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MEDIALAWLETTER

Reporting Developments Through October 31, 2006

LIBEL & PRIVACY

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RESERVE YOUR SPOT NOW!

A Forum for MLRC members on the Espionage Act and Related Statutes

Wednesday, November 8
2:30-4:30 p.m.
Sheraton New York Hotel & Towers, Empire West Ballroom

A very practical look at the questions these statutes raise for media lawyers (and their clients), what resources exist for finding the answers, procedures to be considered for newsrooms and precautions media counsel may wish to consider to protect their clients. The Forum will be led by a panel of lawyers whose work has brought them into close contact with these statutes, including

Susan Buckley, Cahill Gordon & Reindel, Partner (Moderator)
Kevin Baine, Williams & Connolly LLP, Partner
Karlene Goller, The Los Angeles Times, Vice President & Deputy General Counsel
Eric Lieberman, The Washington Post, Deputy Counsel & Director of Government Affairs
Nathan Siegel, Levine Sullivan Koch & Schulz LLP, Partner
Jeffrey Smith, Arnold & Porter, Partner & former General Counsel of the CIA (May 1995 to September 1996)

Please contact Kelly Chew (kchew@medialaw.org) if you plan to attend.

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MLRC Calendar

PLEASE VISIT WWW.MEDIALAW.ORG FOR MORE INFORMATION

November 8, 2006

A Forum for MLRC members on the Espionage Act and Related Statutes

2:30-4:30 p.m.
Sheraton New York Hotel & Towers

November 8, 2006

MLRC Annual Dinner

Cocktail Reception 6:00 p.m.
Dinner 7:30 p.m.
Sheraton New York Hotel & Towers

November 10, 2006

Defense Counsel Breakfast

7:00-9:00 a.m.
Proskauer Rose Conference Room

January 25, 2007

Los Angeles, California

"Legal Challenges of Integrating Traditional Media and Entertainment Into a Digital Environment"

Presented with Southwestern Law School's Donald Biederman Entertainment and Media Law Institute

September 17-18, 2007

London, England

MLRC London Conference

International Developments in Libel, Privacy, Newsgathering & New Media

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MLRC 2006 First Amendment Leadership Award

FOR EXTRAORDINARY CONTRIBUTIONS TO FREE SPEECH AND PRESS

Solomon Watson IV of The New York Times

On September 27, 2006, at the biennial NAA/NAB/MLRC Media Law Conference, Henry Hoberman presented MLRC's First Amendment Leadership Award to Solomon Watson IV of The New York Times. Here is a transcript of the presentation.

HENRY HOBERMAN: I am Henry Hoberman, Chair of MLRC's Board of Directors. It is my honor to present MLRC's First Amendment Leadership Award this evening. MLRC's First Amendment Leadership Award was created to honor senior lawyers whose contributions to First Amendment law – and to the institutions that support the First Amendment – were and are stellar.

If you recall from past conferences, this is an award that is given to lawyers whose work, wisdom, leadership and unselfish mentoring of colleagues have made them true deans of the First Amendment Bar.

That's a fitting description of this year's recipient, Sol Watson, of The New York Times Company. Sol has had a remarkable 32-year career at The New York Times Company starting in the trenches of the company's Law Department, serving as corporate secretary for 14 years, and then from 1989 through 2005 as General Counsel of the company, where he guided The New York Times Company through a daunting maze of legal and business challenges.

And it is a remarkable career that continues today as Sol remains the company's Senior Legal Officer and a member of the company's governing Executive Committee. By the way, for 25 of those 32 years, Sol Watson has managed George Freeman. And for that remarkable feat alone he is richly deserving of this award.

In his 17 years at the helm of The New York Times' legal staff, Sol has set the tone for a law department that advises and supports one of the most important media entities in America, known for its always assertive and sometimes controversial journalism and journalists.

Corporate Counsel Magazine has referred to Sol as, "An island of stability at the world's most watched newspaper company." And that seems like an apt description of Sol. He's been at the center of the storm but he's always the calm, unassuming, reassuring, steady influence that guides his colleagues through the crisis.

Testimonials of his steady hand and sage advice abound. Russ Lewis, the former President and CEO of The Times, has called Sol unflappable. He credits Sol with always admonishing him to follow Rudyard Kipling's advice and, "Treat victory and defeat as the same imposter."

Kathy Darrow, Sol's predecessor as General Counsel, says that more people seek Sol's counsel at The Times than any other person. And it's not just the CEO who seeks him out, it's the cafeteria workers as well, according to Kathy.

Floyd Abrams, himself a rather steady and reliable hand, describes Sol in this way, "Sol has served the cause of protecting the First Amendment with wisdom, foresight and fierce dedication."

And Ken Richieri, Sol's successor as General Counsel, calls Sol, "The moral compass of the company for the past three decades."

Russ Lewis reports that in all the years he has known Sol, he has only seen Sol flustered on one occasion, and he was kind enough to share that occasion with us by email. So I'm going to read from Russ Lewis's email about the one occasion when Sol lost his legendary composure. Sorry, I need my glasses for this one.

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> "The only time we saw Sol lose his legendary composure was several years back at The Times Company's annual shareholders' meeting. As usual, Sol was prepared to answer every conceivable question relating to his vast responsibilities. Sitting on the stage next to his Chairman, Arthur Sulzberger, Jr., Sol's face advertised his trademark imperturbable nature. "Mr. Watson," a long time gadfly shareholder addressed Sol as he took the microphone, "Last year, the New York Times Company Legal Department had 125 lawyers. How many lawyers do you have this year?" asked the shareholder. Sol nearly fell off his chair. His colleagues on the stage, including Mr. Sulzberger, impatiently waited for Sol's response. Struggling to catch his breath, Sol gasped to correct the record. Sol said, "The Legal Department had only 12 and a half lawyers last year. And that total remains the same in the current year."

Maybe after this dinner, Sol, you can tell me who the half a lawyer is. [Laughter] With a rich history of giving us legal milestones, including New York Times v. Sullivan and the Pentagon Papers case, The Times has set the bar pretty high for Sol when he took over the Legal Department in 1989.

Sol has been more than up to the task. In his years as General Counsel, Sol has ably and courageously carried on The Times' tradition of defending and expanding the rights of the press and the First Amendment. On his watch, Sol's legal department preserved The New York Times newspaper's remarkable streak of not losing or settling an American libel case for money, a streak that began over 50 years ago, well before Times v. Sullivan.

On his watch, The Times Company, which includes not just The New York Times, but also The International Herald Tribune, The Boston Globe and 15 other newspapers around the country, 18 television stations, two New York radio stations and more than 40 Web sites, successfully defended scores of libel and privacy cases, establishing important precedents in many areas of First Amendment Law.

I had the pleasure of working with Sol myself in the case of Moldea v. New York Times, a landmark opinion case. To name just a few others, he and his team won a hard fought libel lawsuit brought by Elliot Gross, New York City's Chief Medical Examiner, over a series of articles critical of his handling of autopsies. In the case of Sweeney v. New York Times, his team won a hard fought libel trial in Ohio brought by a sitting judge who had prosecuted Sam Shepard in the 1960s. The list goes on and on.

On its own and in conjunction with so many of the media companies in the room tonight, The Times under Sol's leadership persistently fought to keep courts open and to compel government agencies to conduct their business in the public's view, whether the agency was a local government board or among the highest power brokers in Washington, D.C. or NASA withholding the Challenger tapes.

And most recently, The Times steadfastly stood by its reporters as they stood behind their confidential sources during the most difficult of times and cases, the Valerie Plame case.

You won't be surprised to learn then, that the humble guy piloting the hard charging ship has humble roots. He was born, as most great people are, in New Jersey [laughter] in a town called Woodstown, which is in Southern New Jersey. He grew up in the civil rights era and experienced the tumult of the Vietnam war firsthand. He went to college at Howard, then served in Vietnam as a lieutenant in the Military Police Corps, earning a Bronze Star.

He actually took the LSAT's in Saigon and then applied to law school. Sol went on to Harvard Law School and was one of the first minority lawyers of the Boston law firm of Bingham Dana and then at The New York Times Company.

At The Times, Sol has been an extraordinary voice for inclusion, helping to create a company that has been singled out for recruiting and welcoming minorities into their ranks of its newsrooms and executive offices. He's also championed inclusion within our bar, the Media Law Bar and within the legal profession as a whole.

In that last category, Sol's efforts to create a better and stronger Media Bar include his longstanding and generous support for MLRC and its mission to educate and prepare lawyers to defend the press and the First Amendment.

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MLRC 2006 First Amendment Leadership Award

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Sol, for your extraordinary contributions to free speech and free press, I am honored to present to you with MLRC's First Amendment Leadership Award. Congratulations. [Applause]

SOLOMON WATSON: Thank you, Henry, for those kind words – giving me credit for managing George might be rhetorical hyperbole. But more seriously, thanks to the Media Law Resource Center for this First Amendment Leadership Award.

Now, I am a team player, so I accept this award on behalf of The New York Times Company, the efforts of whose journalists help the company achieve its mission of creating, collecting and distributing high quality news, information and entertainment. And since we are in this era, we do it internationally and across multiple platforms.

Sol Watson and Henry Hoberman

I also accept this award on behalf of The New York Times Legal Department, a place where I've worked for more than half of my life. The Legal Department, as many of you know, was started by Jimmy Goodale more than 40 years ago, and Jimmy continues to work for freedom of the press.

And it has included such other persons as Kathy Darrow, who succeeded Jimmy as General Counsel. And Russ Lewis, who ended up his career as CEO of The New York Times Company, who started out in the Legal Department.

And I accept this award with great gratitude, my own personal gratitude and the corporate gratitude, if you will, of the company. In large measure, I accept the award on behalf of the present members of the Legal Department – the members of the Legal Department here who are present. There is of course the sophisticated and urbane David McCraw. The veteran and inimitable George Freeman, an icon in his own right.

And of course, I do this on behalf of my good friend and successor, Ken Richieri who, as the fourth General Counsel in the history of The New York Times, is perfectly positioned and suited to lead the legal department and the company into the 21st Century.

One of the very good things about my job and our job, because all lawyers were created equal titles not withstanding, is that we have access to the senior members of both the journalism staff and the business side.

Today, I had the pleasure of chatting a little bit with Arthur, who was chairing a meeting for the NAA's convention in New York next year and then I went to see Arthur's father, the former publisher, Punch.

Now Punch and I have a similar personal proclivity in that we are people of few words. So I went to Punch and told him about this award and he said, "That's good, Sol." And I said, "Punch, what should I say by way of an acceptance speech?" He said, "Say thank you and sit down." And indeed, I'm on my way to do that.

But before I do that, what I thought I would do, unknown to Punch, is to read to this group some of his words. They are as follows.

> "The courts are becoming increasingly tough on questions involving newspapers and newspaper people and there is little comfort to be found for our causes and recent decisions of the U.S. Supreme Court. This being the trend, I believe we have no recourse but to ride out the storm. In so doing, it is obvious that we must continue to assure that fairness exists in our reports. At the same time, we must continue to call the shots as we see them. It remains our duty not to provoke, but to report. And threats of litigation or retaliation should not deter us when our cause is just."

So said Punch. Now if I may carry the "riding out the storm" figure of speech to the perfect storm, it is very clear that members of the mainstream media – the media overall

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– are, in fact, being attacked by many quarters. There are high seas, there are strong currents and hurricane-force winds. We, lawyers and journalists alike, have to captain that ship through those high seas, those strong currents and strong winds.

And to paraphrase another publisher of The Times, I'd like to give you what I believe is the profile of you, lawyers and journalists, captains of this ship. You have chosen an arduous and self-sacrificing profession that in its legitimate practice demands the highest standards of morals, that knows neither time nor season, that occupies all your waking hours and visits your dreams. Yours is a guiding profession dedicated to the public welfare whose moral can be, in the words of Jimmy Goodale, "Another great victory for freedom of the press."

2006 NAA/NAB/MLRC Media Law Conference
Protecting the First Amendment in Challenging Times

MLRC would like to thank all those who contributed to making this year's Media Law Conference a great success. Over 300 delegates participated in the conference held on September 27-29, 2006.

This year's conference included breakout sessions on Access, Defamation and Privacy and Property. An expanded roster of boutiques included sessions on: Ethics, Internet, Pre-Publication/Pre-Broadcast Primer, Indecency and Edge Content, Libel and Privacy Depositions 101, Advertising/Promotions and Media Insurance.

Conference panels tackled the latest issues in international media law, protecting sources in criminal cases and discussed the tactics and results of some of the past years most interesting media trials. The conference concluded with a look at the hot issues for 2006 and the future. The power point from that session is reprinted in full below.

MLRC gives its special thanks to Conference Chairs Slade R. Metcalf, *Hogan & Hartson LLP*, Mary Ellen Roy, *Phelps Dunbar LLP* and Daniel M. Waggoner, *Davis Wright Tremaine LLP*

We thank our conference sponsors for their generous support.

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And thanks to all our conference session chairs, panelists and facilitators.

Access
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Elizabeth A. Casey, Fox Group Legal
David Cohen, ABC, Inc.

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Peter R. Rienecker, Home Box Office, Inc.
Mark Sableman, Thompson Coburn LLP
Natalie J. Spears, Sonnenschein Nath & Rosenthal LLP
Anke Steinecke, Random House, Inc.
Katherine J. Trager, Random House, Inc.
Debra S. Weaver, Hearst Corporation

Ethics Boutique
Lucian T. Pera, Adams and Reese LLP (Chair)
Ronald C. Minkoff, Frankfurt Kurnit Klein & Selz, P.C.
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Roberta Brackman, Esq.
Timothy J. Conner, Holland & Knight LLP
Luther T. Munford, Phelps Dunbar LLP
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Internet Boutiques
Thomas R. Burke, Davis Wright Tremaine LLP (Chair)
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Stuart Karle, Wall Street Journal
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Nicole Wong, Google Inc.

Pre-Pub/Pre-Broadcast Primer
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Indecency and Edge Content
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Trial Tactics
Charles A. Brown, Esq.
Nancy W. Hamilton, Jackson Walker L.L.P.

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James E. Stewart, Butzel Long, PC

Advertising and Promotion for Publishers
Richard Constantine, Sabin, Bermant & Gould LLP
Rick Kurnit, Frankfurt Kurnit Klein & Selz PC

Media Insurance
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Rick Fenstermacher, Risk Management Solutions, Inc.

Trial Tales
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Richard M. Goehler, Frost Brown Todd LLC
Nancy W. Hamilton, Jackson Walker L.L.P.
Steven M. Perry, Munger, Tolles & Olson LLP
J. Banks Sewell III, Lightfoot Franklin & White LLC
Robin G. Weaver, Squire, Sanders & Dempsey LLP

International Law
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Mark Stephens, Finers Stephens Innocent LLP (Chair)
Geoffrey Robertson QC, Doughty Street Chambers (Keynote)
Peter Bartlett, Minter Ellison
Murray Hiebert
Stuart D. Karle, Dow Jones & Company
David E. McCraw, The New York Times
Gill Phillips, Times Newspapers Ltd.
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Jan Johannes, Guardian Newspapers Ltd.
Chris Newton, Media/Professional Insurance Agency, Inc.
Brian MacLeod Rogers, Barrister & Solicitor

Wednesday Night Program: Reporters Panel
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Paul M. Smith, Jenner & Block LLP

Thursday Night Program:
Crisis Management in the Newsroom
Eric Lieberman, The Washington Post Company
David Sternlicht, National Broadcasting Company, Inc.

Reporter's Privilege:
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Roscoe C. Howard, Jr., Troutman Sanders LLP
Abbe D. Lowell, Chadbourne & Parke LLP

The Next Big Thing – Hot Issues for 2007 and Beyond
Lee Levine, Levine Sullivan Koch & Schulz, L.L.P. (Chair)
Ronald Collins, Freedom Forum First Amendment Center
Henry S. Hoberman, ABC, Inc.
Jane Kirtley, University of Minnesota School of Journalism
David C. Kohler, Southwestern University School of Law
Marc Lawrence-Apfelbaum, Time Warner Cable
Caroline Little, Washingtonpost.Newsweek Interactive
Adam Liptak, The New York Times
Keith Mathieson, Reynolds Porter Chamberlain, LLP
Adam Thierer, The Progress & Freedom Foundation
Kurt Wimmer, Gannett

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"The Next Big Thing" – Hot Issues for 2007 and Beyond

This year's NAA/NAB/MLRC Media Law Conference concluded with an interesting panel discussion on the hot media law and policy issues of the year and beyond.

Here is their top ten list.

"THE NEXT BIG THING"

1. Geo-Filtering
2. Citizen Journalism
3. Indecency
4. Portable Content
5. Regulation of Truth
6. Commercial Speech
7. Internet Prior Restraints
8. De-Nationalization of Defamation
9. Net Neutrality
10. U.K. Defamation Law

Geo-Filtering

Courts and legislatures throughout the world will increasingly permit content litigation against American media to be adjudicated pursuant to their own country's laws, resulting in the withering of global publishing and the establishment as the norm of "geo-filtering," the filtering/targeting of content to specific geographic markets by American media in an effort to avoid potential liability.

Citizen Journalism

A marked increase in "citizen journalism" – i.e., the posting of video, photographs and other content created by the users/consumers of media websites – will lead to significant litigation concerning media liability/immunity for such postings.

Indecency

The federal government will expand the reach of indecency regulation from the broadcast media to cable and satellite television and satellite radio as well.

Portable Content

The increasing ubiquity of portable devices for delivering content (e.g., photographs, video, books, music) will lead to a transformation in the concept of the exclusive rights of copyright holders, which will include the increased creation of compulsory licenses and a trend toward requiring copyright owners to opt out of granting such rights.

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Regulation of Truth

The confluence of criminal prosecutions such as the AIPAC case and doctrinal developments such as the D.C. Circuit's decision in the Boehner v. McDermott case will lead to the prosecution of a journalist for the publication of accurate information about public matters.

Commercial Speech

The Supreme Court will move toward doing away with and may well actually abandon the commercial speech category by holding that commercial speech is entitled to full protection under the First Amendment.

Internet Prior Restraints

Courts will increasingly be asked to issue injunctions and mandatory "take down" orders in the context of defamation actions against the media arising from Internet publications.

De-Nationalization of Defamation

The Supreme Court will continue to decline to review defamation cases involving the press, with the practical consequence that libel law will become increasingly different from jurisdiction to jurisdiction, even with respect to issues ostensibly grounded in the First Amendment.

Net Neutrality

The "net neutrality" movement will lead to increasing calls for legislation regulating the content of Internet speech.

U.K. Defamation Law

There will be a judicial backlash against the recent spate of pro-plaintiff decisions in defamation actions against the press in the United Kingdom, such that a newspaper will actually prevail in such a case.

The session was chaired by Lee Levine, Levine Sullivan Koch & Schulz, L.L.P., and featured Ronald Collins, *Freedom Forum First Amendment Center*; Henry S. Hoberman, *ABC, Inc.;* Jane Kirtley, *University of Minnesota School of Journalism;* David C. Kohler, *Southwestern University School of Law;* Marc Lawrence-Apfelbaum, *Time Warner Cable*; Caroline Little, *Washingtonpost.Newsweek Interactive;* Adam Liptak, *The New York Times*; Keith Mathieson, *Reynolds Porter Chamberlain, LLP;* Adam Thierer, *The Progress & Freedom Foundation*; and Kurt Wimmer, *Gannett Co., Inc.*

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Speakers Bureau on the Reporter's Privilege

The MLRC Institute is currently building a network of media lawyers, reporters, editors, and others whose work involves the reporter's privilege to help educate the public about the privilege.

Through this network of speakers nationwide, we are facilitating presentations explaining the privilege and its history, with the heart of the presentation focusing on why this privilege should matter to the public. We have prepared a "turn-key" set of materials for speakers to use, including, a PowerPoint presentation and written handout materials.

We are looking for speakers to join this network and conduct presentations at conferences, libraries, bookstores, colleges, high schools and city clubs and before groups like chambers of commerce, rotary clubs and other civic organizations.

The MLRC Institute, a not-for-profit educational organization focused on the media and the First Amendment, has received a grant from the McCormick Tribune Foundation to develop and administer the speakers bureau on the reporter's privilege.

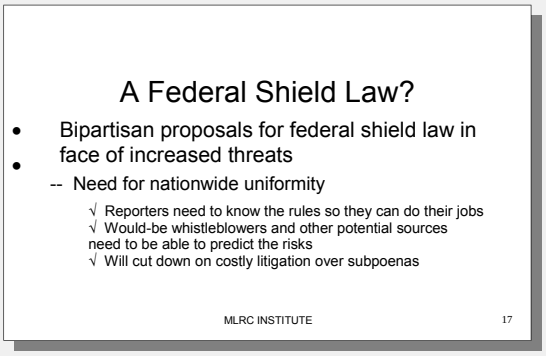
We hope to expand this project so that the reporter's privilege is the first in a number of topics addressed by the speakers bureau.

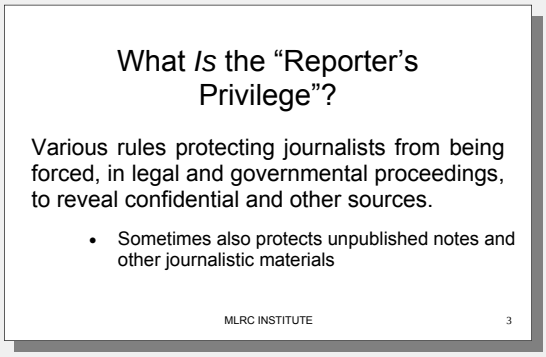
If you are interested in joining the speakers bureau or in helping to organize a presentation in your area, please contact:

Maherin Gangat
Staff Attorney
Media Law Resource Center
(212) 337-0200, ext. 214
mgangat@medialaw.org

Suggestion for background reading: Custodians of Conscience by James S. Ettema and Theodore Glasser. Great source re: nature of investigative journalism and its role in society as force for moral and social inquiry.

Presentation note: During the weeks leading up to your presentation, consider pulling articles from local papers quoting anonymous sources -- circle the references to these sources as an illustration for the audience of how valuable they are for reporters.





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House of Lords Delivers Landmark Libel Ruling

Outlines Privilege for Responsible Journalism on Subjects of Public Interest

By Stuart Karle

In a widely covered landmark ruling in a long-running libel case against *The Wall Street Journal Europe*, the United Kingdom's House of Lords on October 11 entered a judgment in favor of the *Journal Europe* that should provide far greater protection for serious journalism in the U.K. and throughout the Commonwealth. *Jameel v. Wall Street Journal*, [2006] UKHL 44 (Bingham, Hoffman, Hope, Scott, Hale, JJ.).

The ruling by the Law Lords found that a February 6, 2002 article in the *Journal Europe* on Saudi Arabia's cooperation with the U.S. in the effort to cut off the flow of funds to terrorists was precisely the type of serious, sober, carefully reported investigative journalism that should be protected from libel claims.

As Baroness Hale writes about this article and the *Journal*, "We need more such serious journalism in this country and our defamation law should encourage rather than discourage it."

The Lords ordered lower courts to stop looking for every little flaw in reporting and editing that might be apparent years after publication. Instead, they should look at the overall performance of the journalists in light of the circumstances surrounding publication.

The decision is significant for all journalists whose work is published in the U.K. and throughout the Commonwealth (which means both the English press and anyone whose work is available on the web), as the Law Lords explicitly endorsed the editorial procedures of the *Journal* on this story as careful enough to merit protection from defamation actions.

This stamp of approval is in stark contrast to *Reynolds v. Times Newspapers*, [2001] 2 AC 127, where the Lords, while fashioning a privilege for responsible journalism on subjects of public interest, found that the article at issue did not merit protection. Journalists now, finally, have at least some idea what they need to do to avoid the obscurities of English libel when covering important stories, sometimes under very difficult conditions.

If the promise of the *Jameel* decision is realized, then finally in the United Kingdom the ultimate decision on whether to publish an article on serious topics might be taken from night lawyers excising copy that cannot be proved true to a libel judge, and returned to news rooms where it belongs.

Background

The *Journal Europe*'s February 6, 2002 article reported on what its reporter James Dorsey in Saudi Arabia had been told was an agreement by Saudi Arabia to monitor the bank accounts of some of its most prominent citizens to ensure that no money, wittingly or unwittingly, ended up helping to finance terrorism.

The article included the names of five prominent Saudis who were among those whose accounts were being monitored. Dorsey and his editors asked another reporter in Washington, D.C., Glenn Simpson, who covered terrorism finance for *The Wall Street Journal*, to confirm the story with his U.S. government sources. (As is discussed at length by the Law Lords, Simpson's uncontradicted testified was that he did so.)

Mohammed Jameel, a billionaire Saudi Toyota dealer whose family company was one of the five names included in the article, sued for defamation in London, alleging that including his name in the article amounted to an accusation that he was associated with terrorists. The *Journal Europe*'s position was that the article explicitly disavowed such an implication, and that the article was actually quite a positive report to the effect that the Saudis were finally getting serious about choking off funding from terrorists.

Under English common law as it has existed for centuries, the only real defense available to a newspaper sued for libel is to prove the truth of allegedly defamatory statements. If the libel defendant in London cannot prove truth, then it is exceedingly difficult for it to win the libel case.

The Law Lords had tried to loosen this up a bit to protect more serious journalism in *Reynolds*, where it held

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that stories on matters of public interest that are the product of what the Lords called "responsible journalism" should be protected even if the publisher could not prove them true. But in reality little changed after *Reynolds* as the lower courts largely ignored the Lords' holding.

House of Lords Decision

Thus on October 11 the Lords said in *Jameel v. WSJE*, "[i]t is therefore necessary to restate the principles." The Lords held that in deciding whether articles should be protected even without a defense of truth courts should examine three factors:

1. WAS THE ARTICLE IN THE PUBLIC INTEREST?

In this case, "[t]he thrust of the article as a whole was to inform the public that the Saudis were cooperating with the U.S. Treasury in monitoring accounts." This article, the leading opinion found, "was a serious contribution in measured tone to a subject of very considerable importance"

2. WAS IT APPROPRIATE TO INCLUDE THE DEFAMATORY STATEMENTS IN THE ARTICLE?

If it decides an article concerns a matter of public interest, the court must then consider whether it was appropriate to include the defamatory statement in it. On this point, the Lords held that "allowance must be made for editorial judgment."

Of particular importance to editors who have for years had English judges second guess their newsroom decisions, the Lords held:

> "The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are … in the public interest, too risky and would discourage investigative reporting."

Here, the Lords found the inclusion of the names of prominent Saudis in the article "necessary" to convey the seriousness of the Saudis' cooperation with the U.S. Treasury.

3. DID THE JOURNALISTS PRACTICE "RESPONSIBLE JOURNALISM"?

The Lords ordered lower courts to stop looking for every little flaw in reporting and editing that might be apparent years after publication. Instead, they should look at the overall performance of the journalists in light of the circumstances surrounding publication.

Here, the *Journal*'s reporter in Riyadh, James Dorsey, was operating under very difficult circumstances, and he had to rely on confidential sources. Were his sources identified, the Lords noted, it was likely that they would suffer reprisals, as had happened on an earlier story where a 75-year-old source who was willingly identified had been sentenced to years in prison and thousands of lashes for speaking with a reporter.

Critical evidence of the care exercised by the *Journal* was provided at trial by Glenn Simpson, the staff reporter for *The Wall Street Journal* in Washington, DC, whose contacts with his source in the U.S. Treasury in his effort to confirm the article is described at length by the Lords.

Noting that these conversations occurred in a "ritual or code" used by reporters and sources in Washington DC, Lord Hoffmann stressed that the issue was *not* the literal words that were exchanged between reporter and source, *but* whether there was any confusion in Simpson's mind as to what those rituals and codes meant. Because Simpson's testimony had stood up under harsh cross-examination at trial, there was no reason to doubt that Simpson believed the story had been confirmed.

Confidential Sources

One of the remarkable features of the case, especially to American eyes at the moment, is that the *Journal Europe*'s reporters relied on six confidential sources, none of whom were ever identified in the case, and yet it still won.

Aside from the charm of the witnesses, there are a few factors that probably aided the Lords in reaching its decision without knowing who any of the sources were and without the plaintiffs having the opportunity to cross-examine those sources.

First, the plaintiffs never pressed the point, in part perhaps because the *Reynolds* privilege had generally been so futile that they did not think there was much for them to do.

Second, five of the six sources were in Saudi Arabia, and there was evidence at trial that one of Dorsey's sources, an elderly man who had hosted a dinner for him, had been sentenced to years in prison and thousands of lashes for

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House of Lords Delivers Landmark Libel Ruling

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even talking with a Western reporter. In short, this was not a situation where a source faced loss of employment if identified, but something far more serious.

Third, a key question was what in fact the Saudi government had promised the U.S. government it would do and whether it was doing what it promised. There was strong evidence at trial that the Saudi central bank had publicly lied about its monitoring of accounts when, after the publication of the story, it denied doing. In fact, the evidence showed that plainly it was monitoring accounts.

Fourth, the plaintiffs had claimed the article accused them of actually financing terrorism, and the Lords made clear that they didn't think that was what the article was about. Those who discuss the article pretty clearly thought it was about a monitoring program, and that the fact that one was being monitored did not mean he was suspected of actually financing terrorism.

Conclusion

The ruling itself will do nothing to help the worst of the tabloid press in covering celebrity nonsense. The Lords are fond of the concept that not everything that interests the public is of public interest. But serious journalism does appear to have gotten a ringing endorsement in one of the world's most plaintiff-friendly libel jurisdictions.

Stuart Karle is General Counsel of The Wall Street Journal, *and was up to his neck in the case since the plaintffs' lawyers at Peter Carter-Ruck wrote their first letter the week after the article was published. Geoffrey Robertson, QC of Doughty Street Chambers and Rupert Elliot of One Brick Court were the barristers on the case for the newspaper; Mark Stephens, Dominic Ward and Gina Laytner of Finers Stephens Innocent were the solicitors. Barrister James Price QC, 5RB, represented plaintiff throughout the case.*

The Wall Street Journal Article Litigated in Jameel

Saudi Officials Monitor Certain Band Accounts

Focus Is on Those With Potential Terrorist Ties

RIYADH, Saudi Arabia - The Saudi Arabian Monetary Authority, the kingdom's central bank, is monitoring at the request of US law-enforcement agencies the bank accounts associated with some of the country's most prominent businessmen in a bid to prevent them from being used wittingly or unwittingly for the funneling of funds to terrorist organizations, according to U.S. officials and Saudis familiar with the issue.

The accounts - belonging to Al Rajhi Banking & Investment Corp, headed by Saleh Abdulaziz al Rajhi; Al Rajhi Commercial Foreign Exchange, which isn't connected to Al Rajhi Banking; Islamic banking conglomerate Dallah Al Baraka Group, with $7 billion (8.05 billion euros) in assets and whose chairman is Sheik Saleh Kamel; the Bin Mahfouz family, separate members of which own National Commercial Bank, Saudi Arabia's largest bank, and the Saudi Economic Development Co; and the Abdullatif Jamil Group of companies - are among 150 accounts being monitored by SAMA, said the Saudis and the US officials based in Riyadh. The US officials said the US presented the names of the accounts to Saudi Arabia since the Sept. 11 terrorist attacks in America. They said four Saudi charities and eight businesses were also among 140 world-wide names given to Saudi Arabia last month.

The US officials said the US had agreed not to publish the names of Saudi institutions and individuals provided that Saudi authorities took appropriate action. Many of the Saudi accounts on the US list belong to legitimate entities and businessmen who may in the past have had an association with institutions suspected of links to terrorism, the officials said. The officials said similar agreements had been reached with authorities in Kuwait and the United Arab Emirates. 'This arrangement sends out a warning to people,' a US official said.

SAMA couldn't be reached for comment. In a recent report to the United Nations about combating terrorism, however, the Saudi government said: 'The Kingdom took many urgent executive steps, amongst which SAMA sent a circular to all Saudi banks to uncover whether those listed in suspect lists have any real connection with terrorism.'"

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Florida Appeals Court Reverses $18 Million False Light Verdict

False Light Subject to Libel Statute of Limitations

A Florida appeals court this month reversed and dismissed in its entirety an $18.28 million jury damage award on a false light claim against *The Pensacola News Journal*, holding that the claim was time barred because false light claims are governed by the two-year statute of limitations for libel. *Anderson v. Pensacola News Journal reversed sub nom. Gannett Co., et al. v. Anderson*, No. 1D05-2179, 2006 WL 2986459 (Fla. App. 1st Dist. Oct. 20, 2006) (Padovano, Benton, Lewis, JJ.). *See also MLRC MediaLawLetter*, Feb. 2003 at 11; July 2004 at 19; April 2005 at 15.

The appeals court went on to cast serious doubt on the validity of the false light cause of action in general, noting that it "remains the subject of a heated debate among judges and legal scholars" because it allows plaintiff's to circumvent the constitutional, common law and procedural protections that surround defamation law.

The proceedings at the trial level had been marred by precisely these issues and on appeal the newspaper also raised issues regarding proof of falsity, actual malice, privilege and damages. The appeals court, though, focused solely on the defendants' circumvention argument and did not directly address the alternate grounds – though the decision suggests that a minimum all the constitutional requirements of libel would have to apply to false light claims.

The claim was time barred because false light claims are governed by the two-year statute of limitations for libel.

The court, though, acknowledged that its ruling conflicted with an earlier appellate court decision that expressly recognized a cause of action for false light with a four year statute of limitations. The court therefore asked the state supreme court to address the decisional conflict and ultimately, perhaps, the viability of the false light cause of action itself.

Background

At issue in this case were a series of investigative articles published between December 1998 and November 1999 about Anderson Columbia, Inc., a large Florida road paving company, and its founder Joe Anderson. The articles reported on several grand jury investigations surrounding the company's political connections, campaign contributions and business dealings.

Joe Anderson initially sued for libel and tortious interference. The trial court held that the most of the libel claims were time barred under Florida's two-year statute of limitations for libel. Plaintiff then amended to state claims for libel and false light invasion of privacy over a single article entitled "Contractor Puts Squeeze on State" and subtitled, "Company Pursues Political Clout."

In discussing the various investigations, the article stated that Joe Anderson had been indicted in 1983 on federal bribery charges, pled guilty to mail fraud and received a fine and three years' probation.

It then explained that the probation was extended after Joe Anderson shot and killed his wife in a hunting incident that officials determined was accidental. This portion of the article, entirely true, formed the basis for the false light claim – the sole claim that ultimately went to trial. Anderson claimed that in the context of the article about his political "clout," the truthful statement implied he had murdered his wife and gotten away with it.

The trial court ruled that the false light claim was governed by a four-year statute of limitations under Fla. St. § 95.11(3)(p), the state's catch all provision for unspecified claims.

The relevant portion of the newspaper article is as follows:

> In 1988, while still on probation and before his conviction was reversed, Anderson shot and killed his wife, Ira Anderson, with a 12-gauge shotgun.
>
> The death occurred in Dixie County just north of Suwannee where days before the shooting Joe Anderson had filed for divorce but then had the case dismissed.
>
> Law enforcement officials determined the shooting was a hunting accident.
>
> A federal judge ruled that by having the shotgun, Anderson violated his probation, and the judge added two years to Anderson's probation.
>
> Capt. Bab Stanley of the Florida Game and Fresh Water Fish Commission, was one of

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> the officials who went to the scene of the shooting.
>
> Anderson said that he and his wife were deer hunting when she walked one way down a road and he walked the other way, Stanley recalls. A deer ran between them and Joe Anderson fired twice. One shot hit the deer, the other hit his wife.
>
> "One buckshot pellet hit her under the arm and went through her heart," Stanley said.
>
> When investigators arrived on the scene, he said, they found that the other people in the hunting party had taken the deer back to the hunt club and were cleaning it.
>
> "You have to understand, it's Dixie County," he said. "Back then, they shut down the schools for the first week of hunting season."
>
> He said that Anderson had stayed behind at the shooting scene, and he described Anderson as looking "visibly upset" after the shooting.

Trial Proceedings

The false light claim was tried over nine days in late 2003. The trial court, holding that truth was irrelevant to the trial since plaintiff conceded the article to be true, had granted plaintiff's motion in limine to exclude any evidence surrounding the shooting, essentially relieving plaintiff of proving that the implication was false.

The court acknowledged the plaintiff would have to show actual malice, but did not require plaintiff to prove that the newspaper intended to convey the impression that plaintiff murdered his wife. Instead, the trial court allowed plaintiff to present journalism experts to testify on the issue of actual malice.

Over defendants' objections, former *Tampa Tribune* news editor Jim Head, Florida A&M University Professor Joe Ritchie and former reporter John Van Gieson testified for plaintiff. Each testified that the article created the impression that plaintiff murdered his wife by first stating that he "shot and killed his wife" and then waiting until two sentences later to state that the shooting was ruled accidental. Jim Head, for instance, testified that the phrase "shot and killed" placed a "curse" on the article that could not be lifted.

Also over defendants' objections, plaintiff presented evidence that he suffered millions of dollars in economic damages when a non-party company he had an ownership stake in lost a state contract after publication of the article. The jury based its privacy damage award on this claim of harm to a non-party company (with no cognizable right of privacy) rather than any emotional harm suffered by plaintiff.

Anderson claimed that in the context of the article about his political "clout," the truthful statement implied he had murdered his wife and gotten away with it.

Court of Appeals Decision

The appeals court began by stating that to properly review the trial court judgment it had to address the controversy surrounding the false light cause of action. It first surveyed decisions from nine states that expressly reject the cause of action. (See side bar below.)

The basic rationale for these decisions is that false light essentially duplicates a cause of action for libel while allowing plaintiffs to evade the constitutional limits on libel. Not only is the statute of limitations generally longer for false light actions, but retraction law does not apply, privileges may or may not apply, and the actual malice standard may not be applied to the alleged false impression.

"The confusion," over false light, "is nowhere more evident than it is in the present case," the court stated, specifically citing the muddled proof of falsity issue from trial. It then addressed the cause of action under Florida law.

The Florida Supreme Court has mentioned false light in several cases. In *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So.2d 1239, 1252 n. 20 (Fla.1996), for example, the court dropped a footnote listing the four classic privacy actions. But the state supreme court had never expressly approved of the cause of action. And no Florida appellate court had ever affirmed a false light judgment.

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One other Florida appellate decision had addressed the statute of limitations issue for false light. *Heekin v. CBS Broadcasting, Inc*., 789 So. 2d 355 (Fla. 2d DCA 2001). In *Heekin*, the plaintiff brought a false light claim over a *60 Minutes* segment on domestic violence. While the statements made about him in the broadcast were true, he claimed the juxtaposition of those statements with the stories and pictures of women who had been abused created the false impression that he had abused his wife and children. The trial court dismissed the claim holding it was essentially a time barred libel claim.

In a confusing decision, the appeals court in *Heekin* reversed. It appeared to recognize a separate and distinct tort of false light for claims over true statements that create a false impression, while agreeing that a plaintiff cannot avoid the two-year statute of limitations for defamation actions by bringing a false light claim over false statements.

"The confusion," over false light, "is nowhere more evident than it is in the present case," the court stated.

"We are unable to accept this distinction as a reason to apply a longer statute of limitations," the First District Appellate Court concluded. "In either case, the falsity of what the publication communicates is the essence of the claim."

Because libel and false light are nearly identical, they must be treated the same way for statute of limitations purposes, the court concluded. *Citing, e.g., Gashgai v. Leibowitz*, 703 F.2d 10, 13 (1st Cir. 1983) (a longer statute of limitations for false light would "defeat the obvious legislative intent to impose a relatively short period ... for the bringing of defamation actions").

And the court dismissed as "largely academic" the doctrinal distinction that false light claims can be based on statements that are offensive but not necessarily defamatory. "Most false light claims involve statements that would also be defamatory."

Concurrence

Judge Lewis wrote a separate opinion concurring in the result only. He disagreed that all false light claims are governed by the two-year statute of limitations. Instead he would have reversed because plaintiff first brought a claim for libel and then amended to bring the false light action. Under these facts, "plaintiff simply recast his libel claim as one for false light ... in an attempt to circumvent the two-year limitations period applicable to libel."

The newspaper defendants were represented by Robert Bernius and Kevin Colmey of Nixon Peabody LLP in Washington, D.C.; Talbot D'Alemberte, Tallahassee; Dennis Larry of Clark, Partington, Hart, Larry, Bond & Stackhouse in Pensacola; and Bob Kerrigan of Kerrigan, Estess, Rankin & McLeod, LLP in Pensacola. Plaintiff was represented by Willie Gary, Phyllis Gillespie and C.K. Hoffler of Gary, Williams, Parenti in Stuart, Florida; Beverly A. Pohl of Broad and Cassel, Fort Lauderdale; and Bruce S. Rogow of Bruce S. Rogow, P.A., Fort Lauderdale.

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$1.1 Million Jury Award in Libel Suit Over Arrest Report

Plaintiff Claimed Broadcast Implied He Was BTK Serial Killer

By Bernard J. Rhodes

This month a Kansas jury returned a $1.1 million libel and emotional distress damage award against Kansas television station KSN-TV over a series of news broadcasts that reported on a search of plaintiff's home and his subsequent arrest in the BTK murder investigation. *Valadez v. KSN-TV and Emmis Communications*, (jury verdict Oct. 20, 2006).

Background

In March of 2004, the *Wichita Eagle* received a letter from someone claiming to be BTK, the notorious self-named serial killer (the name stood for "Bind, Torture, Kill") who terrorized Wichita during the late 1970s and early 1980s and then fell silent. During the intervening period, many Wichitans believed that the killer had died, been arrested, or moved away. The receipt of the March 2004 letter changed everything. A massive police manhunt was relaunched and for months the killer played a cat and mouse game with the police and the media.

KSN was careful to point out that Valadez had only been arrested on the unrelated charges set forth above, and that police were not saying he was a BTK suspect.

In late October 2004, BTK sent another message to the police, this time enclosing his purported life story. On November 30, the police held a press conference during which they released a profile of the serial killer (based in large part on the October message) and requested the public to call a special BTK Tip Line with information about any person who might fit the profile.

The very next morning, a tipster called police and identified Wichita resident Roger Valadez as fitting several elements of the profile. The police categorized the tip as a "priority" tip and assigned a detective from the BTK Task Force to immediately investigate the tip. Three detectives went to Valadez's home to request a voluntary DNA swab. When Valadez did not answer the door, two of the detectives left to personally interview the tipster, while the third detective remained behind to surveil the house from a rental business located across the street.

During the interview of the tipster, the detectives learned additional information about Valadez that increased their suspicion of him. Additionally, the detective who remained outside Valadez's home observed Valadez come out of his home to retrieve his mail and return inside – he had been home the whole time

Armed with this information, the detectives sought and obtained a search warrant for Valadez's DNA. They then assembled a force of Wichita Police officers, agents of the Kansas Bureau of Investigation and special agents of the Federal Bureau of Investigation who forced their way into Valadez's home. They presented Valadez with the search warrant for his DNA and, after Valadez refused to voluntarily provide the sample, forcibly took the sample from Valadez's mouth. The officers then placed Valadez under arrest on two unrelated municipal court warrants, one for criminal trespass-domestic violence and one for housing code violations relating to a rental home which Valadez owned.

While in the house executing the DNA search warrant, officers observed other items (in plain view) which further increased their suspicion of Valadez. As a result, they prepared a second search warrant application, this time for Valadez's home. After they obtained this second search warrant, a group of twenty officers literally worked through the night searching Valadez's home for BTK-related evidence.

At the same time, the administrative judge of the Wichita municipal court was called at home and advised that police had a "person of interest" in the BTK case in custody on city warrants. As a result, the judge increased Valadez's bond on the criminal trespass charge from the standard $2,500 property/$1,000 cash bond, to a $25,000 cash only bond.

The next morning at 2:30 a.m., the local Wichita ABC-affiliate, KAKE-TV, broke into programming with a report that there had been a possible arrest in the BTK case. The report gave the location of the arrest, but did not identify the person arrested. A few hours later, the CBS-affiliate, KWCH-TV, did the same. At 5:00 a.m., the NBC-affiliate, KSNW-TV, began its regular morning newscast

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with news of the arrest. KSN, as it is called, gave the exact address of the home where the arrest and search had occurred.

At 6:45 a.m., KSN reported that, according to the Polk Directory, a Roger Valadez owned the home where the arrest and search occurred and that a Roger Valadez was also listed on the official jail log as being arrested at that address the prior night.

KSN – and only KSN – continued to broadcast Valadez's name throughout the rest of the day. In each of its broadcasts, KSN was careful to point out that Valadez had only been arrested on the unrelated charges set forth above, and that police were not saying he was a BTK suspect. KSN pointed out, however, that the overwhelming police presence at Valadez's home overnight, along with his unusually high bond, were all inconsistent with the man being held only on simple city charges.

Later that afternoon, the Wichita Police Chief held a press conference during which he stated that there had been no arrest in the BTK case. The chief gave no explanation, however, for the overwhelming police presence the night before at Valadez's home, nor did he explain the high bond. Still later that afternoon, after preliminary DNA results showed that Valadez was likely not the BTK killer, his bond was reduced and he was released from jail.

The following day, Valadez's attorney issued a press release stating that Wichita Police had confirmed that Valadez's DNA did not match DNA found at several of the BTK crime scenes.

In January 2005 – two months before the real BTK killer, Dennis Rader, was arrested and later publicly confessed – Valadez sued KSN's owner, the owner of Wichita radio station KFDI, and the Associated Press for defamation, invasion of privacy and outrage. Valadez later voluntarily dismissed KFDI and the AP after the two media outlets convinced Valadez they did not use Valadez's name in their reports. Accordingly, at trial, the only remaining defendants were KSN and KSN's news director, who had been added simply to destroy diversity when Valadez dismissed KFDI and the AP.

Trial

The trial began in October 2006, with the plaintiff calling KSN's news director as his first witness. The news director testified he was aware of Valadez's name at or around the time the station began its reporting at 5:00 a.m., but decided to wait to use the name until the station had confirmation of the name from the official jail log. He testified that the station got that confirmation shortly before 6:45 a.m. and that once the name was confirmed through the official jail log, he believed Valadez's name was public record and that he was merely following the long-accepted practice of identifying criminal suspects once they were formally charged. He pointed out that the station repeatedly warned viewers against jumping to the conclusion that Valadez had been arrested in connection with the BTK case and that he had only been arrested on two unrelated warrants.

Upon questioning from Valadez's attorney, the news director testified that he believed that KSN had covered the arrest properly and that the other stations, along with the newspaper, had acted irresponsibly in not reporting Valadez's name. He pointed out, for example, that during his fifteen-year career he could not recall a single time where the media had reported live on a court appearance (which every station had done for Valadez's 3:00 p.m. arraignment on the city charges) but not used the defendant's name.

Valadez next called one of his two adult daughters, who currently lives in Arlington, Texas. She testified that she received a call at 4:00 a.m. (an hour before KSN first began its reports) informing her that her father had been arrested as BTK. She testified that she frantically drove to Wichita to help find a lawyer for her father. Next, the plaintiff called Valadez's other adult daughter, who testified she learned of her father's arrest from her brother at 8:00 p.m. on December 1, the day before KSN's first broadcast. She explained that her brother learned of their father's arrest from a *Wichita Eagle* reporter who called the brother asking about Valadez's arrest as BTK.

Valadez himself testified next. He explained that he had been home sick on the day of his arrest and that he had been sleeping both times police arrived and that is why he did not come to the door. He said that he was not BTK and that he was emotionally upset over KSN's reporting. He testified that he had been retired for two years at the time of his arrest. He also testified that he did not see a doctor, psychiatrist, counselor, etc. over his emotional distress, only a lawyer.

Defense Case

In their case, defendants called the detective who had been assigned to investigate the tip. He testified as to the police investigation of Valadez set forth above and stated

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that on December 2, 2004, it was his personal belief that Valadez "very possibly was BTK." Defendants also called the judge who increased Valadez's bond during the overnight hours.

The trial judge then shocked both parties when he announced that he was not going to instruct on actual malice, despite long-standing Kansas law that provides a qualified privilege to media reports of matters of legitimate public concern, specifically including police investigations of crime. Instead, he issued a bizarre set of jury instructions which included the following:

> "The evidence in this case proves that by certain information put out to the community by defendant, a reasonable person would conclude that a man under arrest on unrelated charges was more than likely a serial killer whose evil exploits were known by the majority of the adult population in the community where the man arrested lives."

Needless to say, when the trial judge read this instruction to the jury, you could hear a pin drop in the courtroom. After spending four days attempting to convince the jury that KSN had acted responsibly in reporting that Valadez had only been arrested on unrelated charges and was only a "possible suspect" in the BTK case, the trial judge had cut our legs out from beneath us by making this finding that we had said Valadez was BTK. Accordingly, the jury had little trouble finding that KSN's broadcasts were false – KSN had admitted that Valadez was not BTK.

It went downhill from there, with the judge substituting the actual malice instruction with an instruction which defined negligence as what would a responsible broadcaster in the community do. Given that KSN was the only media outlet in Wichita to report Valadez's name, it was a forgone conclusion that the jury would find that KSN was negligent.

The judge then compounded our problems with a defective verdict form which asked: "Do you find plaintiff has proved the defendants [no apostrophe] conduct was: defamatory." Of course, given the judge's instruction that KSN had reported that Valadez was "a serial killer whose evil exploits were known by the majority of the adult population," the jury found KSN's broadcasts to be defamatory. The jury was never asked whether the broadcasts were false, or whether KSN was negligent, despite the fact that both elements were identified earlier in the instructions.

Additionally, the trial judge instructed on false light invasion of privacy and the tort of outrage. The jury checked yes as to whether the "defendants [no apostrophe] conduct was: extreme and outrageous," but did not answer whether "defendants [no apostrophe] conduct was: an invasion of privacy," instead leaving that section of the verdict form blank. Both parties asked the trial judge to send the jury back to deliberate on that claim, but he refused to do so.

The jury assessed damages of $800,000 on Valadez's emotional distress claim and $300,000 on Valadez's damage to reputation claim. Kansas, however, has a statutory damage cap of $250,000 on "non-economic" damages. Given that Valadez is retired and presented no evidence of economic damages, *i.e*. he did not lose his job, he has not been unable to get a new job, etc., it is anticipated that Valadez's total damage award will be reduced to $250,000.

Formal judgment has not yet been rendered. Defendants have ten days from the issuance of the formal judgment to file their notice of appeal.

Bernard J. Rhodes of Lathrop & Gage L.C. represented the defendants in this case. Plaintiff was represented by Craig Shultz of Wichita, Kansas.

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Radio Host Wins Summary Judgment in Defamation Claim Involving Abu Ghraib

By Laura Handman and Amber Husbands

Last month a Virginia federal district court issued a Memorandum Order granting summary judgment to Air America Radio and its talk show host Randi Rhodes in a defamation lawsuit brought by defense contractor CACI International, Inc., which had supplied interrogators to the United States at Abu Ghraib prison in Iraq. *CACI Premier Technology, Inc. & CACI Int'l, Inc. v. Randi Rhodes & Piquant, LLC d/b/a Air America Radio*, No. 1:05 - 1111 (E.D. Va. Sept. 21, 2006) (Lee, J.).

Judge Gerald Bruce Lee

The case is an important application of libel principles to the discussion of serious political and legal subjects – prisoner abuse in Iraq – in the heated rhetoric of radio talk shows.

The record suggested that the statements were not demonstrably false.

Background

Randi Rhodes, a veteran talk show host, has hosted *The Randi Rhodes Show* on the Air America Radio network since its launch in March 2004. On her show, Rhodes has been a steadfast and constant critic of the current President and the war in Iraq, and has been highly critical of the role that private military defense contractors have played in the initiation and continuation of the war in Iraq.

In August 2005, Rhodes made various statements on her show concerning private contractors, including statements regarding the behavior of CACI employees in their capacity as interrogators at Abu Ghraib prison.

On September 23, 2005, CACI brought an action for defamation under Virginia law against Ms. Rhodes and Air America Radio in federal district court in Alexandria, Virginia claiming that Ms. Rhodes falsely alleged that "CACI engaged in murder, rape, and torture at the Abu Ghraib prison, that CACI interrogators misrepresented themselves as military officers, that CACI supplied interrogators to the United States in Guantanamo Bay, Cuba and Afghanistan, and that CACI fought on the side of the pro-apartheid South African government."

Defendants filed their motion for summary judgment on March 27, 2006, which was argued before Judge Gerald Bruce Lee on April 14, 2006. On April 28, 2006, Judge Lee issued an Order granting Defendants' summary judgment motion.

On September 21, 2006, Judge Lee issued a 49-page Memorandum Order setting forth the reasoning behind the dismissal; namely, that (1) the alleged defamatory statements could not "reasonably be interpreted as stating actual facts" about CACI; (2) the alleged defamatory statements that CACI was responsible for torture were "not demonstrably false;" and/or (3) the alleged defamatory statements were not made with actual malice, i.e., a "reckless disregard for the truth."

Memorandum Opinion

The court noted that CACI based its defamation claims on thirteen separate statements that Ms. Rhodes made in August 2005. The court divided the statements into several categories: (1) statements concerning "torture" and "confusion" as to the chain of command; (2) statements that CACI fought on the side of the pro-apartheid South African government and supplied interrogators to the United States in Guantanamo Bay and Afghanistan; and (3) statements regarding CACI's alleged involvement in the rape and murder of Iraqis.

The court found that CACI was a public figure for purposes of the defamation action, and held that the matter was appropriate for summary judgment because the parties did not dispute what Ms. Rhodes said on the air.

First, the court addressed Ms. Rhodes's statements concerning "torture" and "confusion." The court held that Ms. Rhodes's statements alleging that CACI tortured Iraqi detainees at Abu Ghraib were not actionable because the

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Radio Host Wins Summary Judgment in Defamation Claim Involving Abu Ghraib

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record suggested that the statements were not demonstrably false; according to the publicly available sources upon which Ms. Rhodes relied (namely, government reports of investigations into the Abu Ghraib scandal as well as published news reports), CACI employees may have engaged in activities that amounted to torture.

The court noted that "[t]he record reflects that several CACI employees cooperated with military personnel in the abuse of Iraqi prisoners." While the court declined to discuss whether or not CACI employees actually tortured Iraqi detainees, it held that Ms. Rhodes's statements were not defamatory because "there are facts which support allegations that CACI employees, in fact, may have engaged in improper activities that amounted to torture."

Similarly, the court held that "it appears from government investigation reports that CACI, in fact, may have contributed to the confusion in the chain of command;" therefore, any of Ms. Rhodes's statements indicating that CACI employees supervised military personnel or misrepresented themselves as military personnel were not defamatory because the statements were not demonstrably false.

Ms. Rhodes's statements on her talk radio show have to be put in context as political commentary.

As the court noted, "Ms. Rhodes's political commentary was based upon publicly available information, and she is entitled to state her political opinions in her talk radio program."

Finally, the court held that even if the statements were demonstrably false, Ms. Rhodes's statements were not made with actual malice because her reliance on government reports supported a conclusion that she did not recklessly disregard the truth or the probable falsity of the statements.

Next, the court addressed Ms. Rhodes's statements that CACI fought on the side of the pro-apartheid South African government and supplied interrogators to the United States in Guantanamo Bay and Afghanistan. The court found that statements regarding CACI's relation to South African apartheid were hyperbole, and not meant to suggest that CACI literally fought alongside the apartheid military.

Similarly, with regard to statements relating to the claim that CACI supplied interrogators to the United States in Guantanamo Bay and Afghanistan and imported prohibited practices from those prisons to Iraq, the court held that even if such statements could be held to make an association between CACI and the use of such techniques, they did so in a hyperbolic manner.

Finally, the court held that Ms. Rhodes's statements regarding CACI's alleged involvement in the rape and murder of Iraqis were not actionable because they constituted hyperbole and could not reasonably be interpreted as stating actual facts about CACI.

The court held that several of the statements did not state facts specifically about CACI or its employees, and that the remaining statements in this category were "quintessential examples of non-actionable rhetorical hyperbole." Further, the court held that any remaining statements allegedly claiming that CACI murdered and raped Iraqis were not actionable because CACI is a public figure and had not demonstrated that Ms. Rhodes made such statements with actual malice, noting that "while the record does not confirm the truth of Ms. Rhodes's allegations, it provides enough support for her allegations to defeat a finding that she made them with a reckless disregard for the truth."

In conclusion, the court stated that

> The Court holds that Ms. Rhodes did not recklessly disregard the truth when making statements regarding CACI's role in the rape and murder of Iraqi detainees at Abu Ghraib because the government reports of investigations into the Abu Ghraib scandal and published news reports provided a factual background for Ms. Rhodes's hyperbolic statements on her talk radio show. Ms. Rhodes's statements on her talk radio show have to be put in context as political commentary.

On October 20, 2006, plaintiffs filed a Notice of Appeal of the grant of summary judgment with respect to defendant Randi Rhodes. (Defendant Piquant, LLC d/b/a Air America Radio filed a bankruptcy petition on October 13, 2006; therefore, plaintiffs' claims against the corporate entity are subject to an automatic stay pursuant to 11 U.S.C. § 362).

Laura Handman, Richard Cys, Carolyn Foley, Constance Pendleton, Ronnie London, and Amber Husbands of Davis Wright Tremaine LLP represent defendants. Plaintiffs are represented by William Koegel, John O'Connor, and Frank Griffin, IV of Steptoe & Johnson.

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Magistrate Judge Orders New York Times to Reveal Sources in Libel Case

Plaintiff Has "Compelling Need" in Claims Over Anthrax Columns

A federal magistrate judge this month ordered *The New York Times* to reveal the identities of confidential sources used in a series of allegedly defamatory columns that discussed plaintiff Steven Hatfill's possible involvement in the 2001 anthrax murders. *Hatfill v. The New York Times Company*, No. 1:04 CV 807 (E.D. Va. Oct. 20, 2006) (O'Grady, J.).

Applying Virginia's conflicts of rule law, the judge first held that Virginia's qualified common law reporter's privilege applied rather than New York or Maryland's absolute statutory privileges. The judge then concluded that plaintiff demonstrated that he had a "compelling" need for the information in his libel suit against the newspaper.

Background

At issue in the case are a series of op-ed articles written by *News York Times* columnist Nicholas Kristof criticizing the FBI's investigation into the killings of five people from the mailing of several anthrax-laced letters. Referring to Hatfill as "Mr. Z," Kristof detailed several reasons why the FBI should complete its investigation of him, including his expertise with biological agents and access to anthrax through his employment at a U.S. bio-defense facility. In his last article, Kristof named Mr. Z as Hatfill, who had by then identified himself as a person of interest in the attacks. Kristof praised the FBI for finally making progress with its investigation.

A divided Fourth Circuit panel held that the columns were capable of defamatory meaning. According to the Fourth Circuit majority the columns did not merely report others' suspicions; they actually generated suspicion by asserting allegedly false facts that implicated plaintiff in the murders. *See* 416 F.3d 320, 33 Media L. Rep. 2057 (4th Cir. 2005), *cert. denied*, 126 S.Ct. 1619 (U.S. 2006).

During discovery, Kristof refused at a deposition to reveal the identities of five confidential sources. Two of the sources later came forward. Of the remaining sources, two were identified as FBI officials involved in the investigation; the third, as a friend or colleague of plaintiff. Hatfill brought the instant motion to compel Kristof to reveal their identities.

Magistrate's Ruling

The magistrate judge first analyzed which state's law applied to issue of reporter's privilege. Plaintiff asked court to apply Virginia law which recognizes only a common law qualified privilege. The *Times* argued that either the law of Maryland (Hatfill's residence) or New York (the newspaper's location and where Kristof is based) applied. Both Maryland and New York have reporter privilege statutes that provide absolute protection for confidential sources – even in the context of libel actions against the press. *See* Md. Cts. & Jud. Proc. Code Ann. § 9-112 (C)(1) (absolute privilege against the compelled disclosure confidential sources); N.Y. Civil Rights Law §79-h (b) (same).

Virginia recognizes only a common law qualified privilege which balances 1) whether the information is relevant, 2) whether the information can be obtained by alternative means, and 3) whether there is a compelling interest in the information. *See Philip Morris Co., Inc. v. Am. Broad. Co., Inc.*, 36 Va. Cir. 1, 18 (Richmond 1995).

Although Virginia courts had never addressed this specific conflicts issue, the magistrate judge held that Virginia law applied. Virginia, the judge reasoned, "adheres to traditional conflict of law rules, when presented with choice of law questions" and would treat the privilege question as procedural and subject to the law of the forum state.

Balancing Test

The magistrate then reviewed the *Philip Morris* factors to determine whether Hatfill had demonstrated sufficient need for the information. Not surprisingly the court found the information relevant to Hatfill's libel claim with respect to questions of accuracy and state of mind. The court also found that the information could not reasonably be obtained by alternate means because hundreds of FBI agents were involved in the investigation

Finally, the magistrate ruled that Hatfill had a compelling need for the information. Even though *The Times* had not yet put the confidential sources or their information at issue, "Plaintiff may need to do so in order to effectively prove his case."

The New York Times is represented by in-house counsel David McCraw and Michael Sullivan, David Schulz and Jay Ward Brown, Levine, Sullivan, Koch & Schulz LLP. Plaintiff is represented by Thomas Connolly and Patrick O'Donnell, of Harris, Wiltshire & Grannis, LLP, Washington, D.C.

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Florida Court Upholds Reporter's Privilege in Defamation Lawsuit

By Rachel E. Fugate

A defamation plaintiff must comply with the dictates of Florida's shield law and cannot compel discovery of privileged, newsgathering material unless the strict requirements of the shield law are met, a Florida Circuit Court ruled this month. *E. Michael Gutman, M.D., et al. v. Orlando Sentinel Communications Co., et al.*, No. 2005-CA-4071 (Fla. 9th Cir. Ct. Oct. 11, 2005) (Kirkwood, J.).

Background

In May 2005, Dr. Michael E. Gutman ("Gutman") filed a defamation and invasion of privacy lawsuit against Orlando Sentinel Communications Company and two reporters over two articles published in the *Orlando Sentinel*.

Throughout discovery in the litigation, Gutman requested all documents from the reporters' files related to the two articles. The *Sentinel* responded by producing thousands of pages of documents from the reporters' files. However, the *Sentinel* did assert Florida's shield law, Fla. Stat. § 90.5015 for certain documents contained in the reporters' files. Specifically, the *Sentinel* withheld information related to confidential sources and unpublished newsgathering information that was unrelated to Gutman.

The decision is a significant victory for the shield law in a defamation action where the media is a party – a situation that can often prove tricky.

Gutman filed a motion to compel the privileged documents. Gutman put forth three arguments to compel production of the reporters' confidential sources and unrelated work product: (1) there is a defamation exemption to Florida's shield law; (2) the *Sentinel*'s affirmative defenses created a compelling need to overcome the privilege; and (3) the *Sentinel* waived the privilege by producing some documents from the reporters' files.

Florida's Shield Law

For more than 20 years, Florida courts have recognized a common law privilege that protected journalists' newsgathering information from compelled disclosure in court. In 1998, the Florida Legislature codified this protective policy as Section 90.5015 of the Florida Statutes. The statute prohibits the compelled disclosure of newsgathering information unless the moving party can demonstrate by clear and specific evidence that:

> (a) The information is relevant and material to unresolved issues that have been raised in the proceeding for which the information is sought;
> (b) The information cannot be obtained from alternative sources; and
> (c) A compelling interest exists for requiring disclosure of the information.

Fla. Stat. § 90.5015(2) (2005).

Importantly, the statute does not contain an exception for cases where the media is a party and does not hinge on the confidential character of the information. Therefore, the statute applies in defamation actions and is not waived by disclosure.

Motion to Compel Denied

In denying Gutman's motion to compel privileged documents, the trial court recognized the importance of a free press. "Florida courts have long recognized that protecting a free and unfettered press through the Reporter's Privilege justifies limiting litigants' access to information and news gathered in that effort."

Against this backdrop the court analyzed Gutman's request to compel the privileged material. The court rejected all of the arguments advanced by Gutman.

First, Gutman argued that the privilege was overcome by the "essential role of the requested information in a defamation suit." The court recognized that the essence of the argument was for a defamation exception, which was not consistent with Florida law.

Second, Gutman argued that the assertion of affirmative defenses made the information "essential" because Gutman had to prove actual malice. The court was quick to note that Gutman failed to establish how the specific information would assist in proving actual malice.

Finally, the court disagreed with Gutman's contention that the production of some documents waives the privilege for all documents and found that partial production did not waive Florida's shield law.

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Florida Court Upholds Reporter's Privilege in Defamation Lawsuit

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After dispelling the arguments raised by Gutman, the court considered the motion to compel under the prongs of Section 90.5015. In so doing, the court stressed that Gutman had made no effort to satisfy any of the stringent requirements of Florida's shield law. The court found that Gutman failed to even prove the relevancy of the information requested, much less a compelling need.

Regarding the alternative source prong, the court noted any person who could provide the information was a possible alternative source. Gutman failed to show that the information was unavailable from alternative sources and compelled disclosure of the information was therefore inappropriate.

In the end, the court denied the motion, stating it would "not compel [the reporter] to break her vow of confidentiality to third parties or force [the reporter] to disgorge hours of unrelated work product based on [Gutman's] failed effort to overcome the privilege with unsupported legal theories."

The decision is a significant victory for the shield law in a defamation action where the media is a party – a situation that can often prove tricky. The ruling reflects a sound understanding of the impact of the shield law in Florida.

Rachel E. Fugate is a partner at Thomas & LoCicero PL. She along with her partner, Gregg D. Thomas, David S. Bralow and Karen Kaiser, Tribune Company, and David King and Mayanne Downs with King, Blackwell, Downs & Zehnder, P.A., represented the Sentinel *in this matter.*

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Texas Federal Court Applies Single Publication Rule to the Internet

Issue of First Impression in the State

This month a Texas federal district court, on an issue of first impression in the state, held that the single publication rule applies to online publications. *Nationwide Bi-Weekly Administration, Inc. v. Belo Corp.*, No. 3:06-CV-0600-N (N.D. Tex. October 16, 2006) (Godbey, J.). Texas joins a growing list of states that have applied the single publication rule in the internet context, including Arizona, California, Georgia, Kentucky, Massachusetts, Mississippi, New Jersey and New York.

Background

At issue was an article published in the *Dallas Morning News* on July 29, 2003 and re-published on the newspaper's website. Plaintiff filed a complaint for defamation, tortious interference and disparagement on July 28, 2004, within the state's one year limitations period. But plaintiff failed to serve the complaint on the newspaper until June of 2005.

The newspaper moved to dismiss for failure to serve the complaint in time. Plaintiff argued that because the newspaper article was available online there was a "continuous publication" for statute of limitations purposes.

Single Publication Rule

Texas state courts had not yet addressed the issue of the single publication rule in the internet context. But the federal court determined that the state would follow the reasoning of *Firth v. State*, 775 N.E. 463, 465-66 (N.Y. 2002) and *McCandliss v. Cox Enterprises, Inc.*, 593 S.E.2d 856, 858 (Ga. App. 2004). In *Firth*, New York's highest court reasoned that the single publication rule applied with even greater force to internet publications to prevent the "endless retriggering of the statute of limitations."

The one year statue of limitations for plaintiff's action also barred the related claims for business disparagement and tortious interference claims, since Texas courts have consistently held that when defamatory statements form the gist of a complaint the libel statute of limitations applies.

Belo was represented by Paul C Watler, Jenkens & Gilchrist, Dallas. Plaintiff was represented by Brent W. Bailey, Dallas; and Martha Hardwick Hofmeister and Derek D Rollins, Shackelford Melton & McKinley, Dallas.

Cases applying the single publication rule to Internet publications.

Simon v. Ariz. Bd. Of Regents, 28 Media Law Reports 1240, 1245-1246 (Ariz.Sup.Ct.1999)
Firth v. State, 775 N.E.2d 463, 465-66 (N.Y. 2002)
Van Buskirk v. N.Y. Times Co., 325 F.3d 87, 89-90 (2d Cir.2003)
Lane v. Strang Communications Co., 297 F.Supp.2d 897, 899-900 (N.D.Miss.2003)
Mitan v. Davis, 243 F.Supp.2d 719, 721-724 (W.D.Ky.2003);
Traditional Cat Ass'n, Inc. v. Gilbreath, 13 Cal.Rptr.3d 353, 355, 358-363 (Cal. App. 2004)
McCandliss v. Cox Enter., Inc., 265 Ga.App. 377, 593 S.E.2d 856, 858 (2004).
Abate v. Me. Antique Digest, 2004 WL 293903, *1-2 (Mass.Sup.Ct. Jan. 26, 2004)
E.B. v. Liberation Publ'ns, Inc., 777 N.Y.S.2d 133, 134 (N.Y. App. 2004)
Churchill v. State, 876 A.2d 311(N.J. App. 2005)

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Olympic Caller?

Jewell v. Atlanta Journal-Constitution Libel Case Headed Back to Appellate Court

By Tom Clyde

More than a decade after the Centennial Olympic Park bombing, a Georgia trial court has issued a decision on the merits of Richard Jewell's libel claim against *The Atlanta Journal-Constitution.* *Jewell v. Atlanta Journal-Constitution*.

On October 2, ruling on the *Journal-Constitution*'s December 1998 motion for summary judgment, Fulton State Court Judge John Mather dismissed 21 of Jewell's 22 libel claims against the *Journal-Constitution* – at least 18 of them based on his conclusion that Jewell could not raise a triable issue of falsity.

Dismissed were Jewell's claims relating to the *Journal-Constitution*'s reporting that investigators believed Jewell planted the bomb, that he fit law enforcement's bomber profile, that he had sought publicity for his actions in the days immediately following the bombing, and that he had had a troubled history in law enforcement and was regarded by former employers and coworkers as overzealous.

Also dismissed were Jewell's claims relating to a series of *Journal-Constitution* opinion columns, including one that noted similarities between the law enforcement investigation of Jewell and the prior investigation of another famous murder suspect, Wayne Williams.

The one claim the court permitted to proceed challenged a portion of an article published August 4, 1996, over a week after the bombing and several days after the *Journal-Constitution* first reported Jewell was a suspect. The article concerned growing doubt about the investigation of Jewell and, in particular, of investigators' belief that it was Jewell who had placed a 911 call designed to lure law enforcement to the vicinity of the bomb.

In addition to quoting harsh commentary on the investigation and its effort to "railroad his client" by Jewell's counsel Watson Bryant – including Bryant's comment that the FBI wanted a voice sample from Jewell "'so they can somehow say it's a match to the 911 call" – the article noted that the FBI in Atlanta would not comment on "persistent news reports out of Washington" that the 911 caller's voice did not match Jewell's.

The court nevertheless held that the article was actionable insofar as it reported, as context for the FBI's request for a Jewell voice sample, that, "Investigators have said they believe Jewell … placed the 911 call."

On October 9, at the *Journal-Constitution*'s request, Judge Mather certified that the order is of such importance to the case that immediate review should be had.

On October 19, the *Journal-Constitution*, pursuant to this certification, filed an application for interlocutory appeal of the order to the Georgia Court of Appeals.

The article was actionable insofar as it reported that, "Investigators have said they believe Jewell … placed the 911 call."

As grounds for the appeal, the *Journal-Constitution* argues that the trial court ignored the directive of the Georgia Court of Appeals in an earlier appeal in the *Jewell* case, decided in 2001.

2001 Appeals Court Decision

In 2001, the court of appeals had considered the *Journal-Constitution*'s appeal of a trial court order threatening to jail certain of its reporters for contempt for refusing to identify confidential sources, Jewell's appeal of the trial court's determination that he is a "public figure," and the *Journal-Constitution*'s cross-appeal of the trial court's failure to consider and grant the *Journal-Constitution*'s December 1998 motion for summary judgment.

By its decision, the court reversed the trial court's finding of contempt and affirmed its finding that Jewell is a "public figure." It also ruled that in light of the pendency of these issues the trial court was correct in deferring ruling on the *Journal-Constitution*'s summary judgment motion.

The Court held that in considering any renewed effort by Jewell to seek to compel the *Journal-Constitution* to identify confidential sources the trial court should conduct a legal analysis "similar to, perhaps even identical to, that required in ruling upon a motion for summary judgment" to determine whether Jewell had a viable claim for libel. 251 Ga. App. 808, 813 (Ga. Ct. App. 2001).

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Specifically:

> We suggest an analytical framework which would require Jewell to precisely identify by date, page, and line each published statement he alleges libels him. The trial court should then look to the entire record to determine if each particular claim is legally viable, and if it is, the trial court can then perform the necessary balancing test as to each legally viable allegation of libel.
>
> *If, for example, a plaintiff in a libel case alleged that a certain statement was libelous while admitting in another statement that the fact was true, his burden of proving that the statement was false could not possibly be met. His libel action as to that statement would not be legally viable*, and there should be no order requiring the defendant to disclose the confidential source of that statement.

Id. at 814 (emphasis added).

With respect specifically to the *Journal-Constitution*'s motion for summary judgment, the court held that:

> Until it was determined with finality whether Jewell is to be considered a private or public citizen, the standard of proof necessary for Jewell to maintain his claim was unsettled. It has only now been finally determined that as a public figure, Jewell must show by clear and convincing evidence that false and defamatory statements were published with actual malice.

Id. at 814.

In 2004 and 2005, pursuant to the standards set forth in the 2001 appellate decision, the trial court rejected Jewell's renewed effort to compel the *Journal-Constitution* to identify confidential sources.

This cleared the way for the October 2006 order in which the trial court ruled on the *Journal-Constitution*'s long pending motion for summary judgment.

Motion for Appeal

According to the *Journal-Constitution*'s application to appeal, the trial court in its October 2 order violated the standards articulated by the court of appeals in leaving pending Jewell's claim that he was defamed by the statement in the August 4 article that, "[i]nvestigators have said they believe Jewell … placed the 911 call."

Given Jewell's repeated public statements that law enforcement believed he was the bomber and given the court's sensible conclusion that this precludes Jewell's claims based on reporting that investigators believed he was the bomber, this same logic should preclude any claims based on the 911 call. The bomber and the 911 call were inextricably intertwined in the mind of investigators. Indeed, when Jewell and his attorneys subsequently challenged the government's theory that he was the bomber, they started by proving Jewell could not have made the 911 call. They described this as fatal to "the government's theory" of the case.

Additionally, the October 2 order's reading of the sentence as essentially a statement that Jewell made the 911 call is not supportable. The thrust of the article is that the government investigators were attempting to gather more evidence, but there were increasing reasons to question their case, including questions about the 911 call. It also quotes Jewell's counsel at length, describing the investigation as politically motivated "overkill." The order's interpretation of the statement as an assertion of guilt by the newspaper ignores its context.

Finally, the application asserts the trial court's order applies the law of actual malice erroneously. Rather than credit the *Journal-Constitution* for reporting on the emerging questions about the 911 call, the trial court holds such reporting is evidence of actual malice. What the trial court ignores is that the *Journal-Constitution* accurately informed readers of those questions before, after and in the very article that the trial court finds actionable. Reporting conscientiously on emerging flaws in the government's theory was improperly construed as actual malice.

The court of appeals is expected to rule by early December on whether it will accept the interlocutory application.

Peter Canfield, Tom Clyde and Michael Kovaka of Dow Lohnes represent The Atlanta Journal-Constitution. *Richard Jewell is represented by Lin Wood of Powell Goldstein.*

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Sex, Lies and Gossip Columns

Plaintiff States Claim for Libel, False Light and Private Facts

A D.C. federal district court last month denied a newspaper's motion to dismiss a complaint filed by a CNN producer who was the subject of a short gossip item that stated she "uses her position to meet all the right people" and was "linked romantically" to nine D.C. "power players," including a "porn king." *Benz v. Washington Newspaper Publ'g Co., LLC & Bisney*, No. 05-1760, 2006 WL 2844896 (D.D.C. Sept. 29, 2006) (Sullivan, J.).

Relying on the "unchastity of a woman" concept, the court held that gossip item was capable of a defamatory meaning to support the libel and false light claims even where all the parties were unmarried. But more curiously the court also held that plaintiff stated a claim for publication of private facts over true portions of the article because "plaintiff's personal romantic life is not a matter of public concern."

It is unlikely that an unmarried, professional woman in her 30s would want her private life about whom she had dated and had sexual relations revealed in the gossip column.

Background

At issue is a short gossip item published in the August 19, 2005 *Washington Examiner*, entitled "Controversial Love for CNN Producer." The article states in its entirety:

> CNN Producer Kathy Benz, 35, uses her position to meet all the "right" people. She's been linked romantically with power players – including venture capitalist Jonathan Ledecky (a Washington Nationals ownership hopeful), University of Maryland basketball coach Gary Williams, Chicago Cubs VP John McDonough, Sirius CEO Mel Karmazin, actor Hugh O'Brien, CNN correspondent John Bisney, Georgetown hairstylist Paul Bosserman and her one time fiancé, AOL millionaire John Daggitt. Now she has hooked up, according to her gal pals, with porn king Mark Kulkis. The couple first met when Kulkis, 40, president and CEO of Kick Ass Pictures, did a CNN interview while he was in D.C. for the National Republican Congressional Committee's annual President's Dinner. He's the honorary chairman of the NRCC's Business Advisory Council. That's a roundtable of millionaire entrepreneurs. Kulkis made tabloid headlines when he escorted porn star Mary Carey to GOP dinner with President Bush in June. At that time, he and Carey enjoyed a private lunch with White House insider Karl Rove. Wouldn't you have liked to have been a fly on that wall?

One of the men mentioned in the item, John Bisney, a former CNN announcer, was the source for the story. According to the complaint, after Benz rejected Bisney's romantic advances he began cyberstalking her by accessing her emails and posting and distributing false news items about her.

Benz sued Bisney and the *Washington Examiner* for libel, false light, publication of private facts and intrusion (against Bisney only). In a correction published after the complaint was filed, the newspaper apologized and stated "we now believe we were the target of an Internet "spoofer" who used an email address that appeared to come from another news organization." Plaintiff later added claims of libel and false light against the newspaper for publication of the correction, but the court held the correction was not actionable.

Plaintiff acknowledged that she had been romantically involved with four of the men mentioned in the article.

Defamatory Meaning

Ruling on the newspaper's motion to dismiss, the court held that when read together the statements that plaintiff "uses her position to meet all the 'right' people," was "linked romantically with power players" and "hooked up" with a porn king "paint a picture of an opportunistic woman who will use her job in the media and sex to get what she wants."

The court rejected the newspaper's argument that there is nothing defamatory about a single women being "linked ro-

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mantically" to other single men, reasoning instead that any form of unchastity of a women, married or single, constitutes "serious sexual misconduct" for pleading purposes.

The court also ruled that while the term "hooking up" may be vague in ordinary usage, in context it implied that plaintiff engaged in sexual conduct with "porn king Mark Kulkis as part of her pattern of using her CNN position to meet such men."

These defamatory meanings were sufficient to support plaintiff's false light claims against the newspaper.

Private Facts Claim

Without citation to any authority the court concluded that plaintiff also stated a claim against the newspaper for the true disclosure that she had romantic relationships with four men named in the article.

> The Court is persuaded that it is unlikely that an unmarried, professional woman in her 30s would want her private life about whom she had dated and had sexual relations revealed in the gossip column of a widely distributed newspaper, particularly in the context in which the information was revealed. Further, plaintiff's personal, romantic life is not a matter of public concern. Because the Court finds that unwanted publication of such personal, true facts would cause suffering, shame or humiliation to a person of ordinary sensibilities, the plaintiff has sufficiently satisfied the elements of this claim

Not surprisingly plaintiff's allegations were sufficient to state a claim against John Bisney on the libel, false light and private facts counts. But the court dismissed without prejudice plaintiff's intrusion claim where she did not allege any physical intrusion into her seclusion.

The Washington Examiner is represented by Laura Handman and Amber Husbands, Davis Wright Tremaine LLP, in Washington, D.C. Plaintiff is represented by William McDaniel, Jr., Baltimore.

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A Forum for MLRC members on the Espionage Act and Related Statutes

Wednesday, November 8
2:30-4:30 p.m.
Sheraton New York Hotel & Towers, Empire West Ballroom

A very practical look at the questions these statutes raise for media lawyers (and their clients), what resources exist for finding the answers, procedures to be considered for newsrooms and precautions media counsel may wish to consider to protect their clients. The Forum will be led by a panel of lawyers whose work has brought them into close contact with these statutes, including

Susan Buckley, Cahill Gordon & Reindel, Partner (Moderator)
Kevin Baine, Williams & Connolly LLP, Partner
Karlene Goller, The Los Angeles Times, Vice President & Deputy General Counsel
Eric Lieberman, The Washington Post, Deputy Counsel & Director of Government Affairs
Nathan Siegel, Levine Sullivan Koch & Schulz LLP, Partner
Jeffrey Smith, Arnold & Porter, Partner & former General Counsel of the CIA (May 1995 to September 1996)

Please contact Kelly Chew (kchew@medialaw.org) if you plan to attend.

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Ohio Appeals Court Affirms Summary Judgment For Broadcaster Over "I-Team" Investigation

Opinion Defense and Lack of Negligence Support Dismissal

By Jill P. Meyer

In a solid and thoroughly reasoned opinion, Ohio's First District Court of Appeals affirmed summary judgment in favor of a Cincinnati television station and its sources in a defamation action brought by a dentist over investigative broadcasts about patients' complaints. *Fuchs v. Scripps Howard Broad. Co. d/b/a WCPO-TV*, No. C050166, 2006 WL 2924673 (Ohio Ct. App. Oct. 13, 2006) (Painter, J.).

The Broadcasts

Plaintiff J. Michael Fuchs and his dental practice, Family Dental Care Associates (FDCA), did not name WCPO-TV (WCPO) as a defendant when they filed the lawsuit in August 2003. Instead, Fuchs and FDCA initially sued only former patients and former employees for statements they made which were included in five WCPO broadcasts about the plaintiffs' billing procedures and customer service.

In an unusual move, WCPO asked the court to allow it to become a defendant to support its sources and defend its broadcasts.

In an unusual move, WCPO asked the court to allow it to become a defendant to support its sources and defend its broadcasts. The judge granted that request, allowing WCPO, its General Manager Bill Fee, News Director Bob Morford, and I-Team reporter Hagit Limor to be added as defendants.

The first broadcast in February 2003 reported the complaints of former patients regarding billing errors and their problems getting in touch with FDCA to address their concerns. The station received an enormous response from viewers after the first broadcast, including dozens of phone calls and emails from former patients and employees supporting the claims in the first broadcast. As a result, the station broadcast the report again the next evening.

In response, Fuchs took out a full-page advertisement in *The Cincinnati Enquirer* denying the allegations and attacking WCPO and Ms. Limor. In response to the ad, WCPO re-ran the initial broadcast the next day and made several statements defending its investigation.

After more than 200 former and current patients and employees contacted the station, WCPO aired its fourth broadcast. That broadcast included interviews with a wide variety of former patients and employees who raised concerns about billing, customer service, cleanliness, and unnecessary care.

The fifth broadcast, which aired approximately one month later, dealt with cleanliness issues including sterilization of dental instruments and the relationship between Fuchs and the Ohio State Dental Board. The final broadcast, in August 2003, was aired after Fuchs filed his lawsuit and included short segments from the previous broadcasts.

From the first three broadcasts, Fuchs challenged several statements made by former patients, whom he also sued:

> "They [FDCA] billed my insurance for the same thing they billed me for. In my heart I honestly think that it's a way to get double paid."
>
> "This is not what happens accidentally. You don't have 125 accidents and that is just what the Better Business Bureau is aware of. It just doesn't seem right. And you know what's so funny is you think if there's that many people that complained, how many didn't."
>
> "They continued to bill me for monies that I did not owe them."
>
> "They don't care about the customer or the patient. They care about their money."

Court of Appeals Decision

The court's analysis began with a holding that the plaintiffs are private figures. This was a reversal of the trial court's determination that they became public figures after they took out the full-page newspaper advertisement after the initial broadcasts.

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Evaluating that issue, the appellate court held that:

> "the alleged defamers cannot, by provoking a response to an attack, make the subject of the statements – the one attacked – a public figure simply because the attacked person responds. … That is, they can't say 'it started when he hit me back.'"

Though the court declined to hold that the plaintiffs made themselves public figures in this case, it stated that it must be determined on a case-by-case basis:

> "This is not to say that in another case, with different facts, placing ads or replying to charges could not rise to a level to change a private person to a public figure. But not here."

Even though "troubleshooting investigations ... are generally regarded as fact," the former patients' statements had "an air of hyperbole and subjectivity."

Moving to the statements at issue, the appellate court deemed most of the former patients' statements to be protected opinion. Even though "troubleshooting investigations in a newscast, such as the I-Team reports, are generally regarded as fact rather than opinion," it found that the former patients' statements had "an air of hyperbole and subjectivity," "elicited an emotional response" or were not "readily verifiable."

Two of the challenged statements, however, were not opinion: "They billed my insurance company for the same thing they billed me for" and "[t]hey continued to bill me for monies that I did not owe."

Performing a painstaking review of the documents and deposition testimony and rejecting the plaintiffs' argument that the statements were akin to accusing them of criminal conduct, the court determined that those two statements were true or "essentially true" and thus were dismissed properly on summary judgment.

Lack of Negligence

The court next turned to the conduct of the media defendants to review whether the plaintiffs had met their burden to show by clear and convincing evidence that they "failed to act reasonably in attempting to discover the truth or falsity of the publications. The focus is on the state of the evidence as it related to [the reporter's] efforts to discover the truth of the broadcast statements."

Reviewing the voluminous record, the court found that the reporter acted reasonably during the three months of investigation before the first broadcast. She attempted to interview Fuchs several times, but just as the complaining former patients found, she was met with unanswered phones and full voice-mail boxes.

She interviewed a spokesman for the Ohio Attorney General's office, who said that the number of complaints regarding FDCA was unusual. She interviewed the president of the Cincinnati Better Business Bureau, which tallied more than 100 unresolved complaints about FDCA and reported an unsatisfactory rating for the dental practice.

The reporter interviewed some of the people involved in more than 180 lawsuits filed in state court dealing with FDCA, and those people also complained about service and billing problems. She also interviewed two non-FDCA dentists about their billing practices. In addition, she interviewed the Executive Director of the Ohio State Dental Board and many former employees of FDCA.

When Fuchs finally returned the reporter's calls, he denied the patients' allegations and told Ms. Limor that he would not release his patients' files to her unless she obtained releases from them. When she did so, as the appellate court noted, Fuchs "stonewalled her." Limor and a cameraman visited Fuchs twice in unsuccessful attempts to gain an interview. When she set up a meeting between Fuchs, his attorney, and WCPO, Fuchs did not attend and his attorney refused to comment on the actual story. All of these efforts were reasonable attempts by Limor to accurately report the news story.

Plaintiffs' challenge of the claimed false implication and statements that they had an improper relationship with the Dental Board also were rejected. This was based upon evidence in the record that Fuchs and the Dental Inspector "had been on vacation twice" and that former employees told Limor that Fuchs "always seemed to know when inspections were imminent." Finally, the station included the Dental Board's statements denying an improper relationship.

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The appellate court also readily dismissed the plaintiffs' argument that they were defamed by the station's use of graphics describing one of the original complaints as one for "double billing":

> The "double billing" graphic must be construed within the context of the entire broadcast to determine any defamatory effect. We have already determined that the statements by [the former patients] were essentially true. … Further, the gist or sting of the broadcasts was the poor customer service provided by FDCA and the cavalier attitude of FDCA toward its patients, not "double billing."
>
> Whether the claims were in fact true is not the issue – it is whether reasonable minds could find by clear and convincing evidence *that she did not act reasonably*. We are not sure what more she could have done, given the intransigence she encountered.

The court thus found no remaining issue and held that the case was dismissed properly on summary judgment. It is unknown whether the plaintiffs will attempt to have the decision reviewed by the Ohio Supreme Court.

Richard M. Goehler, Jill P. Meyer, and Monica L. Dias of Frost Brown Todd LLC represented Scripps Howard Broadcasting Company d/b/a WCPO-TV and the Station General Manager Bill Fee, News Director Bob Morford, and I-Team Investigator Hagit Limor. Plaintiff J. Michael Fuchs, DDS was represented by Richard L. Creighton of Keating, Muething & Klekamp in Cincinnati.

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Allegations that "Con Artist" "Ripped off" and "Scammed" Customers Not Actionable

By Nicole A. Auerbach

On September 13, 2006, New York State Supreme Court Justice Marcy Friedman dismissed defamation and related claims brought against CBS Broadcasting Inc. and its reporter, Arnold Diaz, based on their reporting of the ongoing dispute between a local businesswoman and the New York City Department of Consumer Affairs ("the DCA"). *Foley v. CBS Broadcasting Inc.*, Index No. 169463/05 (N.Y. Sup. Ct. N.Y. County), Decision/Order entered Sept. 13, 2006.

The opinion is most notable for the court's holding that statements in the broadcast referring to plaintiff as a "con artist" who had engaged in a "scam" and "ripped off" her customers were not defamatory because they were non-actionable opinion.

The court also found that defendants' reporting on the actions taken against plaintiff by the DCA was a privileged "fair and true report" of official proceedings. The court declined, however, to apply the New York Strategic Lawsuit Against Public Participation Act, or anti-SLAPP statute, N.Y. Civ. Rights Law §§ 70-a and 76-a, to the lawsuit.

Background

Plaintiff Mary Foley is in the business of selling high-end kitchen cabinets in a showroom on the Upper East Side of New York City. Between December 2003 and June 2005, Foley was the subject of three reports by WCBS-TV's consumer affairs reporter, Arnold Diaz, as part of Diaz's "Shame on U" series.

In the first broadcast, on December 4, 2003, Diaz reported that Foley had been "scamming customers for years under at least five different names." While Foley denied that she had failed to deliver the cabinets ordered by her customers, the broadcast included interviews of several former customers who said they had been "ripped off" by Foley.

Some had recovered judgments against her, and one said in the broadcast that he had obtained a restraining order against her, based on Foley's assaulting him with a pole when he came to collect on his judgment. The broadcast ended with a statement by Diaz that all of the complaining customers had been referred to the DCA, which has "the power to take action against crooked businesses."

The second segment was broadcast on November 30, 2004. That broadcast focused on the DCA's padlocking of Foley's store. Diaz referred to Foley as a "con artist" and the broadcast contained the footage of the consumers from the December 2003 broadcast discussing their complaints about Foley. Diaz then explained that Foley's history of "unresolved complaints, plus the fact that she had no license to install kitchen cabinets," was what led to the padlocking of her store.

While Foley denied having any unsatisfied customers, the Commissioner of the DCA explained in the report that there were $170,000 of "outstanding complaints" against Foley and that she owed the city approximately "$30,000 in fines." The report concluded by stating that the padlock would remain on Foley's business until she had resolved the complaints and paid the fines.

The final segment aired on June 16, 2005. In that segment, Diaz reported that Foley was back in business. After reviewing the history of complaints against her, and the DCA's padlocking of the store, Diaz reported that the DCA had told Foley's "victims" that she had agreed to good-faith mediation. However, Diaz reported, the proposed deal had "fallen apart."

Diaz stated that Foley had failed to pay back her customers, and that she was back in business in the same location, under a different name. He also noted that Foley was appealing "multiple decisions that have found her guilty of unlicensed home improvement activity."

Foley refused to allow Diaz into her store this time around. Instead, Diaz asked her questions through the glass door. The segment closed by noting that Foley did not need a license from the DCA to sell cabinets, but that a license would be required if she were to install them.

At the time of the broadcasts, Foley was embroiled in an ongoing dispute with the DCA, which had repeatedly charged her with operating an unlicensed home improvement business, and had issued four padlock orders over the course of seven years. Foley eventually sued the DCA to

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reopen her store, see Foley v. Dykstra, 04 Civ. 10320 (SAS) (S.D.N.Y.).

In order to settle that case, Foley and the DCA entered into a stipulation providing that she would be allowed to reopen her store in exchange for her agreement to engage in good faith mediation with some 25 consumers who had brought complaints against her. She was also required to apply for a home improvement contractor's license. At the time of the last broadcast, Foley's store had reopened, but the mediation process had stalled, and the DCA had not issued the required license.

Motion to Restrain Broadcast

In June 2005, just before the third broadcast, Foley filed a lawsuit against CBS and Diaz alleging defamation and also sought a temporary restraining order prohibiting CBS from airing the June 2005 broadcast and prohibiting CBS personnel from approaching her store. The Court refused to issue the restraining order, holding that Foley failed to demonstrate the "extraordinary circumstances" that could warrant such relief. Foley v. CBS Broadcasting Inc., Index No. 169463/05 (N.Y. Sup. Ct. N.Y. County), Decision/Order entered Aug. 31, 2005 at 2.

Plaintiff then lodged an amended complaint, claiming defamation, tortious interference with prospective business relations and intentional infliction of emotional distress. The latter two claims were based at least in part on Diaz's alleged attempts to enter her store in June 2005 to obtain an interview.

In her defamation claims, Foley took issue with many of the statements made by Diaz, including his reference to her as a "scam artist" who had "ripped off" her customers, but did not allege that any of the statements made by her customers or the Department of Consumer Affairs were themselves defamatory.

Opinion Defense

Justice Friedman quickly dismissed the defamation claim based on the first broadcast on statute of limitations grounds. Foley had argued that the reference to the first broadcast in the second, and the inclusion therein of the footage from the first broadcast of Foley's customers complaining about her, was sufficient to revitalize the first for purposes of bringing a defamation claim, but the court disagreed.

Justice Friedman noted that none of the portions of the first broadcast that were alleged by Foley to be defamatory were repeated in the second broadcast. Decision/Order at 5. Thus, she ruled that the limitations period for a defamation claim based on the first broadcast had expired.

Turning to the later broadcasts, the court concluded that each of the allegedly defamatory statements were either protected opinion or privileged statements protected by the fair report privilege.

Each of the allegedly defamatory statements were either protected opinion or privileged statements protected by the fair report privilege.

The court first reviewed the law of opinion, concluding that "the dispositive inquiry is 'whether a [reasonable] listener ... could have concluded that [the broadcast was] conveying facts about plaintiff.'" Decision/Order at 5 (quoting Gross v. New York Times Co., 623 N.E.2d 1163, 1167, 82 N.Y.2d 146, 152 (N.Y. 1993)).

The court further explained that it was obliged to review the allegedly defamatory statements in context (the court accepted without comment the transcripts of each of the broadcasts as exhibits to the motion to dismiss), Decision/Order at 5 (citing Steinhilber v. Alphonse, 501 N.E.2d 550, 555, 68 N.Y.2d 283, 293 (N.Y. 1986)); Immuno AG. V. Moor-Jankowski, 567 N.E.2d 1270, 1281, 77 N.Y.2d 235, 254 (N.Y. 1991)), and that statements of opinion based on fully disclosed facts are not actionable, noting that "'a proffered hypothesis that is offered after a full recitation of the facts on which it is based is readily understood by the audience as conjecture.'" Decision/Order at 6 (quoting Gross, 623 N.E.2d at 1168, 92 N.Y.2d at 153).

On this basis, the court concluded that the calling plaintiff a "con artist" who ran a "crooked business" and who had engaged in a "scam" were statements of opinion, conveying "'mere allegations to be investigated rather than ... facts.'" Decision/Order at 6 (quoting Brian v. Richardson, 660 N.E.2d 1126, 1131, 87 N.Y.2d 46, 53 (N.Y. 1995)). The court found that the broadcasts contained no suggestions of "additional undisclosed facts." Decision/Order at 6.

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Fair Report Privilege

The court also ruled that the statements in the broadcasts pertaining to the DCA proceedings were protected by the fair report privilege as "fair and true report[s]" of an "official proceeding." Decision/Order at 7. See N.Y. Civ. Rights Law § 74 (2006); Freeze Right Refrig. & Air Conditioning Servs. v. City of New York, 475 N.Y.S.2d 383, 101 A.D.2d 175 (1st Dep't 1984).

Concluding that the broadcasts contained "[a]t most ... minor inaccuracies," Justice Friedman ruled that the privilege could not be overcome. Decision/Order at 7 As an example of a "minor" inaccuracy, the court noted that the broadcast stated that Foley's store had been padlocked as a result of both unlicensed activities and consumer complaints, while Foley asserted that the padlocking was the result only of unlicensed activity.

Defendants had argued in their motion to dismiss that this was at most a minor inaccuracy or substantially true in that the consumer complaints were a matter of fact and had led directly to the DCA's investigation of Foley and its conclusions that she had engaged in unlicensed activity.

Additional Tort Claims Dismissed

The court dismissed out of hand Foley's additional claims, which were for tortious interference with business relations and intentional infliction of emotional distress related for the most part to Diaz's newsgathering. The court simply concluded that Foley had not met the pleading requirements of those claims and further denied Foley's request for leave to amend the complaint a second time because she had made "no showing of merit and offered no proposed pleading amending these claims." Decision/Order at 7.

Anti-SLAPP Law Does Not Apply

The court was not so generous in its treatment of CBS's argument that the lawsuit was a "SLAPP" suit, which is defined under New York law as "an action . . . brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." N.Y. Civ. Rights Law § 76-a(1)(a) (2006). Plaintiffs in SLAPP suits must meet heightened pleading requirements, including a requirement that the plaintiff carry the burden of proof on a motion to dismiss. N.Y. C.P.L.R. § 3211(g) (2006). SLAPP plaintiffs who allege defamation must also prove actual malice in order to prevail, regardless of whether or not they are public figures. N.Y. Civ. Rights Law §§ 70-a,76-a (2006). CBS relied on Foley's status as an applicant for a public license and her conceded goal of muzzling the CBS broadcasts about her in support of this argument.

The court found, however, that there was "no claim or evidence that" Foley had been an applicant for a public license at the time of the first or second broadcasts. Justice Friedman further concluded that, although Foley was an applicant by the time of the third broadcast, none of the statements at issue in that broadcast "directly challenge[d]" her application. Decision/Order at 4.

Justice Friedman also found that Foley's lawsuit had not "curtailed" any of defendants' "pertinent fundamental rights," noting that "defendants have continued to broadcast their programs unimpeded by plaintiff's actions." Id.

Defendants were represented by Anthony M. Bongiorno and Hazel-Ann Mayers of CBS Broadcasting Inc. and by Lee Levine, Gayle C. Sproul and Nicole A. Auerbach, all of Levine Sullivan Koch & Schulz, L.L.P. Foley was represented by Mayne Miller.

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California Appeals Court Affirms Anti-SLAPP Ruling Over "Troubleshooter" Broadcast

A California appellate court recently affirmed an anti-SLAPP motion in favor of television station KGTV in a slander lawsuit over a "Troubleshooter" consumer news broadcast about an electrical repair company. *CWE Enterprises v. McGraw-Hill Broad. Co., Inc.*, No.D046284, 2006 WL 2361316 (Cal. Ct. App. Aug. 16, 2006) (Aaron, Huffman, Haller, JJ.).

Background

On August 16, 2002, KGTV in San Diego aired a "Troubleshooter" news story concerning Citywide Electric and one of its owners, Cort Carpenter. The report stated that the station's "Troubleshooter" unit had received numerous complaints about the business and that it had been cited by various government agencies for improper business practices.

The report included a comparison between the store's repair recommendations and those from another company on a "test house" which suggested that the repairs recommended by Citywide were unnecessary.

The news report also noted that Carpenter had been the subject of a prior consumer investigation report by the station for running a coupon book scheme called "Shopping Spree" that was shut down by authorities.

The Citywide plaintiffs sued the station in federal court for slander. Ultimately, the federal court determined that there was no diversity jurisdiction and dismissed the case without prejudice. Plaintiffs then filed their slander complaint in state court.

KGTV filed an anti-SLAPP motion, which the superior court granted on the ground that the statute of limitations had run and, therefore, plaintiffs had not established a probability of prevailing on their claims, as required under California's anti-SLAPP statute. Cal. Code. § 425.16.

Appeals Court Ruling

The appellate court affirmed dismissal, but for different reasons. The court found that plaintiffs' claims were timely, based on the equitable tolling doctrine, but held that plaintiffs could not establish a probability of prevailing on any of them.

The court easily agreed with KGTV that a consumer news broadcast constituted free speech on a matter of public interest. The burden then shifted under the statute to the plaintiffs to show a probability of prevailing on the slander claims, which they failed to do.

Among the statements at issue in the broadcast were that Citywide was "generating a lot of complaints," "making a lot of customers unhappy," "building a reputation for working 'fast' in a different sort of way" and selling unnecessary services to the public were false. All these statements were not actionable in light of substantial evidence of disgruntled customers, small claims judgments against Citywide, its settlement of a criminal fraud action and other lawsuits and proceedings against it.

The broadcast then put Citywide to the test by having it make a repair recommendation on a "test house" that another licensed electrician had pronounced sound and up to code. Citiwide recommended a $563 repair job. Unbeknownst to KGTV, the test house had actually failed code inspections conducted by the City of San Diego years earlier. Plaintiffs therefore argued "the test was clearly set-up for a pre-ordained outcome."

The court rejected the claim, finding that even assuming the falsity of the electrician's statement that "everything 'seems' to be okay and up to code," plaintiff failed to establish a probability of proving that the broadcaster acted negligently in making, or republishing those statements.

Finally, the court also found that plaintiffs had no probability of proving negligence over the broadcast's discussion of Citywide owner's past brush with the law over his "coupon scheme" where that portion of the report was based on interviews with defendant and a former employee.

The court additionally confirmed an award of $48,972 in attorneys fees and costs to KGTV under the anti-SLAPP statute, and remanded the case for a further award of the costs of the appeal.

Guylyn Cummins, Sheppard, Mullin, Richter & Hampton, San Diego, represented the defendants in this action. Gregg Allen Johnson, San Diego, represented plaintiffs.

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Broadcaster's Report of Allegations Protected As Substantially True

Minnesota Court of Appeals Cites Importance of "Context"

By Paul Hannah

The Minnesota Court of Appeals this month affirmed summary judgment in favor of a news broadcaster on the grounds of substantial truth where the station accurately summarized allegations of alleged misconduct. *Iverson v. Hubbard Broadcasting, d/b/a KSTP-TV*, No. A05-2437, 2006 WL 2601658 (Minn. Ct. App. Sept. 12, 2006) (Klaphake, Minge, Forsberg, JJ.).

The appellate decision may prove helpful in media litigation because it distinguishes between the facts presented by the station and the allegations communicated by those interviewed by the television station. The court of appeals found that as long as the station depicted those allegations with substantial accuracy, separated its reporting from the stories being told by third parties, and balanced the report with comments from both sides, it would not be liable.

Background

The background facts in the case started in mid-2002, when Robert Shogren contacted KSTP-TV's "viewer tip line" saying that he was being sued by Steven Iverson for calling 911 to report Iverson for possible drunk driving. Iverson had been pulled over by a state trooper following the 911 call, but was released after a field sobriety test.

The appellate decision distinguishes between the facts presented by the station and the allegations communicated by those interviewed.

Shogren told KSTP-TV he was going to contact his legislator to try to amend Minnesota's Good Samaritan law so people making 911 calls in good faith would be immune from litigation. An investigative reporter for KSTP-TV, Kristin Stinar, took up the story. She reviewed documents from the case, interviewed the parties and a Minnesota State Patrol official. She also reviewed briefs from a separate (and unsuccessful) lawsuit Iverson filed against the state trooper who stopped him..

On November 7, 2002, KSTP-TV broadcast a report about the matter, including that Shogren believed he was acting as a good samaritan and was trying to get the state's Good Samaritan law amended. (In fact, later that next year, the Minnesota Legislature did amend the statute to protect 911 callers. KSTP-TV later reported on the legislation and change in the law.) The broadcast also stated that "based on field sobriety tests the trooper let [Iverson] go."

In November 2004, Iverson sued KSTP-TV alleging the station defamed him by reporting that a state trooper thought his driving was "erratic," allegedly implying that he was driving while impaired.

KSTP-TV moved for summary judgment, arguing that its report was substantially correct and was not broadcast negligently. In September 2005, the district court granted KSTP-TV's motion for summary judgment on the ground that Iverson had failed to prove that KSTP-TV had published a false statement of fact about him.

Court of Appeals Decision

On appeal, the Minnesota Court of Appeals found that KSTP-TV's statements were substantially correct. Plaintiff argued that KSTP-TV's statement that the state patrol thought that Iverson's driving was "erratic" was false. He pointed to deposition testimony from the trooper who said he might describe the driving he witnessed as "errant" rather than "erratic." However, the trooper could not say that Iverson's conduct that night was not "erratic."

The court of appeals refused to distinguish between "errant" and "erratic" driving behavior. Viewed in context, the gist of the broadcast was that plaintiff's driving raised enough concern that a citizen called 911 and a trooper pulled him over. The viewer would be left with the accurate impression that the trooper determined that plaintiff's driving warranted an inquiry.

The court concluded that KSTP-TV truthfully reported the accusations that led to the litigation between Iverson and the Shogren. A statement presenting a "supportable interpretation of the underlying situation is not false."

The court of appeals also rejected as completely unsupported by the record plaintiff's argument that the broadcast falsely implied that he was driving while impaired. KSTP-TV's language, the court found, "carefully implies only that Shogren initially believed appellant was driving while impaired." The report then made it clear that "based on the field sobriety tests the trooper let him go." As a result, the report "clearly indicates that, despite initial concerns by Shogren and [the trooper], [Iverson] was not illegally driving while impaired."

Paul R. Hannah, Kelly & Berens, PA, in Minneapolis, represented KSTP-TV in this case. Plaintiff proceeded pro se.

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Ex-Wife Wins Bench Trial Over Book About Relationship With Her Ex

Judge Applied Strict Liability Standard

In an unusual ruling, a Kentucky federal court applied a strict liability standard to a libel suit brought by a man against his ex-wife over a book she wrote discussing the couple's relationship. *Lassiter v. Lassiter*, No. 04-106, 2006 WL 2792221 (E.D. Ky. bench verdict Sept. 26, 2006).

Judge William O. Bertelsman held that plaintiff was a private figure, that defendant was non-media, and that her book was of purely private interest. A strict liability standard therefore applied and plaintiff needed only to prove the publication of defamatory statements, according to the court. Nevertheless, following a bench trial, the judge ruled in favor of the defendant, finding the complained of statements in her book were either true or matters of opinion based on disclosed facts.

Background

The case was a sequel to a bitter divorce proceeding between two law professors, University of Cincinnati Professor Christo Lassiter and his ex-wife Northern Kentucky University Professor Sharlene Graham Lassiter.

After the couple's contentious divorce, Sharlene Graham Lassiter wrote a book entitled *I Have a Testimony*, which was published in 2003 by Winepress Publishing, a religious publisher in Washington state. The main theme of the book, according to the court, is how her faith and the power of prayer guided her through many trying times, including her marriage and divorce.

Christo Lassiter sued over several passages in the book that stated he had been violent during the marriage – including throwing his then-wife down a flight of stairs, attempting to choke her on another – and that he had affairs with students.

Plaintiff had originally also sued Winepress Publishing but the publisher was dropped from the suit after it agreed to send retraction letters.

Prior to the bench trial, Judge Bertelsman denied a defense motion for summary judgment, ruling that plaintiff was a private figure and that disputed issues of fact required a trial.

Bench Trial

In his bench trial ruling, Judge Bertelsman found that Kentucky "treats defamation by a private, non-media defendant as a matter of strict liability and does not require that the plaintiff prove that the defendant acted with negligence, except for the element of publication which is not disputed here." This standard was in quotations and sourced to the Kentucky Supreme Court's decision in *Stringer v. Wal-Mart Stores, Inc.*, 151 S.W.3d 781, 793 (Ky. 2004), though those words do not appear in that case. In *Stringer*, the court did not directly address whether strict liability could be applied in private figure cases against non-media defendants and no other Kentucky state court case has squarely addressed the issue.

The ruling does not discuss why the claims over the publication were deemed to be a non-media.

On the merits, Judge Bertelsman found that Sharlene Lassiter proved by a preponderance of evidence that her allegations of abuse were true, citing her fact specific testimony about the dates and times of the alleged assaults, as compared to her ex-husband's general denial.

She failed to prove by a preponderance of the evidence that her ex-husband had adulterous affairs where her supporting evidence consisted of third party hearsay. But Judge Bertelsman concluded that the allegations were non-actionable opinion because they were based on facts disclosed in the book.

Having found for the defendant, the judge nevertheless concluded his opinion with a lengthy discussion of plaintiff's request for injunctive relief. He noted in dicta that a post-trial injunction in a libel case would require at a minimum clear and convincing proof of falsity. Plaintiff has filed a motion for reconsideration or a new trial.

Sharlene Lassiter is representing herself, with Linda Smith of Florence, Ky. assisting during Sharlene Lassiter's testimony. Christo Lassiter is represented by Christian A. Jenkins, Erik W. Laursen and Marc D. Mezibov, all of Mezibov & Jenkins in Cincinnati, Ohio.

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$500,000 Libel Verdict for Memo on Public Meeting

Memo Stated Participants' Allegations Against Councilwoman As Fact

In a trial recently discovered by MLRC, a Texas jury awarded $500,000 in damages to a city councilwoman on a libel claim against a civil rights organization which republished defamatory allegations made against plaintiff at a public meeting. *Jenkins v. Black Citizens for Justice, Law and Order*, (Tex. Dist. Ct. jury verdict June 15, 2006).

The meeting was held in November 2002 to address allegations of police brutality and discrimination against black residents of Athens, Texas. Defendant Paul Clark, an official with Black Citizens for Justice, Law and Order in Dallas, (BCJLO) attended the meeting and wrote a memo summarizing it.

The memo, titled "Murder and Intimidation of Black Citizens in Athens, Texas (Henderson County)," included several defamatory allegations that were made by meeting participants against Athens City Councilwoman Gladys Elaine Jenkins: that she was a drug dealer, that she had been a prostitute, and that she was a convicted felon. All of these allegations were untrue. The memo also noted that under Texas law felons cannot hold elective office (*see* Tex. Code § 141.001(a)(4)), then added, "she must be removed from office."

Defendants sent the memo to Texas Congressman Peter Sessions and the U.S. Department of Justice.

The council woman sued Clark and BCJLO. She initially sought just $50,000 in damages, but at trial upped her demand to $5 million in compensatory damages and $10 million in punitives.

The parties agreed that Jenkins was a public figure, and District Judge Jim Parsons instructed the jury on actual malice. At trial plaintiff apparently showed that the memo repeated the allegations as fact and that defendants did so recklessly.

After a two-and-a-half-day trial and forty minutes of deliberations, the jury awarded Jenkins $300,000 in actual damages, jointly from the organization and Clark, and $100,000 in punitives from each defendant. The defendants are appealing to the Texas Court of Appeals.

Black Citizens for Justice, Law and Order are represented by Eliot D. Shavin of Dallas, while Clark was represented by Kent Wade Starr of Starr & Associates, P.C. of Dallas. Plaintiff was represented by E. Leon Carter of Munck Butrus, P.C. in Dallas and Shelli Mossion of the Law Offices of Jeffrey L Weinstein in Athens, Texas.

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Wyoming Court Dismisses Libel Suit on Grounds of Truth

Allegations Taken From Court Proceedings Protected

By Thomas B. Kelley

After one-and-one-half years of vigorous litigation, on October 20, 2006, the Hon. Nancy J. Guthrie of the Teton County District Court in Jackson, Wyoming, entered summary judgment of dismissal of a libel suit brought by CC Builders against *Planet Jackson Hole* a weekly Wyoming newspaper. *Planet Jackson Hole*. *Clint Cook. et al. v. Ed Bushnell, et al.*, Civ. No. 13434 (Wyo. Dist. Ct.).

The case presents an interesting tale of the traps and treasures that can be found in the interplay of the First Amendment and local libel jurisprudence. The case involved substantially accurate reports of allegations contained in judicial records. The substance of the allegations was later disproven.

Wyoming's Libel Jurisprudence

Wyoming has always been a fiercely independent state, and its judiciary is no exception to that tradition. Regarding free speech, Article I Section 20 of the Wyoming Constitution provides that in libel actions "the truth, when published with good intent and for justifiable ends, shall be a sufficient defense," thus making the defense of truth conditional rather than absolute.

It was only with great angst and agitation that a divided Wyoming Supreme Court held that in libel actions by public figures, the Wyoming Constitution was trumped under the Supremacy Clause by the First Amendment, which mandates that – regardless of "intent" or "ends" – a public figure must overcome the unconditional burden of proving falsity. *See Dworkin v. LPF*, 839 P.2d 903 (Wyo. 1992).

On the other hand, the Wyoming Supreme Court was among the first in the U.S. to embrace the modern, common-sense approach to the questions of truth and the republication rule in the reporting of public allegations.

In *Spriggs v. Cheyenne Newspapers, Inc.*, 182 P.2d 801 (Wyo. 1947), an attorney (Spriggs) filed a libel suit against *The Cheyenne News* over two articles that reported upon court filings seeking Spriggs' disbarment. The reports were derived from court pleadings reviewed by the reporter, and included the following language:

> The complaint charged that during the primary campaign ... Spriggs "prepared and circulated ... a letter containing false and defamatory statements concerning the supreme court of Wyoming" ... and that "these acts constitute unprofessional conduct and constitute just and legal cause for revocation of his license to practice law in the State of Wyoming and for his disbarment as a member of the legal profession." 182 P.2d at 802-03.

The newspaper did not report Spriggs' position or response.

The case involved substantially accurate reports of allegations contained in judicial records.

The case went to the jury, which found in favor of the *Cheyenne News*, after the trial judge concluded that the articles were accurate reports of the charges against Spriggs and told the jury the articles were "to be considered by you in your deliberations in this case as true." 182 P.2d at 810.

In its verdict for the defendant, the jury found that the truthful articles were published with "good intent and for justifiable ends." Spriggs appealed assigning error, *inter alia*, to the trial court's charge on truth.

The Wyoming Supreme Court compared the articles to the pleadings upon which they reported and concluded:

> [T]he charges thus made are practically verbatim statements with the two articles as printed and published by the two newspapers owned and operated by the defendant . . . . It is perfectly plain that neither publication contained any comments on the material contained in the complaint nor did they even hint that the charges made by the State Board of Law Examiners were true. *They merely published that these charges had been made in the complaint filed, which was the undeniable truth.* 182 P.2d at 810-11 (emphasis added).

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The Court concluded that the trial judge correctly instructed that the two published articles were to be considered "as true," because they accurately reported the contents of the court pleadings. 182 P.2d at 812. The Court also upheld the jury's determination that the publication had been made with "good intent and for justifiable ends," because of the public interest in the qualifications of lawyers, who, after all, serve as officers of the court. 182 P.2d at 812-13.

Two years after *Spriggs* was decided, the Wyoming legislature enacted Wyo. Stat. § 1-29-105, which recognizes a peculiarly conditioned privilege for publications of complaints and other aspects of civil and criminal court proceedings.

The statute requires not only a "fair and impartial report," but can be defeated by showing that the defendant published the report "maliciously" or that defendant failed to publish in the same manner as the original publication a "reasonable written explanation or contradiction thereof by the plaintiff," or failed to publish upon plaintiff's request "the subsequent determination of the suit or action."

In a very interesting ruling, the Wyoming Supreme Court determined that even though a report of a proceeding was inaccurate, it was nonetheless "fair and impartial." *Casteel v. News Record, Inc.*, 875 P.2d 21, 24 (Wyo. 1994).

Planet Jackson Hole Suit

Such was the Wyoming legal landscape when *Planet Jackson Hole*, on February 17, 2004, published a report of a civil complaint filed by a couple by the name of Garrison against CC Builders and its owners, the Cooks, alleging fraud in the inducement of a building contract, fraud in billing for materials and services allegedly not utilized in construction of the Garrisons' residence, and misappropriation of building materials for the Cooks' own use.

The salient facts were: (1) the article was substantially accurate in reporting the allegations; (2) the article was accurate in reporting the unproven status of the allegations, by repeatedly referring to the facts stated in the complaint as "allegations," and by reporting that no response had been filed nor had any court date been set; (3) the article failed to disclose that the reporter who wrote the story had part-time employment with the investigator who assisted the attorney for the Garrisons in putting the Cook case together; (4) the reporter made no attempt to contact the Cooks or the Cooks' attorney for comment.

Subsequently, the newspaper did not cover the filing of the Cooks' answer, which denied the allegations of fraud and misappropriation, and asserted a counterclaim for defamation based upon those allegedly false statements. Several months later, however, on July 16, 2004, the newspaper published a second article concerning the Garrisons' suit.

It reported that the Garrisons had filed a motion to compel discovery, supported by the work of the same investigator, demonstrating reason to suspect that the Cooks had misappropriated building materials that had been billed to the Garrisons for the Cooks' use in building their own house in Aruba.

This article, like the first, (1) was accurate in all material respects in reporting the allegations made in the Garrisons' motion; (2) fairly reported the status of those allegations, by emphasizing that they were based upon mere "suspicion," and remained unproven; (3) failed to disclose the reporter's part-time employment with the Garrisons' investigator; and (4) was published without any attempt to review the Cooks' answer and counterclaim or contact the Cooks or their attorney.

The Garrisons' fraud and misappropriation allegations were later disproven.

Round 1: Summary Judgment Denied

Planet Jackson Hole responded to the Cooks' suit over both articles with a motion under the Wyoming analogue of Rule 12(b)(6), asserting that the defendant's report was true under the doctrine of the *Spriggs* case, and published with "good intent and for justifiable ends" because of the public interest in learning about court-filed allegations of fraud against a contractor who offers its services to the general public.

Alternatively, the newspaper relied upon the Wyoming fair reports privilege, claiming that its report was fair and accurate, and that it had published a reasonable explanation of the Cooks' position in the form of a letter to the editor.

The Cooks opposed the motion on the grounds that there was a genuine issue of material fact over whether the defen-

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dants published with "good intent and for justifiable ends," because of the reporter's alleged bias in favor of the Garrisons' side of the case due to his employment with the Garrisons' investigator, and the failure of the defendants to seek out the Garrisons' side of the story.

The Cooks argued the same in opposition to the Wyoming statutory fair report privilege, and also that the letter to the editor was insufficient to comply with the requirement that the defendants publish the plaintiffs' rebuttal, inasmuch as the defendant had failed to report on the Cooks' answer and a letter by the Cooks' attorney in response to the second article; and further that the newspaper failed to publish anything in the same manner as the original articles.

The trial court treated the motion as one for summary judgment under Wyoming Rule 56, and denied the motion, finding there was a genuine issue of material fact as to whether the defendants published with "good intent and for justifiable ends" for purposes of the truth defense under the Wyoming Constitution.

The court also identified fact issues over whether the "fair and impartial" report condition of the Wyoming statutory fair reports privilege had been met, and whether the privilege was defeated by malice or failure to report the Cooks' position. The court did not note any issue of material fact over the truth of either article. An emergency petition to the Wyoming Supreme Court seeking review of the trial court's decision was denied.

Round 2: Summary Judgment Granted

After considerable discovery, the newspaper again moved for summary judgment on numerous grounds, including that the defendant's truthful publication was not actionable under the First Amendment, regardless of the defendant's motive or intent, and was subject to dismissal for inability of the plaintiff to prove falsity under *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986).

This time, the court granted the summary judgment motion, holding that under the *Spriggs* decision, the defendant's publication was true, and that under the First Amendment, the plaintiff must prove falsity regardless of the defendants' motive or intent.

The court concluded:

> Quite simply the initial inquiry is, was there a false statement made in the Planet Jackson Hole articles? The answer is NO. Both Planet Jackson Hole articles made it perfectly clear that the statements were nothing more than allegations and would be determined by the Court at a later date. The statements in the two articles were taken directly from pleadings filed in court proceedings. These pleadings were on file with the Clerk of the District Court's office for public perusal and consumption.

Was there a false statement made in the Planet Jackson Hole articles? The answer is NO.

Conclusion

This case demonstrates just how inadequate a state law fair report privilege can be depending upon where the defendant publishes. Very few states have the peculiar conditions contained in the Wyoming statute, but many condition the fair report privilege on the absence of common law malice, or the presence of an undefined form of "court action" upon a filing before the privilege kicks in.

Happily, Wyoming redeemed itself with its measured and sensible formulation of the defense of substantial truth. When applied to report on a court pleading, truth in Wyoming turns on whether the report accurately summarizes the contents of the pleading and provides an accurate perspective on the unproven status of allegations.

Marrying a common law application of the substantial truth doctrine with a First Amendment allocation of burden of proof may not always be an easy sell to a judge sitting in a state court. However, the two-step process utilized in *CC Builders v. Planet Jackson Hole* seemed to make the judicial pill a bit easier to swallow in the second round.

Thomas Kelley of Faegre & Benson in Denver represented the defendants together with Jessica Rutzick of Jackson, Wyoming, and Thomas R. Burke of Davis Wright Tremaine in San Francisco. Plaintiffs, CC Builders and the Cooks, were represented by Kenneth Cohen of Jackson, Wyoming.

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Inter-American Court of Human Rights Issues Landmark Ruling on Freedom of Information

Eduardo Bertoni

Court decisions are labeled as "historical decisions" from time to time. For example, there is some consensus that U.S. Supreme Court holdings in *Near v. Minnesota* and *New York Times v. Sullivan*, among others, were historic ones.

International tribunals' decisions may also be considered historic when, for example, they establish an international standard for the first time. Many non-governmental organizations and this author consider the recent decision by the Inter-American Court of Human Rights (IACourt) in the case *Claude Reyes et al v. Chile* to be a landmark ruling. The complete decision of the Court is available in Spanish at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_esp.pdf An un-official translation, made by the Open Society Justice Initiative is available at http://www.justiceinitiative.org/advocacy/press

The IACourt decided that the American Convention on Human Rights includes, in its list of civil and political rights, the right to access to government held information. Until now, no other international tribunal had recognized freedom of information as a fundamental right.

Background

The facts in the *Claude* case were simple: Claude Reyes, the executive director of an environmental NGO in Chile, requested information from the Foreign Investment Office. The information requested related to a contract between the Chilean state and a couple of foreign companies and a local one. The object of the contract was the development of a forest industrialization project.

The project had raised important concerns in Chile because of its potentially harmful environmental impact. The Office only provided some of the information requested, and denied the rest without any legal basis. The denial was challenged before the Chilean tribunals, which finally upheld the Investment Office's decision.

In 1998, after exhausting all domestic remedies, Reyes petitioned the Inter-American Commission on Human Rights, arguing the denial violated Article 13 of the American Convention on Human Rights. This convention and the American Declaration of the Rights and Duties of Man are the principal instruments through which the Inter-American system provides for the protection of human rights. The organizations responsible for enforcing these international obligations are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. A brief description of the two is available at http://www.cidh.org/Basicos/basic1.htm

In 2003 the Commission formally admitted the case and in 2005 sent the case for a decision to the IACourt.

Right to Information

The IACourt issued its landmark ruling on September 19th, 2006. The main holding of the ruling is that Article 13 of the American Convention on Human Rights:

> "protects the right of all persons to request access to information held by the State, with the exceptions permitted by the restrictions regime of the Convention. As a result, this article supports the right of persons to receive such information and the positive obligation on the State to supply it, so that the person may have access to the information or receive a reasoned response when, for ground permitted by the Convention, the State may limit access to it in the specific case."

The IACourt was even more specific in tailoring the decision: first, the information "should be provided without a need to demonstrate a direct interest in obtaining it, or a personal interest, except in cases where there applies a legitimate restriction."

Second, restrictions "must be established by laws," not by the discretionary judgment of public officials. The IACourt considered that without legal basis, a restriction "creates ample room for discretional and arbitrary state actions in classifying information as secret, reserved or confidential."

Third, a restriction should be limited to those goals permitted by the Convention (respect for the rights and reputations of others, protection of national security, public order, health or public morals) and should be propor-

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tionate to the right being protected by the restriction. The State – and not the individual requesting information – has the burden to prove that the restriction is necessary.

And fourth, "state authorities are governed by the principle of *maximum disclosure*, which establishes the presumption that all information should be accessible, subject to a restricted system of exceptions."

In applying these principles to the facts of the *Claude* case, the IACourt found Chile had violated the Inter-American Convention. The IACourt ordered Chile to pass an access to information law, saying that "in particular, this means a legal framework that regulates restrictions on access to information held by the Sate that should comply with the Convention standards and may only impose restrictions for reasons permitted by the Convention."

Moreover, the court ordered that Chile "should, in a reasonable time, conduct training for the bodies, authorities, public agents charged with receiving requests for information on the norms that regulate this right, including on the Convention standards that they should respect with regard to restrictions on access to such information."

"State authorities are governed by the principle of maximum disclosure, which establishes the presumption that all information should be accessible, subject to a restricted system of exceptions."

Impact of the Decision

The decision has the potential of impacting freedom of information law throughout the world. It is important to underscore that the United States has had an important influence in transparency issues in the rest of the hemisphere. The principles established in the Freedom of Information Act (FOIA), were seriously considered during many years as principles that should be followed in other countries.

These principles helped spur the enactment of freedom of information laws in many countries around the world over the past five years. Since 2002, in Latin America and the Caribbean, Mexico, Panama, Peru, Ecuador, Dominican Republic, Jamaica, Antigua & Barbuda, Trinidad & Tobago, among others countries, passed access to information laws.

Freedom of information bills are pending in other national legislatures and from now on the decision in the *Claude* case will help to move forward that reform.

Finally, even though the United States has never accepted the jurisdiction of the Inter-American Court of Human Rights, the *Claude* ruling could be an important tool for lawyers within the U.S. to challenge denials of information – particularly in challenging cases involving access to allegedly sensitive government information. Lawyers can argue that freedom of information is not just a statutory right, but one that is grounded in the constitutionally protected right to free speech.

Eduardo Bertoni, Executive Director of the Due Process of Law Foundation, a non-governmental organization based in Washington, D.C. (www.dplf.org) is the former Special Rapporteur for Freedom of Expression at the Organization of American States (2002-2005), and advised the Inter-American Commission on Human Rights in filing the Claude case before the IACourt. The Open Society Justice Initiative, ARTICLE 19, Libertad de Información Mexico, Asociación Civil (LIMAC); Instituto Prensa y Sociedad (IPYS) of Peru; and Access Info Europe were among the groups that filed an amicus brief in support of Reyes and his two co-applicants.

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European Court of Human Rights Rules in Favor of Ukrainian Journalist

Reaffirms Protection For Reporting Allegations

In August, the European Court of Human Rights ruled in favor of a Ukrainian journalist, finding that his conviction for criminal defamation was a violation of Article 10 – the free speech provision of the European Convention on Human Rights. *Lyashko v. Ukraine*, Application No. 21040/02 (ECHR Aug. 10, 2006).

The court cited a number of reasons for ruling that the conviction violated Article 10. Many of the statements were value judgments about public figures and concerned matters of public interest. Criminal punishment was wholly disproportionate under the circumstances. And, reaffirming the Court's recent jurisprudence protecting the republication of newsworthy allegations, the Court found that the journalist was essentially "reporting what was being said by others." In such circumstances he was "faced with an unreasonable, if not impossible task," of proving those statements true. *Id. at* ¶ 55.

Background

At issue in the case were four articles published in 1997 by Oleg Valeriyovych Lyashko, a Ukrainian journalist and former editor in chief of the now defunct Ukrainian daily newspaper, *Polityka*. The first article criticized the then acting Prime Minister, accusing him of firing the head of a state-owned shipping company because it advertised in *Polityka*. It caustically referred to the prime minister as a former "bureaucrat, police pen-pusher and near-political schemer."

The second article published two weeks later reported that the Prime Minister had gone to state prosecutors to demand that the newspaper be criminally published for the first report. The newspaper described this as an "abuse of power."

The third and fourth articles involved separate issues of official corruption. The newspaper published an article and photographs of the Chief of the Odessa Police at a private party together with a "Mr. S." – a reputed criminal. The paper reported that Mr. S. was using the pictures to show a close relationship with the police chief to extort money from local businesses. The final article published an update on the relationship: the police chief and Mr. S. were brothers-in-law.

Criminal Proceedings

Lyashko was charged with criminal defamation and abuse of power under Ukranian law. He was acquitted but was then retried and found guilty of defaming the former prime minister and the law enforcement agencies of the Ukraine. He was sentenced to two years imprisonment on probation and a two year ban on occupying a media management post.

A Ukranian appeals court ruled that there was sufficient evidence to sustain the conviction, but it effectively reversed because defamation had been subsequently decriminalized and other claims were stale under the relevant statute of limitations.

ECHR Decision

Notwithstanding the result of the appeal, the ECHR ruled that Lyashko's complaint was admissible. The Ukrainian appeals court decision was equivocal at best because it "gave a strong indication to the applicant that the authorities were displeased with the publications and that, unless he modified his behavior in future, he would run the risk of being prosecuted again." *Id. at* ¶ 32.

The Court also took specific note that this was a criminal defamation case – an important circumstance in determining the proportionality of a restriction on free expression.

> The dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.

Id. at ¶ 41.

But the Court refused to categorically condemn criminal defamation.

> "It remains open to the competent State authorities to adopt ... measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith.

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European Court of Human Rights Rules in Favor of Ukrainian Journalist

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What an appropriately crafted criminal defamation law looks like is still unknown. The ECHR has never affirmed the imprisonment of a journalist for criminal defamation. And this decision certainly casts doubt on the validity of criminal defamation when alternative civil remedies are available.

Article 10

As to the merits of Lyashko's Article 10 claims, the Court found that the articles all involved matters of public interest, e.g., the management of a public company and police corruption. And there was no evidence that Lyashko was prejudiced against any of the subjects of his articles.

The first set of articles reflected value judgments not susceptible of being proven false, notwithstanding the "sarcastic and broad terms" used to describe the Prime Minister.

The second set of articles also contained protected value judgments. Moreover, they were protected on separate grounds.

> In short, the applicant was essentially reporting what was being said by others, or what could be reasonably inferred from the events that have undisputedly taken place. In so far as the applicant was required to establish the truth of his statements, he was, in the Court's opinion, faced with an unreasonable, if not impossible task

Id. at ¶ 55. Under these circumstances, the lengthy criminal proceedings, conviction and sentenced had a considerable "chilling effect" on the applicant's freedom of expression in violation of Article 10.

The Court concluded that the Ukrainian government violated Article 10, since the government's reasons for applicant's conviction were insufficient to show that "the interference complained of was proportionate to the legitimate aim pursued. [That interference] was therefore not necessary in a democratic society."

Lyashko was represented by Natalya Petrova, Kiev, Ukraine. The Ukrainian government was represented by Valeria Lutkovska.

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Eric Lieberman, The Washington Post, Deputy Counsel & Director of Government Affairs
Nathan Siegel, Levine Sullivan Koch & Schulz LLP, Partner
Jeffrey Smith, Arnold & Porter, Partner & former General Counsel of the CIA (May 1995 to September 1996)

Please contact Kelly Chew (kchew@medialaw.org) if you plan to attend.

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EU Court Dismisses Reporter's Lawsuit Stemming From Search of Home and Office

Decision Exposes Gap in Legal Protections Over Acts of EU Authorities

By Christoph Arhold

On October 4, 2006, the European Court of First Instance rejected an action for damages by journalist Hans-Martin Tillack against the European Commission's Anti-Fraud Office for making false accusations of bribery which led Belgian authorities in March 2004 to order a police raid of the journalist's home and office to identify his sources within OLAF. *Tillack v. European Commission*, Case T-193/04.

The European Court of First Instance is based in Luxembourg and functions under the authority of the 25 members state European Union. The court hears disputes arising under EU rules and regulations.

The court found that the journalist had no cause of action against the Anti-Fraud Office which instigated the police raid because the raid was a discretionary act by Belgian police authorities. The decision is alarming because it means there may be little direct accountability for actions by some EU authorities that impinge on free expression rights.

There may be little direct accountability for actions by some EU authorities that impinge on free expression rights.

Background

In March 2004, Belgian police raided the home and office of Hans-Martin Tillack, then Brussels correspondent for the German news magazine *Stern*, and seized his computers and documents. They were acting on a complaint from the European Commission's Anti-Fraud Office (OLAF), which is responsible for investigating administrative fraud in the European Union (EU).

Mr. Tillack had published a number of articles criticizing OLAF. The articles were based on leaked information, and OLAF had repeatedly suggested, despite the lack of any evidence, that Mr. Tillack obtained the information by bribing an EU official. OLAF's real goal was to identify the leak in its administration.

Once Mr. Tillack's materials became part of the Belgian authorities' file on the "bribery case" (two and a half years after the raid, no charges have been brought against Mr. Tillack), OLAF or the Commission itself could become a "*partie civile*" and obtain the right to access the file.

After his files were seized, Mr. Tillack fulfilled his ethical duty by trying to protect his sources by bringing a number of legal actions. As Belgian law at the time did not protect a journalist's sources, his initial action in Belgium to obtain the return of his files was dismissed. (Only in March 2005 did Belgium adopt a law which explicitly grants journalists the right to protect their sources; Mr. Tillack is pursuing this aspect of the case against the Belgian authorities before the European Court of Human Rights).

Denied legal protection from the Belgian courts, Mr. Tillack also asked the European Court of First Instance for interim measures to prevent OLAF from obtaining any information or documents seized by the Belgian police. Applications for interim measures are only admissible if they are linked to a substantive action before the court.

Mr. Tillack's main action was brought under Article 230(4) EC Treaty for annulment of OLAF's decision to file its complaint with the Belgian authorities. As it was uncertain whether OLAF's complaint was such an act, Mr. Tillack also filed an action for damages under Article 288(2) EC Treaty to compensate for injury resulting from the decision and the defamation campaign against him.

Both actions rely heavily on OLAF's infringement of most of its few procedural obligations during its investigations, and the fact that the information provided to the Belgian authorities was egregious, based entirely on vague rumors and hearsay, and misleading in order to induce the Belgian authorities to act immediately against the journalist.

It said, for instance, that Mr. Tillack was about to move to Washington and take important evidence with him, which was not the case. OLAF's investigators knew this.

In October 2004 and (on appeal) in April 2005, the Court of First Instance and then the European Court of Justice Presidents refused Tillack's request for interim meas-

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EU Court Dismisses Reporter's Lawsuit Stemming From Search of Home and Office

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ures on the ground that there was no *prima facie* case in the main proceedings. They considered the action for annulment inadmissible and the action for damages unfounded, for the same reason: that Belgian authorities acted under their own discretion in conducting the raids.

Since OLAF's complaints were not legally binding on Belgian authorities, they did not constitute challengeable acts, and as the Belgian authorities had discretion in responding to them, there was no direct causal link between OLAF's complaint and the injury resulting from the raid, the court reasoned.

This reasoning, though, endangers the principle of effective judicial control, since it means that someone harmed by actions resulting from false accusations by OLAF would be left without protection: the national authorities could claim they had been misled by OLAF, while OLAF could maintain that the national authorities were not legally bound by its requests. Judicial review of OLAF's information-gathering and processing behaviour would be impossible.

Court of First Instance Decision

Unfortunately, the Court of First Instance did not weigh this risk sufficiently and followed the Presidents' reasoning. This month the court ruled that the report OLAF sent to the Belgian authorities was not the cause of the harm suffered by Mr. Tillack, since the Belgian authorities were free to decide whether or not to act on the report. Thus in the court's view, the sole responsibility for the raid and any consequences following from it lies with the national authorities.

The Court dismissed Mr. Tillack's action for lack of "direct and individual concern," and "direct causal link" relying on case law developed in the context of classic European economic law as laid down, for instance, in regulations on market organizations for milk or bananas, where the interest of the market operators is normally limited to quick financial compensation, regardless of who – the national or the European authorities - has committed the misconduct and regardless of who has caused the prejudice.

Times, of course, have been changing. The EU is not a mere economic community anymore. It is not only about milk quotas and import duties anymore, but has a much broader mandate that includes the fight against terrorism and organized crime. Its institutions do not act solely via directives to be implemented by national authorities, but have developed their own investigative powers – ones that can clash with European citizens' fundamental rights on almost all sectors of private and public life.

It should be a matter of course that EU actions be fully reviewable. But, as the Tillack case shows, this is not so. There is a critical gap in the EU's protection of its citizens against arbitrary behavior by the EU's Institutions. This gap needs to be bridged.

With respect to the protection of his journalistic sources, Mr. Tillack is now pinning his hopes on a separate action filed with the European Court for Human Rights in Strasbourg. The ECHR recently opened the written procedure with respect to Mr. Tillack's complaint against the unjustified raids by the Belgian police (Case No 20477/05, *Tillack v Belgium*). This procedure, however, will not deal with OLAF's misconduct which falls solely under the jurisdiction of the European Court of First Instance.

Christoph Arhold, a lawyer with White & Case in Brussels, represents the reporter in this matter.

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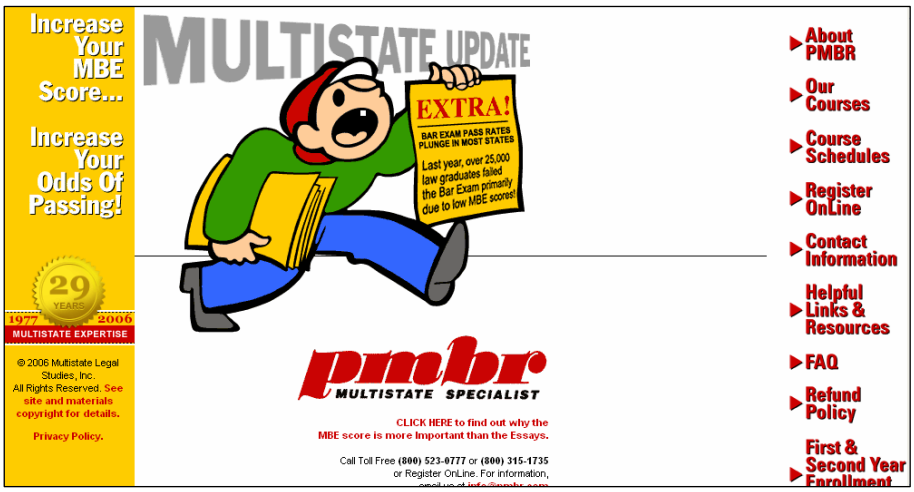
$11.9 Million Verdict Against Bar Review Course for Copyright Infringement

This past August a Pennsylvania federal district court found one of America's leading bar preparation companies liable for copyright infringement for copying questions from the national multistate bar exam, awarding $11.9 million in damages. *Nat'l Conference of Bar Exam'rs v. Multistate Legal Studies, Inc.*, No. 04-03282, 2006 WL 2460903 (E.D. Pa. Aug. 22, 2006) (Fullam, J).

Background

Plaintiff the National Conference of Bar Examiners ("NCBE") develops the testing materials used by more than 50 jurisdictions to evaluate bar applicants. The most widely used of these materials is the Multistate Bar Examination ("MBE"), a 200-question multiple-choice test administered twice annually.



Defendants Robert Feinberg and Donna Zimmerman are the founders of the popular bar review company "PMBR" (Preliminary Multistate Bar Review). PMBR offers a nationally available three-day supplementary course designed to help law students pass the MBE portion of their state bar exam. In their advertisements, defendants touted that their review course offered "nearly identical" practice questions as the MBE. And defendants and their employees regularly sat for nearly every administration of the MBE.

In 1993, Feinberg sat for the MBE in Alaska and was caught by a proctor leaving the exam with scratch paper with notes about questions. After that event, the NCBE reviewed PMBR's test preparation materials and concluded that more than 100 questions had likely been copied.

Direct Evidence of Copying

Ruling after a non-jury trial, the court noted that this was "the rare case in which there is direct evidence that defendant copied plaintiff's work." Three forms of direct evidence existed in this case: 1) defendant Feinberg and his employees took copious notes related to MBE questions; 2) PMBR advertised that its questions are closely modeled after MBE questions; and 3) many PMBR questions reproduce MBE questions nearly verbatim.

As to the substantial similarity between the questions, the court found that evidence of copying practically leapt from the page. The 113 questions at issue "duplicated passages nearly verbatim or reproduced labyrinthine fact patterns turn by turn."

The court summarily rejected defendants' argument that the MBE questions were not subject to copyright protection.

> "Teaching the legal principles tested on the MBE is permissible. Doing so using the same fact patterns, prompts, and answer-choice combinations found in MBE questions is not."

Damages

The multi-million dollar damage award was based on defendants' gross revenues over a three-year period at issue in the litigation. During this time, defendants' took in $35.7 million in gross revenue for their three-day course. Because infringing questions made up nearly 40% of the review course, the court concluded that awarding one-third of defendants' revenues (plus attorney's fees) was appropriate.

Plaintiffs were represented by Barbara W. Mather and Christopher J. Huber, Pepper Hamilton LLP, Philadelphia, PA; and Caroline M. Mew and Robert A. Burgoyne, Fulbright & Jaworski LLP, Washington, DC. Defendants were represented by Anthony L. Press, Morrison & Foerster LLP, Los Angeles, CA, Cori A. Szczucki, Caesar Rivise Bernstein Cohen & Pokotilow Ltd., Philadelphia, PA.

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Speakers Bureau on the Reporter's Privilege

The MLRC Institute is currently building a network of media lawyers, reporters, editors, and others whose work involves the reporter's privilege to help educate the public about the privilege.

Through this network of speakers nationwide, we are facilitating presentations explaining the privilege and its history, with the heart of the presentation focusing on why this privilege should matter to the public. We have prepared a "turn-key" set of materials for speakers to use, including, a PowerPoint presentation and written handout materials.

We are looking for speakers to join this network and conduct presentations at conferences, libraries, bookstores, colleges, high schools and city clubs and before groups like chambers of commerce, rotary clubs and other civic organizations.

The MLRC Institute, a not-for-profit educational organization focused on the media and the First Amendment, has received a grant from the McCormick Tribune Foundation to develop and administer the speakers bureau on the reporter's privilege.

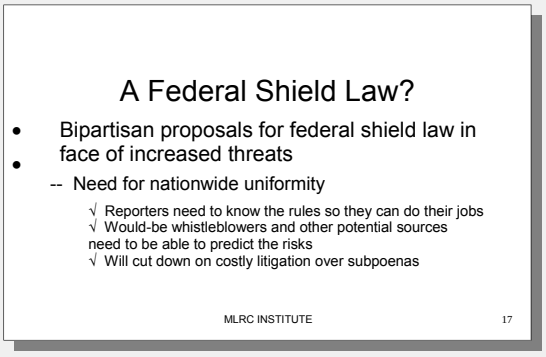
We hope to expand this project so that the reporter's privilege is the first in a number of topics addressed by the speakers bureau.

If you are interested in joining the speakers bureau or in helping to organize a presentation in your area, please contact:

Maherin Gangat
Staff Attorney
Media Law Resource Center
(212) 337-0200, ext. 214
mgangat@medialaw.org

Suggestion for background reading: Custodians of Conscience by James S. Ettema and Theodore Glasser. Great source re: nature of investigative journalism and its role in society as force for moral and social inquiry.

Presentation note: During the weeks leading up to your presentation, consider pulling articles from local papers quoting anonymous sources -- circle the references to these sources as an illustration for the audience of how valuable they are for reporters.



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AP Wins Latest FOIA Round Over Guantanamo Detainees

By David Tomlin

The Associated Press won another major victory in its Freedom of Information Act confrontation with the Department of Defense over identification of detainees at the U.S. military prison at Guantanamo Bay, Cuba. *Associated Press v. U.S. Dep't of Defense*, No. 05 Civ. 5468, 2006 WL 2707395, 34 Media L. Rep. 2251 (S.D.N.Y. Sept. 20, 2006).

In the latest case, as in an earlier one, U.S. District Judge Jed S. Rakoff of the Southern District of New York firmly rejected DOD's claims that FOIA privacy exemptions allowed DOD to black out detainee names in documents demanded by AP. "As before, the Court finds that AP is entitled to nearly all the information it seeks," Judge Rakoff wrote in his September 20 opinion.

SDNY Ruling

The September ruling concerned detainee names and other identifying information that had been redacted from four distinct groups of documents first requested by AP as part of a FOIA request submitted in November 2004.

The first of the four groups recorded disciplinary actions taken against guards or other DOD personnel for detainee abuse. Judge Rakoff found that detainees had "minimal" privacy interest in such incidents.

On the other hand, the judge wrote, there is "considerable public interest in learning more about DOD's treatment of identifiable detainees, whether they have been abused, and whether such abuse has been properly investigated."

"By redacting the identities of the abused detainees," Judge Rakoff wrote, "DOD has seriously interfered with the ability of the public to engage in the independent fact-finding necessary to properly evaluate the allegations of abuse and DOD's response to it."

Documents in the second group concerned detainee complaints that they had been abused by other detainees. Again, DOD had withheld names on privacy grounds, but Judge Rakoff said the public interest in knowing the context of the disputes and how DOD responded to the complaints trumped any privacy interest.

"How could a[] FOIA requester meaningfully evaluate the DOD response to a case of detainee-on-detainee abuse if he did not know the nationalities or religions of the detainees involved," the judge wrote.

Judge Rakoff also rejected DOD arguments in the third group of documents, which concerned decisions whether or not to release or transfer detainees.

DOD argued that those were exempt under FOIA as "deliberative process" or "pre-decisional" documents, since no actual release or transfer is made until assurances are received that the detainee will not be mistreated in his home country.

There is "considerable public interest in learning more about DOD's treatment of identifiable detainees, whether they have been abused, and whether such abuse has been properly investigated."

But Judge Rakoff said the decision to release upon such assurances is still a final decision, and the documents therefore are not exempt from FOIA disclosure. He also dismissed DOD's "conclusory speculation" that the privacy exemption should apply to this group because released or transferred detainees or their families might be harmed.

The fourth group of DOD-redacted documents included letters or other correspondence from detainee family members, delivered by the Red Cross and later offered by the detainees as evidence in hearings where DOD was considering whether to continue their detentions.

DOD argued that such documents were exempt from FOIA release because a separate federal statute bars disclosure of "sensitive information" of a "foreign government or international organization."

The Red Cross had asked that DOD not release the letters. But Judge Rakoff wrote that the statute applied only to documents that pertained to the Red Cross itself. He also noted that the detainees, not the Red Cross, had given the letters to DOD.

DOD also argued that the letters could be withheld under FOIA's privacy exemption. Judge Rakoff said this would only be true where DOD could offer specific evidence that the letter writer's privacy interest outweighed the public interest in disclosure.

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AP Wins Latest FOIA Round Over Guantanamo Detainees

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The judge concluded, "with some hesitation," that DOD had made such a showing in the case of one letter from a detainee's wife. That was the only document from any of the four groups to remain redacted under Judge Rakoff's order.

The DOD had 60 days in which to consider whether it would appeal.

An earlier AP Guantanamo case involved transcripts of detainee hearings on which DOD had blacked out detainee names and other identifying information before releasing the transcripts in response to an AP FOIA request, also filed in the fall of 2004. Judge Rakoff ordered the names provided in January 2006, and the unredacted transcripts were released last March.

David Tomlin is Associate General Counsel of The Associated Press. David Schulz of Levine, Sullivan, Koch & Schulz represented AP throughout its Guantanamo FOIA effort.

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California Passes Telephone Pretexting Bills in Wake of Hewlett-Packard Scandal

Federal Legislation Remains on Hold

On September 29, 2006, following the revelations of Hewlett-Packard's spying on members of the press to discover the source of boardroom leaks, California Governor Arnold Schwarzenegger signed into law a statute designed to criminalize "pretexting," – the use of misrepresentation or deceit to obtain telephone records. The statute is effective January 1, 2007.

The statute is intended "to ensure that telephone companies maintain telephone calling pattern records or lists in the strictest confidence, and protect the privacy of their subscribers with all due care."

New Penal Code Section 638 provides in relevant part that:

> Any person who purchases, sells, offers to purchase or sell, or conspires to purchase or sell any telephone calling pattern record or list, without the written consent of the subscriber, *or* any person who procures or obtains through fraud or deceit, or attempts to procure or obtain through fraud or deceit any telephone calling pattern record or list shall be punished by a fine not exceeding two thousand five hundred dollars ($2,5000), *or* by imprisonment in a county jail not exceeding one year, *or* by both a fine and imprisonment.

(emphasis added). The statute provides for a maximum fine of $10,000 for a repeat offense. The new statute was added to California's pre-existing "Invasion of Privacy" laws, Cal. Penal Code §§ 630 – 637.9

A "telephone calling pattern record or list" is defined as "information retained by a telephone company that relates to the telephone number dialed by the subscriber" or someone permitted to use the subscriber's phone. Cal. Penal Code § 638 (c)(2). It also includes information about incoming calls, the length of any phone calls, and charges.

Section 638 (b) also provides that telephone calling information obtained in violation of the statute (and not otherwise authorized by law) is "inadmissible as evidence in any judicial, administrative, legislative, or other proceeding except when that information is offered as proof in an action or prosecution for a violation of this section…."

The statute also extends to employers to the extent "the employer or contracting entity knowingly allowed the employee or contractor to engage in conduct that violated subdivision (a)." Cal. Penal Code § 638(d),

As to law enforcement, the statute provides that it "shall not be construed to prevent a law enforcement or prosecutorial agency, or any officer, employee, or agent thereof from obtaining telephone records in connection with the performance of the official duties of the agency consistent with any other applicable state and federal law."

HP Indictment

The California pretexting bill had been under consideration for almost a year and a half, but its ultimate passage coincided with the September events surrounding Hewlett-Packard. The company, in a much publicized scandal, acknowledged that as part of an internal leak investigation private investigators for the company obtained telephone records of Board Members and reporters.

On October 4, California's Attorney General filed a four count felony complaint against former HP CEO Patricia Dunn, in-house counsel Kevin Hunsaker and three outside investigators. They were charged with:

- Violation of Cal. Penal Code § 182(a)(1) ("Conspiracy to Commit Crime");
- Violation of Cal. Penal Code § 538.5 ("Fraudulent Use of Wire, Radio or Television Transmissions");
- Violation of Cal. Penal Code § 502(c)(2) ("Taking, Copying, and Using Computer Data"); and
- Violation of Cal. Penal Code § 530.5(a) ("Using Personal Identifying Information Without Authorization").

See http://ag.ca.gov/newsalerts/cms06/06-087_0b.pdf

Federal Bills

Though Congress held hearings to investigate the Hewlett-Packard incident, no legislation was passed during this last session.

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California Passes Telephone Pretexting Bills in Wake of Hewlett-Packard Scandal

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The Law Enforcement and Phone Privacy Protection Act of 2006, HR4709, was introduced by Representative Lamar Smith of Texas and passed the House and is awaiting Senate action.

The bill provides in relevant part that:

> "whoever, in interstate or foreign commerce, knowingly and intentionally purchases or receives, or attempts to purchase or receive, confidential phone records information of a covered entity, without prior authorization from the customer to whom such confidential phone records information relates, or knowing or having reason to know such information was obtained fraudulently, shall be fined under this title, imprisoned not more than 10 years, or both."

New York Statute

Whether the Hewlett-Packard case will encourage other states to enact legislation similar to the new California law remains to be seen. In August 2006, New York amended its General Business Code to create a civil cause of action for pretexting.

The "Consumer Communication Records Privacy Act," makes it a civil wrong for a person or business entity to knowingly and intentionally procure, attempt to procure, solicit or conspire with another to procure, offer for sale, sell or fraudulently transfer or use or attempt to sell or fraudulently transfer or use, telephone record information from a telephone company, without written authorization from the customer to whom such telephone record information relates except as otherwise provided for by applicable law.

N.Y. Gen. Bus. Law § 399-dd(2) (2006).

Under the statute a court "may impose a civil penalty of one thousand dollars per violation." N.Y. Gen. Bus. Law § 399-dd(3)(a).

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The Trademark Dilution Revision Act of 2006

Clarification and Expansion of the Fair Use Exception

By Mark E. Ackerman and Christopher Glancy

The Trademark Dilution Revision Act of 2006 ("TDRA" or the "Act") was signed into law on October 6, 2006. The TDRA amends Section 43(c) of the Lanham Act, 15 U.S.C. § 1125(c), to clarify Congress's intent in enacting the Federal Trademark Dilution Act of 1995 ("FTDA"), and to strike a balance between protecting proprietary rights of trademark owners and facilitating fair and free competition.

While the Act broadens the dilution cause of action in accordance with original legislative intent, consumers, small business advocates, ISP providers, and artists will find they have a stronger defense derived from explicitly enumerated exclusions and a broader fair use definition. Under the new language, defendants might also raise defenses not previously covered, such as fair commercial uses invoking the First Amendment.

The broader protections afforded trademark owners are subject to fair use exceptions, which the TDRA redefines and expands.

Cause of Action for Dilution

The TDRA creates a cause of action for the owner of a famous mark against any person who uses a mark or trade name in commerce that is "likely to cause dilution" of the famous mark. This likelihood of dilution standard is the most significant aspect of the Act because it overrules the 2003 Supreme Court decision , 537 U.S. 418 (2003), which interpreted the Lanham Act to require dilution and a showing of lost profits. Thus, under the Act, the owner of a famous mark need not wait until the damage is done before filing suit.

Furthermore, a greater number of owners will have a cause of action because the scope of protected famous marks is broader. To merit protection against dilution under the TDRA, a famous mark now may be either inherently distinctive or have distinctiveness. This amendment overrules Second Circuit precedent that excluded from federal dilution protection famous descriptive marks that have acquired distinctiveness or "secondary meaning" through extensive use, no matter how well-known the marks had become.

The Act also defines two types of dilution: "dilution by blurring" and "dilution by tarnishment." This revision addresses dicta in *Moseley* that narrowly read the Lanham Act to bar only "dilution by blurring." Under the Act, blurring occurs when an "association arising from the similarity of" the parties' respective marks "impairs the distinctiveness of the famous mark"; tarnishment occurs when the similarity of the marks "harms the reputation of the famous mark."

However, the benefit of this expanded language to a trademark owner is contingent on the mark being "widely recognized by the general consuming public of the United States." The TDRA appears to lay to rest the so-called niche market theory of fame, approved by some Circuits Courts of Appeal and rejected by others. The niche market theory allowed a trademark owner to assert a dilution claim if its mark was famous in a particular consumer market or localized area, even if the market or area was small and not widely known to the general public.

Fair Use Exception

The broader protections afforded trademark owners are subject to fair use exceptions, which the TDRA redefines and expands. The Act broadly excludes from liability "*any* fair use, including a *nominative or descriptive* fair use, or *facilitation of such fair use*, of a famous mark by another person other than as a designation of source for the person's own goods or services," including use in comparative advertising or in "*identifying and parodying, criticizing, or commenting upon* the famous mark owner or the goods or services of the famous mark owner." The Act also retains the exclusions for news reporting and commentary, and for noncommercial use of a mark.

The exclusion of "facilitation of fair use" is meant to address Internet service provider (ISP) concerns about secondary liability for the actions of ISP users. The exemption for parody, criticism, and commentary responds to free speech concerns and bolsters the exemption for noncommercial uses.

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The Trademark Dilution Revision Act of 2006

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The exclusion for "noncommercial uses," which existed in the FTDA, was omitted from earlier drafts of the TDRA, but was later reinserted in response to protests from consumer, artist, and small business advocates claiming the need to protect noncommercial speech that does not necessarily parody, criticize or comment on the trademark owner.

One group of advocates, including the American Library Association, Electronic Frontier Foundation, National Video Resources, Professional Photographers of America, Public Citizen, Public Knowledge, and the Society of Children's Book Writers and Illustrators, cited as examples:

> "Walter Mondale's use of 'where's the beef' to criticize Gary Hart is an example of the common usage that would be exposed to litigation. When Don McLean sang about driving his 'Chevy' to the levee and finding it dry, or when Muley told Tom Joad that his family had been 'tractored out by the cats,' they were not commenting on General Motors and Caterpillar."

They argued that "artists commonly incorporate well-known brands into their works because it is often difficult to portray everyday life without referring to well-known goods and services."

It is as yet unclear how the legislative history of "noncommercial uses" – its initial inclusion, subsequent removal, and final reinsertion – will impact analysis of "noncommercial use" defenses, although its apparent staying power may strengthen its viability as a fair use defense.

The TDRA's redefinition of fair use exclusions as "*any* fair use" (and facilitation thereof) may be read to broaden fair use exclusions beyond those enumerated in the Act. Defendants may begin asserting new fair use defenses to dilution claims not previously covered by the statute, potentially including fair commercial use defenses invoking the First Amendment.

For instance, Marvin J. Johnson, Legislative Counsel of the American Civil Liberties Union, noted that, "as even commercial speech is protected under the First Amendment, it makes little sense to deprive it of protection under the FTDA simply because it is commercial," citing examples of speech that may have only "incidental commercial components": "Activist groups routinely seek donations on a web site to support their work, sell T-shirts, stickers and books, and possibly even allow advertising on the web site."

Conclusion

The TDRA attempts to strike a balance between the protection of trademarks against both dilution by blurring and dilution by tarnishment, and the protection of First Amendment rights to use such marks in certain circumstances. The Act lightens the burden on trademark owners to demonstrate the fame of their marks, and the dilution of same by others, and expressly sets forth both a dilution by tarnishment claim and protections for marks with acquired distinctiveness, clarifying Congressional intent with respect to trademark dilution and resolving conflicting dilution case law.

At the same time, these protections are appropriately limited through the elimination of the niche market theory of fame and the expansion of fair use exclusions. How the courts will apply its provisions remains to be seen. Possible battlegrounds include the scope of protection courts will afford to a famous but descriptive mark, the meaning of "widely recognized by the general consuming public," and the interpretation of the fair use provisions.

Mark E. Ackerman and Christopher J. Glancy are partners at White & Case LLP in New York. Associates Jennifer Co and Gabriel Stern assisted in the preparation of the article which was adapted from a client alert sent by the Intellectual Property Group at White & Case LLP.

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LEGISLATIVE UPDATE

Homeland Security and an Official Secrets Act

By Kevin Goldberg

The 109th Congress has adjourned until after the November elections. It will return (to do more damage, one assumes) for at least a week but is likely to focus only on a few bills and those will mainly be related to appropriations.

Before leaving, there was another hearing on the Free Flow of Information Act in the Senate Judiciary Committee, raising hopes that the bill will get early attention when the 110th Congress convenes in January. That committee also approved the Open Government Act's (S 394) proposed changes to the Freedom of Information Act; the subcommittee on Government Management, Finance and Accountability of the House Government Reform Committee also approved this measure (HR 867).

This month's update focuses on two bills that took shape late in the legislative session. One increases access to sensitive security information. The other would destroy access to national security information as we know it.

Department of Homeland Security Appropriations Act (HR 5541)

- Introduced on May 22, 2006 by Rep. Harold Ford (D-TN) this was signed into law on October 4, 2006.
- Section 525 requires the Department of Homeland Security to release more information that it has labeled "sensitive security information" – a classification that has no real basis in law but has been used in the past to deny FOIA requests.
- There are three provisions that affect access to sensitive security information:
    - Upon receipt of a FOIA request for a document containing sensitive security information, the Department of Homeland Security must review that document in a timely manner to ensure whether it merits continued protection as sensitive security information.
    - Any sensitive security information that is three years old and not incorporated in a current transportation security plan is presumed to be fit for release unless the Secretary of the Department makes a written determination that there is a rational reason the information should continue to be withheld from public view or unless another law prevents its release.
    - There is also a mechanism by which sensitive security information can be introduced as evidence in a civil proceeding.

"Official Secrets" Act (S 3774)

- Senator Christopher Bond (R-MO), introduced the Official Secrets Act proposal as S 3774 on August 2, 2004; it has 14 co-sponsors, all Republican.
- The bill amends those portions of 18 U.S.C. § 798 that comprise the Espionage Act.
    - It would criminalize all disclosures of classified documents, even if the document was not specifically marked "classified" – punishment could occur if the government could simply demonstrate a "reason to believe" the information could be classified.
    - The legislation would also remove the requirement currently contained in the Espionage Act that a disclosure can only be criminally punished if it was intended to harm national security – so even whistleblowers who act with the intention of making our nation more secure could be punished.
    - Proposed penalties include fines and up to three years of jail time.
- This is the third time this legislation has been introduced in Congress.
    - In 2000, both houses of Congress passed this legislation; only a successful 11th hour effort to achieve a Presidential veto prevented the imposition of criminal penalties on federal employees who engage in unauthorized disclosures of classified information.
    - The legislation was reintroduced in 2001 but quickly lost steam when then-Attorney General John Ashcroft concluded that legislation was not the best way protect classified information.

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LEGISLATIVE UPDATE

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- Media organizations consider the legislation to be an overly broad attempt to prevent the leaking of information from those within the federal government.
    - The likely result of this legislation would be the loss of many important sources within government.
    - The media has urged the Congress to pursue a sharper focus on enforcement of currently existing legislation in a manner that more accurately balances the need to protect classified information with the need of the public to have a free flow of information from government sources to the press.
    - To date, Congress has not acted on the bill, perhaps because of a recently reintroduced series of "dialogue meetings" between national security officials and reporters has a chance to take shape and both sides can determine whether their goals are met through this non-invasive process.

For more information on any legislative or executive branch matters, please feel free to contact the MLRC Legislative Committee Co-Chair, Kevin M. Goldberg of Fletcher, Heald & Hildreth, P.L.C., at (703) 812-0462 or Goldberg@fhhlaw.com.

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ETHICS CORNER

Lateral Hiring, Imputed Disqualification and Screening – Finding the Way Out of the Maze

By Samuel Fifer and Wendy Enerson

As discussed in Part I of this two-part series, the ABA Model Rules and several states' ethical rules fail to recognize screening as an effective method to avoid the vicarious disqualification of a lateral lawyer's new firm.[1] Thankfully, numerous states and courts have formulated standards for implementing lateral screens.

This article provides an in-depth analysis of Illinois', California's and New York's ethical rules and laws, which represent the spectrum of states' approaches to lateral screening. This article also provides practitioners with the nuts and bolts of an effective screen.[2]

I. No Clear Guidance from California Courts

California is the most conservative but uncertain of the three states. The California Rules of Professional Conduct do not "specifically address the question of vicarious disqualification."[3] California courts were therefore left to determine the law regarding imputed disqualification, and unfortunately, created great uncertainty.

Two leading California appellate court cases laid the framework for imputed disqualification: *Klein v. Superior Court*[4], and *Henriksen v. Great American Savings & Loan*.[5] In both cases, the courts held that even with the use of an ethical wall, the lateral lawyer's new firm must be disqualified.[6]

Later decisions, however, departed from this harsh rule. In 1999, the California Supreme Court issued its decision in *Department of Corporations v. Speedee Oil Change Sys., Inc.* (not a lateral hiring case) and suggested screening might prevent imputed disqualification.[7] The court observed that it "need not consider whether an attorney could rebut a presumption of shared confidences, and avoid disqualification, by establishing that the firm imposed effective screening procedures."[8]

The court's statement sparked a handful of rulings recognizing screening to avoid disqualification, including the Ninth Circuit's decision in *In re County of Los Angeles*.[9] There, the court explained that "[a]n ethical wall, when implemented in a timely and effective way, can rebut the presumption that a lawyer has contaminated the entire firm."[10]

The trend towards recognizing screening was recently forestalled in *Hitachi, Ltd. v. Tatung Co.*, a 2006 Northern District of California case which held that screens would not prevent imputed disqualification.[11] The *Hitachi* court disqualified Greenberg Traurig from representing a company in a patent case because a new associate defended the patent in suit at his prior firm.[12] In doing so, the court disregarded the ethical screen implemented by Greenberg and noted that it could not point to a California state court case that had recently approved the use of screening.[13]

Three months later, the California Supreme Court in *City of San Francisco v. Cobra Solutions, Inc.* upheld the disqualification of a government legal office despite the use of a screen. The court explained that in light of the City Attorney's supervisory and policy-setting role, a screen could not be effective.[14] Thus, the court again left unresolved the question of whether a properly implemented screen could avoid a lateral lawyer's vicarious disqualification in California. Proponents of screening can take some heart in the two-Justice dissent which argued that "[a] client's confidences can . . . be kept inviolate by adopting measures to quarantine the tainted lawyer."[15]

However, trying to discern California law (and where it is going) continues to be very difficult. As a leading commentator recently observed, relying on screening to avoid disqualification in California "may be dangerous."[16]

II. Illinois Embraces Screening to Avoid Imputed Disqualification

In sharp contrast to California, Illinois law regarding screening to prevent imputed disqualification is clear. Although Illinois adopted the ABA Model Rules, it enacted an amendment expressly authorizing screening.[17] In addition, Illinois decisional law provides clear guidance for practitioners.

In *Cromley v. Bd. of Educ. of Lockport*, the Seventh Circuit outlined a three-step analysis employed in determining disqualification motions. First, the court must "determine

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whether a substantial relationship exists between the subject matter of the prior and present representations."[18] If a relationship is found, the court must then determine "whether the presumption of shared confidences with respect to the prior representations has been rebutted."[19] Finally, the court looks at "whether the presumption of shared confidences has been rebutted with regards to the present representation."[20] The timely implementation of a screen will rebut the presumption of shared confidences.[21]

In *Cromley*, the moving lawyer represented a teacher and former school administrator in a civil rights suit against the school district.[22] During the litigation, the moving lawyer accepted an offer from the firm defending the district, and withdrew from litigation prior to joining the new firm.[23] The Seventh Circuit affirmed the district court's decision not to disqualify the firm because of "the timely establishment of a screening process."[24]

The court's decision provides guidance as to the *types* of procedures that courts approve to successfully protect the confidentiality of the attorney-client relationship and avoid imputed disqualification.[25] These include:

> (1) Instructions given to all members of the new firm, of the attorney's recusal and of the ban on exchange of information; (2) prohibited access to the files and other information on the case; (3) locked case files with keys distributed to a select few; (4) secret codes necessary to access pertinent information on electronic hardware; and (5) prohibited sharing in the fees derived from such litigation.

The court further noted that screening devices should be employed "as soon as the disqualifying event occurred."[26]

Timely implementation of a screen does not, however, rebut the presumption of shared confidences in all circumstances. Illinois courts have disqualified firms despite the use of screens when they determine that the screen has been or may be ineffective. Factors that courts consider in determining whether a screen is effective include: the size and structure of the firm; the probability of contact between the screened lawyer and the lawyer representing the other party; and the position of the screened lawyer in the firm.[27]

For example, in *Van Jackson v. Check 'n Go of Ill., Inc.*, the court disqualified a four-attorney firm that hired a new lawyer because the law firm was too small for the screen to be effective.[28] Despite these limitations, Illinois courts embrace screening to prevent the sharing of confidential information and thus avoid imputed disqualification.

III. New York Upholds Screening Under Limited Circumstances

New York has adopted a middle ground between Illinois' and California's approaches to lateral screening. New York's Code of Professional Responsibility does not provide for screening. However, New York courts have upheld lateral screens under limited circumstances.[29]

The New York Court of Appeals explained the rationale behind judicial approval of lateral screens in *Kasis v. Teacher's Ins. & Annuity Ass'n.*[30] The court stated that although the New York Code of Professional Responsibility imputes a moving lawyer's disqualification to an entire firm and does not provide for screening, courts should nonetheless uphold the use of screens to avoid disqualification: "it is particularly important that the Code of Professional Responsibility not be mechanically applied when disqualification is raised in litigation" since "disqualification of a law firm during litigation may have significant adverse consequences to the client and others."[31] A "per se rule of disqualification . . . is unnecessarily preclusive," "imposes significant hardship on the current client," "is subject to abusive invocation to tactical advantages," "conflicts with the public policies favoring client choice" and "restricts an attorney's ability to practice."[32]

The ("Restatement") adopts a similar rationale, stating that courts should consider disqualification motions to be within their discretion and are not bound to strictly adhere to states' disciplinary rules.[33]

The *Kasis* court outlined the test for avoiding disqualification. Under this test, if the moving lawyer possesses significant knowledge of client confidences, then a screen will not be upheld. In *Kasis*, the lawyer attended court and took depositions on behalf of the plaintiff. During the litigation, the lawyer went to work for the defendant's firm. The court held that there was an irrebuttable presumption that the lawyer possessed confidences which were imputed to the firm.[34]

New York courts have considered the following factors in determining whether a moving attorney has significant

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knowledge of his prior firm's representation: whether the lawyer played an active role in the litigation; whether the lawyer had access to files while working at his previous firm; the size of the former firm; and the time between the hiring of the moving lawyer and the opening of the matter at the new firm.[35]

The Restatement parallels New York's approach to lateral screening. Section 124 identifies five factors for consideration when determining the significance of information gained during a prior representation: (1) the value of the information as proof or for tactical purposes; (2) whether the information is "in most material respects" publicly known; (3) whether the information was "of only temporary significance;" (4) the scope of the present representation; and (5) "the duration and degree of responsibility of the personally prohibited lawyer in the earlier representation."[36]

Thus, so long as the moving lawyer can show that the knowledge he gained was *not significant,* and an effective screen is implemented, then the presumption of shared confidences will be rebutted.

IV. Elements of an Effective Screen

Although the ABA Model Rules reject lateral screening for the private lawyer, they do provide guidance as to what constitutes an effective screen.[37] The elements of an effective screen are relatively straightforward: (a) the screen must be implemented in a timely manner; (b) the lateral lawyer may not work on the screened matter; and (c) the new firm must adequately guard against the sharing of confidential information. In addition, every attempt should be made to obtain the former client's consent.[38]

A. TIMELY IMPLEMENTATION OF SCREEN

Timing is the most important element of an effective screen. Comment 10 to Model Rule 1.10(k) provides that in order to be effective, screening measures must be implemented "as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening."[39] Thus, firms should strive to identify potential conflicts during the hiring process[40] and, if possible, implement screens on the moving lawyer's first day.[41]

The majority of courts will not, however, disqualify a firm for not implementing a screen on the moving lawyer's first day, if the firm takes actions once it or the moving lawyer becomes aware of the potential conflict, provided that no confidences have yet been shared.[42]

This was the case in *In re Del-Val Fin. Corp. Sec. Litig.*[43] There, two experienced lawyers joined a new firm. One brought an ongoing representation of an accounting firm which was a co-defendant with Del-Val Financial Corp. ("Del-Val") in a shareholders class action lawsuit (the co-defendants brought cross-claims against each other). The other lawyer was the lead partner who represented Del-Val in an SEC investigation (but had never appeared in the matter). Due to an error in the firm's conflict system, the conflict was not detected during the hiring process, and a screen was not implemented for several months.

The court refused to disqualify the firm because the firm was not previously aware of the conflict and there was no sharing of confidential information between the moving lawyers and the new firm.[44]

B. NO PARTICIPATION IN THE MATTER

Once a conflict is identified, the lateral lawyer may not participate in the screened matter. In addition, the lateral lawyer may not receive any direct fees from the matter.[45] The lawyer is still entitled to receive his salary or predetermined partnership share, as long his compensation is not tied to the screened matter.

C. MECHANICS OF AN ADEQUATE SCREEN

The most important elements of an effective screen involve: i) preventing members of the new firm from discussing the screened matter with the moving lawyer; ii) prohibiting the screened lawyer from accessing files related to the matter; and iii) memorializing the screen through a firm-wide communication.[46]

At a minimum, written notice must be provided to all firm personnel outlining the screening procedure, including the ban on communications with the lateral lawyer and file access.[47] In addition, the firm must instruct the lateral lawyer in writing to avoid any communications regarding the screened matter with all firm employees (not just those working on the screened matter), and to refrain from accessing electronic and other screened files. Written acknowledgement from the lateral lawyer of his

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obligation not to discuss the matter and to avoid contact with screened files should also be obtained.[48]

As a practical matter, the screening procedure should include an enforcement mechanism that is communicated to all firm employees, including a contact person and a description of appropriate sanctions.

Some states, including Massachusetts and Oregon, require the firm and new lawyer to prepare an affidavit testifying to the steps taken to screen the moving lawyer from the matter.[49] Many states, including Massachusetts and Arizona, also require firms to inform former clients of the screening procedures.[50] The Restatement adopts this position.[51]

Courts have cited with approval concrete evidence that there is no contact between screened lawyers and the screened matters. Such evidence may include reports from an electronic file system which indicate that the screened attorney has not accessed files related to the matter or that the screened lawyer is physically or geographically separated from the attorneys working on the matter.

For example, in upholding a screen, the Seventh Circuit in *Cromley* noted that the lateral attorney worked in a separate office from the screened matter.[52] Likewise, in *Reilly v. Computer Associates Long-Term Disability Plan*, the court explained that "70 miles, state lines, two (2) rivers and (New York City's) legendarily bad traffic" separated a lateral lawyer from the files and attorneys working on the matter and found that there was no sharing of confidences.[53]

IV. Conclusion

While the landscape of screening and imputed disqualification is both confusing and changing, it is not insolvable. So long as firms are actively identifying conflicts, implementing timely and effective screens, and carefully weighing business risks and rewards, they can remain in charge of their own destiny.

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1 For example, the Michigan Rules of Professional Conduct do not recognize screening as an effective method to avoid imputed disqualification. Recently, in *National Union Fire Ins. Co. v. Alticor, Inc*., the Sixth Circuit held that the law firm representing the defendant was disqualified because one of its associates previously represented the plaintiff at his prior firm. The court explained that under the Michigan Rules, the defendant's law firm "cannot avoid imputed disqualification by 'screening' [the lateral lawyer] from the matter, no matter how diligently. 2006 WL 2956522, at *3 (6th Cir. Oct. 19, 2006).

2 This article only addresses lateral screening and imputed disqualification in the private sector.

3 *City of San Francisco v. Cobra Solutions, Inc.*, 38 Cal. 4th 839, 847, 135 P.3d 20 (Cal. Sup. Ct. 2006).

4 *Klein v. Superior Court*, 198 Cal. App. 3d 894, 223 Cal. Rptr. 226 (Cal. Ct. App. 1988).

5 *Henriksen v. Great Am. Savings & Loan*, 11 Cal. App. 4th 109, 14 Cal. Rptr. 2d 184 (Cal. Ct. App. 1992).

6 *Id.* at 117, 14 Cal. Rptr. 2d at 188 ("we believe the rule to be quite clear cut in California: where an attorney is disqualified because he formerly represented and therefore possesses confidential information regarding the adverse party in the current litigation, vicarious disqualification of the entire firm is compelled as a matter of law."); *Klein*, 198 Cal. App. at 912 ("California precedent has not rushed to accept the concept of disqualifying the attorney but not the firm, nor has it enthusiastically embarked upon erecting Chinese walls [screens].").

7 *Dep't of Corps. v. Speedee Oil Change Sys., Inc.*, 20 Cal. 4th 1135, 1151-52, 980 P.2d 37, 382 (Cal. Sup. Ct. 1999).

8 *Id.*

9 *See In re County of Los Angeles*, 223 F.3d 990, 997 (9th Cir. 2000); *VISA U.S.A, Inc. v. First Data Corp.*, 241 F. Supp. 2d 1100, 1110 (N.D. Cal. 2003) (holding that an ethical wall was effective to protect the "duty of confidentiality" in a case not involving a moving lawyer).

10 *In re County of Los Angeles*, 223 F.3d at 996. Reliance on *County of Los Angeles* has been questioned because the case involved a federal magistrate who joined a firm after serving as settlement judge and not a lawyer moving between private firms.

11 *Hitachi, Ltd. v. Tatung Co.*, 419 F. Supp. 2d 1158, 1164 (N.D. Cal. 2006).

12 *Id*. at 1159.

13 *Id*. at 1164.

14 *City of San Francisco*, 38 Cal. 4th 839, 135 P.3d 20.

15 *Id*. at 855, 135 P.3d at 33.

16 William Freivogel, *Changing Firms*, available at http://www.freivogelonconflicts.com

17 Ill. Rules 1.10(b)(2) and 1.10(e).

18 *Cromley v. Bd. of Educ. of Lockport*, 17 F.3d 1059, 1064 (7th Cir. 1994).

19 *Id*.

20 *Id*.

21 *Id*.

22 *Id*. at 1063.

23 *Id*.

24 *Id*. at 1065.

25 *Id*.

26 *Id*.

27 *Id*.

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28 *See Van Jackson v. Check 'n Go of Ill., Inc.*, 114 F. Supp. 2d 731, 733-34 (N.D. Ill. 2000).

29 *Kasis v. Teacher's Ins. & Annuity Ass'n*, 93 N.Y.2d 611, 616-17 (N.Y. 1999); *see* NY DR 5-105; NY DR 5-108.

30 *Kasis*, 93 N.Y.2d at 616-17.

31 *Id.*

32 *Id*.

33 Restatement, § 124 cmt. d(i).

34 *Kasis*, 93 N.Y.2d at 618.

35 *Papyrus Tech. Corp. v. New York Stock Exchange*, 325 F. Supp. 2d 270, 273-75 (S.D.N.Y. 2004).

36 Restatement, § 124 cmt. d(i)

37 ABA Model Rule 1.10(k). Rule 1.10(k) defines screening as "the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate to protect information that the isolated lawyer is obligated to protect."

38 In those states that do not recognize screening, if client consent cannot be obtained, the new firm must either decline to hire the lateral lawyer or resign from the conflicting engagement.

39 ABA Model Rules 1.10(k), comment 10.

40 New York State Bar Assoc. Com on Prof. Ethics Op. 720 (Aug. 27, 1999).

41 In *SK Handtool Corp. v. Corcoran Partners, Ltd.*, 226 Ill. App. 3d 979, 619 N.E.2d 1282 (Ill. App. Ct. 1993), the Illinois Court of Appeals held a lateral lawyer's new firm is required to make efforts to ascertain in advance whether hiring an attorney will require screening. Because the firm waited five weeks to implement a screen, the court held the firm was disqualified.

42 *In re Del-Val Fin. Corp. Sec. Litig.*, 158 F.R.D. 270, 271 (S.D.N.Y. 1994); *Papyrus Tech. Corp.*, 323 F. Supp. 2d at 281.

43 *In re Del-Val Fin. Corp. Sec. Litig.*, 158 F.R.D. at 271.

44 *Id.*

45 Restatement, § 124.

46 Restatement, § 124, cmt. d(ii).

47 *See* ABA Model Rule 1.10(k)(9) (recommending that "written notice and instructions" be provided to all firm personnel).

48 In fact, Comment 9 to ABA Model Rule 1.10(k) mandates that the screened professional must acknowledge his obligation not to communicate.

49 *See e.g.* Mass. Rules Prof. Conduct, R. 1.10(e)(4) ("the former client of the personally disqualified lawyer or of the firm with which the personally disqualified lawyer was associated receives notice of the conflict and an affidavit of the personally disqualified lawyer and the firm describing the procedures being used effectively to screen the personally disqualified lawyer, and attesting that (i) the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current firm, (ii) no material information was transmitted by the personally disqualified lawyer before implementation of the screening procedures and notice to the former client; and (iii) during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter"); Ore. Rules of Prof. Conduct, R. 1.10(c).

50 *e.g.*, Arizona R. 1.10, *see also* Mass. Rules Prof. Conduct, R. 1.10(e)(4).

51 Restatement § 124, comment (d)(iii).

52 *Cromley*, 17 F.3d at 1065-66. This is not a repudiation of the venerable *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1321 & n. 28 (7th Cir.), *cert.denied*, 439 U.S. 955 (1978), where the fact that Kirkland & Ellis had separate teams of lawyers in its Chicago and Washington, D.C. offices did not impact the Court's decision to disqualify the firm.

53 *Reilly v. Computer Assocs. Long-Term Disability Plan*, 423 F. Supp. 2d 5, 10 (E.D.N.Y. 2006).

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Dinner 7:30 p.m.
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