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

DEFENSE COUNSEL SECTION
ANNUAL BREAKFAST MEETING
Friday, November 15th
7:00 am to 9:00 am

LDRC MEDIALAWLETTER

LDRC ANNUAL DINNER
"In the Trenches: War Reporting and the First Amendment"
Wednesday, November 13th
7:30 pm

Reporting Developments Through October 18, 2002

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NEWSGATHERING

NEWS & UPDATES

2002 NAA/NAB/LDRC Libel Conference: Thanks to All for a Great Success

The LDRC would like to sincerely thank all those who contributed in making this year's NAA/NAB/LDRC Libel Conference a huge success. Over 300 attended the Conference, held September 25-27 at the Hilton Alexandria Mark Center outside Washington, DC.

Attendees participated in three breakout group sessions: CyberLaw, Ethics/Pre-Publication/Pre-Broadcast, and Newsgathering. Panels were held on international news gathering and libel laws, public figure privacy, and controversial broadcast programming.

Seth Waxman, former Solicitor General and currently with Wilmer, Cutler & Pickering, spoke on his Supreme Court experiences as well as important First Amendment cases to be heard by the Court in its upcoming term. Friday, during "Trial Tales", panelists discussed lessons to be learned from their recent experiences in litigation.

Finally, a Mock Jury presentation was conducted during which attendees participated in a "trial" based on an investigation by a "local tv station" into the employment practices of a school bus company. Members of the "jury" (composed of outside volunteers) were periodically polled on their views of the facts and presentation of both parties. A running visual analysis of whether the jury, and a random group of Conference participants, thought what they were hearing was effective was shown on a large screen. The jury deliberations were also taped and analyzed by the RandD Solutions. An article on the results appears at page 9 of this *MediaLawLetter*.

Thanks to Peter and Dan...

LDRC would like to offer special thanks first to Dan Waggoner (Davis Wright Tremaine) and Peter Canfield (Dow, Lohnes & Albertson) who were co-chairs of the Conference. These two guys started working very far in advance of the actual Conference to cull through comments on the past Conferences and to begin to generate ideas and perspectives for the next one. Peter, in addition to his co-chair responsibilities, took charge of the Mock Jury Proceeding, working with the jury consultants to make that aspect of the Conference happen. He was ultimately required as well to fill in – masterfully, let us note – for Jim Brosnahan, scheduled to be the defense attorney in the project, who found he was unable to extricate himself from a hearing.

Dan always adds to his duties the responsibility of keeping all of us on target throughout the Conference and its development. No one – repeat, no one – has the capacity he has to get our attention and motivate us in the right direction. (Give that man a golden bullhorn....) His organizational and leadership skills are tested, to be sure, by the random and decidedly individualistic traits of lawyers, but Dan has proven up to the task over and over again.

Thanks to Breakout and Panel Leaders...

LDRC also wants to thank those who chaired and those who ran the various breakout sessions and panels. These folks put together an extraordinary array of materials, hypotheticals and questions designed to make the most out of the subject matter of their sessions.

Breakout Sessions

Ethics & Pre-publication/Pre-telecast

Chairs:

Roberta Brackman - *Faegre & Benson, LLP*
Dale Cohen - *Chicago Tribune*

Facilitators:

Sanford L. Bohrer - *Holland & Knight*
Patricia Clark - *Sabin, Bermant & Gould*
Paulette R. Dodson - *Tribune Company*
Katherine Hatton - *Philadelphia Inquirer/ Daily News*
Bruce E.H. Johnson - *Davis Wright Tremaine, LLP*
James A. Klenk - *Sonnenschein, Nath & Rosenthal*
Edward J. Klaris - *The New Yorker*
Thomas S. Leatherbury - *Vinson & Elkins, LLP*
Muriel Henle Reis - *Fox Television Stations, Inc.*
Mary Ellen Roy - *Phelps Dunbar, LLP*
Charles D. Tobin - *Holland & Knight*
Jennifer Falk Weiss - *Cable News Network*

Newsgathering

Chairs:

John P. Borger - *Faegre & Benson, LLP*
Susan Grogan Faller - *Frost Brown Todd, LLC*

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2002 NAA/NAB/LDRC Libel Conference

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Facilitators:

David S. Bralow - *Tribune Company*
Cameron Stracher - *Levine, Sullivan & Koch*
Jon A Epstein - *Hall, Estill, Hardwick, Gable, Golden & Nelson, P.C.*
Mark B. Helm - *Munger Tolles & Olson, LLP*
Henry S. Hoberman - *ABC, Inc.*
Eric Lieberman - *The Washington Post*
Len Niehoff - *Butzel Long*
Nicholas E. Poser - *CBS*
David A. Schulz – *Clifford Chance Rogers & Wells*
Nathan Siegel – *ABC, Inc.*
David Sanders – *Jenner & Block*
Maya Windholz - *NBC*

Cyberlaw

Chairs:

Patrick J. Carome - *Wilmer, Cutler & Pickering*
Nicole A. Wong - *Perkins Coie, LLP*

Facilitators:

Randall J. Boe - *America Online, Inc.*
Thomas R. Burke - *Davis Wright Tremaine, LLP*
Jonathan D. Hart - *Dow, Lohnes & Albertson*
Samir Jain - *Wilmer, Cutler & Pickering*
Judith B Jennison - *Perkins Coie, LLP*
Peter D. Kennedy - *George & Donaldson, LLP*
Steven Lieberman - *Rothwell, Figg Ernst & Kurz*
Robert D. Lystad - *Baker & Hostetler, LLP*
Kenneth Richieri - *New York Times Digital*
Clifford M. Sloan - *Washingtonpost.Newsweek Interactive*
Mary E. Snapp - *Microsoft Corporation*
Mark Stephens - *Finers Stephens Innocent*

Mock Jury Presentation

Jack Weiss - *Gibson, Dunn & Crutcher, LLP*
Ben DiMuro - *DiMuro, Ginsberg & Mook, PC*
Peter Canfield - *Dow, Lohnes, Albertson, PLLC*
Rhonda Schwartz - *ABC News*
Stephen J. Wermiel - *American University*

Jury Consultants:

Rick R. Fuentes - *RandD Solutions*
Maithilee K. Pathak-Sharma - *RandD Solutions*
Jennifer M. Keeney - *RandD Solutions*

Panels

International Media Law

Chairs:

James T. Borelli - *Media/Professional Insurance*
Kurt A. Wimmer - *Covington & Burling*

Panelists:

Newsgathering

Marc-Andre Blanchard - *Gowling, Lafleur, Henderson* (Quebec)
Douglas F. Curtis - *Reuters* (New York)
David Hooper- *Pinsent Curtis Biddle* (London)
Eric S. Johnson - *Internews International* (Paris)
Jane E. Kirtley - *University of Minnesota* (Minneapolis)

Libel/Privacy

Siobhain Butterworth - *The Guardian* (London)
Fiona Campbell - *Finer Stephens Innocent* (London)
Kevin W. Goering - *Coudert Brothers* (New York)
Juan R. Marchand (San Juan)

Wednesday Dinner

Moderators:

George Freeman – *The New York Times Company*
Laura Handman – *Davis Wright Tremaine, LLP*

Panelists:

Jorge Colon - *American Media, Inc.*
Lloyd Grove - *The Washington Post*
Jackie Judd - *ABC News*
John Riggins - *former NFL player & current sportscaster*
Thomas Yanucci - *Kirkland & Ellis*

Controversial Programming

Moderators:

Chad E. Milton - *Marsh USA Inc.*
Jerianne Timmerman - *National Association of Broadcasters*

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2002 NAA/NAB/LDRC Libel Conference

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Panelists:

Donald R. Gordon - *Leopold, Petrich & Smith, P.C.*
Eve Konstan - *Home Box Office*
Laura Lee Stapleton - *Jackson Walker, L.L.P.*

Trial Tales

Chair:

Thomas Kelley - *Faegre & Benson, LLP*

Panelists:

William L. Chapman - *Orr & Reno, P.A.*
Mark B. Helm - *Munger Tolles & Olson, LLP*
Victor A. Kovner - *Davis Wright Tremaine, LLP*
Jon A. Epstein- *Hall, Estill, Hardwick, Gable, Golden & Nelson*
Kelli L. Sager - *Davis Wright Tremaine, LLP*

Sponsors

Baker & Hostetler, LLP
Dow, Lohnes & Albertson PLLC
Jackson Walker, LLP
Mutual Insurance Company, Ltd.
Vinson & Elkins, LLP

A note about our sponsors. This Conference has never had sponsors before, other than the three sponsoring organizations of the LDRC, NAA, and NAB. But after the 2001 Conference – due to commence on September 12, 2001 – was cancelled last year, there remained a substantial amount of cost that needed to be absorbed. It was unclear the degree to which the insurance covering the 2001 Conference would cover those costs. The firms noted above here stepped in on very short notice last winter, agreeing to each put up some money to allow the Conference to go forward without fear of running into debt. LDRC, NAA, and NAB are and were very grateful to these firms and companies for making it possible for us to go forward in 2002 without concerns about a river or even a stream of red ink.

And the NAA Staff and the NAB...

The two co-sponsoring organizations of the biennial Conference with LDRC. Without them, the Conference wouldn't exist at all. And most assuredly, without the NAA staff to do the heavy hauling on the administrative and logistical side of the Conference, this Conference could not happen. On behalf of LDRC, and indeed, all of the participants in the 2002 NAA/NAB/LDRC Conference, we would like to express our continuing gratitude to these organizations.

And Now On To 2004!

Send in your comments about the Conference so we know what you thought about the current Conference, and get your ideas for 2004. Next November, 2003, there will be a planning meeting, no doubt, here in New York in conjunction with the MLRC Annual Dinner, to which anyone with ideas or an interest in involving him or herself should come. But if you wish to volunteer or send on ideas, do so anytime.

LDRC ANNUAL DINNER

"In the Trenches:
War Reporting and the First Amendment"

Moderated by

TED KOPPEL, ABC News "Nightline"

Panelists:

DEXTER FILKINS, *The New York Times*

SEYMOUR M. HERSH, *The New Yorker*

JOHANNA MCGEARY, *TIME*

BOB SIMON, CBS News

Wednesday, November 13, 2002

Dinner at 7:30 p.m. in the Imperial Ballroom
Cocktail Reception at 6:00 in the Royal Ballroom
sponsored by Media/Professional Insurance

RSVP by Friday October 25, 2002

LDRC's First Amendment Leadership Awards

P. Cameron DeVore • Richard Schmidt • Richard Winfield

LDRC wanted to honor those individuals whose contributions to the development of the law of the First Amendment and the institutions that support the First Amendment, were and are stellar. We chose to create an award – the First Amendment Leadership Award – to be given to those who are officially taking on senior status in their firms, but whose work on behalf of free speech and free press should never be allowed to retire.

Hal Fuson, Vice President and Chief Legal Office of The Copley Press, Inc. and a member of the LDRC Board of Directors, introduced the First Amendment Leadership Award and its recipients at the NAA/NAB/LDRC Conference on Thursday night, September 26, 2002.

> I am privileged this evening to announce the inaugural winners of the Media Law Resource Center's First Amendment Leadership Awards.
>
> In the 30 years I have played my small part, the practice of media law has evolved dramatically. Many lawyers achieved great things for the 1st Amendment before 1970 — one thinks, for example, of James Madison — but in 1970 there wasn't a media bar in the sense represented at this Conference. In 1970 it would have been impossible to fill a room with 300 lawyers from across the country, indeed from throughout the world. Lawyers who come together to exchange ideas and techniques. Lawyers who share a dedication to the importance of their clients' rights to free dissemination of information and ideas.
>
> This bar did not come together by accident. Many individuals and organizations are responsible. MLRC directors and the Executive Committee of the DCS concluded that the time has come to begin recognizing those who played key roles in making the media bar what it is today.
>
> Our three recipients aren't the only ones deserving credit, but they make a darn good start. All are themselves outstanding lawyers. But what separates them from most of the rest of us is the commitment they bring to making other lawyers better. These are lawyers who suffer fools gladly, even gleefully, returning always to the hope that, if they are patient enough, they can help the rest of us outgrow our foolishness.
>
> As I announce the names, you need not hold your applause. The winners can remain at their places until I finish the list. Then, please come forward together and receive these tokens of esteem.
>
> And the winners are:
>
> First, a lawyer who began as a lecturer on radio law in 1948. A lawyer who by 1970 was father confessor of every journalist in the National Press Club, who knew everyone in the hierarchy of the ABA in the 1970s and 80s whose sympathies could be plied by press organizations ... and whose work on behalf of the American Society of Newspaper Editors is unflagging to this day, especially on the legislative front. Richard M. Schmidt.
>
> Next, a New York lawyer who mastered the legislative politics of the state of New York in the 1960s — but who understood long before most New York lawyers, that his clients' well being often depended on finding the best local media lawyer in Rockford, Illinois; Topeka, Kansas; or Beijing, China. A former teacher of American diplomatic history, who found that he could best assist his national and international clients, especially the Associated Press, by leading PLI programs on libel and privacy litigation to make his competitors even smarter. Richard N. Winfield.
>
> And, another westerner, like Dick Schmidt, who came east as a young man to learn its secret handshakes, but managed to escape to the Pacific Northwest. A lawyer who recognized that to serve his clients in Seattle, he needed to draw on the expertise of lawyers throughout the country. As he built on that expertise he found it could be projected back out across the country through the power of a national law firm and his own gentle personality and oh, by the way, managed to create an entire doctrine of constitutional law protecting commercial speech. P. Cameron DeVore.

LDRC's First Amendment Leadership Awards

P. Cameron DeVore

P. Cameron DeVore, in a rather quiet spoken, Western way, has had a profound impact on First Amendment law. He is the anchor – and, indeed, magnet and mentor – for the ever expanding media law practice group of the Davis Wright Tremaine media lawyer group. If, as Emerson once suggested, "an institution is the lengthened shadow of one man," then Cam DeVore has cast a very long shadow over the world of media and communications law for the past generation.

Born in Great Falls, Montana in 1932, of a newspaperman and his wife, Cam was educated at Yale College, Cambridge University (Clare College), and then Harvard Law School. Cam moved to Seattle after law school in 1961 and developed a First Amendment practice at the Wright Simon Todd & Schmechel firm (a predecessor firm to Davis Wright Tremaine), with the Seattle Times being a principal client. He, of course, has represented a good many more media clients over the years, including CBS, CNN and the NAB.

He early on began to analyze the notion that commercial speech could be protected by the First Amendment — a proposition that he first explored in the annual PLI Communications Law seminars. Next came a series of amicus briefs to the United States Supreme Court helping to influence almost three decades of Court decisions on commercial speech and freedom of speech. Indeed, a continuing force on this issue**,** Cam will be representing media in the amicus brief filed in support of the cert petition in Nike v. Kasky, one of the most significant commercial and free speech cases seeking Supreme Court review this term.

Cam, with his good friend Bob Sack (now Judge Sack), published a path breaking treatise "Advertising and Commercial Speech: A First Amendment Guide."

Cam also became the "go to guy" for the media on punitive damages, representing the media in a series of amicus briefs to the Supreme Court on the Constitutional implications of imposing punitive damages.

Cam served as Chair of the Governing Board of the ABA Forum on Communications Law and was the extraordinary and wildly productive President of the LDRC's Defense Counsel Section from 1994-96 and member of the DCS Executive Committee from 1993-97. He has long been a member of the Advisory Board for the Media Law Reporter.

Cam has also long been the corporate secretary for the Seattle Art Museum and was President and a member of the Trustees of the Seattle Foundation.

Richard M. Schmidt Jr.

Richard M. Schmidt Jr. has often been referred to as the "Dean" of the First Amendment and media bar in Washington D.C. He was first, and he was foremost, in organizing media organizations and associations on a vast range of key issues – indeed, in recognizing the need for a collective dialogue and approach to key issues. Dick's expertise and his incredible skills can be found behind countless legislative, amicus and other efforts of media over the last thirty plus years.

He started out in broadcasting in Denver, Colorado in the 1940's. He went to law school in Denver, and practiced in Colorado from 1949 through 1965, serving as President of the Denver Bar Association from 1963-64, among other bar and government advisory commissions during his tenure in Colorado. Dick had a keynote role in bringing cameras to Colorado courtrooms in 1956, one of the first states to allow cameras.

He first came to Washington at the request of Senator Stuart Symington to serve as counsel to a Senate Committee investigating grain storage fraud. After returning to Colorado one year later, he traveled east again to become General Counsel and Congressional Liaison for the U.S. Information Agency in 1965 - 1968 and then to practice law with Cohn and Marks in D.C. where he is currently Of Counsel. He has been General Counsel to the American Society of Newspaper Editors since 1969 and in that role was one of the participants in the founding of LDRC.

Dick was the first Chair of the ABA Forum Committee on Communications Law from 1979-81, and a Member of its Governing Board from 1981-84. He has been a member

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LDRC's First Amendment Leadership Awards

Richard M. Schmidt Jr.

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of the ABA National Conference of Lawyers and Representatives of the Media since 1983, and was also on the ABA Task Force on Courts and the Public, 1974-76, as well as numerous other ABA Committees.

Dick has been Chairman of the Communications Law Institute of Catholic University College of Law since 1983 and a member of the Advisory Board of the University of Colorado School of Journalism and Mass Communications since 1991.

A member of the Board of Trustees of the National Press Foundation since 1983, he is also a member of the Board of Directors of the Broadcast Pioneers Library Foundation since 1989.

He got his A.B. and J.D. from the University of Denver and was a member of that university's Board of Trustees from 1964-1980, becoming an Honorary Life Trustee in 1980.

When LDRC created its Legislative Affairs Committee several years ago, it was the universal and enthusiastically held consensus that Dick Schmidt had to be its first leadership. No one in D.C. holds a higher level of esteem, and genuine affection, from his colleagues than does Dick Schmidt.

Dick Winfield

Richard N. Winfield functioned as the outside general counsel for the Associated Press for nearly two decades, directing virtually all aspects of legal representation of the world's oldest and largest news organization. During his career he also represented a number of other news organizations, such as Newsday, Time, Newsweek and Knight-Ridder in First Amendment litigation, and still others such as CBS, ABC, NBC, Gannett and Newhouse in legislative matters. Dick successfully defended several hundreds of libel suits and handled scores of other litigations involving access, prior restraint, reporter's privilege and freedom of information issues.

But Dick has done far more than represent media in First Amendment matters. He has spearheaded a media group for the ABA Central and Eastern European Law Initiative, a program to bring modern and press and speech sensitive law and policy to Eastern Europe. Dick has conducted conferences in Armenia, Croatia and Georgia, and has also served as an international observer at a criminal trial in Turkey this Fall. He serves on the boards of the Fund for Peace and the International Senior Lawyers' Project.

He has led the charge for law initiatives and changes in the U.S. as well, on a wide range of matters, including the Uniform Correction and Clarification Act, the New York shield law, and cameras in the courtroom.

Dick served for 24 years as co-chair of the PLI libel and newsgathering litigation conferences. He has written numerous articles on various aspects of communications law and he frequently speaks on First Amendment issues at national and regional editors' and bar meetings. He served for four years as state chairman of the Media Law Committee of the New York State Bar Association.

Before joining the Rogers & Wells law firm, Dick served in government as an assistant counsel to Governor Nelson A. Rockefeller, special counsel to the New York State Public Employment Relations Board and co-counsel to the Governor's Committee on Public Employee Relations. While an officer on active duty in the U.S. Navy, Dick was an instructor in European and American diplomatic history at the U.S. Naval Academy.

Since "retiring" last spring, Dick has taken on adjunct positions teaching media law at Fordham Law School and comparative international libel law at Columbia Law School. He also continues to lead media law reform programs in nations of the former Soviet bloc as part of the America Bar Association's Central and East European Law Initiative.

Dick received his bachelor's degree from Villanova University and his law degree from Georgetown University Law Center. He was president of the Villanova University National Alumni Association, received the Alumnus of the Year Loyalty Award from Villanova and chairs the Board of Consultors of the School of Law of Villanova University.

"A free press is the blessing of a civilized society."

2002 Libel Conference

By Maithilee K. Pathak-Sharma, Ph.D., J.D. and Jennifer M. Keeney, M.S.

"A free press is the blessing of a civilized society." These were the last words spoken by a mock juror in an afternoon of debate and deliberation by a group of 10 community members acting as jurors in a mock trial exercise conducted during the 2002 Libel Conference.

The Jurors

The mock jury panel included 6 women and 4 men, holding occupations as diverse as financial analyst, sales, teaching, and janitorial services. Jurors reported annual household incomes ranging from less than $15,000 to $99,000, and hailed from counties surrounding the metropolitan Washington D.C. area.

The Process and the Case Facts

During the morning session, the panel of 10 jurors heard evidence and argument in a case in which a school bus company sued a local television station for invasion of privacy, fraud, and trespass following the broadcast of an investigative news report on the bus company's hiring practices. The station had two undercover reporters apply for jobs at the bus company—one as a driver, and the other as an administrative assistant in human resources. Both reporters used their real names and social security numbers on the job applications, and provided the phone number of their executive producer as a reference. The bus company hired both applicants without doing background checks, or calling the reference number.

The reporter/driver engaged three other company drivers in conversation in the school bus parking lot where she boasted about a prior felony conviction and expressed amazement that she had been hired by the bus company at all. Another bus driver echoed that he also had a felony conviction and no valid license. The parking lot conversation was caught on videotape, and used in the station's *expose* on the poor hiring practices of the bus company. The human resources assistant was told by management to overlook incomplete applications and "get the drivers behind the wheel."

Mock Jury

Jurors deliberated on whether the station's use of undercover reporters armed with a hidden camera constituted fraud, invasion of privacy, and trespass against the bus company and its employees, and whether punitive damages were warranted to deter similarly deceptive conduct by news stations in the future.

In its defense, the television station argued that the undercover tactics were justified given public safety concerns, and had the company merely followed its policy to call references (i.e., the executive producer) the investigation would have been dropped, as the bus company would have "passed the test."

Most of the station's actions were justified because they resulted in a tangible benefit to the public, and no tangible harm to the company or its drivers.

The jury deliberated for 2.5 hours and found that *most* of the station's actions were justified because they resulted in a tangible benefit to the public, and no tangible harm to the company or its drivers. Jurors' final verdict decisions reflected their counter-veiling perceptions about the role of the media in preserving public safety and individuals' rights to privacy. On one hand, jurors felt that the stations' misrepresentations and undercover tactics were justified to protect public safety, while on the other hand, they felt that the station erred in publishing the identity of individuals "caught on tape" without proof, as revealing identities did not advance the public good, and may have resulted in harm to the individuals.

Misrepresentations Were Justified: No Fraud or Trespass Damages

Jurors determined that the investigative reporting tactics employed by the station (i.e., hidden camera etc.) were justified in this case for several reasons including:

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"A free press is the blessing of a civilized society." — 2002 Libel Conference

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1) the public's right to safety warranted the use of misrepresentations to reveal improper hiring practices—i.e., the public good outweighs private interests;
2) public dollars funded the school district that hired the bus company, and therefore the public had a right to know where its money was going;
3) public safety was of paramount concern, especially given that the school buses carried precious cargo—namely, children;
4) the misrepresentations did not extend to risky conduct by the undercover reporters—i.e., reporters never drove buses;
5) the company could have avoided incurring even the $3,000 dollars claimed loss due to costs associated with processing the new employees if it had simply followed its internal policies to check references as the executive producer would have halted the investigation and revealed the true identity of the reporters; and,
6) the station's deception did not continue for an extended period of time as the entire investigation was conducted over the span of 2 weeks.

No Reasonable Expectation of Privacy in Open-Air Parking Lot

Jurors rejected the notion that the bus company and its drivers had a reasonable expectation of privacy in an open-air parking lot, especially when the bus company drivers were sharing personal and intimate information (i.e., "I am a felon") with a complete stranger (i.e., the undercover reporter on the job for less than 2 weeks).

No Public Benefit to Identifying Drivers in the Parking Lot: Invasion of Privacy Damages

Notwithstanding the lack of privacy expectation in an open-air parking lot, jurors determined that the three individuals pictured on the newscast were entitled to compensatory damages in the amount of $5,000 a piece because 1) there was no public benefit to identifying the three drivers of the company engaged in the videotaped conversation with the reporter in the parking lot, and 2) there was no way for an individual so identified to diffuse damage to his/her reputation or credibility if the report or the inferences drawn from it turn out to be wrong.

Punitive Damages Warranted to "Teach the Station a Lesson"

Jurors were unable to come to a unanimous decision regarding the amount of punitive damages necessary to deter stations from publishing identities unnecessarily, but all jurors agreed that the station should *not* have published faces of the drivers on television. Eight jurors' were inclined to award punitive damages in amounts ranging from $1,000 to $33,333 per person depicted on video. Two jurors were inclined to award 3-5% of the station's profits in punitive damages to be split by the three individuals on tape.

What Factors Led to Jurors' Decisions?

One explanation for these findings is that jurors today feel vulnerable, and are looking for a "champion" to protect them from the evils of the world. Jurors fear for their personal safety in the aftermath of 9/11, anthrax scares, and snipers in metropolitan Washington, D.C., etc. and fear for their economic safety in the aftermath of Enron, Tyco, WorldCom, etc.

Jurors perceive investigative news reports as somewhat sensationalized, not always accurate, and sometimes based on information obtained through illegal means. Notwithstanding these shortcomings of investigative news reports, given this age of uncertainty and fear, jurors are willing to grant greater quarter to reporters who use subterfuge to expose dangers to the populace as jurors perceive these reports as one means by which individuals, organizations, or companies intending to fleece the American public may be exposed, and they perceive the reporters as the "knights in shining armor" to expose them.

Please Contact Dr. Pathak-Sharma for information: mpathaksharma@randdllc.com

Maithilee K. Pathak-Sharma, Ph.D., J.D. and Jennifer M. Keeney, M.S. are with RandD Strategic Solutions, LLC, a consulting firm that ran the mock jury proceeding.

Third Circuit Upholds Closure of Post 9/11 INS Deportations

Circuit Conflict May Bring Issue to Supreme Court

In a closely watched case, the Third Circuit Court of Appeals this month upheld the legality of secret INS deportation proceedings for post 9/11 detainees. The court reversed a New Jersey district court decision that had recognized a broad First Amendment right of access under which closure would only have been permitted on a case-by-case basis under a strict scrutiny standard. *North Jersey Media Group, Inc. v. Ashcroft*, No. 02-2524 (Oct. 8, 2002), reversing 205 F. Supp. 2d 288, 30 Media L. Rep. 1865 (May 28, 2002) (Bissel, J.).

Found Richmond Newspapers Applied, But Not Met

In a 2-1 decision, written by Chief Judge Edward Becker, and joined by Judge Morton Greenberg, (Judge Anthony Sirica dissenting), the court flatly rejected the government's sweeping argument that no constitutional right of access could apply to federal administrative proceedings, holding instead that the legality of the closure had to be measured under the First Amendment access standards articulated in *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980). But in applying the *Richmond Newspapers* considerations of "experience" and "logic," the Third Circuit concluded that there was no history of openness to deportation proceedings and that openness for these post 9/11 deportations – so-called special interest cases – would not play a positive role "at a time when our nation is faced with threats of such profound and unknown dimension."

The court comes down firmly on the side of security in the wake of last year's attacks on the World Trade Center and Pentagon.

The decision rightly notes that at issue in the case is the "the eternal struggle between liberty and security." And while not unmindful of the First Amendment interests at stake, the court comes down firmly on the side of security in the wake of last year's attacks on the World Trade Center and Pentagon.

The Third Circuit's decision conflicts with the recent decision in the nearly identical Sixth Circuit case of *Detroit Free Press v. Aschcroft*, 2002 U.S. LEXIS 17646 (6th Cir. 2002), setting the stage for the possible resolution of the issue by the U.S. Supreme Court. See LDRC *MediaLawLetter*, Sept. 2002 at 3.

Background – The "Creppy Directive"

At issue in this case, as in the Sixth Circuit litigation, was a directive promulgated shortly after the September 11th attacks by Chief Immigration Judge Michael J. Creppy (the "Directive"). The Directive ordered immigration judges to close special interest deportation proceedings – cases involving aliens who, in the determination of the Justice Department, might have connections to, or information about, terrorist activities against the United States.

The Directive, issued pursuant to 8 C.F.R. 3.27 (2002) (permitting the closure of deportation proceedings to protect "witnesses, parties or the public interest"), ordered that special interest cases be closed to visitors, family, and the press and, furthermore, that immigration judges not confirm or deny whether such cases were on the docket or scheduled for hearings. According to the Third Circuit, the Directive imposed "a complete blackout of information on these cases."

The rationale for the Directive, as explained in the litigation, was that the information blackout would help prevent terrorist organizations from learning the facts and details of individual cases, as well as the overall pattern of the government's investigation. As to this latter concern, the government argued that blanket closure was necessary to prevent information, which might appear insignificant in individual cases, from being pieced together in mosaic fashion to reveal the content, methods and directions of the government's investigations.

This rationale was questioned by the media plaintiffs in the district court and on appeal where they noted that detainees were themselves free to communicate with family and friends thereby circumventing the stated purpose of the closure rule. But the Third Circuit dismissed this objection in a footnote, noting that under more recent regula-

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Third Circuit Upholds Closure of Post 9/11 INS Deportations

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tions immigration judges are empowered to seal proceedings to protect sensitive law enforcement information – a conclusion that arguably only reinforces the media's position that closure on a case-by-case basis can accommodate both sides' interests. In the end, by finding that no qualified right of access attached to the proceedings, the government approach – inexact as it may be – was entitled to almost complete deference under post 9/11 circumstances.

The instant case was filed in New Jersey federal district court in March 2002 by the New Jersey Law Journal and North Jersey Media, publisher of the *Record* and *Herald* newspapers, joined by a media coalition as amicus curiae. Reporters from the newspapers were denied access and information about special interest deportation proceedings in federal immigration court in Newark, New Jersey, where a large number of special interest cases were pending.

"We ultimately do not believe that deportation hearings boast a tradition of openness sufficient to satisfy* Richmond Newspapers.*"

District Court: Qualified Right of Access Exists

The district court, applying the Supreme Court's "experience" and "logic" test articulated in *Richmond Newspapers* and *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*), held that a qualified right of access existed to the deportation hearings. 205 F. Supp. 2d 288, 30 Media L. Rep. 1865 (May 28, 2002). Under the experience prong, the district court found that while there may be no clear history of access to deportation proceedings "there is certainly no tradition of their presumptive closure." Moreover, it found that from 1903 onwards deportation proceedings have been subject to due process requirements "the touchstone of which is the right to an open hearing."

Under the logic prong, the district court noted the "abundant similarities" between deportation proceedings and judicial proceedings, concluding that the "same functional goals served by openness in the criminal and civil context would be equally served in the context of deportation proceedings." 205 F. Supp. 2d at 301.

Finding that the Directive could not withstand strict scrutiny, the district court issued a nation-wide preliminary injunction against the Directive, which was subsequently stayed by the U.S. Supreme Court pending the appeal to the Third Circuit.

3rd Circuit Applies Richmond Newspapers Test

The Third Circuit agreed with the district court (and the Sixth Circuit) that *Richmond Newspapers* is the proper framework to analyze whether a right of access attaches to deportation proceedings – a victory of sorts for the media in light of the government's argument that no constitutional right of access could attach to federal administrative proceedings. But the Third Circuit concluded that under this framework there was neither the "experience" nor the "logic" to support access to deportation proceedings.

No History of Access

In a lengthy analysis of the historical right to access to government proceedings generally, and deportation proceedings specifically, the court held that any history of open deportation proceedings "is too recent and inconsistent to support a First Amendment right of access. According to the court:

> "The strongest historical evidence of open deportation proceedings is that since the 1890s, when Congress first codified deportation procedures, the governing statutes have always expressly closed exclusion hearings, but have never closed deportation hearings.... But there is also evidence that, in practice, deportation hearings have frequently been closed to the general public. From the early 1900s, the government has often conducted deportation hearings in prisons, hospitals, or in private homes, places where there is no general right of public access.... We ultimately do not believe that deportation hearings boast a

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Third Circuit Upholds Closure of Post 9/11 INS Deportations

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tradition of openness sufficient to satisfy *Richmond Newspapers*."

In fact, whatever tradition of openness surrounds deportation proceedings (regulations established in 1964 created a presumption of openness and there was virtually no evidence in the record of actual practice prior to 1964), the court found it was not comparable to the criminal proceedings at issue in *Richmond Newspapers* involving the "unbroken, uncontradicted history" of public access to criminal trials since "before the Norman Conquest."

The Supreme Court's recent decision in *Federal Maritime Commission (FMC) v. South Carolina Ports Authority*, 122 S. Ct. 1864 (U.S. 2002) – rendered after the New Jersey district court's decision – did give the Third Circuit pause. In *FMC*, the Supreme Court held that state sovereign immunity barred a state administrative agency from hearing a private party complaint against a non-consenting state. In so ruling, the Court observed that while administrative proceedings were unknown during the Framer's time, they "walk[], talk[] and squawk[] like a civil lawsuit." *Id*. at 1873.

The Third Circuit noted, though, that while on a procedural level deportation proceedings and civil trials are practically indistinguishable, the Supreme Court did not intend "to import the full panoply of constitutional rights to any administrative proceeding that resembles a civil trial." According to the court:

> "This is not a situation where the Framers contemplated a perfectly transparent government, only to have deportation proceedings, which they did not foresee, jeopardize that intended scheme. This is also not a situation involving allegations that the government assigned to an administrative agency a function that courts historically performed in order to deprive the public of an access right it once possessed. And most importantly, this is not a situation that risks affront to states' residual and inviolable sovereignty, the concern that motivated the *Ports Authority* Court."

"Logic" Prong Does Not Support Access

In weighing *Richmond's* "logic" prong – whether public access plays a significant positive role in the functioning of the particular process in question – the Third Circuit gave particular deference to the government's security arguments. The court noted that under the logic prong a court should consider not just whether access served some good, but also the "flip side" – the extent to which access impairs the public good – an analysis, the court found, that the district court and Sixth Circuit neglected to perform. Under this balanced analysis the court credited the "substantial evidence" presented by the government that open deportation proceedings would threaten national security. And while acknowledging that these security concerns were to some degree speculative, it noted its reluctance "to conduct a judicial inquiry into the credibility of these security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise."

National security is an area where courts have traditionally extended great deference to Executive expertise."

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ATTENTION MEDIA MEMBERS:

NOTICE OF ANNUAL MEETING

NOVEMBER 13, 2002
WEDNESDAY
5:00 pm

SHERATON NEW YORK HOTEL & TOWER
811 SEVENTH AVENUE AT 52ND STREET, 2ND FLOOR

NEW YORK CITY

Third Circuit Upholds Closure of Post 9/11 INS Deportations

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Conclusion

In its conclusion, the Third Circuit acknowledged the well-received observation of the Sixth Circuit in *Detroit Free Press* that "democracies die behind closed doors." In response – and rather unusual for a judicial decision – the Third Circuit cited with approval a *Washington Post* op-ed which argued quite somberly that the real threat to American democracy is not posed by the incrementalism of restricted access, but by the side effects of any future terrorist attacks.

> Democracy in America does at this moment face a serious threat. But it is not the threat the [Sixth Circuit] has in mind, at least not directly. It is true that last September's unprecedented mass-slaughter of American citizens on American soil inevitably forced the government to take security measures that infringed on some rights and privileges. But these do not in themselves represent any real threat to democracy. A real threat could arise, however, should the government fail in its mission to prevent another September 11. If that happens, the public will demand, and will get, immense restrictions on liberties.

See Michael Kelly, "Secrecy, Case by Case," Washington Post (Aug. 28, 2002) (archived at www.washingtonpost.com).

Interestingly, Kelly wholly approved of the Sixth Circuit's decision to allow closure of deportation hearings on a case by case basis – a policy which whether it be practical or wise is not required by law according to the Third Circuit. Plaintiffs are considering requesting a rehearing en banc or a petition for certiorari to the U.S. Supreme Court.

Plaintiffs North Jersey Media Group, Inc. and the New Jersey Law Journal were represented by Lee Gelernt (argued), Steven Shapiro, and Lucas Guttentag of the ACLU's Immigrants' Rights Project; Edward Barocas, ACLU New Jersey; Lawrence Lustberg and Shavar Jeffries of Gibbons, Del Deo, Dolan, Griffinger & Vecchione in Newark, New Jersey; Professor David Cole, Georgetown University; and Nancy Chang and Shayana Kadidal of the Center for Constitutional Rights. A coalition of media companies, intervening as amicus curiae, were represented by David Schulz and Mark Weissman of Clifford Chance Rogers & Wells.

The government was represented by Assistant Attorney General Robert McCallum, U.S. Attorney Christopher Christie, Deputy Assistant Attorney General Gregory Katsas (argued) and Sharon Swingle and Robert Loeb of the U.S. Department of Justice.

SPJ Passes Resolution on the Ethical Treatment of Suspects by Journalists

Expressing concern about law authorities' attempts to use the news media to further law enforcement objectives, Society of Professional Journalists delegates approved a resolution that encourages reporters and editors to be more conscious of their responsibilities under their code of ethics at a national convention in Fort Worth, Texas. Specifically addressing the problem of naming suspects without being told of the charges against the suspect or any other information, the resolution pointed to the need for journalists to balance "the need for thorough, accurate, and independent reporting with a sense of accountability and compassion." *SPJ Delegates Pass Resolutions On First Amendment, Treatment of Sources and More*, Sept. 20, 2002, *available at* http://www.spj.org/news.asp?ref=272. In them, journalists are urged to remember their responsibilities to:

- resist being used as tools of government investigators and prosecutors
- report as fully as possible on the tactics used by government to accuse named individuals of serious crimes without legally charging them with those crimes
- diligently seek out subjects of news stories to give them the opportunity to respond to the allegations
- be judicious about identifying criminal suspects
- press authorities for the release of all pertinent information, and test the accuracy of information form all sources
- explain why the full story cannot be told when such is the case.

Id.

Third Circuit Orders Release of Letter that Topples Torricelli

By Bruce S. Rosen and Daniel M. Kummer

In a decision that appears to have altered the campaign for the U.S. Senate in New Jersey, the Third Circuit U.S. Court of Appeals ruled that the common law right of access required the unsealing of a government court filing in which prosecutors explained why they had dropped their investigation of U.S. Senator Robert Torricelli, in the context of seeking a downward departure from the sentencing guidelines for his chief accuser, David Chang. The Circuit's September 20, 2002 opinion in *U.S. v. Chang* (02-2839/02-2907) was designated as "non-precedential."

The Court's subsequent decision granting the media organizations' motion to release the government's "5K letter" immediately, rather than after a 52-day waiting period for further appeals, contributed to a new round of publicity involving Torricelli's ethics problems that resulted in the first-term senator's abrupt withdrawal from the race four days later. Ultimately, the New Jersey Supreme Court permitted former U.S. Sen. Frank Lautenberg to replace Torricelli as the Democratic candidate.

The government argued that the First Amendment right of access applies only to "proceedings," and not to documents.

District Court Seals Documents

The case was brought in June by WNBC, The New York Times, The Philadelphia Inquirer, The Record of Hackensack, N.J., and ABC, Inc., after U.S. District Court Judge Alfred Wolin in Newark, N.J. sealed the government's motion under Section 5K1.1 of the U.S. Sentencing Guidelines (commonly known as a "5K letter") on behalf of David Chang. Chang had accused Torricelli of accepting illegal gifts in exchange for official favors.

At the May 23, 2002 sentencing hearing, Judge Wolin sentenced Chang to 18 months and one day in prison on campaign finance and obstruction charges, a downward departure of only a month from the low range of the guidelines. At the sentencing, Judge Wolin was sharply critical of Chang for destroying his own credibility as a witness for the government, a fact that turned out to be a central theme of the letter, which nevertheless said that the information Chang provided concerning Torricelli was "credible in most material respects."

Judge Wolin had opened the sentencing proceedings with a reference to the news coverage involving Chang's own sentencing memorandum filed by his counsel the day before, and stated that "I want you to know it's in the public domain and *The New York Times* and *The Star Ledger* have quoted it with a degree of intimacy of the details indicating they had an opportunity to read it very carefully." He also encouraged the government, which had requested sealing of its 5K letter (without explanation), to present a sealing order immediately because WNBC had asked his chambers for a copy, and because "I anticipate that the press, CNBC (sic), under the mantra of the public interest will probably be here with papers by 11:00 seeking the release of this memorandum."

Judge Wolin granted the media organizations' subsequent motion to unseal only in part, ruling that although there was a presumptive First Amendment right of access to 5K letters, the government had raised countervailing interests that required that only a redacted version of the 5K letter be released.

Torricelli and Media Appeal

Senator Torricelli — who had intervened in opposition to the media motion to make a grand jury secrecy argument that the government not only declined to make but actively opposed — appealed. The media organizations cross-appealed, arguing, as they did below, that the First Amendment right of access trumped any of the government's objections and that Judge Wolin had failed to consider the common law access argument.

At that point, the government revised its argument wholesale, arguing for the first time that the First Amendment right of access applies only to "proceedings," and not to *documents*, and that the common law access doctrine, with its lower threshold for appellate review, should be applied to uphold Judge Wolin's ruling. Although the me-

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dia organizations replied by noting that *nine* circuits, including the Third, had held the First Amendment right of access applicable to documents, the Third Circuit panel asked numerous questions at oral argument about the common law right of access, and ultimately determined that it was unnecessary to reach the First Amendment issue.

Third Circuit Grants Media Access

In a unanimous eight-page decision authored by Judge Richard L. Nygaard, the Court of Appeals first rejected as "meritless" Torricelli's argument that the 5K letter was covered by grand jury secrecy rules. The Court also rejected arguments by the Justice Department that releasing the letter would reveal prosecutorial methodology or compromise government candor to judges, ruling that "these bald, unsupported assertions simply fail to overcome the strong presumption of openness that attaches to judicial documents."

Privacy interests of unindicted third-parties — in this case, Sen. Torricelli — did not overcome the common law presumption of access to judicial documents.

Further, the Court ruled that arguments by Sen. Torricelli and the government that release of the letter would adversely affect the privacy interests of unindicted third-parties — in this case, Sen. Torricelli — did not overcome the common law presumption of access to judicial documents, primarily because much of what was in the letter was already in the sentencing memorandum submitted by Chang's lawyer, and/or had already been publicly refuted by Torricelli. The Court determined,

> "Although the 5K letter contains statements that are perhaps painful to Torricelli, it is not the 'unnecessary and intensified pain' required to overcome the presumption of openness,"

Accelerated Issuance of Mandate

Despite its decision that the entire 5K letter should be released, the Circuit initially ruled that normal Circuit rules for issuance of the Court's mandate would apply, and that because the United States was a party, the mandate would be delayed for at least 45 days and possibly as long as 52 days – i.e., until either immediately before or shortly after the November 5 election. Until the mandate issued, Judge Wolin would have no jurisdiction to sign a order lifting the seal.

The media organizations then filed a motion for immediate issuance of the mandate, which Senator Torricelli opposed. The Circuit granted the motion on September 26, just as Torricelli's lawyers were meeting with the Justice Department lawyers in Washington urging them to support an appeal, and in the midst of the LDRC/NAA/NAB Libel Conference in Alexandria, where counsel for the media parties were gathered.

The Third Circuit may have misjudged its decision's precedential value. Shortly after the Chang 5K letter was released, the same WNBC reporter on the Torricelli story, Jonathan Dienst, used the decision to convince a U.S. District Court Judge in Manhattan to release a 5K letter written on behalf of another Torricelli contributor. The judge contacted the defendant, the government and Senator Torricelli to determine whether there was any objection. This time there was none.

The media organizations were represented by Bruce S. Rosen of DCS member firm McCusker, Anselmi, Rosen Carvelli & Walsh, P.A. in Chatham, N.J. with the active involvement of Daniel M. Kummer of the NBC Law Department and David E. McCraw of the New York Times as well as Katherine Hatton of Philadelphia Newspapers, Inc., Jennifer Borg of North Jersey Media Inc., and Elizabeth L. Schorr of ABC, Inc. Donald A. Robinson and Keith Miller of Robinson & Livelli in Newark, N.J. filed an amicus brief on behalf of the Newark Star-Ledger.

Theodore E. Wells Jr. and James Brochin of Paul Weiss Rifkind Wharton & Garrison represented Senator Torricelli and Michael A. Rotker of the Criminal Appeals Section of the Department of Justice represented the United States.

Ninth Circuit Affirms Dismissal of Newsgathering Claims Against ABC Undercover Report on Pap Smear Labs

By Andrew D. Hurwitz

On September 20, 2002, a unanimous panel of the Ninth Circuit affirmed a summary judgment of the United States District Court for the District of Arizona granting in favor of ABC on virtually all claims in a case arising out of a *PrimeTime Live* investigative report concerning pap smear testing. *Med. Lab. Mgmt. Consultants v. Am. Broadcasting Cos.*, 2002 WL 31104879 (9th Cir. 2002).

The opinion rejected a broad-ranging attack on ABC's newsgathering techniques by plaintiffs' counsel, Neville Johnson and Brian Rishwain of the Los Angeles firm of Johnson & Rishwain, and provides valuable guidance for future undercover investigations.

Factual and Procedural Background

The *PrimeTime Live* story, "Rush to Read," aired in 1994. It reported the performance of several laboratories, including Scottsdale-based Consultants Medical Lab ("CML"), in reading a collection of pap smears. ABC supplied the pap smears to the labs, claiming that they were from patients at the "Huron Women's Health Collective." The story reported that CML failed to identify evidence of cancer on several of the slides.

As part of its investigation, ABC conducted an interview with John Devaraj, the manager of the lab. The ABC personnel represented that they were interested in setting up their own lab in Georgia, and Devaraj claimed he agreed to meet with them because he believed that a business relationship might result. During a meeting between Devaraj and the ABC representatives in CML's offices, Devaraj described the laboratory business in general, and CML's approach to that business in particular. Unbeknownst to Devaraj, the meeting was recorded on a hidden camera. A brief portion of the hidden camera footage was used in the broadcast. Neither Devaraj nor CML was identified by name.

Devaraj and CML filed suit in Arizona state court against ABC, ABC's local affiliate, and a number of ABC personnel. After removal, United States District Judge Roslyn O. Silver dismissed all claims against the affiliate, as well as claims for public disclosure of private facts, intentional infliction of emotional distress, unfair practices, trade libel, negligent infliction of emotional distress, and conspiracy. *Matter of Med. Lab. Mgmt. Consultants*, 931 F. Supp. 1487 (D. Ariz. 1996). Plaintiffs later voluntarily dismissed their claims for defamation and false light invasion of privacy.

The remaining claims were for intrusion, fraud, interference with contractual relations, trespass, eavesdropping (violation of the federal wiretap statute), and punitive damages. After discovery was completed, Judge Silver granted summary judgment to ABC on all claims except fraud. *Med. Lab. Mgmt. Consultants v. Am. Broadcasting Cos.*, 30 F. Supp. 2d 1182 (1998). Plaintiffs then dismissed the fraud claim, and the appeal to the Ninth Circuit followed.

The Court concluded that the visit itself did not intrude upon any reasonable expectation of seclusion.

The Ninth Circuit Opinion: Intrusion

In a thorough and thoughtful opinion by Senior Circuit Judge Proctor Hug, the Ninth Circuit affirmed the district court's summary judgment. The most significant part of the opinion is its analysis of plaintiffs' claims for intrusion upon seclusion. Judge Hug began by noting that Arizona courts follow the two-part test of the Restatement (Second) of Torts § 652B, which imposes liability for intrusion upon "the solitude of another or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person." The district court had held that ABC did not offend either branch of the Restatement test, and the Ninth Circuit agreed.

The Ninth Circuit began by examining Devaraj's expectation of privacy with respect to his meeting with the ABC representatives. Noting that Devaraj had invited strangers into his business offices for a meeting, the Court concluded that the visit itself did not intrude upon any reasonable expectation of seclusion. Nor did the contents

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of the conversation, which dealt not at all with Devaraj's personal life, but instead with the general business of the laboratory corporation, violate any reasonable expectation of privacy. In so holding, the Ninth Circuit emphasized that the corporation itself could not make a privacy claim under §652(I) of the Restatement.

Distinguishes California Eavesdropping Cases

Judge Hug then moved to the most critical issue – whether Devaraj's privacy interests were violated by ABC's surreptitious recording and subsequent broadcast of the interview. He noted that in *Sanders v. Am. Broad. Cos.*, 978 P.2d 671 (Cal. 1999) and *Shulman v. Group W. Productions, Inc.*, 955 P.2d 469 (Cal. 1998), the California Supreme Court had recognized an "expectation of limited privacy," which is an expectation of privacy against the electronic recording of a conversation, even under circumstances where the speaker lacks an expectation of complete privacy as to the conversation itself. Nonetheless, the Ninth Circuit held that Devaraj did not have a reasonable expectation of privacy against the videotaping by ABC of his conversations.

Judge Hug emphasized the de minimis nature of the intrusion – the videotaping of a business conversation among strangers.

First, the panel held that Arizona law provided a more limited protection against electronic interception of oral conversations than California law. Arizona criminal statutes against eavesdropping are not applicable when one party to the conversation consents to the interception of the communication; in contrast, California law prohibits the recording of "confidential communications" without the consent of all participants. Thus, since at least one of the participants to the conversations between Devaraj and the ABC representatives consented to the recording, the Ninth Circuit held that Devaraj could have no reasonable expectation of privacy in the conversations under Arizona law, particularly because he took no steps to ensure that the conversations were confidential and because no personal matters were discussed.

Second, the Ninth Circuit held that, even assuming that California law applied, the same result would nonetheless obtain. Judge Hug carefully distinguished *Shulman*, which involved a patient's conversation with a medical care provider about "intensely private and personal" matters, and *Sanders*, which involved an "internal workplace" conversation among coworkers of a "personal and private nature."

Here, in contrast, the recording involved only the business matters of a corporation, and was between Devaraj and strangers whom he viewed as potential business prospects. Judge Hug stressed that such "external" workplace communications with strangers, which involve nothing private or personal, did not invoke the same expectation of privacy as those in the California cases. Notably, Judge Hug rejected the plaintiffs' reliance on the Ninth Circuit's previous decision in *Dietemann v. Time, Inc.*, 449 F.2d 245 (9th Cir. 1971), on the ground that that case involved intrusion into a plaintiff's private affairs in his home.

Third, the Court held that, even assuming that the videotaping intruded upon Devaraj's reasonable expectation of privacy, the intrusion did not meet the Restatement's "highly offensive" standard. Judge Hug emphasized the *de minimis* nature of the intrusion – the videotaping of a business conversation among strangers – and the strong public interest in reporting about medical issues with potential life and death consequences for millions of women.

For these reasons, the Ninth Circuit held that Judge Silver had properly granted ABC summary judgment on the intrusion claim. The panel did not find it necessary to reach the district court's alternative holding – that Devaraj could not recover in any event, because all damages he alleged arose from the publication of the ABC story, not from the intrusion itself.

Trespass Claim Dismissal Affirmed

The Ninth Circuit also affirmed the dismissal of CML's trespass claim. As had Judge Silver, the Court of

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Appeals held that CML had identified no damages arising from the alleged trespass, as opposed to the broadcast. (CML had not sought nominal damages). Thus, the alleged tortious conduct was not a "legal cause" of CML's damages. Given its ruling, the Ninth Circuit did not reach ABC's alternative defense that a trespass claim was barred because of CML's consent to the entry.

Tortious Interference Claims Dismissed

Finally, the Ninth Circuit upheld the district court's rejection of CML's claims for tortious interference with contractual relations and prospective economic advantage. Since each of these claims arose from statements made during a broadcast about a matter of public interest, the panel held that CML was required to demonstrate the falsity of the statements made, as well as ABC's fault in making the statements. Carefully reviewing each allegedly false statement, the Ninth Circuit held that each was true or substantially true.

Implications of the Opinion for Newsgathering

While the Ninth Circuit's opinion leans heavily on the facts of the case before it, *Medical Laboratory Management Consultants* suggests that carefully designed undercover investigative reports can be successfully defended against intrusion claims. It is particularly important under the Ninth Circuit's test that secretly recorded reports involve matters of public interest, not deal with personal or private matters, and be recorded in areas used for the general conduct of business with the public, and that media representatives present themselves to the subjects of the interviews as strangers, not as coworkers. By distinguishing *Sanders* and *Shulman* and limiting *Dietemann* to its facts, *Medical Laboratory Management Consultants* suggests that undercover reporting about matters of public interest will not automatically be subject to successful intrusion claims.

LDRC members Andrew D. Hurwitz and Diane M. Johnsen of Osborn Maledon, P.A., Phoenix, represented the defendants in this matter, along with Jean E. Zoeller of ABC.

Ninth Circuit Finds Local Paper Not "State Actor" But Permits Trespass and Invasion of Privacy Claims to Proceed

A local newspaper following a local Humane Society on a search of plaintiff-Mrs. Brunette's property and her cat breeding facilities resulted in two separate decisions on news gathering claims by the Ninth Circuit this past summer. The first opinion upheld dismissals of §1983 claims against the press defendants and reporter, holding that the newspaper and its reporter were not "state actors". *Brunette v. Humane Society of Ventura County 294 F.3d 1205*.

In the second opinion (unpublished) the court reversed the district court's dismissal of the trespass and invasion of privacy claims, and held that plaintiff-appellant had presented facts sufficient for these claims to continue.(*30 Med. L. Rptr. 2181*) However, the court also upheld the district court's dismissal of claims of conspiracy, conversion, infliction of emotional distress, declaratory relief, and injunctive relief.

Both decisions were written by Judge Trott.

Search Warrant for Brunette's Business

The suit was the result of a search of plaintiff's local cat-breeding business conducted by the Human Society of Ventura County, a non-profit corporation created by state government with the objective of protecting sick and abused animals. Notified that Ms. Brunette was selling cats appearing to be sick and/or abused, the Humane Society obtained a search warrant and searched the farm on which Ms. Brunette ran her business. Several animals were also seized.

Before conducting the search, the Humane Society invited The Ojai Valley News and KADY, a local television station, to attend the search. KADY declined to participate, but The Ojai Valley News sent a reporter who took pictures of the search. The reporter arrived at the scene after the Humane Society had gained access to the farm, and was permitted onto Ms. Brunette's property by the Humane Society. At no time did the reporter actively participate in the search.

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9th Cir. Finds Paper Not "State Actor" But Permits Trespass and Invasion of Privacy Claims to Proceed

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Once the search was completed, The Ojai Valley News published several articles on the search and Ms. Brunette, accompanied by pictures of sickly animals. Ms. Brunette was eventually charged with criminal animal neglect but the Superior Court for the County of Verona dismissed the charges holding that the search violated Ms. Brunette's Fourth Amendment rights as the Human Society "lacked statutory authority to execute search warrants".

Ms. Brunette subsequently brought §1983 claims as well as various state tort claims against the Humane Society, The Ojai Valley News, its reporter, and the publisher. The federal district court, Judge Tevrizian, dismissed her complaints against the media defendants. The Humane Society and Ms. Brunette settled their claims before trial. Ms. Brunette then appealed the dismissals for the media defendants.

§1983 – Newspaper Was Not "State Actor"

The Ninth Circuit affirmed the district court's dismissal of Ms. Brunette's §1983 claim against the defendants holding that the newspaper was not a "state actor" and therefore not subject to §1983 liability. The court analyzed the paper's relationship with the Humane Society through three tests: joint action, symbiotic relationship, public functions, and determined plaintiff could not present evidence satisfying any of the tests.

Distinguishing Berger v. Hanlon

Under the joint action test, a private actor will be liable if they were "willful participants in joint action with the government or its agents" and the actions of the private actor and government were "inextricably intertwined". The Ninth Circuit failed to see either of these standards satisfied by the relationship between The Ojai Valley News and Humane Society.

Comparing the present facts to those in *Berger v. Hanlon, 129 F.3d 505 (9th Cir. 1997)*, the Ninth Circuit failed to find a substantial relationship between The Ojai Valley News and Humane Society. Unlike in *Berger*, there was no express contract between The Ojai Valley News and Humane Society. The paper did not assist in obtaining the warrant, nor plan the search, while the Humane Society (aside from the invitation to enter) did not assist the paper with its coverage. Finally, the cooperation between both parties was minimal as the Humane Society and paper acted mostly independent from each other, not jointly.

Furthermore, the connection between the paper and Humane Society did not amount to a "symbiotic relationship". Quoting *Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)*, the Ninth Circuit described that a symbiotic relationship exists when "the government has 'so far insinuated itself into a position of interdependence (with a private entity) that it must be recognized as a joint participant in the challenged activity'".

The cooperation between both parties was minimal as the Humane Society and paper acted mostly independent from each other, not jointly.

In the present situation, there was no "substantial coordination and integration between the private entity and the government", nor financial integration to qualify the relationship as sufficiently symbiotic. The Humane Society did not rely on the paper for its economic survival, nor did the paper give the Society any influence in editorial decisions. While the Humane Society had a history of inviting the paper to accompany searches, this "exchange of 'mutual benefits" was insufficient to establish the existence of a symbiotic relationship.

Finally, the relationship did not satisfy the public function test. The Ninth Circuit failed to find any actions taken by the paper that were "traditionally the exclusive prerogative of the State" *(*quoting *Rendell Baker v. Kohn, 457 U.S. 830, 842 (1982))*. Ms. Brunette admitted that the paper merely performed news gathering activities and not any law enforcement functions. Accordingly, the court held,

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9th Cir. Finds Paper Not "State Actor" But Permits Trespass and Invasion of Privacy Claims to Proceed

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> "News gathering is the quintessential private activity, jealously guarded from impermissible government influence."

Trespass: Invalid Warrant Could Not Provide Consent

The dismissal of Ms. Brunette's trespass claim was reversed and remanded. The Ninth Circuit held that the facts presented by Ms. Brunette, if true, would prove her claim of trespass. Specifically, Ms. Brunette argued that the warrant did not provide consent to enter her property, nor did the paper perform a function necessary to the search. The paper claimed that the warrant provided the Humane Society with the requisite lawful possession and control of the property to afford adequate consent for the newspaper's entry.

The Ninth Circuit found, however, that if the warrant was invalid, the Humane Society had no authority to enter the property, and therefore could not give the paper consent to enter to the property. Moreover, even if the Humane Society's presence was lawful, the media's presence was, Brunette alleged, "superfluous" and unrelated to any legitimate law enforcement function.

Invasion of Privacy: Valid Expectation from Illegal Entry by Media

The Ninth Circuit also reversed and remanded the district court on the invasion of privacy claim. According to the court, Ms. Brunette had sufficiently alleged a valid expectation of privacy against illegal entries onto her property. Citing *Dietemann v. Time, Inc., 449 F. 2d 245, 247-49 (9th Cir. 1971),* the Ninth Circuit's 1971 decision concerning surreptitious reporting from inside Mr. Dietemann's home, an illegal entry would be sufficient to state a claim of invasion of privacy.

Remaining Tort Claims Dismissed

The dismissal of Ms. Brunette's remaining tort claims was affirmed. According to the court, Ms. Brunette's conspiracy claim was properly dismissed because she did not produce any evidence of a conspiracy between defendants "to violate her rights". Plaintiff's conversion claim was without merit and properly dismissed because photographs are not considered an intangible property right protected by a claim of conversion.(citing *Ault v. Hustler Magazine, 860 F. 2d 877, 833 (9th Cir. 1988)*.

The Ninth Circuit affirmed the dismissal of the claim for infliction of emotional distress because neither of Ms. Brunette's alternative allegations were valid. First, to bar duplicative relief, California plaintiffs cannot bring an independent claim for emotional distress based on a separate claim of trespass. Second, the publication of the photos could not give rise to a separate action for emotional distress when the asserted distress would be classified as damages in a defamation claim based on the same facts.

Ms. Brunette's request for declaratory relief was improper as its sole purpose was to advance her claims, and neither helped to clarify a "legal relation" nor provide relief from "controversy giving rise to the proceeding". Finally, the court characterized as a prior restraint plaintiff's request for an injunction which would prevent the paper from further use of pictures taken during the search. This remedy was not necessary because plaintiff could be fairly restored by less drastic post-publication measures.

For Plaintiff-Appellant: Henry H. Rossbacher & Nanci E. Nishimura of Rossbacher & Associates, Los Angeles, California

For Defendants-Appellees: Kelli L. Sager, Mary Haas and Rochelle Wilcox of Davis, Wright, Tremaine, Los Angeles, *California*

LDRC would like to thank Fall interns — Connie Chen, Cardozo Law School, Class of 2004 and Rachel Mazer, Cardozo Law School, Class of 2004 — for their contributions to this month's MediaLawLetter.

Ohio Supreme Court Rejects Newspaper's Appeal of Privacy Verdict

Plaintiff's Award Based on Telemarketing Calls; Jury Found for Paper on Newsgathering Claims

The Ohio Supreme Court has declined an appeal of a decision upholding a jury verdict against the the *Akron Beacon Journal* based on its repeated phone calls to Akron police chief Edward Irvine and his wife Geneva soliciting a subscription to the paper. *See Irvine v. Beacon Journal*, *rev. denied*, No. 2002-0785 (Ohio Sept. 11, 2002). One of the court's nine members dissented.

The denial marks the apparent end of a hard-fought case that began when Geneva Irvine was hospitalized in October 1998 for injuries she reportedly blamed on her husband. When she went to stay with relatives in Louisiana, the *Beacon Journal* sent a reporter and a photographer to interview her. Mrs. Irvine refused to be interviewed, so the reporter left a copy of a series that the paper had already published on the allegations, his business card and a note on the windshield of Mrs. Irvine's car.

The trial jury found that the reporter acted reasonably when attempting to interview Mrs. Irvine, but that the calls constituted telephone harassment.

The Irvines filed suit over the incident, and cancelled their subscription to the paper. The cancellation led the *Beacon Journal*'s telemarketing department to call the Irvines to try to get them to re-subscribe. The paper said that the Irvines had been called 18 times, while the plaintiffs alleged they received hundreds of calls.

The trial jury found that the reporter acted reasonably when attempting to interview Mrs. Irvine, but that the calls constituted telephone harassment. It awarded a total of $206,500 to the Irvines. *See LDRC LibelLetter*, April 2000, at 7. The damage amount included $500 in statutory damages for each of three phone calls (for a total of $1,500) and $4,500 in treble damages, as permitted by the federal Telephone Consumer Protection Act. *See* 47 U.S.C. § 227(c)(5).

In the newspaper's appeal of the award for the telemarketing calls, the Ohio Court of Appeals upheld all but the statutory damages, holding that the statute permitted the award of either statutory damages, or treble this amount, but not both. *See Irvine v. Akron Beacon Journal*, 770 N.E.2d 1105 (Ohio Ct. App. May 8, 2002) (vacating 2002 WL 24324, 2002 Ohio App. LEXIS 39, 30 Media L. Rep. 1225 (Ohio Ct. App. Jan 9, 2002) on evidentiary issue not related to final result); *see also LDRC LibelLetter*, Jan. 2002, at 26. The jury verdict in the newspaper's favor on the newsgathering claims was not appealed.

The Irvines also filed a second suit over the newspaper's use of medical records discovered through the case in articles for the paper. The trial court's grant of summary judgment in the records case was affirmed by the Ohio Court of Appeals in June. *See Irvine v. Akron Beacon Journal*, 2002 WL 1371184, 30 Media L. Rep. 2008 (Ohio Ct. App. Jun. 26, 2002); *see also LDRC MediaLawLetter*, July 2002, at 19.

The *Beacon-Journal* announced that it would not petition for *certorari* from the U.S. Supreme Court. With the removal of the treble damages amount, the result is a final judgment of $202,000 for the Irvines.

The *Beacon Journal* was represented by Ronald S. Kopp, Alisa L. Wright and Stephen W. Funk of Roetzel & Andress in Akron, Ohio. Edward L. Gilbert of Akron represented the Irvines.

Denver Publishing Co. v. Bueno

By Bruce W. Sanford and Bruce D. Brown

Colorado has joined the small but growing number of states to reject false light. In *Denver Publishing Co. v. Bueno*, (2002 WL 31097976) decided on September 16, 2002, the Colorado Supreme Court refused to recognize the tort on the grounds that it endangers First Amendment protections and is essentially duplicative of defamation. With the ruling in *Bueno*, Colorado joins the eleven other states that have either refused to recognize or outright rejected false light as a theory of recovery over the last two decades. False light is still recognized in a majority of states, to be sure, but the decision in *Bueno* provides some new momentum to efforts to discredit this dangerous and unpredictable tort.

Denver's Biggest Crime Family

The *Bueno* litigation arose out of the publication of an article in the *Rocky Mountain News* during the summer of 1994. The article detailed the criminal activities carried out by members of Denver's Bueno family, a clan of 13 brothers and 5 sisters whom the city's police chief had identified as Denver's "biggest crime family." The numbers support that label: Between them, over the course of three decades, the Bueno siblings accounted for at least 206 arrests, 793 years in prison sentences, hundreds of crimes, and more than $2 million in stolen cash and goods. The family's more notorious members include brothers Joey and Marty, the so-called "society bandits" who robbed upscale Denver neighborhoods in the early 1990s, and brother Michael, widely known in the area as the "gentleman bandit."

The text of the article identified Eddie Bueno, the oldest brother and eventual plaintiff, and Freddie, the youngest, as "the only two Bueno boys who have stayed out of trouble." The story also contained two subheadlines, one on the front page and one beneath a family tree that illustrated the piece, that indicated that the number of Buenos with arrest records was 15. This same statement was repeated in the first column of the news copy. (In addition to Eddie and Freddie, one Bueno sister had a clean record.) The family tree demarcated these 15 by detailing their criminal histories in the captions accompanying their pictures. For example, the caption with Joey Bueno's picture read, "Joey, 29, Society Bandit, serving 118 years." Pete Jr.'s caption stated, "Pete Jr., 52, arrested 26 times in Denver. Served 10 years for robbery." Eddie Bueno's caption, however, read in its entirety, "Eddie, 55, oldest of the Bueno children."

> ***"[W]e find no benefit to our jurisprudence by adopting the tort of false light invasion of privacy."***

Libel and False Light at Trial

Eddie Bueno sued the *News*, claiming that the article "characterized" him as having engaged in criminal conduct. In particular, he maintained that the use of certain summarial phrases, such as "Bueno brothers" and "older Buenos," in the piece's discussion of crimes committed by the family would induce readers into believing that Eddie was involved in these activities. His complaint contained four claims: invasion of privacy by publication of private facts; negligence; defamation; and invasion of privacy by false light. He based his libel and false light counts on identical passages in the article. Bueno also asserted the exact same measure of damages in his false light claim as he did in his libel claim.

The trial judge ruled that the article addressed a matter of public concern and granted a motion for summary judgment on two of these claims – publication of private facts and negligence. The defamation and false light counts proceeded to trial. At the close of Bueno's evidence, the *News* moved for a directed verdict. The trial court dismissed the defamation count, holding that Bueno's claim was one of libel per quod for which he had failed to prove special damages. The court let the false light claim go forward, however, finding that special damages were not an essential element of the tort.

The jury found in favor of Bueno and awarded him $47,973.90 for noneconomic losses, $5,280.00 for economic losses, and $53,253.90 for exemplary damages.

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Denver Publishing Co. v. Bueno

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The Colorado Court of Appeals affirmed the false light verdict but did not take up Bueno's cross-appeal regarding the dismissal of his defamation claim.

An Unacceptable Chill

The Colorado Supreme Court accepted certiorari on three questions:

1) Whether Colorado should recognize the tort of false light with this case;
2) Whether a publication is actionable as false light when any allegedly offensive implications it creates are refuted by statements in the report plainly to the contrary; and
3) Whether a plaintiff must prove special damages as an element of false light in Colorado, if Colorado makes false light a valid theory of recovery. As it turned out, the Court only had to answer the first of the these questions, as it rejected false light in a decision that echoed First Amendment values more commonly seen a decade ago.

In an opinion written by Justice Rebecca Love Kourlis, the Court concluded that false light was "highly duplicative of defamation both in the interests protected and conduct averted." As the Court further elaborated,

> "[W]e find no benefit to our jurisprudence by adopting the tort of false light invasion of privacy. The tort applies only to a narrow band of cases such that any potential gain in individual protection is offset by the chilling effect the new, undefined tort could have on speech."

In the majority's view, defamation law already provides adequate protections for allegedly false speech.

Furthermore, the Court held that First Amendment values stood in the way of adopting a tort as subjective and ambiguous as false light, with its impossible to contain "highly offensive" standard:

> Our decision today to reject false light in Colorado reflects not only caution with respect to adopting new torts, but also our recognition that the tort implicates First Amendment principles. Freedom of the press is a critical part of our constitutional framework. We must weigh torts in this area carefully against the infringement they represent upon freedom of the press. . . . We believe false light is too amorphous a tort for Colorado, and it risks inflicting an unacceptable chill on those in the media seeking to avoid liability.

Chief Justice Mary Mullarkey filed a dissent joined by two other members of the Court. The case has now been remanded to the Colorado Court of Appeals for consideration of Bueno's cross-appeal of the dismissal of his defamation claim.

We believe false light is too amorphous a tort for Colorado, and it risks inflicting an unacceptable chill on those in the media seeking to avoid liability.

Bruce W. Sanford and Bruce D. Brown are lawyers in the Washington office of Baker & Hostetler LLP. Along with Marc D. Flink of the firm's Denver office, they represented the Rocky Mountain News *in* Denver Publishing Co. v. Bueno. *Roger T. Castle, P.C., Denver, represented respondent.*

Naomi Campbell UK Privacy Judgment Reversed on Appeal

Article Reporting Her Drug Addiction Was in the Public Interest and Exempt from Data Protection Act

The UK Court of Appeal this month reversed a controversial High Court judgment in favor of model Naomi Campbell on breach of confidence and data protection claims against *The Mirror* newspaper for publishing a true report that she was a drug addict and attending Narcotics Anonymous (NA) for treatment. *Campbell v. MGN* [2002] EWCA Civ No: 1373 (CA Oct. 14, 2002) (Lord Phillips, Master of the Rolls; Lord Justice Chadwick and Lord Justice Keene). The decision is not yet available online, but a detailed summary is available on the website of *The Mirror's* solicitors, Davenport Lyons, at <www.davenportlyons.com>.

In a significant press victory, the Court of Appeal held that *The Mirror's* article was 1) reasonable and in the public interest; and 2) protected by the journalism exemption to the Data Protection Act. The Court's holding on the Data Protection Act may be the most significant aspect of the decision, since it is the first UK appellate court decision on the application of data protection rules to the press – and it reverses the damaging trial court decision that stripped the press of its exemptions under the Act for published material. *See* LDRC *MediaLawLetter* April 2002 at 25.

> ***"Where a public figure chooses to make untrue pronouncements about his or her private life, the press will normally be entitled to put the record straight."***

Background

On February 1, 2000, *The Mirror* published an article entitled "Naomi: I am a Drug Addict" which revealed in generally sympathetic terms that she had a drug problem (contrary to her many public denials) and was seeking treatment at NA. It was illustrated with a photograph of Campbell on a public street leaving an NA meeting and reported that she "has been a regular at [NA] counseling sessions for three months, often attending twice a day"; that she attended a lunchtime meeting and later that same day attended a women's only meeting; that she dressed "in jeans and a baseball hat" and "is treated as just another addict trying to put her life back together."

Following a bench trial earlier this year, High Court Justice Morland surprisingly ruled that while *The Mirror* newspaper "was entitled to reveal, and to reveal in strong terms, that Miss Naomi Campbell was a drug addict" and "was receiving therapy" she still had a "residual area of privacy" to make actionable the disclosures of details regarding her NA meetings. *Campbell v. MGN*, [2002] EWHC 499 (QB) (March 27, 2002) at ¶ 10, 68-70. The court awarded Campbell £2,500 in damages for the two substantive claims and an additional £1,000 for aggravated damages for subsequent *Mirror* articles that criticized the well-known Campbell for complaining about privacy.

Justice Morland found that Campbell's privacy interest was "obvious" and suggested that "[a]ll that needed to be published in pursuit of the defendant's legitimate interests were the facts of drug addiction and therapy – full stop." Id. at ¶ 112. He found the newspaper liable for breach of confidence on the ground that the source for the information must have been an employee or fellow NA attendee obliged to keep the information private. Publication also violated the Data Protection Act by revealing sensitive personal information. Morland expressly rejected the newspapers claim that it was protected by the journalism exemption to the Act, holding that the exemption only applied to prepublication newsgathering.

The Mirror Was Entitled to Set the Record Straight

With respect to privacy, the Court of Appeal cautioned that "the fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media," adding that a celebrity's status as a role model should not be taken as a green light to reveal his or her "clay feet." But here "where a public figure chooses to make untrue pronouncements about his or her private life, the press will normally be entitled to put the record

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Naomi Campbell UK Privacy Judgment Reversed on Appeal

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straight." [2002] EWCA Civ No: 1373 (CA Oct. 14, 2002) ¶¶ 41-43.

Acknowledging, as did the trial court, that the *Mirror* was entitled to report that Campbell was a drug addict, it found that no reasonable person could find it offensive that the *Mirror* also disclosed that she was attending Narcotics Anonymous.

> What is it suggested that the Mirror should have published? 'Naomi Campbell is a drug addict. The Mirror has discovered that she is receiving treatment for her addiction'? Such a story, without any background detail to support it, would have bordered on the absurd. We consider that the detail that was given, and indeed the photographs, were a legitimate, if not an essential, part of the journalistic package designed to demonstrate that Miss Campbell had been deceiving the public when she said that she did not take drugs.

Id. at ¶ 62.

A narrow application of the Act was simply not appropriate for the data processing, i.e., newsgathering, which will normally be an incident of journalism.

Data Protection Act's Press Exemption Applies

The Court next analyzed at length Campbell's Data Protection Act claim, specifically whether the Act's media exemption applied to the Mirror's publication. Section 32 of the Act exempts from its scope data processed "with a view to the publication by any person of any journalistic, literary or artistic material." The trial court construed "with a view to the publication" to mean that the exemption only applied prior to publication, and that the exemption was intended merely to prevent pre-publication injunctions, a view supported by a number of English legal commentators and part of the legislative debate.

The Court of Appeal, though, recognized the flaw in this, citing with approval the Mirror's argument that under this interpretation:

> a newspaper would hardly ever be entitled to publish any of the information categorised as sensitive without running the risk of having to pay compensation. Indeed, it would be difficult to establish that the conditions for processing any personal information were satisfied. If this were correct, it would follow that the Data Protection Act had created a law of privacy and achieved a fundamental enhancement of Article 8 rights, at the expense of Article 10 rights, extending into all areas of media activity, to the extent that the Act was incompatible with the Human Rights Convention.

Id. at ¶ 92.

It concluded that

> it would seem totally illogical to exempt the data controller from the obligation, prior to publication, ... but to leave him exposed to a claim for compensation ... the moment that the data have been published.... For these reasons we have reached the conclusion that, giving the provisions of the subsections their natural meaning and the only meaning that makes sense of them, they apply both before and after publication.

Id. at ¶¶ 120-121.

In a common sense approach, the Court of Appeal recognized that a narrow application of the Act was simply not appropriate for the data processing, i.e., newsgathering, which will normally be an incident of journalism. The Data Protection Act 1998 is available through <www.legislation.hmso.gov.uk>.

The Mirror was represented by Desmond Browne QC, Richard Spearman QC, Mark Warby QC ; and Kevin Bays and Mark Bateman of Davenport Lyons. Naomi Campbell was represented by Andrew Caldecott QC, Antony White QC and the solicitors firm Schillings.

U P D A T E S

Supreme Court Denies Jewell Petition for Certiorari

Sending his suit against *The Atlanta Journal-Constitution* back to the trial court, the Supreme Court on October 7 denied Richard Jewell's petition for certiorari without comment. Jewell, was appealing a decision by the Georgia Court of Appeals which, reversing the trial court, held him to be a voluntary and involuntary public figure in regards to his libel claim against the newspaper. *(555 SE 2d 175*, See also *LDRC MediaLawLetter*, October 2001 at 3)

The Court of Appeals had also denied Jewell's request to force the Journal-Constitution to divulge the names confidential sources. The Georgia Supreme Court had previously denied Jewell's certiorari petition to that court. See *LDRC Media Law Letter*, February 2002 at 13.

The case arose out of the bombing in Atlanta during the 1996 Summer Olympics. Jewell, then a private security guard at the bomb site, was initially hailed as a hero for finding the bomb and assisting people out of the area. Immediately after the bombing, Jewell appeared on several news outlets and gave numerous interviews. However, during its investigation, the FBI and other law enforcement agencies considered Jewell to be a suspect in planting the bomb. This information was leaked and reported on by several members of the media, including The Atlanta Journal-Constitution.

Jewell Still Public Figure

The denial of certiorari means that Jewell will have to try the case as a public figure. Focusing on his numerous media appearances (ten interviews and one photo shoot in three days), the Court of Appeals declared that Jewell had insinuated himself into the public controversy and should have been aware that his remarks would be seen by "millions of American citizens."

Jewell was also found to be an involuntary public figure. Following *Dameron v. Washington Magazine*, Inc (779 F. 2d 736), the Court of Appeals maintained that an individual may be dragged involuntarily into a public controversy. This is what happened with Jewell, as he "became a central figure in the specific public controversy with respect to which he was allegedly defamed".

Journal-Constitution Can Maintain Confidentiality of Sources

The trial court had also ordered the Journal-Constitution to divulge the names of confidential sources from its coverage of the Olympic bombing and articles pertaining to Jewell. Vacating this order, the Court of Appeals saw a "strong public policy" against mandatory disclosure even though Georgia did not have a specific reporters' privilege. The Court of Appeals instructed the trial court to use a test balancing Jewell's need for the information against the public policy favoring the confidentiality of news sources.

For The Atlanta Journal-Constitution: Peter Canfield, Sean Smith, Michael Kovaka, Tom Clyde of Dow, Lohnes & Albertson (Atlanta)

For Richard Jewell: L. Lin Wood, Brandon Hornsby, Mahaley C. Paulk of L. Lin Wood, P.C. (Atlanta); Wayne Grant, Kim Rabren of Wayne Grant, P.C. (Atlanta); G. Watson Bryant (Atlanta)

Green v. CBS, Inc.

Supreme Court Denies Petition for Certiorari

The Supreme Court denied plaintiff's petition for certiorari in *Green v. CBS, Inc.* without comment allowing to stand a Fifth Circuit affirmance of summary judgment for CBS. (286 F. 3d 281, *LDRC Media LawLetter*, April 2002 at 11) Plaintiff, Mitzi Green, brought claims of defamation and invasion of privacy against CBS for a story broadcast on "48 Hours" that suggested she was a "gold digger", and revealed information regarding abuse allegations pertaining to her daughter.

Ms. Green's claims arose out of a story ("Lotto Town") on "48 Hours" about the town of Roby, Texas, a town where forty-two lottery millionaires lived. The broadcast documented how the lives of several millionaires had changed since they won. One individual featured was Lance Green, plaintiff's ex-husband. On the program Mr. Green explained how he and the plaintiff

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had divorced after he won the lottery and how the plaintiff had fabricated allegations that he abused her daughter (and Mr. Green's stepdaughter) in order to obtain a greater share of the winnings.

In the broadcast, several people interviewed, including Mr. Green and his attorney, discussed how the plaintiff had rejected a divorce settlement with her ex-husband after he won the lottery and prevented him from seeing his step-daughter as leverage. It was also reported that some believed the allegations that Mr. Green had abused his step-daughter were fabricated.

The district court granted defendant's motion for summary judgment on both the defamation and invasion of privacy claims holding that plaintiff had failed to provide adequate evidence suggesting the broadcast was defamatory; and that no private facts were disclosed during the broadcast. (2000 WL 33243748, *see also LDRC LibelLetter*, February 2001 at 15)

Summary Judgment for CBS Stands

The Fifth Circuit upheld the decision of the district court on both claims. On the defamation claim, the Fifth Circuit examined the broadcast as whole and determined that the "gist" of the report was "substantially true". Even though CBS did not include certain facts that supported Ms. Green (including that she eventually accepted a lower settlement, and Mr. Green had given up visitation rights to their daughter), the broadcast did not harm Ms. Green's reputation any more than a complete recitation of the facts (or completely true report) would have. The court also examined individual parts of the broadcast finding them either not defamatory or opinions.

On the private facts claims, the Fifth Circuit, applying Texas law, held that once the information concerning the abuse allegations entered the public record, as they did in open court, the divorce proceedings, and in discussions with others in Roby, "there can be no liability for publicizing it". (Quoting *Gill v. Snow*, 644 S.W. 2d 222 ,224)

For CBS: Mike Raiff, Tom Leatherbury and Dan Petalas of Vinson & Elkins (Dallas); Susanna Lowy and Anthony Bongiorno of CBS, Inc

For Mitzi Green: Sandra Bowers Self of Law Offices of Sandy Self (Abilene, Texas); Sheryl G. Rasmus (Austin, Texas)

"Girls Gone Wild" Case Settled

A lawsuit brought by a former college student who was shown in a "Girls Gone Wild" video baring her breasts has been settled on the eve of trial for an undisclosed amount. As part of the agreement, the video will no longer be distributed and advertising including the student will be discontinued. *See Gritzke v. MRA Holding LLC*, Civil No. 01-0495 (N.D. Fla. dismissed Oct. 2, 2002).

The plaintiff, former Florida State University student Becky Lynn Gritzke, was shown in the "Sexy Sorority Sweethearts" video lifting her shirt on Bourbon Street in New Orleans during Mardi Gras celebrations in 2000. She was also shown on the video box and in television advertisements for the video.

The case was due to go to trial Oct. 7 on claims of misappropriation and false light invasion of privacy. Gritzke had sought more than $75,000 in actual damages, plus a share of the profits from sales of the video, but District Court Judge Robert Hinkle ruled that Gritzke could not claim any of the video's profits.

Another case brought by three other women shown in another video in the "Girls Gone Wild" series was dismissed in March. *See Doe v. Mantra Entertainment*, No. _____ (La. Civil Dist. Ct., Orleans Parish dismissed June 4, 2002).

In Texas, a default judgment involving another video series, titled "Wild Party Girls," was vacated in March. *See Kulhanek v. Acro Media Group, Inc.*, No. 01-0505 (Tex. Dist. Ct., 22nd Dist. default judgment vacated March 28, 2002); *see also LDRC MediaLawLetter*, April 2002, at 24. That case is still pending.

U P D A T E S

NIKE Files Petition for Cert From California Commercial Speech Decision

Nike, Inc. has filed a petition for writ of certiorari coming out of the disastrous decision of the California Supreme Court in which it held applicable the state's false advertising and unfair trade practices provisions to Nike's public responses to charges of unfair labor practices in its Southeast Asian operations. The decision below is *Kasky v. Nike*, Inc., 45 P.3d 243. See, LDRC *MediaLawLetter*, May 2002 at 3. The California Supreme Court held that :

> "[s]peech is commercial in its content [so long as] it is likely to influence consumers in their commercial decision."

Creating a definition of commercial speech that effectively sweeps in virtually anything that a corporation might say about itself and its operations, the California Supreme Court specifically intended to include "image" advertising and written pieces in which no product or service is mentioned and statements to reporters or reviewers who are "likely to repeat the message to or otherwise influence actual buyers or customers."

The California Court applied state strict liability statutes to issue oriented advertising, press releases, letters to the editor, op-ed pieces, and statements to reporters covering the dispute, made in response to what its petition characterizes as a deluge of inquiries from the press after public interest groups made Nike the poster child for all that was wrong with labor practices by multinational corporations. Note as well, that the California statutes authorize any resident of the state to sue as a "private attorney general," without any allegation that the plaintiff was actually deceived or damaged in any way.

Nike states in its cert petition that the questions presented are:

> "1. When a corporation participates in a public debate – writing letters to newspaper editors and to educators and publishing communications addressed to the general public on issues of great political, social, and economic importance – may it be subjected to liability for factual inaccuracies on the theory that its statements are 'commercial speech' because they might affect consumers' opinions about the business as a good corporate citizen and thereby affect their purchasing decision?
>
> 2. Even assuming the California Supreme Court properly characterized such statements as 'commercial speech,' does the First Amendment, as applied to the states through the Fourteenth Amendment, permit subjecting speakers to the legal regime approved by that court in the decision below?"

The issues raised by the *Kasky v. Nike* case should be seen as terribly important by media and First Amendment practitioners. The sweep of the California definition of commercial speech is so great as to pick up virtually anything any corporation or entity – for profit or not-for-profit – has to say about itself. And its second holding, that such speech could be held to a strict liability standard for falsity is as well breathtaking in its scope.

An amicus brief on behalf of substantial number of media and media associations and in support of the cert petition is being written by P. Cameron DeVore and Bruce Johnson of Davis Wright Tremaine in Seattle. Counsel for Nike on the petition include Walter Dellinger, former acting Solicitor General, and Professor Laurence Tribe of Harvard Law School.

New York District Court Denies Dow Jones Motion to Stop Harrods and Al Fayed Libel Suits in UK

A federal district court judge in the Southern District of New York has granted the motion to dismiss filed by Harrods and its chairman, Mohamed Al Fayed, against Dow Jones' suit to obtain a declaratory judgment and an injunction precluding the defendants from pursuing a libel claim in England. Judge Victor Marrero, in a very lengthy opinion in *Dow Jones & Company, Inc. v. Harrods, Limited and Mohamed Al Fayed*, concluded that declaratory judgment was not an appropriate device to protect Dow Jones from what it (correctly) characterized as frivolous litigation by American law standards.

The dispute and the Dow Jones motion were described in the *LDRC MediaLawLetter*, June 2002 at page 65. The litigations arose out of first, a press release by Harrods that was

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ultimately determined to be an April Food's joke...but not before The Wall Street Journal published a small note in the paper that day based upon a serious reading of its contents... and second, an article on the stunt published April 5 in the U.S. edition of the *WSJ* and on its website.

Harrods' initial April 1 announcement was of its selling stock to the public. *The Wall Street Journal* article on April 5 took what the *WSJ* saw as a humorous look at the initial release, under the headline: "The Enron of Britain."

Harrods did not see the humor in the *WSJ*'s April 5 article and promptly had its solicitors in London begin the pre-claim procedures that herald a libel lawsuit in the British court. Dow Jones sought to prevent that litigation by seeking a declaratory judgment barring that suit, arguing that the claim that would be brought would be utterly unable to meet libel standards in the U.S. and that any judgment obtained by Harrods would be unenforceable in U.S. courts. Rather than expending substantial resources to litigate such a claim, Dow Jones asked the U.S. court to bar the UK lawsuit altogether.

The court concluded that what Dow Jones sought was not an appropriate use of the declaratory judgment procedure, neither under a reading of the Declaratory Judgment Act nor under its understanding of the discretion afforded the district court. It found that in the international context, and despite the Constitutional rights at stake, there was "nothing in the statute or in pertinent case law that lends cogency or force to such an application of the DJA." The court analyzed the issues from the constitutional dimensions through comity in the next 115 pages. Among its concerns was that British courts would not recognize a judgment from the US federal court seeking to prevent the UK court from adjudicating a claim by UK residents, corporate and individual, that otherwise might properly lie within its jurisdiction, and that the concrete controversy that better suited the DJA was an effort to enforce a judgment after litigation by the UK court similar to the facts presented in *Yahoo!, Inc. v. LaLigue Contr Le Racisme et L'Antisemitisme*, 159 F.Supp. 2d 1181 (C.D. Cal. 2001).

Harrods did, indeed, file suit against Dow Jones in London. Dow Jones is reviewing the opinion and analyzing its options.

Dow Jones is represented by Jack Weiss of Gibson, Dunn & Crutcher, New York. Harrods and Al Fayed were represented by Dorsey & Whitney, New York.

Heads up – Watermarks on Video Can Protect it From Unauthorized Use

Using someone else's footage has always had its risks as the report on the litigation between CBS and Los Angeles News Service (reported on page 43 of this *MediaLawLetter*) suggests. But now technology makes it even easier for distributors to determine who is using their material. The European Broadcasting Union (the "EBU") joins Reuters Television in using a new digital watermarking and reporting system that will allow it to not only embed an invisible watermark into videotape fed in its Eurovision News Exchange, but actually track use of that tape. The system will send back reports, created by tracking done via satellite, cable or terrestrial means, of uses of the footage.

Ninth Circuit Affirms Judgment for Boise Newspaper Against Ex-Housing Authority Chief

By Charles D. Tobin

The Ninth Circuit, in a public official's libel lawsuit that challenged more than 100 separate articles, editorials, and columns, has affirmed summary judgment for an Idaho newspaper. *Worrell-Payne v. Gannett Co., Inc.*, No. 01-35112 2002 WL, 31246121 (9th Cir. October 7, 2002) (unpublished disposition).

The court's unpublished disposition, upholding The Idaho Statesman's right to air critics' views of official's conduct as "extravagant, excessive, or an abuse of her position," held that plaintiff had failed to demonstrate the falsity of the coverage or actual malice.

Background

Plaintiff Judith Worrell-Payne brought this action against The Idaho Statesman based on coverage of her tenure as the executive director of the Boise-Ada County Housing. In 1996, she came under fire from public officials and authority employees because, among other things:

- Worrell-Payne's son was allowed to live in a rent-to-own project built and managed by the housing authority for low- to moderate-income tenants;
- She hired her son's girlfriend and another personal acquaintance for jobs at the authority;
- She drove the authority-owned Chevy Blazer on a family vacation;
- She traveled to other municipal housing districts and to attend national and regional housing meetings on more days than she spent working locally in Boise.

The newspaper extensively covered the matter – which spawned numerous debates in public meetings, concerns among public housing residents, and a police investigation – in the course of that year. Worrell-Payne ultimately was fired from her job; no criminal charges were filed. She sued the housing agency and the county and settled. She then filed the action against the newspaper, alleging defamation, defamation by implication, and several other torts.

In the litigation against the newspaper, Worrell-Payne objected to the coverage on grounds that: all of her actions were approved by the housing authority's governing board; the travel was a part of her job; and all people she hired were qualified for their positions. She particularly objected to the newspaper's repeated use of the phrase "nepotism, frequent absenteeism, and mismanagement" to describe the charges against her.

Worrell-Payne also alleged that during the reporting, she had advised The Idaho Statesman's journalists of each of her defenses to the criticisms. The publications, Worrell-Payne alleged, did not give adequate play to her denials and defenses, and thus constituted actual malice.

Her status as a public official "for statements involving these matters did not change after her termination or the passage of two years."

In November 2000, the District Court granted summary judgment to the newspaper. *Worrell-Payne v. Gannett Co., Inc.*, 134 F. Supp. 2d 1167 (D. Idaho 2000). See LDRC *LibelLetter*, December 2000 at 17-18.

Public Official Designation Upheld

Worrell-Payne argued that because she was out of her appointed office for two years before bringing the lawsuit, she no longer should be considered a public official. The Ninth Circuit disagreed in a brief passage and footnote citing *Rosenblatt v. Baer*, 376 U.S. 254, 279-80 (1964) and *Partington v. Bugliosi*, 56 F. 3d 1147, 1152 n. 8 (9th Cir. 1995). Because past management of the Authority was "still a matter of lively public interest'" her status as a public official "for statements involving these matters did not change after her termination or the passage of two years."

Denials Do Not Prove Falsity or Malice

The Ninth Circuit disagreed with Worrell-Payne that the newspaper failed to amply heed her protests about

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Ninth Circuit Affirms Judgment for Boise Newspaper Against Ex-Housing Authority Chief

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the nepotism and mismanagement charges. The panel noted that, "on more than one occasion, the articles included Worrell-Payne's asserted denials" and also observed, "these denials did not prove the falsity of the statements themselves or the impressions being reported". The court cited as an example Worrell-Payne's use of the authority's Blazer and the $83,000 travel budget she had been given. These perks, the court held "can be criticized as extravagant, excessive, or an abuse of her position as executive director of the Authority, regardless of whether they were approved by the Board."

Based on this record and reasoning, the Ninth Circuit held that even with her denials to the newspaper, Worrell-Payne failed to establish by "clear and convincing evidence that The Statesman 'in fact entertained serious doubts as to the truth of' or acted with a "high degree of awareness of . . . probable falsity' of the statements[.]" The court cited *Harte-HanksCommunications, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989); *Kaelin v. Globe Communications, Inc.*, 162 F. 2d 1036, 101041-42 (9th 1998).

No Credible Claim of Falsity

The Ninth Circuit also held that Worrell-Payne had not established falsity. Specifically citing the reports Worrell-Payne had been charged with "frequent absenteeism," the court held that the newspaper did not use the term in "a clearly false or misleading way." The court noted that while Worrell-Payne claimed the trips out of town were for business, they nonetheless were "a part of her job that she had initiated and of which some critics did not approve."

Moreover, without detailed comment, the Ninth Circuit held the newspaper accurately had reported the "substance or gist" of Worrell-Payne's tenure by describing it in print as "scandal-plagued" and "rocked" by "scandals and controversies."

Other Torts Fall With Defamation Claims

Citing *Hustler Magazine v. Falwell*, 485 46, 56 (1988), the court held that as Worrell-Payne could not prove the publication of "a false statement of fact which was made by 'actual malice," both her intentional infliction of emotional distress and false light claims fail.

The court affirmed dismissal of Worrell-Payne's intentional interference with prospective economic advantage and interference with contract claims on grounds that she failed to show an independent wrong other than the alleged interference with her employment was wrongful. The court also held that, as the housing authority's representative had testified in her lawsuit against the agency that press coverage was not the reason Worrell-Payne lost her job, "proof of causation was lacking."

Expert Testimony Properly Excluded

Finally, the Ninth Circuit addressed Worrell-Payne's argument that the District Court improperly excluded an affidavit from her journalism expert on the issue of actual malice. The Ninth Circuit held that, even assuming arguendo the trial judge had abused his discretion, "because this material has little relevance to the 'actual malice' issue, we conclude that any such error was harmless and does not warrant reversal."

Chuck Tobin argued the case for Gannett's newspaper, The Idaho Statesman, in the Ninth Circuit. He is a partner with Holland & Knight LLP, Washington, D.C. Elizabeth M. Dunne, an associate with the firm, assisted in preparations for argument. Debora K. Kristensen, a partner with Givens Pursley LLP in Boise, represented The Idaho Statesman *in the District Court and was lead counsel on the brief in the Ninth Circuit.*

Donald W. Lojek of Lojek Law Offices, Boise, represented Worrell-Payne

Ninth Circuit Finds Personal Jurisdiction for Out-of-State Web Site

Furthering the continued debate over how jurisdictional rules apply in cyberspace, the Ninth Circuit, in a October 7 opinion, held that a federal district court in Washington state has personal jurisdiction over a website operated in Colorado and incorporated in Delaware.*(Northwest Healthcare Alliance, Inc. v. Healthgrades.com, 2002 WL 31246123)* Recognizing that the Internet presents unique jurisdictional issues, the court utilized the "effects test" of *Calder v. Jones* in finding personal jurisdiction "when the harm suffered by plaintiff sounds in tort". The Ninth Circuit had previously applied the "effects test" for non-Internet parties in *Panavision Int'l L.P. v. Toeppen*.(141 F. 3d 1316)

Healthgrades.com, Inc. (defendant) is a web site operated out of Denver but incorporated in Delaware. The site rates and grades the performance and services of health care providers. Northwest Healthcare Alliance (plaintiff) is a health care provider in Washington state and received (in its estimation) an unfavorable review by Healthgrades. Northwest Healthcare brought two claims in state court: defamation and infraction of Washington state's Consumer Protection Act.

Healthgrades moved and was granted permission to remove the case to federal court for diversity jurisdiction. Immediately after, Healthgrades moved to dismiss for lack of personal jurisdiction. The district court granted the motion to dismiss asserting that there was no personal jurisdiction over defendant because Healthgrades had not purposefully availed itself in the forum, and not committed acts directly aimed at Washington state.

Ninth Circuit Finds Personal Jurisdiction

The Ninth Circuit reversed finding that the district court could exert personal jurisdiction without violating Healthgrades constitutional due process. Previously, the Ninth Circuit had applied two tests in determining whether personal jurisdiction existed over web sites that were operated out-of-state: *Cybersell*'s sliding scale test; and *Calder*'s "effects test". Following its decision in *Panavision*, the Ninth Circuit applied the "effects test" as the alleged defamatory harms to the plaintiff were tortious in nature.

Web Site Purposefully Interjected Itself into Forum

By choosing the "effects test", the Ninth Circuit decided to place great importance on how the defendant's web site interacted with Washington citizens. Under this test, personal jurisdiction is appropriate when the defendant "1) engaged in intentional actions; 2) expressly aimed at the forum state; 3) causing harm, the brunt of which is suffered-and which the defendant knows is likely to be suffered- in the forum state".(citing *Panavision*).

The Ninth Circuit found that Healthgrades purposefully interjected itself into Washington state by rating health care providers located in Washington. First, according to the court, Healthgrades had intentionally aimed its business at Washington state because the site should have known this information on Northwest, and all other Washington state providers, would be most useful to Washington residents. Second, Healthcare used information gathered from Washington state. Third, the allegedly defamatory remarks concerned "the Washington activities of a Washington resident". Finally, Northwest Healthcare's alleged harm was primarily felt in Washington, plaintiff's place of business and incorporation.

By choosing the "effects test", the Ninth Circuit decided to place great importance on how the defendant's web site interacted with Washington citizens.

In summary, the court held,

> "The effects, therefore, of defendant's out-of-state conduct were felt in Washington, plaintiff's claims arise from that out-of-state conduct, and the defendant could reasonably expect to be called to account for its conduct in the forum where it understood the effects of its actions would be felt."

For Northwest Healthcare Alliance, Inc.: Mark M. Hough and James Rhett Brigman of Riddell & Williams (Seattle).

For Healthgrades.com, Inc.: Robert Jason Henry of Lasher, Holzapfel, Sperry & Ebberson (Seattle); and Kris J. Kostolansky of Rothgerber Johnson & Lyons, LLP (Denver).

New Jersey Fair Report Privilege Applies to OJ Simpson Comparison

By Bruce S. Rosen and Nathan Siegel

Allegations by former major league baseball pitcher John "The Count" Montefusco that he was libeled by an ESPN report comparing his domestic violence criminal case with that of O.J. Simpson fail because the comparison was factually accurate and protected by New Jersey's fair report privilege and its prohibition against libel by implication, the Third U.S. Circuit Court of Appeals ruled on September 20, 2002.

"All of the statements related to the criminal charges [against Montefusco] were factually accurate, as was the comparison of Montefusco's case to Simpson's," wrote Circuit Judge Richard L. Nygaard in a short, non-precedential opinion upholding dismissal of Montefusco's defamation complaint against the sports cable network. *Montefusco v. ESPN, Inc*. docket number 01-3276, 2002 WL 31108927.

New Jersey has specifically held that there can be no libel by innuendo of a public figure where the facts in the challenged communication are true.

Broadcast Documented Abuse Charge

The suit involved a March, 2000 ESPN SportsCenter news report that was pegged to Montefusco's hiring as a minor league pitching coach following his acquittal on rape, aggravated assault and kidnapping charges brought by Monmouth County, New Jersey authorities on a complaint by Montefusco's ex-wife, Doris.

The seven-minute report began with the familiar helicopter shot of Simpson's white Bronco with the voiceover:

> "2500 miles and three years removed from perhaps the crime of the century another ex-athlete is accused of domestic violence."

After the broadcast described the judicial proceeding and gave Montefusco several minutes to deny the allegations and attack the motivations of prosecutors, Doris' attorney is interviewed and says the cases have many parallels:

> "a famous athlete, an attractive ex-wife, and someone who wasn't willing to let go. And a jury who could not find, beyond a reasonable doubt, that O.J. Simpson killed his ex-wife or that John Montefusco raped and tried to kill his ex-wife."

The Report's voiceover then paraphrased Doris as stating,

> "the only difference between this and the O.J. Simpson case is that she is alive to talk about it. Nicole Simpson is not."

The report went on to include an interview with a juror who said Doris' testimony had no credibility.

Montefusco had argued that the comparison between the two ex-athletes' cases was unfair because the public does not believe that Simpson was innocent of the killings and that it therefore implies he was really guilty. He alleged that this impression was bolstered by a civil jury's finding of wrongful death against Simpson for the deaths of Nicole Brown Simpson and Ronald Goldman, a finding that was not mentioned in the report. He also alleged the report exaggerated the charges against Montefusco by referring to his "attempt to kill his wife."

ESPN countered that the comparison and the attorney's conclusion concerning the alleged "attempt to kill his wife" were protected by the fair report privilege and that the comparison was constitutionally protected opinion. In addition, ESPN cited New Jersey law that would prohibit libel by implication in this case.

Third Circuit: Story "Accurate and Complete"

The Court, in agreeing with U.S. District Court Judge Anne Thompson, said that publication of the statements was privileged pursuant to New Jersey's fair report privilege, as the ESPN presentation was "accurate and complete," and did not mislead viewers as to the Simpson case or Montefusco's circumstances.

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New Jersey Fair Report Privilege Applies to OJ Simpson Comparison

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The Court also ruled that Montefusco's theory of defamation-by-implication fails because the reported comparison does not imply that Montefusco is guilty of the crimes of which he was acquitted. Moreover, New Jersey has specifically held that there can be no libel by innuendo of a public figure where the facts in the challenged communication are true.

Montefusco, who was National League Rookie of the Year while with the San Francisco Giants in 1975, was found not guilty in November 1999 on an 18-count indictment involving multiple instances of violence against his ex-wife. He had been held in jail for two years on $1 million bail because he had violated previous domestic violence restraining orders, including one instance after he was released on a lower bail. He was convicted of three disorderly persons violations of assault and trespass and pled guilty to a contempt charge and was sentenced to additional probation, and anger management counseling.

Montefusco actually himself raised the Simpson case without prompting during an interview that was edited out of the broadcast when he said "because of the O.J. Simpson case [judges] are afraid of domestic violence," in attempt to explain why the judge did not sentence him only to time served. The outtakes to Montefusco's interview were submitted as part of ESPN's motion.

ESPN Inc. was represented by Bruce S. Rosen of DCS member firm McCusker, Anselmi, Rosen Carvelli & Walsh, P.A. in Chatham, N.J. with Nathan Siegel of ABC, Inc.

Montefusco was represented by Phil H. Leone of Red Bank, N.J.

Liability Upheld, Appeals Court Reverses and Remands $6 Million Compensatory Damages for Veterinarian

Holds That Trial Judge Erred in Instructing Jury; $500,000 Punitives May Be Vacated

The Oklahoma Court of Civil Appeals has upheld a trial jury's finding that veterinarian Howard Mitchell was slandered and placed in a false light by a news report on KWTV in Oklahoma City which alleged that he was connected to improprities with respect to two quarterhorses. But the court, in an opinion written by Judge Carol M. Hansen, Judges Adams and Mitchell concurring, reversed and remanded the jury's $6 million actual damages award because of improper jury instructions. *Mitchell v. Griffin Television*, No. DF-96640 (Okla. Ct. Civ. App. Sept. 6, 2002) (affirming on liability, reversing and remanding on compensatory damages).

The court did not reverse the jury's award of $500,000 in punitive damages – split evenly between the a television station and reporter Chris Halsne – but instructed the trial court to vacate the punitive award if, on retrial, the jury does not award compensatory damages.

The parties have petitioned the Oklahoma Supreme Court for certoriari in the case. *Mitchell v. Griffin Television*, No. DF-96640 (Okla. petition filed Sept. 26, 2002).

The appeals court's reversal of the compensatory damages was based on its holding that trial judge Joe Sam Vassar erred when he instructed the jury that if Mitchell showed that KWTV and Halsne had acted with malice, the law presumes that he suffered general damages, and that the jury could award such damages without proof of harm.

The appellate court rejected all of the station's other arguments, including the sufficiency of evidence to find liability; that certain statements were not about Mitchell, were not defamatory, or were privileged; other arguments regarding the jury instructions; that the trial court abused it discretion by refusing to give special interrogatories; and that certain evidence was improperly admitted.

The case arose from a two-part news story stating that This Lady Sings, a horse recognized as the top amateur in her class at the 1997 World Quarter Horse Championships and then sold for more than $100,000, may actually have been lame, and that an investigation by the Ameri-

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Liability Upheld, Appeals Court Reverses and Remands $6M Compensatory Damages for Veterinarian

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can Quarter Horse Association was underway to determine whether Mitchell had administered a drug which could have affected the horse's performance in the competition. The second report detailed a lawsuit stemming from the sale of the horse, which contended that the horse's lame condition had been hidden from the purchaser. *See Skoda v. Offutt*, Civil No. 98-104 (W.D.Ok. dismissed May 1, 1998) (settled).

The reports resulted in a tip that Mitchell had been in trouble for his veterinary practices in New Mexico. Further investigation by KWTV revealed that in 1995, Mitchell had been banned for life from New Mexico racing after he was discovered to have been practicing veterinary medicine illegally. KWTV did a followup report about the New Mexico proceedings, and also broadcast reports about Oklahoma proceedings which followed the KWTV stories.

After an eight-day trial – during which Dr. Mitchell was conceded to be a private figure – the jury decided by an 11-1 margin that the defendants had recklessly disregarded the truth and acted with common law malice, and awarded the veterinarian $6 million in actual and $500,000 in punitive damages. *See LDRC LibelLetter*, July 2001, at 18.

KWTV and Halsne were represented by Robert D. Nelon, Jon Epstein, and Susanna G. Voegeli of Hall, Estill, Hardwick, Gable, Golden & Nelson in Oklahoma City.

Douglas E. Stall and David Von Hartitzsch of Latham, Stall, Wagner, Steele & Lehman in Tulsa and Clyde A. Muchmore and Mary Hirth Tolbert of Crowe & Dunleavy in Oklahoma City represented the plaintiff.

Charges Dropped Against Student Arrested for Photographing Undercover Officer

Charges were dropped Sept. 17 against a student photographer for California's Chico State University newspaper, *The Orion*, who was arrested on Aug. 31 for taking photographs of an undercover Alcoholic Beverage Control officer. The photographer, Misha Osinovskiy, had been charged with resisting, delaying or obstructing an officer, and faced a maximum penalty of $1,000 and/or one year in a county jail.

The undercover officer, who was citing a 19-year-old student for public urination when his photograph was taken, alleged that he was momentarily blinded by flashes from the camera and lost sight of the man he was arresting. The officer also argued that publishing pictures of undercover officers places their lives at risk.

Osinovskiy did not have his press pass with him when arrested, explaining that there had not been time to print it so early into the semester. But he told the ABC officer that he was protected by Cal. Penal Code § 409.5(d), which protects the right of journalists to enter areas closed to the public for emergency reasons.

His camera and film were confiscated and Osinovskiy spent five hours in Butte County Jail before he was released. The camera and film were both returned approximately twenty-four hours later.

A court date was set for September 20, 2002, but the District Attorney for Butte County dropped the charges on the ground that the student photographer had not intended to interfere with the officer's arrest nor his duties.

Orion Managing Editor Jen Cooper speculated that no arrest would have been made if the photographer had not been a college student.

Any developments you think other LDRC members should know about?

Call us, send us an email or a note.

Libel Defense Resource Center, Inc.
80 Eighth Avenue, New York, NY 10011

Ph: 212.337.0200
Fx: 212.337.9893
ldrc@ldrc.com

Pennsylvania Trial Court Dismisses Judge's Defamation Claim

By Amy Ginensky and Michael Baughman

Recognizing that "Judges are often and must get used to being criticized for the manner in which they adjudicate some cases," one Pennsylvania common pleas court judge has dismissed a defamation claim brought by another common pleas court judge. Judge Isaac S. Garb, a Senior Judge on the Bucks County Court of Common Pleas sitting by special designation in Philadelphia County, granted summary judgment in Judge Kathryn Streeter Lewis' defamation claim against the Philadelphia Daily News. Lewis sued the Daily News' publisher, Philadelphia Newspapers, Inc., and one of its columnists, Dan Geringer, claiming she was defamed by three columns which criticized her decision to release a dangerous criminal defendant under Pennsylvania's Speedy Trial Rule. In his September 13, 2002 Opinion and Order, Judge Garb found that the columns were not false, were not made with constitutional malice, and were protected statements of opinion.

The Underlying Case

Carlton Bryant was charged with committing numerous, violent gunpoint robberies in West Philadelphia. He was not an easy criminal to catch. The Philadelphia Police Department spent many months trying to track him down. Finally, Bryant was arrested in June of 1997 and charged with numerous offenses. In December of 1997, Bryant pleaded guilty to the robberies. However, six months later, he withdrew his guilty plea.

After Bryant withdrew his guilty plea, the case was assigned to several different common pleas court judges. On June 18, 1998, there was a hearing before Judge Patricia McInerney. At that hearing, Bryant's attorney informed the court that there were several motions pending. The defense counsel indicated that those motions needed to be resolved before a trial could be set. Judge McInerney continued the case until July 2nd, and transferred it to the plaintiff, Judge Kathryn Streeter Lewis.

Pennsylvania's Speedy Trial Rule (then numbered Rule 1100), required that a defendant be brought to trial within 120 days of the date of Bryant's withdrawal of a guilty plea. However, in calculating the 120 days, the Court is required to exclude any period of time due to "the unavailability of the defendant or the defendant's attorney" or "any continuance granted at the request of defendant or defendant's attorney." If a defendant is not brought to trial within 120 days, he is entitled to release on nominal bail.

When Judge Lewis received the case, she set the trial to begin on October 26, 1998. She made no inquiry of counsel as to the date that Rule 1100 would expire. She testified at her deposition that she bears no responsibility for setting a defendant's trial date within the time required by Rule 1100 and she routinely does not ask about run dates. Instead, Judge Lewis testified at deposition that the district attorney is solely responsible for ensuring that cases are brought to trial in her courtroom within the confines of Rule 1100.

Bryant moved to dismiss or release pursuant to the Speedy Trial Rule, claiming that 120 days had expired between June 18th and October 23rd, and that he was therefore entitled to release. The Commonwealth argued that all of the time after withdrawal of the guilty pleas was excludable. Judge Lewis found that there was no excludable time between June 18th and October 23rd and ordered that Bryant be released upon electronic monitoring.

Trial was later rescheduled for February 1, 1999. But Bryant did not show up for the trial. He did not show up because he cut off the electronic monitor which was supposed to keep tabs on him and went into hiding.

The Columns

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

Geringer researched the case, including reviewing the court files, and spoke to confidential sources in the District Attorney's Office who told him that there was enough time for Judge Lewis to have brought Bryant to trial in a timely manner. The source also told Geringer that Judge Lewis improperly charged the period between June 18th and July 2nd to the Commonwealth when the period should have been charged to the defendant.

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Pennsylvania Trial Court Dismisses Judge's Defamation Claim

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Based on his research, Geringer concluded that Judge Lewis should have done more to ensure that Bryant was brought to trial before the Speedy Trial Rule required his release. He also concluded that Judge Lewis was not required to release Bryant because she had improperly charged the June 18th to July 2nd period to the Commonwealth. Geringer sought Judge Lewis' comment, but she refused to comment other than to say "the Rule is clear."

Geringer wrote three opinion columns criticizing Judge Lewis' performance. The columns, written in strong terms, opined among other things:

- "Why was a defendant who pleaded guilty to seven gun point robberies, changed his mind six months later, withdrew his guilty plea and was in jail awaiting trial, released and given the golden opportunity to disappear? Because hug-a-thug judges like Lewis have made Common Pleas Court a place where good police work goes to die."
- What's unclear is why Lewis ignored the Rule and freed a man charged with seven gun point robberies. The Commonwealth now has 365 days to try Bryant, beginning on the day they catch him. That is if they catch him. And if the next Judge he gets is more interested in bringing him to "prompt trial" than on relying on an electronic bracelet to do her job.

The Parties' Positions

Judge Lewis claimed that the columns were false because they stated that Judge Lewis had misapplied Rule 1100 by including the June 18th to July 2nd time period in her calculations, which she claimed had not been argued by the Commonwealth at the release hearing. In Judge Lewis' view the June 18th to July 2nd period should have been charged to the Commonwealth. Remarkably, the plaintiff also claimed that the columns were "false" to the extent they suggested that it was her fault that Bryant's trial date was set near or beyond the run date under Rule 1100. Judge Lewis' position was that it was solely the job of the district attorney to tell her of any Rule 1100 problems, and that she is not responsible for ensuring that defendants in her courtroom are tried within the time prescribed by the Rule 1100. Based on these alleged falsehoods, plaintiff claimed that the columns were defamatory because they suggested that she "disregarded the law, her oath of office and the safety of the citizens of Philadelphia . . . engaged in unethical, unprofessional and reprehensible conduct, abused her power as a public official . . . is ignorant of the law, lacks intelligence and does not perform her duties in a timely and responsible, professional manner."

[The defendants] made as a theme to their brief that Judge Lewis was blaming everyone but herself for having released a dangerous criminal.

The defendants moved for summary judgment. They emphasized that this is speech at the core of what the first amendment protects — speech criticizing the official action of an elected government official. In their summary judgment motion, the defendants stressed the absurdity of Judge Lewis' position that she has no responsibility for managing her criminal calendar so as to avoid Rule 1100 problems. They thus made as a theme to their brief that Judge Lewis was blaming everyone but herself for having released a dangerous criminal.

Defendants argued that the columns were true or, at a minimum, were constitutionally protected opinions under *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), because the statements were not provably false. The defendants offered an expert report from a criminal law professor who opined that the June 18th to July 2nd period *was* chargeable to the defendant. The expert further opined that, contrary to Judge Lewis' position, judges *do* bear responsibility for managing their criminal calendars and that role does not fall solely on the prosecutor.

At a minimum, the defendants argued, Geringer's opinions were rationale interpretations of an ambiguous

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Pennsylvania Trial Court Dismisses Judge's Defamation Claim

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event protected under *Time, Inc. v. Pape*, 401 U.S. 279 (1971) and its progeny. The defendants further argued that they acted without malice.

The defendants emphasized that it is not defamatory to criticize a public official's official decision. Judges are required to make legal rulings every day. Every time a litigant files an appeal, he makes an argument that the judge erred in some way. Therefore, it can hardly be defamatory to state that a judge has made an incorrect legal ruling.

Judge Garb's Ruling

Judge Garb granted the motion. First, he found that the three columns did not present a statement that was sufficiently "false" to survive constitutional scrutiny. Judge Garb agreed with the defendants that Judge Lewis could not pass the responsibility for managing her calendar off on the prosecutor. While there was "some ambiguity as to whether the release was dictated or mandated by proper application of Rule 1100," that was not an issue which he needed to decide.

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

Judge Garb found that "the thrust of the article was that the Plaintiff failed to bring [Bryant] to trial within the time permissible under the Rule." Judge Garb found that, contrary to Judge Lewis' assertion, "the calendaring of cases lies ultimately within the power and responsibility of the trial court which has the ultimate responsibility for proper management of the criminal calendar."

Judge Garb went on to note that the remainder of the article simply pointed out (although in what he thought were "distasteful" terms) that Judge Lewis had released Bryant. This assertion was, therefore, not false.

Judge Garb also found that, because the columns were substantially true "the search for 'malice' is superfluous. (In fact we find none)."

Judge Garb went on to hold that the columns were nothing more than Geringer's *opinion* and therefore were protected under Pennsylvania and federal law. Judge Garb found that columns were "in the nature of a disagreement with the manner in which Plaintiff handled these cases [and do] not suggest or infer any corruption, unlawfulness, stupidity, or lack of good faith." Judge Garb stated that, although he thought the columns were distasteful, Judges must expect criticism and it is not defamatory simply to suggest that a Judge's ruling is wrong:

> We neither condone, applaud or admire the manner in which the Defendants expressed their displeasure with the Plaintiff's handling of these cases. The articles are tasteless, nasty and mean-spirited. However, Judges are often and must get used to being criticized for the manner in which they adjudicate some cases. *See*, *Dodds v. American Broadcasting Co.*, 145 F.3d 1053 (9th Cir. 1998). Obviously, in practically every case someone loses and invariably some of those losers feel that they have been abused. Public criticism of public officials is an inherent part of our democratic system of justice. Courtrooms are public places and the proceedings conducted therein are matters of public interest. Newspapers have a license to inform the public respecting public matters, but one would hope that it be done in a civilized and tasteful manner. In this case it was not. Notwithstanding, we have concluded and hold that these publications are not libelous.

A number of Pennsylvania judges have sued for libel in the last two decades. Perhaps Judge Garb's recognition that Judges, like other elected officials, are subject to legitimate public criticism will help quell this unfortunate trend.

The defendants were represented by Amy Ginensky, chair of Dechert's Media Practice Group and Michael Baughman, an associate in Dechert's Media Practice Group.

Plaintiff was represented by Richard Sprague and Geoffrey Johnson of Sprague & Sprague in Philadelphia.

WCBS-TV Not "Grossly Irresponsible"

Plaintiffs Did Not Respond to Reporter

By Tom Curley

A New York trial court has dismissed a defamation lawsuit against WCBS-TV brought by four teachers accused by a student of corporal punishment, ruling that the station was not "grossly irresponsible" in reporting on the accusations. Significantly, the court, in an opinion by Judge William T. Glover, held that because school officials thwarted the station's attempts to investigate the story further, the reporter was justified in reporting the student's version of events.

Student Complaint of Abuse

In a brief opinion issued September 18, the trial judge in *Kublall, et al. v. WCBS News, et al.*, No. 20625/98 (Queens County Supreme Court), granted the defendants' motion for summary judgment. The case arose from two news broadcasts aired in March 1998 on WCBS-TV that concerned the allegations of a fifth-grade student who claimed that four teachers at his public school had subjected him to corporal punishment. Among other accusations, the student alleged that he had been "forced to go to a 'time out' room where he was required to kneel with his hands behind his head" and where a teacher had stuck the student with a walkie-talkie.

The student first complained about the alleged mistreatment to his mother, who subsequently contacted school officials. Because "the mother claim[ed] that the school was not responsive when she expressed her concerns," she contacted reporter Marcia Kramer of WCBS-TV. Kramer interviewed both the mother and the student, who demonstrated how he was allegedly subjected to physical abuse. Kramer also confirmed that the mother had formally filed a complaint with the Special Investigator's Office of the New York City Board of Education.

Kramer next "contacted the school but they refused to speak with her. She then went to the school in an attempt to interview teachers and other school professionals as they left the building." However, Kramer was unable to speak with the plaintiffs, other teachers or school administrator about the student's allegations because "they had been instructed by the Superintendent's office not to speak with her."

Teachers Sue for Libel

Although they never complained to the station about the story when it first aired or made themselves available for comment, the plaintiffs sued WCBS-TV and Kramer six months after the broadcasts. Asserting claims for defamation and infliction of emotional distress, the plaintiffs maintained that the student's corporal punishment allegations were false.

The trial court first held that "the broadcasts were clearly about a matter of public concern," involving as they did allegations of inappropriate corporal punishment and the physical abuse of students in a public school. Accordingly, under New York law, the plaintiffs were required to demonstrate that the defendants were "grossly irresponsible" in broadcasting the student's accusations. As the New York Court of Appeals has explained, where the content of a publication relates to a matter of public concern, even a plaintiff who is neither a public official nor a public figure must establish that a defendant "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199, 341 N.E.2d 569, 571, 379 N.Y.S.2d 61, 64 (1975).

> ***Kramer "was actually prevented from conducting a more thorough investigation by school officials."***

The court ultimately concluded that the plaintiffs had failed to establish that WCBS-TV and Kramer acted "without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties," especially where, as here, the school district superintendent's office thwarted the defendants efforts to speak with the administration and staff of the school, including the plaintiffs, about the substance of the student's allegations. As the court observed, Kramer "was actually prevented from conducting a more thorough investigation by school officials."

Defendants were represented by CBS in-house counsel Susanna M. Lowy and Anthony M. Bongiorno and Lee Levine, Cameron Stracher and Tom Curley of Levine Sullivan & Koch, L.L.P. of Washington, D.C.. Derrick G. Arjune of Brooklyn, New York represented the plaintiffs.

Court Denies Motions to Dismiss in Post-September 11 Libel Action

By David P. Sanders

In one of the first libel actions dealing with post-September 11 reporting on the war on terrorism, the United States District Court for the Northern District of Illinois, in a wide-ranging opinion by Judge Coar, has denied a motion to dismiss a libel action brought by a United States Islamic charity against several prominent news organizations which reported that the plaintiff was the subject of a government investigation into possible financial links to terrorists. (*Global Relief v. New York Times Co.*, 2002 WL 31045394, N.D.Ill., Sept. 11 2002).

Background: Media Reports On Investigation

The plaintiff, Global Relief Foundation, Inc. ("GRF"), is the second largest Islamic charitable organization in the United States, which alleges that it provides humanitarian relief to Muslims in need of assistance around the world. As part of the war on terrorism, the government initiated an investigation into numerous domestic and foreign charities which the government believed had financial ties to terrorist organizations, including al Qaeda. On September 24, 2001, President Bush issued Executive Order 13224, which authorized the government to freeze the assets of persons and organizations, including charities, suspected of such financial links. The Executive Order listed the first charities whose assets would be frozen.

GRF alleged that the news reports were false and defamatory because they accused GRF of having financial ties to terrorists when it had no such ties

News organizations around the country reported on the government's investigation into charities. On September 24, 2001, before the exact content of the Executive Order was released, ABC News reported on its *Good Morning America* news program that the Executive Order would freeze the assets of several domestic charities accused of funneling money to Osama bin Laden, and identified GRF as one of them. The Executive Order, issued later that day, however, did not refer to GRF. ABC corrected its news story on its web site later that day.

On September 28, 2001, the *New York Daily News* published a column that reported that GRF was "suspected of being" a "front" for Hamas, and that GRF "has been accused by Israel and American security experts of funneling money and support to Hamas . . . it is currently under intense federal scrutiny." Several days later, on October 1, the *New York Times* published an article under the headline, "A Nation Challenged: The Investigations: U.S. Set to Widen Financial Assault," concerning the government's investigation into organizations "suspected of" providing money to terrorists organizations. The article reported that the Treasury Department was compiling a list of suspect organizations, and that "administration officials are preparing to freeze the assets of about two dozen more charities . . . suspected of providing money and support to terrorist organizations." The article also said that government officials were recommending that GRF be included on the new list of organizations whose assets would be frozen.

On October 5, 2001, the Associated Press published an article under the headline, "Islamic Aid Groups Scrutinized." It reported that GRF was one of three U.S. based relief organizations receiving "close federal scrutiny" that "may or may" not be on the government's next list of organizations with suspected links to terrorism whose assets would be frozen.

The *Boston Globe* published an article on October 11 under the headline, "Charity Probe: Muslim Relief Agency Eyed in Terror Link." It too reported that GRF "has been under federal scrutiny for some time" for alleged links to terrorists, and that it was expected to be added to the list of charities whose assets the government would freeze. On November 7, 2001, the *San Francisco Chronicle* published an article, headlined "Two Muslim Charities Probed For Terror Link," stating that the government was "scrutinizing" GRF for links to terrorists.

Suits Against Media and U.S.

GRF filed a complaint in federal court in Chicago on November 15, 2001, against all six news organizations and

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Court Denies Motions to Dismiss in Post-September 11 Libel Action

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the reporters who prepared the news stories, asserting claims for libel *per se* and commercial disparagement. GRF alleged that the news reports were false and defamatory because they accused GRF of having financial ties to terrorists when it had no such ties, and had not been accused by the government of having those ties.

Meanwhile, on December 14, 2001, before the media defendants had filed their responsive pleadings, the government added GRF to its list of organizations with suspected financial ties to terrorist organizations, raided GRF's offices, carted away its records, and froze all of GRF's assets pending further investigation into GRF's ties to terrorists. Shortly thereafter, GRF filed a lawsuit against the federal government in federal court in Chicago (the "O'Neill Action"). It alleged that the government had raided its offices and frozen its assets, in violation of GRF's constitutional rights.

In defending that case, a Treasury Department official filed an affidavit stating that the federal government had been investigating GRF since at least September 2001. GRF's admissions and this affidavit plainly confirmed the truth of the news organizations' prior news reports that the government had been investigating GRF for possible links to terrorists.

Motions to Dismiss Denied

The media defendants all filed Rule 12(b) motions to dismiss. The *New York Daily News*, the *San Francisco Chronicle*, and certain reporter-defendants initially moved under Rule 12(b)(2), contending that the court lacked personal jurisdiction over them under federal due process standards, because the articles were prepared outside of Illinois, and each of the newspapers circulated less than 15 copies in Illinois.

All of the defendants moved to dismiss, pursuant to Rule 12(b)(6), for failure to state a claim on the grounds that their publications were not libelous *per se* under the Illinois innocent construction rule, and that their statements reporting that GRF was being investigated by the government and was targeted to have its assets frozen were substantially true. In addition, the *San Francisco Chronicle* filed a motion under the California anti-SLAPP statute.

Jurisdiction Upheld

The district court denied these motions in their entirety. The court first addressed the personal jurisdiction motions. Relying primarily on *Calder v. Jones*, 465 U.S. 785 (1984) and *Gordy v. Daily News, L.P.*, 95 F.3d 829 (10th Cir. 1996), and ignoring recent decisions from the First and Second Circuits to the contrary, the court rejected the personal jurisdiction challenge. It ruled that the moving defendants were subjected to personal jurisdiction in Illinois because they specifically directed copies of the newspaper into Illinois knowing that GRF was an Illinois-based corporation. In essence, the court adopted a rule that a news defendant is *per se* subject to personal jurisdiction in a libel action in any state in which it circulates copies, regardless of how few, if the defendant knows that it is publishing an article about a resident of that state.

The court adopted a rule that a news defendant is per se subject to personal jurisdiction in a libel action in any state in which it circulates copies, regardless of how few, if the defendant knows that it is publishing an article about a resident of that state.

The court also rejected the argument by certain of the reporter-defendants that they were not subject to personal jurisdiction under the "fiduciary shield doctrine," which prohibits the exercise of personal jurisdiction over an employee whose contacts with the forum state arise solely out of work on behalf of his or her employer. Despite uncontradicted affidavits from the employees establishing that they were assigned to write the

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article in question, the court refused to apply the fiduciary shield doctrine on the ground that the reporters had a "personal interest" in their conduct because the articles contained their byline, and therefore were not acting solely for their employer.

Insurer Has Duty to Defend Insured in Defamation Action

In a recent non-media decision, an insurance company was held by the New York Court of Appeals to have a duty to defend its insured, a town hospital, in a defamation action. *Town of Massena v. Healthcare Underwriters Mut. Ins. Co. et. al.* No. 06398, 2002 WL 31056039 (N.Y. Ct. App. Sept. 17, 2002).

The district court in the underlying defamation action deemed the plaintiff physician a limited public figure who had to prove that members of the defendant hospital acted with actual malice. *Franzon v. Massena Memorial Hosp.* 89 F. Supp.2d 270 (N.D.N.Y. 2000). In an opinion by Judge Smith, the Court of Appeals found that the plaintiff's recovery would not be barred by public policy, which precludes conduct that is intended to injure from being covered by insurance (*see Public Serv. Mut. Ins. Co. v. Goldfarb*, 53 N.Y.2d 392 (1981)), because actual malice is alternatively defined as recklessness as to the falsehood. *See New York Times v. Sullivan*, 376 U.S. 254 (1964). Since, under its coverage policy, the insurer had a duty to defend the insured against the defamation, the insurer was required to defend the entire action according to *Frontier Insulation Contrs. v. Merchants Mut. Ins.*, 91 N.Y.2d 169 (1997).

This case was the result of a suit brought by Dr. Olof Franzen against Massena Memorial Hospital, its Board of Managers, its Medical Executive Committee, and hospital physicians and executives. Dr. Franzen alleged defamation, tortuous interference with business relations, and tortuous interference with contract.

Thomas J. O'Connor represented Healthcare Underwriters. William S. Brandt represented Town of Massena.

Refuses to Consider Evidence of Truth

The court's ruling on the truth was even more troublesome. The defendants argued that the gist or sting of their publications was that the government was investigating GRF for possible links to terrorism and was considering freezing GRF's assets as part of that investigation. In support of this argument, the defendants asked the court to take judicial notice of Global's admissions in its complaint from the O'Neill Action that the government had raided GRF's offices and frozen its assets on December 14, which demonstrated that their news reports were substantially true, a request supported by extensive authority holding that courts can take judicial notice on a motion to dismiss of a party's admissions in another pleading without converting the motion to dismiss into a motion for summary judgment.

Despite these authorities, the district court refused to take judicial notice of GRF's admissions because they were "disputable," and therefore, refused to find that the news reports were true. According to the district court, the fact that GRF itself admitted that its offices were raided by the government and that the government had frozen its assets on December 14 "says nothing about whether GRF was under investigation" at the time of the news reports. The court also refused to take judicial notice of the Treasury Department official's uncontradicted statement in the affidavit in the O'Neill Action that the government had been investigating GRF since September.

By refusing to take judicial notice, the district court avoiding reaching the substantive truth issue briefed by the parties: whether, as GRF contended, the truth issue is governed by the "rule of republication," requiring that the defendants establish that GRF actually had the ties to terrorists that the news reports stated the government was investigating, or instead, whether truth could be established simply by proof that GRF was, in fact, the subject of a government investigation, as the defendants contended. It remains unclear whether the court ultimately will accept the defendants' arguments that they need only prove the fact of an investigation into GRF to

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establish substantial truth, rather than proving that GRF actually had ties to terrorists.

Innocent Construction Defense Denied

The defendants also argued in the alternative that GRF failed to state a libel *per se* claim under the Illinois innocent construction rule. Under that rule, a statement which is susceptible to a reasonable construction falling outside one of Illinois' four recognized libel *per se* categories is not actionable as a matter of law, even if it also can be construed in a way that would be libel as *per se*; in this circumstance, the court is not permitted to weigh the two competing constructions, and must instead dismiss a libel *per se* claim. Citing established Illinois precedent, the defendants argued that their reports that GRF was being investigated for criminal activity was not actionable under the innocent construction rule because it can be construed in a way that does not accuse the person of actually engaging in criminal conduct.

In addressing this argument, the court seemingly conflated the element of defamatory meaning with the wholly separate element of falsity, stating "none of the reports [that GRF was under investigation] can be innocently construed if those statements are false." Because the court had refused to take judicial notice of the facts showing that the report of the investigation of GRF was true, it also denied the defendants' motion to dismissing challenging the separate issue of defamatory meaning.

Anti-SLAPP Applied But Denied

The court also denied the *San Francisco Chronicle's* Anti-SLAPP motion. That motion raised a conflict of law question: whether the law of Illinois, where GRF was located, or of California, where the defendants prepared the article, governed.

As a threshold matter, the court held that it was required to determine which state has the most significant relationship to a dispute on an "issue-by-issue" basis, rather than determining which one state has the greatest interest in the entire controversy, and then applying that state's law to every issue. The court concluded that Illinois had a greater interest than California in having its law applied to the elements of GRF's claim, but California had a greater interest in determining how much protection to give California speakers, and therefore, California law applied to the *Chronicle*'s defenses, including the Anti-SLAPP statute (which the court also held was applicable in federal court cases, and not just California state courts). Despite these favorable rulings on the threshold procedural issues, the court denied the *Chronicle's* motion under the statute on the grounds that it failed to establish its news report was true.

Disparagement Claims Dismissed

The court did provide at least one of item of good news to the defendants by dismissing GRF's claims for commercial disparagement under Illinois common law, the Uniform Deceptive Trade Practices Act, and the Illinois Consumer Fraud Act. The court accepted the defendants' arguments that a disparagement claim requires a statement that impugns the quality of the plaintiff's goods or services, not a statement which attacks the plaintiff's conduct or its integrity, and correctly concluded that the news reports did not give rise to a disparagement claim because they did not attack the quality of GRF's charitable services.

The defendants recently filed their answers to the complaint and are considering their strategy for defending the case.

David P. Sanders is a member of Jenner & Block, LLC, in Chicago, who is representing ABC in this action. Roger C. Simmons of Gordon & Simmons in Frederick, Maryland represents GRF. Michael M. Conway and Miki Vucic of Foley & Lardner are representing The New York Times, *the* Boston Globe, *and the* New York Daily News*; David A. Schulz of Clifford Chance Rogers & Wells in New York and Bruce A. Braverman of Sachnoff & Weaver in Chicago are representing the Associated Press; and Roger R. Myers and Lisa M. Sitkin of Steinhart & Falconer in San Francisco and Steven L. Baron of D'Ancona & Pflaum in Chicago are representing the* San Francisco Chronicle *in this action.*

Germany is More Appropriate Forum for Libel Action Against Publisher of German Magazine, BUNTE

By Mark A. Weissman

A New York Supreme Court judge recently dismissed a libel action against the publisher of the German magazine, BUNTE, on the grounds of *forum non conveniens.*

In March 2002, plaintiffs Thomas Zeumer, a renown German businessman, and Metropolitan Worldwide, Inc., a modeling agency of which Mr. Zeumer is president, were the subject of an article published in the German newsweekly, BUNTE. BUNTE is published in Germany by the German publishing company, Bunte Entertainment Verlag, GmbH. BUNTE is immensely popular in Germany, but has only limited circulation outside of that country. Of the total worldwide circulation of 800,000, less than 300 copies of BUNTE are circulated in the New York area.

The BUNTE article that was the subject of the libel suit allegedly related "the downfall of the fortunes" of Metropolitan, the agency which had once represented and purportedly discovered German "supermodels" such as Claudia Schiffer and Heidi Klum. The BUNTE article allegedly defamed plaintiffs by reporting that plaintiffs were under investigation by German prosecutors and had been sued by investors for securities fraud. The article also allegedly reported that plaintiffs had business dealings with a convicted criminal and that funds invested in Metropolitan Worldwide were diverted for Zeumer's personal use.

The BUNTE article was written and edited by BUNTE reporters in Germany. Newsgathering for the report was conducted primarily in Germany, although a New York-based reporter working for Hubert Burda Media, Inc., contributed some elements to the report. Hubert Burda Media, Inc. is a New York company that conducts research and newsgathering for BUNTE magazine, among others.

Shortly after BUNTE's publication of article, Zeumer sought and received a preliminary injunction in a German court to prevent BUNTE's publisher from republishing the allegedly defamatory article, and hired a second attorney, in Germany, to attempt to settle with BUNTE's publisher.

Zeumer and Metropolitan Worldwide then sued BUNTE's publisher in Supreme Court, New York County seeking compensatory and punitive damages for libel in excess of $100 million. Plaintiffs also named as defendants in the lawsuit the article's German author and German editor, as well as the New York-based reporter and her employer, Hubert Burda Media, Inc. Only the New York-based reporter and Hubert Burda Media, Inc. were served in the New York action.

The two New York defendants moved to dismiss the New York action on the grounds that New York had insignificant contacts with the BUNTE article and that Germany was a more appropriate forum for resolution of the issues in the case. Defendants argued that BUNTE was a German magazine and had limited circulation in New York, that all of the essential parties and witnesses were located in Germany, that virtually all of the reporting and newsgathering took place in Germany, and that plaintiffs had already commenced related actions in the German courts. Defendants also argued that in a New York court, the documentary evidence, including the allegedly defamatory article, would need to be translated for an English-speaking jury, unfamiliar with the nuances of the German language.

Defendants argued that BUNTE was a German magazine and had limited circulation in New York.

In their opposition, plaintiffs argued that New York was the more appropriate forum because Metropolitan Worldwide had its headquarters in New York, that Zeumer worked in New York, and that damages to plaintiffs' reputation occurred in New York, and that some witnesses resided in New York. Plaintiffs also argued that Germany was not an adequate legal forum for resolution of their claims because features of the American judicial system — such as trial by jury, contingency fees and punitive damages — are not available in German courts. In addition, plaintiffs sought to amend their complaint to add an additional New York defendant, Paolo Zampoli, alleging that Zampoli defamed Zeumer by allegedly calling him a "crook."

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Germany is More Appropriate Forum

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Justice Walter B. Tolub, of Supreme Court, New York County, dismissed the action on grounds of *forum non conveniens*, holding that Germany was the "appropriate forum" for resolution of the dispute. In dismissing the complaint, Justice Tolub found that "the defamatory statements were made in German and directed in the main to … German speaking and European residents," recognizing that there would "be problems of translation" in a New York trial.

The court also found that German libel law would likely be applicable, that many of the important witnesses were in Germany, that damages would be measured by the impact of the article in Germany, that plaintiffs maintained offices and conducted business in Germany, and that plaintiffs had already commenced actions in Germany. The court rejected plaintiffs' argument that Germany was not an adequate forum, reasoning that accepting plaintiffs' argument would prohibit *forum non conveniens* dismissal wherever a non-American forum is sought because "contingency fees and jury trials of civil cases are unique to our system of law."

The court also accepted defendants' argument that jurisdiction over the most significant defendants was doubtful given New York's policy against asserting long-arm jurisdiction over foreign publishers in defamation cases.

In its decision, the court conditioned dismissal on defendants' submission to the jurisdiction of German courts and their waiver of a statute of limitations defense.

In *Metropolitan Worldwide, Inc. v. Bunte Entertainment*, the plaintiffs were represented by Edward C. Kramer of the Law Office of Edward C. Kramer, P.C. in New York. Defendants were represented by David A. Schulz and Mark A. Weissman of Clifford Chance US LLP, in New York.

Mark A. Weissman is an associate in the New York office of Clifford Chance US LLP.

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80 Eighth Avenue, Suite 200
New York, NY 10011

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Ninth Circuit Upholds Fair Use of Denny Beating Footage

Court TV's Use Of "Denny Beating" Footage To Promote Its Trial Coverage Did Not Infringe Plaintiffs' Copyright

By Frederick F. Mumm

Finding an advertising use of copyrighted material to be a fair use, the Ninth Circuit Court of Appeals affirmed summary judgment in favor of Court TV in *Los Angeles News Service v. CBS Broadcasting Inc.*, 2002 WL 31051541 (9th Cir. 2002).

Los Angeles News Service ("LANS") is an independent newsgathering organization, owned by Robert Tur and his wife Marika Tur. LANS and Robert Tur own the copyright in the famous video known as "The Beating of Reginald Denny." In 1993, Court TV broadcast the trial of the perpetrators of the beating. Robert Tur testified at the trial, and his videotape of the attack was shown repeatedly to the jury.

Court TV used a few seconds of the footage in advertisements promoting its coverage of the trial. Court TV also incorporated a portion of this footage into an introductory montage for its program "Prime Time Justice," which recapped the day's events in various trials around the country.

LANS and Robert Tur sued Court TV and CBS Broadcasting Inc. for copyright infringement. LANS' claim against CBS was that its predecessor-in-interest, Westinghouse Electric Co., allegedly had made portions of the Denny beating (and other riot footage) available to subscribers of its Group W Newsfeed news reporting service ("Newsfeed"), including Court TV.

The District Court granted summary judgment to both CBS and Court TV. The claim against CBS was dismissed based on CBS' objections to plaintiffs' evidence of infringement. The claim against Court TV was dismissed based on fair use.

The Ninth Circuit, while affirming the District Court's rulings on most of CBS' evidentiary objections, reversed the exclusion of one piece of evidence tending to support plaintiffs' claim that Newsfeed had infringed plaintiffs' works. The Court therefore remanded the case as to CBS to the District Court for further proceedings.

Analyzing Four Factors

More significantly, however, the Ninth Circuit affirmed dismissal of the copyright claim against Court TV. In reaching this decision, the Court faced a dearth of authority analyzing fair use in the context of commercial advertising as well as two prior Ninth Circuit decisions rejecting claims of fair use of the same video. (*Los Angeles News Service v. KCAL-TV Channel 9*, 108 F.3d 1119 (9th Cir. 1997) (reversing summary judgment obtained by defendant based on fair use); *Los Angeles News Service v. Reuters Television Int'l*., 149 F.3d 987, 993 (9th Cir. 1998) (affirming denial of defendant's motion for summary judgment based on fair use).

According to the Court, the most important aspect of the first element of the fair use analysis (purpose and character of the use) is whether the use was transformative.

The Court examined the four fair use factors enumerated in 17 U.S.C. § 107. According to the Court, the most important aspect of the first element of the fair use analysis (purpose and character of the use) is whether the use was transformative – whether the use "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." The significance of this inquiry is that "[t]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against the finding of fair use."

The Court noted that a mere rebroadcast of a newsworthy event is *not* ordinarily transformative. In *KCAL-TV*, the defendant television station had provided its own voice-over to plaintiffs' "Beating of Reginald Denny" videotape. In reversing a finding of fair use, the Ninth Circuit concluded in that case that KCAL had not added anything new or transformative.

Transformative Uses

Here, Court TV had used portions of the video in an introductory montage for its "Prime Time Justice" program:

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Ninth Circuit Upholds Fair Use of Denny Beating Footage

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> which used a stylized orange clock design superimposed over a grainy, tinted, monochromatic video background. The background changed as the "hands" of the clock revolved; LANS' copyrighted video was in the background for a couple of seconds, one 360° sweep of the clock.

Court TV also used portions of plaintiffs' video in promotions that used a split screen effect, with excerpts of witnesses testifying on the right-hand of the screen while portions of the Denny beating were shown on the left side of the screen.

The Court found that the "editing for dramatic effect" provided the introductory montage with a better claim to being transformative than the use in the promotions for the trial coverage. Using a sliding scale approach, the Court concluded that the commercial purpose of the montage use was offset by the transformative nature of that same use. On the other hand, the Court found the use in the promotions for the trial coverage, while less transformative, was more plausibly associated with news reporting, a favored purpose under the statute. On balance the Court found the first factor weakly favored a finding of fair use.

The Court noted that a mere rebroadcast of a newsworthy event is not ordinarily transformative.

In *KCAL*, the Court had already reviewed the nature of the Denny beating work (a tape of a news event). Referring to the opinion in that case, the Court held that the second factor clearly pointed toward fair use.

Amount Used

The third factor, the amount and substantiality of the portion used, was neutral. The Court rejected plaintiffs' claim that the few seconds used by Court TV was "the heart of the work," noting that in a prior case involving the same videotape, plaintiffs claimed that 45 seconds used in that case was the heart of the work. Nonetheless, the Court did not wish to minimize the importance of the portions used by Court TV ("if not the heart, they amount at least to a ventricle").

Impact on Potential Market

Finally, the Court evaluated the effect of Court TV's use on the potential market for the work. The Court had no difficulty finding that the transformative use in the montage would not have negatively affected plaintiffs' market. The Court found the rebroadcast of the clip to promote the trial coverage more troublesome. Nonetheless, the Court found this factor also pointed in favor of fair use:

> Court TV operated in a significantly different market than did LANS. As we have noted, Court TV was not competing with LANS to show riot coverage, or even breaking news of the same general type; the courtroom setting is, after all, singularly unsuited to helicopter coverage. Moreover, this incident presented no apparent effort to evade licensing outright.

The deference the Ninth Circuit gave to Court TV's use promoting its trial coverage is consistent with right of publicity cases holding that advertising a lawful use of a protected image is itself a lawful use of the image. *E.g.*, *Booth v. Curtis Publishing Co*., 15 A.D. 2d 343, 223 N.Y.S. 2d 737 (1962); *Namath v. Sports Illustrated*, 48 A.D. 2d 487, 371 N.Y.S. 2d 10 (1975); *Montana v. San Jose Mercury News*, 34 Cal. App. 4th 790, 40 Cal. Rptr. 2d 639 (1995). The Ninth Circuit's decision in *LANS v. CBS* contains, perhaps, the clearest application of this principle to a claim of copyright infringement.

H. J. Ford III and Lindsay A. Duro of Tyre Kamins Katz & Granoff, Los Angeles, California, and William A. Bergen, Auburn, California, represented Los Angeles News Service and Robert Tur.

Frederick F. Mumm, a partner of Davis Wright Tremaine LLP, Los Angeles, California, and Susanna Lowy and Anthony M. Bongiorno of CBS Broadcasting Inc., New York, New York, represented CBS Broadcasting Inc. and Courtroom Television Network.

Tennessee Adopts "Functional Equivalence" Test for Access to Non-Governmental Entity's Records Under the Tennessee Public Records Act

By Lucian T. Pera and Brian S. Faughnan

On September 5, 2002, the Tennessee Supreme Court, in an unanimous ruling, ruled that the records of a private corporation are subject to the access requirements of the Tennessee Public Records Act, Tenn. Code Ann. §§ 10-7-503 *et seq.*, when the private corporation is the "functional equivalent" of a government agency. *Memphis Publishing Co. v. Cherokee Children and Family Services, Inc.*, slip op., No. M2000-01705-SC-R11-CV, 2002 Tenn. LEXIS 379 (Tenn. Sept. 5, 2002). In bringing an end to a protracted, three-year dispute over public access to the records of a non-profit corporation that had served as child care broker services for subsidized childcare for the Tennessee Department of Human Services ("TDHS"), the Tennessee Supreme Court continued its recent history of interpreting the Tennessee Public Records Act flexibly so as to ensure "the fullest possible public access to public records."

Cherokee's Relationship With the State

In December 1989, Cherokee Children and Family Services, Inc. ("Cherokee") was privately-created as a non-profit, public benefit corporation. Within a matter of months, Cherokee contracted with the TDHS to provide child care broker services such as screening applicants for subsidized child care and helping eligible applicants locate TDHS-approved child care providers.

Cherokee's relationship with TDHS was governed by three different contracts over ten years. The first contract, lasting from 1990-1992, was a grant contract under which Cherokee performed its brokerage services for the TDHS on a cost-reimbursement basis ("the 1990 Contract"). The second contract executed by TDHS and Cherokee, which was in force from 1992-1999, changed the payment method to a fee-for-services arrangement under which Cherokee received payment in the form of a commission amounting to a percentage of the funds disbursed by TDHS to day care centers as a result of Cherokee's services ("the 1992 Contract"). The third and final contract, which was in effect beginning on January 1, 2000, returned to the cost-reimbursement plan ("the 2000 Contract").

The Commercial Appeal Seeks to Review Cherokee's Records

In 1999, Marc Perrusquia, an investigative reporter for *The Commercial Appeal* began making public records requests of Cherokee with regard to a wide variety of financial documents and related records in order to investigate whether Cherokee was properly performing its public duties or whether, as was suspected, Cherokee was wasting public monies and enriching Cherokee insiders at taxpayer expense. After numerous letters from Perrusquia to WillieAnn Madison, Cherokee's executive director, went unanswered, *The Commercial Appeal* enlisted the assistance of its attorneys in seeking access to Cherokee's records. Prior to the commencement of litigation, TDHS took the position that Cherokee's records were public records and instructed Cherokee to comply with *The Commercial Appeal*'s request for access. Cherokee defied TDHS and refused to provide any of the requested records.

The Lower Courts Rest Their Decisions on the Contract Between Cherokee and TDHS

The Tennessee Public Records Act declares that "all state, county and municipal records . . . shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law." Tenn. Code Ann. § 10-7-503(a).

Before the trial court, *The Commercial Appeal*'s principal assertion was that it was entitled to access to all of the Cherokee records it sought because the 1992 Contract specifically stated that "All records, files, and documentation held in the custody of the Contractor [Cherokee] shall be considered to be the property of the State." In addition, however, *The Commercial Appeal* also argued that Cherokee was acting as an agent of the State and that under existing Tennessee authority, *Creative Restaurants, Inc. v. City of Memphis*, 795 S.W.2d 672 (Tenn. Ct. App. 1990), the records sought were subject to public access.

The trial court agreed with *The Commercial Appeal* that, based on the plain language of the 1992 Contract, all of the

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Tennessee Adopts "Functional Equivalence" Test

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records sought were public records because they were state property. The trial court, however, refused to find that Cherokee was an agent or instrumentality of the State.

Subsequently, Cherokee appealed, and a three-member panel of the Tennessee Court of Appeals reversed the trial court's ruling. The Court of Appeals held that the 1992 Contract could not reasonably be construed as making "all" of Cherokee's records state property, reasoning that such an interpretation would lead to what it considered absurd results. The Court of Appeals agreed with the trial court, however, that Cherokee was acting as an independent contractor and not as an agent or instrumentality of the State.

The Tennessee Supreme Court granted *The Commercial Appeal* permission to appeal this adverse ruling and ultimately reversed the decision of the Court of Appeals. In its briefs to the Tennessee Supreme Court, in addition to arguing the contractual interpretation and agent of the state issues that had been analyzed by the lower courts, *The Commercial Appeal* also argued that the Tennessee Supreme Court should take the opportunity presented by this case to adopt a functional equivalence test in order to assure the public access to records when certain traditionally governmental functions are privatized or contracted out to private entities.

"When a private entity's relationship with the government is so extensive that the entity serves as the functional equivalent of a governmental agency, the accountability created by public oversight should be preserved."

Access Under a Functional Equivalence Theory

In an unanimous opinion authored by Justice Adolpho A. Birch, Jr., the Tennessee Supreme Court set the contractual interpretation issue aside and proceeded directly to a statutory analysis of the Tennessee Public Records Act, noting as prologue that the Tennessee Public Records Act "serves a crucial role in promoting accountability in government through public oversight of governmental activities."

The Court explained that the Court of Appeals had taken what it considered to be a "relatively narrow" approach in the past with regard to defining whose records are subject to the Act. The Tennessee Supreme Court noted that in *Memphis Publishing Co. v. Shelby County Health Care Corp.*, 799 S.W.2d 225 (Tenn. Ct. App. 1990), the Court of Appeals had applied a "legislative determination" test in finding that because a private hospital had not been established as a governmental entity by legislative determination that it was not subject to the Tennessee Public Records Act regardless of its public function, public oversight, or public funding. The Tennessee Supreme Court also noted that in *Creative Restaurants, Inc. v. City of Memphis*, the Court of Appeals relied upon agency law to find that certain subleases of City-owned property in the hands of a private entity that was serving as the City's leasing agent were public records.

Nevertheless, the Tennessee Supreme Court announced that the law of agency was not the appropriate vehicle for evaluating whether records in the hands of a private entity are public records because of the "growing trend toward privatization of governmental functions and services." After briefly reviewing several decisions from a variety of other jurisdictions dealing with issues of public access to records in the hands of private entities performing government functions, the Tennessee Supreme Court adopted a functional equivalency test similar to that initially created by the Connecticut Supreme Court, so that,

> "[w]hen a private entity's relationship with the government is so extensive that the entity serves as the functional equivalent of a governmental agency, the accountability created by public oversight should be preserved."

The Tennessee Supreme Court then explained that the cornerstone of the test adopted was "whether and to what extent the entity performs a governmental or public function." The Court's stated intent was

> "to ensure that a governmental agency cannot, intentionally or unintentionally, avoid its disclosure obligations under the Act by contractually delegating its responsibilities to a private entity."

The Court also listed additional factors relevant to the functional equivalence analysis, namely

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Tennessee Adopts "Functional Equivalence" Test

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(1) the level of government funding of the entity;

(2) the extent of government involvement with, regulation of, or control over the entity; and

(3) whether the entity was created by an act of the legislature or previously determined by law to be open to public access.

Prior to applying this newly adopted test to Cherokee, the Court made clear that "[a] private business does not open its records to public scrutiny merely by doing business with, or performing services on behalf of, state or municipal government," but that the Tennessee Public Records Act will apply so that a private entity is "held accountable to the public for its performance" when "an entity assumes responsibility for providing public functions to such an extent that it becomes the functional equivalent of a governmental agency."

Finally, in applying the functional equivalence test to Cherokee, the entity in question, the Court found that Cherokee was the functional equivalent of a state agency, emphasizing that: (1) the services that Cherokee performed were public in nature; (2) all of Cherokee's employees were involved in providing these services; (3) Cherokee's charter explained that its business activities were exclusively dedicated to performing the state services under its contracts; (4) Cherokee's operation was financed with public funds; and (5) the State exercised a significant level of governmental control and oversight over Cherokee.

The Tennessee Supreme Court's decision in *Cherokee* should prove extremely helpful to media entities in Tennessee in their efforts at newsgathering in a political environment in which governmental functions, from state prisons to county hospitals, increasingly seem to be contractually entrusted to private companies.

Mr. Pera and Mr. Faughnan, who practice in the Memphis, Tennessee, office of Armstrong Allen, PLLC, represented plaintiffs Memphis Publishing Company and Mike Kerr in Memphis Publishing Company v. Cherokee Children and Family Service, Inc.

Alan Wade, Thomas Lang Wiseman and Lori Hackleman Patterson of Memphis for Cherokee Children & Family Services

Colorado Court Holds Sunshine Law Applies To Gatherings Of Public Bodies Organized By Private Entities

By Christopher Beall

In an important decision addressing a common tactic by public bodies and private businesses to avoid their states' sunshine law requirements, the Colorado Court of Appeals held last month that Colorado's Sunshine Law applies to gatherings that are organized or arranged by a private entity if a quorum of a public body attends the meeting and public business is discussed, even if the public officials are merely passive observers at the meeting and do not actively "participate" in the discussion. *See Costilla County Conservancy Dist. v. Board of County Commissioners*, __ P.3d __, 2002 WL 31116739 (Colo. Ct. App. Sept, 12, 2002) (pet. for rehearing pending). The decision, by Judge Roy, which concurs with the holdings of a scattering of other courts in other jurisdictions, stresses that a public body may not avoid the obligations of public access and public notice through a subterfuge of having a private entity call or organize a meeting.

The *Costilla County* case arose out of the continuing efforts of residents and environmental organizations to monitor the activities of a gold mine operated by Battle Mountain Resources, Inc., in Costilla County, Colorado, which is in the San Juan Mountains in south-central Colorado. In 1999, while the company was working on the reclamation program instituted for the mine, the Colorado Department of Public Health and Environment issued a notice of violation and a cease and desist order to the company for water quality violations. As part of the settlement of that regulatory violation, the company agreed to construct a water treatment facility for the mine. This water treatment plant needed permits from a variety of state and local permitting organizations, including the land use department of Costilla County.

Meeting at "The Hideaway"

On September 20, 1999, the company and two state administrative departments organized a meeting to discuss the

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Colo. Ct. Holds Sunshine Law Applies To Gatherings Of Public Bodies Organized By Private Entities

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water treatment plant at a restaurant appropriately named "The Hideaway." All three members of the County Commission were individually invited to attend, and two of them did attend. The two county commissioners did not actively participate in the meeting (by making presentations or asking any questions), but instead merely observed the presentations from the company's officials and lawyers and the presentations from the two state agencies.

Although this meeting did not receive any public notice, additional invited guests attended the meeting, including the mayor of the City of San Luis, other county officials, and certain private citizens. No member of the Costilla County Conservancy District, a local citizen's group which had been actively involved in monitoring the gold mine's reclamation program, was invited or received notice of the meeting. Shortly after the September 20, 1999, meeting, Costilla County's land use administrator approved three permits for the water treatment facility. (This decision by the land use administrator was otherwise appealable to the Board of County Commissioners.)

Upon learning of the meeting at The Hideaway, the Costilla County Conservancy District brought suit under the Colorado Open Meetings Law, Colo. Rev. Stat. § 24-6-401 to -402, seeking a declaratory judgment that the meeting violated the statute. The trial court concluded, however, that because the county commissioners who attended the meeting had not "participated" in the session and were merely passive observers, and because the meeting was organized and convened by an entity not subject to the statute, the obligations of public access and public notice under the Colorado Open Meetings Law did not apply.

Sunshine Laws Applied to Meeting

In reversing the trial court's judgment, the Colorado Court of Appeals concluded that the Colorado Open Meetings Law applies not just to meetings called by a public body, but also to any meeting where a quorum of a public body "is expected to be in attendance." *See* Colo. Rev. Stat. § 24-6-402(2)(c). This language necessarily means that it is irrelevant whether there is "participation" by the public officials at the meeting – mere expected attendance at a meeting where public business is to be discussed is sufficient to trigger the obligations of the statute.

In reaching this conclusion, which had also been advocated by two amici curiae, the Colorado Press Association and the Colorado Freedom of Information Council, the Court of Appeals' holding conforms to the decisions of other jurisdictions that have addressed similar attempts to avoid the obligations of their state's sunshine laws. *See State ex rel. Badke v. Village Bd.*, 494 N.W.2d 408, 415 (Wis. 1993); *McComas v. Board of Educ.*, 475 S.E.2d 280, 289-90 (W. Va. 1996). In its opinion, the Colorado court did not cite these out-of-state decisions.

Mere expected attendance at a meeting where public business is to be discussed is sufficient to trigger the obligations of the statute.

The Court of Appeals noted that any other holding would invite public bodies and private parties subject to government regulation to engage in subterfuge and deceit:

> "If public entities are excused from the public notice requirements merely because they did not convene or arrange the meeting, private parties would be encouraged to circumvent the Act by inviting public officials to attend as passive onlookers private presentations on public matters for the purpose of influencing their subsequent policy decisions. . . . That interpretation would be inconsistent with a liberal construction of the Act in favor of openness and public notice and would fail to protect the public, the Act's ultimate beneficiary." *Costilla County*, 2002 WL 31116739, at *3.

The plaintiffs, Costilla County Conservancy District and Michael McGowan, were represented by Lori Potter and James W. Hubbell, of Kelly Haglund Garnsey & Kahn LLC, of Denver, Colorado.

The Colorado Press Association and the Colorado Freedom of Information Council, which filed an amici curiae brief in favor of the plaintiffs, were represented by Thomas B. Kelley and Steven D. Zansberg, of Faegre & Benson, LLP, of Denver, Colorado.

Christopher Beall is an associate with Faegre & Benson, Denver, Colorado.

Courts Rule On Access In Terror War Cases

Open Hearing in Haddad Case

As reported in detail on page 11 of this *LDRC MediaLawLetter*, on October 8 the Third Circuit Court of Appeals reversed a lower court ruling that the blanket policy of holding closed immigration hearings in cases that the government says are related to terrorism investigations is unconstitutional. *North Jersey Media v. Attorney General*, No. 02-2524 (3rd Cir. Oct. 8, 2002) (appeal of 205 F.Supp.2d 288, 30 Media L. Rep. 1865 (D.N.J. May 28, 2002).

The Third Circuit's opinion stands in stark contrast to the Sixth Circuit's August 26 ruling in a similar case, which upheld a federal district court judge's ruling that immigration hearings involving Muslim activist Rabih Haddad could not be closed under a blanket order issued after the Sept. 11, 2001 terrorist attacks. *See Detroit Free Press v. Ashcroft*, Civil No. 02-1437, 2002 WL 1972919 (6th Cir. Aug. 26, 2002); *see also LDRC MediaLawLetter*, Sept. 2002, at 3.

The Third Circuit's opinion stands in stark contrast to the Sixth Circuit's August 26 ruling in a similar case.

Following the Sixth Circuit opinion, a bond hearing that was open to the public was held Oct. 2 in Haddad's deportation case.

The bond hearing occurred after District Judge Nancy Edmunds held, in light of the appellate court's opinion, that a closed bond hearing violated Haddad's right to due process. On Sept. 17, Edmonds ruled that a new, public hearing must be held, or else Haddad must be released within 10 days. She also ordered that the case be assigned to a new immigration judge.

Although the open hearing was held, Justice Department officials appealed Edmonds' order requiring it. *See Haddad v. Ashcroft*, No. 02-2189 (6th Cir. filed Oct. 3, 2002). They also asked for and received more time from the Sixth Circuit to apply for an *en banc* rehearing of the government's appeal of Edmunds original order. *See Detroit Free Press v. Ashcroft*, No. 02-1437 (6th Cir. order Sept. 30, 2002) (extending time to file motion for rehearing *en banc*).

Haddad, co-founder of the Global Relief Foundation, has been detained by the federal government since Dec. 14. The government, which is seeking to deport Haddad and several of his relatives for overstaying their visas, alleges that the foundation raises funds to support terrorist activities.

Haddad's supporters say that he does not support terrorists, and a libel suit filed the foundation against various media outlets that reported on the government's allegations against it continues. (The trial court's denial of defendants' motions to dismiss in this suit is reported on p. 39.) *See Global Relief Fdtn. v. New York Times Co.*, Civil No. 01-8821, 2002 WL 31045394 (N.D. Ill. Sept. 11, 2002).

Edmonds' decision to open the proceedings in Haddad's case, and the appellate ruling upholding it, came in consolidated lawsuits brought by *The Detroit News*, *The Metro Times*, the *Detroit Free Press*, the *Ann Arbor News*, the ACLU, Congressman John Conyers (D-Mich.) and by Haddad himself. *See Detroit Free Press v. Ashcroft*, Civil No. 02-1437, 2002 WL 1972919 (6th Cir. Aug. 26, 2002) (affirming 195 F. Supp. 2d 937, 30 Media L. Rep. 1598 (E.D. Mich. 2002)); *see also LDRC MediaLawLetter*, Sept. 2002, at 3; April 2002, at 31.

While much of the bond hearing – which was eventually continued until Oct. 22 – was open to the public, a portion was closed so that the government could present classified evidence in support of its contention that releasing Haddad on bond while his deportation case proceeds would be dangerous. Haddad has also applied for political asylum, a request that will be heard Oct. 23.

Meanwhile, arguments are scheduled for Nov. 18 in the expedited appeal of a district court ruling that the government must release the names of those who have been detained since the attacks. *See Center for Nat'l Security Studies v. Dept. of Justice*, No. 02-5254 (D.C. Cir. filed Aug. 13, 2002), *stayed by* Civil No. 01-2500 (D.D.C. stay issued Aug. 15, 2002); *see also LDRC MediaLawLetter*, Aug. 2002, at 55.

Moussaoui's Motions Public After Review

On Sept. 27 the judge presiding over the prosecution of alleged terrorist conspirator Zacarias Moussaoui ruled that the defendant's sometimes cognizant, sometimes rambling briefs would be released to the public and press after being reviewed by government terrorism experts. *U.S. v. Moussaoui*, Crim. No. 01-455-A (E.D. Va. order Sept. 27, 2002),

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available at notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/67639/0.pdf.

The ruling by U.S. District Judge Leonie Brinkema reverses an earlier order she issued in late August which sealed all of Moussaoui's *pro se* pleadings, based on the government's argument that they may include coded messages to terrorists. *See LDRC MediaLawLetter*, Sept. 2002, at 40. Brinkema was asked to reconsider her order by several media organizations, including the Tribune Company, ABC, the Associated Press, CNN, CBS, *The Washington Post*, *USA Today* and the Reporters Committee for Freedom of the Press. The media intervenors were represented by Jay Ward Brown of Levine, Sullivan and Koch in Washington, D.C.

Under the new order, the government will have 10 days to review each of Moussaoui's filings and to petition the court asking that the entire document, or portions of it, be sealed. If the government does not file such a petition, the document will be released.

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Brinkema's new order came nine days after she released, with a few redactions at the request of the government, a handwritten pleading that Moussaoui submitted to the court on Sept. 15. Unlike many of his previous motions, this document did not include threats or racial slurs. "This motion must be publish (sic)," the document stated. "You have no false excuse to gag me any longer."

Some Light on Secret Court

The court established in 1978 to hear appeals from a lower court which evaluates requests for government surveillance in intelligence investigations heard its first case ever on Sept. 9, during a closed session in a secret room within the Justice Department. *In re Appeal from July 19, 2002 Decision of the United States Foreign Intelligence Surveillance Court*, No. 02-001 (F.I.S. Ct. Rev. filed Aug. 21, 2002).

The appeal is of a decision by the Foreign Intelligence Surveillance Court rejecting a new policy for using evidence gathered in non-intelligence investigations in intelligence cases. That decision itself marked a number of firsts – the court's first outright rejection of a government request, and the first public release of a decision by the court. *See In Re All Matters Submitted to the Foreign Intelligence Surveillance Court*, No. 02-429, 2002 WL 1949263 (F.I.S.Ct. May 17, 2002), *available at* www.washingtonpost.com/wp-srv/onpolitics/transcripts/fisa_opinion.pdf. *See also LDRC MediaLawLetter*, Sept. 2002, at 39.

The only oral argument came from the government, and was made by Solicitor General Theodore B. Olsen himself.

While the proceeding and argument were secret, the government did release its briefs in the case. The government's brief is available at www.eff.org/Privacy/Surveillance/FISCR/pdf/20020919_DOJ_FISA _appeal.pdf; the supplemental brief is at www.fas.org/irp/agency/doj/fisa/092502sup.html. Associate Deputy Attorney General David S. Kris justified the government's argument before a Senate Judiciary Committee hearing on Sept. 10; the testimony is available at www.usdoj.gov/dag/testimony/2002/krissenjud091002.htm.

The ACLU, the Center for Democracy and Technology, the Center for National Security Studies, the Electronic Privacy Information Center (EPIC), the Electronic Frontier Foundation, and the Open Society Institute filed an amicus brief arguing that the lower court's opinion should be upheld; it is available at www.epic.org/privacy/terrorism/fisa/FISCR_amicus_brief.pdf.

The National Association of Criminal Defense Lawyers filed its own amicus motion in support of the lower court; the motion can be found at www.epic.org/privacy/terrorism/fisa/nacdl_fisa_brief.pdf.

The appellate court, the Foreign Intelligence Surveillance Court of Review, consists of three judges appointed to seven-year terms by Chief Justice William H. Rehnquist: 6th Circuit Court of Appeals Judge Ralph B. Guy, 9th Circuit Judge Edward Leavy and D.C. Circuit Judge Laurence H. Silberman.

The hearing was held without prior public notice. Also, the Justice Department prevented various Congressional staffers from attending the session, citing the small size of

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the room and the sensitive nature of the activities discussed at the hearing.

It is unclear when the appeals court decision will be made, and whether it will be released to the public. At the Senate committee hearing, a number of senators requested that the appeals court make its decision publicly available.

Meanwhile, the ACLU and EPIC also joined the American Booksellers Foundation for Free Expression in a Freedom of Information Act request asking the Justice Department to reveal how many times the agency has used its new surveillance powers under the USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). For an outline of the Act's surveillance provisions, *see LDRC LibelLetter*, Dec. 2001, at 47.

9/11 Family Anonymity Rejected

The judge overseeing the lawsuits filed by victims of the Sept. 11 terrorist attacks and their families rejected a request that some of the plaintiffs be permitted to proceed anonymously. *See Mariani v. United Air Lines*, No. 01-11628 (ruling Sept. 19, 2002).

According to the *New York Law Journal*, in his Sept. 19 ruling U.S. District Judge Alvin K. Hellerstein stated that there was an "overriding public interest in having the trials be public and true identities of the parties be known."

Restrictions at Guantanamo, Elsewhere

Military officials at the U.S. Naval Base at Guantanamo Bay in Cuba – where the American government is holding almost 600 suspected terrorists and fighters from the Afghan war – have imposed a variety of new restrictions on reporters in recent weeks.

A group of 17 reporters and crew were taken to Guantanamo to cover the Sept. 11 anniversary at the base. But they were barred from filming or taking pictures of the anniversary events, because it would "interfere with the spirituality of events," the Associated Press quoted unnamed military officials as stating. The media employees were also prohibited from interviewing American civilians on the base, and were constantly accompanied when traveling near the detention facility – including trips to the restrooms.

Military investigators also searched the room of an Italian news crew after observing what they said were violations of "ground rules" regarding filming on the base. The crew turned over two tapes, and was barred from visiting the area near the detention facility.

In Afghanistan, there are less restrictions now then there were during the fighting there: for example, reporters are able to interview American soldiers. But they may not get much information. According to the BBC, the American military has given the troops laminated cards telling them what to tell journalists. In response to the question, "How do you feel about you're doing in Afghanistan?," the card suggests "We're united in our purpose and committed to achieving our goals." How long will that take? "We will stay here as long as it takes to get the job done."

The American military has given the troops laminated cards telling them what to tell journalists.

In Maryland, a cameraman for the Voice of America was questioned after he photographed telephone wires on a public road near a military base for a story on wiretapping. *See Television journalist questioned for activities near military installation*, News Media Update, Sept. 10, 2002, *available at* www.rcfp.org/news/2002/0910voiceo. html. And in Pennsylvania, a solider was indicted on federal charges after he allegedly offered a journalist photographs of a installation which was built to accommodate government officials in case of emergency. *See Feds Indict "Mr. Fantastic,"* Phil. City Paper, Sept. 19-25, 2002, *available at* citypaper.net/articles/2002-09-19/cb.shtml.

Preparing for the Next Phase

As President Bush makes the case for removing Saddam Hussein from power in Iraq, the press is preparing to cover combat there.

A group of military reporters has formed a new group, Military Reporters and Editors, to advocate for more media access to military operations and personnel. The group will hold a conference in Washington, D.C. in mid-November to discuss strategies for covering any conflict in Iraq. Several media organizations were also reported to be sending journalists for training in bioterrorism protection.

Ethics Corner - Conference Footnotes

By Roberta Brackman

As Co-chair, with Dale Cohen, of the NAA/NAB/LDRC Conference breakout sessions on Ethics and Pre-publication/ Pre-Broadcast issues, we want to thank everyone who attended the breakout sessions for making them so dynamic and instructive — even if, in the words of one attendee it was "the most painful two hours of the conference!" The feedback on the ethics discussions, in particular, has been great, and at Sandy's request we are offering here just a few of the available resources you might wish to consult as you wind your way through some of these issues:

- *Representing Media Clients and Their Employees in Newsgathering Cases: Traps for the Unwary*, By Richard Goehler, Bruce Johnson and Thomas Leatherbury. A reprint of this article was among the Conference materials in the canvas bag (not actually in the loose-leaf binder). You can also find it in Communications Lawyer, Volume 20, Number 2, Summer 2002. This is an amazing review of many of the issues discussed in the breakout sessions, including conflicts, joint representation and waiver letters, along with a wealth of citations to legal opinions and other resources. A must read!
- *www.abanet.org* - The ABA web site is a treasure trove of information and resources. In addition to the obvious, The Rules of Professional Conduct, model codes, Ethics 2000, opinions and the like, the site offers The ETHICSearch, where you can seek answers to hypothetical questions. For an initial consultation or if the answer is simple, there is no charge. For further research you may pay by the hour (a reasonable $45 for rmembers, $60 for non-members).
- *www.ACCA.com* - The American Corporate Counsel Association site is also extremely helpful. You can find a state- by- state summary of in-house Bar admission requirements and definitions of what is and what is not the unauthorized practice of law. Look in the virtual library under the ACCA States' Corporate Admission Rules Chart.
- *www.dri.org/dri/about/stateguidetoethicsopinionshidden.cfm* - In this section of the Defense Research Institute web site the DRI has published a complete state by state list of ethics opinions.
- A case to watch is *Nixon Peabody LLP v. Beaupre*. This suit is an outgrowth of the controversy between Chiquita Brands and The Cincinnati Enquirer, and was brought by the former editor of The Cincinnati Enquirer against Gannett and other parties, including Gannett counsel, alleging, among other things, that counsel engaged in malpractice. The case is pending in the District of Columbia and the only reported decision to date is at 791 A.2d 34 (D.C. Ct. App. 2002), which is the denial of a motion to dismiss for forum non conveniens.
- *Financial Technologies International, Inc v. U.S. District Court*, 2000 U.S. Dist. Lexis 18220 (SDNY 2000) (no privilege attaches to corporations' communications with its general counsel, who was not a member of the bar).
- VA UPL Op. No. 103 (in-house counsel to corporations in Virginia, who are not licensed in Virginia, are not committing UPL: "The definition of the practice of law does not encompass one who undertakes to advise his regular employer in matters involving the application of legal principles to facts or purposes or desires.")
- *Jenkins & Gilchrist v. Robert Riggs*, 2002 WL 31057023 (Tx. App. Sept. 17, 2002) (WFAA attorneys seeking arbitration in action by former reporter alleging bad legal advice on whether or not the reporter could use illegally obtained wiretaps).
- *Birbrower, Montalbano, Condon & Frank v. Superior Court*, 70 Cal. Rptr. 2d 304 (Cal. 1998) (Firm cannot recover fees for services constituting the unauthorized practice of law in California)
- *Elliott v. McFarland Unified School District*, 211 Cal Rptr 802 (Cal. Ct. App. 1985) (validity of advance waivers)
- ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 93-372 (1993) (advance waivers of conflicts of interest).
- Restatement (3d) of Law -- The Law Governing Lawyers

Roberta Brackman is Special Counsel to Faegre & Benson, LLP in Minneapolis, Minnesota.