauss and Lunden voluntary placed their personal lives into the public arena, the assertion that his personal life was inherently a private matter was "equally unconvincing." *Slip op.* at 13.

The court also held that even if Krauss were not to be considered a "public figure," at minimum he must be considered a "limited-purpose public figure," who also must prove actual malice to recover for defamation. This decision was based on the fact that for many years, both Krauss and Lunden sought public attention to their views on married family life in television shows, books, videos and newspaper columns.

"Must Have Avoided Truth" is Not Enough

Finding Krauss to be a public figure, the court then addressed whether he could demonstrate that the *Globe* acted with "knowing falsity" or "actual malice" in publishing the article. To support his claim, Krauss argued that the prostitute's account "was so inherently improbable that only a reckless person would have put it into circulation and that the *Globe* engaged in 'purposeful avoidance of the truth.'" *Slip op.* at 16.

The court, however, rejected Krauss' arguments by noting that "[w]hile 'purposeful avoidance of the truth' may be evidence of actual malice if the defendant's inaction was 'a product of a deliberate decision not to acquire knowledge of facts might confirm the probable falsity of a statement,' [citations omitted] the plaintiff is still required to show that the publisher *actually believed* its source's story to be probably false." *Slip op.* at 17 (emphasis in original). Thus, the court held "[a] public figure plaintiff cannot sustain his burden of proof, as Krauss tries to, by asserting that the defendant 'must have' purposely avoided the truth or claiming that a wrongful intention can be shown through circumstantial evidence." *Slip op.* at 17.

ATTENTION DCS MEMBERS:

Please submit Directory changes and e-mail addresses for 1997

The new DCS Directory for 1997 will be undergoing production shortly. We need your help in correcting any errors in your firm's listing and updating any changes that occurred with regard to your firm's name, address, phone number, branch offices, etc. since the Directory was published last February. LDRC would like to also include e-mail addresses in the Directory so please submit yours if you wish it to be listed.

Send all information to: Melinda Tesser, LDRC, 404 Park Ave. South, New York, NY 10016 or fax (212) 689-3315. Thank you.

How Do These Get To Trial?
A Victory for NBC in Denver

By Anne H. Egerton

A trial court in Denver recently granted a defense motion for a directed verdict in a defamation and false light case arising from a Denver television station's three-part series on "disciplined doctors." The Denver station, KCNC-TV, aired a series of news reports in 1993 regarding the Colorado State Board of Medical Examiners, its purpose, operations, proponents, and critics. The report explained that the board's files are public records. During the course of the three broadcasts, KCNC listed the names of seventeen doctors in the Denver metropolitan area whom the board had disciplined in 1992. Viewers were invited to write to the station for a brochure that listed the reasons for the discipline of each.

In the first broadcast in the series, the KCNC reporter stated:

> "In all, seventy-five physicians from across the state were disciplined in 1992 for everything from drug and alcohol abuse to sexual misconduct to substandard care to negligence."

John M. Connolly, a retired surgeon, sued, claiming that the "seventy-five physicians" statement accused all seventy-five disciplined doctors, including him, of having been disciplined for all of the matters listed. In fact, Connolly's license had been suspended after he failed to appear for an examination related to suspected alcohol abuse.

Connolly sued KCNC, the reporter on the "disciplined doctor" series, KCNC's general manager, and National Broadcasting Company, Inc., which owned the station at the time of the broadcast.

The District Court for the City and County of Denver, the state trial court, denied the KCNC defendants'

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Unauthorized Use of Cop Photo on Crucifucks CD Not Defamatory

By Michael D. Epstein

Holding that a photograph appearing on the back of a compact disc was not capable of conveying the meaning ascribed to it by the plaintiffs, a federal district court in Philadelphia has dismissed a defamation and invasion of privacy action brought against Borders, Inc., the corporation which owns a chain of retail stores that sell books, compact discs and records. *Fraternal Order of Police, et al. v. The Crucifucks, et al.*, 96-2358 (E.D.Pa.)

Unauthorized Use of Cop's Photo

The case arose out of the release in 1992 of a compact disc by the band The Crucifucks. According to the Complaint, the back cover of the disc contained an unauthorized reproduction of a poster created by the union that represents Philadelphia's police officers (the "FOP"), depicting what appears to be a slain police officer. The FOP allegedly created the poster in the mid-1980s as part of a promotional campaign to protest proposed police cut-backs. The photo on the poster showed an unidentified officer lying on the ground, his face obscured by his shoulder, next to a police car bearing an emblem stating "Philadelphia Police." On the photo appearing on the disc, the words "Philadelphia Police" on the emblem were changed to "Lansing Police." The disc cover did not refer to the FOP, the officer or the Philadelphia Police in any way.

Plaintiffs, the officer who posed as the "slain" police officer and a union representing police officers, brought the action against the band, its record company and Borders, which was alleged to be liable merely because it sold copies of the compact disc. Plaintiffs claimed that the defendants invaded their privacy by misappropriating their likeness and property for commercial purposes and by portraying them in a false light; defamed them by implying that they endorsed violence against and murder of police officers; and infringed on their common law copyright.

The plaintiffs were upset that The Crucifucks used the photograph, because the compact disc contained "virulent, anti-American, anti-law enforcement" lyrics and conveyed the impression that the plaintiffs -- the FOP, and an individual police officer -- approved of and endorsed violence against and murder of police officers,

Borders moved to dismiss plaintiffs' complaint. In its motion, Borders made several arguments:

1) that plaintiffs were neither identified nor identifiable in the photograph depicted on the compact disc;
2) that no reasonable person would conclude that a police officer and a union representing police officers would have endorsed a disc with such obvious hostility toward law enforcement agents;
3) that the First Amendment shielded from liability distributors of publications that had no editorial control over the content of the publication and no specific knowledge of alleged defamatory innuendo contained on the disc;
4) that plaintiffs' claims were barred by the statute of limitations, since the disc was released nearly four years prior to the suit; and
5) that the copyright claim was preempted by the federal Copyright Act.

Failure to State Privacy Claim

In granting Borders' motion, the Honorable Herbert J. Hutton of the Eastern District of Pennsylvania first dismissed the FOP's invasion of privacy claims on the grounds that only natural persons had causes of action under those torts.

Judge Hutton also rejected

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A Victory for NBC in Denver

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motion to dismiss Connolly's complaint and, later, their motions for summary judgment. The court also allowed Connolly to proceed to trial on alternate (and mutually exclusive) theories of libel *per se* and libel *per quod*. Trial began on September 23 before a different judge.

The Linguistic Expert

The court denied a defense motion *in limine* to exclude the testimony of Connolly's linguistics expert, David S. Rood, Ph.D., a professor who studies the Lakota Indian language. Dr. Rood testified that the technical, grammatical construction of the "seventy-five physicians" sentence meant that all seventy-five doctors had been disciplined for all of the offenses listed. The linguist conceded that he was offering no opinion as to how an average viewer would have understood the statement, and he disclaimed any interest in "talking about common sense."

Damages?

Connolly, who retired nearly two years before the broadcast, testified that the "seventy-five physicians" statement had damaged his reputation. Connolly admitted that his medical license remained suspended and that he had not applied for any jobs since the broadcast. But Connolly contended that there was consulting work that he could do without a license, and that he had not applied for any positions because -- in his view -- prospective employers believed, as a consequence of the broadcast, that Connolly was a "sexual offender" and "a drug and alcohol abuser."

Connolly called the reporter and the general manager as adverse witnesses at trial. He also presented testimony from the research director of another Denver station regarding the Nielsen ratings for the broadcast in question.

A Directed Verdict

After the plaintiff rested, the KCNC defendants moved for a directed verdict. The trial judge, John W. Coughlin, granted the motion and dismissed the case. Judge Coughlin first ruled that Connolly's defamation claim was for libel *per quod*, not libel *per se*. The court noted that the "seventy-five physicians" statement did not mention Connolly. Moreover, Judge Coughlin said, the only reference to Connolly in the broadcasts -- that he was one of the "physicians from the Denver metro area who were . . . disciplined by the state board of medical examiners" in 1992 -- was "absolutely true."

The court then found that Connolly had no evidence of special damages, a required element of a libel *per quod* claim. The judge noted that Connolly "couldn't apply for any job that would require a medical license because his medical license had been suspended, and he had not taken any action to get that suspension lifted." Judge Coughlin further noted, "As to [any] other jobs outside one requiring a medical license, there was absolutely no evidence that there was any application for one after the [broadcast], [nor was there] any evidence that any such employer heard of the . . . broadcast and, therefore, refused to hire Dr. Connolly."

Judge Coughlin went on to hold that, even if he were "wrong and this should be considered as a libel *per se* case," Connolly had failed to prove actual malice, required under Colorado law where the publication concerned a matter of public interest. The court stated that there was "absolutely no evidence that the personnel at [KCNC] acted with anything but good faith." The judge found that "the broadcast was well-investigated prior to [air]", noting that the KCNC reporter had examined the board's public records and had double-checked her facts with board personnel before the broadcast.

Judge Coughlin also emphasized that the brochure that KCNC made available to viewers accurately stated the reason for Connolly's discipline. In finding the brochure to be further evidence of KCNC's "careful and considerate work," Judge Coughlin implicitly rejected the argument of Connolly's attorney that the brochure evidenced actual malice, because -- according to Connolly -- it showed that KCNC "knew the true reason" for Connolly's discipline and that that reason was not alcohol and drug abuse, sexual misconduct, substandard care, and negligence.

Judge Coughlin also emphasized that there was no evidence that "anybody at [KCNC] ever thought or even considered" -- "in their wildest imagination" -- "that the 75 physician[s] statement would somehow be construed by anybody to mean that Dr. Connolly was disciplined for [all of the items listed]."

The court did not reach the defendants' argument that Connolly's libel claim was barred by the "group libel" rule.

Finally, Judge Coughlin held that Connolly's failure of proof on actual malice defeated his false light claim as well.

Anne H. Egerton of NBC and George B. Curtis of Gibson, Dunn & Crutcher represented the KCNC defendants.

BAN OF TRADING CARDS DEPICTING HEINOUS CRIMES AND CRIMINALS STRUCK DOWN BY NY FEDERAL COURT AS UNCONSTITUTIONAL

Finds Even TV Link to Violence is Inconclusive

By Edward J. Klaris
Robert D. Balin

On appeal from a U.S. Magistrate's report and recommendation, a federal judge recently held that a local county ordinance making it a misdemeanor to sell to children under seventeen any trading cards that discuss or depict heinous crimes is violative of the First Amendment.

The case, *Eclipse Enterprises, Inc. v. Gulotta*, slip. op. CV 92-3416 (ADS), 1996 WL 549297 (E.D.N.Y. Sept. 26, 1996), is significant not only because of its core holding that written discussions of crime and violence, even when purchased and read by children, are fully protected by the First Amendment, but because the court went out of its way to note that any causal link between television violence -- a far "hotter" medium -- and real-life crime "is inconclusive." Until now, the question whether violence on television causes children to become violent and/or aggressive has been solely the domain of scholarly and political debate.

Offensive Cards in Nassau County

The primary plaintiff in the *Eclipse* case publishes several series of trading cards, including, among others, a "True Crime" series with the faces of infamous criminals and law enforcement officials on the front and an encyclopedic history of their lives on the back. Other series include "Coup D'etat," which reviews the events leading to the assassination of President John F. Kennedy. The "Rotten to the Core" series addresses various crimes connected with New York City's municipal scandals. And the "Drug Wars" series considers individuals and events related to the prohibition of drug trafficking.

The challenged local ordinance -- which was enacted in Nassau County, New York -- was the product of a small group of activists who were "offended" by trading cards that depict serial killers such as Charles Manson and Jeffrey Dahmer. In the Legislative Intent section of the ordinance, the County concluded that the dissemination of trading cards depicting "heinous crimes and heinous criminals is a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of [County] youth" and that such trading cards are "harmful to minors."

Strict Scrutiny

District Judge Arthur D. Spatt initially denied the plaintiffs' motion for summary judgment and referred the action to Magistrate Michael Orenstein to hold an evidentiary hearing and determine (1) whether the local law is narrowly tailored to serve the County's compelling interest in providing for the well-being of minors, and (2) whether the types of trading cards prohibited by the statute are "harmful to minors."

The term "harmful to minors" is defined in the ordinance as any description or representation of a heinous crime or a heinous criminal, when it: (1) "Considered as a whole, appeals to the depraved interest of minors in crime; and (2) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and (3) Considered as a whole, lacks serious literary, artistic, political and scientific value for minors." This is the definition of "harmful to minors" upheld by the Supreme Court in *Ginsberg v. New York*, 390 U.S. 629 (1968), except here references to violence and crime replace references to sex in *Ginsberg*.

Upon review of the cases holding that speech depicting violence is fully protected under the First Amendment, Judge Spatt found that the trading cards at issue were protected speech. Yet, he was careful to note that "not all attempts to control dissemination of speech depicting acts of violence is necessarily unconstitutional," citing *Pacifica Foundation v. FCC*, 556 F.2d 9, 29 (D.C. Cir. 1977) (Bazelon, J. concurring) (noting that "the prevalence of violence, is a serious concern" which will continue to "pressure" First Amendment concerns), *rev'd*, 438 U.S. 726 (1978), and *Betts v. McCaughtry*, 827 F. Supp. 1400, 1406 (W.D. Wis. 1993), *aff'd*, 19 F.3d 21 (7th Cir. 1994) (upholding prison's censorship of certain rap music which may "incite or encourage violence" on the ground that prisoners are subject to a different level of scrutiny than that applied to the general population).

Judge Spatt then determined that the appropriate level of protection accorded to the trading cards at issue was strict scrutiny because the statute was a content-based restriction on speech. That is, the ordinance prohibited the sale to minors of trading cards that depict crime, while not subjecting analogous cards (i.e. baseball cards) to similar restrictions.

Having articulated the standard by which the local law must be measured, the Court then turned to whether the ordinance was narrowly tailored to achieve a compelling governmental interest. In this regard, Judge Spatt recognized that the County (like all local government) has a compelling interest in deterring juvenile crime and in protecting the emotional and psychological well being of minors. The court found, however, that the County's trading card ban did not, in fact, advance their asserted interests.

Judge Spatt noted that, while the County was not required to draft its legislation with scientific certainty, it must come forward with sufficient proof to justify convincingly its abridgment of the constitutional right to speak. Indeed, the court stated, any legislative body seeking to maintain a restriction on protected speech must establish that the restriction directly advances the state interest involved.

Upon *de novo* review of the Magistrate's evidentiary findings, Judge Spatt determined that the evidence presented by the County in support of its asserted interests was so "weak and insuffi-

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Unauthorized Use of Cop Photo on Crucifucks CD Not Defamatory

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the individual officer's invasion of privacy-misappropriation claim, holding that the complaint failed to allege the value -- if any -- that Borders appropriated from the officer's likeness that inured to Borders' benefit.

No Defamatory Meaning

The Court next dismissed the defamation and false light claims on the grounds that the inference that the plaintiffs desired to draw from the use of the photograph on the compact disc was unreasonable as a matter of law. As Judge Hutton explained, "Assuming knowledge of Sergeant Whalen's position as a police officer and the FOP's function as a union for police officers (as those persons who are capable of recognizing the plaintiffs from the photograph must know), the Court can think of no circumstances under which police officers or the union would support violence against police officers."

But Of and Concerning Made Easy to Meet

Although he ultimately dismissed these claims, the judge declined to do so on the grounds that the plaintiffs were unidentifiable as a matter of law. Although Judge Hutton recognized that it would not be possible for a person from the general public to recognize the officer on the basis of the "scant features" available on the photograph, he nevertheless found that the identification requirement was capable of being satisfied merely because certain people close to the officer -- for example, his family, friends and fellow police officers -- who knew about the circumstances under which the photograph was taken would be able to recognize him from the photo. The Court also believed it was reasonable to infer that a large number of city residents were exposed to the photograph when it was used in a city-wide campaign by the FOP -- even though the campaign predated the disc by seven years and the lawsuit by nearly 12 -- so that the photo was capable of referring to the FOP.

Under such an analysis, therefore, any defamation plaintiff seemingly could survive the identification requirement even if only his immediate family members were able to recognize him. While the Judge's reasoning on this point is alarming, because of his holding that the photograph was not capable of defamatory meaning, the ruling on identification did not salvage plaintiffs' claims and is merely dictum.

In addition, Judge Hutton did not address Borders' First Amendment-based argument, that to hold a retailer liable for the content of material it merely sells or distributes would chill the distribution of speech to the public.

The Court also dismissed plaintiffs' civil conspiracy claim and plaintiffs' common law copyright infringement claim. With respect to the latter, Judge Hutton agreed with Borders that the common law copyright claim was preempted by the Copyright Act of 1976, which preempts both published and unpublished works.

Plaintiffs attempted to appeal the Court's ruling but, because the Court had dismissed the Complaint as to Borders only (which was the only party to move to dismiss the Complaint), the appeal was withdrawn as untimely.

Michael D. Epstein is an associate with Montgomery, McCracken, Walker & Rhoads of Philadelphia, Pennsylvania. Howard D. Scher, Richard M. Simins and Michael D. Epstein, of Montgomery, McCracken, Walker & Rhoads, represented Borders..

TRADING CARDS

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cient" that it could not withstand constitutional scrutiny.

The hearing had revealed that there had been no studies whatsoever on the effects of trading cards -- or any reading material for that matter -- on the behavior of children. In addition, the County Board of Supervisors, which passed the law, had gathered absolutely "no evidence linking any trading cards to juvenile crime." Indeed, the Board of Supervisors had failed to do anything more than look at the cards and to come to its findings based on sheer "surmise." The Court wrote: "surprisingly, the Board never even contacted the Nassau County Police Department to determine whether the trading cards played a role in any crimes. Further, the Board did not consult any mental health professionals, such as psychiatrists or psychologists, to determine whether the cards were 'harmful' to minors."

Additionally, the evidence that the County presented at the hearing, the Court wrote, addressed only violence on television. The Court distinguished television from reading matter, noting that television is "a vibrant visual medium which also engages an individual's hearing." But, Judge Spatt noted, "even if the Court were to find that studies on violence in television would control an ordinance prohibiting distribution of trading cards, the literature regarding the causal link between television violence and crime is inconclusive."

Accordingly, Judge Spatt held, the County had failed to establish that the local law was narrowly tailored to meet a compelling state interest. Unlike the Magistrate in his Report and Recommendation, the Court declined to address the question whether the local law was unconstitutionally vague and/or overbroad.

The County has indicated that it intends to appeal the decision.

Mr. Balin is a partner and Mr. Klaris an associate at Lankenau Kovner & Kurtz, LLP in New York City. Together they represent the plaintiffs in Eclipse Enterprises as cooperating attorneys for the Nassau County Civil Liberties Union.

Supreme Court Update:

In the first week of the 1996-97 term the United States Supreme Court denied certiorari in five cases involving the media and libel law. Three of the denials favor the media while the fourth permitted a jury verdict of $750,000 to stand. In the fifth case the Court refused to review ABC's appeal of its motion to intervene in a class action suit. (see page 14 in this month's LDRC LibelLetter).

1. *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 24 Media L. Rep. 1332, *cert. denied*, 65 U.S.L.W. 3245 (10/8/96, No. 95-1769)

Robert "Bud" McFarlane's petitioned for certiorari in his libel suit against *Esquire* magazine over an October 1991 article. The article included allegations that McFarlane, the national security advisor to President Reagan, assisted Israeli intelligence and participated in a conspiracy between Iran and the 1980 Reagan-Bush campaign to forestall a release of the American hostages in Iran until after the presidential election. *See LDRC LibelLetter*, February 1996 at 1, June 1996 at 8.

Unhappy with the D.C. Circuit's affirmation of a summary judgment motion against him on the basis of the actual malice standard, McFarlane's petition argued for re-examination of *New York Times v. Sullivan*. Among the questions presented by the petition were: (1) In a case governed by *New York Times v. Sullivan*, does a publisher act with actual malice when it publishes without corroboration highly defamatory accusations of an informant that publisher acknowledges is a liar? (2) Is the *New York Times v. Sullivan* standard so purely subjective that admitted review of information showing publication's falsity will not constitute actual malice unless the publisher confesses to his thoughts concerning the material? (3) Should the actual malice requirement of *New York Times v. Sullivan* be re-examined, when its "daunting" standard allows publication of defamatory falsehoods invented by an acknowledged liar?

2. *Hopewell v. Midcontinent Broadcasting Corp.*, S.D. Sup. Ct., 538 N.W.2d 780, 24 Media L. Rep. 1091, *cert. denied*, 65 U.S.L.W. 3245 (10/8/96, No.95-1954)

The South Dakota Supreme Court affirmed summary judgment in favor of defendant, a television station, that had been sued for defamation by a candidate for Second Circuit judge in Sioux Falls. The station broadcast a news report, based on information from a confidential source, that 12 years earlier the candidate had been slipped a hallucinatory drug, causing him to enter a drug store and a cathedral completely nude and ultimately leading to an arrest for attempted rape. The court ruled that the lower court correctly did not compel the journalist to divulge his source and that there was no evidence of actual malice.

The question presented by the petition was: Did the release of confidential records in violation of city regulation and state statutes deprive petitioner of equal protection, due process, Fourth Amendment right to be let alone, and First Amendment right to run for office without tortious interference by his election opponents?

3. *Lafayette Morehouse Inc. v. Chronicle Publishing Company*, 37 Cal. App. 4th 855, 44 Cal. Rptr. 2d 46, 23 Media L. Rep. 2389 (Cal. Ct. App. 1995), *cert. denied*, 65 U.S.L.W. 3245 (10/8/96, No. 95-1789)

Plaintiffs, More University and several affiliates, brought a libel claim against the publisher of the San Francisco Chronicle based on a series of articles describing a dispute between More University and the county authorities. Defendant moved to dismiss, relying on section 425.16 of California Code Civ. Proc., an Anti-SLAPP statute, which provides for early dismissal of nonmeritorious actions that chill the valid exercise of free speech. Ruling that More failed to present proof of falsity, the trial court granted defendant's motion. On appeal, the California court of appeals affirmed the dismissal, holding that plaintiff did not show a probability that it would prevail on its libel claim. *See LDRC LibelLetter*, August 1995 at 3.

In its petition for *certiorari*, plaintiff presented the following questions: (1) Is California's anti-SLAPP statute unconstitutionally vague? (2) Were petitioners denied equal protection guaranteed by the Fourteenth Amendment by application of the anti-SLAPP statute against them, limiting their access to courts when they sought redress against a newspaper for a series of articles that defamed them and invaded their commercial and academic interests?

4. *Philadelphia Tribune Co. v. Brown*, 668 A.2d 159, 447 Pa. Super. 52, 24 Media L. Rep. 1505 (Pa. Super. Ct. 1996), *cert. denied*, 65 U.S.L.W. 3245 (10/8/96, No. 96-71)

The Supreme Court let stand a $750,000 libel judgment in a case arising out of a report concerning the reimbursement the plaintiff, a dentist, received from the state for work that he performed on lower-income patients. While the plaintiff had been investigated for welfare fraud, he had not been charged with any crime as the article alleged. On appeal the defendant argued that the plaintiff should have been found to be a limited purpose public figure and subsequently held to the actual malice standard. *See LDRC LibelLetter*, December 1995 at 8.

The question presented by the petition was: Did the Pennsylvania appellate courts err in not concluding that individual who was the subject of a widely disseminated government issued press release alleging that he had misused public funds was not a limited purpose public figure and therefore did not have to prove actual malice in his defamation action brought against a newspaper which reported on the public controversy?

Can Parties Vacate A Jury Verdict By Agreement?

Collateral Estoppel by ABC in Libel Suit Disappeared as Well

The U.S. Supreme Court has recently declined to review an attempt by ABC to challenge the settlement and subsequent vacatur of an $8 million securities fraud verdict that ABC sought to use in defense of a libel suit filed against it. *American Broadcasting Companies, Inc. v. BankAtlantic Financial Corp.*, 85 F.3d 1508 (11th Cir., 1996), *cert. denied*, 65 U.S.L.W. 3230 (10/7/96, No. 96-124).

Verdict? What Verdict?

In 1992, a Miami federal court jury found that financier Alan Levan and the corporate defendant had misled thousands of real-estate investors, awarding the plaintiff class $8 million in damages.

In the same courthouse Levan had already filed a libel action against ABC for a 20/20 report which criticized Levan's dealings with the same investors. Verdict in hand, ABC moved for summary judgment in February 1993, arguing that the collateral estoppel effect of the verdict in the class action suit precluded a judgment against ABC in the libel lawsuit.

The magistrate overseeing the preliminary stages of the case, U.S. Magistrate William Turnoff, agreed, stating that Levan would be "unable to prove the gist of the 20/20 story false," and therefore recommended that the libel suit be dismissed. But with an issue of equitable rescission still open in the class action suit, the district court stayed the proceedings in the libel suit, and by the time the court finally got around to making a final ruling on ABC's motion, the $8 million verdict had disappeared.

Motions for remititur, JNOV, and a new trial brought on by the class action defendants, including Levan, were denied, and an appeal dismissed on the holding that the district court's judgment was not yet final because of the outstanding claim for equitable recission. Levan and the corporate defendant then settled with the investors, paying the full $8 million, plus an interest component, in exchange for a stipulated motion to vacate the jury verdict and resulting judgment -- a clean slate, with all traces of the verdict erased.

Upon receiving notice of the turn of events the district court rejected the magistrate's recommendation and returned the case for further consideration. In April 1995, the magistrate recommended that ABC's summary judgment motion be denied.

ABC's Motion to Intervene

Facing the prospect of defending the libel suit at a trial, and without its strongest and certainly most easily demonstrated defense, ABC moved to intervene in the class action for the purpose of opposing the vacatur of the jury verdict and the judgment, arguing that the magistrate's recommendation regarding the summary judgment motion gave ABC sufficient interest in the settlement to entitle it to intervene. With Levan and the plaintiff class both opposing ABC's attempt at intervention, the district court denied ABC's motion. After a hearing on the proposed settlement, the district court approved the agreement and entered a final judgment vacating the jury verdict and the judgment.

ABC then appealed to the U.S. Court of Appeals for the Eleventh Circuit arguing both that it was entitled to intervene in the class action and that the district court's approval of the settlement was an abuse of discretion because the agreement was designed to manipulate the judicial system. To support its arguments, ABC cited the 1994 U.S. Supreme Court decision in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, -- U.S. --, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994), where the Court noted that it disapproved of such settlement agreements.

The Court of Appeals never reached ABC's second argument, however, because it found that ABC lacked the standing necessary to challenge the proposed settlement. Addressing first ABC's contention that it should be permitted to intervene as of right, the court found that "ABC's interest in the collateral estoppel effect of the jury's verdict in this case is too collateral, indirect, and insubstantial to support intervention as of right." 85 F.3d at 1513.

Turning to ABC's argument that it, nonetheless, should be permitted permissive intervention, the court again ruled against ABC holding that permitting ABC to intervene for the purpose of blocking the vacatur would "substantially prejudice Levan and [his company] BFC, because unless vacated, the jury verdict and judgment in the class action will preclude their libel claim against ABC." 85 F.3d at 1514.

In the court's words, "ABC will have an opportunity to establish in the old-fashioned way the defense that it sought to preclusively establish with the class action jury verdict and judgment." 85 F.3d at 1514.

The court then affirmed the district court's denial of ABC's motion to intervene, and ABC filed a petition for certiorari with the U.S. Supreme Court. The filing attracted media interest in the case and brought to light the all too common pattern of rich litigants using their deep pockets to eradicate adverse judgments. (*See Wall Street Journal*, September 24, 1996, at p.B15, col. 1) As Floyd Abrams, ABC's attorney, argued in the petition, "once a judgment is entered it may not become a settlement pawn to be routinely purchased and sold at will by the litigants."

Unfortunately, the Supreme Court denied review of ABC's petition on the first day of the 1996-97 session. Trial in the case is scheduled to commence October 28 and to require at least three weeks.

FIRST AMENDMENT OBSERVATIONS ON THE 1995-96 SUPREME COURT TERM

Cam DeVore was unable to join our other essayists this August when we published comments by Floyd Abrams, Terry Adamson, Bruce Ennis and Luther Munford on the Supreme Court and the First Amendment. But LDRC will be publishing Cam's essay, as well as republishing the other essays, in the October 1996 LDRC BULLETIN and thought it worthwhile to publish it here as well.

By P. Cameron DeVore

The 1995 term was a good year for the First Amendment in the Supreme Court. While their doctrinal approaches varied, the justices often agreed that government cannot burden any category of speech if less speech-intrusive alternatives are readily available.

In cases of less direct interest to the media bar, the Court broke new First Amendment ground in *O'Hare Truck Service v. Northlake* and *Board of County Commissioners v. Umbehr*, extending to independent government contractors the First Amendment protection accorded the speech of government employees. And in *Colorado Republican Federal Campaign Commission v. FEC*, the Court struck down a federal election law limiting political party expenditures made independently of a particular candidate.

Continuing its pro-speaker trend in media-related cases, the Court's two most significant First Amendment decisions were the unanimous result in the latest in its apparently annual commercial speech series in *44 Liquormart v. Rhode Island*, and a mixed but disquieting decision in the cable indecency case, *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*. *44 Liquormart* and *Denver Area* also provided an early glimpse into cases currently or inevitably on the Court's agenda, one testing Congress's Internet indecency ban, and others challenging the federal restrictions on tobacco advertising.

44 Liquormart was a splendid decision -- less for any profound changes wrought in the *Central Hudson* test than as a harbinger of the eventual demise of *Central Hudson* and evolution toward stricter scrutiny for commercial speech regulations. All nine justices agreed that Rhode Island's ban on liquor price advertising was "more extensive than necessary" to serve the state's asserted interest in promoting temperance, thus failing the fourth prong of *Central Hudson*. Justices Stevens, Kennedy, Ginsburg, and Thomas would apply a higher level of scrutiny to any paternalistic government suppression of nonmisleading and truthful commercial speech. Justices O'Connor, Souter, Breyer, and Chief Justice Rehnquist would nominally retain the *Central Hudson* test, but all appeared to agree to such a strong reading of part four as to greatly limit the reach of *Central Hudson*. Justice Scalia supported the result but was relatively noncommittal.

The *Central Hudson* test has allowed such aberrations as *Posadas* (now effectively overruled by *44 Liquormart*), *Edge Broadcasting*, and *Florida Bar*. The dark side of *Central Hudson* has always been its arguable approval of advertising restrictions designed to suppress demand for a lawful product. Justice Stevens' opinion in *44 Liquormart* would lop off the worst aspects of that reading of *Central Hudson*, reiterating *Rubin*'s insistence that there is no special deference permitted for restrictions of advertising of so-called "vice" products, and rejecting the much criticized Rehnquist theory in *Posadas*, which asserted that government's power to ban a product must include the "lesser" power to ban speech about same.

In any event, *44 Liquormart* is a powerful result highlighting the apparently growing number of justices prepared to give enhanced protection of commercial speech.

Regrettably, *Denver Area* is a darker story. Cable operators challenged the operation of three key provisions of the 1992 Cable Television Consumer Protection and Competition Act. Two were struck down by the Court under the First Amendment, but Section 10(a), giving cable operators editorial discretion to ban "indecent" programming on leased-access channels, survived.

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THE 1995-96 SUPREME COURT TERM

(Continued from page 15)

Justice Breyer's almost painfully hedged opinion declined to apply even intermediate scrutiny to the provision, and instead invented a brand new and more lenient scrutiny called "close judicial scrutiny" -- requiring something called an "extraordinary problem," and only a "carefully tailored" governmental solution. Justice Kennedy, clearly this Court's most consistent and eloquent First Amendment spokesman, described his colleague's opinion on Section 10(a) as "adrift." In spite of some comments that Justice Breyer was wise to take a cautious approach in considering "new technologies" under the First Amendment, it was hard to disagree with Justice Kennedy's critical analysis.

Both *44 Liquormart* and *Denver Area* will play a significant role in the 1996 Term, and in cases in the Fourth Circuit involving alcohol beverage and tobacco advertising -- all of which may ultimately be headed for the Court.

As opposed to Justice Breyer's unanalyzed assertion that the adequately "extraordinary" problem underlying Section 10(a) is "protecting children from exposure to patently offensive depictions of sex," a three-judge court applied classic First Amendment analysis in its unanimous decision of June 12 in *ACLU v. Reno*, striking down congressional attempts to "protect children" by forbidding indecency on the Internet. In sharp contrast to Justice Breyer's approach, Judge Dalzell observed:

> "My analysis does not deprive the Government of all means of protecting children from the dangers of Internet communication. The Government can continue to protect children from pornography on the Internet through vigorous enforcement of existing laws criminalizing obscenity and child pornography. . . . As we learned at the hearing, there is also a compelling need for public education about the benefits and dangers of this new medium, and the Government can fill that role as well. In my view, our action today should only mean that the Government's permissible supervision of Internet content stops at the traditional line of unprotected speech."

The powerful fact base and profound acknowledgement of the uniqueness of the Internet supporting the *ACLU v. Reno* decision will make it difficult for the Supreme Court to overturn the trial court. However, *Denver Area*, at least given Justice Breyer's "new technology" analysis, leads to concern about how some justices may respond in *Reno*.

Denver Area's stress on protecting children has also been seized upon by the United States to help legitimize the FDA's wide-ranging limits on tobacco advertising. However, when confronting advertising of a legal product as opposed to attempted limits on patently offensive depictions of sex, *Denver Area* cannot legitimately be stretched to overcome the *Butler*, *Sable*, and *Bolger* requirement that adult speech not be reduced to a level appropriate for the sandbox. Summary judgment will be argued early in 1997 in the tobacco and advertising industry challenges in North Carolina to the FDA's regulations.

More immediately, the Fourth Circuit is likely to respond this fall to the Supreme Court's remand of *Anheuser-Busch v. Schmoke* and *Penn Advertising v. Baltimore*, the Baltimore billboard cases, for reconsideration in light of *44 Liquormart*. The United States has also filed an amicus brief in the Fourth Circuit, asserting that *44 Liquormart* does not foreclose the Fourth Circuit's extraordinarily deferential approval of § 12(b)(6) dismissal of those challenges to the Baltimore billboard regulations, and asserting that *Denver Area*'s protection of children allows the Fourth Circuit to affirm its earlier result.

In short, the United States is pursuing a unified strategy in these various cases, and this Term's results in *44 Liquormart* and *Denver Area* will obviously play a central role in this continuing First Amendment drama.

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Federal Rules of Civil Procedure

Amended Rule 26(a) Criticized

DCS Survey

Last month LDRC reported the results of a survey of DCS membership conducted by DCS member firms Steinhart & Falconer and Willcox & Savage which found that of the attorneys who had dealt with the new rule in the libel/privacy context nearly 80% believed that the new Rule 26 favors neither plaintiff of defendant. The survey also showed that defense counsel have adapted to the new rule by changing their litigation strategy – seeking dismissal, summary judgment or settlement more often. *See LDRC LibelLetter*, September 1996 at 13.

In a related article, Nicole Wong, a media practitioner with Steinhart & Falconer, analyzed the potential pitfalls that new Rule 26 presents to the media defendant. Especially troubling, Ms. Wong noted, is the concern that "coerced 'voluntary' discovery undermines the existing constitutional limits on litigation against [the media]." While noting that it is still early to see the full impact of the amendments, Ms. Wong pointed out that, without a uniform rule throughout the federal courts and with the threat of litigation over just what must be disclosed under the new rule, "The uncertainty and potential ancillary litigation caused by the amendments threatens the well-established First Amendment principle that 'suits against the media should be controlled so as to minimize their adverse impact upon press freedom.'" *See LDRC LibelLetter*, September 1996 at 13, *quoting McBride v. Merrell Dow & Pharm. Inc.*, 717 F.2d 1460, 1466 (D.C. Cir. 1983).

ABA Survey

A far more critical eye was cast upon new Rule 26 in a recently published survey conducted by the ABA's Section of Litigation's Committee on Pretrial Practice and Discovery. In its 279 page report entitled, *Mandatory Disclosure Survey: Federal Rule 26(a)(1) After One Year* ("*ABA Report*"), the Committee related that the survey results suggest "that federal practitioners feel that the mandatory disclosure provisions of Rule 26(a)(1) have had little impact on their practice, and they strongly urge that the Rule be repealed." Jasmina A. Theodore, *Amendment to Rule 26(a)(1) may have Limited Impact on Federal Pretrial Practice*, LITIGATION NEWS, September 1996 at 8.

Specifically, the report stated that "roughly 75% of the respondents said that Rule 26(a)(1) should not be continued as a rule of procedure." *Id.* In addition, the Committee reported that, "The survey provides no evidence that the Rule has reduced discovery costs, delays, or conflict between opposing counsel. Neither has the Rule generated visible systemic improvements to the discovery process." *Id.*

In addition, the survey found that respondents felt that the rule change imposed greater costs on litigation, but more so on defendants than on plaintiffs. The Rule, according to over 50% of the respondents, provides an additional arena for obstructionist tactics and did not reduce the need for subsequent discovery. *Id.* at 5.

Although the report also revealed that "the Rule has promoted an earlier exchange of information than traditional discovery and increased communication between opposing counsel," the authors point out that "since the mandatory meet-and-confer requirement was added to Rule 26 at the same time as other prediscovery amendments, it is not clear which part of the Rule is truly responsible for increase in communication." *Id.* at 8.

Despite the fact that the reliability of the survey may have been affected by various factors (see below) the Committee wrote that "federal rulemakers can fairly consider the survey results and responses as an objective, reliable

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Rule 26(c) Update on Advisory Committee

As was reported in the June 1996 *LDRC LibelLetter*, the Advisory Committee on Civil Rules decided not to adopt amendments to Rule 26(c) which would have allowed courts to issue protective orders based merely on the stipulations of the parties. Rather, the Committee decided to hold Rule 26 (c) "for further consideration as part of a new project to study the general scope of discovery authorized by Rule 26(b)(1) and the scope of document discovery under Rules 34 and 45." Report at p. 1; *See LDRC LibelLetter*, June 1996 at 3.

The early work on this project has already begun with discussion of the project on the agenda at this month's Advisory Committee meeting. For the meeting the American College of Trial Lawyers, at whose request the Committee decided to reconsider "the basic scope of civil discovery," has prepared a paper on the history of civil discovery. But with the project expected to take two to three years to complete, it may be some time before the Committee has anything further to say on Rule 26(c).

Senator Kohl's Legislation

On another front Senator Kohl (D. Wisc.) has introduced legislation in the Senate proposing an amendment to Rule 26(c) that would affect protective orders and the sealing of cases and settlements in suits related to public health or safety. Entitled the "Sunshine in Litigation Act of 1996," the bill provides that courts shall enter protective orders under Rule 26(c) only after "making particularized findings of fact that –

"(A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or

"(B)(i) the public interest in disclosure of potential health or safety hazards is clearly outweighed by a specific and substantial interest in maintaining the

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Amended Rule 26(a) Criticized

(Continued from page 17)

resource about the impact of Rule 26(a)(1) on federal practice and practitioners to date." *ABA Report* at 29.

Finally, the report stated, "The bottom line conclusion that we reach . . . is that a sizable majority of the respondents have not accepted Rule 26(a)(1) disclosure as a part of the procedural framework for civil litigation in federal court, and they want automatic disclosure struck from the rules when the discovery issue is revisited." *ABA Report, Executive Summary*, p. 6.

The Federal Judicial Center's Critiques

In response to the criticism levied at Rule 26 by the ABA Litigation Section Survey, the Federal Judicial Center provided comments to the Advisory Committee on Civil Rules critiquing the study's findings and methodology. Stressing that their critique "is not a Federal Judicial Center commentary on the policy questions underlying the debate on Rule 26(a)(1), nor is it a defense of the rule or an argument that the litigation bar favors the rule," the Center stated that its purpose in critiquing the study was to "simply argue that the bar's position cannot be gleaned from these data." Letter from Federal Judicial Center to Rules Committee Support Office (July 19, 1996) at 1 ("Letter").

Specifically, the Center highlighted three "fundamental problems" with the research upon which the ABA based its study. First, the Center noted that the fact that the ABA study was based upon a questionnaire response rate of 4% calls into question the reliability of the responses. Despite the ABA's statement that "survey research literature indicates that a response rate between three and five percent can be expected," the Center contended that the same "literature also warns of the dangers of relying on studies with such low response rates." In fact, the Center continued, the danger is particularly high when the question may arouse "strong feelings for or against an issue" as with Rule 26. Letter at 2.

Further, the Center stated that with 65% of those responding identifying themselves as defense attorneys, the ABA should have been more cautious in formulating the generalizations it attributed to the entire bar. While the ABA study stated that the survey "was designed so that most questions would be neutral as to attorney-orientation," (*see ABA Report* at 34), the Center countered by pointing out that "[w]hile the questions may be phrased neutrally, to the extent that opinion is related to the side one routinely represents it matters very much who answers the questions." Letter at 2. Thus, the Center argued "we cannot know whether the findings of this study are representative of the Litigation Section without information about the defense/plaintiff makeup of the section (and a higher response rate)." Letter at 2.

Finally, the Center questioned the ABA's reliance on the opinions of attorneys with too little experience with the new rule. In fact, the Center pointed out that while 820 respondents answered the survey's central question – whether amended Rule 26 should be retained in its present form – only 603 had litigated in a district where the rule was in effect. Thus, the Center continued, "a quarter of the respondents expressed an opinion though they had no experience with the rule." Letter at 3. The Center then concluded that, "[g]iven the respondents' limited experience with the rule and the possibility that their opposition may be grounded more in the rule's prior reputation than in actual experience, we believe the study provides no empirical basis for drawing any conclusions about the rule's effects." Letter at 3.

According to *Litigation News*, the ABA Litigation Section Newsletter, the Section is contemplating the preparation of a response to the Federal Judicial Center, while those responsible for the study may be retreating somewhat from the generalized conclusions of the survey. In Litigation Docket, an ABA publication, Melinda Thaler, co-chair of the Pretrial Practice and Discovery Committee, was quoted as saying, "Certainly we recognize in the report that this is not a statistically valid sample. Our objective was to participate in the dialogue that the Civil Justice Reform Act began by providing anecdotal evidence of practical experience to Rule 26." *See Litigation Docket*, Fall 1996, Vol. 2, Iss. 1, at 2.

Other Studies

In addition to the LDRC survey and the ABA study, two other studies have been done analyzing the effects and attitudes regarding amended Rule 26. First, the government has commissioned a study by the Rand Organization analyzing the effects of Rule 26. Although the report is in a final draft stage, and has not yet been made public, it is reported that the study shows a 95% confidence rate that amended Rule 26 does, in fact, cut down on litigation time.

Another survey was conducted in the Eastern District of Pennsylvania. That study reportedly showed that 80% of judges favor the rule while 60% of the bar also like it.

Rule 26(c)

(Continued from page 17)

confidentiality of the information or records in question; and

"(ii) the requested protective order is no broader than necessary to protect the privacy interest asserted."

In addition, any protective order that meets the requirements above will not be permitted to remain in place after the entry of final judgment unless the court makes a separate particularized finding of fact stating that the conditions continue to be met.

Further, the bill provides that the party seeking the protective order will bear the burden of proof, and also includes a prohibition on protective orders which would restrict a party "from disclosing information to a Federal or State agency with authority to enforce laws regulating an activity relating to such information."

Although the bill passed the Judiciary Committee with a favorable vote of 11-7, it was subsequently voluntarily pulled off the floor. Senator Kohl's office has reported, however, that the Senator will re-introduce the bill next year.

U P D A T E S

1. Prozeralik v. CapCities Settled

$11 Million Libel Verdict Had Withstood N.Y. Appellate Courts

The parties have settled *Prozeralik v. Capital Cities Communications Inc*, the libel suit brought by a Niagra Falls restauranteur against a Buffalo television station, formerly owned by Capital Cities. While winning $11.5 million in his second trial against Capital Cities -- $11 million in various compensatory damages and $500,000 in punitive damages -- the appellate court had reduced the amount to $11 million, finding that the evidence did not support the common law malice required in New York for a punitive damage award.

In September, the Court of Appeals, New York's highest court, refused to hear Capital Cities' appeal. The parties have not indicated the terms of the settlement. (*See LDRC LibelLetter*, September 1996 at 1)

The libel suit was brought after the Buffalo television station mistakenly identified John Prozeralik as the victim of an organized crime beating. (*See LDRC LibelLetter*, November 1994, at 4). The $11 million compensatory award included $6 million for loss of reputation, $3.5 million for emotional and physical injury, and $1.5 million for out-of-pocket losses.

This was the second trial in this case. The first trial resulted in an $18.5 million jury verdict which was remitted by the trial judge to $15.4 million, affirmed by the Appellate Division, but subsequently reversed and remanded by the New York Court of Appeals based upon an error in instructing the jury on the issue of falsity. (*See LDRC LibelLetter*, January 1996, at 8).

2. California Amends Fair Report Statute Overruling Shahvar

California has adopted an amendment to its statutory fair report privilege making it clear that a fair and accurate report *to* a public journal, as well as *in* a public journal is privileged. The bill amends § 47 of the California Civil Code dealing with privileged publication or broadcast. In section 1 of the Bill, the legislature states that the statute is intended to overrule a California appellate court decision finding that a plaintiff providing, through his lawyer, a copy of a civil complaint to a reporter was not privileged. *Shahvar v. Superior Court*, 28 Cal. App. 4th 453 (1994).

In *Shahvar*, at issue was whether the plaintiff was privileged to transmit a facsimile copy of a complaint to the San Francisco Examiner newspaper. Shahvar, an original founder and former employee of ASP, a computer service company, filed suit against the company following his dismissal for poor performance and misconduct. The basis for cross-complainants' libel claim, however, was not that Shahvar filed a false complaint in court. Rather, the libel claim was based on Shahvar's communication of copy of complaint which induced the newspaper to publish an article summarizing the complaint's allegation. The Court of Appeal held that such communication was not covered by litigation privilege since it was made to someone unrelated to litigation.

Citing *Financial Corp. of America v. Wilburn*, 189 Cal.App.3d at p. 777, the court interpreted § 47 to contain "the requirement that the communication be in furtherance of the objects of the litigation," which allowed the court to conclude that the communication must be "connected with or have some logical relation to the action..."

3. California Supreme Court Grants Hearing in Khawar

The California Supreme Court has granted defendant's Petition for Hearing in an appeal of a $1.17 million verdict awarded to Khalid Khawar against *The Globe*, a nationally distributed tabloid, after it printed a story in April, 1989 reporting allegations in a recently published book that it was Khawar who assassinated Robert Kennedy, and not Sirhan Sirhan, the man convicted of the crime. The Supreme Court has vacated the California Court of Appeal decision which affirmed the jury verdict. *Khawar v. Globe International Inc.*, No. BO84899-96 D.A.R. 6549 (Cal. Ct. App., June 5, 1996), *opinion superseded by* California Supreme Court (September 25, 1996). *See LDRC LibelLetter*, June 1996 at 1.

At trial, the jury found that the article was a neutral and accurate report, but nonetheless, awarded damages to Khawar in the amount of $100,000 for reputational harm, $400,000 for emotional distress, $175,000 in presumed damages and $500,000 in punitive damages. The trial judge disregarded the jury's first finding and entered a judgment for Khawar.

The *Globe* defended the suit by arguing that its article merely reported the allegations made in a book written by Robert Morrow, a prominent author, and accordingly, should be protected under the neutral reportage doctrine. The appellate court panel, however, agreed with the lower court's finding that Khawar, though being in the center of the controversy, was not a public figure, and held that California would not extend the neutral reportage doctrine to private figures. The appellate court also concluded that the plaintiff's failure to independently investigate into source allegations constituted evidence of actual malice.

U P D A T E S

4. Media Amici Join the Fray in Commercial Misappropriation Case

New York Times and Interactive Services Support Users

NBC Supports NBA

The New York Times Co. and Interactive Services Association ("ISA") have filed *amicus curiae* briefs in the Federal Court of Appeals for the Second Circuit in the commercial misappropriation case against Motorola, Inc. and Stats, Inc. brought by the National Basketball Association. *The National Basketball Ass'n and NBA Properties, Inc. v. Sports Team Analysis and Tracking Systems, Inc. (STATS) and Motorola Inc.*, 1996 U.S. Dist. LEXIS 10262 (Preska, J.). (*LDRC LibelLetter*, August 1996 at 1) Both *amici* urge reversal of the order below, which *The Times* contends permits sports promoters and other non-governmental sources to unilaterally determine whether factual information about their newsworthy activities can be reported to the public.

The Times argues that the reporting of scores and factual information about a professional basketball game constitutes truthful newsworthy information and is, therefore, protected by the First Amendment. Since facts are not copyrightable, the distribution of sports facts and statistics cannot be restrained, as long as it was legally obtained. The misappropriation theory used by the lower court to strike the defense, obliterates the careful distinction between fact and expression embodied in the Copyright Act, *The Times* argues. The injunction against reporting constitutes an impermissible prior restraint.

Moreover, adds ISA, the theory that the misappropriation doctrine in New York offers broader and more flexible remedies than that offered by federal copyright law is totally incompatible with the First Amendment. The lower court's heavy reliance on *International News Services v. Associated Press*, 248 U.S. 215 (1918), was also unjustifiable, according to ISA, because this case was decided prior to modern First Amendment jurisprudence which now recognizes that restrictions on speech are extremely narrow and limited to the most weighty of circumstances. Thus, ISA concludes, the facts of this case do not meet the narrow, reconciled with the First Amendment, mold of the *International News* case.

ISA also argues that the District court's proper rejection of the NBA's copyright claims for the game and its broadcasts, should have resolved the misappropriation claims; that the court's focus on protection of the *games* rather than *information* about the games led it to an erroneous conclusion.

NBC Disagrees

In what some in the media clearly found to be a controversial move, the National Broadcasting Company filed amicus support on behalf of the NBA. NBC argues that the district court was correct in finding that defendants, Motorola and STATS, were selling a commercial product that interfered with the NBA's own marketing of basketball games which resulted in devaluing the NBA's rights to those games; that the court's findings did not unduly limit news reporting or other protected speech. NBC further argues that there is no inconsistency between the decision of the District Court and the preemptive force of federal copyright law because "state protection for intellectual property may be enforced where a work falls outside the subject matter covered by the Copyright Act."

Oral argument in the case is scheduled for October 21.

5. Arizona Jury Deliberations Televised

Access to jury deliberation was approved by the Arizona Supreme Court in December, 1995, provided that the judge, jurors, prosecutors and defendants all consent.

Jury deliberations in four Arizona criminal trials have been videotaped by CBS News for a documentary on the jury process. CBS also obtained approval to videotape deliberations in civil trials in Maine, but the only case in which deliberations were videotaped was settled before trial.

In a 1986, a Wisconsin jury deliberation was videotaped for a PBS program. However, the forthcoming CBS documentary on the Arizona trials, will be the broadest of its kind, including trial proceedings, including testimony by the witnesses and sidebar conferences with the judge.

LDRC would like to acknowledge fall interns Natasha Gourari and Anna Pokhvishcheva, both of Benjamin N. Cardozo School of Law, for their contributions to this month's LDRC LibelLetter.

Alternative Dispute Resolution - An Effective Approach To Settling Defamation Cases

(Continued from page 1)

vide some measure of relief. While most libel plaintiffs seek financial satisfaction as well, the depth of their desire to be heard should not be underestimated in considering whether to proceed with ADR in a given case.

We have participated in alternative dispute resolution in a wide array of settings ranging from informal face-to-face meetings between representatives of our company and the plaintiff, to formal mediations in which "rented" judges or attorneys preside, to settlement conferences with magistrates or court-appointed mediators, to even a mock trial with a sitting judge and sworn jury in one case in Travis County, Texas.

Obviously, the form and forum of the ADR must be agreed upon by both parties, but there are a few universal elements:

- We have found that holding the meeting or mediation in the plaintiff's locale (which for us has more often than not been a plane flight away) speaks volumes to the plaintiff about our level of commitment to resolving the dispute.
- Having our company represented by a senior officer likewise communicates that we are sincere and serious of purpose in the settlement process.
- In all cases, the result is non-binding.

The Mediator

Where third-party mediators preside, a good mediator can obviously make a big difference. Although more expensive, private mediators are sometimes preferable to court-appointed ones because they are more likely to stay with the mediation process to a successful conclusion. Third-party mediators have been particularly helpful in cases where plaintiffs are reluctant to speak with us directly. The mediator can break the ice, facilitate dialogue between the parties and, most importantly, give the plaintiff some objective advice about the difficulties of prevailing in this kind of litigation. It is critically important to the process that the mediator have credibility with the plaintiff. For that reason, and since the process is non-binding, we do not rule out agreeing to a mediator proposed by the plaintiff's counsel.

Send a Senior Corporate Representative

We have been able to dispose of a number of cases by having a senior representative of the company, often the General Counsel, meet one-on-one with the plaintiff early in the litigation. These meetings may occur as a sort of sidebar in a formal mediation or as part of a less structured meeting between the parties.

While the plaintiff's attorney is always present at some point in such discussions, it is surprising how many opposing counsel agree to a one-on-one meeting between the plaintiff and our own representative. This setting is conducive to settlement: the plaintiff has the opportunity to be heard directly by a senior representative of the publisher (with whom the plaintiff may actually prefer to meet instead of the author, since some consider the publisher more "objective"); the plaintiff perceives that the publisher is willing to take the claims seriously given the publisher's willingness to send a senior representative to meet with the plaintiff at what to him/her is the "home court"; and finally, the plaintiff can experience a positive company "persona," while at the same time hearing a credible message that this may be his/her best -- and perhaps final -- opportunity to resolve the case short of trial.

The Results: Impressive

Our results have been impressive. We have settled cases without monetary compensation to the plaintiff or for extremely modest sums of money--far less than the initial, usually outrageous, demand. In some cases where we have been wrong or less clear than we might have been about a matter, we have agreed to provide a letter of clarification or to make changes to the book in the future. This frequently can be done without admission of wrongdoing or liability. It is worth noting that unlike some other forms of media, book publishers generally are not in a position to offer an immediate retraction, correction or clarification in the same form as the initial publication. An offer of a face-to-face meeting early on provides to the plaintiff immediate access to the publisher.

Once a threshold decision is made to attempt settlement, unlike a binding mediation or arbitration, there is really no downside to using non-binding processes to seek creative resolutions of disputes; in the event the case proceeds, litigation strategies and positions remain unaffected. (Nor have we found these processes particularly burdensome--the meetings and mediations themselves typically last less than two days, although continuing negotiations over the telephone may go on for several weeks.)

This approach to dispute resolution seems consistently to put plaintiffs and their counsel in the mindset of settling "on the courthouse steps" without incurring thousands of dollars in litigation expenses and many years of litigation stress beforehand. And if it does not produce results early in the litigation, over time relationships with the plaintiff and opposing counsel may develop in such a way as to permit the parties to revisit alternative dispute resolution later on in the process.

Mark C. Morril is Senior Vice President and General Counsel of Simon & Schuster. Emily R. Remes is Vice President and Senior Counsel of Simon & Schuster.

New Hampshire Supreme Court Finds Personal Jurisdiction Over Author and Ghost Writer

(Continued from page 1)
1996).

The Plaintiffs

The suit was brought by Beach Boy, Alan Jardine, and Brother Records, Inc. and Brother Tours, Inc., the two California corporations through which the Beach Boys conduct business. In addition to Wilson, Gold and B & G, the plaintiffs also filed suit against HarperCollins Publishers and Eugene Landy, a psychologist who treated Wilson for many years and Wilson's partner in B & G.

The Defendants

It was only Wilson, Gold and B & G, however, who moved for dismissal on the basis of lack of personal jurisdiction. While each of these defendants conceded that they fall within the bounds of New Hampshire's long-arm statute applicable to individual foreign defendants, they argued that "New Hampshire has virtually no connection with the parties or the subject matter of the action and that they lacked contacts with New Hampshire sufficient to justify the exercise of personal jurisdiction over them by the superior court." *Slip op.* at 2.

Specifically, Wilson argued that his involvement with the book was "extremely limited," in that he participated in thirty to forty hours of interviews with Gold and skimmed through a draft of the book prior to publication. In this light, Wilson contended that "he was manipulated by others and, therefore, could not have purposefully directed his activity toward New Hampshire." *Slip op.* at 4.

For his part, Todd Gold argued that "after researching and writing the manuscript, his involvement was limited to incorporating comments made by Landy and Wilson." *Slip op.* at 4. Pointing out that his work was entirely done in California and concerned events which did not involve New Hampshire, Gold argued that "he could not have anticipated that any injury caused by his conduct would have occurred in [New Hampshire]." *Slip op.* at 4. In addition, Gold contended that "the distribution and sale of the book in New Hampshire was controlled by HarperCollins and that he played no role in the selection of a publisher or the decisions of where and when to publish." *Slip op.* at 4.

B & G, the partnership consisting of Wilson and Landy, argued that "the only demonstrated details of its involvement with the book are contained in collaboration and publication agreements." *Slip op.* at 4. While the agreements show that B & G hired Gold to write the manuscript over which B & G retained control and that the details of publication, distribution, and promotion would be determined by HarperCollins, B & G contended that "any relevant acts directed at New Hampshire were undertaken by HarperCollins rather than by B & G." *Slip op.* at 4.

The Decision

Addressing the issue, the Supreme Court first noted the two-part inquiry necessary to determine if personal jurisdiction has been properly exercise. As the court stated, "Jurisdiction must be authorized, first, under the State's long-arm statute, and second, under the due process clause of the fourteenth amendment to the United States Constitution." Slip op. at 2. With the defendants conceding the first question, the court turned to "determine whether the 'assertion of jurisdiction is consistent with the due process, or minimum contacts, requirements clause of the United States Constitution.'" *Slip op.* at 2, *quoting Buckley v. McGraw-Hill, Inc.*, 762 F.Supp. 430 (D.N.H. 1991). The court addressed the minimum contacts requirement and the fair play and substantial justice requirement each in turn.

Minimum Contacts

In order to establish minimum contacts, the court noted that the "defendants must have 'purposefully avail[ed themselves] of the privilege of conducting activities within the forum state." *Slip op.* at 3, *citing Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Despite the defendants' attempts to distance themselves from the work and from New Hampshire, the court concluded that the plaintiffs had satisfied the requirement by demonstrating that the defendants "purposefully directed their activities at New Hampshire residents." *Slip op.* at 4.

In Wilson's case, the court relied on, among other things, the power Wilson retained over the creation of the book, the collaboration agreement which provided that Wilson would participate in a nationwide promotional tour and that the book would be released through "normal retail channels in the United States," as well as the fact that Wilson is credited with authorship on the cover of the book. *Slip op.* at 5.

As for Gold the court also cited the collaboration agreement which stated that his services would be required until the book's general release "throughout the United States through normal retail channels." *Slip op.* at 5.

B & G, the court found, "maintained exclusive control over every aspect of the project," from the collaboration agreement with Gold, which provided that all work was to be done under B & G's supervision and control to the publishing agreement with HarperCollins, which retained rights to proofs and production materials prior to publication. Slip op. at 5.

In short, the court held that "[t]he defendants are the parties directly responsible for the content of the book." *Slip op.* at 5. As such, the

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New Hampshire Supreme Court Finds Personal Jurisdiction Over Author and Ghost Writer

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court distinguished these defendants from a mere source. The court continued to note that "[t]he defendants' ultimate goals regarding the book included nationwide distribution and sale," a market which "included New Hampshire, where the Beach Boys had performed several times in recent years." *Slip op.* at 6. Thus, the court found, "the defendants deliberately exploited the New Hampshire market." *Slip op.* at 6.

Fair Play and Substantial Justice

Addressing the additional requirement of fair play and substantial justice, the court relied in large part on the U.S. Supreme Court decision in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984).

[Keeton was a non-resident plaintiff who chose New Hampshire because of its lengthy statute of limitations. The defendant, Hustler Magazine, was found to have regular circulation of thousands of magazines in the state, which, although relatively small as compared to total circulation, was not "random, isolated, or fortuitous." 465 U.S. at 774.]

In *Keeton*, the court wrote, the Supreme Court held "that a state's interest in adjudicating a dispute extends to libel actions brought by nonresidents because libel harms 'both the subject of the falsehood and the readers of the statement.'" *Slip op.* at 6, *quoting Keeton*, 465 U.S. at 776. Accordingly, "'New Hampshire may rightly employ its libel laws to discourage the deception of its citizens' even in order to remedy 'the injury that in-state libel causes within New Hampshire to a nonresident.'" *Slip op.* at 6-7, *quoting Keeton*, 465 U.S. at 776-77.

Thus, the court concluded, "Due to the nature of the claim of libel, and because we find that the defendants' activities were purposefully directed at New Hampshire, the superior court's jurisdiction over the defendants comports with 'traditional notions of fair play and substantial justice.'" *Slip op.* at 7.

The Second Suit

This is the second suit to arise out of the 1991 publication of *Wouldn't It Be Nice*. Audree and Carl Wilson, Brian Wilson's mother and brother, have also filed suit in a New Mexico federal court. In that case, the plaintiffs brought suit only against HarperCollins, as publisher. A motion for summary judgment filed by HarperCollins was denied by the court.

This case is also the second tough jurisdictional loss that the media has faced in as many months. As was reported in last month's *LDRC LibelLetter*, in September the Ninth Circuit Court of Appeals found personal jurisdiction in a libel suit over the New York-based *Daily News*, despite the fact that only 13 daily and 18 Sunday copies of the paper were regularly delivered in California. *Gordy v. The Daily News*, No. 95-55102 (9th Cir., Sept. 9, 1996). Regular circulation, however small, and knowledge that the resident plaintiff would suffer harm in the forum state appeared to be sufficient under the Ninth Circuit's analysis. *See LDRC LibelLetter*, September 1996 at 1.

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New York, New York 10016

New York Sexual Assault Victim Identity Statute Does Not Extend to the Media

Holding that the N.Y. statute barring disclosure by government officials of information identifying a victim of a sexual assault does not extend to the media, New York Supreme Court Justice Harold J. Hughes granted the defendant's motion for summary judgment dismissing the plaintiff's claims for violation of Civil Rights Law section 50-b, negligence, and intentional infliction of emotional distress. *Doe v. Hearst Corporation*, No. 1500-96 (N.Y. Sup. Ct., October 4, 1996).

The claims arose out of a *Times Union* newspaper article which reported the arrest of an Albany man for allegedly sexually assaulting a 13-year-old girl. Despite the fact that the article did not mention the girl's name, she claimed that the newspaper had violated section 50-b because the facts contained in the article led to the discovery of her identity.

Civil Rights Law section 50-b provides that "[t]he identity of any victim of a sex offense . . . shall be confidential." To that end, the law prohibits "any public officer or employee" from disclosing any material "which identifies such a victim."

The plaintiff argued that section 50-b should not be limited to public employees, but rather that the confidentiality provision "imposes a duty upon everyone in the State, including the media, to refrain from disclosing the victim's identity." *Slip op.* at 3.

The newspaper objected to this claim contending that the statute's requirement that "the identity of any victim of sex offense shall be confidential," applies exclusively to public officers or employees. The court agreed, finding that both legislative history and case law "require[] the rejection of plaintiff's position." *Slip op.* at 3.

Indeed, as Governor Cuomo stated in his memorandum approving the statute, "'[m]edia accounts of sexual offenses, including reports of the victim's identity, are not affected by the bill.'" *Slip op.* at 5. And as one New York court reiterated, "'[t]he statute does not affect the First Amendment's freedom of the press or penalize media accounts of sexual offenses lawfully obtained, including the accurate publication of the name of the rape victim.'" *Slip op.* at 5, *citing Deborah S. v. Diorio*, 153 Misc.2d 708, 720.

The other two counts of the plaintiff's complaint, negligent deviation from the standard of reasonable care and intentional infliction of emotional distress were also quickly disposed of by the judge. First, Judge Hughes noted that because newspaper liability for the publication of articles is limited to grossly irresponsible conduct, the plaintiff's second cause of action sounding in negligence simply "fails to state a viable claim." *Slip op.* at 5.

Further, Judge Hughes, citing *Freihofer v. Hearst Corp.*, 65 NY2d 135, 143, which held that to state a claim for intentional infliction of emotional distress the plaintiff must show conduct "which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society," found that the plaintiff in the present case "has not alleged, or introduced evidence, of such atrocious and intolerable conduct." *Slip op.* at 5-6.

In Case You Missed It...
Alar Industry Lost the Legal Battle with CBS But Won the PR War

In a recent Columbia Journalism Review article addressing the "so-called Alar scare," writer Elliott Negin notes that despite the fact that the Supreme Court recently denied certiorari in the $250 million class action suit filed against CBS "60 Minutes" by a group of Washington state apple growers -- letting stand lower court holdings that the plaintiffs had failed to raise a genuine issue with regard to falsity -- the apple industry has mounted a very successful campaign to convince the public that the Alar scare was a hoax. Elliot Negin, *The Alar "Scare" Was For Real*, COLUM. J. REV., September/October 1996 at 13. *See also, Auvil v. CBS 60 Minutes*," 67 F.3d 816 (9th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3722 (4/30/96, No. 95-1372); *LDRC LibelLetter*, May 1996 at 2.

And according to Mr. Negin, the apple industry has even managed to convince the media that the Alar scare was a "prime example of Chicken Little environmentalism and government regulation run amok." Mr. Negin writes, "of the roughly eighty articles, editorials, op-eds, and book reviews that commented directly on whether Alar actually posed a risk, all but a handful present the Alar affair as much ado about nothing."

According to the article, however, such views fly in the face of scientific fact. As David Rall, a physician and former director of the National Institute of Environmental Sciences, comments, the public relations counterattack is "a triumph of publicity over science." But despite EPA statements emphasizing the dangers of Alar, Mr. Negin writes, the apple industry, with the media's assistance, continues to write off the Alar scare as nothing but a "false alarm."

Mr. Negin also points out that the food and chemical industries have also been very successful in convincing state legislatures to support their ends. With agricultural-disparagement laws cropping up in at least twelve states, the industry has been able to arm itself with additional weapons to fight of adverse media coverage. As a John Stauber, editor of *PR Watch* comments, "'[t]he laws . . . are part of the national campaign to intimidate anyone who raises legitimate concerns about food safety."